



The National Assembly  
of the Republic of Serbia



*Serbia*



NATIONAL ASSEMBLY OF THE REPUBLIC OF SERBIA  
AND INDEPENDENT BODIES







NATIONAL ASSEMBLY OF THE REPUBLIC OF SERBIA  
AND INDEPENDENT BODIES

Materials from the Conference  
"National Assembly of the Republic of Serbia and Independent Bodies"  
Belgrade, 26-27 November 2009  
and an Overview of the Examples of International Practice

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# INTRODUCTION

## 1.1 Background and Context

The presence of an effective parliamentary institution is strongly correlated with the existence of a viable democracy and an open society. Such institutions are critical to the establishment and consolidation of democracy because they empower ordinary people to participate in the policies that shape their lives. Parliaments are fundamental to establishing the rule of law, protecting human rights, overseeing transparent governance processes, and ensuring national compliance with international obligations.

United Nations Development Programme (UNDP) currently supports one in four parliaments globally. It does so primarily in recognition of the important role these institutions play in democracy and development, but also because the existence of effective democratic oversight institutions is essential in the light of many donors shifting toward budget support as a vehicle for development assistance. Consequently, parliamentary development is an integral component of UNDP services in democratic governance, with activities aimed at enhancing the representative, legislative or oversight capacity of parliamentary institutions in the governance process.<sup>1</sup>

In November 2009, the National Assembly of the Republic of Serbia, with support from the UNDP Project “Strengthening the Accountability of the Serbian Parliament”, organised an international conference “National Assembly and Independent Bodies”. Its objectives were to enable the National Assembly and its Independent Bodies to share their experiences and discuss avenues for strengthening their relationships, with special emphasis on international experiences in this area.

The Conference offered a unique opportunity for the National Assembly Committees and Independent Bodies, some in existence for some time and some newly established, to address directly the highly complex issues that are of critical importance to their present functioning and future cooperation. It was attended by the Speaker, Deputy Speakers, Secretary General and MPs; and the heads of the independent bodies along with esteemed guests from the Kingdom

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<sup>1</sup> UNDP Strategy Note, Parliamentary Development, May 2009

of Norway's Parliament and Auditor General; the Commissioner for Information and Ombudsman of the Republic of Slovenia; the Head of GRECO; CEO of GOPAC; the UK Auditor's Office representative and representatives of the Ministry of Justice and the Ministry of Finance of the Republic of Serbia.

The Conference demonstrated how separate thematic workshops can be beneficial for all parties engaged in improving lines of communication and setting the groundwork for independent bodies, reporting to the National Assembly's committees.

## 1.2 The Publication

This publication is a follow-up to the Conference, a record of the lessons learnt and opinions exchanged, but also a systematisation and extension of the data which, it is hoped, will enable comparative analyses. It is also intended to serve as a support to the National Assembly in drafting new Rules of Procedure, which incorporates the best model for the National Assembly, thus, strengthening its scrutiny function.

The publication is organised in three sections that follow the structure of the Conference sessions. These sections present three dimensions of parliamentary scrutiny: I. Basis for Parliamentary Scrutiny; II. Relations between Parliament and Independent Bodies; and III. Parliamentary Scrutiny over the Executive Branch and the Importance of Independent Bodies for its Implementation.

The Annexes contain GOPAC strategies for forming a National Chapter and the Conference Agenda.

This publication sets out a vision of a reformed Parliament and advocates the adoption of more effective methods to hold the Government to account. Parliament's relationship with regulatory bodies and their role in parliamentary accountability has two dimensions. The first is the extent to which the regulators are accountable to Parliament, so that their internal administration and activity is scrutinised by politicians. The second is the extent to which Parliament uses the technical investigations and evidence of these bodies as the basis on which to hold government to account. It is the second dimension that has the potential to make a real difference to parliamentary scrutiny. The 'extra-parliamentary' scrutiny of the various regulatory or independent bodies has challenged the traditional role of Parliament, providing new forms and opportunity for proper scrutiny.<sup>2</sup>

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<sup>2</sup> Adapted from: *Parliaments at the Apex: Parliamentary Scrutiny and Regulatory Bodies* by the Hansard Society Commission on Parliamentary Scrutiny





# Introductory Speeches



**Prof. Slavica Đukić-Dejanović Ph.D.**

Speaker of the National Assembly of the Republic of Serbia

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Dear representatives of the Norwegian Parliament,

Dear representatives of the Government of the Republic of Serbia and independent bodies,

Dear representatives of international organisations and NGOs,

Dear members of the diplomatic corps,

Ladies and gentlemen,

Dear guests,

It is my great pleasure to open, on behalf of the members of the National Assembly, the International Conference "the National Assembly of the Republic of Serbia and Independent Bodies", which aims to examine the various models of institutional relations between the parliament and the independent bodies.

Active dialogue is the foundation of every parliament's work, and therefore I express my hope that through exactly this type of communication during this two-day Conference, we will identify the examples of best practice for collaboration between the parliament and the independent bodies, and the ways they can be adapted to the constitutional and legal order of the Republic of Serbia.

The fundamental democratisation of social relations relies on the principle of respecting the public good and public importance, and on the principle of the accountability of functionaries and state officials for what they do. Adhering to these principles is the foundation, both for a

more efficient Parliament and independent bodies, and for their collaboration to establish systematic and constant control of the work of the executive branch.

It is a widespread case in relatively young democracies to encounter problems of various types in the work of independent state institutions – from technical to operational. Our common task is to change that situation.

In this sense, the National Assembly will try, within its jurisdiction, to influence the accountability of authorities that do not act in line with the recommendations of independent bodies. In addition, with the support of international partners (United Nations Development Program), NGO sector and donors, the National Assembly is building its own capacities to examine the reports of independent bodies. This includes education of employees in the National Assembly Secretariat, but also education of representatives of the executive branch.

Finally, with active collaboration between the National Assembly and independent bodies, the Government of the Republic of Serbia will have guidelines to increase efficiency and improve the quality of services that it provides to its citizens, and in a wider sense it will also get institutional support in combating corruption.

In the end, I would like to thank, once again our current partners without whose assistance we would not be able to work on strengthening the oversight function of the National Assembly, and I would also like to point out the need for further and wider assistance to the building and sustainability of our capacities, in order to fully carry out the mandate entrusted to us by the citizens of Serbia.

Thank you for your attention.



**Dorit Nitzan**

United Nations Resident Coordinator a.i

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### **Responsibility, Accountability and Transparency - Introductory Speech**

It is a great honour to be with you here today on behalf of the United Nations system in Serbia. Let me start with the words of the United Nations Secretary-General, Mr. Ban Ki-moon: "Experience has taught us, time and again, that democracy is essential to achieving our three fundamental goals of peace, of human rights, and of development. Human rights and rule of law are best protected in democratic societies. And development is much more likely to take hold if people are given a genuine say in their own governance, and a chance to share in the fruits of progress."

Reform and transition toward a "good governance" model is always a long-term process with many challenges and crossroads along the way. One could argue therefore that the reform process actually never finishes since there is always space for new improvements for the benefit of citizens.

The main principles of good governance are: Responsibility, Accountability and Transparency.

It is important that the action and decisions of political actors are transparent, ensuring that citizens can openly question what is happening within the political process. Equally, it is important to clearly define codes of conduct by which anyone within the public sector behaves and acts to ensure that governance is open and transparent, ensuring that corruption and self-interest are practically eradicated.

It is also crucial for the development of civil society that all participants in the governance process are both responsible and accountable for their actions and decisions. The final goal is to have government accountable to the people, both directly, to the public and individuals, and also indirectly, through mediating institutions which ensure the legal, financial and political



accountability of all government officials for their policies and actions undertaken in the peoples' name. Effective accountability depends on two vital elements:

- 1) Clarity about who can be held to account and held responsible when things go wrong;
- 2) Confidence that Parliament is able to gain the accurate information required to hold the Executive to account and to ascertain where responsibility lies.

It is with this in mind that the UN system in Serbia has been supporting all 3 branches of power. And on behalf of the United Nations system in Serbia, let me pledge that you can count on our strong and continued support.

Specifically, the UN has been collaborating with the National Assembly of Serbia through the work of its various agencies for the last 5 years. The UNDP and UNICEF have signed agreements on collaboration with the National Assembly, while other agencies are providing expertise to various committees in their deliberations. Today's Conference has been supported by the UNDP, under the "Strengthening the Accountability of the Serbian Parliament" project.

As a result of the worldwide decline in public trust in governing systems, the governments have been forced to respond to these changes by making themselves more accountable to the citizens. The Parliament, of course, plays a significant role in holding the government accountable as its role is the continuous scrutiny over the Government's implementation of the measures to which Parliament has given assent. The scrutiny of Parliament involves more than discussion and approval of legislation; it encompasses the review of public administration in the full sense of examining priorities, plans and their implementation. In other words, it deals not only with the policies of Government, but also with the efficiency and effectiveness with which programs are carried out to implement those policies. Another way for the executives to present themselves as more dependable and trustworthy is to be evaluated by an independent body. Like Parliaments themselves, the independent bodies help ensure the accountability of government for the benefit of the people.

Public trust arises when independent bodies are seen to be independent from government; legitimacy arises when they are held accountable to Parliament. Their accountability and independence also help government to be more accountable and responsible to the electorate by following their objective and independent recommendations which, at the end of the day, helps the executive to increase its performance. Their independence guarantees their detachment from the executive and ensures the impartial evaluation of government. The objective investigation or audit of government in the areas of financial management, the access to government information and the protection of personal privacy, human and minority rights and other areas, help to guarantee the responsible nature of governments around the world.

In that sense, the aim of this conference is to provide a forum for discussion about the role and challenges which parliaments and independent bodies have in the process of holding executives accountable. Please take advantage of this opportunity – take advantage of the presence of so many colleagues and practitioners from around the world who have faced or are facing the same challenges as you are now – to gain from their experiences and develop a model that would best work for Serbia – for the citizens of Serbia you represent.

We will continue to work with all relevant institutions in raising their capacity to tackle the challenging but very important task of developing and conducting democracy audit processes and fully implementing anti-corruption laws which are one of the important prerequisites for further integration of Serbia in the EU.

Allow me to finish with a quotation – “The success of a democracy is to be judged to the extent to which it can assure that Government is publicly accountable” – John Griffith (Professor of Public Law at the LSE) and Michael Ryle (a former senior officer of the House of Commons).

Thank you.



## Boris Čamernik

Consultant for the “Strengthening the Accountability of the Serbian Parliament” project, United Nations Development Programme (UNDP)

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### Parliament as One of the Means of Executive Branch Oversight

"The test of democracy is freedom of criticism".

*David Ben-Gurion*

Within the framework of the traditional division of power into legislative, executive and judicial branches, the Parliament, as the highest representative body occupies a central place in every democratic system. The executive branch draws its legitimacy from the Parliament, and it represents a place where the government's measures and activities are reviewed and monitored for the benefit of the citizens, and where the citizens' opinions can be heard through various instruments – both those of individual citizens and those of organised groups.

The citizens, by voting in elections and paying taxes, finance the state apparatus, so that it should manage their common affairs on their behalf and for their account, and provide them with necessary services. As a result, the citizens have the right to demand that state bodies be accountable for managing their money and for the quality of the services provided with that money<sup>3</sup>. But you cannot expect accountability to be omnipresent without a developed concept and mechanisms that will make it possible to control the operation of the state system.

The principles of respecting the public good, the public interest, the accountability of officials and civil servants for their work constitute the essential indicators and aims of successful parliamentary oversight of the work of the executive branch of government.

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3 Danko Čosić, "Introduction" in Danko Čosić ed., *Holding Government Accountable, in Search for Successful Solutions*, Belgrade, ProConcept 2008, pg. 7

Parliamentary control of the government is an essential characteristic of parliamentarianism. The authority of the Parliament to control the work of the Government constitutes the essential core of the relations that shape the nature of the parliamentary system. The Parliament has numerous instruments at its disposal that enable the implementation of this right. These instruments are varied; some of them merely provide insight into the activities of the government (representatives' questions, survey committees, parliamentary investigations, the work of standing parliamentary committees, approval of the executive branch appointments), while others may force the government to resign or cause its downfall (interpellation, vote of confidence in the Government, the budgetary right of the Parliament).

The system works in both ways, so the Government, for its part, can influence the work of the Parliament through its right to tender its resignation, demand a vote of confidence and, in some cases, to demand that the Parliament be dissolved. Thus, the relations between the legislative (Parliament) and the executive branches of power (Government) are based on mutual restriction and control (the so-called "system of checks and balances")<sup>4</sup>.

It is a well-known fact that efficient control of the increasingly powerful executive branch of government constitutes a challenge for parliaments the world over. Efficiency in this task doesn't mean that the Parliament and the Government need necessarily to be adversaries. Parliamentary control need not be destructive toward the work of the government. Dialogue and mutual respect constitute the very foundation of the system of checks and balances and the division of power. For this system to function, we need clearly defined mechanisms to guide all participants in the political process.

### **The Instruments of Parliamentary Oversight**

The most systematic and widespread method of control over the Executive is oversight through parliamentary committees, which follow the work of individual government bodies and ministries and investigate particularly important aspects of their policy and their management.<sup>5</sup> In most parliaments, the system of parliamentary committees reflects the system of ministries, so that each committee monitors the work of a particular ministry. In this way, parliamentary committees focus on and specialise in the area of authority of a particular ministry, which makes them more efficient. The limited resources at the disposal of parliamentary committees mean they are unable to monitor the work of the ministries in their entirety. However, the very fact that they exist and are authorised to do so, tends to act as a spur for ministries to act responsibly. Some of the preconditions for successful control through the work of parliamentary committees are the

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4 PhD Marijana Pajvančić, *Mali rečnik pojmova o parlamentarizmu*, Belgrade, Civic Initiatives, 2001, pg. 26

5 David Beetham, *Parliament and Democracy in the 21st century*, Interparliamentary Union 2006, pg. 128

provision of the necessary resources (including expert support), independence when it comes to deciding which part of the work of a sector is to be monitored, the scope of authorisation that committees have when it comes to summoning ministers and civil servants to appear before them and answer representatives' questions, and access to information (including classified information). An important indicator of the successfulness of control through the work of parliamentary committees is the monitoring of the actions and responses on the part of the government, pertaining to the recommendations made in committee reports following a review of a certain Government policy.

Representatives' questions, be it written or oral, also represent an important mechanism for informing the public of the work of ministers. Even though, over time, numerous "strategies" have been developed, both by the parliamentary majority and the opposition, for formulating questions and conducting this part of a plenary session, answering representatives' questions is a regular duty of ministers, who are obligated to appear before representatives of the people, provide argumentation for their policies and publicly answer questions pertaining to anything within the purview of their ministries.<sup>6</sup>

Besides the oversight instruments listed above, an additional instrument should also be emphasised - interpellation, the Parliament's approval of the executive branch appointments, Select and *ad hoc* Committees, operation of independent bodies, and especially public hearings as one of the wide-spread (and used) mechanisms for performing oversight over the executive branch.

Public hearings (an oversight tool which is starting to be used more frequently in Serbian parliamentary practice) are increasingly becoming a standardised method for collecting information used by the Members, Parliamentary Committees and the Parliaments in performing both their legislative and oversight functions. Gathering of information is undertaken by means of testimonials of experts or stakeholders' representatives at Committee meetings, written comments, expert opinions and examples from practice. Public hearings, thus, represent an opportunity for a broader inclusion of the general public and non-governmental sector representatives into debates and discussions.<sup>7</sup>

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6 Beetham, pg. 133

7 Slaviša Orlović, *Public Hearings as Institution of Parliamentary Practice*, Belgrade, UNDP, 2007, pg. 15

## Independent Bodies

An efficient and transparent public sector depends on a great number of factors: the level of citizens' interest in the public domain (for a responsible government presupposes the existence of responsible citizens, responsible towards themselves, as well as others), the power and the autonomy of the institutions whose role it is to control the work of the executive branch, the confidence of the citizens in those institutions, the media and a dynamic civil society<sup>8</sup>.

Apart from the instruments for controlling the work of the executive branch mentioned above, it is precisely the work of independent bodies that is of exceptional importance. Independent bodies are organs conceived so as to contribute to control, and as such, they constitute the foundation of an independent and unbiased system of executive branch control based on close cooperation with the Parliament. It is precisely the strong and efficient cooperation between these state bodies that has been recognised all over the world as the basis for strengthening the systemic and permanent control of the work of the executive branch.

Contemporary parliamentary practice has shown that there is a need for highly specialised and independent bodies that will monitor the work of the Government in particular segments of the administration and be accountable to the Parliament, not the Government, for what they do.

Owing to their expertise in specific areas, their connections with civil society organisations, their integrity and independence, these bodies are invaluable when it comes to supplementing the control functions of parliamentary committees. The work of independent state institutions is not just a vital means of providing help to Parliaments in exercising their oversight function, established by the Constitution, but also represents an important control point of the work of the Government, which can receive guidelines through reports and recommendations that will enable it to operate with greater efficiency and improve the quality of the services that it provides to the citizens.

The relatively large number of independent state institutions indicates a wish on the part of the National Assembly to strengthen its oversight function and autonomy, as well as the Government's intention to strengthen its legitimacy and integrity by enabling external, independent and unbiased control of its work.

Lately, the National Assembly has been trying to deepen and review the existing, very specific relations with independent institutions, both through the proposed Law on the National Assembly and through proposals for amendments to existing or the introduction of new provisions in the Rules of Procedure and other solutions, thus ensuring mechanisms for cooperation and communication with independent institutions.

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<sup>8</sup> Srećko Mihailović, "Citizens and Government, Accountability Questions" in Danko Čosić ed., *Holding government accountable, in search for successful solutions*, Belgrade, ProConcept supported by UNDP and EU, 2008, pg. 21

The areas the Assembly is trying to regulate are numerous, from the manner and format of submitting reports and making recommendations, participation in the work of committees, reviewing reports, to establishing the degree of the government institutions' responsiveness when it comes to accepting the above-mentioned recommendations.

The integrity of independent state bodies and their commitment toward setting new performance standards in the areas under their jurisdiction, has gained undivided support from the Serbian public and international institutions so it is important to flag up the National Assembly's announcements of its resolve to participate actively in finding solutions to the problems that independent bodies are faced with. These range from the technical conditions in which they operate to criticism of the Government's response to their recommendations. Furthermore, participation in activities such as education (not only of representatives of the National Assembly and independent bodies, but also of representatives of the Government and the state administration) and reviewing comparative practices, constitute important contributions to the development of systemic and institutionalised solutions in the sphere of cooperation between the National Assembly and independent state organs, necessary for the success of this exceptionally important control mechanism of parliamentary democracy.

## THE CONFERENCE CONCLUSIONS

The following conclusions were adopted at the Conference “National Assembly of the Republic of Serbia and Independent bodies” in Belgrade 26-27 November 2009:

### CONCLUSIONS

1. In order for the National Assembly of the Republic of Serbia to exercise its oversight role, it is desirable that the reports of the Independent Bodies be reviewed at special meetings of the appropriate Committee and the main conclusions pursuant to the reviewed report be presented at a plenary session of the National Assembly;
2. In accordance with the present Rules of Procedure of the National Assembly, it is necessary to define the specific circumstances in which a separate session of the National Assembly can or should be held to review a particular report submitted by an independent body as specified by law;
3. It is recommended that, either through the Rules of Procedure or a future Law on the National Assembly, the relations and obligations between the National Assembly and its Committees and Independent Bodies be more precisely defined and that the possibility of setting up a separate Committee which would deal with these issues be considered;
4. The obligatory elements of a report submitted by an Independent Body to a particular Committee should be prescribed specifically by the laws which regulate the position and powers of Independent Bodies;
5. In the event of future amendments to the Constitution it may be useful to consider whether, due to the importance of their scrutiny role, other Independent Bodies, in addition to the Ombudsman, should be introduced as a Constitutional category;
6. Independent Bodies that have not been granted the authority or opportunity to present their opinions during the preparation of laws and other regulations, especially when such regulations concern issues from within the remit of such Bodies, should be granted the opportunity to do so;
7. The harmonisation of the legal system of the Republic of Serbia with EU standards requires that, in legislative activities and processes, the human resources in the Secretariat of the National Assembly, Government, the ministries and Independent Bodies be utilised economically and linked together;



8. The position of Independent Bodies with regards to resources should be established so that it is completely independent of executive power and the consideration of the budgets of independent bodies, from proposal to execution, be connected with strengthening the independence of the National Assembly;
9. The Government should assign a member responsible for cooperation with Independent Bodies, and it would be desirable, by a directive on their internal organisation and systematisation, for a particular individual to be appointed for this purpose within certain ministries;
10. The Government must ensure the execution of the recommendations of the Independent Bodies, when it has the authority to do so, since failure to secure the execution of the decisions of Independent Bodies is a serious breach of law;
11. The cooperation between Independent Bodies must be based on formal rather than personal cooperation;
12. Provision of proper working conditions and funding for new Independent Bodies cannot, in future, become a reason for problems in their functioning (as has been the case for years);
13. Since the defining characteristic of Independent Bodies is their independence, it is essential to prevent positions, within such bodies, being filled by members of political parties and to determine a clear procedure for the proposal of candidates which shall include public advertisement of positions, testing and assessment of the suitability of applicants.



## II. RELATIONS BETWEEN PARLIAMENT AND INDEPENDENT BODIES



## Preface

Though the term “accountability” is of recent provenance, and independent bodies are, in many cases, a modern creation, the same cannot be said in regard to the issues pertaining to oversight of the executive branch and prevention of administration abuse, corruption and violation of individual rights. It is absolutely clear that insisting on the integrity of the administration is an objective worth the effort, but what is fundamentally different nowadays is the actual size and complexity of the modern state. Therefore, the questions arise, how the oversight function over such an extensive and complex executive system can be performed, whether multiplication and expansion of the mechanisms dealing with the accountability and integrity of administration will, in fact, lead to increased public accountability and what the role of the Parliament is in this process. Answers to these questions bring us to the fact that, for the efficiency and strengthening of the oversight role of the parliament, it is necessary to clearly define its role in the accountability system as well as its connections and relationships with other mechanisms and instruments of executive oversight. Parliament, on its own, cannot be the warrant of the accountability of the whole spectrum of government activities. Although we have witnessed the creation of new forms and instruments of government oversight, Parliament has a unique role and power to make their work relevant, transforming the findings and recommendations of technical oversight into political decision and policy, interpreting the importance of technical control findings and using them for the formulation of its own stand points and oversight of government policies and management systems.<sup>9</sup> In the representative democracy, the Parliament should be the final instance of the accountability system<sup>10</sup>, using its committee system as the main means for performing oversight over the executive branch.

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<sup>9</sup> Report of the Hansard Society Commission on Parliamentary Scrutiny, *The Challenge for Parliament: Making Government Accountable*, Vacher Dod Publishing Ltd 2001, pg 11.

<sup>10</sup> A Tomkins, ‘What is Parliament for?’ in *Public Law in a Multi-Layered Constitution* edited by N. Bamforth and P. Leyland, Hart Publishing 2003, pg. 70.

One of the contemporary instruments of Executive oversight is the creation of a whole range of independent bodies as allies to the Parliament in the performance of this function. They include Audit Institutions, Ombudsman Offices, Anti-Corruption Agencies, etc. Efficient bodies of this kind are required and obligated to meet at least five key requirements:

- a. Independence – is the agency beholden to the Minister or government, politically or financially?
- b. Powers – is the process complaint-driven or can the agency audit relevant activities as it sees fit?
- c. Information – does the agency have ready access to all relevant information?
- d. Resources – are there sufficient?
- e. Reporting – does the reporting mechanism put the issues in the public domain?<sup>11</sup>

The work of independent bodies covers oversight over adherence to the legal norms, proper decision-making and enhancing the work of the public administration. However, a common focus that independent bodies share stretches further, towards maintaining institutional integrity and protecting the public interests and values for which state institutions were created in the first place. Many are of the opinion that development of independent bodies leads towards establishment of the fourth branch of power in addition to the three existing ones. The fact which needs to be emphasised is that independent bodies must remain both independent and accountable. More specifically they must be directly accountable to the Parliament. Parliamentary Committees were created to address the said challenges, appointed by Parliament to supervise and centre the accountability system developed in democratic governance systems. Many parliaments have established select committees to this end- to cooperate with independent bodies in the area that implies oversight over the work of the executive, but also to perform oversight over the work of the independent bodies themselves<sup>12</sup>. In relation to that, the Parliament should systematically and rigorously make use of the findings and information furnished by independent bodies, on one hand by ensuring a framework for their operation so that they could feel less *ad hoc* than they do at the moment, and on the other, to use the expertise and resources of independent bodies in order to enable the Parliament to perform its oversight function more efficiently.

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<sup>11</sup> K. Hammond, *Speech delivered at the Institute of Public Administration Australia, WA Division, May 2005*

<sup>12</sup> «The question is often rightly posed 'Who guards the guardians'. No body, however lofty its aims and objectives, should be placed in a position where it is accountable to no-one" - the former Ombudsman of New South Wales (Australia), Mr. George Masterman - NSW Ombudsman, *Special Report to Parliament*, 10 September 1987, pg. 2.

The experiences of parliaments with a longer history of cooperation with independent bodies demonstrate that the efficiency of the Parliament oversight role is increased if they consciously share their work related to executive oversight with independent bodies. The key to the success of such an “alliance” lies in good professional cooperation and relations between the Parliament and other bodies engaged in securing the accountability and integrity of the Government<sup>13</sup>.

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13 P. Barberis, *The New Public Management and a New Accountability* (Autumn 1998) pg. 76, *Public Administration* 451 at 464.



## **Marienne Seip**

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### **The Supervisory Work of the *Storting* (Norwegian Parliament)**

The supervisory work of the Norwegian Parliament – the *Storting* – has been organised in different ways over the last 200 years. The control function was the responsibility of a separate committee in the period of 1814-1972. From 1972–1981 it was dealt with by the various standing committees. In 1981 a separate standing committee on scrutiny was established, but the committee’s area of responsibility was limited, and its members were also members of other committees. Since 1993 the *Storting* has had a separate supervisory committee - the Standing Committee on Scrutiny and Constitutional Affairs. The creation of this new committee represented a strengthening of the *Storting*’s supervisory role.

The Standing Committee on Scrutiny and Constitutional Affairs is one of 12 standing committees in the Norwegian Parliament. The parliament has 169 members representing 7 political parties. All parties have to be represented on this special committee.

The committee deals with constitutional affairs – that is making recommendations to the *Storting* on constitutional bills. At present the committee has 25 proposals on the table – on a wide range of issues.

The second major function – and the most challenging - is the control function – overseeing whether the government implements decisions taken by the Parliament.

The public administration in Norway consists of 17 ministries and some 180 agencies. It is a formidable task to check that they are all acting in accordance with the decisions of the *Storting*. This is not a task which the *Storting* alone has the capacity to carry out.

The Storting has therefore established four independent regulatory bodies to assist in this work. These are:

- The Ombudsman for Public Administration – the Parliamentary Ombudsman – who makes sure that individuals do not suffer injustice in their contact with public administration. By taking a complaint to the Ombudsman, an aggrieved person may obtain a decision through a much easier and cheaper process than taking the case to court. The Ombudsman examines the case and makes a statement. If he finds that a government action or decision is in violation of the law or is manifestly unreasonable, the agency in question will normally reconsider the matter and follow the recommendation of the Ombudsman.
- The Committee for Monitoring the Secret Services (The EOS-committee) is a permanent body. This committee is responsible for continuous oversight of the secret services, and it also looks into complaints from private citizens. According to the EOS-act, the EOS-committee shall submit an annual report to Parliament by April each year. The report covers the activities of the committee during the previous year. The Standing Committee on Scrutiny and Constitutional Affairs reviews the report, and makes a recommendation to the Parliament. This annual report is an opportunity for the committee to signal areas that the EOS-committee should emphasise in its future work. One of the challenges with our system of parliamentary oversight with the secret services is that Parliament, and the public in general, has to trust the EOS-committee. It is the EOS-committee which is given authority to inspect and physically control the services. Members of parliament, political and parliamentary staff and the general public never get to see any classified information. Parliament of course, may ask to see classified information from the services, but this has not been the case in recent years.
- The Ombudsman of the Armed Forces was established in 1952, as the world's first parliamentary military ombudsman. The Norwegian army is based on conscription, and the Ombudsman shall safeguard the rights of all members (and former members) of the Armed Forces. Anyone who feels that he or she has been wrongly, unjustly or unreasonably treated can bring his or her case before the Ombudsman and request him to investigate the matter to determine whether an injustice has been committed, and if it has, to see to it that corrective action is taken. In its role as an independent military oversight mechanism the Ombudsman's committee inspects military units at home and abroad. The Ombudsman's committee submits annual reports to the Storting and may also at any time report a matter to Parliament. Reports from the Ombudsman are sent to the Standing Committee on Scrutiny and Constitutional Affairs, which makes recommendations to parliament on the issues which are raised in the reports. Other defence related issues; such as the budget, are handled by The Standing Committee on Foreign Affairs and Defence.



- Last, but not least, there is the Office of Auditor General (OAG). The office supplies the committee with a number of reports each year on a wide range of important topics.

The committee has a very good working relationship with the Office of the Auditor General. The office has high standing in Norwegian public opinion. It is highly regarded for its independence and the quality of its work.

All four institutions report to the Parliament. The Standing Committee on Scrutiny and Constitutional Affairs prepares recommendations to the Storting on the basis of these reports, which are later debated in plenary sessions in Parliament.

It is important to underline that these four institutions are financed by our Parliament. This means that the government has no role in the funding, which is essential for ensuring the complete independence of the parliamentary control bodies.

Another important point to be made is that it is entirely up to the control bodies themselves to decide what matters they will look into. Parliament - in plenary session - is however entitled to instruct them. This happens extremely rarely, but may be a convenient way to make sure a matter is properly investigated. Parliament however, will never interfere in or halt any investigation undertaken by the control bodies.

The committee has a limited administrative support staff; two committee secretaries and one part time administrative assistant. In addition the party groups receive funds from parliament to employ their own political staff. Today there are seven party groups represented in the committee, and on average each party group has one political advisor working on matters related to the committee.

Reports from the Office of Auditor General represent the main workload for the Committee. Each year the OAG presents approximately 15-18 reports to parliament.

The annual financial audit report is the most comprehensive and important document from the OAG. This report contains the OAG's comments on the ministries' management and implementation of their budgets. In addition, the committee receives a report commenting on the cabinet ministers' management of state ownership in companies.

For a number of years the OAG has been particularly concerned about the failure of government administration to comply with the public procurement regulations.

The OAG puts lot of resources into the financial audit process and the annual report is a very condensed presentation of the findings of this process. For Parliament, however, it may be true to say that the most important part is that it can be assured that ministries and their agencies are continuously supervised by an independent body.

Each year the OAG submits 12-15 performance audit reports. In these reports the OAG presents the findings of in-depth studies of effectiveness in various policy areas.

Parliamentary control of the government is recognised as an important part of Parliament's work, and most of the work in the committee is dedicated to this function.

It is important to underline that the remarks in the committee recommendations on reports from the regulatory bodies, are mostly shared by all political parties – the parties in government included, and few issues cause disagreement along party lines.

This shows that there is a general agreement in the Storting that parliamentary scrutiny is an important function and a shared responsibility, regardless of which parties are in power. It is also the author's impression that the ministries which are being scrutinised also see the value of this work. It may be uncomfortable for them when mistakes and malpractices are uncovered, but also the government side agrees that it is important with a transparent system. The ministries furthermore do follow up the remarks of the committees.

It is important to mention a specific control-mechanism in the parliamentary system of Norway: The Norwegian Parliament may pass resolutions with requests to the government – where the government is explicitly requested to carry out specific measures. The number of such resolutions may vary – from more than 200, in one year, to 20-30 resolutions, often depending on whether the government has a majority in Parliament or not. Every year the government has to present a report to the Parliament on how these resolutions have been followed up. This is a very important document, which forces both the government and the MPs to keep an eye on the results. The Standing Committee on Scrutiny and Constitutional Affairs handles these reports.

The Committee is empowered to conduct whatever investigation into the public administration it may find necessary to exercise the parliamentary control function. In fact, a decision to start an investigation only requires the support of 1/3 of the committee-members. This is a very important fact. In a situation with a majority government this gives an opportunity to the minority in Parliament to influence the political agenda.

The Committee - even a minority of the committee, may decide to hold hearings in all scrutiny matters. A special set of rules has been established, which outlines in detail procedures for such hearings. Most commonly, these hearings are open to the press and the public. It is always the minister in charge, sometimes even the Prime Minister, who is called to the Committee. It is not compulsory for anybody to appear before the committee in a hearing; but members of the government always appear, and, most commonly, also others who are asked to come.

So what are the results of parliament's scrutiny-function? And what can the committee and Parliament do if grave errors are uncovered?

The committee may criticise the minister in charge in its recommendation, and such criticism may also be expressed in the Storting itself when the committee's recommendation is debated in plenary session. This will have no formal consequences for a minister, but his or her reputation may be weakened.

A vote of no confidence may also be the outcome of a control-matter and if the majority of MP's vote in favour, the minister has to resign. In June this year we had such a vote of no-confidence. The Minister of Trade and Industry was criticised for the handling of the state ownership in a large Norwegian company. The Minister however "survived" the vote.

The most drastic measure available is to start legal proceedings before the court of impeachment. The last time this happened, however, was in 1926.

Most control-matters result in a number of critical remarks from the committee, or remarks urging the government to make changes or improvement. Severe criticism from the majority of the parties is rare - fortunately.

The Norwegian parliamentary control function has undergone thorough review and consideration over the past almost 20 years. A number of changes have been implemented and it is my opinion that politicians, both those belonging to the position and to the opposition – agree that the control function is an extremely important part of our democratic system. It is, however, important to keep a continuous watchful eye on the system – to make sure the institutions and measures are updated and effective!

**The Standing Committee on Scrutiny and Constitutional Affairs deals with two key areas; matters relating to the Storting's supervisory authority and constitutional matters**

**The Committee's Main Responsibilities (An excerpt from the Rules of Procedures)**

The committee's duties are set out in § 12, paragraph 9 of the Rules of Procedure:

"The Standing Committee on Scrutiny and Constitutional Affairs:

The committee shall review and submit recommendations to the Storting on:

- a. records of proceedings etc. of the Council of State, cf. Section 75, subparagraph f, of the Constitution;
- b. the annual report from the Government concerning the follow-up of resolutions of the Storting containing requests to the Government and concerning Private Member's Motions submitted by the Storting to the Government for consideration and comments;
- c. documents from the Office of the Auditor General, and other matters concerning the Auditor General's activities;
- d. reports from the Parliamentary Ombudsman for Public Administration and other matters concerning the Ombudsman's activities;
- e. reports from the Storting's Committee for the Monitoring of Intelligence, Surveillance and Security Services and other matters concerning the committee's activities;
- f. reports from the Storting's Accountability Select Committee and commissions of inquiry appointed by the Storting;
- g. reports from the Parliamentary Ombudsman's Committee for the Armed Forces and the Parliamentary Ombudsman's Committee for the Civilian National Service.

The Committee on Scrutiny and Constitutional Affairs decides in each case whether a draft recommendation shall be submitted to the appropriate standing committee for comment before the recommendation is presented.

Furthermore, the committee deals with constitutional matters, legislation relating to elections, and allocations to the Storting and to the Royal Household.

The committee also deals with matters in which the Storting shall consider the extent to which constitutional responsibility shall be asserted, including whether the Storting's Accountability Select Committee shall be requested to make the necessary enquiries to determine the basis for such responsibility, cf. the Act of 5th February 1932 no. 2, relating to the Legal Procedure

for Offences Indicted before the Court of Impeachment. One-third of the committee's members may require that the committee shall deal with such a matter on its own initiative. The committee shall make recommendations on the matters it deals with. Should the committee find that circumstances in an external request regarding breach of constitutional duties cannot be prosecuted through the Court of Impeachment, the request shall be referred to the appropriate prosecuting authority. Furthermore, the committee may decide that a request shall not be put before the Storting when it is evident that the circumstances in question will not result in further action. The request shall be put before the Storting in a recommendation if one-third of the committee's members require this. The party that has put forward the request shall be notified of the result of the matter once it has been dealt with. When a decision has been made to prosecute through the Court of Impeachment, the committee acts on behalf of the Storting during the preparation and implementation of the case.

Before committees, other than the Standing Committee on Scrutiny and Constitutional Affairs, submit a recommendation that puts forward a proposal that constitutional responsibility shall be asserted or a proposal to implement enquiries as mentioned in Section 45 a, a draft recommendation from the committee concerned shall be submitted to the Standing Committee on Scrutiny and Constitutional Affairs for comment.

The committee may also make any further inquiries within the administration deemed necessary for the Storting's scrutiny of the public administration. Such a decision shall be made by one-third of the committee's members. Before the committee itself makes such inquiries, the minister concerned shall be notified and requested to procure the information required. The committee shall make recommendations on the matters it deals with.

One-third of the committee's members may require a committee hearing to be held on a scrutiny issue pursuant to section 18.

The committee may lay down further rules for its secretariat, including the duties of the secretariat and the use of the secretariat that may be made by individual committee members.

## **Oversight Matters**

The Storting's supervisory authority is there to ensure that the Government and public administration implement decisions taken in the Storting. The Storting has established three independent supervisory bodies to assist in this work:

- The Office of the Auditor General is the Storting's auditory and control body. The Office of the Auditor General is independent of government administration. It is responsible for auditing the central government accounts, monitoring administration of the government's interests in companies and banks (corporate control) and ensuring that the State's revenues are paid as intended and that the State's resources and assets are used and administered in a sound financial manner and in keeping with the decisions and intentions of the Storting (performance audits). The Office of the Auditor General reports to the Storting on these areas. In addition, it issues an annual report.
- The Storting's Ombudsman for Public Administration (Parliamentary Ombudsman) ensures that individuals do not suffer injustice at the hands of public administration, and that human rights are respected. This work is carried out first and foremost by investigating complaints brought by private individuals. The Ombudsman also takes up issues on his own initiative and carries out inspections and visits to the civil service, prisons, psychiatric hospitals and other closed institutions. In addition to endeavouring to prevent injustice, the Office of the Ombudsman also aims to improve administrative agencies in general and strengthen confidence in public administration. The Ombudsman submits an annual report to the Storting.
- The Committee for the Monitoring of Intelligence, Surveillance and Security Services is a permanent seven-member committee who monitor the Police Security Service, the Defence Security Service and Military Intelligence. The committee is responsible for continuous supervision of the work of these services, and investigates complaints. It also takes up issues on its own initiative where appropriate. The main aim is to protect the security of the individual. The committee reports annually to the Storting.

The Standing Committee on Scrutiny and Constitutional Affairs makes recommendations to the Storting on issues arising from the Storting's independent supervisory bodies. These most commonly involve documents from the office of the Auditor General, of which reports on performance audits are the most frequent.

In addition to dealing with supervisory issues arising from one of the independent bodies, the committee reviews other matters which come under the Storting's monitoring of the Government and public administration. The committee reviews:

- The Records of the Council of State. These include decisions taken by the King in the Council of State. The records are submitted by the Government twice a year and the committee makes recommendations twice annually, in the spring and autumn.
- The Government's annual report on the follow-up of decisions of the Storting that contain requests to the Government and on consideration of private member's bills submitted by the Storting to the Government for investigation and comment.

The Standing Committee on Scrutiny and Constitutional Affairs is distinguished from other committees by the fact that it can take its own initiatives. This means that the committee can instigate investigations into public administration which it finds necessary in order to fulfil the Storting's supervisory function. The other committees can only deal with issues that have been referred to them by the Storting in plenary session.

At least one-third of the members must vote in favour to allow the committee to open a case on its own initiative. Once such an agreement has been reached the committee must make recommendations to the Storting.

The committee may decide to subject a scrutiny matter to a public scrutiny hearing. Separate rules apply for these hearings. The minister responsible is requested to attend together with other parties whom the committee believes may be able to shed light on the matter. Official reports are kept of public scrutiny hearings.

## **Constitutional Issues**

The Standing Committee on Scrutiny and Constitutional Affairs reviews and makes recommendations to the Storting on constitutional bills.

A bill to amend the Constitution may be put forward by a member of the Storting or a member of the Government. Article 112 provides that proposed amendments to the Constitution must be submitted during the first three sessions of an electoral term and must be considered during the first, second or third session of the following term. There will, therefore, always be a general election between the submission of a proposed amendment and the decision whether or not to adopt it. This allows the electorate to make its opinions known.

A two-thirds majority is required to adopt an amendment to the Constitution and at least two-thirds of the members must be present in the Chamber to vote on any constitutional matter.

The committee also deals with electoral legislation issues.

## **Rules for Public Scrutiny Hearings**

(Adopted by the Storting 11 June 2001)

(Entered into force 1 January 2002)

### *Section 1 Scope and Purpose*

(1) The committees shall hold public hearings in scrutiny matters in accordance with section 18 of the Rules of Procedure of the Storting and in accordance with these Rules. By scrutiny matters is meant all matters dealt with by the Standing Committee on Scrutiny and Constitutional Affairs with the exception of matters relating to amendments to the Constitution, appropriations and electoral legislation. In other committees, the rules concerning scrutiny hearings shall apply when the purpose of a public hearing is to clarify or assess the previous course of actual events. All committees may decide that other hearings shall also be held in accordance with the rules on scrutiny hearings.

(2) The purpose of the rules is to answer the Storting's need for information in scrutiny matters and to ensure the satisfactory progress of hearings while safeguarding the security under the law of persons summoned to give information at such hearings. *Section 2 Preparation of the hearing*

### *Section 2 Preparation of the Hearings*

(1) Pursuant to section 18 of the Rules of Procedure of the Storting, the committee may, by simple majority, decide that a hearing shall be held in a scrutiny matter and who shall be requested to attend. However, pursuant to section 12 no. 9, seventh paragraph of the Rules of Procedure, one-third of the members of the Standing Committee on Scrutiny and Constitutional Affairs may demand that a hearing be held in a scrutiny matter. Unless otherwise decided, the hearing shall be held in public. The decision to hold the hearing wholly or partly in camera is made by the committee by simple majority.

(2) Prior to the hearing, the committee shall hold a special preparatory meeting. The committee should review the issues on which it requires elucidation with a view to ensuring that the questioning is as effective as possible. A schedule for the hearing should also be prepared.

(3) During the preparatory meeting the committee shall decide whether principal questioners shall be nominated for the hearing and, if so, who these shall be, cf. section 4, third paragraph.



### *Section 3 The Status of Persons Summoned to Hearings*

(1) Persons requested to attend hearings shall be notified as early as possible. The matter or matters on which the committee requires elucidation shall be stated in the summons. A copy of these Rules shall be enclosed. Information shall also be given as to which media will be permitted to be present and whether minutes will be taken. Persons attending shall have access to documents relevant to the matter unless otherwise indicated by rules concerning duty of secrecy.

(2) Persons summoned shall be free to decide whether or not to attend and whether or not to answer the questions of the committee. If a question cannot be answered without revealing information subject to the duty of secrecy, the summoned person should inform the committee of this. The summoned person may make a request to the committee to be allowed to make his or her statement wholly or partly in camera. If such a request is made, the committee shall interrupt the hearing and consider the request in camera.

(3) Persons summoned shall be entitled to be accompanied by an adviser. Two or more advisers may attend unless disallowed by the committee. The person summoned is entitled to confer with his or her adviser before answering a question. If so permitted by the chair of the meeting, the adviser may supply the answer.

### *Section 4 Conduct of the Hearing*

(1) The committee chair shall give an introductory presentation of the topic for the hearing and state the procedures that will apply. The committee chair shall be responsible for allocating speaking time between the committee members and for ensuring that the hearing is conducted in accordance with section 18 of the Rules of Procedure of the Storting and these Rules. When questions are asked by the committee chair, the meeting should be chaired by the first vice chair or the second vice chair. The chair of the meeting shall ensure that questions are within the scope of the stated topic and that the security under the law of the person summoned to give information is safeguarded.

(2) Before questions are asked by members of the committee, the person summoned shall be allowed 10 minutes to present his or her version of the matter. When all questions have been asked, the person summoned shall be allowed a maximum of five minutes to summarise the matter. The chair of the meeting may extend the speaking time of the person summoned to the extent found necessary for clarification of the matter.

(3) During questioning, the spokesperson and two other members of the committee shall be allocated a specific time to ask questions. The choice of principal questioners should be made with due regard for elucidation of all aspects of the matter. If principal questioners are

nominated, the remaining members of the committee shall each be entitled to a maximum of 10 minutes speaking time including the reply.

(4) The hearing shall begin with the questions of the spokesperson followed, if appropriate, by the two other principal questioners. The remaining members of the committee are then called upon to ask questions in the order that is usual in the debates of the Storting.

(5) The chair of the meeting may allow brief and direct follow-up questions from other committee members. Such follow-up questions shall not be included in the speaking time allocated pursuant to the third paragraph. A further opportunity shall be given for a brief concluding round of questions, beginning with the spokesperson and followed by the principal questioners and the remaining committee members.

(6) There shall be no exchange of views between committee members during the hearing. Members shall not comment upon answers given except when such comments form a natural part of a follow-up question. Improper or offensive behaviour or questions shall not be permitted. Such behaviour shall be censured by the chair of the meeting.

(7) Pursuant to section 18, fourth paragraph, of the Rules of Procedure of the Storting, a member of the committee may request the interruption of a hearing so that the committee may discuss further progress including proposals that the hearing be discontinued or continued in camera. Confidential information may only be received by the committee in camera. During public hearings the committee members may not repeat or refer to information subject to a duty of secrecy laid down in Statute or instructions.

#### *Section 5 Summoning of Civil Servants and Senior Officials to Hearings*

(1) The committee may request civil servants and senior officials to attend hearings. In the case of ministerial employees, such requests shall be made to the Minister concerned, who is then entitled to be present at the hearing. All questions shall be addressed to the Minister, who shall decide who shall answer. If found necessary for specific reasons, the committee may, following a separate discussion in camera, nevertheless decide that questions shall be addressed directly to the civil servant or senior official who has been summoned to attend.

(2) Civil servants and senior officials in external agencies may be requested directly to attend hearings. In such cases, the Minister concerned shall be notified and allowed to attend. Questions shall be addressed directly to the person summoned, but the Minister shall be allowed to supply additional information.

(3) When questioning civil servants and senior officials, the committee is obliged to pay due consideration to the duty of loyalty within the public administration, and between the civil service and the Minister. The chair of the meeting must ensure that this is respected.



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## **The Constitution and Regulatory (Independent) Bodies – An Attempt at Defining the Place and the Role of Regulatory Bodies in the Constitutional System**

### **1. The Classical Definition of the System of Government, Including an Overview of the System of Government in the Republic of Serbia**

The “core” of the constitutional system is the system of government. The system (form) of a state’s government is “the manner in which powers of state are exercised and relations between them are established”.<sup>14</sup> The system of government of a modern constitutional state is based on the principle of division of powers. This principle presupposes that three state powers, the legislative, executive and judicial, are exercised by three different state bodies. It has long been established that the division of powers has never been carried out in full. In the presidential system, which is based on the so-called firm division of powers, areas where the legislative and the executive powers overlap. Only the judicial power is autonomous and independent. Strictly depoliticised, this power is not a relevant factor in determining a system of government as is the presidential or parliamentary one. In other words, political powers, the legislative and the executive powers, and the relations between them, determine the system of government in each particular case.

However, the constitutional system is a broader notion than that of a “system of government”. The constitutional system is made up of other subjects as well, without which it is impossible to think of having a constitutional democracy. First of all, those are political parties, which have lately, through their constitutionalisation (that is, a constitutional definition of the position and the role of

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<sup>14</sup> R. Marković, *Ustavno pravo [Constitutional Law]*, Belgrade, 2009, pg. 176.

political parties in principle) become formal, and not just factual, constitutional factors. Then there are constitutional courts, which seriously “endanger” the classical concept of division of powers and are clearly the basic guarantor of the rule of law in the modern sense of the term. Finally, we can consider some (not all) independent regulatory bodies (independent state bodies), such as the Ombudsman and the body in charge of monitoring public expenditure, to be important subjects of the constitutional system. While a lot has been written in literature dealing with public law about political parties and constitutional courts, the so-called independent state bodies, with the exception of the Ombudsman, still wait for legal science to have its say on their place and role within the constitutional system.

As far as the constitutional system of the Republic of Serbia is concerned, its “core” is made up of a system of government that is based on division of powers (Article 4 of the Serbian Constitution of 2006). The Serbian Constitution of 2006 formally opts for the classical, three-way division of powers. The National Assembly is the bearer of the constitutional and legislative powers (Article 98 of the Constitution) the Government is the bearer of the executive power (Article 122 of the Constitution), whereas “the judicial power in the Republic of Serbia belongs to courts of general and special jurisdiction” (Article 143 item 1 of the Constitution). The President of the Republic remains outside the three-way division of powers. According to the Constitution, he/she is not a bearer of the executive power. The President of the Republic “expresses the state unity of the Republic of Serbia” (Article 111 of the Constitution). In spite of the fact that, strictly speaking, the executive branch is not bicephalous (the Government and the head of state) but monocephalous (the Government), the system of government in the Republic of Serbia is a parliamentary one, for the Government is politically accountable to the National Assembly (Article 124 of the Constitution) and the National Assembly can be dissolved (Article 109 of the Constitution). Nonetheless, this is a “shifted” parliamentary system, wherein the directly elected President of the Republic has strong democratic legitimacy and relatively little authority, while the Government is the central body of political decision-making, which constitutes a deviation from the theoretically pure model of parliamentarism. Thus, the state bodies referred to above and the relations among them define the system of government in the Republic of Serbia.

Other state bodies, among them the Ombudsman (the Protector of Citizens, Article 138 of the Constitution), are not relevant elements of the qualification of the system of government, but they are relevant elements of the constitutional system of the Republic of Serbia (Part Five – The Organisation of Government, Articles 98-165 of the Constitution). It should be noted that Article 138, dedicated to the Protector of Citizens, follows the regulations pertaining to the state administration (Articles 136-137 of the Constitution), and is not an integral part of the constitutional regulations of the National Assembly (Articles 98-110 of the Constitution). This is one of the clear indicators of the intention on the part of the makers of the Constitution to

define the Protector of Citizens as an autonomous and independent body, and not as part of the National Assembly, of which we shall say more later. Another institution that can be placed in the category of independent state institutions envisaged by the Serbian Constitution of 2006 is the State Audit Institution. Article 96, which establishes this institution in the constitutional system of Serbia, ends Part Three of the Constitution – “The organisation of the economy and public finances” (Articles 82-96).<sup>15</sup>

## 2. The Oversight Function of the Parliament

“The real job of a representative assembly (...) is to supervise the government, to shed light on all its affairs, thus making them public knowledge, to make it fully expose and justify each step that it takes which anyone could consider to be suspicious, to condemn them if they deserve condemnation, and if the people who make up the government abuse the power that has been entrusted to them, or if they act in a manner contrary to the feelings of the nation, to drive them out of office and to name, expressly or indirectly, their successors” (Ch. Montesquieu). This is the supervisory function of the parliament, considered by many to be even more important than its legislative function. Modern parliamentary democracy is based on accountability, and there is no accountability without supervision, exercised directly or indirectly by a parliament. For this control to be effective, the parliament must have various instruments at its disposal. The parliament uses some of these instruments directly, while some are used through other bodies specialised in supervising various activities of the government and the executive branch as a whole. The parliament exercises control over the executive branch by means of questions and interpellations submitted by representatives of the people, parliamentary committees authorised to monitor some ministry departments, and also by means of *ad hoc* investigative committees, which we shall not deal with here. However, the parliament also exercises control of the executive branch through special oversight bodies. These bodies can be divided into two groups: 1) *bodies controlling public expenditures (public finances)*; 2) *bodies primarily controlling the administration*. In Serbia, the State Audit Institution is an example of the former, and the Protector of Citizens of the latter (although, according to the Serbian Constitution of 2006, the Protector of Citizens is envisaged as a body that not only monitors the work of the administration, but also protects the rights of the citizens).<sup>16</sup>

15 For more details on the history of this institution in the constitutional system of Serbia, later Yugoslavia, until its modern form, introduced by the Serbian Constitution of 2006, cf.: A Rabrenović, “Uspostavljanje vrhovne revizorske institucije u Srbiji – povratak zaboravljenoj tradiciji [Establishing the Highest Audit Institution in Serbia – a Return to a Forgotten Tradition]”, *Pravni život [Legal Life]*, no. 10-2008, vol. VI, pp. 663-679.

16 As regards the Protector of Citizens according to the Serbian Constitution of 2006, there is an opinion to the effect that it is an organ of the state performing tasks that are close to those performed by the judiciary. Cf. R. Marković, “Mišljenje Venecijanske komisije o Ustavu Republike Srbije od 2006. – odredbama o sistemu vlasti [The Opinion of the Venice Commission on the 2006 Constitution of the Republic of Serbia – the Provisions Pertaining to the System of Government]”, *Ustav i iskušenja [The Constitution and the Attendant Trials]*, Nova srpska politička misao [The New Serbian Political Thought], special edition no. 2, 2008, pg. 26.

### 3. The Relationship Between Independent Regulatory Bodies and Parliament

Three essential questions arise in connection with the nature of independent regulatory bodies and their place in the constitutional system: 1) *are independent regulatory bodies autonomous, or are they bodies of the parliament*; 2) *are they independent in their work or could they at least become independent*; 3) *can these bodies be considered to be “the fourth branch of power” in a modern parliamentary democracy*, that is to say, are these bodies of power or are they more in the nature of auxiliary and consulting bodies? Although it seems necessary to provide answers to these questions in a general manner, it is difficult to do so, in view of the differences between some oversight bodies, as well as the very diverse legal regulations pertaining to these organs. Thus, for example, some independent regulatory bodies are established by the Constitution while others are established by law. There are traditionally democratic countries where the legal regulations governing independent regulatory bodies are not very developed, or exist in the form of written and unwritten norms of varying strength. This creates almost insurmountable obstacles if one tries to determine the nature and the place of these bodies in the constitutional system in a uniform manner.

Oversight bodies, as a rule, are elected by the parliament. There are independent regulatory bodies, the members of which are appointed by the government, entrusting them with the exercise of certain supervisory powers over some activities of the executive branch, as well as part of the authority of the executive branch itself.<sup>17</sup> Such organs, even when they are obligated to submit reports to the parliament, cannot be considered autonomous state bodies (for example, the Commission for the Protection of Rights), and we shall not deal with them here. The fact that the independent regulatory bodies we deal with here are mostly elected by the parliament does not in itself exclude the possibility of these bodies being autonomous and independent. Autonomy means that independent regulatory bodies are a special kind of state body, to which special organisational rules apply, while independence means that no external influences may be exerted while they exercise their functions, especially influences originating from the executive branch, whose activities are subject to monitoring by these bodies.

Independent regulatory bodies are characterised by being linked to the parliament to a greater or lesser degree. Let us, for example, consider the position of the Ombudsman in Croatia and Serbia. The 1991 Croatian Constitution defines the Ombudsman in the following manner: “The Protector of People’s Rights shall be *entrusted by the Croatian Parliament* to protect the constitutional and legal rights of the citizens in the course of proceedings before the state administration and bodies having public authority” (Article 92 paragraph 1). Thus, the Croatian

<sup>17</sup> Author’s note: Under exceptional circumstances, supervisory bodies can be appointed by the head of a state. According to the new Article 71-1 of the Constitution of the Fifth French Republic of 1958 (as last amended in 2008), the Protector of Citizens’ Rights is appointed by the President of the Republic for a six-year period, to be answerable to the President of the Republic and the Parliament, with the proviso that one and the same person cannot be appointed to this post again.

Constitution accepts the original concept of the Ombudsman as a parliamentary appointee (the, so called, Swedish model). Still, the Croatian Ombudsman cannot be considered a dependent body, working body or committee of the Croatian Parliament. If the Ombudsman were merely an auxiliary organ of the Parliament, their appointment, organisation, manner of work and authority would be regulated by the Parliament's Rules of Procedure, and their term of office could not exceed that of the Parliament. The Croatian Constitution prescribes the following: "The conditions for appointing and dismissing the Protector of People's Rights, the scope and the manner of his/her work and that of his/her deputies, shall be determined by law" (Article 92 paragraph 3), and the Protector of People's Rights is elected for a period of eight years (Article 92 paragraph 3). The Serbian Constitution of 2006 defines the Protector of Citizens as "*an independent state body that protects citizens' rights and monitors the work of state administration bodies, the body in charge of the legal protection of the property rights and interests of the Republic of Serbia, and other bodies and organisations, firms and institutions entrusted with public authority*" (Article 138 paragraph 1). This Constitution abandons the concept of the ombudsman as a parliamentary appointee, placing him/her in an even more independent position. This is evident from the constitutional definition of the Protector of Citizens, as well as the systemic characteristics of the Constitution. There is a special section dedicated to the Protector of Citizens – (Section 5) within the framework of Part Five of the Constitution, dealing with the organisation of government (the state bodies dealt with previously in this part of the Constitution are the National Assembly, the President of the Republic, the Government, the state administration, and after the Protector of Citizens there come the Army, the High Council of the Judiciary and the Public Prosecutor's Office). Still, it is an organ that remains closer to the Parliament than to any other organ of authority in the constitutional system of Serbia.

As regards the relations between independent regulatory bodies and parliamentary committees authorised to control the executive branch, those are actually relations between independent bodies that are answerable to the parliament for their work, on the one hand, and internal parliamentary organisational units that are integral parts of the parliament. While the former have more or less independent authority, even though that is not the essential authority of the powers-that-be (the power to make decisions), others do not have such authority, except in rare circumstances. Independent regulatory bodies and parliamentary committees should be characterised by expertise in their work and specialisation in tasks, but their composition is not determined according to the same criterion. Parliamentary committees as "parliamentary units" are made up of parliamentarians who are selected mostly on the basis of the balance of power of the political parties represented in the parliament. Parliamentary committees, being an integral part of the parliament, are at the same time political bodies, even though they should be characterised by greater knowledge of a particular area than that possessed by the parliament



in its plenary form. Independent regulatory bodies must not be political bodies. They should not be made up of political practitioners who are politically answerable to the parliament. Where that is the case, or when such bodies are of “mixed” composition, they cannot act as control institutions in the manner of independent bodies. In functional terms, parliamentary committees that control the executive branch and independent regulatory bodies complement each other. Thus, for example, in many parliaments there is a committee that controls public expenditure (monitors budget spending), checking whether public resources are spent effectively and economically, whether there is any evidence of abuse and other wrongdoing, etc.<sup>18</sup> Apart from this kind of committee, financial control of public spending is also performed by independent state auditors or a special Accounting Court. In Serbia, there is no separate parliamentary committee for financial control (control of public finances), nor is there a committee for the protection of rights, but there is a need to introduce them.<sup>19</sup>

In any case, we can conclude that a link between independent regulatory bodies and the parliament, far from constituting an obstacle to their autonomy, is a necessary precondition for it. Through the parliament as a representative office of the people, a necessary link is established between citizens and supervisory organs. Through being linked to the parliament, these organs, envisaged as expert and specialised bodies, assume the greatest possible authority in any democracy, the authority originating from the people. This authority is, at best, diluted, and actually lost when these bodies are selected by the government or the head of state.

As regards the independence of supervisory bodies, two things should be pointed out. Firstly, autonomy is primarily an organisational category, while independence is a functional category. Although these two characteristics are intertwined and it is difficult to separate one from the other, at least nominally, autonomy is easier to achieve. An organ may be envisaged as autonomous, which does not mean that, while performing its function, this organ will not be subjected to certain external influences. Independence is always the ideal to strive to after in the case of state bodies whose main guidance criterion is objective law and not political expediency. There is no independence in absolute terms. The best example of this is provided by courts and the judicial power in countries that possess a rich tradition of the rule of law. Hence, there can be no independence of this kind in the case of independent regulatory bodies either. Secondly, there is a phrase that has become customary as a reference to independent regulatory bodies is “independent state organs”. We are not sure that this expression is quite appropriate. First of all, it does not tell us what the basic characteristics and role of these bodies are. Are not courts independent state bodies as well? Is it not the case with the Public Prosecutor’s Office also? The Serbian Constitution of 2006 defines the High Council of the Judiciary as “an independent and autonomous body...” (Article 153, paragraph 1), etc. Therefore, it would be more appropriate

<sup>18</sup> Cf.: A. Bačić, *Parlamentarno pravo [Parliamentary Law]*, Split, 2004, pg. 369-373.

<sup>19</sup> Cf.: M. Radaković, V. Petrov, “Vreme parlamentarne reforme [The Time of Parliamentary Reform]”, *Pravni život*, no. 14, vol. VI, Belgrade, 2009, pg. 908.

to use the term independent regulatory body, or bodies, for this points to their basic function – external (parliamentary) control of the executive branch of government. That, precisely, is their *differentia specifica* with respect to other state bodies that are, or at least should be, autonomous and independent. At the same time, it is the only serious common characteristic of these “independent” state bodies. In every other respect, such as their nature, organisation, scope of work etc., they differ considerably. It will suffice to compare, within the framework of the constitutional system of the Republic of Serbia, two “independent state bodies” envisaged by the Constitution – the Protector of Citizens and the State Audit Institution, in order to understand how true the previous claim is. A constitutional expert will know and be able to elaborate on the ombudsman, but his/her knowledge of the State Audit Institution and auditing public finances, most likely, will not extend beyond Article 96 of the Constitution, which is quite understandable, for strictly speaking, this is not a constitutional law matter.

The independence of independent regulatory bodies presupposes that they should be free from the influence of the political authorities, first of all the government, but also the parliament itself, when exercising their authority. In other words, the independence of these bodies means dependence solely on the law. The parliament must not interfere with the work of these bodies or issue specific instructions and orders to them.<sup>20</sup> It should gain regular insight into the work of independent regulatory bodies through the reports that they submit to it periodically (the most important of them being the annual report). In fact, the role of these reports is twofold. On the one hand, they are the main instruments in the hands of oversight bodies, through which these bodies exercise their control function. It is through them that the parliament is informed about the legality and the effectiveness of the work of the executive branch, as well as other public bodies and organisations. On the other hand, these reports are instruments through which the parliament gets acquainted with the work of the independent regulatory bodies themselves. It is mostly on the basis of these reports that the parliament evaluates the correctness and the quality of the work of oversight bodies. On the basis of these reports, it can establish whether, in a given case, there are legal grounds to relieve a supervisory body of its duty. Finally, the effect of these reports cannot be restricted solely to the relationship between independent regulatory bodies and the parliament. The contents of those reports must be communicated to authorised state bodies and the public. If the relationship between a regulatory body and the parliament is reduced to a kind of internal exchange of information, and the reports remain “buried” in the parliamentary committees, control loses its purpose entirely. One should bear in mind that regulatory bodies, as a rule, do not pass binding decisions. They lack the essential prerogatives of power. They warn, caution, advise, but their activities become meaningless unless the parliament seriously takes their reports into consideration and takes specific steps with a view to eliminating irregularities in

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<sup>20</sup> Author's note: There are, certainly, exceptions to this rule. For example, in Denmark and Norway the Parliament may issue general directives to the ombudsman, but it cannot interfere with his/her work in specific cases.

the work of public bodies and organisations. Thus, in Serbia, according to the testimony of the current Protector of Citizens, the National Assembly has not reviewed a single report submitted by the Protector in a manner that would enable the public to be properly informed about it. From a strictly legal point of view, the problem lies in the lack of an orderly legal procedure when it comes to reviewing the reports of regulatory bodies. An exception to this is the review given to the report of the State Audit Institution. According to Article 48 of the Law on the State Audit Institution of 2005, the authorised work group of the National Assembly shall review the report submitted by the State Audit Institution, and then forward its views and recommendations, in the form of a report, to the National Assembly. On the basis of the essential facts and circumstances pointed out in the report, the National Assembly passes a decision on the proposals submitted, and the measures and deadlines for their implementation.

In Serbia, generally speaking, many issues in connection with the legal regulations pertaining to the procedure for reviewing the reports of independent regulatory bodies have not yet been resolved. Control mechanisms should be introduced into legal regulations, laying an emphasis on the manner and the result of reviewing the reports of independent regulatory bodies (forwarding them to the authorised committee, reviewing them in the course of committee sessions, committee reports with proposals, recommendations or conclusions, and reviewing them in the course of National Assembly sessions, the results of such parliamentary reviews). In view of the fact that the Rules of Procedure of the National Assembly currently in force do not make it obligatory to review those reports, they are usually just distributed among the representatives of the people for the purpose of providing them with information. Moreover, parliamentary control of reports submitted by independent regulatory bodies is not regulated. It has been left to the discretion of these bodies to decide whether they should submit any reports to the parliament at all. The Rules of Procedure of the National Assembly state that it shall pass: laws, the budget, the development plan, the spatial plan, the annual balance sheet, the rules of procedure, declarations, resolutions, recommendations, decisions, conclusions and authentic interpretations of the acts it passes; this gives rise to the question of what act the National Assembly would pass following a review of a report submitted to it by an oversight body. No obligation of the authorised parliamentary committee to review a report submitted by an oversight body has been established by the Rules of Procedure, as a consequence of which the holding of such a session depends on the level of interest and the goodwill of the chairman of the authorised working body of the National Assembly.<sup>21</sup>

A good example of normative regulation of the procedure of reviewing a report by an independent body, the Ombudsman for Human Rights, is provided by the Rules of Procedure of the National Assembly of Slovenia (Article 262). The regular annual report of the Ombudsman

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21 M. Radaković, V. Petrov, *op.cit.*, pg. 906.

for Human Rights is a separate item on the agenda of the regular autumn session of the National Assembly. A special report by the Ombudsman for Human Rights may be a separate item on the agenda of the regular autumn or spring session. A special report is entered into the agenda of a National Assembly session if the representatives of the people receive it at least 15 days before the beginning of the session. A session featuring a discussion of a special report by the Ombudsman must be attended by the ministers to whose jurisdiction the report pertains. After a discussion, the National Assembly shall adopt a recommendation.<sup>22</sup>

Still, one should not expect that all the dilemmas will be eliminated by means of very precisely worded legal rules regulating the parliamentary review of reports submitted by supervisory bodies organs, whether regulated by law or by parliamentary rules of procedure. The control function of these bodies must be conducted on a daily basis, the relations between these bodies and the parliament must be based on trust, and trust is not created solely by written legal regulations. The well-known British statesman from the second half of the 19th century, William Gladstone, explained that the successfulness of the “unwritten” English Constitution was based on “the good faith (conscientiousness and trust) of those who participate in its functioning”. Therefore, independent regulatory bodies must build their authority among the public, and they will not have any without the authority of the parliament as the central representative institution. It is a complex process, which is an integral part of serious parliamentary and political reform. It is a long-lasting process that cannot be reduced to partial interventions of a purely normative-legal character, irrespective of what legal acts are used to effect these interventions, parliamentary rules of procedure, laws or even constitutional amendments.

Bearing in mind that all generalisations have certain shortcomings, we can conclude the following concerning the autonomy and independence of oversight bodies. Independent regulatory bodies are autonomous state bodies, for they represent organisational units to which special (legal) rules apply. In organisational terms, they are not an integral part of the parliament, that is to say, they are not bodies of the parliament. In functional terms, they perform their control function by means of relatively autonomous (legal) authority, partly borrowing their authority from the parliament (a part of the authority of these bodies is based on the expertise of their members), to which they are answerable for their work, but which cannot interfere with their work. Since independent regulatory bodies cannot perform their function successfully if there is no connection between them and the parliament (the reverse also holds true, as far as the control function of the parliament is concerned), one can conclude that these bodies and the parliament are “natural allies”, or, as politicians usually say, “partners” (quoting Ms. Gordana Čomić, Deputy Speaker of the National Assembly of the Republic of Serbia). On the other hand, can we consider independent regulatory bodies to be “the fourth branch of power”? It is to this question that we must now try to provide an answer.

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<sup>22</sup> Author's note: By way of recommendations, the National Assembly gives proposals pertaining to the work of state bodies, organisations and individuals performing public services or having public authority (Article 111 of the Rules of Procedure of the Parliament of the Republic of Slovenia).

#### 4. Independent Regulatory Bodies as “the Fourth Branch of Power”?

In the science of constitutional law, the idea of the fourth function of the state or “the fourth branch of power” is not a new one. In a sense, it has come into being as a kind of criticism of theories of tripartite state functions and as an attempt to provide a better explanation of the complexity of the executive function of state power. That is the origin of theories of four-way state functions, which emphasised the function of government as an autonomous function, separate from the executive function in narrow sense of the term. One of the most respected advocates of these four-way theories from the first half of the 19th century, Benjamin Constant, argued in favour of introducing a fourth, “neutral” state power, embodied in a monarch. This idea was “revived” by the Constitution of the Fifth French Republic of 1958, which defined the President of the Republic as an “arbiter” and “moderator” in the relations between the legislative and the executive branches of power (Article 5 of the French Constitution of 1958). Still, “the fourth state power”, which brings into question the classical three-way division of power, was most often discussed in the 20th century in connection with the institution of constitutional courts. This debate did not remain on the level of vacuous theoretical discussions. The great importance of the constitutional court as a *sui generis* institution in organisational and functional terms has been recognised by modern constitutions over time, by expressly separating constitutional courts from the constitutional-legal regime of the so-called regular courts. The Serbian Constitution of 2006 did the same thing. The constitutional court was dealt with in a separate; sixth part of the Constitution, which, in a sense, points to the Constitution makers’ intention to define this institution as a separate, fourth function of government.

Over the last several years, we have heard increasingly more often that independent regulatory bodies (the so-called independent state bodies) are so important in democratic constitutional systems that they may be rightly called “the fourth branch of power”.<sup>23</sup> Without calling into question the veracity of this claim, we must point out that “importance” and “influence” are sociological and political, not legal categories. State power (function) is determined with regard to its legal quality. This legal quality is reflected in the appropriate content and form of the legal act passed by the authorities. If that institution has the ability, conferred upon it by objective law, to pass decisions in the course of a specific legal procedure and with specific legal effects, then it has the potential to be a separate branch of power, because state power is the power to pass decisions into objective law. Thus, for example, the parliament has legislative power because it passes final decisions on laws in the course of a legislative procedure, and its laws have legal force (being generally binding, abstract, constitutive). Also, courts resolve legal disputes in the course of judicial proceedings, and a court decision has the force of a judgement (the principle of *ne bis in idem*). In that sense, the constitutional-judicial function can be considered to consti-

23 Slaviša Orlović, *The Parliament and the Citizens, A Guide for Citizens and Citizens’ Associations*, Supported by UNDP, Belgrade, 2009, pg. 66.

tute the fourth state power to the greatest extent, bearing in mind the organisation, authority and the procedure before constitutional courts, as well as the effects of their decisions.

As regards oversight bodies, they undoubtedly have at their disposal certain legal elements of state power, but not so fully that we can define them in constitutional-legal terms as a separate power. Thus, as a rule, they have organisational autonomy and a relatively precisely defined legal authority. Still, their organisational autonomy is very relative in those systems where these bodies are legally defined as parliamentary bodies. Their legal authority, for the most part, is not extensive. It almost never pertains to passing binding decisions. Even the Ombudsman, who certainly comes closest to qualifying as a separate state organ of power, restricts their work to issuing warnings, informing the parliament and the public, criticising. In practical terms, their greatest authority pertains to initiating misdemeanour, disciplinary or criminal proceedings against the persons responsible, starting legislative initiatives within the area of their authority, and, possibly, initiating a procedure for establishing the constitutionality or legality of legal acts passed by bodies and organisations. In the case of the majority of oversight bodies, the main act is the report that is submitted to the parliament, whose legal effect is very dubious. In some legal systems, as is the case in Serbia, there is no express legal obligation on the part of the National Assembly to take those reports into consideration and at least take a stand on them. That amounts to too little legal power to consider independent regulatory bodies as a separate state power. In any case, as far as we know, a comparative analysis of constitutional provisions does not support the thesis that independent regulatory bodies are the fourth function of state power. One of the rare modern constitutions that partly, based on its structure and systemic characteristics, meets the criteria for qualifying independent regulatory bodies as “the fourth power” is the Constitution of Holland (as last amended in 2002). Following the chapters on the Government and the Parliament, this Constitution contains a separate chapter on the State Council, the Audit Institution, the National Ombudsman and permanent advisory bodies (Articles 72-73 of the Dutch Constitution).

Finally, if we wanted to recognise independent regulatory bodies as having the characteristic of a separate state power, we would first have to do the same in the case of constitutional courts. In this way, we would get the fourth and the fifth state powers. This claim may appear to be scientifically irresponsible, but it is certainly a thesis worth thinking about. The science of constitutional law and its scholars must be prepared, at least argumentatively, to call into question the “sacred rule” of constitutional law about the division of powers into three state functions, for it obviously needs to be revised in view of the situation and the relations in the modern political system. One should also bear in mind that “in human matters there is nothing that corresponds to the harmonious, logical divisions established in the constitution”.<sup>24</sup>

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24 B. Laskin, *Canadian Constitutional Law*, Toronto, 1951, pg. 4.

## 5. Conclusion

From the point of view of the constitutional law, we do not have strong enough arguments to consider independent regulatory bodies as the fourth branch of power, if they can be regarded as a separate category at all. From a political science point of view, the idea of independent regulatory bodies as the fourth state power is quite legitimate. It should not be rejected, but should be promoted as one of exceptional importance when it comes to ensuring the public character and realisation of accountability in a political society that strives to become/remain democratic.

As regards the constitutional law of Serbia, we are of the opinion that the Serbian Constitution of 2006 did enough by envisaging two basic forms of supervisory organs: the Protector of Citizens, whose function is much more than to exercise control over the state administration, and the State Audit Institution, as “the highest state body for auditing public resources in the Republic of Serbia”. Other independent regulatory bodies are established by special law and this is sufficient legal guarantee because, with the exception of the two bodies referred to above, the regulations pertaining to other independent regulatory bodies are not constitutional matters. This is the way it should remain. It is not our intention hereby to deny the significance of regulatory bodies, but only to leave room for introducing more efficient ones in the future. It is certain that the existing legal regulations on independent regulatory bodies need to be improved, especially the *lacunae* that exist when it comes to regulating the relations between these bodies and the parliament. It is also believed that the current Law on the Protector of Citizens from 2005 has shortcomings that need to be eliminated. The regulations pertaining to the relations between the parliament and regulatory bodies, as a matter of principle, may be a matter to be dealt with in the Law on the National Assembly, which has yet to be adopted at the time of writing this paper (January 2010).

To end with, even the best-quality normative and legal regulations dealing with independent regulatory bodies and their relations with the parliament will remain “sterile” and useless unless the general public is informed of the work performed by independent regulatory bodies and raises its awareness of the exceptional importance of these institutions for establishing a responsible political society. Also relevant in this respect are scientific and professional conferences such as the one, held on November 26th-27th 2009 at the National Assembly of the Republic of Serbia, entitled “National Assembly of the Republic of Serbia and Independent Bodies”, which provided the immediate impetus for writing this paper.

## EXAMPLES OF THE RELATIONS BETWEEN PARLIAMENTARY COMMITTEES AND AN INDEPENDENT BODY

*An excerpt from the SIGMA paper 33*

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### RELATIONS BETWEEN SUPREME AUDIT INSTITUTIONS (SAI) AND PARLIAMENTARY COMMITTEES

Role of Parliament and Parliamentary Committees in relation to the SAI

Candidate/Participant Countries

Worldwide, the way the relationship to Parliament is established can be reflected in various forms, as far as the general status of the SAI is concerned:

- Some SAIs formally belong to the Executive branch, but the bulk of their work is directed to the Parliament.
- A large number of SAIs are considered as being independent from both parliament and government. This is probably the most common model, at least in Europe. Such a model does not preclude the fact that the work done is, sometimes to a significant extent, also directed to the parliament.
- Other SAIs are clearly part of the Legislative. Some of these SAIs were initially created within the executive sphere, but were subsequently transferred to the Legislative.

The relations between the SAI and Parliament in several countries have become significantly stronger during the past two or three decades. Previously such relations were merely an infrequent occurrence; they often just concerned the presentation of an annual report (frequently overdue) and possibly occasional detailed audit reports. In recent years, however, these relations have become of a more substantial and sometimes even day-to-day character. This change has led to a broadening of knowledge in audit related

matters by members of parliament. It has also helped parliament to perform its supervisory functions over the Executive more efficiently and effectively.

In most EU candidate/participant countries, SAIs have close relations with the respective parliaments. Relations may be connected with the appointment/dismissal of the head of the SAI, review of audit reports, review of draft legislation (particularly in areas of financial control), review of the SAI's annual audit programme and activities, requests for audits of particular subject areas, adoption of the SAI budget, review of bills related to the SAI, etc. Relations may be directly with parliament or with the parliamentary committees.

Parliamentary committees that have regular contacts with the SAI

Current relations between SAIs and parliaments largely concern the review of annual audit programmes and activities, and the review and possibly follow-up of audit findings. These functions are primarily performed by the parliamentary committees.

SAIs of the candidate/participant countries co-operate with the following parliamentary committees:

1. Committees that are in charge of various branches of administration and economy, *i.e.* the committees having specific scope of responsibility such as committees on economy, transport, agriculture and health care (called branch committees). The main function of those parliamentary committees is to examine and prepare issues that are currently the object of parliament's debate and to deliver opinions on matters that have been referred to them by parliament or its speaker. Within the range determined by the Constitution and statutes, the committees also work as bodies of parliamentary review in specific areas of government activities.
2. Committees responsible, exclusively or mainly, for state audit-related matters (called audit committees), can be divided into two types:



- Public Accounts Committees, responsible mainly for inquiring into all matters related to public accounts provided for in the Constitution or referred to them by the parliament, a minister or Head of SAI (Cyprus, Malta).
- State Audit Committees that on behalf of parliament review the operations of the Supreme Audit Institution. They provide opinions on annual audit programmes and activities, evaluate SAI's performance on a day-to-day basis, review some of the audit reports and attempt to co-ordinate SAI's relations with other parliamentary committees. Sometimes they are also responsible for the review of the functioning of all the country's other inspection and control bodies, as well as for the co-operation of these bodies with the SAI (the State Audit Committee in Hungary, the State Control Committee in Poland). A partly similar solution is the establishment of a standing audit subcommittee within a budgetary committee for the purpose of resolving questions related to the audit system, especially to activities and status of the SAI (the Czech Republic).
- Committees specifically responsible mainly for SAI's budget related matters: the approval of the SAI's budget, the appointment of outside auditors to audit SAI and the review of the audited accounts (the National Audit Office Accounts Committee in Malta; a similar committee in Romania).
- Co-operation mainly with a public accounts committee (Cyprus, Malta) or a standing audit subcommittee within a budgetary committee (the Czech Republic).

### **Composition and Mode of Operation of Parliamentary Committee(s) that Have Regular Contacts with the SAI**

#### ***The composition of parliamentary committees and representation of political parties***

Parliamentary committees that have regular contacts with the SAI are established pursuant to general principles, similar to those that govern the establishment of other standing committees. They are composed of members of Parliament (MPs) only. Other persons may participate in PC meetings if invited or requested by the committee. Typically, MPs who are not committee members may participate freely in a PC meeting but have no right to vote.

The number of committee members can be fixed (in parliament's Standing Orders or in a separate resolution), or can result from the resolution on their election. In practice, the number of the parliamentary committee members, in the various committees of the different candidate/participant countries varies between 7 and 40 MPs, including a chairperson and one or more vice-chairs.

The SAI's maintain regular relations with one or more parliamentary committees. The following models can be distinguished:

- Co-operation with various branch committees (Croatia, Estonia, Latvia, Lithuania, Romania).
- Co-operation with various branch committees and with a State Audit Committee (Hungary, Poland).
- In the case of two-chamber Parliaments, reference is to the chamber which has the right to conduct oversight of the Government.
- Co-operation with one, or mainly with one, branch committee - particularly with the committee that deals with public finance matters (Albania, Bulgaria, the Slovak Republic, Slovenia).

The composition of the parliamentary committee results from the consultation procedures carried out between parliamentary factions and is usually based upon the principle of proportional representation. The appointment of the position of the chair and vice-chair is usually a question of political agreement. In practice, parliamentary factions are also responsible for the appointment of other PC members, although this has to be approved by way of a parliamentary resolution. As a result, the composition of the committees often reflects the political structure of the parliament with the majority of the committee members often representing the governing political party or coalition.

The role of parliament and its parliamentary committees is most often of a political nature. However, there are also functions that are not, or should not be, of a political character, such as when

the PCs discuss SAI related matters. The following factors assist in ensuring the non-politicisation of SAI related meetings: a) the organisation of the PC's work according to parliament's Standing Orders, b) the participation in PC meetings of officers responsible for the matters being discussed, and other experts, c) the participation in PCs of members from all political parties and the right of all members to be heard, d) the oath each MP takes, which provides for adherence and respect for the Constitution and other legislation, e) in some of the countries the MPs endeavour to avoid politicising PC sittings, when SAI related matters are discussed, f) in case of committees that are, exclusively or mainly, in charge of state audit-related issues, the position of a Chair is sometimes held by a representative of an opposition party (the Czech Republic, Malta, Poland) or a representative of an opposition party holds the position of a vice-chair.

#### ***Frequency that Parliamentary Committees meet to discuss SAI related matters***

In most of the countries is no tradition of frequent and periodical meetings between SAs and parliamentary committees. Such meetings take place in the parliaments where there are committees in charge of, whether exclusively or mainly, issues of state audit (Cyprus, Hungary, Malta), or where there exists an established tradition of reviewing audit reports by most of the parliamentary committees (Poland). The annual number of meetings of the PCs convened to discuss SAI related matters varies from one to three in Albania, Bulgaria, Latvia and Lithuania; several in Croatia, the Czech Republic, Estonia, Romania, the Slovak Republic and Slovenia; about 20 in Hungary and Malta; up to approximately 75 of such meetings held in Cyprus and 70-100 in Poland. It is rare that all of the meetings are devoted to SAI related matters -- most often they constitute just one item on the agenda. The duration of the session depends primarily on the quantity and gravity of the topics under discussion.

There is usually no separate procedure in any of the parliaments to deal with SAI related matters. Audit reports are reviewed pursuant to similar procedures that apply to other documents presented by government or other state authorities. Usually, the provisions of law do not require such reports to be reviewed by parliament, except for those that concern the execution of state budget audit. Under such circumstances only some of the audit reports are reviewed at the parliamentary committees meetings.

#### ***Instances when parliamentary committee decisions are considered as valid***

Typically parliamentary committee meetings are valid if the majority of members are present (Albania, Croatia, Cyprus, Hungary, Lithuania, Malta, the Slovak Republic), but sometimes the presence of just one-third of the members of the committee constitutes a quorum (the Czech Republic, Estonia, Poland). For decisions to be taken by the PC the majority of votes of members present is required (Albania, Bulgaria, Croatia, Cyprus, the Czech Republic, Estonia, Hungary, Lithuania, Malta, Poland, Romania, Slovenia). In one instance (Latvia), the qualified majority of members present is required and, in another instance (the Slovak Republic), the absolute majority of all members, not only those present, is necessary.

#### ***Requirement or invitation of SAI Head to attend parliamentary committee SAI related meetings***

Heads and other representatives of Supreme Audit Institutions usually attend all meetings of parliamentary committees that review documents presented by SAs (especially when audit reports are being reviewed). In the majority of countries, it is usual that the Head of SAI personally attends the PC SAI related meetings, although he/she may delegate a deputy or other representative to attend instead. The rank of the SAI representative is normally of a senior level and depends upon the nature of the matter (seriousness or sensitivity of the issue or audit under discussion).

The issue of the right, or the duty, to attend is rarely clearly specified and depends upon everyday practice. Most often the parliamentary committee invites the Head of SAI to participate in a meeting. It is presumed that he/she, or a representative, can attend such a meeting accompanied by other SAI employees as he/she may consider appropriate. Under such circumstances, taking the legal perspective into account, the participation of SAI Head or his/her representative is not mandatory. However, the Head of SAI or his/her representative is generally expected to attend such meetings and it is in the SAI's own interest to be represented. Only in some countries is the attendance in SAI related meetings considered as mandatory (Albania, Lithuania, Poland), or mandatory if required by the PC (the Czech Republic).

In practice, as specified earlier, in many of the candidate/participant countries parliamentary committees do not review documents presented by SAIs on a regular basis. Therefore, SAIs' representatives do not often participate in committee meetings. Supreme Audit Institution related PC meetings, in some countries, are limited to the review of the annual report on audit activities and the report on the implementation of state budget. More frequent meetings take place in parliaments where there are committees in charge of, whether exclusively or mainly, issues of state audit (Cyprus, Hungary, Malta), or where there exists an established tradition of reviewing audit reports by most of the PCs (Poland). The situation in Poland is different since the SAI, the Supreme Chamber of Control (SCC), is notified of all PC meetings. Hence, it is the topic of a meeting that determines whether a person has the right or the duty to attend: the SCC President (or an authorised representative of the SCC) is obliged to participate in the SCC-related meetings; as for other issues, the SCC receives an invitation to the meeting (in practice, SCC representatives participate in about 60-70% of all PC meetings).

### ***Other persons that normally attend SAI related parliamentary committee meetings***

In all candidate/participant countries high ranking representatives of appropriate ministries, including the Ministry of Finance, attend almost all SAI related PC meetings. Typically, upon the request of the PC, ministers and heads of other state offices and institutions are obliged to submit reports and provide information. They are obliged to participate in meetings of PCs that would be reviewing matters in their field of operation; in practice, for the most part, they are represented by their deputies. In accordance with general law, the PC has the right to require information in relation to their duties to be given orally or in writing, and there is a requirement for those attending a PC meeting to be truthful, and not refuse or hide any information the PC considers useful on issues it examines. The ministers and heads of other state bodies are requested to discuss audit reports and answer questions raised by PC members (they may bring along with them experts, or be represented by their deputies or authorised representatives). The presence of these government officials (once invited) is mandatory, though non-attendance is not "punishable" (the media can draw the attention of the public to their absence and sometimes such officials can be held politically liable before the Parliament). In Malta's case, it is not customary for a minister to be requested to attend a PC meeting; it is usually the Permanent Secretary (the Head of the Ministry) or the head of another public organisation who is requested to attend such meetings since he/she would be the person primarily held accountable for audit issues.

In addition, the parliamentary committee may invite other persons, such as representatives of professional, social or even political organisations, to provide requested information or explanations. The PC also has the right to invite experts, either on a permanent or temporary basis, who may act in the capacity of advisers. Non-governmental experts, who are invited, are expected to attend a PC meeting.

### ***Parliamentary committees' support staff***

Each PC usually has one person (rarely two or three) in charge of administrative duties (organisational issues, co-ordination, and administrative tasks). When a committee needs professional expertise, there are three typical solutions: in some countries members of the support staff perform both administrative and advisory duties (Albania, Cyprus, Estonia); in other countries committees either have their own advisors (Bulgaria, Hungary, Latvia, Lithuania); or may seek advisory aid from the highly specialised personnel of the parliamentary secretariat (Albania, Croatia, Poland). Additionally, PCs can hire external experts.

### ***Attendance at parliamentary committee meetings by the media and general public***

From the formal point of view, in parliaments of candidate/participant countries, there are two situations concerning the attendance of media persons and the general public in PC meetings:

- PC meetings are public and therefore they can be attended by the media and the public, except on very rare occasions when meetings may be closed for very specific reasons (Bulgaria, Croatia, Cyprus, the Czech Republic, Hungary, Latvia, Malta, Romania, the Slovak Republic, Slovenia).
- PC meetings are not public but media persons and other interested parties may freely obtain permission to attend these meetings (Albania, Estonia, Lithuania, Poland).

In practice, media persons and the general public usually may attend PC meetings, whether they are public or not. An appropriate parliamentary service attempts to create the proper conditions so as to enable such participation, e.g. the general public is informed about the date of the meeting and its agenda.

In reality, this opportunity is not often taken. In the majority of countries, the media and the public rarely attend such meetings (the media are always present in Cyprus and Malta, very often in Poland). In certain countries the parliamentary service makes an effort to inform the public about the course of such meetings, mainly by publishing a bulletin that describes and details every such meeting (Latvia, Lithuania, Poland).

### ***Media coverage of SAI related parliamentary committee meetings***

Media coverage involves TV and radio reports, articles in newspapers and magazines and also coverage on the Internet. The extent of media coverage of SAI related PC meetings depends on the relevance of topics to the general public. The journalists rarely participate in such meetings and their articles are brief. Meetings that deal with issues of material public interest are covered more closely and participants in such PC meetings are sometimes interviewed. Essential information is regularly broadcast by news agencies. Only in a few countries is the extent of media coverage of SAI related PC meetings considered as being adequate (Cyprus, Slovenia).

### ***Parliamentary Committee's Role in Outputs/Results of the SAI***

The number of SAI audit reports sent to parliament and reviewed by parliamentary committees

The ultimate products of an SAI are the audit reports, which would include the material audit findings and related possible recommendations, where applicable. Audit reports are made on the overall or individual government financial statements, the financial statements of government corporations, companies or other public entities, value for money reports, investigations, advice on draft legislation, and other reports and papers on themes that fall within the terms of reference of an SAI. The most common type of reports prepared by SAIs are financial/compliance reports and value for money/performance reports. Value for money/performance audits have been given more prominence by most SAIs in recent years. SAIs also give an account of their activities in their annual reports.

Certain SAIs issue an individual report on each material audit finding. Other SAIs issue an audit report on several audit findings at the same time. Comparisons are not meant to be made, and cannot be made between one SAI and another since the number of issues reported upon in an audit report may vary widely between one SAI and another, or even between one report and another of the same SAI. Furthermore, the volume of work also depends upon the size

of the SAI in question. The number of employees in the different SAIs (including the regional offices) varies significantly from under one hundred (e.g. Cyprus, Estonia, Malta) to several hundred (e.g. the Czech Republic, Hungary), or more (Poland, Romania). The number of SAI employees largely depends upon the size of the country concerned and upon the scope of SAI constitutional and legally defined competencies.

Typically, in terms of a constitution or law, SAIs are obliged to submit the main audit reports to parliament, in particular an annual report on their activities, an audit report on the execution of the State budget and reports on audits requested by parliament (where applicable). In some cases an opinion on public accounts, a report on the use and preservation of state assets and a report on the public debt is submitted as well. In the Czech Republic the SAI is obliged to submit all its audit reports to parliament.

Not all SAI audit reports received by parliament are reviewed by parliamentary committees. Primarily parliamentary committees regularly review those audit reports whose review by parliament is mandatory. Moreover parliamentary committees regularly review reports from the audits ordered (where applicable) or suggested by them.

In the majority of countries parliamentary committees do not review more than half of received audit reports. There are the following kinds of situation:

- Parliamentary committees receive a significant number of audit reports every year (e.g. about 40, 60 or 200) and thoroughly review the majority of them during several meetings throughout the year (Cyprus, Hungary, Poland). Similarly, in Malta the Annual Audit Report (composed of several parts, largely relating to the audit of the Government Financial Report and individual Financial Audits) and separate value for money and investigative reports are reviewed in about 20 meetings. In 2001, new procedures were adopted whereby the PC and the SAI together decided that only a number of items featuring in the Annual Report (considered key issues), apart from the other individual reports, were to be examined by the PC.

- Parliamentary committees receive a significant number of audit reports (e.g. about 20, 40 or 100) and review only a few of them (the Czech Republic, Estonia, Latvia, the Slovak Republic).
- In some of the countries a significant majority of the audit findings is included in the annual report and/or an audit report on execution of State budget. These are reviewed by parliamentary committees during one, two or three meetings (Albania, Bulgaria, Romania).
- Sometimes parliamentary committees, during several meetings, review a large number of audit reports (e.g. about 70, 120 or 900), most of which are of a detailed character (e.g. relating to the audits of financial statements and financial transactions of local self-government and government units). In such instances few of them are generally reviewed in depth (Croatia, Lithuania, Slovenia).

#### ***The review of SAI audit reports by parliamentary committees and SAI related PC reports***

The purpose of reviewing audit reports by PCs is to consider SAIs' observations, findings and recommendations and/or to present their own points of views and recommendations to help parliament and the audited organisation take appropriate decisions and action. In this way, pressure is applied to government and the audited entity to take timely, necessary measures to rectify shortcomings. Through such a system of review, the accountability of auditees is also increased.

In all candidate/participant countries the PCs consider, evaluate and analyse the audit reports (or at least note them without discussion). In practically all cases the procedure is the same as that of other documents that are considered and discussed during the meetings. As a norm, audit reports are submitted prior to the meeting so that PC members may get acquainted with the audit report in question. Sometimes the PCs request additional information and documentation prior to the meeting.

After reviewing the audit reports certain PCs prepare their own reports with their views, comments and recommendations to parliament (Croatia, Romania, sometimes in Cyprus), or formulate a draft resolution for parliament (Latvia). In these cases, PCs must also report upon the opinions of the minority of the PC members if the minority insists. In Hungary, PCs make a formal decision of approving or rejecting an SAI report and this decision is referred to parliament. Other PCs review the audit reports but do not take any formal decisions/ resolutions, as such decisions would be implied in the PC hearings (Albania, Bulgaria, Estonia, Lithuania, Malta and Slovenia). In the case of Malta, transcripts of PAC sittings are made, a copy of which is distributed to the SAI and extracts of which are also transmitted to the auditees. Other parliamentary committees take note of audit reports, but do not formally discuss them (the Slovak Republic). In the Czech Republic, it is the subcommittee of the budget committee, which actually discusses the SAI's reports and proposes a draft resolution; the committee usually acts upon suggestions of the subcommittee and submits draft resolutions to the parliament. In other instances, decisions are only made on the annual activities report, but not on the audit reports (Bulgaria, Slovenia).

In Poland, the relevant PC may take the audit report into account by means of a resolution, but this is rarely done in practice (usually it is implied, as would be stated in the minutes of the meeting). In addition, depending on the content and conclusions of the audit report, the PC may pass:

- A *desideratum* with postulates of the PC. The *desideratum* may be addressed to the Council of Ministers, individual Ministers or other central state bodies. The recipient is obliged to reply to the *desideratum* and notify the Sejm's (the Parliament) Speaker in writing of its opinion within 30 days.
- An "opinion" with PC's views on a certain issue. The opinion may be sent to the same bodies as the *desideratum*. A reply is not obligatory but the PC may request a position paper on issues raised in the opinion (also within 30 days).

*Desiderata* and opinions passed by PCs are often made, following review of audit reports, and they sometimes contain a direct reference to the SCC audit report. Replies to *desiderata* and opinions, as well as reports of state bodies on the performance thereof, are reviewed at PC meetings. If a reply is not received in due time or reply is deemed unsatisfactory, the PC may re-send the *desideratum* or opinion, submit a motion to the Sejm's Speaker for rejection of the reply as unsatisfactory, or submit a draft of a relevant resolution of the Sejm.

### **Follow-up on audit reports by PC and SAI**

In the majority of candidate/participant countries, some form of follow-up either by the SAI or the PC, or both, is carried out (Croatia, Cyprus, the Czech Republic, Hungary, Malta, Poland, Romania, the Slovak Republic and Slovenia). Other SAIs and parliamentary committees do not, as a rule, carry out any follow-up on SAI reports.

The forms of follow-up are different and their type, extent, and degree varies between one country and another:

- The auditors are obliged to check what progress was made in the auditee's state of affairs since the previous audit (in many countries this task is included in the SAI auditing methods and planning procedures).
- If an issue reported in the audit report is not resolved, the matter would be included in the following year's Annual Report (e.g. Cyprus, Hungary).
- The PC can request different state bodies to report upon audit findings and recommendations. On the basis of an audit report, the PC can adopt a resolution raising specific demands on the government, ministries or other central state administrative bodies. In particular, it may request that SAI-noted deficiencies be rectified and that the PC be informed about the remedial measures adopted and the outcome thereof. The body that is the addressee of such a resolution is required to communicate the information or deliver an explanation to the PC within a requested time limit (e.g. the Czech Republic, Poland, the Slovak Republic).

- The PC report to parliament can contain concrete proposals for the follow-up of the measures proposed by the SAI (e.g. Romania).
- In many countries, the user of public funds, whose operations, irregularities or inefficiencies have been disclosed, has to submit to the SAI a report on the remedy of disclosed irregularities and inefficiencies (the response report).

### ***Parliamentary Committee's Role in Operations of the SAI***

Right of PC to review and influence SAI's audit programme and to request an audit, investigation or other review from the SAI

Practically all SAIs effectively have a reasonable degree of independence in preparing their annual audit programme. Some SAIs are not influenced in their work-plan in any way by parliament or by the individual PCs (Albania, Cyprus, the Czech Republic, Estonia, Malta). Other SAIs are influenced to some extent. However, the major part of work carried out by SAIs largely depends upon the SAI's priorities and decisions.

The influence of parliament and PCs on an SAI's audit programme may take the form of their right to review (or approve) the annual audit programme, or to order additional audits. Thus one must stress the few examples of influence on SAI's annual audit programme:

- In Croatia, under the provisions of the State Audit Act, the House of Representatives should confirm the SAI's Annual Programme on its proposal (in practice, it never had any influence on the SAI's Annual Programme).
- In Slovenia, the SAI is obliged to include in its work-plan five proposals from parliament, two of which would be from opposition deputies and two from the PCs.
- In Hungary, the SAI President determines the content of the Annual Audit Programme after consulting the State Audit Committee.
- In Poland, according to the act on the SCC, "the SCC performs its tasks on the basis of periodical plans, which are submitted to the

Sejm". The State Control Committee discusses the annual audit plan when it is approved by the SCC.

- In the Czech Republic, once approved, the audit activity plan is submitted to the House of Representatives and the Senate for their information, (the SAI President also reports in person on the audit activity plan in the budget committee).

In some of the countries there is also the possibility of ordering additional audits:

- In some cases, only one of the chambers of parliament may request an audit or other review, but not the individual parliamentary committees (Bulgaria - up to three audits annually, Croatia, Hungary, Lithuania, Romania and the Slovak Republic). It is possible for parliamentary committees to turn to the plenary session of parliament to instruct the SAI to amend the annual audit programme or include a new theme in the work-plan. However, in practice such orders are rare.
- In Poland, according to the act on the Supreme Chamber of Control, "the SCC undertakes audits on the order of the Sejm or its bodies". The orders are binding on the SCC. An order from the PC takes place when the PC passes a resolution on an audit to be performed by the SCC. In 1999 there were 14 audits following orders of the Sejm and its bodies, in the year 2000 there were five such audits.
- In Latvia, a parliamentary investigation committee, in compliance with the assignment set by the Saeima (the Parliament), has the right to request an audit to be carried out.

Apart from this, in many candidate/participant countries, there is an informal practice of parliamentary committees (or even individual MPs) submitting suggestions on audit subjects. They may be included in the SAI's audit programme at the discretion of the SAI Head or Council. Although such proposals are not mandatory, the SAIs consider them seriously and respond appropriately. The proposals are often submitted after prior consultations with the SAI. Some SAIs stress that they never refuse such proposals so long as they are reasonable and within their mandate. By way of example, from 1996 through 2000, the SAI of the Czech Republic

received a total of 24 suggestions, primarily from individual PCs, of which 13 were accepted. In Poland, in the first half of every year, the SCC President applies to the Sejm's Speaker for suggestions of audit subjects for the forthcoming year. PCs often use this opportunity -in the year 2000 they submitted 46 suggestions of which 43 were partly or fully considered (moreover, parliamentary committees influence audit activities of the SCC through audit orders).

There is no apparent evidence in any of the countries that parliaments or PCs prevent audits from being planned or performed by the SAI. In theory, this may possibly be done in either a formal or informal way, for instance by applying political pressure on the SAI, or by threatening its budgetary allocation. There do not seem to be instances of formal veto powers. However, the informal modes of persuasion could be a serious problem should a PC be controlled by the governing political party/coalition, as it may have an interest in avoiding audits that the government might find politically damaging. This risk would depend upon the political maturity of the ruling class.

#### ***Contacts between SAI and parliamentary committee prior to and after PC meetings***

In the majority of countries, contacts exist between the SAI and a PC prior to and after PC meetings. These relate to PC discussions on SAI related reports and other issues. Certain SAIs have few such contacts (Cyprus, the Czech Republic, Estonia, Latvia, Lithuania, Malta, Romania, the Slovak Republic). Other SAIs have a more frequent way of communicating with the PCs (Albania, Croatia, Hungary, Poland, Slovenia).

The contacts relate to more detailed information about SAI's reports that would be on the agenda for the next PC meeting (Albania, Croatia), collaboration and preparation for the meeting (Romania, the Slovak Republic, Slovenia), including lists of proposed questions by SAI to PC prior to the meeting (Malta), the request for additional documents, information or clarification (Latvia, Poland), and pre-review of PC reports (Bulgaria). In Hungary, the SAI informs the PC about an audit report six

months before the end of the audit and submission of the relevant report to the PC.

The main area of SAI-PC contacts relates to the audit reports. Conclusions resulting from audit activities sometimes inspire PCs to act upon certain problems. In addition, SAIs sometimes provide other assistance and support, which may take the form of comments on draft legislation submitted to the SAI for consideration (Bulgaria, Czech Republic, Lithuania, Poland), discussions on particular questions (Croatia), preparing additional analytical papers (Lithuania, Poland), presentations and guidance on professional questions (Hungary) or submission of other information requested by the PC (Romania, the Slovak Republic). In the Czech Republic, if requested by the House of Representatives or the Senate Committees that were assigned to debate certain draft legislation, the State Audit Office (SAO) President may from time to time appoint a member of the SAO or an SAO employee, who happens to possess expertise in the relevant area, to participate in discussions concerning such draft norms.

Typically there are contacts between the PC Chair and the SAI Head, but in some countries also SAI units (departments, directorates, etc.) have direct contacts with relevant PCs (Albania, Bulgaria, Estonia, Hungary, Latvia, Lithuania, Poland, the Slovak Republic). Those contacts involve rather informal oral or more official written communication between PC members and SAI members. They may be concerned with the request for further details, clarification or other information on certain issues in the audit report or collaboration in a wider sense. Where contacts exist, these would usually be between the PC Chair or PC members and the deputy Head, Head assistants or directors in the SAI. In some cases it is the committee's rapporteur responsible for a specific audit report who, in the preparations of his/her own report for the committee, gets into contact with a respective member or director of the SAI or with the auditors, who participated in the audit. This is done for the purpose of clarifying particular questions arising from the audit report. In other countries, SAI units have no direct contacts with the PCs.



### ***Influence of Parliamentary Committees in SAI's audit work or methodology***

All 14 SAIs reported that PCs cannot interfere in the SAI's audit work and methodology. It was noted that the activities, organisation and methodology to be applied, are the prerogative of the SAI. SAI audit procedures are sometimes defined by an Act, so that no external entities may affect the audit procedure. PCs cannot influence audit methodology. This may be described in legal regulations and is developed in detail individually for every audit by the SAI.

### **Other Parliamentary Committee Functions Related to the SAI**

#### ***SAI legislative opinions and proposals***

One of the criteria of audits performed by the SAIs is the criterion of legality. The assessment of activity of audited entities from the point of view of legality, provides the SAIs with an extensive basis for formulating notes and conclusions on the law in force or amendments required. This concerns, in particular, the legislation that the SAIs are most concerned with, namely that legislation which is applicable to public finances and other issues that come under audit, *i.e.* the Budget Act, the Public Procurement Act, the Financial Control Act, the Accounting Act, taxes and duties, the SAI Act, etc. In the various documents generated in the course of audit (*e.g.* working papers, audit protocols, post-audit statements), as well as in audit reports, observations and remarks appear concerning current legislation and the advisability of any amendments thereto.

The majority of SAIs from time to time presents their suggestions in the form of *de lege ferenda* motions, although some of them avoid this practice, which they perceive as trespassing onto the area of policy; "the SAI cannot comment on matters of policy" - Malta. In practice, legislative proposals are usually submitted not directly by the SAI itself, but through other bodies, mainly the appropriate parliamentary committees (Albania, Bulgaria, Croatia, Hungary, Latvia and Poland). No SAI has the power to propose bills to parliament, and are only exceptionally allowed to submit their drafts to the government. Therefore, if a SAI wishes to attain some legislative amendments, it first of all, seeks to consult the relevant

parliamentary committees and draw their attention to the failures of existing legal regulations. If a parliamentary committee agrees with the SAI's proposals, it can submit a draft bill to the plenary. It should be stressed, however, that this practice is not very frequent.

More common is the solution whereby the SAI presents its opinions on draft bills submitted by other entities. This can be done in the course of government work (Bulgaria, the Czech Republic, Estonia, Latvia, Malta and Poland), or parliamentary work. Usually, these opinions are presented during sessions of parliamentary committees (Bulgaria, the Czech Republic, Latvia, Poland, Romania and Slovenia). In various countries different procedures are available, including: a) the general right of the SAI to take part in all committee meetings and the possibility to present its opinion on all draft bills (Poland only); b) the preparation of an opinion on a given draft bill on request by parliament or its bodies (the Czech Republic, Latvia and Romania); and c) the delegation of SAI experts as consultants to the debates on request by the appropriate PC (the Czech Republic). In some countries it is regarded as particularly important that it is part of the mandate of the SAI to present its comments on the draft state budget (Estonia and Hungary).

It is worth mentioning that some SAIs present their opinions not only on draft bills, but also on draft secondary legislation, namely at the external consultation stage within the executive branch. In principle, providing comments on draft legal regulations prepared by government ministries, or other central administrative bodies, is not the duty of the SAIs, but they perceive such activities as part of their efforts to promote the principles of proper financial management in state administration (the Czech Republic, Estonia and Poland).

#### ***Role of parliamentary committee in review and approval of the annual budget of the SAI***

In order to fulfil its mandate, appropriate financial resources should be made available to the SAI. The budget of the Supreme Audit Institution in all candidate/participant countries, constitutes

a separate chapter in the state budget. The draft budget of the SAI is prepared by itself and then is submitted to the government (or eventually directly to parliament) to be included in the overall draft state budget. In some countries (Cyprus, Estonia, Latvia) the government has the right to change the SAI's draft. The draft state budget is then submitted to parliament for approval.

Hence, parliament and government often influence the decisions concerning the amount of the SAI's budget. PCs play a significant role in this respect in almost all the countries. There exist two basic models:

- Review of the draft budget of SAI is carried out by a budgetary committee within a general process of draft state budget approval (Albania, Bulgaria, Cyprus, the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland, Romania, the Slovak Republic, Slovenia). In this respect, the situation in Poland is slightly different, *i.e.* the Sejm refers the draft of the state budget to the Public Finance Committee for review. Certain parts of the draft are also reviewed by relevant PCs. As regards SCC budget draft, the State Control Committee is the relevant PC. Having reviewed the draft, the parliamentary committees send their positions along with opinions or proposals for amendments with justification to the Public Finance Committee. Having reviewed specific parts of the state budget draft and positions submitted by the PCs, the Public Finance Committee presents a report at the Sejm plenary session.
- Review of the draft budget of the SAI is carried out by a committee, set-up mainly for this purpose. The National Audit Office (NAO) Accounts Committee in Malta reviews the NAO budget as well as its implementation and submits a report to Parliament on its review. Based on the PC report, Parliament then approves the NAO budget.

In practice, the role the PCs play in this proceeding is often decisive, since they can suggest increases (in the majority of countries) or decreases in the amount of the SAI's budget and they sometimes do so. Occasionally, it is done under the influence of the government, since the government itself has no mandate to amend the draft budget of SAI, yet it can persuade the parliament to do so.

### ***Review of the SAI's annual activity report by parliamentary committees***

In some of the candidate/participant countries, PCs do not have the right to review and evaluate the SAI's annual activity report (Bulgaria, Cyprus, Estonia, Latvia, Romania, the Slovak Republic, Slovenia). In other countries PCs do possess such a right (Albania, Croatia, the Czech Republic, Hungary, Lithuania, Malta, Poland), especially when this review is a preparation for further discussions to be made by parliament.

The evaluation results have practically always been positive so far. It has to be added, however, that a possible negative assessment would not, in fact, affect the SAI. This does not mean that it would not be taken into account – such an assessment would probably entail the PC encouraging and advising the SAI to rectify and improve matters and possibly to seek professional assistance, if necessary. In the majority of countries, the SAI would not be formally obliged to follow such recommendations, in view of the independence clause in the constitution and the legislation (that typically ensures that the SAI is not subject to the authority or pressure from any person or body). However, in practice, the SAI would probably still try to accommodate the PC's recommendations.

### ***Role of parliamentary committees in the audit of the SAI***

In some of the candidate/participant countries the law provides the PC with the right to designate or suggest outside auditors to carry out an annual audit of SAI (Albania, Estonia, Hungary, Malta, Slovenia). In other countries it is the SAI itself that chooses an outside auditor (the Czech Republic, Latvia) or that carries out its own audit (Bulgaria, Croatia, Cyprus). In the Slovak Republic, the Ministry of Finance performs the audit. In Poland - according to the Supreme Chamber of Control Act - the Sejm shall supervise the implementation of the SCC budget. A similar solution exists in Lithuania.

In some of the countries the results of SAI's annual audit are submitted to the relevant PC for its information or review (Albania,

the Czech Republic, Hungary, Malta, Romania). Most often, the audit of the SAI is a financial audit (Cyprus, the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, the Slovak Republic, Slovenia); only rarely is a performance audit also carried out (Albania, planned in Bulgaria and Estonia).

### ***Other parliamentary committees functions***

In some countries PCs perform also other SAI related functions:

- They have the right to discuss the candidate/participants for the position of the Head of SAI or for other managerial positions in SAs, including the right to actually suggest the candidates for such positions (Hungary, Romania) or to provide opinions on candidates before parliament makes a final decision (the Czech Republic, Poland).
- They have the right to provide the Sejm's Speaker with an opinion concerning internal legal acts on the SAI, that he/she approves (Poland).

## **GOOD PRACTICES IDENTIFIED**

Any discussion of relations between an SAI and its parliament, and of steps that might be taken to improve those relations, must start by recognizing the symbiotic relationship that ideally exists between these important, but separate, institutions. Parliament can perform its vital oversight functions most effectively when it uses - and can rely upon - the auditing work of an SAI. Similarly, an SAI can be much more effective when parliament and its committees provide both a forum for the presentation and discussion of the SAI's important audit results and, potentially, an ally in taking, or strongly encouraging others to take, appropriate corrective actions.

This part of the report aims to identify good practices in relations between SAs and parliamentary committees. These are based on the information gathered regarding the situation in the participating

countries, as described in Chapter 2, experiences of countries with the systems of SAI/PC relations, detailed and discussed in the Annexes, and professional judgement and analysis.

The recommendations may be considered as possible guidelines for SAs. The formal and legal relationships between SAI and parliament vary widely among different countries. Each SAI must obviously view the recommendations within the context of its own particular situation and circumstances, as well as within the context of the parliamentary system of the country concerned.

Notwithstanding the differences in organisational structure and formal location in the state structure, virtually all SAs recognise the importance of:

- Assuring the independence of the SAI in setting audit priorities and in fairly, factually and objectively reporting audit results.
- Gaining appropriate parliamentary attention to audit results as a vital step in obtaining corrective action on problems revealed during the audit process.

Reconciling these goals requires a careful balancing act. Too close a relationship with parliament can threaten the SAI's independence, a vital foundation for its credibility. If the relationship is too distant, parliament may ignore important audit findings. Each SAI must judge how best to maintain the appropriate balance, considering its unique national circumstances.

The recommendations hereunder are to be viewed from the perspective of the SAs. Certain recommendations, however, may need to be sensitively discussed with the PCs concerned, where these have a direct bearing on, and largely concern, the PCs.

The recommendations set forth in this chapter are in two primary groups. The first group includes actions that an SAI should consider taking - if it has not already done so - steps to assure that it is fully prepared to provide effective and reliable assistance to parliament and its committees in overseeing governmental activities. In principle, at least, these are actions that should be within the purview of the SAI, although some may require parliamentary approval of additional budgetary resources.

The second group of recommendations includes actions that parliament and its committees could take - if they have not already done so - to strengthen its oversight functions and its use of SAI audit work in that regard. This report is addressed to SAIs and recognises that an SAI has no authority to (nor should it), instruct parliament on how to carry out its constitutional responsibilities. Thus, these recommendations are best understood as matters that the leadership of an SAI might wish to discuss with the leaders of parliament and others who would support strengthened parliamentary oversight of governmental activities.

### ***Recommendations for Consideration by SAIs***

These are steps that the SAI may wish to take - if it has not already done - to enhance its auditing effectiveness and its potential usefulness in parliamentary oversight.

The SAI must demonstrate to parliament and its committees that it is a professional body prepared to assist in a professional way. The SAI, in order to accomplish this, must assure that its staff, taken collectively, has the knowledge, skills and abilities needed to perform the full range of audits that would be of value to parliament and its committees. Depending upon the circumstances in a particular SAI, this may require any or all of the following:

- Adoption of appropriate auditing standards.
- Development and promulgation of audit manuals reflecting those standards.
- Training of staff to assure that the standards and procedures are understood and can be implemented.
- The recruitment of staff to fill critical gaps in needed skills.
- Internal and external (peer) review to assure that actual auditing work conforms to the standards and procedures.
- The SAI must also assure that the SAI staff carries out its duties with appropriate objectivity and professionalism. This may require any or all of the following:

- Adoption of appropriate ethical standards, and internal regulations implementing those standards covering, among other things, avoidance of personal and financial conflicts of interest and inappropriate consideration of partisan political factors.
- Training on the standards and on the importance of objectivity and professionalism in conducting audits and reporting audit results.
- Review procedures to assure conformity to the standards.

The SAI should give appropriate consideration to parliamentary concerns in setting its audit priorities. Although the SAI should act independently, its ties with parliament, especially with particular PCs, are often extensive. It is inevitable - and desirable - that the SAI should be aware of parliament and the Executive's needs and interests and should take them into account in setting its priorities, while also assuring that it carries out its other responsibilities. SAIs that wish to promote closer working relations with parliament and its committees will need to be open to considering parliamentary views on audit targets and priorities. The establishment of a liaison unit, discussed in item seven, below, can facilitate this. It is essential, however, that parliamentary views not be the only consideration in this regard and that the SAI retains its discretion to accept or reject suggestions from parliament and to perform audits on its own initiative, without regard to parliamentary views. One reason is that, if the SAI becomes too focused on responding to parliamentary interests, its work may be skewed by partisan concerns in ways that would undermine the SAI's perceived independence and, thus its credibility. Another reason is that members of parliament may have rather short-term agendas and may thus place achieving the long-term improvements in financial management and other matters of high priority to the SAI as a lower priority.

The way in which the SAI reports audit results can have a considerable effect on the parliamentary reaction to those reports. To the extent that it has discretion in this regard, an SAI should be quite selective in choosing the reports to be presented to parliament and its committees. Typically, members of parliament

are very busy people, with far more reading material supplied to them than they can possibly handle. Many audit reports involve administrative matters that are best handled by working with the affected ministry or with the Ministry of Finance, rather than by seeking parliamentary attention. In general, to avoid overburdening MPs, it would be better if audit reports on these matters were presented to the affected ministry, with periodic summaries provided to parliament and the relevant PCs for their information. In principle, the SAI should only report to parliament on matters that, it believes, truly warrant parliamentary attention. These might include audit reports revealing specific problems of such significance that pressure from parliament or legislative action may be required to resolve the problem, or reports revealing a consistent pattern of one or more ministries failing to take corrective action on deficiencies disclosed by audits. In addition, there may be statutory requirements that certain reports be addressed to parliament.

SAI audit reports, that are deemed to be material, should be presented to parliament or the relevant committee, with a clear statement of why it is believed to warrant parliamentary attention. Selected reports falling within this concept of materiality for parliament may include findings, observations, comments and recommendations on any of the following:

- Audits of government financial statements.
- Regularity/compliance audits.
- Value for money/performance audits;
- Investigations.
- Analysis of past audit reports of a common nature.
- Advisory documents.
- Proposals and comments on draft legislation.
- Guides on good practice.

The writing style of audit reports can also play an important part in generating interest in the issues from members of parliament and others. Reports should be clear and concise, but with sufficient evidence to convince an objective reader, including the PC members, of the validity of the audit findings. Some SAIs have found it to

be especially useful in this regard to include a brief Executive Summary in the report, so as to convey the central findings and recommendations quickly to busy readers. The audit reports should also be written in a fair and factual manner and deal with important issues in a timely fashion, to assure the PC of the professional and serious way in which the audit was performed and the SAI report written, reinforcing the credibility of the audit results. The reports should be balanced, non-partisan, non-ideological and written within the terms of legislation to avoid controversy with the PCs. Audit reports typically concern financial control, proper management of public funds and government's implementation of its policies, but not government policies themselves. The SAI should be totally apolitical. In principle, the SAI should avoid commenting on government policy. In practice, however, the disclosure of problems in the implementation of those policies may raise unavoidable questions about the policies themselves.

Many SAIs have found it useful to establish a separate unit or person to co-ordinate the SAI's contacts with parliament. The unit's responsibilities may include maintaining day-to-day contact and communications with the relevant PCs. In this capacity, the parliamentary liaison unit can assure that the SAI is aware of current parliamentary interests and concerns that may need to be considered in developing the SAI annual audit programme. The unit can also assure that interested MPs are kept informed of SAI work that may be of material interest to them. The liaison unit also can provide a useful channel through which MPs can convey their views to the SAI on matters of mutual interest. Information gathered by the liaison unit about parliamentary views regarding the SAI's work should be shared with other leaders in the SAI. The liaison unit can also help co-ordinate the work of different units of SAI with the PCs.

Follow-up of material audit issues of previous years should be included in the annual audit programme of the SAI so as to ensure that appropriate action has been taken by the auditee. It should make the results of this review available to the relevant PC, especially if a pattern of inaction on important problems is revealed. It should also be prepared, if appropriate, to assist the relevant PC in reviewing follow-up issues.

### ***Matters that SAI Leaders may wish to Discuss with Members of Parliament***

The matters discussed in this section involve actions that are entirely within the purview of parliament. At convenient opportunities, the leadership of the SAI may find it helpful to discuss these matters with the leadership of parliament and with other MPs who are interested in improving parliamentary oversight. It is important to stress, however, that the SAI should at all times avoid any appearance of seeking to instruct parliament on how to carry out its constitutional responsibilities. Rather, the SAI should emphasise the symbiotic nature of the relationship between parliament and the SAI, the steps the SAI has taken to make itself more useful to parliament, and then introduce the items below as being actions that the parliament could take to enhance the usefulness of the SAI with regard to parliamentary oversight.

Actions directly affecting relations between the SAI and parliament

Define clearly, in state audit legislation, the type of audit reports and other SAI documents that are to be presented to parliament. Ideally, there would be a small number of requisite reports chosen, because it is known that they are important state documents warranting (or requiring) parliamentary attention. The audit of the execution of the state budget is one such example. Other audit reports should be presented to parliament, or one of its committees, only if requested or if deemed by the SAI to warrant parliamentary attention.

Enact state audit legislation in such a way that the SAI is not in any way subordinate to the Executive, but answerable only to the parliament. The SAI must be independent of other institutions because that independence, together with the competence and integrity of its staff, are essential foundations for the credibility of the SAI, and consequently of its influence on parliament, the Executive and the public in general.

Appoint the SAI Head in such a way that he/she enjoys as much consensus as possible in parliament. This might be done by parliament undertaking extensive consultations among all parties therein represented prior to making the selection of the SAI Head

through a simple or qualified majority of all MPs. Furthermore, the SAI Head should not be easily removed during his/her term of office, except for specified valid reasons such as health, misconduct, fraud or incapacity to continue to perform duties. To further protect the SAI Head from any possible political pressure and unfair dismissal, any proposal for such removal might be required to demonstrate widespread consensus (say, two-thirds majority) in parliament.

If the SAI is to be credible and most useful to parliament in its oversight functions, it must be seen, both in parliament and elsewhere, as an independent entity, exercising its own judgement with regard to the matters within its scope of responsibility. The relationship of parliament and its committees to the SAI should be seen as a collaborative one. In this regard, the SAI must have the power to select the matters to be subject to audit (apart from those that are required by law) and to decide how best to perform those audits. At the same time, parliament and its committees have a legitimate interest both in the SAI's audit programme in general and in seeking audit coverage of matters of special interest to them. Parliamentary committees should be able to suggest to the SAI, audit topics that they would find of particular concern and the SAI should give serious consideration to such proposals. In doing so, it is important that the PCs recognise that any proposal for inclusion in the SAI's annual audit programme, or as additional requests to the audit programme, must necessarily be considered by the SAI in the light of its own priorities in audit issues, budget allocation and staff constraints, and that the final decision would rest with the SAI.

Contacts between the SAI and PCs should be clearly defined, to establish a consistent mode of working relationships between the two bodies. In some countries, especially those in which the SAI works extensively with multiple PCs, it has been found useful to prepare written procedures governing the relationship, developed jointly by the SAI and the parliamentary leadership. The extent of contacts between the SAI and PC is largely dependent upon the requirements of the PC's Chair and its members. They could vary from a very high level (between the Chair of the PC and SAI

Head), to a much lower level (for instance, between PC staff and SAI auditors directly involved with the audit report in question).

Establish clear parliamentary rules and procedures for the way in which parliament and its committees will deal with the SAI's audit reports that are presented to it. If there is not at least one PC that has clear responsibility to deal with audit reports, parliament might wish to consider the benefits of having one or more such committees. The existence of one or more parliamentary committees responsible for responding to audit reports helps to focus the attention of government and the public on the findings and recommendations arising from the audit reports and exert pressure for implementation of such recommendations. The decision of whether there should be one specialised PC that deals with audit reports or several (according to the subject in hand), rests with the parliament of the country concerned. Both systems have their merits. Models of effective PC systems in countries with similar political and social traditions could be used as examples of good practice to be emulated. The attached annexes provide examples of countries with advanced and effective systems of SAI/PC relations.

Designate a PC to deal (not necessarily exclusively) with SAI's financial statements and activities to ensure that parliament is able to monitor the SAI, not just its reports. The functions of such a Committee (found in several countries) might include the:

- Review and approval of SAI's draft budget.
- Appointment of outside auditors to audit SAI's financial statements and the review and approval of such audited financial statements.
- Evaluation of SAI audit activities.

Clearly define, in legislation, the right of the SAI to make audit reports public within a reasonable time following presentation of such reports to Parliament or to other bodies, as the case may be. At the same time, certain audit reports (transmitted to parliament or otherwise) may be, to some extent, a national security, commercially sensitive, sub-judiciary or have some other secre-

tive or sensitive nature that would best not be discussed in public due to adverse repercussions not in the public interest. Although such instances should be as uncommon as possible, it would be appropriate if the SAI were to have authority to decline to make such reports public. They might suggest to the relevant PC that such a report, or extracts thereof, be discussed in private by the PC, should the PC not have already decided upon such course of action.

### **Actions that could enhance the role of parliamentary committees more broadly**

The following matters, which might also be offered for consideration by MPs concern ways of strengthening the operations of parliamentary committees that may be called upon to deal with SAI's audit reports but would also enhance the effectiveness of parliamentary committees in their other roles. As the composition and mode of operation of parliamentary committees may vary considerably between one country and another, some of these suggestions may not be germane.

Elements that are found in most parliamentary committees and are deemed to be of particular importance for the proper functioning of a PC (usually regulated by Standing Orders of parliament or legislation) include:

- Stipulated quorum for a PC meeting to be considered as valid and for the reaching of decisions by the PC.
- Power of the PC to call for any person to testify in PC meetings and request any information relevant to the audit issue in hand.
- Right of the PC to request additional written information from any person relevant to the audit issue in hand.
- Composition of parliamentary committees reflecting the political composition of parties in parliament. Safeguards, at the same time, to ensure that Parliamentary Committees function, as far as possible, in a non-political way such as, for instance, by

having the Chair of the Committee (especially a Committee that is responsible for overseeing the SAI) being a member from an Opposition Party. An alternative approach is to ensure that PC members who may disagree with the majority have the right to submit a minority report.

Ensure adequate support staff to assist parliamentary committees in their duties. Parliamentary committees should also be able to make use of independent experts, as and when required. This might include the secondment of at least one of the SAI staff to assist the PC in its reporting functions. This might be particularly important for the preparation of follow-up reports by parliamentary committees on audit findings and recommendations.

In many countries, it has been found to be helpful to allow the general public and media to be present during PC meetings, in order to encourage transparency and awareness by the general public of the matters being addressed. The most important exception to this rule should be meetings whereby matters are specifically kept private because of the sensitivity or national security implications of the issues concerned.

Experience of several SAIs shows that the impact of audit reports on government is enhanced when a PC examines the reports promptly. Thus, when the SAI advises the relevant PC about a significant forthcoming report, the PC should endeavour to discuss the report within a reasonable time-frame to avoid the danger of having the findings in the audit report become outdated.

Just as the SAI should prepare itself for PC meetings, it could prove beneficial for the PC Chair to likewise have such a preparatory session. The SAI may be able to assist by helping the PC staff prepare questions relating to the major issues in an audit report and submit them to the PC Chairman prior to the PC meeting. It would be at the discretion of the PC Chair and members whether or not to use such questions during the forthcoming PC meeting.

It is advisable that the SAI Head and/or senior SAI staff be present during PC meetings when SAI audit reports are to be discussed. It is also good practice that senior representatives and technical

experts of entities on which an audit report is being discussed during a PC meeting, be present so as to answer any questions that may be brought up by the PC members. Although questioning of persons during a PC meeting, including those from the SAI, is the prerogative of the PC, it is helpful if such questions are designed to emphasise or reinforce audit findings.

The PC should be free to request additional information, prior to or after a PC meeting, to be able to obtain all information it considers necessary or useful for the discussion of an audit report or of other matters.

Many parliamentary committees have found it useful to establish a follow-up process on audit reports by the SAI to help ensure that due attention is given to audit findings and recommendations and that any shortcomings in the audited body are rectified.

It is the practice of many parliamentary committees to draw up, within a reasonable time frame, their own report on an SAI audit report they have reviewed and outline their own recommendations to government, based on the SAI findings and recommendations. The SAI may provide assistance to the PC in preparing the latter's report. The PC may present its recommendations to parliament for approval. This procedure gives added emphasis to those audit findings and recommendations with which the PC agrees. The procedure is most effective, however, if the PC report is issued with the unanimous approval of the PC members. Unanimity is facilitated if the members openly discuss any differences that may arise and then arrive at a solution that would be agreeable to everyone in the PC. This would be beneficial so that corrective action (as proposed by the PC), which the Executive would eventually take on audit findings, would in no way be weakened.

Parliamentary Committee and SAI reports would be more interesting and readily acceptable by government if they included recommendations that were forward looking and based on lessons learnt from the past. The SAI could also issue guides on good practice based on audit reports reviewed in the past.



It may prove useful for a PC to have a formal system whereby responses are requested and expected from government on SAI or PC reports.

Many parliaments find it useful for their committees to seek technical assistance from the SAI in preparing legislative proposals, especially those concerning state auditing, financial management and matters that have been the subject of major audits. This assistance may include the preparation of initial drafts of proposed laws and the provision of comments on drafts prepared by others. In the final analysis, the SAI should be interested in fostering a good working relationship with parliament and the parliamentary committees. Such a working relationship is only possible if the SAI and PC co-operate and collaborate on areas of common interest and if they find mutual agreement on such issues.

## **RELATIONS BETWEEN PARLIAMENTARY COMMITTEES AND OFFICE OF THE AUDITOR GENERAL OF CANADA**

### **1. General Role and Objectives of Parliament and Parliamentary Committees in relation to the SAI**

- The House of Commons' Public Accounts Committee has a mandate to examine reports of the Auditor General, as well as the Office's budget.
- The Senate's National Finance Committee also has a mandate to examine reports from the Auditor General.
- Most contact is with the House of Commons' committees and the largest portion of that contact is with the Public Accounts Committee (PAC). In any given year, the PAC will meet with the Auditor general and his/her staff approximately 20 to 25 times. Two of these hearings are held to discuss our "Plans and Priorities" and the "Performance Report".
- All standing committees of the House of Commons are provided with summary information of each of the chapters that fall within the committee's purview immediately after SAI reports are made public. Many of these committees invite SAI representatives to appear before them to answer questions relating to the chapters. Occasionally, with Auditor General appearances before standing committees other than the PAC, the department referred to in the chapter is also present to provide testimony.

### **2. Composition and Mode of Operation of Parliamentary Committees vis-à-vis the SAI (do any customs, principles, rules or regulations exist to ensure and preserve the non-political character of PC activities vis-à-vis the SAI?)**

By convention and House rules, the OAG has a special relationship with the Standing Committee on Public Accounts (PAC). The PAC is one of 16 standing committees of the House of Commons. The Standing Orders of the House provide for the automatic

and permanent referral to the PAC of the reports of the Auditor General and of the Public Accounts of Canada once they are tabled in the House of Commons. What the Committee does with these documents and whether it issues any reports to the House is at its own discretion. The basic powers of the PAC are the same as other House Committees: to call witnesses, to send for papers and to report to the House.

There are currently 17 members on the PAC. Since 1958, the committee has been chaired by a member of Parliament from the official opposition and the two Vice-chairs are from the government side. The Committee generally operates in a non-partisan manner by focusing on public administration and the implementation of policy as opposed to the merits of government policy. The Auditor General interacts equally, in a non-partisan manner, with all members of the committee. Further, the committee calls the deputy head of a department rather than the minister to appear as a witness. The Auditor General appears as a witness at the table concurrently with the departmental witness at the majority of hearings.

In recent years, the committee has issued 10 to 15 reports to the House per year. These reports are substantive in nature and contain recommendations addressed to the specific department involved in the related hearings, to the Government and to the Auditor General.

### **3. Parliamentary Committee's Role in reviewing SAI's Reports and Other Outputs**

Although the Auditor General's reports attract considerable media attention when they are released, their long-term impact is felt when they are examined by the PAC. The committee reviews whether public money was spent for the approved purposes and with due regard to efficiency, economy and effectiveness. It bases much of its work on the Auditor General's reports. Throughout the year, the committee holds hearings to review audit findings. After the hearing, the committee tables a report in the House of Commons with recommendations to the Government or to a department. The government departments have 150 days to report back to the committee on what they have done in response to these

recommendations. Ministers provide the responses on behalf of the Government. Through this process, the PAC ensures completion of the accountability loop.

In cases where a chapter is not made the subject of a hearing, the PAC will follow-up with the department by asking it to provide in writing a status report or a plan to correct the deficiencies identified by the Auditor General. This follow-up process is normally done once a year.

As stated previously, other standing committees of the House or Senate will also hold hearings on report chapters. The Auditor General attends 15 to 20 such hearings in a year.

In addition, the PAC reviews the Auditor General's budget documents (see section 6).

### **4. Degree of independence of SAI vis-à-vis Parliamentary Committees**

Parliamentary interest in any given matter is routinely considered during the planning of topics to be audited. Parliamentary committees are invited to advise SAI of their interests and concerns during hearings and during informal meetings. The Office seriously considers committee recommendations to undertake an audit of a particular matter. Ultimately, however, SAI has the mandate to independently choose the topics to review.

### **5. Parliamentary Committee's role in operations of SAI in areas such as :**

- **SAI's audit programme:** Planning begins by considering broad issues and overall priorities, needs and expectations of Parliament and other key stakeholders, and allocated resources. External input to this process comes from informal consultations with members of parliament, deputy ministers and from external advisors.

- **Parliamentary Committee's request for audits/investigations from SAI:** Requests by committees are considered and the subject matter is audited if it is deemed appropriate by the office. For example, the office is auditing grants and contributions on a government-wide scale as a result of a request by the Public Accounts Committee. The office also conducted a more detailed audit of the management of grants and contributions at Human Resources Development Canada by taking into consideration the interests of the Human Resources Development Committee. The results of the government-wide audit will be published later this year. Notwithstanding the office's desire to be of service to parliamentarians and to be responsive to requests from committees, the decision to undertake audits rests completely with the Auditor General and his/her independence is assured.
- Type of assistance that SAI provides parliamentary committees.
- Testimony at hearings, meetings with committee research staff to discuss the reports prior to the hearing (research staff prepare briefing notes to the committee members based on this discussion).
- Parliamentary committee's influence on SAI's audit methodology.

## 6. Other possible functions, such as:

- **SAI's functions vis-à-vis law-making process:** The SAI Office is not generally involved in any aspect of the law-making process except on those occasions when specifically asked to comment on a bill as it is being studied by parliament. And on these occasions, the SAI will normally only speak on the bill if there is an impact on its mandate. However, government officials are encouraged to review with us draft proposals to change basic legislation such as the Financial Administration Act.
- **Approval of annual budget for SAI:** A hearing is held by the PAC to discuss the office's budget (hearing on "Plans and Priorities"). The Committee issues a report based on that hearing (a copy of the relevant minutes of the proceedings is tabled). The PAC has never recommended a change in the Office's budget. House of Commons standing orders restrict the powers of standing

committees when reviewing budgets to the following: adopt as presented, reduce or reject. To reduce a budget would be seen as a question of lack of confidence in the government, which could lead to the government's fall.

- **Evaluation of SAI's work by PAC:** The office's overall performance is evaluated by the PAC during the hearing on its yearly Performance Report (part of Estimates process). The PAC issues a report with specific recommendations related to improving the information the SAI provides on its work and its impact. Indirectly, committees also evaluate the work whenever SAI representatives are before them as witnesses and they ask questions about the audit work.
- **Audit of SAI (and type of audit):** There is an external financial audit of the Office conducted annually. The Office has also recently undergone a peer review of its financial audit practices. A similar peer review for its value-for-money audits is currently being planned.
- **Appointment or dismissal of SAI Head, approval of SAI legislation:** The Treasury Board is mandated to make a recommendation to Cabinet on the selection of the Auditor General. Members of Parliament are not systematically involved in the selection process. However, a decision to remove an Auditor General would require the approval of the Senate and the House of Commons. In terms of SAI legislation, both Houses need to agree to any changes. The Auditor General is appointed for a ten-year term.

## 7. Perceived strengths and opportunities of the current system

The Public Accounts Committee's established practice of convening a hearing with the Office and the departmental witnesses on any given chapter constitutes one of the best features of the system. This practice adds much weight to SAI recommendations, as the PAC generally endorses them through a report that the Chair tables in the House of Commons. The PAC reports require a formal response by the government within 150 days.

As stated previously, even if a chapter is not made the subject of a hearing, the PAC has the option of requesting an action plan in response to SAI recommendations.

## **8. Other useful practices established by the Office to enhance parliamentary relations:**

**Tabling day procedures:** On the day a report is presented to Parliament, provision is made for Members of Parliament and their research staff to have the opportunity to 'preview' the report before it is formally tabled. This confidential preview is 'hosted' by the Chair of the PAC in concert with the Office. On the tabling day, a letter that proposes priority topics for hearings is provided to the PAC for consideration in developing its plan for hearings. Two days following tabling of the report, the PAC will hold a public hearing on the report just tabled and on the priorities suggested by the Auditor General.

**Letters to committees:** Shortly after the tabling of a report to Parliament, letters are sent to individual parliamentary committees to advise them of any chapters in the report that may fall under their purview. A short description of the main issues is provided. It is anticipated that these letters will lead to hearings.

**Transition letters:** Subsequent to an election, transition letters are prepared for all standing committees of the House of Commons to inform them of any work that has been conducted in departments that fall within their purview. These highlight issues that remain outstanding from the previous legislature. The Auditor General may also write to selected Senate committees.

**Meetings with MPs:** The Auditor General attempts to hold meetings with small groups of Members of Parliament from the various parties just after an election to talk about the role and mandate of the Office. The Auditor General also meets with small groups of MPs on a regular basis to discuss subjects of mutual interest.

**Letters from parliamentarians:** In addition, the Office will answer a number of letters from parliamentarians. These may pertain to a variety of subjects, including queries about past or on-going work

of the Office and requests that certain matters be audited. These letters are to be considered by the individual audit teams when planning their work.

**Meetings with committees:** All Assistant Auditor Generals are encouraged to meet informally with the members of standing committees that coincide with their audit responsibilities. Meeting with members of committees helps the Office understand their interests and concerns.

**Meetings with researchers:** Prior to hearings with the Public Accounts Committee, the Committee's dedicated research staff will meet with the audit teams responsible for chapter that is the subject of the hearing. This process helps the research staff to better understand the subject matter and allows them to better prepare the Committee members for the actual hearing.

## RELATIONS BETWEEN SAI AND PARLIAMENTARY COMMITTEES IN IRELAND

### 1. General Role and Objectives of Parliament and Parliamentary Committees in relation to the Supreme Audit Institution (SAI)

Ireland has a written Constitution, which provides for two Houses of Parliament – a House of Representatives called Dáil Éireann and a Senate called Seanad Éireann. The Constitution also provides for a Supreme Audit Institution called the Comptroller and Auditor General (C&AG).

The C&AG's relationship with Parliament is essentially a reporting one, exercised by way of annual and periodic reports provided for by law. These reports form the basis for Parliament's examination of State revenue and expenditure. Parliament undertakes such an examination by way of a standing committee of Dáil Éireann known as the Committee of Public Accounts (PAC). This committee's duties and powers are set out in Standing Orders. The PAC has operated since the foundation of the State in 1922 and both it and the Office of C&AG are modelled on the UK equivalents that date from the administrative and parliamentary reforms of the mid-1800s in the UK.

### 2. Composition and Mode of Operation of Parliamentary Committees *vis-à-vis* the SAI

Standing Orders provide that the PAC shall consist of 12 members, none of whom shall be a member of the Government or a Minister of State, and four of whom shall constitute a quorum. The committee shall be constituted so as to be impartially representative of the Dáil. By tradition the committee appoints as chair, a member of the principal opposition party. The committee is precluded from enquiring into the merits of policy or of policy objectives.

### 3. Parliamentary Committee's Role in Reviewing SAI's Reports and other Outputs

Reports of the C&AG may conveniently be divided into a number of categories. First, there are reports which are required to be produced at regular intervals, typically annually, and presented directly to Dáil Éireann by the C&AG. By far the most important of these is the annual report on the audit of the accounts of departments of the State and the accounts of the receipt of revenue of the State. This report is required by law to be presented no later than 30 September in the year following the year to which the accounts relate. It is considered by the PAC, when the committee meets, usually weekly, and forms the basis of its examination of the administrative heads of government departments. The second category of reports is similar to the first in that the reports are required by law to be produced annually, but typically they are submitted to ministers for presentation to each House of Parliament. The PAC in due course considers these reports of the C&AG and the relevant personnel are examined on their content. Such reports relate, for example, to the expenditure of Regional Health Boards and a wide range of non-commercial State Agencies.

The third category of report produced by the C&AG encompasses the discretionary mandate of the Office. The key characteristic of this class of report is the freedom provided in law for the C&AG to choose topics for examination. The most important set of reports in this category is reports relating to value for money (VFM) examinations. Formally this is a relatively new mandate dating from 1993 when legislation, governing the work of the C&AG, was significantly revised for the first time in over one hundred years. However, for many years prior to 1993, the annual reports of the C&AG had tended to draw attention exclusively to instances of loss, waste and excessive expenditure, in other words some aspects of the value for money concept. The VFM mandate as formally set out in the 1993 legislation, is concerned with the extent to which public resources have been used economically and efficiently, and whether or not public agencies have systems in place to evaluate the effectiveness of their operations. Reports under this mandate are made to minis-

ters, who are obliged by law to present them to Dáil Éireann. This leads to their subsequent examination by the PAC. To-date some 38 such reports have been presented for consideration by the PAC.

Four, there are special reports. These, as the term suggests, are intended to allow the C&AG to report on issues arising from his/her audits, examinations or inspections that might otherwise go unreported to Parliament, thus ensuring greater public accountability for the proper use of public resources. Such reports are presented to ministers in the first instance, subsequently laid before Parliament, and ultimately examined by the PAC.

#### **4. Degree of independence of SAI *vis-à-vis* Parliamentary Committees**

The independence of the C&AG derives directly from his/her position as a Constitutional Officer. Historically, the C&AG has strong links with the PAC, and is a permanent witness at all its meetings. It was the PAC that pressed for the development of the C&AG's role in the 1980s. He/she does not report through any other Parliamentary Committee. In the mid 1980s, consideration was given to whether or not he/she might have a reporting relationship with other parliamentary committees. However, such ideas did not find universal favour, and a White Paper on the role of the C&AG, published in 1992, indicated that the Government, in considering revised terms of references for the PAC, had regard to the need to ensure that the PAC should continue to be the only parliamentary committee through which the C&AG reports to Dáil Éireann.

While there are close working relations between the PAC and the C&AG, there is no doubt that the two are quite independent, both in law and in practice. This is clearly recognised by all concerned.

#### **5. Parliamentary Committee's Role in Operations of SAI**

In considering the questions raised under this heading, it is worth noting that the 1993 legislation provides that the C&AG shall audit certain accounts, and may carry out such examinations as he/she

considers appropriate for the purpose of ascertaining whether resources have been used economically and efficiently (the VFM mandate). Thus, the statute proscribes mandatory and discretionary elements in the work of the C&AG. The audit programme is planned to ensure that audits are conducted in accordance with internationally recognised auditing standards and within the constraints of the staff and budget allocations provided for the Office.

As regards the PAC's requests for audit/investigations, it should be noted that the 1993 Act specifically provides in respect of VFM examinations that, where the C&AG proposes to make any examination under this part of his/her mandate, he may, at his/her discretion, seek the views of the PAC.

It should be further noted that the Standing Orders provide that the PAC may, without prejudice to the independence of the C&AG in determining the work to be carried by him, or the manner in which it is to be carried out, in private communication, make such suggestions to the C&AG regarding that work as it sees fit. The C&AG has absolute discretion to accept or reject any such suggestions. Thus, the complementary relationship of the C&AG and the PAC is recognised without prejudice to the independence of either party.

The C&AG or, in his/her absence, a senior member of his/her staff attends the meetings of the PAC as a permanent witness. The Office assists the C&AG in providing the PAC with oral and written presentations on his/her reports to facilitate the PAC in the performance of its functions. The PAC has its own secretariat and support staff. A staff member from the C&AG's Office assists the Chair of the PAC in a liaison capacity.

The PAC has no influence on the Office's audit methodology.

#### **6. Other Possible Functions**

The C&AG has no specific function *vis-à-vis* the law-making process. Nonetheless, it is customary that his/her Office is consulted regarding the enactment of laws which would directly affect the conduct of audits for which he/she is responsible, and

his/her Office is frequently represented on working parties dealing with improvements in such matters as government accounting.

The budget of the Office is determined as part of the overall provision for the civil service as a whole, and is subject to prevailing government policy in such matters. From time to time, this has led to a less than ideal allocation of staff and other resources. However, in practice, this has not, to date, led to any insurmountable problems. It should be noted that the pay of the C&AG (in common with that of the judiciary), is paid from the central fund, rather than being appropriated annually by Parliament, thus emphasising his/her constitutional independence.

As regards the audit of the Office, prior to 1993, the staff of the Office audited the appropriation account of the Office of the C&AG. However, it was recognised that this was a less than ideal situation, and provision was made in the 1993 legislation for the audit of the accounts of the Office by an external auditor appointed by the C&AG. Such an auditor may, at his/her discretion, and with the consent of the Minister for Finance, carry out a value for money examination of the Office. The report of any such examination must be submitted to the C&AG and laid by him/her before Dáil Éireann. This report would then be available to the PAC for consideration in exactly the same way as any other report presented under the legislation. To date, no such examination has occurred.

As regards the possible role of the PAC in the appointment or dismissal of the C&AG, the Constitution provides that the C&AG is appointed by the President on the nomination of Dáil Éireann. He/she shall not be removed from Office except for stated misbehaviour or incapacity, and then only upon resolutions passed by Dáil Éireann and by Seanad Éireann calling for his/her removal.

## **7. Other Developments**

In early 1998 media reports suggested there might be significant evasion of Deposit Interest Retention Tax through the use of bogus non-resident bank accounts. The PAC sought to investigate the matter but concluded it had insufficient powers to do so. This led to the enactment of the Comptroller and Auditor General and Committees of the Houses of the Oireachtas (Special Provisions) Act in 1998, which granted extensive quasi-judicial powers to the C&AG. It allowed him/her to investigate the operation of the tax by the revenue authorities and the financial institutions and to report his/her findings to Dáil Éireann. This investigation broke new ground and the C&AG's report formed the basis for a subsequent public inquiry by a sub-committee of the PAC into the whole affair which generated enormous public interest. It ultimately led to the payment of significant sums by the financial institutions and others to the revenue authorities. The affair raised public awareness, of the PAC and the Office of the C&AG, to levels previously unknown.

## THE INTERACTION BETWEEN THE STATE COMPTROLLER AND THE COMMITTEES OF PARLIAMENT OF ISRAEL

The relationship between the State Comptroller and the Israeli Parliament (The Knesset) express, both on the formal and the practical level, two fundamental principles:

1. The independence of the State Comptroller not only *vis-à-vis* the executive branch, but in regard to the legislature as well.
2. The establishment of an independent SAI as a major tool, in effectively realising the basic principle of the public's "right to know".

It should be born in mind that parliaments are, by definition, political organs as are all parliamentary committees. Since state audit functions within a political environment, there is potential for tension between the public interest, as presented in audit reports and the political agenda of members of parliament and or political parties. It is therefore important to remember, that the more state audit deals in areas of performance audit, the more the potential for tension increases as decision makers may, under certain circumstances, try to threaten the Auditor General's status of professionalism and impartiality.

The relations between state audit in general and parliaments have a formal basis in law, but there are also informal aspects which develop over the years and differ from case to case.

In the Israeli case, some of these relations are stated in the Basic Law, giving them a constitutional standing.

There can be no rules or regulations that can eliminate the scent of politics in the course of discussions in parliamentary committees. Moreover, formalising does not necessarily have superiority over tradition. That is to say, political culture is no less, and usually more, dominant in shaping the balance and relationship between actors in the public arena, than are formal regulations. This basic fact applies to the relations between the organs dealt with here as well.

The question, whether the relations of SAI's *vis-à-vis* the legislature are politically tinted, should be examined both from the formal and informal aspects and should not be separated from the issue of the independence of the SAI.

On the formal level, there are certain provisions in Israeli law, establishing the independence of the State Comptroller *vis-à-vis* Parliament, and, thus, also ensuring the elimination of political influence upon the State Comptroller.

The law provides that "in carrying out his/her functions, the State Comptroller shall be responsible only to the Knesset, and shall not be dependent upon the Government". That is to say, the State Comptroller is not subordinate to the Knesset.

This independence is secured by the procedures for electing the State Comptroller (secret ballot in the plenum); for determining the budget of the office; and by the fact that neither Parliament nor its committees have any influence in regard to the audit programme of the office. They have no power to dictate, or be involved in the selection of subjects to be audited, or to determine what methodology should be applied, either in specific cases or in general. Moreover, a request submitted by an individual member of the Knesset that the State Comptroller investigates a certain matter, does not have any priority over a request submitted by any other person. Both will be notified that the matter brought to the attention of the Comptroller will be examined according to the priorities of the office and that they will not be personally informed, either about the decision of whether to investigate the matter - or in an interim report, about any findings.

The interaction between the State Comptroller and the Parliament takes place mainly in two organs of the Knesset; the plenum and the State Audit Affairs Committee, the last being the major organ in this regard.

The contacts with the Knesset plenum concern three major issues:

1. The election of the State Comptroller: The source of authority to propose candidates for the position of Comptroller is the legislative branch. The executive branch has no standing



concerning this issue. Ten or more members of the Knesset may nominate a candidate to be elected as Comptroller. The Comptroller is elected by the Knesset plenum in a secret ballot, for a term of seven years. This procedure (and the duration of term) is identical to that of electing the President of the State. The President has no executive powers, and is considered to symbolise the unity of the State. The identical procedure of election is meant to express that the State Comptroller is also at the core of public consensus. It should be noted that until 1998 the State Comptroller was elected by the House Committee of the Knesset (and then appointed by the President). The amendment of the law is an expression of the aforesaid idea, and is strengthened by the fact that his/her election was excluded from the authority of just a group of members. The removal of the Comptroller from office requires a resolution of the Knesset, carried by a two-thirds majority of those voting.

2. Laying the Annual Report of the Comptroller on the table of the plenum of the Knesset.
3. Approval of recommendations, formulated following the discussions on the State Comptroller's reports in the Committee.

The State Audit Affairs Committee is the main channel of communication between the two Institutions. The law states that the Comptroller shall carry out his/her activities in contact with the Committee. Thus, according to the wording of the law, he/she is not subordinate to the committee as well. This is a special permanent committee, established in order to deal mainly with State audit reports. From this provision it is derived that the Comptroller should not participate in sessions of other committees of the Knesset, in the course of his/her routine activity, although they may deal with subjects investigated by the Comptroller. He/she also does not appear before the Knesset plenum, except on the occasion of his declaration of allegiance.

The Committee holds three weekly sessions in which the Comptroller and his/her staff always participate.

As the Committee is unable to deal with all the Comptroller's reports, selection must be made. How this is done may appear as an interesting question:

Indeed, it is the prerogative of the Chair of the Committee to determine which subjects to deal with. However, on a non-formal basis, the Comptroller advises the Chair of the Committee as to the priority of reports to be discussed.

Nevertheless, it would be naïve to assume that the selection made by the Chairman of the Committee ignores the public agenda, at any given moment.

The actual selection does not necessarily reflect an identical preference of the Comptroller and Committee Chair, as the Chair's preference may sometimes express a latent "sectorial" interest, rather than the objective importance of a certain report when considered from a purely professional point of view.

According to a certain provision in the law, the Comptroller shall (if requested to do so by the Knesset, the Committee or the Government), prepare an "opinion" as to any matter in the scope of his/her functions. The question as to whether an "opinion" should be interpreted as an investigation with regard to a matter of principle only, or as a request for a regular report, has never been dealt with.

This provision, which enables the aforesaid bodies to compel the State Comptroller to carry out an audit on a certain issue, has very rarely been put into effect.

The Knesset and the Government have never asked for an "opinion", and the Committee has not done so for about a decade.

In practice, when the Committee examines such a request for an "opinion", which may be raised by any of its members, it actually leaves it for the consideration of the Comptroller whether to look into the matter or not. There is a kind of "gentlemen's agreement" between the Comptroller and the Committee, that it should not take a vote, so as not to formally impose on the Comptroller the implementation of an investigation. Practice thus, demonstrates the "constitutional reality" in this regard.

Members of the Committee sometimes make use of this provision in order to raise special issues in the Committee. As this Committee has very clear terms of reference, one might expect that these issues concern matters raised in audit reports. However, the reality is quite different. These issues are sometimes vaguely connected to the reports and rather reflect an attempt by members of the Committee to draw the attention of the public to their parliamentary activity. Thus, they are usually sufficed by raising the issue, and do not ask the Comptroller to submit a special opinion on the matter. When the matter is clearly of a political nature (which is very rare), the Comptroller refrains from attending these sessions, although he/she is invited.

It must be emphasised that the Committee usually conducts its discussions in a non-political atmosphere. Members of the Committee are basically aware of the importance of the State Comptroller's Office as a source of reliable and impartial information to the Knesset and the public. They are aware of the negative implications of politicising the discussions and refrain from doing so.

The Comptroller also has the discretion to decide whether the facts revealed in the course of his/her investigation require the submission of a special report to the Committee. He/she will so decide, when the investigation reveals an infringement of moral standards or raises a fundamental problem, and thus requires, in his/her view, the special attention of the Committee. Should he/she do so, the Committee may, upon its own motion, or upon the proposal of the Comptroller, decide upon the appointment of a commission of enquiry. If the Committee so decides, the President of the Supreme Court shall appoint this commission. The Committee may, in special circumstances and with the agreement of the Comptroller, decide upon the appointment of such a commission on a subject included in any of his/her regular reports.

In practice, the Committee has never decided upon appointing a committee of enquiry on the basis of its own motion. It has done so only upon the proposal of the Comptroller. Moreover, the Comptroller will refrain from submission of such a special report, unless he/she has come to the conclusion that appointing

a commission of enquiry is necessary. It should also be pointed out that the Committee has never denied such a proposal of the Comptroller. One of the remarkable examples of using this tool was the appointment of a commission of enquiry after the Comptroller submitted a special report investigating the crisis in the Israeli stock market in the early eighties, which resulted in the dismissal of the heads of the banks involved.

Following the discussions on the audit reports, the Committee submits its conclusions and recommendations for the approval of the Knesset plenum. It should be noted, that on the grounds of the informal relations developed between the Committee and the Comptroller, the Committee asks the Comptroller to forward his/her remarks on the recommendations, prior to their submission for approval by the Knesset. It should be emphasised that this is the only Knesset committee, all of whose recommendations, are, according to the law, to be approved by the plenum.

The Committee may also decide, upon the proposal of the Comptroller, that certain parts of the report shall not be published, if it deems it necessary to do so in the interests of safeguarding the security of the state, or in order to avoid an impairment of its foreign relations or its international trade relations. Practically, the audited bodies point out to the Comptroller which information in the report, in their view, jeopardises the mentioned interests, and should therefore not be published. The Comptroller very often does not accept the arguments of the audited bodies. It should be said that in spite of the fact that the Committee consists of political figures naturally having different perceptions of the borders of secrecy, common ground is usually found in defining these borders. It is highly unlikely for the Committee to decide to omit information in contradiction to the position of the Comptroller.

The full version of the audit report is discussed either in a session which is declared secret or, in the case of a report dealing with the secret services, by a special joint committee of the State Audit Affairs Committee and the Foreign Affairs and Security Committee of the Knesset. This joint committee was established as a practical means for dealing with these reports and has no standing in the law.

It should be pointed out that the Chair of the State Audit Affairs Committee of the Knesset is, as a matter of tradition, a member of the opposition, the reasons being very clear. On the other hand, the majority of the members consist of parties composing the coalition block.

Along the same lines, the Knesset has also accepted the opinion of the Comptroller, that a minister should not be appointed as the chairman of the Committee, during a certain period of time after his party lost power. The idea is to avoid either the impression or the actual possibility that he deals in this capacity with the activity of the government of which he was a member or refrains from laying on the table of the Committee unpleasant issues.

On the basis of the Comptroller's proposal, the Knesset amended the law, which provides that a person who served as a minister, as a deputy minister, or as a Director General or Deputy Director General of any Government office, shall not be the Chair of the Committee within two years from the day of termination of his/her tenure of such office. A member of the Committee, who served in one of the above mentioned positions, shall not participate in the discussions of the Committee relating to his/her area of responsibility during the period in which he/she served as aforesaid.

Amendments to the State Comptroller Law are either initiated by the Comptroller or by members of the Knesset, and are dealt with by the Committee. In practice, members of the Knesset will consult with the Comptroller prior to formally initiating these

amendments, mainly in order to convince the Comptroller of the necessity of the amendment, not only as a matter of courtesy, but also knowing that it is unlikely that the Knesset will impose an amendment upon the Comptroller.

The procedure of dealing with the budget of the State Comptroller's Office is unique and is dealt with by two committees of the house, so as to avoid a monopolistic position of one committee of the Knesset *vis-à-vis* the Comptroller.

The Knesset Finance Committee on the proposal of the State Comptroller, approves the budget of the office, but the financial report, prepared after the expiration of the financial year, is submitted to the State Audit Affairs Committee.

When approving the budget, members of the Finance Committee might ask for some clarifications. However, due to the respect and trust in which the Comptroller is held, they have never questioned the basic philosophy or strategy of the proposed budget. It should be pointed out that in practice, the budgets proposed by all Comptrollers, over the years, have always been approved without any changes.

The relations between the two institutions reflect the Israeli experience of implementing the principle of the division of power, guided by the rule of self-restraint, as part of the political culture developed in Israel.



III.  
PARLIAMENTARY SCRUTINY  
OVER THE EXECUTIVE BRANCH  
AND THE IMPORTANCE OF INDEPENDENT BODIES  
FOR ITS IMPLEMENTATION



## Preface

The introduction of principles implying the respect of public welfare, public interest, and the accountability of officials and public servants for their actions represents an element of fundamental democratisation of relations within a society, which creates the basis for introducing and empowering the work of the Parliament and independent bodies as an independent and impartial system for exercising oversight over the executive branch. This very powerful and efficient partnership has been recognised worldwide as a basis for strengthening systemic and permanent oversight over the work of the executive branch.

### Definition of Accountability in the Parliamentary Committees' System

It is said that the accountability of the public administration is a “notoriously imprecise term”.<sup>25</sup> There is considerable academic debate about what public administration accountability is or is not. A good introduction to what it actually is may be found in Lord Sharman’s report (*Holding to Account: The Review of Audit and Accountability for Central Government*). In his view, the idea of accountability has four major aspects:

1. *giving an explanation* – through which the main stakeholders (for example Parliament) are advised about what is happening, perhaps through an annual report, outlining performance and capacity;
2. *providing further information when required* – where those accountable may be asked to account further, perhaps by providing information (e.g. to a select committee) on performance, beyond accounts already given;
3. *reviewing, and if necessary revising* – where those accountable respond by examining performance, systems or practices, and if necessary, making changes to meet the expectations of stakeholders; and

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<sup>25</sup> R. Mulgan, ‘Comparing Accountability in the Public and Private Sectors’ (2000) pg. 59 Australian Journal of Public Administration 87.

4. *granting redress or imposing sanctions* – if a mechanism to impose sanctions exists, stakeholders might enforce their rights on those responsible for making changes.<sup>26</sup>

Naturally, not all mechanisms available to the Parliament will be equally successful in regard to meeting the aforementioned four aspects of the accountability system. Despite being useful as structured explanations of the performance and progress of a specific ministry, annual reports do not comprise an interactive component enabling their user to pose questions or ask for additional clarification. Questions of the Members of Parliament on the other hand, represent a means to obtain specific additional information or clarifications about the submitted reports. Public hearings, attended by those who made specific decisions, are a good way to obtain clarifications and present the reasons for a specific decision/action, as well as for reaching an agreement as regards amendments or supplements to the existing procedures.<sup>27</sup>

This all brings us to the conclusion that the system of parliamentary committees may be a potentially efficient and powerful system for holding the Government to account. It is especially successful in regard to the first three listed aspects of accountability: for consideration of received information, asking for additional clarification and proposing necessary modifications of processes or procedures in order to enhance the efficiency of the specific branch of power (ministry, agency, etc). As regards the fourth aspect, although Parliamentary Committees are entitled to propose amendments to the specific practice, implementation of such amendments and the imposition of sanctions for their non-observance is still a matter for the Minister or the Courts. This certainly does not imply that the Parliament should not influence the final outcome, including insisting on implementation of recommendations or reforms proposed by the competent Parliamentary Committee.<sup>28</sup>

The accountability principle implies that the Parliament should not simply receive explanations from the specific Minister or public administration body about their activities and performance, but also influence the decisions of the Government. This activity may take several forms, beginning with obtaining assurance from the respective Ministry that certain required recommendations will be implemented or administrative errors corrected, conclusive with direct action required to remedy the identified state of affairs.

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<sup>26</sup> Lord Sharman, *Holding to Account: The Review of Audit and Accountability for Central Government*, February 2001, para 3.5.

<sup>27</sup> Sharman Report, n 39, para 3.8.

<sup>28</sup> Gareth Griffith, *Parliament and Accountability: The Role of Parliamentary Oversight Committees*, NSW Parliamentary Library, 2005, pg. 11

## **Advantages of the Parliamentary Committees as Oversight Tools over the Operations of the Independent State Bodies**

Analysing the advantages of the parliamentary committees' oversight over operation of anti-corruption agencies and other independent state institutions, the Criminal Justice Committee of the Queensland (Australia) Legislative Assembly reported on some of the numerous advantages of quality and constructive relations between the parliamentary committees and independent bodies:

- a. Direct link – committees enable a direct link with the Parliament as a forum for consideration of all governance and decision-making aspects and procedures in the public administration domain;
- b. Secrecy requirements – committees represent an appropriate way of ensuring the accountability of an independent body without threatening the confidentiality of the activities or information kept by the respective body. The sensitive and confidential nature of potential investigations or information kept by the respective body excludes the possibility of oversight over its operation by the entire Parliament. However, under adequate conditions and through implementation of preliminary activities, the Parliamentary Committee may be furnished with information necessary for its efficient work;
- c. Democratic link – committees comprising elected representatives delegated with the task of overseeing the operation and use of powers of anti-corruption agencies and independent bodies with investigative powers, represent the best way to ensure the adequate balance between protection of human rights and broader public interest. As representatives of the citizens, Members of Parliament should be familiar with the attitudes of their communities and the positions of their electorate;
- d. Educational – committees also represent an opportunity and place for providing broader support and understanding of the independent body's role and function, both among the Members and the wider public;
- e. Reminder – committees serve as a reminder to the body they cooperate with as regards accountability for their actions to the Parliament, and thereby to the citizens;
- f. Transparency – committees provide and promote a forum for public debate. Parliamentary committees are in a position to include public opinion into their work by means of various mechanisms such as public hearings and receipt of public petitions;
- g. Expertise – committees give an opportunity to their members- Members of Parliament- to expand their knowledge and expertise in a specific area, thus leading to public administration capacity building and better informing the Members;



- h. Accountability – accountability to a parliamentary committee in relation to the accountability of an independent body to a single person ensures that the supervisor does not become too close to the specific body which would in return prevent that person from being able to identify strengths and weaknesses in the respective independent body’s operation in an impartial manner;<sup>29</sup>

The work of independent state institutions is not only vital for the Parliament in performing its oversight function over the Government provided for by the Constitution, but it also represents an important reference point for the Government itself that may, through reports and recommendations of independent bodies, obtain guidelines for delivering more efficient and better quality services to the citizens. Owing to their expertise in specific areas and links with the media and civil society organisations, these institutions have indispensable value in supplementing the oversight function of parliamentary committees.

Development and strengthening of democratic parliamentary practice and especially of the Parliament oversight role as a counterbalance to the growing power of the executive, is a challenge many parliaments are facing worldwide. The response to such a challenge for democracy will be confirmation of legitimacy and autonomy of the parliamentary system, given that the degree of democracy in a society is reflected in the degree of mutual control among the political actors and institutions.

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<sup>29</sup> Legislative Assembly of Queensland, Parliamentary Criminal Justice Committee, *Report on the Accountability of the CJC to the PCJC*, Report No 38, 1997, pg. 101.



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## **The National Assembly, Independent Bodies and the Fight Against Corruption in Serbia**<sup>31</sup>

### **I. Introductory Notes**

In contemporary societies, the quality of life of the people greatly depends on the principles that public institutions adhere to with a view to contributing, through their work, to realising public imperatives and advancing the values of a democratic society.

Under present circumstances, the duties that public institutions are authorised to perform are becoming increasingly complex. For an administrative system to be able to perform its basic tasks within the framework of democratic transition at the required level of quality, it is necessary that undergoes an appropriate transformation in order to find new organisational forms and functional varieties. Thus, one of the ways of achieving the values referred to above is by constituting and developing<sup>31</sup> independent state bodies.

The advent of independent state bodies as a new organisational form poses numerous challenges to the legal and political doctrine and practice. Independent state bodies may be entrusted with various public, control, administrative, development, regulatory and other kinds of authority. The nature of the duties conferred upon them influences the organisational and functional characteristics of independent state bodies, and the modes of controlling these institutions by the parliament.

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<sup>30</sup> Stevan Lilić, Ph.D., Professor of the Faculty of Law of Belgrade University. A Representative of the People at the National Assembly of Serbia, the Vice-Chairman of the Committee for Constitutional Issues, 2001-2003 ([www.slilic.com](http://www.slilic.com)).

<sup>31</sup> A revised version of the paper presented at the international conference "The National Assembly of the Republic of Serbia and Independent State Bodies", held at the National Assembly Hall on 26th-27th November 2009.

In the professional literature, one can find several conceptual models dealing with the reasons for creating independent state bodies.<sup>32</sup> According to the so-called “buffer” theory, independent state bodies and agencies are created in order to protect certain affairs of public importance from the increasing prevalence of political influence and corruption. According to the “escape” theory, independent bodies have been created as a form through which it is possible to eliminate the shortcomings of the traditional form of state administration. All these views, however, are based on the opinion that, if the existing state institutions cannot perform the functions for which they are authorised at the requisite level of quality, especially when it comes to controlling the realisation of matters of public importance, a reorganisation should be carried out, resulting in the establishment of corresponding independent bodies and agencies.<sup>33</sup>

## II. The Constitutional Framework and the Legislature in Serbia

Following the changes of October 5th 2000, in the legal system of Serbia, independent bodies and agencies initially appeared “spontaneously” on the basis of special decisions passed by the Government (for example, the Agency for the Reform of Administration, the Committee for Resolving Matters Pertaining to Conflict of Interest, the Anti-corruption Council). The reasons for this were two-fold: on the one hand, getting involved in certain reform and financial trends, especially when it came to foreign donations and financial aid, required the establishment of special organisations that do not belong to the formal system of state administration (such as ministries and bodies and organisations within the framework of the ministries), and on the other, to control certain areas of the state (administrative) system of government under the conditions of democratic transition. That is why, in the period following these changes, certain independent state organs, bodies and agencies were introduced by special laws, for example, the Protector of Citizens, the State Audit Institution, the Commissioner for Information of Public Importance, the Anti-corruption Agency and others.

The constitution is the basic legal framework of a country. As such, the Constitution of the Republic of Serbia (2006)<sup>34</sup> also contains corresponding provisions pertaining to preventing conflict of public and private interest, and also to certain independent bodies as institutions upholding the rule of law, the purpose of which is, among other things, protection of human rights, realising public imperatives, preventing conflict of interest and fighting against corruption. Thus, the Serbian Constitution, among other things, prescribes the following:

32 P. P. Craig, *Administrative Law*, 5th edition, Sweet & Maxwell, London, 2003, pg. 92.

33 D. Hague, W. Mackenzie, A. Barker, *Public Policy and Private Interests - The Institutions of Compromise*, MacMillan, London, 1975, pg. 362.

34 *The Constitution of the Republic of Serbia*, “The Official Gazette of the Republic of Serbia”, no. 83/2006.

- No one may perform a state or public function that is in conflict with his/her other functions, business affairs or private interests (Article 6).
- Any form of discrimination, be it direct or indirect, on any grounds, and especially on the grounds of race, sex, nationality, social origin, birth, religion, political or other beliefs, financial situation, culture, language, age, psychological or physical disability, shall be forbidden (Article 21).
- Everyone shall have the right of access to information possessed by state bodies and organisations entrusted with public authority, in keeping with the law (Article 51/2).
- The State Audit Institution shall be the highest state organ for the purpose of auditing public funds in the Republic of Serbia; it shall be independent and subject to monitoring by the National Assembly, to which it shall be accountable (Article 96).
- Acts that, contrary to the law, restrict freedom of competition by establishing or abusing a monopolistic or dominant position shall be forbidden (Article 84/2).
- The Protector of Citizens shall be an independent state body that protects the rights of citizens and controls the work of state administration organs, the organ authorised to effect the legal protection of the property rights and interests of the Republic of Serbia, and other bodies and organisations, firms and institutions entrusted with public authority (Article 138/1).

Apart from the Constitution, corresponding laws have been passed recently, the purpose of which is to secure and protect public interest, especially when it comes to the institutional control of the executive branch of government by independent bodies and agencies, among others, the Law on the Protector of Citizens, the Law on Free Access to Information of Public Importance and the Law on Personal Data Protection, the Law on the Anti-corruption Agency, the Law on the State Audit Institution, the Law on Public Procurement<sup>35</sup> and others.

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<sup>35</sup> Author's note: In a broader sense, public procurement belongs to this category. However, in view of the very specific nature and complexity of this matter, on this occasion we shall not deal with this issue.

### III. Preventing Conflict of Interest

#### The Ethics of Public Officials

In every country, the administration has a significant role and performs many duties for the purpose of realising the existential and developmental aims of society. The administration is not an isolated entity in society. Many social reforms have administrative implications, while many administrative reforms have social repercussions. The administration is dependent on social factors, and at the same time, it influences, by resolving current and future problems, the shaping of the future of society. The administration is no longer a mere instrument of the powers-that-be for achieving political aims, but also a complex system of “structures” and “procedures” for conducting economic, technological, political and social affairs. That is why the administration and civil servants, who are in touch with the citizens on a daily basis, must themselves be subjects who will change ossified bureaucratic procedures and be mindful, at all levels, of “ethical considerations” and facilitate an “intensive ethical dialogue with the citizens”.

A public official, as an authorised representative of the state, by performing his/her tasks and functions that are manifested in the acts of the administration, has a public interest. Public interests are closely connected with administrative decisions, for they give them direction and meaning in whatever they do. Since this relationship involves a moral duty and obligation of public officials, it also involves ethics. Ethics, therefore, become crucial for the entire scope of activities that a public official is involved in.<sup>36</sup>

The professional vocation of administrative officials and administration as a “highly demanding profession”, through which most human freedoms and rights are realised, requires the presence of a corresponding (high) code of ethics. “It is certainly a normative system that does not come into being at once, is not created through codification, but constitutes a system of specific rules regulating the behaviour of particular professions in the course of performing their duties, shaped by the empirical experience of many years, on the basis of practice, envisaged not as being static but in continuous development, following the dynamics of the development of society and the process of humanisation of relations in society.”<sup>37</sup>

Administration is incompatible with unethical behaviour. Blind loyalty to the system, behaviour that results from the pressure of special interest, indifference towards public interests, corruption, inertness and maltreatment of citizens, laziness, favouritism and the like are examples of unethical behaviour. Bribery and corruption occur in all states, being present to an exceptionally high degree in some (Nigeria) and to a low degree in others (New Zealand, Switzerland). Their

<sup>36</sup> Jong S. Jun, *Public Administration and Problem Solving*, California, 1986, pg. 271.

<sup>37</sup> Peter Kobe, *Prilog diskusiji o etici i pravu [A Contribution to a Discussion of Ethics and Law]*, Arhiv za pravne i društvene nauke, Belgrade, no. 2, 1978, pg. 213.

energetic prevention constitutes (in our country as well) a precondition for all the other measures aimed at reorganising the administration.<sup>38</sup> The administration must be a highly moral institution, and its officials should demonstrate high standards of behaviour.<sup>39</sup>

In mediaeval Venice, "...owing to a very complicated electoral system, worked out to the level of finely realised details, and to a multitude of regulations and laws, the Doges took strict care not to usurp more power than was due to them. As a sign that they were merely humble servants of the state, the title of the Doge was conferred upon them while their hands were tied. They were prohibited from building houses within the territory of Venice, and also from depositing money abroad or owning any property abroad; moreover, they were forbidden from marrying their daughters to foreigners and giving high positions to their relatives and providing them with sinecures." And in Dubrovnik, "... above the door to the room where the Grand Council held its sessions, there stood the inscription: *Obliti privatorum, publica curate* (Forget private matters, take care of public affairs)."<sup>40</sup>

### Preventing Conflict of Interest in the State Administration

In our law, preventing conflict of interest among public officials belongs to the realm of "new" legislation.<sup>41</sup> As a legal category, prevention of conflict of interest was introduced by *The Law on Preventing Conflict of Interest in the Course of Performing Public Functions* (2004).<sup>42</sup> Also, the Constitution of the Republic of Serbia (Article 6) contains an expressly stated provision to the effect that "No one may perform a state or public function that is in conflict with his/her other functions, business affairs or private interests".

For practical purposes, especially when resolving certain conflictual issues pertaining to conflict of interest, the basic notions must be clearly articulated and defined. In this sense, one should distinguish between "general" and public importance. General interest is "politically generated" by the corresponding social subjects, first of all, political parties. These interests, in the form of "input", are directed towards the parliament, which processes these political interests and turns them into normative forms and acts (the law). In this way "public" interest, which is the subject of legal regulations, is generated. It is particularly necessary to clearly define "private" interest, for conflict of interest that should be prevented by law is created precisely on the dividing line

38 Cf.: G. Tullock, *Organizacija moderne federalne države* [*The Organisation of the Modern Federal State*], Belgrade, 1992, pg. 95

39 Cf.: Robert Denhardt, *The Pursuit of Significance: Strategies for Managerial Success in Public Administration*, Belmont, California, 1993, pg. 263.

40 Cf.: Milo Dor, *Srednja Evropa – mit ili stvarnost* [*Central Europe – Myth or Reality*], Belgrade, 2003.

41 Cf.: Stevan Lilić, *Državni službenici i sukob interesa* [*Civil Servants and Conflict of Interest*], the collection of papers "Conflict of interest in officials and Civil Servants in Serbia", Transparency Serbia, Belgrade, 2006, pg. 18–25.

42 *The Law on Preventing Conflict of Interest in the Course of Performing Public Functions*, "The Official Gazette of the Republic of Serbia", no. 43/2004. This Law ceased to have effect when the Law on the Agency for Fighting against Corruption was passed, "The Official Gazette of the Republic of Serbia", no. 97/2008.

between “public” and “private”.<sup>43</sup> This is not always a simple matter. For example, how is one to establish whether there is a conflict of public and private interest when a public official is a member of a non-governmental organisation or a professional association? Does it constitute a conflict between public and private interest (as, for example, when a public official owns an agricultural firm)? In this case, one could speak of “particular” rather than “private” interest. In any case, when determining what constitutes conflict of interest, one must proceed from objective, not subjective elements. For a law to be successful and for its goal to be successfully achieved in accordance with the proclaimed value orientation, it must be clearly visible to everyone, in “legal” terms, when a conflict of interest exists, for example, in the situation referred to in civil law as “confusion”, that is, when one and the same person has both the status of creditor and the status of debtor.

*The Law on the State Administration (2005)*<sup>44</sup> stipulates that a ministry may have one or more secretaries of state, who are accountable for their work to the corresponding minister and the Government. A state secretary assists the minister within the scope of authority determined by the minister. A minister may not authorise a state secretary to pass regulations or to vote in the course of Government sessions. A state secretary is an official appointed and relieved of duty by the Government, acting on a proposal submitted by the corresponding minister, and his/her term of office ceases when the minister’s term of office expires. The Law on the State Administration (Article 24) expressly states that “a state secretary shall be subject to the same regulations on incompatibility and conflict of interest pertaining to Government members (with the provision that he/she may not be a representative of the people)”.

The Law on the State Administration also introduces the category of civil servants (Article 84), who are entrusted with performing duties from the scope of activities of state administration organs, stating that the position of civil servants shall be regulated by a special law. In this particular case, it is *The Law on Civil Servants (2005)*.<sup>45</sup> This Law regulates the rights and duties of civil servants and some of the rights and duties of employees. According to the provisions of this Law (Article 2), a civil servant is a person whose work consists of duties from the sphere of work of state administration bodies, courts, public prosecutors’ offices, the State Attorney's Office, National Assembly services, the President of the Republic, the Government, the Constitutional Court and the services of bodies appointed by the National Assembly, or work pertaining to general legal issues, information technology, material-financial, accounting and administrative

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43 Cf.: Nemanja Nenadić, *Sprečavanje i razrešavanje sukoba javnog i privatnog interesa u Srbiji* [Preventing and Resolving the Conflict between Public and Private Interest in Serbia], Transparency Serbia, November 2005. Material for the round table “Preventing and Resolving Conflict of Interest in Public Officials and Civil Servants – Legal Regulations and Monitoring Their Implementation”, Transparency Serbia, 19th January 2006, Belgrade.

44 *The Law on the State Administration*, “The Official Gazette of the Republic of Serbia”, no. 79/2005.

45 *The Law on Civil Servants*, “The Official Gazette of the Republic of Serbia”, no. 79/2005.

matters, whereas an employee is a person whose work consists of supporting technical duties within a state body.<sup>46</sup>

This Law forbids acceptance of gifts and the exploitation of one's position in a state organ (Article 25), in the sense that a civil servant must not accept a gift in connection with performing his/her duties, with the exception of protocol-related or symbolic gifts of small value, nor can he/she accept any service or other benefit for him/herself or other persons. A civil servant must not use his/her position in a state body to influence the realisation of his/her rights or the rights of person(s) connected to him/her. The rules regulating the prevention of conflict of interest in the course of performing public functions apply when it comes to determining the circle of persons connected with a civil servant and the acceptance of gifts.

The Law prohibits civil servants from establishing companies and public services (Article 28). Thus, a civil servant must not establish a company or public service, nor can he/she be an entrepreneur. The rules regulating the prevention of conflict of interest in the course of performing public functions apply to the transfer of management rights within an economic entity to another person. A civil servant shall be obligated to submit the data on the person onto whom he/she has transferred management rights and evidence of this to his/her superior, whereas a civil servant occupying a post shall be obligated to submit information to the Republican Committee for Resolving Conflict of Interest.<sup>47</sup>

The Law restricts the membership of civil servants in bodies of a legal entity (Article 29). Thus, a civil servant cannot be the manager, deputy or assistant manager of a legal entity, and may be a member of the managing board, supervisory board or another management body of a legal entity only if he/she is appointed by the Government or another state body in accordance with a special regulation.

According to the Law, it is obligatory to report the existence of interest in connection with a decision passed by a state organ (Article 30); a civil servant shall be obligated to inform his/her superior in writing of any interest that he/she, or a person connected with him/her, may have in connection with a decision of a state body in the passing of which he/she is participating, for the purpose of deciding on his/her exemption from it. When a state body is managed by a civil servant, he/she must inform in writing the state body authorised to appoint him/her of any interest that he/she may have.

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46 According to *The Law on Civil Servants*, "The Official Gazette of the Republic of Serbia", no. 79/2005, civil servants, in terms of the provisions of this Law, are not (Article 2, paragraph 2): "... representatives of the people, the President of the Republic, judges of the Constitutional Court, Government members, judges, public prosecutors, deputy public prosecutors and other persons appointed by the National Assembly or the Government, nor persons who are officials in accordance with special regulations".

47 Editor's note: Text written prior to transfer of authority to the Anti-Corruption Agency



## “Insiders” (Whistle Blowers)

When a civil servant finds out that the administrative organisation he/she works for has betrayed the trust of the public whose interest it is supposed to serve, he/she is faced with an ethical dilemma. Should he/she address the public and blow the whistle, offering the media information and thus becoming a whistle-blower? Or should he/she try internally to rectify the unethical behaviour of the organisation? Or should an employee keep quiet out of loyalty to the organisation and thus protect his/her job? As has been pointed out, insiders (whistle-blowers) tend to “act on the basis of motives that are not rooted in fear, anger or selfish pleasure; they are able to review the current definition of the situation and to act on the basis of their critical understanding”.<sup>48</sup>

For the purpose of regulating the legal protection of insiders, the Protector of Citizens has recently submitted an amendment to the Law on Free Access to Information of Public Importance to the National Assembly. In a press release pertaining to the vote on the Proposal of the Law on Amendments to the Law on Free Access to Information, the Commissioner for Information of Public Importance and Personal Data Protection remarked that it would be a great pity if the representatives of the people failed to use this opportunity to enable Serbia to make a big step towards establishing a very important anti-corruption mechanism by adopting the amendment on the protection of insiders submitted by the Protector of Citizens. In connection with this, the Commissioner stated the following: “Ensuring the legal protection of insiders is a formal obligation of this country arising from the compulsory Recommendation of GRECO that should have been implemented by the end of 2007. Needless to say, of course, even without that formal obligation, we have more than enough reasons for doing so. The experiences of many countries show that insiders can very significantly contribute to the fight against corruption. But for something like that to happen, it is necessary that people who have brought to light corruption and abuse in their own surroundings for the purpose of protecting matters of public importance by placing the relevant information at the disposal of the public, thus acting contrary to the formal and informal rules on keeping secrets, should be protected from potential negative consequences, first of all, from various procedures pertaining to responsibility.”<sup>49</sup>

48 Cf.: Deena Weinstein, *Bureaucratic Opposition*, New York, 1979.

49 The Commissioner for Information of Public Importance and Personal Data Protection, *Press release of 11th December 2009*. <http://www.poverenik.org.rs/index.php/yy/saopstenja/843--11-12-2009>

## IV. Independent Bodies in Serbian Law

### 1. The Ombudsman

In many countries, a special form of control of public institutions, above all, the state administration, is realised by introducing the institution of the Ombudsman as the “protector of citizens’ rights”.<sup>50</sup> Originally, the Ombudsman is an institution of Swedish provenance, introduced in the early 19th century (by the Constitution of 1809). In the post-feudal political struggle between the then absolutist Swedish monarch and the Parliament as the representative of the people, the Ombudsman was a special *Commissioner* of the Parliament, entrusted with monitoring how the King and the Administration implemented the laws passed by the Swedish Parliament.<sup>51</sup> The authority of the then Swedish Ombudsman consisted in his being able to request information and explanations from the administrative authorities on why certain laws were not implemented at all or were not implemented the way they should be, and to initiate procedures for establishing the responsibility of administrative clerks in connection with it. The Ombudsman submitted reports on his findings to the Parliament, which could raise the issue of confidence in (and dismissal of) the King’s ministers on the basis of the report.

Essentially, these powers have remained until the present day, even though a number of modes of this institution have been developed depending on the country in question and the particular legal system. The Ombudsman as a parliamentary institution has been present in Nordic countries from the beginning of the 20th century and many other countries introduced it around the middle of the 20th century, so that today there is almost no country that does not have the Ombudsman in one form or another.<sup>52</sup> In this context, Serbia has long been a significant exception.<sup>53</sup> Still, it should be pointed out that our legal, political, scientific and expert thought has contributed to the analysis and comparative study of the institution of the Ombudsman.<sup>54</sup> In this sense, the Ombudsman is not the fruit of the political thought of only one nation. Under this name, and commanding the respect and authority that it has in the political system of Sweden, today this institution has become an inspiration, if not a model for the increasingly necessary efforts required for the *reconstruction* of the traditional political institutions created by rationalist practice, and later on the increasingly mediatory bureaucratic and legalistic thought and practice.<sup>55</sup>

50 Cf.: Stevan Lilić, Dejan Milenković, Biljana Kovačević-Vučo, *Ombudsman – međunarodni dokumenti, uporedno pravo, zakonodavstvo i praksa* [The Ombudsman – International Documents, Comparative Law, Legislation and Practice], Komitet pravnika za ljudska prava [The Committee of Legal Practitioners for Human Rights], Belgrade, 2002.

51 Cf.: Donald Rowat, *The Ombudsman, Citizens’ Defender*, London, 1965.

52 Cf.: Dragan Radinović, *Ombudsman i izvršna vlast* [The Ombudsman and the Executive Branch of Government], PhD thesis, the Faculty of Law in Belgrade, 1999.

53 Stevan Lilić, *Zašto je novi Ustav ostavio Srbiju bez ombudsmana* [Why the New Constitution Has Left Serbia without the Ombudsman], Arhiv za pravne i društvene nauke [The Archive for Law and Social Studies], Belgrade, no. 2–3, 1991.

54 Cf.: Miodrag Jovičić, *Ombudsman – čuvar zakonitosti i prava građana* [The Ombudsman – the Protector of Legality and the Rights of Citizens], Belgrade, 1969.

55 Jovan Đorđević, *Politički sistem* [The Political System], Belgrade, 1967, pg. 636

Even though the Ombudsman has basically remained a parliamentary trustee, entrusted with the duty of monitoring how the administration and the executive branch of government implement the laws, today the Ombudsman is regarded as an institution whose basic task is to protect the rights of citizens, especially from unlawful and irregular activities of the administration (so-called *maladministration*). As has been pointed out, the Scandinavian term *Ombudsman* has become a part of our everyday speech, even though only thirty years or so ago it was almost unknown to both the general and the legal public. Today, not only has it become customary in almost all the countries of the world, but the very essence of this institution is regarded with great respect.<sup>56</sup>

In a sense, today the Ombudsman is the basic institution when it comes to protecting human rights and citizens' rights, the way that, at the beginning of the previous century, the judiciary was the institution that protected legality and the organisation of the rule of law.<sup>57</sup> What is the "secret" of the efficiency in protecting the rights of citizens and controlling the administration that the Ombudsman achieves, which cannot be achieved by the existing forms of administrative and judicial control of the administration? As has been pointed out, "...the essence of the institution of Ombudsman boils down to its immanent ability to penetrate *the vicious circle of bureaucratic circles* and to render impenetrable authoritative administrative systems transparent, that is, accessible to parliamentary control and the general public. Its efficiency derives, first of all, from its ability, based on reports submitted to the parliament, to draw the attention of the public and the parliament to citizens' complaints. The public character of its work, based on unbiased investigation, is a powerful tool. The mere awareness of the monitoring carried out by the Ombudsman has a positive influence on the entire administrative system, making it subject to the public and justice."<sup>58</sup>

*The Law on the Protector of Citizens* (2005)<sup>59</sup> establishes the Protector of Citizens as an independent state organ (the Ombudsman), which: a) protects the rights of citizens and b) controls the work of state administration organs. The Protector of Citizens oversees the protection and advancement of human freedoms and rights. The notion of citizen, in terms of this Law, presupposes not only a physical person who is a domestic national, but also every physical person who is a foreign national, as well as every domestic and foreign legal entity whose rights and duties are decided upon by administrative organs. The Constitution of the Republic of Serbia also expressly states (in Article 138/1) that: "The Protector of Citizens shall be an independent body that protects the rights of citizens and monitors the work of state administration bodies, the body authorised to deal with the legal protection of the property rights and interests of the

56 Karl Freedman, *The Ombudsman*, Canadian Essays On Human Rights And Fundamental Freedoms (Eds. R. Macdonald, J. Humphry), Toronto, 1979, pg. 337.

57 Cf.: Stevan Lilić, *Ombudsman u Srbiji – ustavni i zakonski okvir* [*The Ombudsman in Serbia – the Constitutional and the Legal Framework*], in "The Local Ombudsman – the Comparative Experiences of Serbia, Bosnia and Herzegovina, Switzerland", The Swiss Agency for Development and Cooperation, MSP, Kraljevo, 2007, pg. 23–37.

58 H. W. R Wade, *Administrative Law*, 5th edition, Oxford, 1982, pg. 76.

59 *The Law on the Protector of Citizens*, "The Official Gazette of the Republic of Serbia", no. 79/2005.

Republic of Serbia, and other bodies and organisations, companies and institutions entrusted with public authority.

According to this Law, the Protector of Citizens shall be independent in carrying out the duties established by law, and no one has the right to influence his/her work and actions. The Protector of Citizens is elected by the National Assembly of the Republic of Serbia, acting upon a proposal submitted by its committee authorised to deal with constitutional matters. The Protector of Citizens is appointed for a period of five years, and one and the same person may be elected to perform this function twice in succession at most.

The Protector of Citizens is authorised to control whether the rights of citizens are observed, establish any violations committed through actions or lack of action on the part of administrative bodies, in cases when national laws, other regulations and general acts are violated. The Protector of Citizens is authorised to monitor the legality and correctness of the work of administrative bodies. He/she is not authorised to monitor the work of the National Assembly, the President of the Republic, the Government, the Constitutional Court, courts and public prosecutors' offices.

The Protector of Citizens is authorised to submit initiatives to the Government, or to the National Assembly, for amending laws and other regulations and general acts if he/she is of the opinion that violations of citizens' rights occur on account of flaws contained in the existing regulations, and also to initiate the passing of new laws, other regulations and general acts if he/she considers it to be of importance for realising and protecting the rights of citizens.

The Protector of Citizens is authorised to issue a public proposal that an official who is responsible for violating citizens' rights be dismissed, and to initiate a disciplinary procedure against an employee of an administrative body who is directly responsible for a violation that has been committed, specifically, if it follows from the repeated acts of an official or employee that he/she has no intention of cooperating with the Protector of Citizens, or if it is established that the said violation has resulted in extensive material or other damage to citizen(s).

The Protector of Citizens shall submit a regular annual report to the National Assembly, wherein he/she provides information about his/her activities in the previous year, about the shortcomings observed in the work of administrative bodies, and proposals for improving the position of citizens in relation to the administrative body. The report on the work of the Protector of Citizens is published in the "Official Gazette of the Republic of Serbia" and on the website of the Protector of Citizens, and is also submitted to the media. The funds for the work of the Protector of Citizens are secured from the budget of the Republic.

In his *Regular Annual Report for the Year 2008*, the Protector of Citizens, among other matters, points out that the purpose of this document is to present to the National Assembly, the interested

institutions and the public the situation concerning human and minority rights in the Republic of Serbia, and the quality of the realisation of citizens' rights before bodies exercising public authority and applying the regulations of the Republic of Serbia; to present to the National Assembly and the general public the most important aspects of the work of the institution of Ombudsman, in keeping with legal obligations and the principle of responsibility for performing public duties, and to point out the need for changes in the work of the public sector that would result in improving the realisation of human and minority freedoms and rights, thus contributing to improving the quality of the relationship between the citizens and the administration. The report also states that the Protector of Citizens controls much more than mere formal observance of the law, for he/she investigates the ethics, conscientiousness, objectivity, professional qualifications, purposefulness, efficiency, respect of the dignity of the parties appearing before administrative bodies and other characteristics that should be manifested by the administration, and which the citizens rightfully expect of those they pay for as taxpayers.<sup>60</sup>

According to *The Law on Local Government (2007)*,<sup>61</sup> a local government unit in Serbia may establish a Protector of Citizens (Ombudsman), who protects the individual and collective rights and interests of the citizens by exercising general control of the work of the administration and public services. So far, at the local level the Ombudsman has been established in, among other places, Subotica, Zrenjanin, Bačka Topola, Belgrade, Kragujevac, Leskovac, and some other places.<sup>62</sup>

In Vojvodina, according to *The Decision on Establishing the Ombudsman of the Autonomous Province of Vojvodina (2002)*,<sup>63</sup> the Province Ombudsman was established as an autonomous and independent body, in charge of the protection and advancement of the human rights and freedoms of each person as guaranteed by the Constitution, ratified and published international treaties on human rights, the generally accepted rules of international law, the law and regulations of the Autonomous Province of Vojvodina.

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60 The Protector of Citizens, *The Regular Annual Report for the Year 2008*, Belgrade, 2009, pg. 9, 21. [http://www.ombudsman.rs/index.php/lang-sr\\_YU/izvestaji/godisnji-izvestaji/589--2008](http://www.ombudsman.rs/index.php/lang-sr_YU/izvestaji/godisnji-izvestaji/589--2008)

61 *The Law on Local Government*, "The Official Gazette of the Republic of Serbia", no. 129/2007, Article 97, paragraph 1.

62 In the course of a public debate presenting the results of the project "I have a right to know", carried out by the European Movement in Serbia, in cooperation with the Legal Practitioners for Democracy, the Protector of Citizens stated that it was necessary to increase the number of Ombudsmen in local government units, first of all for the purpose of exercising a more successful control of the work of civil servants. Cf.: [http://www.ombudsman.rs/index.php/lang-sr\\_YU/aktivnosti/informacije/738-2010-01-27-16-04-08](http://www.ombudsman.rs/index.php/lang-sr_YU/aktivnosti/informacije/738-2010-01-27-16-04-08).

63 *The Decision on Establishing the Ombudsman of the Autonomous Province of Vojvodina*, "The Official Gazette of the Autonomous Province of Vojvodina", no. 23/2002.

## 2. The Commissioner for Information of Public Importance and Personal Data Protection

The idea of the public character of the work of administrative bodies dates from the 18th century and was first given legal form in Sweden in 1766, when citizens were first granted access to documents and information held by administrative authorities (*Tryckfrihetsförordning*, 1766). However, it was foregrounded during the last three decades of the 20th century, along with the expansion and universal acceptance of the concept of “human rights”, on the one hand, and the concept of “good governance” and the principle of transparency in the work of state bodies, on the other.

Today, there are more than 30 countries that constitutionally guarantee this right to their citizens. In addition to that, over 50 countries have regulated by law free access to information of public importance in the possession of state bodies, whereas more than 30 countries are in the process of preparing or adopting such laws.<sup>64</sup> In addition to states, international organisations have also started adhering to the principle of transparency and free access to information. In this respect, it is especially important to mention the example of the European Union, whose contract of establishment declares that the information in the possession of its Parliament, Commission and Council of Ministers shall be accessible, whereas the EU Charter of Fundamental Rights guarantees the citizens of the Union free access to this information.

Free access to information of public importance is a precondition for quality and efficient enjoyment of other human rights and freedoms (freedom of thought, the right to information, the right to vote, etc.), and is an irreplaceable instrument of control of the work of public institutions. This right makes it possible for citizens to participate, without any intermediaries, in real terms and responsibly, in carrying out public affairs and the process of decision-making, and also to influence the content of those decisions and their efficient implementation.

As has been pointed out in the publication *The Implementation of the Law on Free Access to Information of Public Importance (A Report on Monitoring)*: “The authorities’ reluctance was reflected in their hesitation to efficiently conclude the already initiated procedure of passing the law, which lasted for years. On a number of occasions, the law entered parliamentary procedure, only for it to be suspended suddenly, apparently without any particular reason, and then forgotten. Under the circumstances, civil society and the media showed admirable perseverance in their efforts to finally get this law adopted. In 2002, civil society experts provided two models of legal regulation of access to information possessed by the administrative organs. One of them, with certain alterations, became the official proposal and later on a law passed by the National Assembly of Serbia in November 2004. Thus, Serbia entered the circle of those

<sup>64</sup> John M. Ackerman, Irma E. Sandoval-Ballesteros, *The Global Explosion of Freedom of Information Laws*, “Administrative Law Review”, Vol. 58, no. 1, 2006, pg. 86.

contemporary democratic societies that are based on the idea that it is in their citizens' justified interest to know everything, or almost everything, about the affairs of the state, for they are the bearers of sovereignty, and through the taxes that they pay they create the budget from which the work of public services and their employees is financed. The recognition and observance of this law is especially important in the so-called new democracy countries, of which Serbia is one, where there is no long tradition of parliamentarianism or the rule of law, and where the notion of good governance has yet to become a part of standard democratic procedures. As a rule, all these countries have a problem with the responsibility of their elected elites. By passing the Law on Free Access to Information, a new independent body was introduced into the system of government in Serbia – the Commissioner for Information of Public Importance. In his work so far, the Commissioner has shown a high degree of independence in relation to both the legislature and the judiciary. From the very start, he did not hesitate to fully use the legal rights due to him, in order to ensure the realisation of the right of free access to information of public importance. By consistently exercising his authority, he drew the attention of the public to the institution of the Commissioner and insisted on autonomy, independence and objectivity in doing his work, which should be the main characteristic of the work of all independent bodies, as the growing fourth branch of government. So far, the Commissioner has very clearly pointed out the problems caused by the actions of public bodies, and insisted on the implementation of legal procedures and on criticising those public authority bodies that did not act in conformity with the Law. In this way, the current Commissioner has managed to establish this institution's independence, to make the issue of the right to access to information of public importance an important one for the future work and position of other independent bodies.”<sup>65</sup>

In Serbia, free access to information of public importance is regulated by *The Law on Free Access to Information of Public Importance* (2004).<sup>66</sup> Even though the Serbian Constitution did not expressly envisage the Commissioner as an independent body, it did stipulate (Article 51/2) that: “Everyone shall have the right of access to data in possession of the state bodies and organisations entrusted with public authority, in accordance with the law.”

Information of public importance, in terms of this Law, is information at the disposal of a public body, created during the work or in connection with the work of a public body, contained in a particular document, and relating to whatever the public has a justified interest to know. For information to be considered of public importance, it does not matter whether the source of that information is a public body or some other person, nor the type of archive (paper, tape, film, electronic media and the like), containing the information, the date of the origin of the information, the manner of obtaining the information or other similar characteristics of the information.

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<sup>65</sup> *The Implementation of the Law on Free Access to Information of Public Importance (A Report on Monitoring)*, Fund for an Open Society, Belgrade, 2006, pg. 7, 10.

<sup>66</sup> *The Law on Free Access to Information of Public Importance*, “The Official Gazette of the Republic of Serbia”, nos. 120/2004, 54/2007, 104/2009.

The Law on Free Access to Information of Public Importance regulates the right of access to information of public importance in the possession of public authority bodies, for the purpose of realising and protecting the interest of the public to know and the realisation of a free democratic order and an open society. In order to realise the right of access to information of public importance at the disposal of public authority bodies, this Law establishes the Commissioner for Information of Public Importance as an autonomous state body, independent in carrying out his/her authority.

In accordance with Article 16 of the Law, the administrative body in question shall be obligated to inform the petitioner immediately, within 15 days of having received a request to that effect at the latest, of whether it possesses the required information, to enable insight into the document containing the said information, or to issue or send the petitioner a copy of the said document. If the request pertains to information which can be supposed to be of importance for protecting the life or freedom of a person, or for endangering or protecting the health of the population and the environment, the public authority in question must inform the petitioner of whether it possesses such information, provide insight into the document containing the required information, or issue a copy of the said document within 48 hours of receiving the request at the latest.

If an administrative body refuses to inform the petitioner, entirely or partially, of whether it possesses the information, to provide insight into the document containing the required information, to issue or forward a copy of the said document, it shall be obliged to pass a decision on rejecting the request, to provide a written justification of that decision, and to inform the petitioner of the legal remedy that he/she can resort to in order to submit a complaint against such a decision.<sup>67</sup> The petitioner may lodge a complaint with the Commissioner within 15 days of the date of delivery of the decision of the administrative body if: a) the administrative body refuses to inform the petitioner of whether it possesses a particular piece of information of public importance or whether it is available to it otherwise, to provide insight into the document containing the information required, to issue or forward a copy of the said document, or if it fails to do so within the prescribed deadline; b) the administrative body fails to respond to the petitioner's request within the prescribed deadline; c) the administrative body imposes payment of a sum of money exceeding the amount of expenditure necessary for preparing a copy of the said document as a precondition for issuing the copy; d) the administrative body does not provide insight into the document containing the required information; e) the administrative body does not provide insight into the document containing the required information or does not issue a copy of the said document. The Commissioner shall pass a decision within 30 days of receiving a complaint, having enabled the administrative body to issue a written statement, and having done the same with the petitioner, if the circumstances warrant it.

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<sup>67</sup> Cf.: Stevan Lilić, *Upravno pravo – Upravno procesno pravo* [Administrative law – Administrative Process Law], 3rd edition, Belgrade, 2009, pg. 172-173.



Based on the *Law on Personal Data Protection* (passed in 2008),<sup>68</sup> the protection of personal data was entrusted to the Commissioner for Information of Public Importance and Personal Data Protection (the Commissioner), as an autonomous state body, independent in exercising its authority (Article 1/3). The Commissioner for Information of Public Importance, established by the Law on Free Access to Information of Public Importance, carries on working under the title of the *Commissioner for Information of Public Importance and Personal Data Protection* (Article 59).

### 3. The Anti-corruption Agency

As pointed out in professional publications: "In totalitarian regimes, corruption is often directly connected with human rights violations. In Latin America, many dictators have justified their rule for years by pointing to the corrupt regimes from the recent past. The very same dictatorships were often merely a screen for thieves and crooks. Under the circumstances, the citizens and journalists were deprived of the legal means that are necessary to expose, within the framework of a competent and credible judicial system, the effrontery and the corruptibility of their governments. At the same time, corruption is best exposed and attacked in a democracy. A nation that arises out of a repressive system need not be aware of the scope of corruption in the previous regimes, when it was not allowed to investigate it and to inform the public of it through the media. At the same time, this new democracy may be sullied by scandals exposed by the free press. The lack of transparency in undemocratic regimes has left the citizens the wrong impression that democracy is essentially prone to corruption. Democratic leaders are faced with the responsibility to explain and rectify this wrong impression. Democracy must be characterised by transparency and dedication to transparency."<sup>69</sup>

In a press release on 9th December, the International Anti-Corruption Day, the Anti-corruption Council of the Government of Serbia, among other things, states the following: "The greatest advance is reflected in the fact that independent anti-corruption bodies have been provided with better working conditions, which has enhanced their influence. Having been delayed for several years, the State Audit Institution has commenced work, which has already yielded significant results, and the establishment of the Anti-corruption Agency, along with strengthening of the existing bodies, will create the conditions for advancing the struggle against corruption. However, there is still a problem: the independent bodies entrusted with the complex task of controlling the authorities do not have adequate conditions for carrying out work of high quality, and the laws on the basis of which these bodies were established were passed in such a way that numerous shortcomings that remain do not allow them to contribute to the fight against corruption in a way that the citizens justifiably expect of them. In the course of the process

68 *The Law on Protecting Personal Information*, "The Official Gazette of the Republic of Serbia", no. 97/2008.

69 *The Anticorruption Manual (Opposing Corruption through a System of Social Integrity)*, "Foreword", Transparency International, Belgrade, 2004, pg. xv.

of preparing and passing the Law on the Anti-corruption Agency, the Council pointed out its shortcomings, especially concerning control of the financing of political parties. We expect that when the Anti-corruption Agency starts its work, it will lead to demands that these shortcomings be eliminated, and that the Government will deal with the task of improving the law with due seriousness in order to create conditions for proper control of the financing of political parties. Compared to the states with a similar corruption index in recent years, Serbia has stagnated according to the results of the latest survey, while other countries have progressed in suppressing corruption. The danger of becoming a state paralysed by corruption can only be eliminated if the work of anti-corruption bodies is further empowered, complemented by the requests of the public to suppress corruption.”<sup>70</sup>

*The Law on the Anti-corruption Agency (2008)*<sup>71</sup> regulates the establishment, legal status, authority, organisation and the manner of work of the Anti-corruption Agency, the rules pertaining to preventing conflict of interest in the course of performing public functions and reporting on the property of persons performing public functions, the procedure in cases when this Law is violated, the introduction of integrity plans, and other issues of importance for the work of the Agency (Article 1). According to this Law, “corruption” is a relationship based on the abuse of one’s professional or social position or influence, be it in the public or in the private sector, for the purpose of gaining personal benefit for oneself or benefit for another person; an “official” is considered to be each person elected, appointed or nominated to a post within bodies of the Republic of Serbia, its autonomous province, local government unit and bodies of public companies, institutions and other organisations founded by the Republic of Serbia, its autonomous province, local government unit, or any person elected by the National Assembly; a “public function” is considered to be a function within bodies of the Republic of Serbia, its autonomous province, local government unit, and bodies of public companies, institutions and other organisations founded by the Republic of Serbia, its autonomous province, local government unit, and also functions performed by persons elected by the National Assembly, and presupposes the authority to manage, make decisions or pass general or individual acts; a “related person” is a spouse or extramarital partner of an official, a blood relative of an official, be it directly or indirectly, up to relatives at the second remove, an adoptive parent or child of an official, and any other physical person or legal entity that can be considered, on other grounds or based on other circumstances, to be connected with an official in terms of interest; “private interest” is any kind of benefit or advantage to an official or a related person; “conflict of interest” is a situation in which an official has a private interest which influences, may influence or seems to influence his/her behaviour in the course of performing a public function or professional duty

<sup>70</sup> The Council for Fighting against Corruption of the Government of Serbia, *Press Release on the Occasion of 9th December, the International Anti-Corruption Day*, Belgrade, 9th December 2009.

<sup>71</sup> *The Law on the Anti-corruption Agency*, “The Official Gazette of the Republic of Serbia”, no. 97/2008.

in such a manner that it endangers public importance; a “gift” is money, some thing, right or service given without proper recompense to an official or a related person in connection with performing a public function; a “protocol-related gift” is a gift that an official receives from a foreign state, its organ or organisation, an international organisation or a foreign legal entity, in the course of an official visit or in some other similar circumstances.

The Law expressly states that the Agency is an autonomous and independent state organ, answerable to the National Assembly for performing the duties within the scope of its authority (Article 3). The bodies of the Agency are its Board and the Director (Article 6).

Concerning conflict of interest, the Law stipulates (Article 27) that an official shall be obligated to perform his/her public function in such a way as not to subordinate public importance to private interest. An official is obligated to adhere to the rules regulating his/her rights and obligations, and to create and maintain the citizens’ trust in his/her conscientious and responsible performance of the public function assigned to him/her. An official is obligated to avoid establishing a relationship of dependence upon a person who may influence his/her objectivity in the performance of his/her public function, and if he/she cannot avoid such a relationship or if such a relationship already exists, he/she should do whatever is necessary to protect public importance. An official must not use his/her public function to gain any benefit or advantage for him/herself or a related person.

Concerning the prohibition of performing another public function (Article 28), the Law prescribes that an official may perform only one public function, unless he/she is obligated by law or some other regulation to perform more than one public function, with the proviso that he/she may perform another public function only on the basis of agreement granted by the Agency.

The measures that may be used against an official who violates this Law (Article 51) are as follows: a) warning, and b) a public announcement of a recommendation that he/she be dismissed.

The Law envisages the obligation of “prevention of corruption” as a special responsibility of the Agency (Article 62), in the sense that the Agency should monitor the implementation of the Anti-corruption Strategy, Action Plan and sector action plans, and also that, with a view to implementing the Strategy, the Agency may submit initiatives for changing regulations and proposals for implementing measures from the Action Plan and sector action plans.

Among other things, the Law authorises the Agency (Article 5) to initiate the requisite procedure and pass measures on account of violations of this Law, and to resolve matters pertaining to conflict of interest. For violations of the provisions of this Law, the Law envisages punishment by way of fines and/or prison sentences.

On the day when the Law on the Anti-corruption Agency comes into effect, the Law on Preventing Conflict of Interest in the Course of Performing Public Functions shall cease to have effect ("The Official Gazette of the Republic of Serbia", no. 43/04). On the day when this Law begins to be implemented, the Agency will take over the staff of the Republic Committee for Resolving Conflict of Interest, as well as the rights, obligations, cases, equipment, means of work and the archive, which are necessary for performing the work that the Agency is authorised to do within the scope of its authority (Articles 77, 81).

#### **4. The State Audit Institution**

*The Law on the State Audit Institution (2007)*<sup>72</sup> regulates the establishment, activities, legal status, authority, organisation and manner of work of the State Audit Institution, other issues of importance for the work of the Institution, and the rights and duties of the subjects of auditing (Article 1).

According to Article 2 of this Law, the Institution is the highest state organ for auditing public funds in the Republic of Serbia. The Institution is an autonomous and independent state body. For performing the duties within its remit, the Institution is answerable to the National Assembly of the Republic of Serbia. The acts through which the Institution carries out the auditing it is authorised to do may not be contested before courts of law and other state bodies.

Among other things, the Institution performs the following duties: a) "auditing financial reports" (examining documents, reports and other information, for the purpose of gathering sufficient, adequate and dependable evidence for pronouncing its opinion on whether the financial reports of the subject of auditing truthfully and objectively present its financial position, business results and financial flows, in accordance with accepted accounting principles and standards); and b) controlling "the business operations of the subject of auditing" (that is, all the activities of the subject of auditing that influence the state of public property, public debt, safeguarding public goods or the state of the environment – Article 2).

According to the Law (Article 9), the subject of auditing encompasses: 1) income and expenditure, in accordance with the rules regulating the budget system and those pertaining to public income and expenditure; 2) financial reports, financial transactions, accounting, analysis and other records and information in the possession of the subject of audit; 3) compliance of the business operations of the subject of auditing, with the law, other regulations and authority; 4) the rational expenditure of public funds, be it in their entirety or a part of them; 5) the system of financial management and control of the budget system and the systems of other bodies and organisations that are the subject of auditing by the Institution; 6) the system of internal control,

<sup>72</sup> *The Law on the State Audit Institution*, "The Official Gazette of the Republic of Serbia", nos. 101/2005, 54/2007.

internal auditing, accounting and financial procedures in the subject of audit; 7) the acts and activities of the subject of auditing that produce or may produce financial effects on the income and expenditure of beneficiaries of public funds, the property of the state, raising loans and providing guarantees, and purposeful use of funds at the disposal of the subjects of audit; 8) the regularity of the work of managing bodies, administrative bodies and other responsible persons authorised for planning, realising and monitoring business operations of beneficiaries of public funds; and 9) other areas envisaged by special laws.

The Institution has a President, Vice-President, the Council, audit services and attendant services (Article 12). The President of the Institution (Article 25) is the general state auditor and head of the Institution. Members of the Council (Article 18) must not be direct blood relatives, or indirect relatives up to the fourth remove of kinship, or spouses, in-laws up to the second remove, even after the dissolution of a marriage, guardians, adoptees, adoptive parents or providers. A Council member may not participate in an auditing procedure if he/she has worked for the person that is the subject of auditing or has performed certain assignments for the account of the subject of auditing, unless a minimum of five years have elapsed since the end of that work or those assignments.

According to the Law (Article 35), the Institution conducts the audit on the basis of the annual auditing programme, which it is obligated to adopt before the end of the year for the next calendar year. Within the framework established by the Law, the Institution independently decides on the subjects of auditing, the object, scope and type of audit, the beginning and duration of audit, unless this Law stipulates otherwise. Every year the auditing programme must encompass: 1) the budget of the Republic of Serbia; 2) the organisations of obligatory social insurance; 3) the appropriate number of local government units; 4) the operations of the National Bank of Serbia pertaining to the use of public funds; 5) the appropriate number of public companies, firms and other legal entities established by a direct or indirect beneficiary of public funds, wherein the said beneficiary owns a share of the capital or participates in the management. The Institution shall be obligated (Article 41) immediately to submit a request for initiating criminal law proceedings, or criminal charges to the authorised body, if it should discover, in the course of the auditing procedure, materially significant acts indicating elements of violation, that is, a criminal offence.

The Institution shall inform the National Assembly by submitting (Article 43): a) the annual report on its work; b) special reports during the year; c) reports on auditing the annual balance sheet of the Republic budget, the balance sheets of the financial plans of organisations of compulsory social insurance and the consolidated financial reports of the Republic.

Towards the end of 2009, the State Audit Institution published its Report on the audit of the budget for the year 2008, based on a review of a part of the documentation of 14 ministries,

three head offices and the Directorate of the Property of the Republic of Serbia. The President of the Institution explained that flaws had been discovered in the accounting system, especially with regard to the data from general ledger of the Treasury, which was not kept properly. In addition to this, it was pointed out that the internal audit and control were not organised in accordance with the Law, that there was no complete and updated record of state property, and that irregularities had also been detected with regard to short-term receivables and obligations.

According to media reports, "immediately after the publication of the report, representatives of some ministries voiced public criticism of the Institution and its work, claiming that there were parts of the report that were not accurate". For years, there had been talk about the need for state audit, and it was only in September 2007 that the Law establishing this Institution was adopted. "The scenario is the same as in the case of establishing other anti-corruption institutions: they waited for the auditors, proposed by political parties, to be elected, then there were no suitable offices in which the State Audit Institution could work properly, then no one wanted to work for this institution because the salaries were too low. The Rules of Procedure regulating the institution were only adopted by the National Assembly in January 2009, when the conditions were fulfilled for the Institution to start performing the duties it is authorised to carry out." It should also be pointed out that the auditors examined only "samples of the transactions that were performed", that is to say, not the complete financial operations of the institutions audited. In addition to the 18 institutions that were monitored, there are more than 8,000 that are not subject to auditing, among them public companies, which means that this year the auditors merely "scratched" the surface of the Treasury.<sup>73</sup>

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73 Cf.: "Vreme", no. 988, 10th December 2009, *Čudesni svet državne kase* [The Wonderful World of the Treasury] (Why the first Audit report on how the taxpayers' money is spent caused a political storm, why the ministers do not feel that this concerns them, and whether there will be any consequences.)

## V. The Control of Independent State Bodies by the National Assembly

For the purpose of realising human rights, the values of a democratic society and the rule of law, the independent state bodies themselves, established for the purpose of efficiently controlling public institutions, are subject to appropriate forms of control. There are two basic forms of control that are at the disposal of the National Assembly in relation to independent bodies. On the one hand, the National Assembly has the sovereign right to decide on appointing and dismissing, and on the other, independent bodies submit reports to the National Assembly on “the state of affairs” in the area for which they have been established. Finally, the actual passing of a law by the National Assembly to establish a corresponding independent body and determine its functions clearly points to their mutual relations.<sup>74</sup> The legal regulation of the status of independent bodies in relation to the National Assembly in Serbia, first of all, with regard to some aspects of control and surveillance effected by the National Assembly in relation to independent bodies, is regulated by the corresponding provisions of the Constitution and some laws.

a) The Protector of Citizens (the Ombudsman), according to the Constitution, is an independent state body that protects the rights of citizens and controls the work of state administration bodies, the body authorised for the legal protection of the property and interests of the Republic of Serbia, and other bodies and organisations, companies and institutions entrusted with public authority (Article 138/1). The National Assembly elects the Protector of Citizens and relieves him/her of duty by a majority vote, monitors his/her work (Article 99/2/5, Articles 105/2/14, 138/3) and revokes his/her immunity (Articles 105/2/7, 138/4). The Protector of Citizens is elected and dismissed by the National Assembly, in accordance with the Constitution and the law (Article 138/3). For his/her work, the Protector of Citizens is answerable to the National Assembly (Article 138/4). The Protector of Citizens is not authorised to control the work of the National Assembly, the President of the Republic, the Government, the Constitutional Court, courts of law and public prosecutors’ offices (Article 138/2). A law shall be passed on the Protector of Citizens (Article 138/5).

According to The Law on the Protector of Citizens, the Protector of Citizens is elected by the National Assembly of the Republic of Serbia, acting on a proposal submitted by the committee authorised to deal with constitutional matters (Article 4). The Protector of Citizens and Deputy Protector of Citizens cannot be held responsible for opinions, criticism or proposals expressed while performing their function. The Protector of Citizens and Deputy Protector of Citizens may not make statements that are political in character (Article 10).

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<sup>74</sup> It should not be forgotten that, apart from the parliament, the control function, especially with regard to the specific decisions of an independent body, is effected by courts in the course of appropriate proceedings, and also by the media.

The Protector of Citizens submits a regular annual report to the National Assembly, containing information about his/her activities in the preceding year, the perceived shortcomings in the work of administrative bodies, and proposals for improving the position of citizens in relation to administrative bodies. The report on the Protector's work must be submitted by March 15th the following year at the latest, and is published in the "Official Gazette of the Republic of Serbia" and on the website of the Protector of Citizens, and is also forwarded to the media. During the year, the Protector of Citizens may submit special reports as the need arises (Article 33).

The Protector of Citizens has the right to propose laws from the scope of his/her authority. The Protector of Citizens is authorised to submit to the Government or to the National Assembly an initiative for amending a law and other regulations and general acts, if he/she is of the opinion that citizens' rights are violated on account of the shortcomings of the regulations themselves, and also to initiate the passing of new laws, other regulations and general acts, if he/she is of the opinion that it is of importance for realising and protecting the rights of citizens. The Government, or the authorised committee of the National Assembly, shall be obligated to take these initiatives submitted by the Protector of Citizens into consideration. The Protector of Citizens is authorised to submit his/her opinion to the Government and to the National Assembly, in the course of the procedure for preparing regulations, concerning proposals of laws and other regulations if they regulate matters that are of importance for protecting the rights of citizens (Article 18).

The Protector of Citizens is dismissed by the National Assembly, acting upon a proposal submitted by the authorised Committee, or by a minimum of one-third of the overall number of representatives of the people. If a proposal for dismissing the Protector of Citizens is submitted by the Committee, it is necessary that the majority of the overall number of Committee members should vote in favour of the proposal. The Protector of Citizens may only be dismissed in the following cases: a) if he/she does not perform his function professionally and conscientiously; b) if he/she performs another public function or professional activity, if he/she performs another duty or job that could influence his/her autonomy and independence, or if he/she acts contrary to the law regulating the prevention of conflict of interest in the course of performing public functions; c) if he/she is convicted of a criminal offence that makes him/her unfit to perform this function. The Protector of Citizens has the right to address the representatives of the people in the course of a National Assembly session when the Assembly is to decide on his/her dismissal (Article 12).

b) The Commissioner for Information of Public Importance and Personal Data Protection. According to the Constitution, everyone has the right of access to information that is in the possession of state bodies and organisations entrusted with public authority, in keeping with the law (Article 51/2).



According to The Law on Free Access to Information of Public Importance, for the purpose of realising the right of access to information of public importance possessed by public administration bodies, this Law establishes the Commissioner for Information of Public importance (the Commissioner) as an autonomous state body, independent in exercising his/her authority (Article 1/2).

The National Assembly of the Republic of Serbia elects the Commissioner, acting on a proposal submitted by the committee of the National Assembly in charge of information (Article 30).

Within three months of the end of the fiscal year, the Commissioner shall submit to the National Assembly his/her annual report about the activities of administrative bodies undertaken for the purpose of implementing this Law, and also about his/her actions and expenditures. In addition to this, the Commissioner may submit other reports to the National Assembly when he/she considers it necessary (Article 36).

The decision on the termination of office of the Commissioner is passed by the National Assembly. The Commissioner shall be dismissed if he/she is convicted and receives a custodial sentence for a criminal offence, if he/she becomes permanently incapacitated, if he/she performs a function or is employed with another state body or political party, if he/she loses citizenship of the Republic of Serbia, or if he/she does not perform his/her job professionally or conscientiously. The procedure for dismissing the Commissioner will be initiated upon a proposal submitted by one-third of the representatives of the people (Article 31).

The Constitution stipulates that protection of personal information shall be guaranteed. Everyone has the right to be informed about the data on his/her person that have been collected, in accordance with the law, and the right to judicial protection in the case of abuse of such data (Article 42).

According to The Law on Personal Data Protection, the duties pertaining to the protection of personal information shall be performed by the Commissioner for Information of Public Importance and Personal Data Protection (the Commissioner), as an autonomous state organ, independent in exercising his/her authority (Article 1/3). The Commissioner shall forward the report that he/she submits to the National Assembly to the President of the Republic, the Government and the Protector of Citizens, and shall place it at the disposal of the media in an appropriate manner (Article 44/3). The Commissioner for Information of Public Importance, established by the Law on Free Access to Information of Public Importance, shall continue working under the title of the Commissioner for Information of Public Importance and Personal Data Protection (Article 59). The provisions of the Law on Free Access to Information of Public Importance shall apply accordingly to the procedure for dismissing the Commissioner (Article 58).

c) According to the Law on Anti-corruption Agency, the Agency is an autonomous and independent state body, accountable to the National Assembly for the duties performed within its remit (Article 3).

The bodies of the Agency are the Board and the Director (Article 6). The Board of the Agency appoints and dismisses the Director of the Agency, decides on complaints submitted against the decisions of the Director pertaining to measures passed in accordance with this Law, adopts the annual report on the work of the Agency, which it submits to the National Assembly, monitors the work and the financial situation of the Director, proposes the budget funds for the work of the Agency, passes the Rules of Procedure regulating its work and performs other duties stipulated by this Law (Article 7/1).

The Board of the Agency consists of nine members. Board members are elected by the National Assembly, acting on a proposal submitted by the Administrative Committee of the National Assembly, the President of the Republic, the Government, the High Court of Cassation, the State Audit Institution, the Protector of Citizens and the Commissioner for Information of Public Importance, based on their joint agreement; and by the Social-Economic Council, the Bar Association of Serbia; the Journalists' Association of the Republic of Serbia, based on their joint agreement (Article 9).

A member of the Board of the Agency shall be dismissed if he/she does not perform the function of a Board member in a conscientious manner, if he/she becomes a member of a political party, if he/she violates the reputation or the political neutrality of the Agency, if he/she is convicted of a criminal offence that makes him/her unworthy of the function of a Board member, or if it is established that he/she has violated this Law. The decision on relieving a Board member of duty shall be passed by the National Assembly, acting on a proposal submitted by the Board of the Agency (Article 13).

The Agency shall be obligated to submit the annual report on its work to the National Assembly by March 31st of the current year, for the preceding year, at the latest. This report shall also contain a report on the implementation of the Anti-corruption Strategy, Action Plan and sector action plans. The Agency may also submit special reports on its work based on a request of the National Assembly, or acting on its own initiative (Article 26).

d) According to the Constitution, the State Audit Institution is the highest state body for auditing public funds in the Republic of Serbia; it is autonomous and subject to monitoring by the National Assembly, to which it is answerable (Article 96). The State Audit Institution controls the realisation of all budgets. The National Assembly reviews the proposal of the budget balance sheet, having obtained the opinion of the State Audit Institution (Article 92/3-4).

According to the Law on the State Audit Institution, the Institution is the highest state body for auditing public funds in the Republic of Serbia. The Institution is an autonomous and independent state organ. It is accountable to the National Assembly of the Republic of Serbia for performing the duties from its scope of authority (Article 3).

The Institution has a President, a Vice-President, Council, auditing services, and support services (Article 12). The Council is the highest body of the Institution. The Council is a collegiate body. It consists of seven members, namely: the Chairperson, Deputy Chairperson and five members. The Chairperson of the Council is at the same time the President of the Institution (Article 13). The President of the Institution is the general state auditor and manager within the Institution (Article 25).

The Chairperson, Deputy Chairperson and members of the Council are elected and dismissed by the National Assembly, on the basis of a majority vote in the course of a session attended by the majority of the overall number of representatives of the people, acting upon a proposal submitted by the authorised working body of the Assembly. The authorised working body reviews the applications, establishes whether the conditions stipulated by this Law have been fulfilled and compiles a list of candidates which it forwards to the National Assembly. The proposal containing a list of candidates must be justified, and must have the candidates' statements to the effect that they accept the nomination attached. If the proposed candidates for the Chairperson, Deputy Chairperson and members of the Council fail to get the requisite majority of the representatives' votes, the authorised working body of the National Assembly shall draw up a proposal for new candidates (Article 19). A Council member shall be dismissed: if he/she has received a custodial sentence from court of law of a minimum of six months, or for a criminal offence punishable by a shorter prison sentence but rendering him/her unfit to perform this function; if he/she has been pronounced unsound of mind by a court; if he/she has taken over a job or a function that is incompatible with the function of a Council member; if he/she acts contrary to the Constitution and the law (Article 22). If there is a valid reason for the cessation of this function or for the dismissal of a Council member, the Council shall inform the National Assembly of this forthwith. A motion for the dismissal of a Council member may be initiated by a minimum of 20 representatives of the people. Such an initiative shall be reviewed by the authorised working body of the National Assembly. Following a discussion and a vote, the authorised working body of the National Assembly submits a report to the Assembly, containing a proposal to the effect that the Assembly should decide on the dismissal of a Council member or reject the motion. The authorised working body of the National Assembly may propose to the Assembly, of its own initiative, that a Council member be dismissed when, on the basis of continuous monitoring of the work of the Council in accordance with the law, or on the basis of information obtained otherwise, it establishes that there are grounds for dismissal (Articles 23-24).

The Institution informs the National Assembly of its activities by submitting: an annual report on its work, special reports in the course of the year, the report on auditing the Republic budget balance sheet, the balance sheets of the financial plans of organisations in charge of compulsory social insurance and the consolidated financial reports of the Republic (Article 43). The Institution informs the local government assemblies of audits pertaining to the subjects of auditing that are within their jurisdiction. These reports are simultaneously forwarded to the National Assembly (Article 44). The authorised working body of the National Assembly, after reviewing the Institution's reports, submits its view and recommendations to the Assembly in the form of a report. On the basis of essential facts and circumstances pointed out in paragraph 1 of this Article, the National Assembly decides on the recommendations and measures proposed, and on the deadlines for their implementation. The National Assembly may require additional explanations from the Institution concerning certain facts and circumstances (Article 48).



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## The Parliament and Independent Bodies

Following the political changes in Serbia of the year 2000, several independent, regulatory and supervisory bodies have been introduced; their role is to monitor the situation in certain areas, that is, above all to act as a corrective factor to executive power. These bodies are often referred to as “the fourth branch of power”. The National Assembly has adopted a number of laws establishing these bodies.<sup>75</sup> The four most important independent bodies elected by the National Assembly of Serbia are the Protector of Citizens, the Commissioner for Information of Public Importance and Personal Data Protection, the State Audit Institution and the Anti-corruption agency. In this text we deal, first of all, with the relations between the parliament and independent bodies, which is of exceptional importance for democratic consolidation in Serbia. The most important issue burdening parliamentarism in the country is the existence of the institution of blank resignation notices, which means that the representatives of the people are answerable to their political parties and not to the people, meaning that the representatives of the people represent political parties, not citizens. The position of independent bodies is often determined by the Constitution, most often in the case of the Ombudsman or the Auditor General, but sometimes this applies to bodies dealing with matters from the sphere of free access to information and the protection of personal information. The Constitution of Serbia establishes the position of the institution of Ombudsman, under the title of the Protector of Citizens (Article 138), practically confirming its status and character, envisaged by the Law on the Protector of

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<sup>75</sup> The Law on Public Procurement, 4.7.2002, 39/02; The Law on Financing Political Parties, 18.7.2003, 72/03; The Law on Preventing Conflict of Interest in the Course of Exercising Public Functions, 20.4.2004, 43/04; The Law on Amendments to the Law on Public Procurement, 21.5.2004, 55/04; The Law on Free Access to Information of Public Importance, 2.11.2004, 120/04; The Law on the Protection of Competition, 16.9.2005, 79/05; The Law on the Protector of Citizens, 16.9.2005, 79/05; The Law on the State Audit Institution, 14.11.2005, 101/05, The Law on the Anti-corruption Agency, 23.10.2008, 97/08.

Citizens, adopted somewhat earlier (in September 2005). The Constitution of Serbia adopted in 2006 contains no adequate general clause providing constitutional grounds for independent bodies established by the National Assembly.

### **What is the Purpose of the Existence of Independent Bodies?**

There are a number of reasons for the establishment and existence of independent bodies. These include: protection of human rights and the rule of law; external control of the government; the transparency, accountability and public integrity of state institutions; achieving the objectives of good governance and care of public importance. In parliamentary democracies, the issues of accountability and public integrity are very important indeed, reflecting efforts to achieve a responsible government that works in the interests of all its citizens. That means that governance should be in keeping with the citizens' preferences as expressed in the elections and with the pre-election promises given by those running for office. The purpose of these institutions is to ensure that laws are observed and to control the work of state bodies. The majority of these bodies are anti-corruption oriented (respect of human rights, suppressing corruption and money laundering, monitoring the lawfulness of public procurement procedures, the protection of competition, preventing conflict of interest, ensuring access to information of public importance, control of public expenditure, control of the work of administrative bodies and public companies). The establishment of some independent bodies has been conditioned by the process of European integration. The existence of the Ombudsman, and the State Audit Institution, are expressly stated as a precondition in several EU documents pertaining to Serbia's accession to the European Union. In terms of the democratisation of the governance process, the citizens do not express their sovereignty merely by slipping their ballots into ballot boxes once every four years, which is the basis of representational democracy, but also through various forms of political engagement offered by participatory democracy during the period between elections. In their work, independent bodies rely on both the parliament and on civil society (the citizens, citizens' associations and the media).

### **An Attempt at Classification**

Even though they have similar objectives, independent bodies differ considerably in terms of their legal status, the manner of being elected and their authority. There are bodies established by the parliament, as opposed to those established by the government. In terms of their functions and authority, those established by the parliament can be divided into regulators, controllers and correctors. Those established by the government, as a rule, are administrative bodies or agencies of sorts. While the role of regulators is to regulate a certain area, that of controllers

and correctors is primarily to monitor and influence the work of the executive power, for example the role played by the State Audit Institution, the Protector of Citizens, the Commissioner for Information of Public Importance and Personal Data Protection. Bodies established in accordance with the Constitution, or particular laws, whose management bodies have been elected by the parliament, have powers delegated to them by the parliament. Independent bodies are established in order to be the basis and guarantee of democratic order, and to guarantee the public integrity of state institutions.

**The Protector of Citizens (the Ombudsman)** has a primarily preventive and control role concerning the protection of human rights, thus constituting a defence against state authorities. The Ombudsman was first established in Sweden by the Swedish Constitution of 1809, as a special rapporteur to the Swedish Parliament, with a view to supervising the monarch's observance of the political agreement on the division of powers.

**The Commissioner for Information of Public Importance and Personal Data Protection** (hereinafter referred to as: the Commissioner) is an autonomous state organ, independent in exercising his/her authority, established by the Law on Free Access to Information of Public Importance, for the purpose of ensuring the realisation of the right of free access to information of public importance.<sup>76</sup> The Commissioner is elected by the National Assembly of Serbia.<sup>77</sup> The Commissioner's functions are both control and corrective when it comes to realising one of the fundamental rights – the right of access to information of public importance.

**The State Audit Institution's** role is to audit the state budget and balance sheet, and also to establish that public funds have been properly spent. This institution has lately become one of the fundamental democratic institutions, guaranteeing the Government's accountability to the citizens. Money from the budget is the citizens' money, and that is why it is important for those in positions of power to be able to manage the citizens' money honestly.

**The Anti-Corruption Agency** officially started working on January 1st 2010. The Board of the Agency, in accordance with the law passed in 2008, was constituted in April 2009, following which the Agency's Director and Deputy Director were elected. The Agency took over the duties that were performed by the Republic Committee for Resolving Conflict of Interest. As far back as 2005, the National Assembly adopted the Anti-corruption Strategy, and the implementation of this Strategy will be the Agency's task.

These bodies, even though they are quite diverse in terms of their characteristics, have one common characteristic – the basic reason for their establishment is to strengthen the public integrity of state institutions in keeping with the principles of transparency and accountability, for

<sup>76</sup> For more detailed information about the Commissioner, see: <http://www.poverenik.org.yu>

<sup>77</sup> The National Assembly elected the Commissioner for Information of Public Importance (Rodoljub Šabić) on 22.12.2004. After the new Constitution was adopted, mr. Rodoljub Šabić was re-elected on 29.06.2007.

the purpose of good governance. The reasons for the development of various anti-corruption agencies have been reviewed in some detail by Susan Rose-Ackerman, who gives the inefficiency of the public prosecutor's office, low credibility of executive and judicial organs, the widespread presence of corruption in developing societies, etc. as the main reasons for their proliferation. Hence independent state institutions offer the possibility of preventing and resolving these problems.<sup>78</sup> The establishment of these bodies was an integral part of the parliament's activities in the struggle against corruption.<sup>79</sup>

### **The Independence of Independent Bodies**

The two basic characteristics of independent bodies are their independence and accountability. In order to qualify for the "independent" attribute, it is necessary for them to have a degree of autonomy, to have quasi-executive, quasi-judicial or quasi-legislative power, and to be established and have their management structures elected by the parliament, based on the principle of delegated authority.<sup>80</sup> The independence of independent bodies does not mean their being separate or excommunicated from other organs, but being autonomous in their work. The essential element of the independence of independent bodies is their complete financial independence in relation to the government, that is, the executive power. That is why it is important for the budget of these bodies to be tied to the parliament rather than the government. However, until the question of the budget of the National Assembly of Serbia itself has been resolved in an orderly manner, the problem of financing, and partly of the independence of independent bodies will persist.

An important factor of the autonomy of independent bodies is their staff, resisting political and other pressures. When selecting the management structures of independent bodies, what should be resisted is the temptation of parties to make them part of the spoils used to line the pockets of party staff. As an important form of protection and personal independence, it is necessary to precisely envisage the conditions for and the procedures for appointment and dismissal of officials.

In order for them to be able to exercise their authority freely and without obstruction, it is necessary to provide adequate forms of protection and immunity to independent bodies. By operative independence, we mean the freedom of these bodies from any external pressures, the timely execution of their decisions, and according respect to the recommendations made by these bodies.

<sup>78</sup> Susan Rose-Ackerman, *Corruption and Government*, Cambridge University Press, 1999.

<sup>79</sup> Orlović Slaviša, "Skupština Srbije u borbi protiv korupcije [The National Assembly of Serbia in the Struggle Against Corruption]", in: *Borba protiv korupcije u Srbiji, Od nacionalne strategije do nacionalnog plana [The Struggle against Corruption in Serbia, From the National Strategy to the National Plan]*, Institut društvenih nauka and Friedrich Ebert Stiftung, Belgrade, 2006.

<sup>80</sup> Cf. "Regulatory Authorities in South East Europe", OECD and Yatahanas, *ibid*.



One of the most important issues when it comes to the efficiency of the work of independent bodies is the absence of the mechanisms of sanctions to be passed by them.

In the past, the relationship between an established independent body and its founder (the legislator) has not been very clearly or precisely defined, nor has that between an independent body and the executive power. One of the problems pertaining to the functioning of independent bodies is that the executive authorities often resort to obstruction when it comes to their obligations towards these bodies. What is essential for the work of independent bodies is the support of administrative bodies, above all, the ministries.

### **The Place and the Role of Independent Bodies in the Context of the Division of Powers**

The principle of the division of powers originated from the logic of restricting the authorities and their power. The restriction of power is necessary because of its corruptible nature, for any power not subject to control and restrictions tends to become absolute and is susceptible to corruption. This has best been summed up by Lord Acton – “*Power tends to corrupt, absolute power corrupts absolutely*”. Even though James Harrington was among the first thinkers in the New Age to develop the idea of the balance of powers,<sup>81</sup> the best-known contributions to the division of powers theory was made by John Locke and Charles Montesquieu, and afterwards, under their influence, by Thomas Jefferson and James Madison in the United States. In his *The Second Treatise on Government*, Locke wrote that, “the true remedy of force without authority, is to oppose force to it”. According to Locke, the only supreme power that can exist is that represented by the parliament.<sup>82</sup> In his work *The Spirit of the Laws*, Montesquieu emphasises that only “power stops power”. In fact, he divided Locke’s executive power (rightly) into executive and judicial powers.<sup>83</sup> In Chapter six of Volume 11 of *The Spirit of the Laws*, which first came out in Geneva in 1789, Charles Montesquieu points to the principle of the division of powers: “All would be lost if one and the same man or body of dignitaries, be it noblemen or common folk, exercised the aforementioned three powers, namely, the power of passing laws, the power of executing public decisions and the power of bringing to trial for crimes or adjudicating lawsuits between private persons.”<sup>84</sup> Montesquieu pointed to the corruptible nature of power: “but time and time again one sees that every man who has power tends to abuse it and go on abusing it until he comes across a barrier”, adding, “to prevent the abuse of power, it is necessary to arrange things so that one power restricts another”.<sup>85</sup> The principle of the division of power is most closely associated with the American Constitution. Americans speak less of the separation

81 Quoted from Vojislav Stanovčić, *Vlast i sloboda [Power and Freedom]*, pg. 201

82 Vojislav Stanovčić, *ibid.*, pg. 232

83 Vojislav Stanovčić, *ibid.*, pg. 333

84 Montesquieu Charles, (1989), *O duhu zakona [The Spirit of the Laws]*, Filip Višnjić, Belgrade, pg. 76

85 *Ibid.*, pg. 75

of powers and more of the principle of checks and balances, thus placing elements of the division of powers and elements of mixed powers next to one another. Today, the principle of the division of powers presupposes the so-called horizontal (functional) division into three branches of power: the legislative, executive and judicial powers.<sup>86</sup> The very term “the fourth branch of power” points to the specific character of independent bodies. From the point of view of legitimacy and autonomy, a better position for independent bodies is ensured by their establishment or election by the parliament, rather than the government. Two opposing attitudes concerning the position and the authority of independent bodies are the principle of non-delegation and the principle of intelligible delegation.

### **Oversight over the Executive Power (the Government)**

One of the most important roles and powers of the parliament today is the oversight over the government, that is, of the executive power. In order to perform this role successfully, the parliament must be equipped with adequate resources, have access to the requisite information and the possibility of gaining insight into the government’s documents. For the purpose of controlling the government, the parliament has at its disposal a number of instruments such as: the institute of representatives’ questions – known as *question time*, interpellation, parliamentary investigation, voting for or against adopting the budget, electing and relieving the government of duty, and public hearings. In view of the trend of the predominance of the executive branch (the government) over the legislative branch (the parliament), there is a need for more efficient control mechanisms. Apart from internal control within the parliament, there is also external control of the government. One of the most important roles of independent bodies is oversight and monitoring of the executive branch. Since the parliament is often unable to exercise adequate oversight for a number of reasons (it is slow to react, lacks sufficient expert knowledge, etc.), it transfers a part of its authority onto independent bodies. One of the tasks that the parliament is insufficiently engaged in performing is monitoring the implementation of laws, that is, monitoring the realisation and implementation of the laws that are passed. When it comes to this task, independent bodies are an indispensable partner to the parliament.

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86 Author’s note: There exist other divisions and mechanisms for restricting power, such as the vertical (spatial) division between different levels of power, such as federalism, regionalism, local government, decentralisation, the principle of subsidiarity and a corresponding division of authority. The third and the fourth dimensions comprise the social and political division of power, the participants in social power being various social groups, classes, parties, organisations, movements and similar subjects. This presupposes social, economic, political and cultural pluralism, as well as an open civil society with a liberal political culture that recognises differences, competition (contestation), tolerance, dialogue and compromise as a way of reaching an agreement. It is what Robert Dahl, the founding father of the pluralist theory of democracy, means by the term “polyarchy”.

## Joint Work and Partner Relations

Independent bodies must develop partner relations with the parliament, for they are engaged on the same or similar tasks, and their functioning depends on this to a great degree. Independent bodies are partners to one another. Through joint actions and operations, they create a synergetic effect. In order to be more successful in their activities, these bodies must be open to the media, the citizens, citizens' associations, that is, all the protagonists of civil society. Various independent bodies have various mechanisms and instruments at their disposal. In countries undergoing transition, independent bodies are struggling to establish their authority. For example, a recommendation by the Ombudsman, even though it is not formally binding, is usually followed in stable democracies, as is the case in Sweden. The Ombudsman cannot implement his/her procedure towards a private person or towards the private sector, which is due to the nature of his/her position, whereas the Commissioner can do so, which is of particular importance in the sphere of protection of personal data. As opposed to the Ombudsman, who only gives recommendations, the Commissioner passes binding decisions, and only administrative procedures may be initiated against them before an administrative court; otherwise, the body in charge or the private person in question must execute it. The Protector of Citizens, for example, may propose a law from the sphere of his/her authority, give expert opinions on proposed laws, propose amendments and the like. So far, the National Assembly of Serbia has adopted more than 20 amendments to laws proposed by the Government submitted by the Protector of Citizens. As Susan Rose-Ackerman points out: "The credibility of new institutions is reflected in the increased number of complaints that they have received since they were established, and in the high percentage of complaints that are not anonymous."<sup>87</sup> This is illustrated by the following facts. In the course of the first three years of his work, the Commissioner had around 5,000 cases to work on, mostly complaints, of which around 4,000 were resolved by 2008. Around 90 % of those from whom information of public importance had been withheld were able to obtain the said information after turning to the Commissioner for Information. Around 7 % of the complaints were rejected. In a small percentage of cases, when information could not be obtained even after the Commissioner's order to that effect, the reason for this was that the Government of Serbia, whose legal obligation it was, did not activate the mechanisms for ensuring that the Commissioner's decisions were executed. In as many as 96 % of the cases when complaints were lodged, they had to do with the so-called "silence of the management", which this law does not allow but sanctions. According to the data from the reports, the number of those seeking information keeps increasing: in 2007, it was higher by more than 50 % than in 2006, and more than 4.5 times higher than in 2005. Information is requested by citizens,

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<sup>87</sup> Susan Rose-Ackerman (2007), *Corruption and Government*, Službeni glasnik, Belgrade, pg. 170

journalists, the media, political parties, even administrative bodies themselves.<sup>88</sup> More than 8,000 citizens have addressed the Protector of Citizens, and their complaints mainly have to do with laws and subordinate acts, so that the National Assembly, through the Protector of Citizens, gets a clear picture of how laws are implemented in practice and where their shortcomings lie.

### **Whom are Independent Bodies Accountable to?**

One of the open and important questions for the work of independent bodies is the issue of their accountability. What we are dealing with here is the accountability of the accountable, that is, the old question of who oversees the overseers themselves. An independent body is not, and cannot be, without any control whatsoever. For the purpose of establishing clear accountability of independent bodies, the most important issue is that of precisely defining their relations with their founders. The relationship between an independent body and its founder (for the most part, the parliament) is primarily manifested as a question of the scope of delegated authority. Independent bodies are answerable to their founder or to whoever elects their management structures. In this way, the role of the independent body in question is prevented from turning rogue in a legal-political sense, and what is thus ensured is the realisation of the aim for which the body was established in the first place, while at the same time making that body accountable for its activities. To the extent that independent bodies belong to the “powers-that-be”, that is, constitute the “fourth branch of power”, it is necessary to establish control and supervision over that power. The authority in question is limited, for these bodies have, first of all, a delegated regulatory, control and corrective function. For the purpose of establishing the accountability of these bodies, which would gain credibility by way of personal example, it is necessary to establish internal control mechanisms within the framework of their organisational structure, and also to provide clear insight into their work for the public. The majority of independent bodies, even one of the oldest among them – the National Bank, do not have adequate mechanisms of internal control. The State Audit Institution also knows no internal surveillance mechanism. Independent bodies forward reports on their work to the National Assembly, but the law does not prescribe the consequences of a possible refusal on the part of the National Assembly to adopt such reports. Reports submitted by independent bodies should be reviewed both by the committee in charge and by the National Assembly in the course of a plenary session; within the framework of the National Assembly, a special body could be set up for the purpose of cooperating with independent bodies, and this body should deal primarily with operative-technical matters pertaining to relations between the parliament and independent bodies. Open questions between the parliament and independent bodies can be resolved and

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88 We have written about this in: Slaviša Orlović, *Politički život Srbije, između partokratije i demokratije* [Political Life in Serbia, between Partocracy and Democracy], Službeni glasnik, Belgrade, pg. 192-193

institutionalised by the Law on the National Assembly or the Rules of Procedure dealing with the manner of work of the National Assembly. “The fourth branch of power” must, just like any other power, be subject to the control of the citizens and the public.

### **The Relations Between Independent Bodies and Civil Society**

What is of importance for the work of independent bodies is not just cooperation with the parliament, but also cooperation with civil society. Civil society appears as a proponent of members of some independent bodies, thus confirming their democratic legitimacy, but also ensuring that the interests of the public are taken into consideration when creating and implementing public policies. Free media are very important for the work of independent bodies, for they can point out irregularities in the work of some state organs, and they can also be a means of exerting pressure.

### **Conclusion**

The main form of assistance and the framework of cooperation between independent bodies and the parliament is reflected in the exercising of one of its most important powers, namely, oversight and control of the government (the executive branch) and strengthening public accountability. Independent bodies can help the parliament most in this joint undertaking. If independent regulatory bodies are to be rightly referred to as the fourth branch of power, the greatest problem to be resolved is a lack of executive authority. In Serbia, independent bodies are still in their formative phase, and that is why it is especially important to establish standards and principles, without politicising and compromising the idea and the institution. One of the possibilities pointing in that direction is the preparation of certain codes of ethics, as well as their proactive orientation.



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and Personal Data Protection of the Republic of Serbia

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## **The Position of the Commissioner for Information of Public Importance**

The grounds for the need to reform and re-evaluate the traditional division into legislative, executive and judicial powers are multi-fold. The delegation of authorities that were once traditionally reserved for these branches of power is justified primarily by the areas in which the delegation of authority is effected. Certain areas, precisely on account of their specific character, require that persons who are to deal with those issues should possess specific kinds of knowledge. On the other hand, certain areas, especially human rights, are of great importance for society, and as such, need to have special treatment. The cumbersome apparatuses of the three traditional branches of power, which is what they are like in most countries, cannot deal with modern, very dynamic processes. Hence, the establishment of independent bodies almost never, especially not in the long term, represents an additional expenditure from the state budget. It is precisely the opposite – the establishment of these bodies aims to adequately and promptly fulfil the needs of society, otherwise, damage would occur.

In comparative legal practice, these independent bodies have various roles, powers and degree of independence. Independent bodies and agencies may have the role of advisers to a particular branch of power, the key or decisive role in the enforcement of a particular law, and/or that of the makers of legislative decisions, the so-called regulatory bodies.

The level of independence of a body is measured by several criteria. According to formal criteria, one can speak of bodies whose establishment has been determined by the Constitution or by law. A constitutional norm certainly guarantees a greater degree of independence, at

least in formal terms. From the point of view of jurisdiction, these bodies may have an advisory, quasi-judicial and/or regulatory role. The jurisdiction and the scope of a body's decisions are determined by the level and the source of control over the work of the body itself. However, often enough it is not a matter of merely formal criteria but also of how these formal criteria are fulfilled in practice, especially on a daily basis. In practice, independence in terms of determining and managing financial resources and/or managing human resources has proved to be the key issue when it comes to the actual level of independence of an organ. It is important to note that, in a democratic society, one never speaks of the independence of a body in absolute terms, which would presuppose there being no control whatsoever. Without control mechanisms, each authority, each body is a danger to society. Thus, each independent body, including those bodies whose role it is to exercise control over others, is subject to the control of other bodies. Naturally, what we are referring to here are legally founded and legitimate forms of control. Therefore, proceeding from the premise that the degree of independence of a body, and thereby the level of control of the work of that organ, varies; when determining the level of independence of a body, one has to take into considerations all aspects.

Serbia is no exception when it comes to reforming the constitutional legal order. The first decade of the 21st century has been marked by an expansion of independent state bodies. The role of independent bodies and the need for their existence, generally speaking, are equal to those existing in comparative legal practice. An additional characteristic of Serbia is that, apart from the need of the society itself, also exist obligations towards those international organisations of which Serbia is a member or aspires to become a member of in the foreseeable future. That may be the *differencia specifica* of the state of Serbia in relation to the states whose standards it is striving to achieve – the position of independent bodies, and especially the attitude of other administrative bodies to these bodies has been accepted as more of an obligation and not, as it should be, the need for society to preserve and promote values, along with redefining the state authorities as a provider of services to the citizens and striving to depoliticise certain areas, at least partially. Understanding the importance, the need for and the clear role of independent bodies constitutes a precondition for the success of their work, that is to say, of the successfulness of meeting precisely those needs of the citizens and society in general for the sake of which these bodies have been established in the first place.

## The Commissioner for Information of Public Importance – the Position and Role in the Legal System of Serbia

The Commissioner for Information of Public Importance and Personal Data Protection was established by the Law on Free Access to Information of Public Importance (Article 1) in November 2004,<sup>89</sup> as an autonomous state body, independent in exercising his/her authority. In many respects, the position of the Commissioner was a pioneering one. First of all, the Commissioner for Information is the first autonomous independent state body whose authority pertains to the realisation of one of the basic human rights – the right of access to information. At the same time, the Commissioner was among the first bodies whose role is to control other state bodies.<sup>90</sup> When he/she decides on a case, his/her decision, if it is in favour of the beneficiary of the right of access to information, is final, and the state body concerned cannot bring the Commissioner's decision into question. Based on this Law, public administrative bodies, at least seemingly, were placed in a subordinate position to citizens.

By the Law on Protection of Personal Information from 2008,<sup>91</sup> the Commissioner was given authority over this sphere; the Law also stresses the Commissioner's autonomy and independence in exercising his/her function. The independence of the Commissioner in this area is at the same time an express obligation on the part of Serbia, originating from the Stabilisation and Association Agreement between the European Union and its members, on the one hand, and the Republic of Serbia, on the other,<sup>92</sup> and also from the Additional Protocol to Convention 108 of the Council of Europe for the Protection of Individuals with Regard to Automatic Data Processing.<sup>93</sup>

However, the Commissioner's independence is not based only on the provisions clearly determining the position of the Commissioner for Information as autonomous and independent, but also on the provisions pertaining to the conditions for electing and relieving the Commissioner of duty, and on the mechanisms of controlling his/her work. Also, his/her position is determined through the provisions pertaining to his/her authority and the powers that he/she has.

89 "The Official Gazette of the Republic of Serbia", nos. 120/2004, 54/2007 and 104/2009.

90 The Law on Public Procurement ("The Official Gazette of the Republic of Serbia", nos. 39/2002, 43/2003, 55/2004, 101/2005 and 116/2008) stipulates the establishment of the Commission for the Protection of Rights, with a view to ensuring the protection of the rights of bidders and public importance in the public procurement procedures involving state organs. However, this Commission has not yet been established.

91 "The Official Gazette of the Republic of Serbia", no. 97/2008.

92 The Stabilisation and Accession Agreement ("The Official Gazette of the Republic of Serbia – International Treaties", no. 83/2008 ); Article 81 – "Protection of personal information", states: "Serbia shall adjust its legislature pertaining to the protection of personal information with *acquis communautaire* and other European and international regulations on privacy, following the coming into effect of this Agreement. Serbia shall establish one or more independent supervisory bodies with sufficient financial and human resources, so that it can efficiently oversee and guarantee the implementation of the national legislature on protecting personal information. The Parties to the Agreement shall cooperate on achieving this objective."

93 The Law on Ratifying the Convention for the Protection of Individuals with Regard to Automatic Data Processing ("The Official Gazette of the Federal Republic of Yugoslavia – International Treaties", no. 1/92 and "The Official Gazette of Serbia and Montenegro – International Treaties", no. 11/2005), and the Law on Ratifying the Additional Protocol to the Convention on the Protection of Individuals with Regard to Automatic Data Processing, Concerning Supervisory bodies and the Cross-border Data Protocol ("The Official Gazette of the Republic of Serbia – International Treaties", no. 98/2008.)



The Commissioner is elected by the National Assembly, and only the Assembly can dismiss him/her before the expiration of his/her term of office, unless at his/her personal request. The procedure for electing and dismissing the Deputy Commissioner, proposed by the Commissioner, is the same as the procedure for electing and dismissing the Commissioner him/herself, though dismissal procedures, logically enough, can be initiated by the Commissioner him/herself. Also, the Commissioner enjoys immunity for any opinion or proposal expressed in the course of exercising his/her authority. Only the National Assembly can grant permission for the Commissioner to be detained in case a procedure has been initiated against him/her on account of a criminal offence committed in the course of exercising his/her authority. It is important to note that the Commissioner's term of office lasts seven years, longer than the terms of office of all the other heads of independent bodies.

The provisions referred to above say a lot about the independence and integrity, both professional and moral, of the person elected to manage the Commissioner for Information as a state body. However, the position of the Commissioner as an independent body cannot remain determined solely by the provisions ensuring that the person who gets elected to that position is one of impeccable professional and moral character. The independence of this state body from the influence and pressures exerted by other branches of power, upon both the organ itself and the person of the Commissioner, is not an end in itself. Independence in exercising his/her authority is pointless unless the Commissioner can achieve concrete results in the area in which he/she operates. Independent bodies do not exist as mere adornments and showcases of the diversity and democratic orientation of a society. Just like any other organ, they ought to exist for the sake of the duty they perform, for the sake of the role they are to fulfil. Therefore, apart from the guarantee of autonomy and independence of an individual, it is important to ensure the autonomy, independence and efficiency of the institution headed by that individual.

The autonomy and independence of the institution are closely connected with its authority, the scope of its duties and the character of the provisions regulating them, the scope of the acts passed by the institution and, naturally, how and by whom it is controlled. At the same time, resolving other issues, which often remain in the background when assessing the position of such an institution, is also of importance, sometimes even of decisive importance. We refer here to all those issues pertaining to the functioning of the body in question, that is, its resources. Providing material resources, in the form of financial resources, physical premises and equipment, constitutes a prerequisite for providing human resources.

Relying on these criteria, the authority and the work of the Commissioner for Information is regulated by law. It would be justified to expect that the position of this institution should be envisaged by constitutional legal norms. This is especially so in view of the authority pertaining to the realisation of two fundamental human rights – the right of free access to information, as

a prerequisite for realising political and civic freedoms; and the right to protection of personal information, which is one of the essential prerequisites for respect of human dignity and independent personality development.

As has been pointed out before, the Commissioner's decisions are final and obligatory. Lodging a complaint against them is not allowed, and administrative proceedings against them, while they may be initiated by persons who believe their rights have been denied, are not available to state bodies. For their professional expertise and the conscientiousness of their work, the Commissioner and his deputies are answerable solely to the National Assembly, which formally excludes any influence of the executive power on the work of the Commissioner.

However, as regards these aspects of the Commissioner's work, and especially in the sphere of free access to information, this greatly depends precisely on the executive power. This is due to the fact that the Commissioner has no authority as a supervisory body over free access to information and cannot initiate infringement proceedings against the responsible persons within a public administration body in the case of a violation of obligations established by the Law on Free Access to Information of Public Importance. Until recently, oversight in this area was performed by the ministry authorised to deal with cultural and media-related affairs, which lacked the basic administrative capacity for this. Based on the latest amendments to the Law, adopted towards the end of 2009, this authority has been transferred to the ministry authorised to deal with state administration. As a consequence of this, the actual number of violations established over the course of more than five years of the implementation of this Law has been negligible.

Apart from lacking the authority to exercise oversight, the Commissioner has no legal way of influencing the implementation of his/her decisions. As stated by the Law, the execution of the Commissioner's decisions shall be ensured by the Government of the Republic of Serbia. The number of the Commissioner's decisions that have not been executed, even though it constitutes a small percentage of the overall number of cases, is actually rather high, especially in view of the fact that these decisions have not been executed by public administration bodies, and that these decisions constitute orders aimed at realising a fundamental human right.

On the other hand, the authority of the Commissioner is considerably more far-reaching in the sphere of protection of personal information. This is due to the fact that the fulfilment of these obligations arises from the European integration process. Each member country of the European Union is obligated to ensure monitoring of the implementation of the provisions on protecting personal information, to be effected by independent organs, which, according to Directive 95/46/EC, have broad powers. As opposed to the sphere of free access to information, in this area oversight is effected by the Commissioner him/herself, and even though the execution of

his/her decisions is ensured by the Government, the Commissioner can influence it him/herself, within the framework of oversight duties, by submitting obligatory infringement reports.

It is not possible to speak about the efficiency of the solutions referred to above, even after more than a year of their implementation, in view of the fact that, in this area, the issue of the influence of the executive power on the efficiency of the Commissioner's work is just being raised. In January 2009, the National Assembly adopted the Systematisation Act,<sup>94</sup> passed by the Commissioner in November 2008. However, the Commissioner's Proposal of the Staff Plan for 2009 did not receive the approval of the Ministry of Finance, which makes any work on the part of the Commissioner on Personal Data Protection almost impossible.

By adopting the Commissioner's budget for the year 2010 towards the end of 2009, and approving the Staff Plan for 2010, the conditions have been created for realising the Commissioner's authority. However, one matter that remains unresolved is the issue of work premises. This seemingly technical issue becomes one of crucial importance in view of the fact that, if it is not resolved, this brings into question the possibility of engaging new collaborators and using the financial resources already granted, and thereby the fulfilment of the Commissioner's role. There are, however, hints that the Commissioner will be assigned work premises which, in view of the space they occupy, does not constitute a permanent solution to the problem of providing work premises for the Commissioner.

### **The National Assembly as a Guarantor of Independence**

It is precisely due to the reasons referred to above that the relationship between the Commissioner and the National Assembly is of exceptional importance. The Assembly, as the sole legislative power, has legally regulated the position of the Commissioner as an independent body, autonomous in his/her work. It is obligatory for all the branches of power and all the members of society to respect that position.

The National Assembly is informed about the Commissioner's work through his/her annual reports. Apart from information on the Commissioner's activities and expenditures, they also contain information about the steps taken by all administrative bodies in the course of implementing the Law on Free Access to Information. The report that pertains to the protection of personal information is also submitted to the National Assembly by the Commissioner, but its content is not closely defined by the Law on Protection of Personal Information.

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<sup>94</sup> The Rules Regulating the Internal Organisation and Workplace Systematisation within the Service of the Commissioner for Information of Public Importance and Protection of Personal Information (no. 110-00-8/2008-01, of 12th November 2008) and the Decision on Approving the Acts Passed by the Commissioner for Information of Public Importance ("The official Gazette of the Republic of Serbia" no. 06/09, of 26.01.2009).

Since establishment, the Commissioner for Information has been submitting reports to the committee in charge, stating his observations and conclusions pertaining to the implementation of the Law on Free Access to Information. The committee, for its part, has reviewed the reports and adopted them unanimously every year. The committee in charge also adopted the conclusions of the Commissioner pertaining to the problems that may arise in the course of the implementation of the Law and the problems encountered in the course of the Commissioner's work, and especially the problems caused by state organs, including the Government, and the National Assembly itself.

Thus, for example, the report for 2008, states: "In the opinion of the Commissioner, the Government should pay serious attention to hints indications that, within the structures directly subordinated to the Government, there are individuals, even services that, by giving unauthorised and incompetent opinions on the implementation of the Law on Free Access to Information of Public Importance, go so far as to incite other bodies not to fulfil their obligations established by the decisions of the Commissioner."<sup>95</sup>

Also, an entire chapter of every annual report submitted to the National Assembly by the Commissioner so far has been entitled "Administrative and other obstacles to the implementation of the Law", pertaining to the problems that prevent the law from being implemented, thus restricting the realisation of the right to full access to information.<sup>96</sup> Such an observation, at the very least, requires additional efforts on the part of the committee members and the National Assembly as the body that elects the Commissioner, and which is the only body that can dismiss him on account of incompetent and improper performance of his/her duties. Any remark pointing to shortcomings in the implementation of a law must be followed by a resolute response by all state bodies with a view to preventing any further consequences this might have on the rights of citizens.

The jurisdiction of the National Assembly is not restricted to normative activities. The National Assembly at the same time controls the work of a large circle of officials, including the Commissioner, and the Government itself, as an executive body. The National Assembly always has at its disposal the option of representatives' questions or interpellations, even initiating a vote of no confidence in the Government. Irrespective of what control mechanism it opts for, this is the only way for the National Assembly to perform the role entrusted to it by the Constitution, confirmed by the one bearer of sovereignty – the citizens.

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95 The Commissioner for Information of Public importance and Protection of Personal Information, *Report on the Implementation of the Law on Free Access to Information of Public importance for the Year 2008*, Belgrade, March 2009, pg. 11.

96 Cf.: The Commissioner for Information of Public importance and Protection of Personal Information, *Report on the Implementation of the Law on Free Access to Information of Public importance for the Year 2008*, Belgrade, March 2009, pg. 18-22; *Report on the Implementation of the Law on Free Access to Information of Public importance for the Year 2007*, Belgrade, March 2008, pg. 15-21; *Report on the Implementation of the Law on Free Access to Information of Public importance for the Year 2006*, Belgrade, March 2007, pg. 18-24.

Reviewing reports is important not only as a way of becoming informed about the implementation of a law but also as an opportunity to improve the implementation of laws, eliminate obstacles to their implementation and establish responsibility for any failures if need be. If the shortcomings in the implementation of a law are pointed out, then one is justified to expect a debate on this issue with a view to resolving the problem. Respect for the laws, especially those that regulate the realisation of human rights, is obligatory for everyone.

Finally, precisely the way it has been formulated in the conclusions adopted at this Conference, reports submitted by independent organs, especially the key conclusions arising from them, should be the subject of debates in the course of National Assembly's sessions.



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## The Ombudsman (Protector of Citizens)

### 1. A General Overview of the Institution of the Ombudsman and other Independent Bodies

The development of new forms of overseeing the work of state bodies in the world was particularly enhanced from the mid-1960's onwards, when there was a sudden expansion of the institution of the ombudsman as a *sui generis* body. The authority of the ombudsman, from the advent of this institution in Sweden, as far back as 1809, has not changed in any significant manner to the present day. It is directly connected to the idea of realising and protecting human rights, on account of which the ombudsman is most often defined, even today, as the ombudsmans' rights, whose chief aim is to prevent irregularities and illegal acts, as well as what is usually referred to as maladministration in the course of the functioning of administrative bodies when dealing with citizens.

Today, the institution of the ombudsman exists in the majority of European countries and has become, as such, "...a source of inspiration, if not a role model for efforts, which are becoming all the more necessary, aimed at reconstructing the traditional political institutions created by the rationalist, subsequently increasingly mediatory bureaucratic and legalistic thought and practice".<sup>98</sup>

The need to protect human rights, as well as the need for new "external" forms of control and oversight of the administration, in keeping with the contemporary concept of the welfare state, in which the central place belongs to man, has imposed the need to find new mechanisms for

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<sup>97</sup> Author's note: This paper was presented as the introductory lecture at the conference entitled *The National Assembly of the Republic of Serbia and Independent State Bodies*, the National Assembly of the Republic of Serbia-UNDP, 26-27 November 2009

<sup>98</sup> Cf.: Jovan Đorđević, *Politički sistem [The Political System]*, Savremena administracija, Belgrade, 1985, pg. 681.

protecting human rights, first of all from the illegal and unlawful actions of administrative bodies. Time has shown that the ombudsman is the very institution required to achieve this.<sup>99</sup>

In a sense, today the ombudsman is an institution for protecting human rights and citizens' rights, in a manner similar to that in which, at the beginning of the previous century, the judiciary was an institution for protecting legality and the organisational set-up of the rule of law. What is the secret of the exceptional efficiency that the ombudsman achieves in protecting citizens' rights and controlling the work of the administration, which cannot be achieved by the existing forms of administrative and judicial control of the administration? As has been pointed out, "...the essence of the institution of the ombudsman boils down to its immanent suitability for penetrating the vicious circles of bureaucracy and for making the impenetrable authoritative administrative systems more transparent, that is, accessible to parliamentary control and to the general public. The ombudsman requires no other legal authority save the right to initiate proceedings. His/her efficiency originates, first of all, from the fact that, through his/her reports submitted to the parliament, he/she can draw the attention of the public and the parliament to complaints lodged by citizens. Transparency based on unbiased investigation is a powerful tool. The very awareness of the oversight effected by the ombudsman exerts a positive influence on the entire administrative system, making it accessible to transparency and justice."<sup>100</sup>

In this sense, we can say that oversight of the administration by the ombudsman represents a successful combination of legal (for example, initiating proceedings as a public prosecutor does) and political control (in particular, initiating parliamentary debates on the responsibility of a minister in charge of an administrative body), which is necessary under the contemporary conditions in order to overcome the shortcomings of the existing forms of administrative and judicial control of the administration. Comparative experiences clearly indicate that, apart from the traditional forms of administrative and judicial control of the administration and all their variant forms, the need exists to introduce simple and cheap instruments for controlling the administration, unencumbered with procedural rigidity and legal formalism, but at the same time efficient in achieving transparency when it comes to administrative processes and structures.<sup>101</sup>

In developed countries, over time other forms of autonomous and independent *sui generis* bodies emerged entrusted with the task of passing decisions, without any interference of other state bodies, on important spheres of social life or the most important segments of human rights. Various forms of commissioners, independent offices, auditors, commissions, councils, trustees and the like increasingly assume classical administrative authority such as, for example passing an administrative act as a legally binding act, conducting various forms of administrative

99 Stevan Lilić, *Upravno pravo [Administrative Law]* (university textbook), Savremena administracija, Belgrade, 1995, pg. 478-484.

100 Cf.: H.W.R Wade, *Administrative Law*, 5<sup>th</sup> ed. Oxford, 1982, pg. 76.

101 Cf.: Stevan Lilić, *Upravno pravo [Administrative Law]* (university textbook), Savremena administracija, Belgrade, 1995, pg. 478-484.

proceedings, exercising administrative oversight and the like. Their legal nature is therefore, as a rule, rather complicated.

Even though the above-mentioned forms are also often referred to as the ombudsman,<sup>102</sup> they are not the ombudsman in the above-mentioned sense of the term. We have seen, then, that further development of society required the creation of new forms of independent and unbiased bodies. Thus, for example, in France towards the end of the 1970's, there appeared new categories of administrative institutions, referred to in theory for the most part, and occasionally in legal texts, as independent quasiadministrative bodies. This category is not a homogeneous legal term. Apart from the Mediator (that is, the Ombudsman), in France these independent bodies are collegial in character and are made up of independent and highly qualified persons appointed for a specific period of time (term of office). In countries characterised by the Anglo-Saxon legal tradition such as Great Britain, Australia or New Zealand, apart from quasiadministrative bodies there have also emerged independent quasijudicial bodies in the form of the so-called administrative tribunals. In a number of different areas, for example, that of freedom of access to information and protection of personal data, these tribunals also represent a significant mechanism of protection and control.<sup>103</sup>

## 2. The Similarities and Differences Between Ombudsman-type Institutions in Comparative Law

Even though the basic objectives of the institution of the ombudsman are the same or similar in all countries, in European countries they differ to a certain extent (the manner of appointing and electing the ombudsman, with or without the participation of the executive branch of government, a single-member or collegial body, a single ombudsman or more than one ombudsman, the manner of addressing the ombudsman by lodging citizens' complaints, the procedure ensuing after a complaint has been lodged, the manner of financing, the ombudsman institution on the national and/or regional levels, and the like), because as such, they are adjusted to the specific legal system of each country.<sup>104</sup>

Still, one should look for the essence of the institution of the ombudsman, first of all, in its legal status. With certain exceptions, the ombudsman is an independent and unbiased parliamentary body, which, in the course of a specific procedure, passes recommendations that are not

<sup>102</sup> Such is the case, for example, in Norway, with *The Gender Equality Ombudsman*, established in 1979 as an independent administrative body attached to the Ministry of Children and Family Affairs.

<sup>103</sup> Venkatesh Nayak, *Access to Information – A comparative Picture of Independent Appellate Mechanisms Available Across the Commonwealth*, Commonwealth Human Rights Initiative, New Delhi, 2006. This publication is available at the Internet site: <http://www.humanrightsinitiative.org>.

<sup>104</sup> Cf.: Stevan Lilić, Dejan Milenković, Biljana Kovačević Vučo, *Ombudsman – međunarodni dokumenti, uporedno pravo, zakonodavstvo i praksa* [*The Ombudsman – International Documents, Comparative Law, Legislation and Practice*], Dejan Milenković, *Uporedni pregled institucije ombudsmana* [*A Comparative Overview of the Institution of the Ombudsman*], Komitet pravnika za ljudska prava (YUCOM), Belgrade, 2002, pg. 42-142.



legally binding along with an opinion, addressed to the body that has committed an irregular or unlawful act, pointing out how the body in question should proceed in order to eliminate the consequences of its maladministration, taking into consideration the sociological notions of justice and fairness, which are not sufficiently determined by law today. Should the body in question fail to act in accordance with the recommendation, the ombudsman may initiate other mechanisms compelling a state body to act accordingly.<sup>105</sup>

Thus, for example, one of the basic characteristics of this institution is that the ombudsman is a single-member body, but there do exist exceptions to this rule. Thus, in Austria the institution of the Ombudsman Board is a *collegial body*, essentially different from the institution of the ombudsman in other European countries. The Austrian Ombudsman Board consists of three members, one of whom always presides over the meetings, and decisions, as a rule, are passed by a simple majority vote of its members.

Regarding the structure of this institution, a country may have one or several ombudsmen. Most European countries have opted for a single-ombudsman system, along with a number of deputy ombudsmen; as a rule, the latter are in charge of particular areas, determined by law or internal organisation acts. Still, in Sweden, Denmark, Lithuania, Moldavia and in some other countries, there are a number of national ombudsmen, one of whom, as a rule, is the head of the office. In these countries, the institution the ombudsman retains the character of a sole-member body, for each of them operates individually within a particular area and in specific cases.

The essence of the institution of a national ombudsman lies in its legal status. The ombudsman is an independent and unbiased parliamentary body. However, certain exceptions to this rule exist. Thus, for example, in France, the State Council passed a decision in 1981, establishing the institution of a mediator as an administrative body, in view of the fact that the ombudsman is appointed by a decree of the Council of Ministers. In Greece, the ombudsman is an independent administrative body elected by the Council of Ministers. The examples of France and Greece are at the same time examples of the situation in which the ombudsman is directly elected by the executive branch. The situation concerning the appointing of the ombudsman is similar in Great Britain, where the ombudsman is elected by the Crown, through a "letter patent" issued acting on a proposal submitted by the Prime Minister, which must be in keeping with the opinion of the leader of the opposition and a special committee of the House of Commons of the British Parliament. However, in Great Britain the ombudsman is referred to as the Parliamentary Commissioner and (as his/her title indicates) has the status of a Parliamentary body.

There are also differences in those countries where the parliament elects the ombudsman. These could be divided into two categories: when the parliament elects the ombudsman without the

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<sup>105</sup> Cf.: Dejan Milenković: *Uputredni pregled institucije ombudsmana*, Stevan Lilić, Dejan Milenković, Biljana Kovačević-Vučo *Ombudsman – međunarodni dokumenti, uporedno pravo, zakonodavstvo i praksa*, YUCOM, Belgrade, 2002, pg. 42-147.

participation of the executive branch, as is the case, for example, in Sweden, Norway, Spain, Moldova or Poland, and when the parliament elects the ombudsman with the participation of the executive branch, for example, acting upon a proposal submitted by the president of the republic, as is the case in Hungary or Slovenia.

Differences also exist when it comes to the manner of addressing the ombudsman and lodging citizens' complaints. As a rule, complaints are submitted directly to the ombudsman, but there are exceptions here as well. In Great Britain, for example, a complaint is lodged through an MP, a member of the House of Commons, and in France, it is done through a member of parliament or a senator, who initially decides whether the complaint in question requires the intervention of the Mediator.

Differences between national institutions of the ombudsman also exist *when it comes to the actual procedure which follows the lodging of citizens' complaints, the requirements for electing the ombudsman and the duration of his/her term of office, the reasons for the cessation of the term of office and for relieving the ombudsman of duty, the manner of financing the institution, of appointing deputy ombudsmen, etc.*

In addition to national ombudsmen, there also exist, depending on the internal organisational set-up of certain states, ombudsmen of republics, provinces, cantons, cities/towns, local governments, which points to the importance of this institution in all the spheres of society. This organisational model of the ombudsman is characteristic of countries that have a developed system of decentralisation, regionalisation and local government. The establishment of this institution based on the above model varies from country to country, and we can distinguish three sub-models in principle: the ombudsman on the national and regional level, and the ombudsman on the regional and local government level.<sup>106</sup>

The ombudsman on the national, regional and local government level is a system that exists in Austria, Great Britain, Spain, Belgium, Holland and other countries. In Austria, apart from the Human Rights Commission as a national ombudsman, also exist regional ombudsmen for the provinces of Tyrol and Vorarlberg. In Belgium, there are ombudsmen for the regions of Wallonia and Flanders, in Great Britain there exist ombudsmen for England, Scotland, Wales and Northern Ireland, in Holland all major cities have the institution of the ombudsman, in France it exists in Paris as the country's capital, and in Spain, apart from the national ombudsman (Defensor del Pueblo) there are also ombudsmen in eleven regions (Catalonia, Seville, Galicia,

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<sup>106</sup> Cf: Dragan Radinović, *Ombudsman i izvršna vlast [The Ombudsman and the Executive Branch]*, Službeni glasnik – Savet za državnu upravu, Belgrade, gp. 166; *Ombudsmen, Parliamentary Commissioners, Mediators and persons discharging similar functions in member states of the Council of Europe*, comparative study, 30th June 1997, Strasbourg, Doc H/Ombudsman (97) 1, pg. 8.

the Canaries, Valencia, Andalucía, etc.). In Bulgaria, apart from the national ombudsman, local ombudsmen have been introduced in around twenty local government units.<sup>107</sup>

Finally, it should be pointed out that, with a view to providing special protection to certain vulnerable social groups, or for the purpose of exercising special parliamentary control of certain important institutions of the system such as the army, in some countries, apart from national ombudsmen, there are special ombudsmen, for example, the ombudsman for children, national minorities, the military ombudsman, etc.

However, attention should also be drawn to the fact that what all the institutions of the ombudsman the world over have in common is that it is a “toothless” body. Recommendations and opinions given by the ombudsman are not binding as such upon the body they are addressed to, as opposed to an administrative act, which is potentially the greatest problem of this institution. Therefore, the power of this institution today does not stem from its legal but primarily from its moral authority. That does not mean to say that this drawback cannot effectively be overcome through other forms of authority conferred upon the ombudsman, for example, by authorising the ombudsman, as mentioned above, to initiate a parliamentary debate with a view to establishing the responsibility of a public official. But in countries where democratic standards are low, it would appear that the ombudsman’s struggle to protect human rights turns into struggling against windmills. Still, comparative law experiences and practice indicate that, over time, the ombudsman becomes a credible institution whose recommendations and opinions gain in importance and are respected more often than not.

### **3. A Brief Overview of the National Ombudsman Institutions in Some European Countries**

In this brief overview of the national ombudsman institution in some European countries,<sup>108</sup> emphasis is laid on Sweden, as the first country to have introduced this institution. Also, without dealing in detail with the manner of electing, relieving of duty or the cessation of the term of office of the ombudsman, his/her financial independence or the right to initiate criminal and other proceedings against responsible public officials and civil servants, particular attention has been paid to the authority of the ombudsman to conduct, acting on his/her own initiative or on the basis of citizens’ complaints, an independent and unbiased investigation, following which he/she submits his recommendation and opinion to the body in question, most often an

<sup>107</sup> Cf.: Dragan Radinović, *Ombudsman i izvršna vlast*, Službeni glasnik – Savet za državnu upravu, Belgrade, pg. 166; as for the institution of Defensor del Pueblo en Andalucía, more detailed information can be obtained at [www.defensor-and.es/](http://www.defensor-and.es/). As for ombudsmen in other Spanish regions, more information can be obtained at <http://www.euro-ombudsman.eu.int/links/en/esreg.htm>.

<sup>108</sup> This is an abridged review of comparative law experiences based on examples from 35 different countries, not only European ones, provided by the present author in: Stevan Lilić, Dejan Milenković, Biljana Kovačević-Vučo, *Ombudsman – međunarodni dokumenti, uporedno pravo, zakonodavstvo i praksa*; Dejan Milenković, *Uporedni pregled institucije ombudsmana*, YUCOM, Belgrade, 2002, pg. 42-142.

administrative body. This is particularly important in order to explain the difference in the power of documents (recommendations and opinions) issued by the ombudsman and those issued by some other autonomous and independent bodies, which are similar to the ombudsman, but whose findings, in view of the fact that they are presented in the form of individual acts, are binding as such, which is the essential feature distinguishing them from the ombudsman (if we disregard their operational area, which is rather more narrow and segmented).

### 3.1. SWEDEN

Sweden is the first country to have introduced the institution of the parliamentary ombudsman (*Justitieombudsman*), as far back as 1809, which is why Sweden deserves special attention in this brief comparative review. The emergence of the institution of the ombudsman in Sweden is inseparably linked with another institution of the Swedish legal system – that of the Chancellor of Justice.<sup>109</sup>

Actually, as early as the year 1713, there existed in Sweden the so-called service of the King's Highest Ombudsman, subsequently referred to as the service of the Chancellor of Justice (*Justitiekansler*), whose task was to deal with the enactment of laws and statutes during the exile of the then King of Sweden Carl XII, and also to oversee the work of civil servants. Since then, and right down to the present day, the Chancellor of Justice has been a traditional institution of the Swedish legal system. In the mid-18th century, under the influence of the principle of division of power, opposition to the King's absolutism increased in Sweden, so that in the 1766-1772 period the Swedish Parliament (*Riksdag*) took over almost all the authority of the Swedish King, among other things the right to appoint the Chancellor of Justice. In 1772, however, King Gustavus III managed to regain his absolute power, and thereby the right to appointing the Chancellor of Justice. In the course of a rebellion that occurred in Sweden in 1809, one of the greatest Swedish absolutist kings, *Gustavus IV Adolphus*, was overthrown, following which, after a hiatus of many years, a session of the Swedish Parliament (*Riksdag*) was held in the course of which it was decided to adopt a new Constitution. The 1809 Swedish Constitution was based on the principle of division of power between the King and the Parliament. As an expression of the principle of division of power, the Constitution contained provisions on the basis of which the King appointed the Chancellor of Justice and Riksdag appointed the parliamentary ombudsman, *that is, Justitieombudsman*, whose task it was to oversee, as a representative of the Parliament, the legality of the work of all civil servants and judges.<sup>110</sup>

109 Cf.: Stevan Lilić, Dejan Milenković, Biljana Kovačević-Vučo, *Ombudsman – međunarodni dokumenti, uporedno pravo, zakonodavstvo i praksa*, Dejan Milenković, *Uporedni pregled institucije ombudsmana*, YUCOM, Belgrade, 2002, pg. 42-140.

110 Cf.: Bengt Wieslander, *The Parliamentary Ombudsman in Sweden*, The Bank of Sweden Tercentenary Foundation, 1994, pp. 11-15; Miodrag Jovičić, *Ombudsman – čuvar zakonitosti i prava građana [The Ombudsman – Protector of Legality and Citizens' Rights]*, Institut za uporedno pravo, Belgrade, 1969, pg. 10-11.

Since the year 1915, there existed two parliamentary ombudsmen in Sweden, for the *Riksdag* considered it necessary to separate the function of overseeing military bodies from that exercised by the *Justitieombudsman*, which resulted in the establishment of a special service for controlling the armed forces – the military ombudsman (*Militieombudsman*). The parliamentary and the military ombudsmen were reintegrated in 1968. The Parliament elected 3 ombudsmen, each one entitled *Justitieombudsman*, who made up a unified institution. In view of its increasing workload and the number of complaints received, in 1975 the *Riksdag* adopted a new set of Guidelines for Parliamentary Ombudsmen, containing new organisational rules and specifying their duties and authority.<sup>111</sup> These rules were further amended by the new Guidelines for Parliamentary Ombudsmen of November 13th 1986, which are still in effect today.<sup>112</sup>

In The Swedish Constitution (The Instrument of Government) of 1809, in chapter 12, entitled Parliamentary control, it was laid down that the Parliament (*Riksdag*) would elect one ombudsman or more, whose basic function would be to oversee, as a parliamentary body, the enforcement of laws and other acts of Parliament.<sup>113</sup>

The Law on the Parliament (The *Riksdag* Act) prescribed that the Office of Parliamentary Ombudsmen would be made up of four ombudsmen elected by the Parliament. One of them would be the Head of the Office. The Head of the Office was an administrative director responsible for internal administration, staff appointment and the like. The Parliament elects ombudsmen for a period of 4 years. Based on a request submitted by the Constitutional Committee, the *Riksdag* may adopt a vote of no confidence to the ombudsman, in which case his/her term of office expires even before the end of the legally determined period. In the case of retirement or leaving the function of the ombudsman in the course of the prescribed term of office, the Parliament appoints a new ombudsman for a full term of office as soon as possible. In the case of a long leave of absence on account of illness or due to any other reasons, the Parliament may appoint another person to serve as the ombudsman for as long as such circumstances last.<sup>114</sup>

Guidelines for Parliamentary Ombudsmen (1986), first of all, establish the bodies which parliamentary ombudsmen oversee, as well as those which are to be exempt from being overseen by ombudsmen. The parliamentary ombudsmen's oversight encompasses all state and local bodies, as well as their personnel, all persons entrusted with public authority and state companies (public companies) not considered to be state bodies (for example, companies that control the safety of road vehicles and the like).

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111 Cf.: Bengt Wieslander, *The Parliamentary Ombudsman in Sweden*, The Bank of Sweden Tercentenary Foundation, 1994, pg. 16-17; Claes Eclund, *Švedski parlamentarni ombudsmani* [Swedish Parliamentary Ombudsmen], collection of papers published by the Faculty of Law in Novi Sad, no. 3-4, 1990, pg. 8.

112 Act with Instructions for the Parliamentary Ombudsmen, issued on November 13th 1986.

113 Cf.: *The Instrument of Government*, 1809, Ch. 12, Art. 6.

114 Cf.: *The Riksdag Act*, Ch. 8, Art. 10.

However, the ombudsman does not oversee the Government or members of Parliament and local council members. Also, the ombudsman does not oversee the work of the Chancellor of Justice, the Board of Governors of the Bank of Sweden and their deputies, except when it comes to enforcing legislation from the sphere of foreign exchange transactions. The ombudsman may not undertake any measures against his/her subordinates who have no independent authority, unless there exist special grounds for this.<sup>115</sup>

Ombudsmen are helped by the Secretariat to exercise their authority; the Secretariat employs staff headed by the Director. The Head of the Office of Ombudsmen may, if he/she has sufficient funds at his/her disposal, employ additional personnel, for example, experts on various fields.<sup>116</sup> Ombudsmen are independent in their work, which cannot be subjected to the control of another ombudsman.<sup>117</sup>

The four ombudsmen have separate areas of responsibility. We shall point out some of the most important of those: collecting taxes and executing judicial decisions, regular courts, public prosecutors' offices, the police and prisons, the armed forces, local governments and administrative tribunals, social welfare and education.<sup>118</sup>

The ombudsman may initiate proceedings based on a complaint received or on his/her own initiative. Everyone, even a foreigner, can lodge a complaint to the ombudsman. A complaint must be submitted in writing, and if need be, the ombudsman's staff has the duty to help any person lodging a complaint to draw it up, free of charge. A complaint must be signed by the person submitting it, otherwise it will not be accepted. However, even an unsigned complaint may serve as an instigation to the ombudsman to start an investigation on his/her own initiative. There exist no absolute deadlines for submitting complaints, but ombudsmen are prohibited, except on special grounds, from starting an investigation if the case in question occurred two years prior to the submission of a complaint. Also, there are no rules stating that all legal resources pertaining to proceedings before courts of law or administration must be exhausted, but in practice, the ombudsman will not intervene before the termination of court proceedings. The ombudsman may intervene at an earlier stage if a complaint pertains to procedural matters.<sup>119</sup>

When a case is closed, the ombudsman passes a recommendation, which expresses his/her attitude concerning the matter in question. Also, the ombudsman is authorised to directly initiate criminal proceedings against any civil servant for a violation of duty, as well as disciplinary proceedings before bodies authorised to pass disciplinary sanctions. The ombudsman initiates

115 Cf.: *Act with Instructions for the Parliamentary Ombudsmen*, issued on November 13th 1986, Arts. 1-2, 8.

116 Cf.: *Act with Instructions for the Parliamentary Ombudsmen*, 1986, Arts. 12-13.

117 Cf.: *Act with Instructions for the Parliamentary Ombudsmen*, 1986, Art. 2.

118 Cf.: Claes Eclund, *Švedski parlamentarni ombudsmeni* [Swedish Parliamentary Ombudsmen], collection of papers published by the Faculty of Law in Novi Sad, no. 3-4, 1990, pg. 11.

119 Cf.: *Act with Instructions for the Parliamentary Ombudsmen*, 1986, Articles 17-20; Bengt Wieslander, *The Parliamentary Ombudsman in Sweden*, The Bank of Sweden Tercentenary Foundation, 1994, pg. 50-51.

criminal proceedings if criminal offences have been committed by employees of government bodies, mainly civil servants and local government personnel, in the course of performing official duties. In view of the fact that Sweden had its first ombudsman as far back as 1809, this institution had the character of a prosecutor's office.<sup>120</sup>

The law prescribes the obligation on the part of the ombudsman to submit an annual report to the Parliament about his/her activities, initiatives, the complaints received and other matters. The ombudsman's report is published and is available to everyone.<sup>121</sup>

### 3.2. FINLAND

Another country that introduced the institution of the ombudsman in its legal system was Finland. Its first Constitution of 1919 prescribed the introduction of the institution of the ombudsman, which has been retained to the present day. There is only one parliamentary ombudsman in Finland, authorised to deal with both civil and military matters. The Constitution prescribes that "The Parliament, at the beginning of every regular convocation, elects a distinguished lawyer as the Ombudsman, for a term of office lasting four years, in the manner prescribed for electing the Speaker of the Parliament".<sup>122</sup>

The Ombudsman, in accordance with the *Instructions* prepared and adopted by the Parliament, oversees law enforcement by courts and other state bodies and civil servants in the course of performing their duties, as well as persons employed with public companies and other persons performing certain public functions. In the course of performing his/her functions, the Parliamentary Ombudsman will also oversee the state and realisation of the basic human rights. The Parliament's *Instructions about the work of the Parliamentary Ombudsman* were passed in 1920, and they are still in effect today, including the subsequent amendments.<sup>123</sup> According to the *Instructions, the Ombudsman is authorised to control the work of courts and other state bodies, as well as the work of the personnel of public services and other persons performing public functions.* The Parliamentary Ombudsman is authorised to undertake the necessary measures if a judge, state official or public service employee, or persons performing other public functions, violate citizens' rights, exceed their authority or neglect their obligations.<sup>124</sup> The Parliamentary Ombudsman is entitled to attend the sessions of the Council of Ministers, courts and other government bodies, as well as to receive information from the reports issued by the Council

120 Cf.: *Act with Instructions for the Parliamentary Ombudsmen*, 1986, Article 6; Claes Eclund, *Švedski parlamentarni ombudsmeni*, collection of papers published by the Faculty of Law in Novi Sad, no. 3-4, 1990, pg. 10.

121 Cf.: *Act with Instructions for the Parliamentary Ombudsmen*, 1986, Article 11.

122 Cf.: Miodrag Jovičić, *Ombudsman – čuvar zakonitosti i prava građana*, Institut za uporedno pravo, Belgrade, 1969, pg. 11.

123 Cf.: *The Regulation of the Parliamentary Ombudsman* (10 January 1920/2, with later amendments).

124 Cf.: *The Regulation of the Parliamentary Ombudsman*, 1920 (with later amendments), Article 1.

of Ministers and ministries, as well as courts and other government bodies.<sup>125</sup> The Parliamentary Ombudsman is authorised to initiate a lawsuit against the Chairperson or a member of the Supreme Court or the Supreme Administrative Court. The Ombudsman is also entitled to receive *all the necessary information* from the bodies and bodies whose work is being overseen.<sup>126</sup> If a written complaint addressed to the Parliamentary Ombudsman pertains to disallowed or unlawful behaviour of persons or organisations which the Ombudsman is authorised to oversee, he/she will *start an investigation*. If such a subject *fails to act in accordance with the Ombudsman's recommendations*, the Ombudsman will directly initiate proceedings against the civil servant that he/she considers to have committed an unlawful or inappropriate act, or will order the passing of disciplinary measures against an employee.<sup>127</sup> The Parliamentary Ombudsman submits an *annual report* to the Parliament. In this report, he/she will point out to the Parliament, whenever he/she finds it necessary, legal provisions that are unclear or contradictory, especially if they occur due to different interpretations of the law or due to legal insecurity, and he/she *may submit proposals for amending them*. The Parliamentary Ombudsman will, when he/she considers it necessary, submit reports on certain cases to the Parliament. He/she will also provide information about his/her work in other ways as well.

### 3.3. AUSTRIA

The Institution of the Austrian Ombudsman is specific in a number of respects. This is, first of all, manifested in the fact that the Ombudsman is actually a collegial, not a single-member body, but its authority corresponds to that of the classical institution of the ombudsman. The Austrian Parliament adopted in 1977 the federal Law Pertaining to the Function and the Organisation of the Public Attorney's Office (*Volksanwaltschaft*) for a limited period of time (from 1977 to 1983). This law was subsequently incorporated in the Austrian Constitution in 1981, so that the major part of the authority and work of the Public Attorney's Office is determined by constitutional provisions.<sup>128</sup>

Thus, the Austrian Constitution today prescribes that everyone can lodge a complaint with the Public Attorney's Office (*Volksanwaltschaft*) on account of his/her rights having been violated by federal administrative bodies, including their activities that infringe on the right to privacy, provided that the right in question has been violated through the work of these bodies and that all the other legal resources have been exhausted previously. Such complaints must be investigated by the People's Legal Defence Office. The person who lodged a complaint must be informed about the results of the investigation and the measures that it was necessary to

<sup>125</sup> Cf.: *The Regulation of the Parliamentary Ombudsman*, 1920 (with later amendments), Article 2.

<sup>126</sup> Cf.: *The Regulation of the Parliamentary Ombudsman*, 1920 (with later amendments), Articles 5-6.

<sup>127</sup> Cf.: *The Regulation of the Parliamentary Ombudsman*, 1920 (with later amendments), Article 7.

<sup>128</sup> Cf.: *National Ombudsmen (collection of legislation from 27 countries)*, Commissioner for Civil Rights Protection of Poland, Warsaw, 1998, pp. 7-13.



undertake. The Public Attorney's Office may also initiate proceedings *ex officio* if there exist reasons to suspect that a violation of rights has occurred. The Public Attorney's Office will deal with citizens' complaints and will submit a report on this to the Parliament. Within the framework of its authority, the Public Attorney's Office is independent in its work.<sup>129</sup>

Administrative bodies on the national, regional and local level have the duty to provide support to the Public Attorney's Office (*Volksanwaltschaft*) in its work and to enable it to conduct inspections, review documents and obtain information without any obstruction.<sup>130</sup> The Public Attorney's Office may issue a recommendation or undertake other measures aimed at the administrative body concerned, depending on the circumstances of each particular case. It can also issue a recommendation to the authorised government body pertaining to local government matters, of which it will inform the highest-ranking federal government bodies. The Public Attorney's Office submits a report on its work to the Federal Parliament.<sup>131</sup> The manner in which complaints are dealt with depends on the circumstances of each case. It is often sufficient for the Public Attorney's Office to inform the authorised government minister and the governor of the province in question of the said violation of rights; following their own investigation into the matter, the latter will issue instructions on how to eliminate the cause of the violation. In the case of negligent and unlawful work of an body, the Public Attorney's Office may issue a recommendation. The body to which the recommendation pertains is obligated to act in accordance with the recommendation within eight weeks of having received it, and must notify the Office of this; otherwise, it must submit a written explanation to the Office, stating the reasons for failing to act in accordance with the recommendation.<sup>132</sup>

### 3.4. DENMARK

Denmark is one of the first countries to have introduced the institution of the ombudsman in its legal system.<sup>133</sup> The constitutional basis for establishing the institution of the ombudsman in Denmark is contained in the 1953 Constitution of Denmark, namely: "The Parliament (*Folketing*) elects one or two persons, who cannot be Parliament members, to oversee the work of the civil and military administration." On the basis of this provision of the Constitution, The Law on the Ombudsman was passed in 1953, and the first Ombudsman took office in March 1955.<sup>134</sup> The legal basis currently in effect is the 1996 Law on the Ombudsman, regulating the authority,

129 Cf.: *The Constitution of Austria*, including the 1981 amendments, Article 148a; Viktor Pickl, *Institucija ombudsmana u Austriji [The Institution of the Ombudsman in Austria] – Volksanwaltschaft*, a collection of papers published by the Faculty of Law in Novi Sad, no. 3-4, 1990, pg. 34.

130 Cf.: *The Constitution of Austria*, including the 1981 amendments, Article 148b.

131 Cf.: *The Constitution of Austria*, including the 1981 amendments, Article 148c-d.

132 Viktor Pickl, *Institucija ombudsmana u Austriji – Volksanwaltschaft*, a collection of papers published by the Faculty of Law in Novi Sad, no. 3-4, 1990, pg. 35-36.

133 Cf.: Miodrag Jovičić, *Ombudsman – čuvar zakonitosti i prava građana*, Institut za uporedno pravo, Belgrade, 1969, pg. 11.

134 Cf.: Miodrag Jovičić, *Ombudsman – čuvar zakonitosti i prava građana*, Institut za uporedno pravo, Belgrade, 1969, pg. 11.

manner of acting and the conditions for electing the Ombudsman and relieving him/her of duty.<sup>135</sup> In accordance with the Danish Constitution, the law more closely defines the authority of the Ombudsman as encompassing all the parts of public administration, but not the courts. If companies, institutions, associations and other subjects are affected by the provisions of The Law on Public Administration or The Law on Access to Public Administration Information or The Law on Protection of Data, the Ombudsman may extent his/her authority to cover these subjects as well. The Ombudsman will not take into consideration complaints against bodies passing decisions on disputes between private persons even in situations when such bodies may be regarded as a part of public administration.<sup>136</sup>

The Ombudsman submits an annual report to the Danish Parliament. That report must be published. If the Ombudsman's report mentions ministers or local government bodies, or some specific case, he/she must state in the report what the official or the body in question has stated in his/her/its defence.<sup>137</sup>

As regards the rules of procedure, *the law prescribes that everyone can lodge a complaint against the above-mentioned bodies to the Ombudsman. A complaint is submitted to the Ombudsman in writing, in a sealed envelope.* The Ombudsman may also initiate proceedings on his/her own initiative (*ex officio*).<sup>138</sup> In the course of proceedings, the Ombudsman establishes whether particular acts by officials or administrative bodies which the Ombudsman oversees have been passed contrary to the existing legal acts, that is to say, whether they have made mistakes in the course of performing their duties. Following the proceedings, the Ombudsman may criticise the work of a particular official body, issue a recommendation or present his/her opinion in another appropriate manner.<sup>139</sup> If, in the course of the proceedings before the Ombudsman, it is established that state administrative and other bodies have made mistakes or committed acts of abuse, the Ombudsman will inform of this the Committee of Legal Affairs of the Danish Parliament, or the minister in charge or local government bodies.<sup>140</sup>

### 3.5. FRANCE

The French Ombudsman, that is, the Mediator, although inspired by the Swedish Ombudsman, is closer to the ombudsman system of Great Britain, even though it differs from it.<sup>141</sup> "The institution emerged from the efforts to provide a protector for the beneficiaries of public

135 Cf.: *National Ombudsmen (collection of legislation from 27 countries)*, Commissioner for Civil Rights Protection of Poland, Warsaw, 1998, pg. 41-46; *The ombudsman Act*, no. 473, 1996.

136 Cf.: *The Ombudsman Act*, no. 473, 1996, Ch 2. *The jurisdiction of the Ombudsman*, Par. 7.

137 Cf.: *The Ombudsman Act*, no. 473, 1996., Ch. 3. *The relationship with the Folketing*, Pars. 10-12.

138 Cf.: *The Ombudsman Act*, no. 473, 1996, Ch. 4 *Lodging a complaint*, Pars. 13-16; Ch. 5. *Initiating own-initiative investigations and inspection*, Pars. 17-18.

139 Cf.: *The Ombudsman Act*, no. 473, 1996, Ch. 6., *The case investigation* Pars. 19-20.

140 Cf.: *The Ombudsman Act* no. 473, 1996, Ch. 7. *Assessment and reaction*, Pars. 21-25.

141 Cf.: Dragaš Denković, *Medijator – Le Mediateur, (the French Ombudsman)*, *The Annals of the Faculty of Law in Belgrade*, no. 1-4, 1983, pg. 258.

administration services in their dealings with the administration, which they increasingly feel as all-encompassing, anonymous, even inhumane, a protector that would be more accessible than a court of law and authorised not to have to deal solely with observance of the law."<sup>142</sup>

The Mediator – the French Ombudsman, was introduced by the Law on the Mediator in 1973. The Law has been amended a number of times (1976, 1989, 1992), but is still in effect.<sup>143</sup> The Law on the Mediator prescribes that the Mediator, as an independent body, shall be authorised to deal with citizens' complaints in connection with the activities of public administration, territorial autonomy bodies, public institutions and all organisations that perform public services, in the course of establishing administrative-legal relations. Within the framework of his/her authority, the Ombudsman will receive no instructions from any government body.<sup>144</sup> The Mediator is appointed by a decree issued by the Council of Ministers for a period of six years, which is a considerable deviation from one of the basic characteristics of the institution of the ombudsman, namely, that the ombudsman is a parliamentary institution. On account of this, in order to ensure the ombudsman's independence and impartiality, the law prescribes that the only reason for the cessation of the function of the Mediator during his/her term of office, that is, for relieving the Mediator of duty, is the Mediator's inability to perform his/her duties.<sup>145</sup>

The law states that the Mediator initiates proceedings based on a request submitted by a physical person (but not a legal person). Each physical person who has reason to believe, within the framework of matters pertaining to him/her, that some body of the state administration, territorial autonomy, public institution or other organisations performing a public service, has not discharged its duty in accordance with the duties of a public service, may request, through an individual complaint, that the matter be brought to the attention of the Mediator. In such a case, an appropriate complaint is submitted to a member of Parliament or a senator, asking him/her to forward to the Mediator. The Parliament member or senator establishes whether the Mediator is authorised to deal with this case, that is, whether the complaint warrants the Mediator's intervention. Members of Parliament too, acting on their own initiative, can address the Mediator. The Mediator can also initiate proceedings acting on his/her own initiative.<sup>146</sup>

Dealing with a complaint is determined by the provisions of this Law, as well as the Mediator's authority. When it comes to eliminating the causes of the perceived irregularities, the Mediator is authorised to do two things: to send a recommendation to the body in question with a view to resolving the problem at hand, and to send a proposal to the body in question with a view

142 Jean Rivero, *Droit administratif*, Dalloz, Paris, 1987, pg. 424-425.

143 Law no. 73-6 of 3<sup>rd</sup> January 1973, supplemented by Law no. 76-1211 of 24<sup>th</sup> December 1976 and by Law no. 89-18 of 13<sup>th</sup> January 1989, and modified by Law no. 92-125 of 6<sup>th</sup> February 1992.

144 Cf.: Law no. 73-6; 76-1211; 89-18; 92-125, Section. 1; Dragan Radinović, *Ombudsman i izvršna vlast [The Ombudsman and the Executive Branch]* (PhD thesis), the Faculty of Law in Belgrade, Belgrade, 2000, pg. 90-95.

145 Cf.: Law no. 73-6; 76-1211; 89-18; 92-125, Sections 2-3.; Dragaš Denković, *Medijator – Le Mediateur, (The French Ombudsman)*, The Annals of the Faculty of Law in Belgrade, no. 1-4, 1983, pg. 258.

146 Cf.: Law no. 73-6; 76-1211; 89-18; 92-125, Section. 6.

to improving its functioning, that is, avoiding such mistakes in its future work. If the Mediator comes to the conclusion that a strict application of legal regulations would result in injustice, he/she may do one of the following two things in connection with a complaint received: propose to the authorised body, in connection with a particular decision, to undertake all the measures that it considers appropriate for eliminating the perceived shortcoming, or propose initiating appropriate amendments to the law whose strict implementation would result in injustice.<sup>147</sup>

On the basis of a decree passed in 1986, which relates to the Mediator's representatives in departments (French administrative districts), the so-called Delegates' Department was established. The delegates intervene on behalf of the Mediator, and if they are of the opinion that there exists a case that must be resolved before it is too late to do so, they may advise the person lodging a complaint to address a member of Parliament.<sup>148</sup>

## **4. The Ombudsman – Protector of Citizens' Rights in Serbia (Guarantees of Independence, Election, Authority, Organisation and Procedure)**

### **4.1. The Constitution of Serbia and Ombudsman**

The Constitution of 2006 raised the institution of the ombudsman to the constitutional level. The Constitution states: "The Ombudsman is an independent state body protecting the rights of citizens and controlling the work of state administration bodies, the body authorised to provide legal protection to the property rights and interests of the Republic of Serbia, as well as other bodies and organisations, companies and institutions entrusted with public authority. The Ombudsman is not authorised to control the work of the National Assembly, the President of the Republic, the Government, the Constitutional Court, courts and public prosecutors' offices. The Ombudsman shall be elected and dismissed by the National Assembly, in accordance with the Constitution and the law. The Ombudsman is accountable for his/her work to the National Assembly. The Ombudsman enjoys the same immunity from prosecution as a representative of the people. The National Assembly decides on the immunity of the Ombudsman. A law shall be passed on the Ombudsman." Thus, the ombudsman finally became a constitutional category in the Republic of Serbia.<sup>149</sup>

<sup>147</sup> Cf.: Law no. 73-6; 76-1211; 89-18; 92-125, Section. 9; Dragan Radinović, *Ombudsman i izvršna vlast [The Ombudsman and the Executive Branch]* (PhD thesis), the Faculty of Law in Belgrade, Belgrade, 2000, pg. 92.

<sup>148</sup> Dragan Radinović, *Ombudsman i izvršna vlast (PhD thesis)*, the Faculty of Law in Belgrade, Belgrade, 2000, pg. 95.

<sup>149</sup> *The Constitution of the Republic of Serbia*, "The Official Gazette of the Republic of Serbia", no. 98/2006, Part five, *Organisation of Government*, Article. 138 *The Protector of Citizens*.

## 4.2. The Basic Characteristics of the Law on Ombudsman

The Law on Ombudsman, first of all, determines basic terms and guarantees of independence. The Ombudsman in Serbia is an independent state body protecting the rights of citizens and controlling the work of state administration bodies, the body authorised to deal with the legal protection of the property rights and interests of the Republic of Serbia, as well as other bodies and organisations, companies and institutions entrusted with public authority (hereinafter referred to as: administrative bodies). The Ombudsman deals with the protection and development of human and minority rights and freedoms, but the term citizen, as used in this Law, does not encompass every physical person only (including not only domestic but also foreign nationals), but also every domestic and foreign legal person whose rights are decided by state administration bodies. The Ombudsman is independent and autonomous in performing his/her tasks established by this Law, and no one has the right to influence his/her work and actions. When doing work from his/her sphere of authority, the Ombudsman acts within the framework of the Constitution, the law and other regulations and general acts, as well as ratified international treaties and generally accepted rules of international law. The Ombudsman is accountable for his/her work to the National Assembly (hereinafter referred to as: the Assembly). The seat of the Ombudsman is in Belgrade, but he/she may establish an office outside the seat that he/she occupies.<sup>150</sup>

The election and termination of office of the Ombudsman are also regulated in detail. In accordance with the Constitution and the Constitutional Law,<sup>151</sup> the Ombudsman is elected by the Assembly by a qualified majority vote, that is, the majority of votes of all the representatives of the people, acting upon a proposal submitted by the Committee of the National Assembly authorised to deal with constitutional matters. Each representatives' group in the Assembly has the right to propose a candidate for the Ombudsman to the Committee. The decision on the candidate to be proposed for the Ombudsman is made by a majority vote of the overall number of Committee members. The Ombudsman is elected for a period of five years, and one and the same person may be elected to perform this function twice in succession at the most. To be elected the Ombudsman, one must be a citizen of the Republic of Serbia and fulfil the following conditions: be a graduate of law, with at least ten years in experience legal matters relevant to performing tasks within the remit of the Ombudsman; possess moral and professional qualities to a high degree, and have high-profile experience in the protection of citizens' rights. The first of the above-mentioned conditions, however, may be controversial. Experience the world over has shown that the ombudsman need not necessarily be a graduate of law, but that journalists,

<sup>150</sup> Cf.: *The Law on Ombudsman*, "The Official Gazette of the Republic of Serbia", nos. 79/05, 54/07, Articles 1-3.

<sup>151</sup> Cf.: *The Constitution of the Republic of Serbia*, "The Official Gazette of the Republic of Serbia", no. 98/2006, *The Constitutional Law on Implementing the Constitution of Serbia*, "The Official Gazette of the Republic of Serbia", no. 98/2006.

sociologists and representatives of other professions, primarily those in the social sphere, could perform this function.<sup>152</sup>

In order to avoid “inflation” of special ombudsmen who would protect only particular categories of citizens or vulnerable social groups, the Law states that the Ombudsman should have four deputies to help him/her in performing the tasks established by this Law, and in doing so, the Ombudsman should pay particular attention to providing certain specialised skills required for the position, particularly when it comes to protecting the rights of people in detention, gender equality, the rights of the child, the rights of members of national minorities and the rights of disabled persons. The deputies of the Ombudsman are elected by the Assembly, by a majority vote of the overall number of representatives of the people, acting upon a proposal submitted by the Ombudsman. This legal provision serves a good purpose, for in this way the Ombudsman is given the opportunity to choose him/herself the “team” that will protect human rights in the most efficient way. The deputies of the Ombudsman are elected for a period of five years, and one and the same person can be elected to perform this function twice in succession at the most. In order to qualify for, the deputies must fulfil certain conditions, similar to those required of the Ombudsman. Before taking office, the Ombudsman and his/her deputies take an oath before the Assembly (in the case of the deputies, before the Speaker of the Assembly). The Ombudsman and the deputies are considered to have taken office at the moment of taking this oath. The function of the Ombudsman or his/her deputies is incompatible with performing other public functions or professional activities, or with performing other duties and jobs that could influence their autonomy and independence. The Ombudsman and his/her deputies cannot be members of political parties. However, the Law leaves a lot of room for abuse of the above-mentioned provision for political purposes, for it applies only from the moment of taking office, which creates a lot of room for manipulation, because, at the moment when the authorised Committee proposes a candidate for the Ombudsman, he/she may still be a member of a political organisation, whereby the choice remains conditioned by the political will of the ruling political elite. The Ombudsman and his/her deputies enjoy the same immunity as representatives of the people. Another legal norm in this section deserves particular attention. Namely, the Law states that “... the Ombudsman and his/her deputies cannot issue statements that are *political in character*”. However, even those statements issued by the Ombudsman that refer to the work of a particular official in the context of human rights could be interpreted as being “political in character”, and the same applies to statements pertaining to the issue of the status of Kosovo that may be related to the human rights situation in this territory. As such statements could be considered to be “political”, this might constitute reasons for relieving the Ombudsman or a

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152 Cf.: The Law on Ombudsman, “The Official Gazette of the Republic of Serbia”, nos. 79/05, 54/07, Articles 4-5.

deputy of his/hers of duty on account of negligently performing his/her function, whereby the hypothetical authority of the Ombudsman is considerably limited.<sup>153</sup>

The spheres of authority of the Ombudsman are manifold and multilayered, and can be divided into several categories.

The first category is made up of general areas of authority, pointing, in a manner similar to that of Poland, in two directions: towards citizens and towards the state bodies in charge. The Ombudsman is authorised to control the observance of citizens' rights, establish cases of violations committed through actions or failure to act on the part of administrative bodies, if this pertains to violations of Republic laws, other regulations and general acts. On the other hand, the Ombudsman is authorised to control the legality and the regularity of the work of administrative bodies. However, the Ombudsman is not authorised to control the work of the National Assembly, the President of the Republic, the Government, the Constitutional Court, courts of law and public prosecutors' offices, i.e. the administrative bodies of the judiciary, the National Assembly and others, which is one of the limiting features of this Law.<sup>154</sup>

Another sphere of authority, as a matter of principle, pertains to the opportunity given to the Ombudsman to participate directly and actively in developing a coherent and non-contradictory legal system as regards human rights. Within this sphere of authority, the Protector of Citizens, first of all, has the right to propose laws from his/her domain, is authorised to submit proposals to the Government or the Assembly to amend laws or other regulations and general acts if he/she considers that violations of citizens' rights are occurring due to the shortcomings of those regulations, and to initiate the passing of new laws, other regulations and general acts if he/she considers it important when it comes to realising and protecting citizens' rights, and the Government and the Assembly are obligated to take those proposals into consideration. The Ombudsman is also authorised to submit his/her opinions concerning proposals of laws and other regulations to the Government and the Assembly in the course of the procedure of preparing new regulations, if the regulations in question pertain to issues that are of importance for protecting citizens' rights. The Ombudsman is also authorised to initiate proceedings before the Constitutional Court for assessing the constitutionality and legality of laws, other regulations and general acts.<sup>155</sup>

The third sphere of authority pertains to the authority of the Ombudsman concerning public administration officials and the personnel of administrative bodies. Within the framework of this area of authority, the Ombudsman is authorised to publicly recommend the dismissal of public officials if they are responsible for violating citizens' rights and to initiate disciplinary

153 Cf.: *The Law on the Protector of Citizens*, "The Official Gazette of the Republic of Serbia", nos. 79/05, 54/07, Articles 6-16.

154 Cf.: *The Law on the Protector of Citizens*, "The Official Gazette of the Republic of Serbia", nos. 79/05, 54/07, Article 17.

155 Cf.: *The Law on the Protector of Citizens*, "The Official Gazette of the Republic of Serbia", nos. 79/05, 54/07, Articles 18-19.

proceedings against the personnel of administrative bodies directly responsible for violations of citizens' rights, provided that repeated actions of officials or employees of administrative bodies indicate deliberate refusal to cooperate with the Ombudsman, or if it is established that the said violations caused major material or other damage to citizens. If the Ombudsman establishes that acts of officials or employees of administrative bodies contain elements of criminal or other legally punishable offences, he/she is authorised to submit a request to the authorised body to initiate criminal, misdemeanour or other appropriate proceedings.<sup>156</sup>

The fourth sphere of authority of the Ombudsman stems from the obligation of administrative bodies to cooperate with him/her. Within the framework of this sphere of authority, the Ombudsman has the right of access to the premises of administrative bodies, and to demand that administrative bodies place at his/her disposal all the data that are available to them and are relevant to the proceedings being conducted, regardless of their level of secrecy, except when this is against the law. Also, he/she has the right to talk to any employee of administrative bodies if this is relevant to the proceedings that he/she is conducting. A special form of authority, which can also be classified in this category, is the right of the Ombudsman to have unobstructed access to institutions for implementing sanctions and other places where persons in detention are kept, as well as the right to talk to such persons in private.<sup>157</sup>

The fifth sphere of authority is connected with conducting independent and unbiased investigations, that is, proceedings aimed at establishing possible human rights violations. We shall deal with this in more detail through provisions pertaining to procedural rules. What is important to point out here is that, based on the authority to conduct proceedings on account of citizens' complaints or on his/her own initiative, the Ombudsman has the right to address the public, the Assembly and the Government, and also has the right to recommend establishing the responsibility of the official managing an administrative body if he/she fails to act in accordance with the recommendation given.<sup>158</sup>

It should also be pointed out that the highest state bodies, that is, the President of the Republic, the Prime Minister and Government members, the Speaker of the Assembly, the Chairperson of the Constitutional Court and officials in administrative bodies are obligated to receive the Ombudsman upon his/her request within 15 days of his/her having requested a meeting at the latest.<sup>159</sup>

The Ombudsman initiates proceedings based on citizens' complaints or on his/her own initiative. Apart from the right to initiate and conduct proceedings, the Ombudsman has the right to act preventively by providing good services, mediating and giving advice and opinions about

156 Cf.: *The Law on Ombudsman*, "The Official Gazette of the Republic of Serbia", nos. 79/05, 54/07, Article 20.

157 Cf.: *The Law on Ombudsman*, "The Official Gazette of the Republic of Serbia", nos. 79/05, 54/07, Article 21.

158 Cf.: *The Law on the Protector of Citizens*, "The Official Gazette of the Republic of Serbia", nos. 79/05, 54/07, Articles 24-32.

159 Cf.: *The Law on Ombudsman*, "The Official Gazette of the Republic of Serbia", nos. 79/05, 54/07, Article 23.



issues from the sphere of his/her authority, with a view to improving the work of administrative bodies and enhancing the protection of human freedoms and rights. Each physical or legal, domestic or foreign person who has reasons to believe that their rights have been violated by acts, actions or failure to act on the part of administrative bodies can lodge a complaint with the Protector of Citizens. In the case of violation of the rights of a child, on behalf of a minor a complaint may be lodged by his/her parent or legal representative, and in the case of violation of the rights of a legal person, a complaint may be lodged by a person authorised to represent the said legal person. Before lodging a complaint, the person doing so is obligated to try to protect his/her rights in appropriate legal proceedings. The Ombudsman will instruct a person lodging a complaint how to initiate appropriate legal proceedings, if such proceedings are stipulated by law, and will not initiate proceedings him/herself until all other legal means have been exhausted. This legal provision, although it is somewhat imprecise, still indicates that a complaint may be lodged only when all legal means within the framework of one kind of proceedings (for example, general administrative proceedings) have been exhausted, and that the possibility of conducting another type of proceedings, for example, before a court instance (for example, administrative proceedings against a final decision) does not prevent the subject of a right from lodging a complaint with the Protector of Citizens. The Ombudsman may, in exceptional cases, initiate proceedings even before all legal resources are exhausted if the person lodging a complaint would suffer irreparable damage or if the said complaint pertains to a violation of the principle of good administration, a particularly inappropriate attitude of administrative bodies towards the person lodging a complaint, failure to act in a timely manner or other forms of violating the rules of ethical conduct of employees of administrative bodies. A complaint will not be taken into consideration if it is anonymous, but there may be exceptions even to this rule. The Ombudsman will not act on the basis of anonymous complaints. Exceptionally, if he/she considers that an anonymous complaint does contain grounds for him/her to act, the Ombudsman may initiate proceedings on his/her own initiative.<sup>160</sup>

A complaint is lodged in writing or orally, following which a record of it is made; the record and the lodging of a complaint are free of charge and exempt from taxation. A complaint may be lodged within one year at the latest from the time the violation occurred, or from the last instance of acting or failure to act on the part of an administrative body in connection with violation of a citizen's right. A complaint must contain: the name of the body to whose work the complaint refers, a description of the rights violation in question, the facts of the case and evidence in support of the complaint, data on the legal means used so far and data on the person submitting the complaint. Persons who are in detention have the right to lodge a complaint in a sealed envelope. The Ombudsman is obligated to act on the basis of any complaint except if the issue to which the complaint in question refers is outside the jurisdiction of the Ombudsman, if the

<sup>160</sup> Cf.: *The Law on Ombudsman*, "The Official Gazette of the Republic of Serbia", nos. 79/05, 54/07, Articles 24-25.

complaint was lodged after the expiry of the deadline for lodging complaints, if the complaint was lodged before all the available legal resources had been exhausted, if the complaint is anonymous, if the complaint does not contain all the data necessary for the Ombudsman to act upon it, and if the person having lodged the complaint fails to eliminate the shortcoming(s) within the deadline stipulated for supplying additional information or fails to address the Ombudsman's service and ask for professional assistance in eliminating the said shortcoming(s). If, due to any of the above reasons, there exist no grounds for the Ombudsman to act on the basis of a complaint, he/she will reject the said complaint, of which he/she is obligated to inform the person having lodged the complaint, stating the reason(s) for rejecting the complaint.<sup>161</sup>

The Ombudsman informs the person having lodged a complaint, as well as the body against which the complaint was lodged, of initiating and terminating proceedings. The administrative body in question is obligated to respond to any request of the Ombudsman and to forward to him/her any information and documents he/she may request, within the deadline stipulated by him/her, which cannot be less than 15 or more than 60 days. In cases which particularly warrant it, the Ombudsman may not reveal to the administrative body in question the identity of the person having lodged a complaint. If the body against which a complaint has been lodged eliminates the shortcomings pointed out, the Ombudsman will inform the person having lodged the complaint of this and leave him/her a deadline of 15 days to state whether he/she is satisfied with the course of action taken. Should the person in question reply that he/she is satisfied with the way in which the matter has been handled, or if the said person fails to reply within the stipulated deadline, the Ombudsman will suspend the proceedings.<sup>162</sup>

After establishing all the relevant facts and circumstances, the Ombudsman may inform the person having lodged the complaint that it is groundless, or he/she may establish that there were shortcomings in the work of the administrative body in question. If the Ombudsman establishes that there were shortcomings in the work of the administrative body in question, he/she will issue a recommendation to the body on how the perceived shortcomings could be eliminated. The said administrative body will be obligated to inform the Ombudsman, within 60 days of having received the recommendation at the latest, of its reasons for failing to act in accordance with the recommendation. In exceptional cases, if there is danger that the rights of the person having submitted a complaint will be permanently impaired to a significant degree unless the perceived shortcoming is eliminated, the Ombudsman may stipulate a shorter deadline than usual in his/her recommendation to the administrative body in question, with the *proviso* that the mentioned deadline may not be shorter than 15 days. If the said administrative body fails to act in accordance with the recommendation, the Ombudsman may inform the general public, the Assembly

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161 Cf.: *The Law on Ombudsman*, "The Official Gazette of the Republic of Serbia", nos. 79/05, 54/07, Articles 26-29.

162 Cf.: *The Law on Ombudsman*, "The Official Gazette of the Republic of Serbia", nos. 79/05, 54/07, Article 30.

and the Government of this, and he/she may also recommend establishing the responsibility of the official who manages the administrative body.<sup>163</sup>

The Ombudsman may also act on his/her own initiative if, on the basis of his/her own insight or information received from other sources, including even anonymous complaints in exceptional circumstances, he/she concludes that an act, action or failure to act on the part of an administrative body has resulted in violating human freedoms or rights.<sup>164</sup> The Ombudsman submits an annual report to the Assembly on a regular basis, wherein he/she provides information on his/her activities in the course of the previous year, information about any perceived shortcomings in the work of administrative bodies, as well as proposals aimed at improving the position of citizens in relation to administrative bodies. This report is to be submitted by 15 March of the following year at the latest and is published in "The Official Gazette of the Republic of Serbia" and on the web page of the Ombudsman, and is also forwarded to the media. During the course of a calendar year, the Ombudsman may submit special reports if a need to do so should arise.<sup>165</sup>

For the purpose of performing professional and administrative tasks, a professional service of the Ombudsman is formed. The work of this professional service is managed by its Secretary General, who must be a graduate of law, must have a minimum of five years of professional experience and must fulfil the requirements for employment in state administrative bodies. The Ombudsman passes a general act on the organisation and systematisation of the tasks of the professional service, which is adopted by the National Assembly. The Ombudsman decides on employing the personnel of his/her professional service. The funds for the work of the Ombudsman are provided from the State budget. The Ombudsman draws up a proposal of next year's funds and forwards it to the Government for the purpose of including it in the State budget proposal as an integral part of it, which is one of the good features of this Law.<sup>166</sup>

## **5. The Similarities and Differences between the Ombudsman and the Commissioner for Information of Public Importance, and their Mutual Relations in Serbia**

In Serbia, apart from the Ombudsman there is a Commissioner for Free Access to Information, established by the Law of 2004. The authority of the Commissioner for Access to Information was expanded to encompass the area of personal data protection by passing the Law on Personal Data Protection towards the end of 2008. Since the passing of this Law, this body has been referred to as the Commissioner for Information of Public Importance and Personal Data Protection. Between the Ombudsman and the Commissioner for Information of Public

163 Cf.: *The Law on Ombudsman*, "The Official Gazette of the Republic of Serbia", nos. 79/05, 54/07, Article 31.

164 Cf.: *The Law on Ombudsman*, "The Official Gazette of the Republic of Serbia", nos. 79/05, 54/07, Article 32.

165 Cf.: *The Law on Ombudsman*, "The Official Gazette of the Republic of Serbia", nos. 79/05, 54/07, Article 33.

166 Cf.: *The Law on Ombudsman*, "The Official Gazette of the Republic of Serbia", nos. 79/05, 54/07, Articles 36-37.

Importance and Personal Data Protection there are certain similarities, as well as significant differences, which are particularly manifested when it comes to their position and election, status, termination of office, authority, procedural matters and relations with the National Assembly.<sup>167</sup>

### 5.1. Position and Election

Both bodies, in accordance with the laws on the basis of which they were established and which regulate their work in detail, are single-member bodies that are independent and autonomous in performing tasks within the sphere of their authority. Also, both bodies are elected by the National Assembly of the Republic of Serbia, by a majority vote of the overall number of representatives of the people. Whereas candidates for the Ombudsman are proposed by the National Assembly Committee for Constitutional Matters, candidates for the Commissioner for Information are proposed by the National Assembly Committee in charge of information. The term of office of the Ombudsman lasts 5 years and one and the same person may perform this function twice in succession at the most (which, however, leaves open the question of whether the Ombudsman may be elected for a third time, but not in succession), as opposed to the Commissioner, whose term of office lasts 7 years, with the proviso that one and the same person may perform this function twice at the most. The conditions that must be fulfilled by candidates for the functions of the Ombudsman and the Commissioner for Information are similar to a certain extent, but there also exist significant differences between them.<sup>168</sup>

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<sup>167</sup> Note: in this section, we analyse the authority and the position of the Commissioner for Information only in relation to the sphere of freedom of access to information, as regulated by *The Law on Free Access to Information of Public Importance*.

<sup>168</sup> Cf: *The Law on Ombudsman*, "The Official Gazette of the Republic of Serbia", nos. 79/05, 54/07, Articles 1-2, 4-6; *The Law on Free Access to Information of Public Importance*, "The Official Gazette of the Republic of Serbia" nos. 120/04, 54/07, Article 1 par. 2, Article 30.

POSITION AND ELECTION	
OMBUDSMAN	COMMISSIONER FOR INFORMATION
Independent and autonomous body	Independent and autonomous body
Candidates proposed by the National Assembly Committee for Constitutional Affairs	Candidates proposed by the National Assembly Committee for Information
Elected by the National Assembly by a majority vote of the overall number of representatives of the people	Elected by the National Assembly by a majority vote of the overall number of representatives of the people
Term of office: 5 years	Term of office: 7 years
Requirements: (1) graduate of law; (2) ten years' working experience with legal matters relevant to the tasks from the sphere of authority of the Protector; (3) possesses high moral and professional qualities; (4) has notable experience in human rights protection.	Requirements: (1) fulfils requirements for working in state bodies; (2) graduate of law; (3) a minimum of ten years' working experience; and (4) has a high reputation and is a recognised expert on human rights protection and improvement.

**Table 1.** A parallel overview of the position of the Commissioner for Information and the Ombudsman

## 5.2. Status and Financing

The Commissioner for Information cannot be a person who performs a function or is employed with another state body or a political party. The function of the Ombudsman is incompatible with performing another public function or professional activity, and also with performing another duty or task that could influence his/her independence and autonomy; the Ombudsman cannot be a member of a political party either. On the day when the Ombudsman takes office, all his/her public, professional and other functions must cease; the same goes for any duties or jobs he/she has performed until then, as well as membership of political organisations. No one has the right to influence the work and actions of the Protector of Citizens, but he/she must not issue statements of political nature. The Ombudsman enjoys the same immunity as representatives of the people. On the other hand, in his/her work, the Commissioner for Information will not seek or accept orders and instructions from state bodies and other persons, nor can he/she be

held accountable for opinions expressed or proposals given in the course of exercising his/her authority; in the course of proceedings initiated on account of a criminal offence committed while exercising his/her authority, he/she cannot be detained without the consent of the National Assembly. The status of the Commissioner for Information as regards this segment of his/her work is better defined than the corresponding provisions pertaining to the Ombudsman.

In the segment pertaining to financing, which can also significantly influence the status of these two bodies, the funds for the work of the Commissioner for Information and his/her professional service are provided from the State budget (it is not specified whether this is done based on a proposal submitted by the Commissioner for Information or by the National Assembly Committee in charge or some other state body); the Ombudsman is also financed from the Republic budget, but the actual proposal for next year's funds is drafted by the Ombudsman him/herself, whereupon it is forwarded to the Government to be included in the budget proposal as an integral part of it, which is a better solution than that which applies to the Commissioner for Information.<sup>169</sup>

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169 Cf.: *The Law on Ombudsman*, "The Official Gazette of the Republic of Serbia" nos. 79/05, 54/07, Articles 9-10a, 37; *The Law on Free Access to Information of Public Importance*, "The Official Gazette of the Republic of Serbia" nos. 120/04, 54/07, Articles 32, 34 par. 4.

STATUS	
OMBUDSMAN	COMMISSIONER FOR INFORMATION
Function incompatible with: (1) performing another public function or professional activity; (2) performing another duty or task that could influence his/her autonomy and independence; (3) membership in a political party.	Function incompatible with: (1) performing another function or employment with another state body; (2) performing a function or employment with a political party.
No one has the right to influence the work and actions of the Protector of Citizens, but he/she must not issue statements of political nature.	In his/her work, the Commissioner for Information will not seek or accept orders and instructions from state bodies and other persons, nor can he/she be held accountable for opinions expressed or proposals given in the course of exercising his/her authority.
Enjoys immunity like representatives of the people.	In proceedings initiated on account of a criminal offence committed while exercising his/her authority, he/she cannot be detained without the consent of the National Assembly.
Funds provided from the State budget, proposal drafted by the Ombudsman and submitted to the Government	Funds for the work of the Commissioner provided from the State budget (not specified whether based on a proposal submitted by the Commissioner, the Assembly Committee in charge or some other state body)
Has a professional service. Act on the organisation of the professional service passed by the Protector and adopted by the National Assembly.	Has a professional service. Act on the organisation of the professional service passed by the Commissioner and adopted by the National Assembly.

**Table 2.** A parallel overview of the status of the Commissioner for Information and Ombudsman

### **5.3. Termination of Office**

The Ombudsman's term of office will be terminated: upon the expiry of his/her term of office, if he/she is not re-elected, on account of his/her death, resignation or loss of citizenship, if he/she meets the requirements for retirement, suffers permanent loss of physical or mental ability to perform his/her function or is dismissed. The reasons for the termination of office of the Commissioner for Information are more narrowly defined (unprofessional and negligent performance of his/her function, performing another public function or professional activity, or being convicted for a criminal offence that makes him/her unfit to perform his/her function). However, these differences become interesting from the point of view of the grounds for dismissal. A comparative analysis of the corresponding legal provisions reveals that the Serbian legal system is not harmonised, as a result of which proposals submitted by various ministries often differ a lot in normative terms and even contradict one another, which is attributable to the Secretariat for Legislation of the Government of the Republic of Serbia.



OMBUDSMAN	COMMISSIONER FOR INFORMATION
Reasons for termination of office: (1) expiry of term of office, if not re-elected; (2) death; (3) resignation (4) loss of citizenship; (5) fulfilling retirement conditions; (6) permanent physical or mental incapacity, based on documentation issued by a relevant medical institution; and (7) dismissal.	Reasons for termination of office: (1) expiry of term of office; (2) upon personal request; (3) reaching 65 years of age; (4) dismissal.
Dismissal (1) unprofessional and negligent performance of function; (2) performing another public function, professional activity or task that could influence his/her autonomy; (3) if acting contrary to the law regulating prevention of conflict of interest; (4) if convicted for a criminal offence making him/her unfit to perform this function.	Dismissal (1) sentence to prison; (2) loss of working ability; (3) performing a function or a job with another state body or a political party; (4) loss of citizenship; (5) unprofessional and negligent performance of function.
Procedure for dismissal initiated by at least 1/3 of representatives of the people or upon request of the majority of members of Committee for Constitutional Affairs	Procedure for dismissal initiated by at least 1/3 or representatives of the people; Committee for Information notifies National Assembly whether reasons exist or not

**Table 3.** A parallel overview of reasons for termination of office and dismissal of the Commissioner for Information and the Ombudsman

It is unclear why that which in one law constitutes a reason for termination of office in another constitutes a reason for dismissal and vice versa. The procedure for dismissing the Ombudsman is initiated based on a proposal submitted by a minimum of one-third of representatives of the people or the majority of members of the Committee for Constitutional Affairs, and in the case of the Commissioner for Information, upon a request submitted by a minimum of one-third of representatives of the people, with the Committee for Information notifying the National Assembly whether reasons for this exist or not.<sup>170</sup>

<sup>170</sup> Cf.: *The Law on Ombudsman*, "The Official Gazette of the Republic of Serbia", nos. 79/05, 54/07, Articles 11-12; *The Law on Free Access to Information of Public Importance*, "The Official Gazette of the Republic of Serbia" nos. 120/04, 54/07, Article 31.

## 5.4. Authority

The greatest difference between these two bodies stems from their spheres of authority. The Ombudsman is authorised to protect all citizens' rights and to control the work of state administration bodies, the body in charge of the legal protection of the property rights and interests of the Republic of Serbia, as well as other bodies and organisations, companies and institutions entrusted with exercising public authority (administrative bodies), oversees the protection and improvement of human and minority freedoms and rights. The authority of the Commissioner for Information is limited to "controlling" and improving the right to free access to information. This "control" of the realisation of the right to free access to information encompasses public administration bodies, which presupposes state bodies, territorial autonomy bodies, local government bodies, and as organisations entrusted with exercising public authority and legal persons established and financed, either entirely or predominantly, by a state body.

Essentially, what we have here are two different forms of control. While the Ombudsman exercises "control" in the form of an external, special form of oversight of administrative bodies, that is not the case with the Commissioner for Information, who primarily exercises second-instance, that is internal administrative oversight of the realisation of the right to free access to information on the part of public administration bodies.

Internal administrative control is the legal control of high-level administrative bodies (in a broader sense, public administration bodies) over lower-level bodies, that is, of senior over lower-level employees, on the basis of hierarchical authority. It is manifested as instance-based control (control based on complaints lodged in the course of administrative proceedings) and oversight in the line of duty (control exercised *ex officio*).<sup>171</sup> The Commissioner for Information appears as a superior, hierarchically higher body in the sphere of freedom of access to information in relation to all other public administration bodies, with the exception of those which, in accordance with the Law on Free Access to Information, are exempt from that kind of control. However, what follows is controversial, for this authority on the part of the Commissioner for Information cannot be "subsumed" under "classical" internal administrative control. The Commissioner for Information is an independent and autonomous body, not an "ordinary" administrative body. If one proceeds from this fact, in organisational terms, this form of control is also an external form of control, for it is exercised by a body which, in organisational terms, is not an administrative body. That is why the term "internal administrative control" should be viewed in functional (according to the type of authority), and not in organisational terms (the type of body).

The authority of both bodies, both in terms of "external" and "internal" administrative control, does not encompass all bodies. The Ombudsman is not authorised to control the work of the

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171 Cf.: Stevan Lilić, Predrag Dimitrijević, Milan Marković, *Upravno pravo [Administrative Law]*, Savremena administracija, Belgrade, 2004, pg. 396-397.

National Assembly, the President of the Republic, the Government, the Constitutional Court, courts of law and public prosecutors' offices. A complaint lodged against a decision refusing access to information passed by the National Assembly, the President of the Republic, the Government of the Republic of Serbia, the Supreme Court of Serbia, the Constitutional Court and the Republican Public Prosecutor cannot be lodged with the Commissioner for Information; against such a decision, one can only initiate administrative proceedings.



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## **Protection of Human Rights and Control of the Administration**

The modern concept of the Ombudsman includes the protection of human rights and freedoms, while the initial concept of the institution was based on protecting citizens from maladministration. The Ombudsman carries out his or her basic competences through protection and improvement of human rights, and also through improvement of the work of administrative authorities.

The universal principle of organisation of all modern and developed states is the principle of separation of powers into branches. The intensity and degree of democratic development of a society largely depends on the legal and especially the actual state of interrelations of certain branches of state power. Contemporary experience shows that it is exactly the institution of ombudsman that helps to establish and maintain balance and interdependence between the executive and the other branches of power, especially the legislative. The powerful legitimacy of the institution of ombudsman originates in the fact that its contribution is through the realisation and protection of citizens' rights and freedoms, which are in democratic societies both the basis and the boundary of power. Therefore, it is a generally accepted opinion that, during its existence, the institution of ombudsman has largely confirmed itself as a necessary element in building a democratic society, as well as an efficient mechanism to strengthen democratic processes, protect the rights and freedoms of citizens, and implement extrajudicial control of the administration and holders of public office. In addition, its particular quality makes the institution of ombudsman very different from other state authorities – it contributes to the establishment of social justice, because it is an institution that tries to protect human rights and freedoms as a category from (and above) positive law. Namely, the function of ombudsman is not only

to control the implementation of positive legality, but also to achieve social justice based on the principles of legitimacy, fairness, honesty and high public standards in the uses of power public service provision. The relation between positive law and natural law, which is the basis for the ombudsman's actions, should be interpreted as an interrelation of a sustainable dynamic balance in which these two elements complement each other, because overemphasising one or the other would lead to extremely harmful consequences.

Bearing in mind that the ombudsman is an institution of eminently democratic nature, the relation towards this institution is rather colorful in those countries that aspire to democracy, or to be more precise, which are in transition from so-called party rule to the rule of law. Experience shows that the center of strong resistance to the introduction and strengthening of the institution is none other than the executive branch. It is not difficult to explain the rejection or refusal of initiatives to introduce the institution of ombudsman, the reason being that an independent democratic institution, which would efficiently protect citizens' rights from illegal and unfair actions of public authorities, would only be an impediment for all the main levers of power in every undemocratic and authoritarian regime. The ombudsman simply cannot fit into a system the main characteristics of which are one-party or one-person rule, disregard for the law, and arbitrary action by public authorities. By introducing the institution of ombudsman, the Republic of Serbia has finally joined the vast majority of countries in which this institution exists already. The Ombudsman of the Republic of Serbia is an independent and autonomous state authority introduced into the legal system by the Law on the Ombudsman in 2005 (*Official Gazette of the Republic of Serbia* No 79/05 and 54/07) and subsequently defined by the Constitution of the Republic of Serbia (*Official Gazette of the Republic of Serbia* No 83/06 and 98/06).

In essence, the characteristics that define the institution of ombudsman have remained the same to this very day:

- It is a parliamentary body.
- It is a body that absolutely does not tackle the existing system of supervising the work of administrative authorities and public servants, it only complements the existing one since it has no power to alter or annul the acts of public authorities, nor to punish them on its own for illegal or incorrect work, but can only criticise the acts and actions of administrative authorities, pinpoint their faults and call for the guilty party to be sanctioned.
- It is the only body that assesses not only the legality but also the appropriateness of the work of administrative authorities and public servants.
- Citizens can address it easily and without special formalities, with no expenses for a fast and efficient intervention, but at the same time, it can also act on its own initiative.

- It is a constitutional category, established as a very stable institution the whole position and competences of which are defined by the constitution and elaborated and specified by the law.

The Ombudsman is appointed by the National Assembly, which is different from a smaller number of countries in which the general ombudsman, or much more often the specialised ombudsmen are appointed by the executive branch. The Ombudsman's deputies are also appointed by the National Assembly, which means that with this constitutional and legal definition the Republic of Serbia has established the concept of a parliamentary ombudsman of general type. The Ombudsman acts within the Constitution, the laws, other regulations and general acts, and ratified international treaties and the generally accepted norms of international law. He or she is a control institution that ensures protection and improvement of human and minority rights and freedoms by monitoring the legality and regularity of administrative authorities' work in relation to the achievement of individual and collective citizens' rights. In opposition to this, the Ombudsman is not an authority of instance control, an administrative authority, a judicial authority nor a legislative authority, due to the fact that he or she is not authorised to take decisions based on the merits of citizens' rights and obligations. Given that the Ombudsman is not authorised to enter decision-making based on merits related to any administrative or court matter, he or she cannot annul or amend decisions made by the administrative authorities or the court. In other words, the executive branch is the effective, really acting power with numerous prerogatives and instruments ensuring its enforcement. Unlike the executive, the ombudsman is an institution that does not have the classical prerogatives of state power. The ombudsman does not give orders, take decisions or have the enforcement apparatus at his or her disposal, but he or she exercises public, social, extralegal and neutral control of public administration. The ombudsman acts by the force of his or her integrity, and his or her positions are not subject to examination. One can only act or not act in line with his or her recommendations. In countries of stable developed democracy, not acting in line with the ombudsman's recommendations is almost unthinkable.

The ombudsman is also different from other control institutions due to the relatively informal procedure adjusted to characteristics of each individual case, and the broad range of his or her competences. The balance to such a broad range of competences of a single authority is made by the formally non-binding nature of its recommendations that indicate how to rectify identified malpractice.

Generally speaking, relations between the public administration and the ombudsman should be viewed as a set of principles that are established between them when they carry out their functions:

- **The principle of collaboration** (Collaboration can take place concerning both certain general activities and individual issues. Specifically, it can be established in relation to legislative initiatives proposed by one of these two authorities, during regulation of social relations. In addition to this, an important area of mutual collaboration is ensuring of conditions and guarantees for implementation of the law and its concrete application in practice. The ombudsman can ask the executive branch to undertake certain measures against public state officials whose appointment and election falls within its competences.);
- **The principle of opposition** (According to positions they take in the system, the executive branch and the ombudsman are situated at fairly opposite poles. Therefore, the executive branch has the instruments of effective power at its disposal, while the ombudsman is an institution that monitors and to a certain point limits the executive branch.);
- **The principle of limitation** (Precisely due to this principle of opposite positions, the executive branch very often tries either to prevent the introduction of the institution of ombudsman or, if the institution already exists, it tries to decrease and minimise its influence. On the other hand, the ombudsman objectively has the position to detect serious malpractice and even illegality in the work of the executive branch and to notify the parliament and the wider public about it, which is a way to limit and control the executive branch.).

In conformity with the principle of separation of powers to legislative, executive and judicial branch, the competences of Ombudsman should not cover the executive authorities only, neglecting the legislative and the judicial authorities. In the case of the legislative branch, this rule is fully respected, so in comparative practice there are not exceptions in the sense of granting the Ombudsman any kind of control competences in relation to the parliament, and even the Serbian Ombudsman is not an exception to this rule. The Ombudsman cannot examine decisions made by the parliament for the simple reason that it is a body established by the parliament to supervise the work of others on its behalf. The independence of the courts is the reason to exclude the work of courts from the Ombudsman's control, even though lately the Ombudsman has been called on to ensure the right to a trial within a reasonable deadline. The government as a whole and the Prime Minister are regularly excluded from the Ombudsman's purview, but the situation is different when it comes to ministers. The ministers are subject to control as heads of administrative authorities (the ministries,) while they are regularly excluded from control in relation to their political activities (as government members). For these reasons, the Ombudsman is not authorised to monitor the work of the National Assembly, the President of the Republic, the Government, the Constitutional Court, the courts and the public prosecutor's offices. It is within the Ombudsman's competences to monitor the work of public administration authorities, the authorities responsible for legal protection of property rights and the interests of the Republic of Serbia (the Public Attorney), and other authorities and organisations, companies and institutions that have public competences entrusted to them. In a relatively quick extrajudicial procedure

freed of too much formality, the Ombudsman examines whether an administrative authority or other organisation legally and appropriately took a decision on a citizens' right or interest, and if this was not the case, the Ombudsman demands rectification of that error and proposes how this can be done. The importance of this institution is great because the Ombudsman controls much more than formal respect of the law – he or she examines morality, commitment, impartiality, professionalism, appropriateness, effectiveness, respect for human dignity and all other features that should be present in administration and that the citizens rightfully expect from those whom they fund as taxpayers.

The administration in the Republic lacks effective and quick mechanisms for internal examination of citizens' complaints. A multitude of non-harmonised regulations, which are sometimes redundant and sometimes vague, contribute to the climate of non-transparency and arbitrariness. There is no respect for client's dignity, and the principle of protection of citizens' rights is neglected (the obligation to allow clients to protect and achieve their rights and interests in the easiest manner), and the same applies to the principle of public interest.

If the Ombudsman is to carry out his or her competences efficiently, he or she needs to have a certain set of powers at his or her disposal. These powers are defined by the law as his or her right to certain actions and demands concerning the authorities that he or she monitors and the officials and public servants working in them. The duties of authorities and persons to carry out what the Ombudsman requires them to do correspond to his or her rights and powers. These are as follows:

- The right to ask for data, information and explanations from authorities and persons whose work he or she monitors. This is a basic and minimal power without which the Ombudsman's work would be unimaginable,
- Insight into official acts, documents and databases, regardless of the confidentiality degree, in relation to a concrete procedure and in line with his or her request and rules on handling of official acts, documents and databases,
- Right to make unannounced visits (inspections) which includes the right to gain direct insight into the actions of authorities and officials that fall within his or her purview, and
- The right to take statements from officials and public servants whose work he or she monitors, when it is necessary in order to clarify all relevant facts in a concrete case.

The Ombudsman also has the right to act preventively, by providing good services, mediating between the citizens and the administrative authorities and providing his or her opinion on issues that fall within his or her jurisdiction, all with the objective to improve the administrative authorities' work and protection of human rights and freedoms.





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Deputy Ombudsman of the Republic of Slovenia

Human Rights Ombudsman

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## **Annual Reports by the Ombudsman of the Republic of Slovenia to the Parliament**

### **1. Status and Powers of the Human Rights Ombudsman of the Republic of Slovenia**

The Human Rights Ombudsman (hereinafter: Ombudsman) was established pursuant to Article 159 of the Constitution of the Republic of Slovenia (hereinafter: Constitution) of 1991 and the Human Rights Ombudsman Act (hereinafter: Act), adopted by the National Assembly in 1993 by regular legislative procedure requiring three readings. When drafting the provisions on the duties and powers of the Slovenian Ombudsman, experiences of several ombudsman systems were examined and taken into consideration. Consequently, a number of elements in this Act reflect the classical Scandinavian model, while other elements are closer to the model adopted in other transition countries (for instance, greater emphasis is put on the protection of human rights, on redressing systemic malfunctions and on accessibility to judicial proceedings).

The Constitution and the Act empower the Ombudsman to examine cases of alleged illegal acts and maladministration of state authorities, local authorities and bearers of public authority. The Ombudsman acts in compliance with the Constitution and international law regarding human rights and fundamental freedoms. The Act does not quote laws as a basis for Ombudsman intervention, since they may not be in compliance with the Constitution or ratified international agreements. This assessment must, of course, be well grounded.

The activity of the Ombudsman is also founded on the principle of equity and good administration. On this basis the Ombudsman may propose exceptional solutions in individual, well grounded

cases not envisaged by the law, by analogy with the Latin model of the ombudsman's powers. If such a situation applies to multiple individuals, modification of the regulations in force is in order; however, proposals by the Ombudsman must never jeopardise the principle of legality and non-discrimination (equality before the law).

Pursuant to the Constitutional Court Act the Ombudsman may initiate a procedure for the review of the constitutionality of regulations or general acts issued for the exercise of public authority, or, in agreement with the person concerned, he may bring an action before the Constitutional Court claiming a violation of human rights or fundamental freedoms (constitutional complaint). In both cases the Ombudsman has the status of authorised petitioner and need not demonstrate legal interest, which is required by law from other persons who wish to lodge a petition with the Constitutional Court. The 2007 amendment to the Constitutional Court Act extended the powers of the Ombudsman to initiate procedures for review of the constitutionality of regulations beyond the framework of (Ombudsman's) petitions under consideration. The Act now authorises the Ombudsman to initiate procedures for reviewing the constitutionality of regulations if he considers that such regulations encroach upon human rights and fundamental freedoms. This modification is of utmost importance in the light of the amendment of the Constitutional Court Act, which otherwise considerably limits the right of filing petitions with the Constitutional Court.

The Ombudsman may submit initiatives to the National Assembly and Government for amending laws or other legal acts. He may also make suggestions to state bodies and affiliated organisations for improving their work and attitude towards their clients, contributing in this way to more client-friendly work on the part of public officials and of public administration in general. This is done, in the first place, by means of regular annual reports and special reports submitted to the National Assembly and/or its working groups.

## **2. The Role of Annual Reports of the Ombudsman and Relations with the National Assembly**

It is true that the primary task of the Ombudsman is to investigate complaints lodged by individuals. However, through such investigations he may also come across so-called "systemic" malfunctions and maladministration of public administration. This involves, in particular, non-conformity of regulations and legal voids, the absence of effective complaint mechanisms and cases of bad, careless and inefficient work of public authorities, which, as a rule, are not sanctioned. The Ombudsman is the only entity within the public administration to have a 360-degree overview of the implementation of regulations and of relevant practices. The annual reports to the National Assembly reflect the Ombudsman's endeavours.

From this point of view, the Ombudsman's annual report to the National Assembly is one of the strongest tools for the implementation of his proposals and recommendations. Pursuant to the Act, the Ombudsman must report on his work to the National Assembly at least once a year. However, his annual report is not only a fulfilment of his legal obligations and a mere report on the work of the institution. It has wider implications. It is a report on the status of the respect of human rights in the country and of the legal certainty of citizens, and also, albeit indirectly, a report on the work of the public administration. The report functions – within the public administration – as a means of harmonising practices and informing public officials of the ombudsman's positions. However, the report is also important in a wider context. Its target public is, besides the deputies of the National Assembly, various government and administrative bodies, individual citizens, civil society and professional groups (lawyers, university scholars and others).

In his annual reports, the Ombudsman presents concrete problems encountered in various segments of public administration and the most typical individual cases investigated; in addition, he spotlights general problems arising in the operation of public administration bodies. The report provides comprehensive information concerning the status of the protection of the rights of individuals that come into contact with public administration bodies, an overview of the operation of public bodies at all levels, and a general picture of the status of respect of human rights and other fundamental freedoms in the country. From this point of view the report represents an essential piece of information for the National Assembly in the exercise of its role of supervision of public administration, in particular of the executive branch.

It is interesting to analyse the discussion of the first two reports by the National Assembly, as at that time it was not clear in what way the discussion should be conducted and concluded. The Ombudsman Act does not provide for it. It only defines that the report shall include an assessment of the status of the protection of human rights and the rule of law in the Republic of

Slovenia. A more detailed structure of the report is defined in Article 40 of the Ombudsman's Rules of Procedure, which stipulates that the report shall contain, besides an assessment of the status of the protection of human rights and the rule of law, an illustration of problems of essence, statistics of cases investigated, a description of individual typical cases and a report on other actions carried out by the Ombudsman.

Prior to 2002, the discussion of the Ombudsman's Report was not provided for in any regulation, and consequently the discussion in the National Assembly was not carried out according to a uniform procedure. The Ombudsman has, however, always insisted that the National Assembly has no authority to decide on the adoption or rejection of the report, and this position was accepted. The Ombudsman also insisted on the fact that the National Assembly was only authorised to adopt recommendations and guidelines for other institutions, in particular for the Government. This procedure concerning the discussion of the report was later made official by the Rules of Procedure of the National Assembly, adopted in 2002. In Article 272, these Rules define the terms to be reserved for the discussion and the procedure to be followed (*a special item on the agenda of a regular session of the National Assembly in the spring or autumn terms may also be reserved for discussion of a special report of the ombudsman for human rights*), and that after the discussion the National Assembly adopts a recommendation. The Rules further explicitly provide that the ministers whose scope of work the report refers to must be present during the discussion of the report.

A great leap forward as far as the discussion of the Ombudsman's Report is concerned was made after 2000, when the Minister of Justice (first mandate Ombudsman), requested and was granted the condition that a special response report by the Government be prepared and annexed to the Ombudsman's Report. The grounds for this request may not be found in any rules of procedure or legal provisions, but are part of the general obligation of the Government to prepare its position for each item of the agenda of any session of the National Assembly. In the initial years, the response report, which was often bulkier than the Ombudsman's Report, was prepared by the Ministry of Justice on the basis of documents provided by various government and ministerial bodies. In recent years, the coordination and the preparation of the response report has been carried out by the Ministry of Public Administration. This response report often has weak points, such as the fact that it does not cover all the areas discussed by the Ombudsman's Report. It is, nevertheless, a welcome reaction of the executive branch and a document that may serve as a basis for a detailed discussion of the report in the working bodies and in the plenary session of the National Assembly. Normally, the discussion of the report takes a whole day. Deputies discuss several documents: the Ombudsman's Report, the Government response report and recommendations prepared by the relevant working group, the Commission for Petitions, Human Rights and Equal Opportunities. The Ombudsman regularly,

albeit informally, collaborates with the Commission's legal service in drafting the Commission's recommendations. In this way the Ombudsman can point out areas that he considers of essence for the implementation of his proposals and recommendations.

National Assembly recommendations are divided into chapters. They contain recommendations to the Government concerning the adoption of new regulations or the regulation of certain areas, which are, in the opinion of the Ombudsman (as presented in the Report) and deputies, insufficiently regulated and negatively affect the status of individuals and their rights. Some recommendations are implemented in a relatively short period of time, while others wait several years before adequate solutions are put in place. By way of his reports, the Ombudsman has contributed considerably to the adoption of certain acts, for instance in the field of access to information of public character, protection of personal data, police powers, court procedures, children's rights, mental health and patient's rights. In relation to the latter, several years of endeavours by the Ombudsman were needed before the necessary regulations were adopted. The Government response report also contains a chapter on the monitoring of implementation of recommendations from the previous report.

In this way the Ombudsman is able to positively influence the implementation of his systemic proposals and recommendations that concern the solving of cases where the problem is not maladministration or bad work of public institutions, but is the result of inadequate legislation or inappropriate practice of public bodies.

Consequently, in the classical distribution between branches of power the Ombudsman may be considered an institution that assists the representation body (National Assembly) in the supervision of the executive and administrative branches. The representation body is thus also entrusted with – besides its legislative function – a supervisory function. In the framework of its supervisory powers, the representative body carries out direct supervision of the work of the Government and of individual ministries by way of votes of (no)confidence, interpellations or questions by the deputies. Hence, the Ombudsman may be defined as an entity assisting the National Assembly in the supervision of the executive branch, and in particular of those segments that the legislative branch may not supervise directly. The annual and special reports of the Ombudsman to the National Assembly are of vital importance in this regard.



**Jørgen Kosmo**

Auditor General of the Kingdom of Norway

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## **Public Oversight Functions of the Office of Auditor General of Norway**

### **1.The Credibility of a Parliament**

The Parliament represents the ultimate expression of the sovereignty of a people. Through the Parliament, it is the people who govern the country, introduce legislation, authorise spending, impose taxes and control the work of the Government. A Parliament's institutional ability to perform lawmaking and to pursue its representative and oversight functions in a transparent and efficient manner, thereby contributing to increased public confidence in the Parliament, is therefore of vital importance to the well-being of a democracy. The Parliament's credibility rests ultimately on its ability to supervise the Government and the public administration so as to ensure that State assets are utilized and managed according to the decisions and intentions of the Parliament, and that the interests of the citizens who pay for and make use of public services are safeguarded.

### **2.The Oversight Functions of a Parliament**

The oversight which Parliaments exercise over the public administration is based on different sources of information. It may be reports from one of a Parliament's independent supervisory bodies such as the Auditor General or a Parliamentary Ombudsman, or it may be matters communicated through the mass media which may be looked into by a Parliamentary Committee such as the Public Accounts Committee or Finance Committee.

### *Public Accounts Committee*

In many countries the Publics Accounts Committee is distinguished from the other standing committees by the fact that it can act on its own initiative when dealing with supervisory matters. The Committee is often entitled to perform any inquiry into the public administration it finds necessary for the exercise of the Parliament's supervisory power.

### *Supreme Audit Institution*

The supreme audit institution, however, is often the Parliament's most important supervisory body, examining the activities of the national administration to ensure that State assets are utilised and managed according to sound financial principles and in keeping with the decisions and intentions of the Parliament.

The supreme audit institution is also an import instrument for the Parliament to supervise the fulfilment of the government's oversight functions and responsibilities. The supreme audit institution's audit of government oversight agencies such as the National Financial Supervisory Authority, National Competition Authority, Data Inspectorate etc; enables the Parliament to monitor whether the government is fulfilling its oversight duties concerning enforcement of and compliance with important relevant laws and regulations.

## **3. The Accountability Chain – Mutual Dependence**

The Parliament and the supreme audit institution of a country are mutually dependent on each other in an accountability chain. The supreme audit institution is the Parliament's tool to supervise the Government and public administration. Correspondingly, in order for audit reports to have impact, the supreme audit institution depends on the Parliament's ability to follow up the reports and hold the government to account for the way it uses public money.

## **4. Important Preconditions to Ensure an Efficient and Independent Audit to Hold the Government Accountable**

- Laws that regulate both external audit by a supreme audit institution and the follow up of audit reports.
- An independent Supreme Audit Institution that works and operates according to the INTOSAI Mexico Declaration on Independence (which states i.a. that it is the Parliament and not the government that appoints and dismisses the Auditor General, that approves the budget of the

Supreme Audit Institution, that receives its audit reports and that is the only authority that has the right to instruct the Supreme Audit Institution).

- The mandate of the Supreme Audit Institution encompasses a wide scope of audit disciplines (e.g. performance audit, compliance audit, IT-audit, environmental audit).
- Well defined regulations and procedures for how audit reports shall be tabled and processed in the Parliament.
- Transparency with regard to the contents and the treatment of the audit reports.
- The Supreme Audit Institution is accountable to the Parliament by means of its annual performance report and the audited accounts.

### **5. The Disruption of a Sound Accountability Chain - Often Identified Challenges in Co-Operation Between Parliaments and Supreme Audit Institutions**

- There are still many countries where the legislative and supervisory power (Parliament) is weak compared to the executive power. The consequence is often weak follow-up on the audit and supervisory reports of the Parliament.
- Lack of knowledge among Parliaments and Parliamentarians about the functioning of the supreme audit institution and public auditing, and how audit reports should be addressed.
- Audit reports are often too voluminous, too detailed and written in a language that is not easily accessible to the recipients.
- Lack of distinct and unambiguous procedures for how the audit reports are to be followed up in the Parliament.
- Lack of real independence makes the supreme audit institutions and their reports less credible in the public eye.

### **6. Strong and Independent Supreme Audit Institutions Increase the Credibility and Strength of Parliaments and Democracy**

Many people are losing confidence in political life and regard it as a poorly understood and complex system to deliver the policies that they want. They often experience a lack of coherence between what the Parliament decides and what the actual outcome is. This leads to distrust and lack of support for the Parliament and the people they have elected to represent them. This is why it is so important to increase the strength and quality of the oversight function of the



Parliament to enable the elected representatives of the people to follow up on their decisions, learn about the results of the government's implementations of the Parliament's decisions, and to hold the government accountable for the way they have used public money. The supreme audit institutions and the Parliaments have a common objective, task and duty to make the oversight function strong and reliable in order to enhance democracy and the respect of the sovereignty of the people in our countries.



## **William Burnett**

Former Director, International Technical Cooperation,  
National Audit Office of the United Kingdom

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### **The Structure and Organisation of the National Audit Office of the United Kingdom**

The Comptroller and Auditor General (C&AG) is the head of the UK NAO and is formally appointed by the monarch on an address from the House of Commons moved by the Prime Minister with the agreement of the Chairman of the Committee of Public Accounts. Following recent changes the C&AG will in future serve for a maximum 10 year non-renewable term of office. Within this term he can be removed from office only by the Queen on an address from both Houses of Parliament thus strengthening his independence.

The Board of the NAO advises the Comptroller & Auditor General on the strategic direction for the NAO, including its strategic objectives and plans, and the governance of the NAO. The Board comprises an independent non-executive Chairman, four other non-executive board members drawn from outside the NAO, the C&AG, the Chief Operating Officer and two Assistant Auditors General.

### **The Recruitment, Remuneration and Qualifications of Staff and Other Resources**

The Comptroller and Auditor General's salary is paid directly from the Consolidated Fund without requiring the annual approval of the Executive or of Parliament. The Comptroller and Auditor General appoints his own staff and determines their numbers, grades, salaries and conditions of service.

The National Audit Office employs over 800 staff. Of these, around 620 are professional audit staff, with some 180 support staff. National Audit Office employees have a wide range of skills and knowledge. Audit staff are recruited mainly as university graduates and trained to acquire professional accountancy qualifications. The Office also draws on a wider pool of skills, particularly for value for money work, and employs economists, operational researchers, social scientists and other specialists. External expertise is drawn in from the private sector and universities. The National Audit Office subcontracts around a quarter of its financial audit work to private sector audit firms. A small number of value for money studies, and parts of studies, have also been contracted out. The use of specialists and contractors allows the National Audit Office to draw on new approaches and methods from outside.

The National Audit Office's operating costs are approximately £80 million each year. The Comptroller and Auditor General presents the National Audit Office budget to the Public Accounts Commission, a committee of Members of Parliament which considers the National Audit Office's plans and budget. The Commission then makes a recommendation to the House of Commons whether to accept the budget.

In recent years, two new Auditor General posts have been established to audit the expenditures of the new Scottish Parliament and National Assembly for Wales. In Scotland, the Auditor General is supported by a new body, Audit Scotland. A new Wales Audit Office, established in 2005, supports the Auditor General for Wales. There has been a Comptroller and Auditor General for Northern Ireland since the foundation of the state in 1921. He heads the Northern Ireland Audit Office and reports to the Northern Ireland Assembly to the United Kingdom Parliament if the Assembly is not operating.

### **The Scope, Role and Rights of Access of the National Audit Office**

The Comptroller function of the Comptroller and Auditor General makes him responsible for the overall account of Government (the Consolidated Fund) and the National Loans Fund, which covers government borrowing and lending. He is required to give authority for Treasury requisitions from these funds, after having assured himself that the credits requested are for the purposes and within the amounts authorised by Parliament.

The Comptroller and Auditor General has a statutory remit to examine and certify the accounts of government departments and agencies and report the results to Parliament. He audits some 520 accounts in total, consisting of departmental resource accounts (under the Government Resources and Accounts Act 2000); accounts of executive agencies (under either the terms of the Government Trading Funds Act 1973 or the Government Resources and Accounts Act 2000); and the accounts of other public bodies (under the specific statute establishing the body

or by agreement). This represents the largest part of the Office's workload, employing around 400 staff. The Comptroller and Auditor General also has inspection rights to some 3,000 other bodies that receive public funds to provide public services such as housing, education and training. This enables him to provide assurance to Parliament that public money has been properly spent and for the purposes intended by Parliament.

The Comptroller and Auditor General also has statutory, but discretionary, powers to carry out examinations into the economy, efficiency and effectiveness with which government and other public bodies have used their resources and report the results to Parliament. He publishes around 60 of these value for money or performance reports each year. Around 220 staff are engaged in this work. The Comptroller and Auditor General's rights to carry out examinations of economy, efficiency and effectiveness extend to the bodies that fall within his audit and inspection remit and he can have such access at all reasonable times to the books of account and other documents, and explanations as he may reasonably require to carry out his statutory functions. He is not entitled to question the merits of the Government's policy objectives.

## **The Auditing Process**

### **Financial Audit**

The National Audit Office's financial audit aims to give an independent opinion on the annual financial statements of public entities. All financial audits are conducted according to national auditing standards issued by the Auditing Practices Board, which accord with EU requirements and with the auditing standards of the International Federation of Accountants. In carrying out its financial audit, the National Audit Office suggests improvements in internal control and financial management. In addition, the National Audit Office's financial audit procedures also examine whether transactions have appropriate parliamentary authority, and have regard to propriety in the handling of public funds and the proper conduct of public business.

The National Audit Office's financial audit work seeks to obtain sufficient, appropriate evidence to support the opinion on the financial statements. This involves obtaining assurance that:

- financial statements are complete and accurate, and are disclosed in line with the relevant financial reporting framework;
- assets and liabilities exist, are owned by the body and are valued according to appropriate, consistently applied accounting policies; and

- transactions that audited bodies have recorded in their accounting records occurred and are legal and regular.

The National Audit Office's financial audit process, in line with the international standards, stresses careful planning based on a thorough understanding of the audited entity's activities, particularly the risks the entity faces. National Audit Office financial auditors draw on several types of evidence to support the audit opinion, but always examine some individual transactions. In support of an opinion, financial auditors usually identify and evaluate internal controls, and test whether they work as intended and have operated throughout the financial year. Examining systems of internal control are an important part of financial audit as such examinations enable the auditor to suggest improvements to those systems.

Audit always involves a high degree of professional judgement and the National Audit Office audit process requires auditors to document their reasons for important judgements so that senior colleagues can review them. In addition, before the opinion is given, sensitive judgements are usually subject to peer review by a financial audit director not directly involved in the audit before the opinion is given. This occurs, for instance, where evidence suggests the Comptroller and Auditor General's opinion may be qualified.

The National Audit Office has supported reforms to government accounting and governance by offering advice and assistance to departments, in particular with the introduction of commercial style accounts in the government sector. Commercial style accounts represented real progress in improving the quality of financial information. The National Audit Office helped bring this change about, by offering advice and assistance to departments.

### **Value for Money (Performance) Audit**

The main steps in the National Audit Office value for money audit process are an annual study selection exercise, preliminary work to design the study, fieldwork and reporting and quality assurance. The National Audit Office's approach to value for money is grounded on careful selection of study topics. Criteria for selecting topics include risk to value for money, the resources at stake, the impact of the programme on the citizen, the scope for drawing convincing conclusions, the amount of Parliamentary and public importance, and whether a National Audit Office examination would help to make a useful difference. The main focus of the National Audit Office's work is to help secure beneficial change. This has led the National Audit Office to examine successful programmes, and identifying factors contributing to success as well as investigating those programmes that have not been so successful. Learning from and

emulating success can be as helpful as learning from mistakes, and National Audit Office value for money reports often give prominence to good practices identified which could be applied more widely.

Work on a value for money study begins with the design of the study. This includes gathering further information to define in more detail the scope, objectives and likely impact of the study, and selecting appropriate methods to obtain and analyse evidence. Recent years have seen increasing use of specialist expertise to enhance the credibility of reports. This includes directly employing specialists, and consulting independent experts. Experts may be consulted to help the National Audit Office understand the issues, and can be asked to comment on the study design and the draft report. There has also been an increasing emphasis on the use of qualitative as well as quantitative research, such as the results of focus groups.

### **Reporting**

The Comptroller and Auditor General's opinion on financial statements is included in the audit certificate published with financial statements. If he has any further observations he presents them in a separate report, also published with the financial statements. Otherwise, he will add a paragraph to the audit certificate stating that he has no observations. Value for money reports are also laid before Parliament and published by order of the House of Commons. Each year, the Comptroller and Auditor General also presents a report covering the National Audit Office's financial audit work and an annual report of the Office's activities.

The National Audit Office measures the impact of its work each year by estimating the savings or economies resulting from its recommendations and those of the Committee of Public Accounts. In 2007, the National Audit Office estimates that its work led to identifiable savings or economies of more than £650 million. This amount was agreed by the government departments concerned and validated by the NAO's own external auditors.

### **Relations with Parliament and Government**

The National Audit Office works closely with the House of Commons Committee of Public Accounts, which examines witnesses based on the Comptroller and Auditor General's reports. The Committee of Public Accounts makes its own reports to the House of Commons following its hearings. The Committee is by convention chaired by a member of the largest opposition party in Parliament and the Committee itself is made up of 16 members of parliament representing

the make up of the full House of Commons. The Committee's reports draw conclusions and make recommendations for action by the departments concerned. The Government publishes a response to the Committee's report in which it sets out the action taken or planned to meet each of the Committee's recommendations. If the Government does not accept the Committee's recommendations, the response gives the reasons. More than ninety per cent of the Committee's recommendations are accepted. The Committee may raise the matter again with officials in a follow-up session. In addition to the Committee sessions there is a further annual opportunity for the House of Commons to discuss the work of the Committee of Public Accounts in full session. This debate is normally focused on a selection of the Committee's reports and the Government's replies and concludes by passing a motion noting the contents of the reports of the Committee during the year.

While the majority of work is for the Committee of Public Accounts, the Office has also developed working relationships with a number of other Committees of the House of Commons, particularly the Environmental Audit Committee, a cross party committee for which the Comptroller and Auditor General has provided a number of briefings on specific issues.

Members of Parliament also write to the Comptroller and Auditor General raising specific matters of concern about the propriety and value for money of public spending – often based on letters they have received from members of the public. The Comptroller and Auditor General alone determines how to respond to requests from Parliament, the public or the Government, which may lead to examinations and reports to Parliament. In recent years, the Comptroller and Auditor General has responded to a number of Government requests to undertake examinations. These include invitations for the National Audit Office to review each year some of the assumptions underlying the state budget, and to review the reliability of data systems that support departments' reporting of progress against performance targets.



**Drago Kos**

President of the Group of States Against Corruption (GRECO)  
Head of the Anti-Corruption Council of the Republic of Slovenia,

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## **Experiences of European Countries in the Sphere of Creation and Functioning of a Specialised Body Responsible for Coordination of National Efforts in the Sphere of Combating and Prevention of Corruption**

### **I. Introduction**

So much has been said about corruption recently, there can be no doubt about the enormous damage it causes, and the threat it poses to the rule of law and to the development of democracy. It does not attack the state, its institutions and the basic principles of democracy from the outside, but corrodes them from within. Corruption is an integral part of every public administration and knowledge about how far-reaching it is and how much damage it can cause the private sector, civil society and every individual is growing daily.

Although corruption does damage to individual countries, we find ourselves in a paradoxical situation – because the driving force in combating corruption is not individual countries, but the international community. The reason for this is the realisation that the best way to fight the damage caused by corruption internationally is to fight it within individual countries. The Council of Europe, as a leading institution in this field, has devoted a lot of attention to this issue, as have others such as the European Union, the organisation for Economic Cooperation and Development (OECD), and recently the UN. Many countries have accepted the leading role of these international organisations with relief because, despite a growing awareness of the necessity for action in this field, many recognise the delicacy of these issues. The prevention, detection and suppression of corruption are made difficult by powerful individuals and/or



groups obstructing progress in individual countries. Not a single country or institution is immune to corruption and any individual may find themselves in a situation of conflict between totally irreconcilable interests. It is because this is the case that it is vital to set effective standards that are accepted by the majority, if not all, the countries of the international community.

The international community is taking on a vital co-ordinating role, which is necessary for all the countries in the face of increasing globalisation and the (at least minimal) universality of solutions. But it is also adopting fundamental positions that importantly affect the formulation of the concept of corruption and its attributes, the strategies for its reduction and the measurement of its consequences. One of the measures, lately almost fixed as an international standard is also the establishment and functioning of national specialised anti-corruption institutions.

## II. International Standards in the Area of Anti-Corruption Institutions

Almost all international legal instruments devote some attention to the position and powers of institutions fighting corruption:

The UN Convention against Corruption stipulates in Article 6:

*“Each State Party shall, in accordance with the fundamental principles of its legal system, ensure the existence of a body or bodies, as appropriate, that prevent corruption by such means as:*

- Implementing the policies referred to in Article 5 of this Convention and, where appropriate, overseeing and coordinating the implementation of those policies,
- Increasing and disseminating knowledge about the prevention of corruption.

*Each State Party shall grant the body or bodies referred to in paragraph 1 of this article the necessary independence, in accordance with the fundamental principles of its legal system, to enable the body or bodies to carry out its or their functions effectively and free from undue influence. The necessary material resources and specialised staff, as well as training that such staff may require to carry out their functions, should be provided.*

Each State Party shall inform the Secretary General of the United Nations of the name and address of the authority or authorities that may assist other State Parties in developing and implementing specific measures for the prevention of corruption”.

Furthermore, the UN Convention against Corruption stipulates in Article 36:

*“Each State Party shall, in accordance with the fundamental principles of its legal system, ensure the existence of a body or bodies specialised in combating corruption through law enforcement. Such body or bodies or persons shall be granted the necessary independence, in accordance*

*with the fundamental principles of the legal system of the State Party, to be able to carry out their functions effectively and without any undue influence. Such persons or staff of such body or bodies should have the appropriate training and resources to carry out their tasks.”.*

The Council of Europe Criminal Law Convention on Corruption (ETS 173) stipulates in Article 20 that “each Party shall adopt such measures as may be necessary to ensure that persons or entities are specialised in the fight against corruption. They shall have the necessary independence in accordance with the fundamental principles of the legal system of the Part, in order for them to be able to carry out their functions effectively and free from any undue pressure. The Party shall ensure that the staff of such entities has adequate training and financial resources for their tasks”.

The Council of Europe Resolution (97) 24 on the Twenty Guiding Principles for the Fight against Corruption stipulates that countries have the duty:

*- to ensure that those in charge of the prevention, investigation, prosecution and adjudication of corruption offences enjoy the independence and autonomy appropriate to their functions, are free from improper influence and have effective means for gathering evidence, protecting the persons who help the authorities in combating corruption and preserving the confidentiality of investigations (Guiding Principle No.3);*

*- to promote the specialisation of persons or bodies in charge of fighting corruption and to provide them with appropriate means and training to perform their tasks (Guiding Principle No. 7).*

It is very easy to summarise the essential mandatory international requirements for bodies for the effective fight against corruption:

- necessary independence and autonomy,
- absence of undue pressure or influence,
- appropriate training,
- sufficient resources,
- specialisation.

The following features can also be extracted from the above mentioned legal texts:

- there can be one or more anti-corruption bodies in a country;
- establishment and functioning of the anti-corruption body(ies) must follow the fundamental principles of the legal system of the country;
- anti-corruption body(ies) can have only preventive<sup>172</sup>, only repressive (investigative, law-enforcement) or combined preventive/repressive powers;
- preventive functions should at least include insurance of the implementation of the national anti-corruption policy(ies) and dissemination of knowledge about the prevention of corruption.

### **III. Practical Problems Connected with the Possible Decision on the Establishment of Specialised Anti-corruption Body(ies)**

Countries seldom decide to establish a new budgetary consumer in a form of a new public institution – they usually do it because they are forced to, either by the population or by their international commitments. Where corruption is concerned, both these types of pressure are very strong and therefore more and more countries have established different anti-corruption institutions. Since fighting corruption can be a very unpleasant exercise for the main policy makers in a country they may be tempted to establish such a body by legal act, which can easily be changed or even abolished. Therefore, one of the most important pre-requisites for an effective anti-corruption body is a proper legal document, which will give the new body a sound footing. Without doubt the best possible way to establish such a body and ensure its relatively unhindered operation is to pass a law through the (normal) legislative procedure, which will provide both for its independence of resources and the manner in which it is to be held accountable to the public.

The very first decision, which has to be made in such a law, is the decision on the main character of the anti-corruption institution and its position in the existing institutional set-up of the country. There are different forms of anti-corruption institutions, dealing with the following ways of fighting corruption: prevention, suppression and education. It is understandable that prevention and education go hand in hand, but what about suppression? Independent repressive anti-corruption bodies are usually created when corruption is so pervasive and law enforcement agencies so corrupt or ineffective that corruption offences are either not investigated or never prosecuted. It is basically very simple: if the population still trust the “ordinary” law enforcement services, the risks of establishing an additional one will be too unpredictable: the division of responsibilities between the new institution and those already in existence, division of powers

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<sup>172</sup> Including educational and awareness raising functions

and cases among them, information-flow, the level of co-operation, fragmentation of the fight against corruption etc., are simply too problematic to be tackled unless there is serious need.

When a decision on the character of a body is made, the decision on its position in the country's institutional set-up has to be made and its powers have to be defined and regulated. Of course, the powers of a body with investigative authority are completely different from the powers of a body which deals exclusively with prevention (and education). Investigative powers raise the very real possibility of breaches of basic human rights, much more than the powers of purely preventative bodies. Therefore, legislators have to be very careful in defining such powers and should at least follow the same standards as used for traditional law enforcement agencies. The powers, which an anti-corruption agency has, and the range of its duties in respect of targeted professions already give the first hint to its formal position: if it is a body established to fight corruption in all three branches of power and it really wants to be independent, the best possible position for it is complete (of course, bound by the basic constitutional principles of the country) independence, without interference from any branch of power. This said, however, it has to be clear that such an institution is also completely accountable for its deeds and actions and a proper reporting mechanism to a superior state body has also to be established. In theory accountability to the countries' legislative body, the parliament, is considered to be the best form of accountability of an independent anti-corruption body.

When the body is established and its powers are regulated the most difficult task starts: the anti-corruption institution has to be allocated sufficient resources to hire and educate employees, to purchase necessary premises and technical equipment and to pay at least decent salaries to its employees. Independence in planning its spending is again a basic pre-condition for its effective work and a clear signal as to the real intentions of the country establishing such a body. The success of a country's anti-corruption institutions depends on such a trivial matter as money – money is proof of real political will. The best legal arrangements on the establishment even of an ideally positioned anti-corruption institution will undoubtedly fail if an appropriate part of the budget is not devoted to this institution.

When the body starts to operate it must strictly follow certain principles, which are unconditionally linked to its work: objectivity, professionalism, impartiality, integrity, honesty, effectiveness and efficiency. If these principles are not followed the enemies of the institution will have a very easy job of discrediting its efforts and in demanding its re-structuring or even abolition.

Based on international legal and other<sup>173</sup> texts and practise it is also apparent that, to succeed, an anti-corruption agency, besides fulfilling the conditions mentioned in Chapter II, needs the following:

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- to be an element within a wider national anti-corruption policy,
- government commitment and political will,
- co-ordinated action with other stakeholders,
- adequate legislation with clearly defined powers,
- transparency and accountability mechanisms,
- credibility and public trust,
- co-operation with civil society,
- a high level of ethics.

In any case before the decision on the establishment of a new (anti-corruption) institution is made three questions<sup>174</sup> have to be answered:

1. What is the problem to be addressed and how should it be addressed?
2. Is the corruption high-volume<sup>175</sup> or high-value<sup>176</sup> or politically sensitive<sup>177</sup> or sophisticated?
3. What are the strengths and weaknesses of existing institutions and should or could they be resolved by a new institution, a merger, interagency co-ordination or co-operation, or segmented responsibilities?

#### **IV. European Countries and Specialised Anti-corruption Institutions**

During its first evaluation round, the Group of States against Corruption - GRECO has been dealing with the existence and functioning of the specialised anti-corruption institutions in its Member States. What came out was a surprise: specialised anti-corruption institutions are not only missing in countries known for a low degree of corruption but also in countries with a high incidence of corruption. At the same time, these countries are also characterised by a high degree of organisational deficits and lack of adequate equipment. This might lead to the conclusion that all the deficiencies mentioned are the result of the minor importance attached to fighting corruption by the whole society, of the lack of proper political will and national financial resources.

The second very important failure noticed by GRECO was the lack of sufficient and fairly educated staff, which includes the lack of specialisation.

<sup>174</sup> As formulated by professor Alan Doig, University of Teeside, UK

<sup>175</sup> Such as traffic police or license clerks

<sup>176</sup> Procurement contracts, for example

<sup>177</sup> Involving highest government officials

As long as specialised anti-corruption institutions are missing there seems to be neither the need nor the opportunity for specialised professional education in this area. Therefore, specialised anti-corruption training programmes are still exceptional. Having in mind that theoretical knowledge is not enough, it has to be complemented with the practical experience of investigators trained in corruption cases.

## **V. Conclusion**

Following the acceptance of the UN Convention against Corruption, countries will have to establish or maintain some kind of preventive institution(s) for the implementation of national anti-corruption strategies. This element can also be used by attaching to such institution(s) other tasks, such as general prevention, public education, awareness raising and even law enforcement. With the establishment of new anti-corruption institutions several complex questions have to be responded, too:

- what will happen with the “old” institutions which were also dealing with suppression of corruption?
- how to establish fair and useful relations with other institutions in the anti-corruption and related areas?
- how to find qualitative and determined leadership and staff for the institution(s)?
- how to ensure enough resources for proper functioning of the institution(s)?

The existence and functioning of specialised anti-corruption institution(s) in the country is the most visible and easily accessible sign of their real readiness to fight corruption and of the existence of a real political will to suppress this phenomenon. However, if anti-corruption institutions do not get the resources needed, it is obvious that their establishment is just another failure in anti-corruption developments throughout the world and a tool for the politicians in the country for their short-term survival in the expanding anti-corruption demands of modern societies.

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## **Anti-corruption Independent Bodies and the National Assembly**

### **Introduction – the Position of Independent Bodies**

The issue of the relations between the National Assembly and independent state bodies is becoming increasingly important in Serbia. The importance of strengthening these relations is two-fold at least. On the one hand, what the National Assembly receives from independent bodies are regular and special reports that enable it to perform its supervisory role better and more efficiently, and that role pertains primarily to the work of the executive branch of the powers-that-be. On the other hand, to independent bodies, the National Assembly is the body that it is most logical for them to address and to point out the problems that they face, first of all due to violations of the law committed by the executive branch of government, or to point to regulations that should be passed or amended. There is an existing form for this kind of address – the reports that these bodies are obligated to submit to the National Assembly. These reports, however, have another purpose as well – that the National Assembly, as the only body capable of such a task, should monitor the work of these independent bodies.

The Constitution of the Republic of Serbia does not recognise the notion of “independent bodies”, nor does it contain any rules for their establishment and work. Instead of a general approach, which would recognise the common characteristics of these bodies that make up the “fourth branch of power”, the makers of the Constitution opted for a partial treatment of each individual body. On account of this, some of them are expressly mentioned in the Constitution (the Constitutional Court, the Protector of Citizens, the National Bank of Serbia, the State Audit Institution), and some are not, even though they did exist at the moment when the Constitution



was being adopted or the laws pertaining to their establishment were in the process of being adopted (for example, the Commissioner for Information of Public Importance, the Anti-corruption Agency).

Each independent state body, just like any other state body (for example, the Government, courts of law, the National Assembly itself) has its place in the fight against corruption. In view of this, the division into anti-corruption bodies and “those other ones” is somewhat artificial. However, one criterion that could be used for this division is whether the legally defined duties that a particular state body should perform are primarily aimed at preventing, suppressing and discovering corruption, or at realising some other objectives. Bearing this in mind, in this text we shall describe more closely the authority and the activities of some independent state bodies.

### **The Anti-corruption Agency**

The Law on the Anti-corruption Agency (“The Official Gazette of the Republic of Serbia” no. 97/2008) went into effect as of 1 January 2010. The Agency’s bodies (the Board and the Director) were elected during 2009. It is expected that, in the first half of 2010, the Agency may staff its posts in accordance with the already adopted workplace systematisation.

It may be worth to mention that the title of the Law governing the Agency is not the most appropriate. Actually, this Law does not regulate only matters pertaining to the work of the Agency as an independent state body, but many other matters as well. First of all, this law prescribes the prohibitions, restrictions and obligations pertaining to public officials, the aim of which is to contribute to preventing and resolving conflict of interest in the course of performing public functions, the manner of receiving gifts in connection with performing a public function, the manner of performing other functions and other jobs by officials and former officials. On the other hand, this Law does not regulate all matters pertaining to the work of the Agency. The entire sphere of financing political parties and election campaigns, where the Agency has significant authority, is still regulated by another act – the Law on Financing Political Parties (“The Official Gazette of the Republic of Serbia” no. 72/2003).

The structure of the Agency is unusual for the legal system of Serbia. Its bodies are a nine-member Board and the Director, as an independent body. There is also a Deputy Director. The Agency also has an expert service, organised on the basis of principles similar to those applying to administrative bodies (the division into sectors, departments, groups), and the functioning of the service is managed by the Director. The Agency may establish branch offices. The number of branch offices is not defined. Finally, the Agency Board, acting on a proposal made by the Director, may establish consulting and other working bodies.

The organisation of the Agency and the manner of selecting its managers are directly connected to ensuring that it is independent in its work. It seems that the main idea when establishing the Board was to ensure maximum protection from political influences for the person managing the operative work of the Agency, the Director. This was achieved owing to the fact that the Director (and Deputy Director) are selected by the Board, from among the candidates who apply to a public advertisement, and not directly by the National Assembly, as is the usual practice in the case of the heads of other independent bodies (for example, the Council of the State Audit Agency, the Commissioner for Information of Public Importance, the Ombudsman, etc.). In the case of appointing Board members, the influence of politics is somewhat suppressed. Namely, the National Assembly decides on the candidates who are put forward by the authorised proponents. In view of the fact that it is possible for them to propose only one candidate, it is evident that the options left to the National Assembly boil down to whether it will accept that one candidate or not. Some of the authorised proponents are from the political structures (for example, the President of the Republic, the Government, the Administrative Committee of the National Assembly), others are from other independent bodies or other branches of power (the candidate proposed jointly by the Ombudsman and the Commissioner for Information of Public Importance, the candidate proposed by the State Audit Institution, the candidate proposed by the High Court of Cassation). Finally, two proposals come from the sphere of civil society (the Journalists' Association and the Bar Association), and one comes from a body whose composition is mixed (the Socio-economic Council).

The authority of the Agency may provisionally be divided into four segments. The first segment, the one of general prevention, comprises, first of all, monitoring the implementation of the National Anti-corruption Strategy, the Action Plan for its implementation and sector action plans. From its designation, one may get the impression that these are subsidiary duties, but they should by no means be understood as such. In view of the fact that the Strategy envisages amendments to regulations that are important for fighting against corruption and undertaking systemic preventive measures in a large number of state organs, it becomes evident that its full implementation would result in great progress in the sphere of fight against corruption. The fact that, for more than four years now, no one has been monitoring whether the Strategy is being realised has contributed to a great extent to the chaotic state of the struggle against corruption, so that even those problems that are evident, in the case of which it has been recognised what needs to be done, are not being solved.

Concerning this obligation on the part of the Agency, it should be noted that its authority is insufficient. In point of fact, the Agency may gather information about how institutions perform the tasks they have been given on the basis of strategic acts, and it can initiate an infringement procedure against the managers of bodies that do not respond within 15 days, but unfortunately

it is not authorised to initiate proceedings against those bodies that have not fulfilled their obligation (for example, have not prepared the draft version of a law within the deadline stipulated by the Action Plan).

In the sphere of general prevention, the Agency also introduces initiatives for changes and adoption of regulations in the area of fighting against corruption, gives opinions in connection with the implementation of the Strategy, the Action Plan and sector action plans, monitors and performs tasks pertaining to coordinating the work of state bodies in fighting against corruption, provides expert assistance in the area of fighting against corruption, cooperates with other state bodies in preparing regulations in the area of fighting against corruption, provides guidelines for preparing integrity plans in the public and the private sectors, introduces and implements training programmes on corruption, organises research, monitors and analyses statistical and other data on the situation pertaining to corruption and, in cooperation with the authorised state organs, monitors international cooperation in the area of fighting against corruption.

Another large area of the Agency's activities is connected with public officials, prevention and resolution of conflict of interest that public officials are faced with, reporting on the property of public officials and members of their families, maintaining a register of public officials, receiving gifts in connection with performing a public function, parallel performance of more than one public function, performing jobs in the course of performance of public functions, etc.

Until recently, these tasks were performed by the Committee for Resolving Conflict of Interest, on the basis of the Law on Preventing Conflict of Interest in the Course of Performing Public Functions passed in 2004, which is no longer in effect (the employees working with the Committee have now started working for the Agency's service). However, the differences in terms of legal regime are great. Let us mention the most conspicuous ones: 1) an express obligation has been introduced to compile a register of public officials, and all bodies are obligated to forward the necessary information to the Agency about public officials immediately after the beginning and the expiration of their term of office; 2) the principle of transparency has been introduced concerning a part of the report that public officials submit on the property that they own (for example, the real estate and vehicles that they own, income from public sources, the amount of savings), which did not exist before; 3) an obligation has been introduced for the Agency to verify the accuracy and completeness of the reports on public officials' property by means of sample checks, and also to establish whether any increase of public officials' property has been achieved by lawful means, as well as the authorisation to request assistance from other bodies and financial institutions when performing such checks – the Committee performed such checks only in the case of suspecting that a certain public official had violated the law; 4) a mechanism has been introduced for resolving the issue of “double public functions” – if there is no express permission given by the Agency, the function that has subsequently been acquired

automatically ceases by law; 5) an obligation has been introduced for former public officials to request permission from the Agency to get a job or establish business cooperation after the cessation of their public function; 6) sanctions have been introduced for violating the rules from the sphere of conflict of interest and reporting on the property owned – a criminal offence consisting in not submitting a report on one's property or supplying false information on the property one owns, qualified by the intention to conceal the real value of the property owned, as well as many offences which may be fined.

It is evident that the Agency will face a lot of difficult tests in this area, especially in the initial period, when registers have to be compiled and many dilemmas and open questions that remain, due to incomplete transitional provisions have to be legally resolved. Concerning this authority, where the Agency will probably be most exposed, there is a third group of duties performed by the Agency – acting on complaints lodged by legal entities and physical persons.

It is to be expected that, following the publication of a part of the property reports submitted by officials, a lot of people will voice doubts as to their veracity and will perhaps supply specific information on this. However, it is even more likely that the Agency will receive a great number of reports expressing suspicion of some form of corruption or other and offering some evidence to that effect, or reports wherein people recognise corruption even in situations when they are dissatisfied with the slowness of work or the content of decisions made by state organs. The Agency has neither the authority nor the capacity required to conduct independent investigations. When there is clear evidence that the law has been infringed or the need to conduct an investigation exists, it can forward the reports it has received to other bodies (for example, the State Auditing Institution, the Budget Inspectorate, the Public Prosecutor's Office, the police). What distinguishes the Agency from other bodies that could do the same under the circumstances is its right to obtain information on what has been done on the basis of the material it has forwarded. In addition to this, the information that the Agency could gain in this way, by reviewing the reports it receives, would be very useful in the performance of its other functions and in identifying systemic problems.

In formal terms, as of October 1st 2009, the Agency has been authorised to monitor the financing of political parties and election campaigns, which was formerly entrusted to the Finance Committee of the National Assembly and the Electoral Commission, and this constitutes the fourth group of duties that the Agency performs. As the material provisions of the Law on Financing Political Parties, passed in 2003, have not been changed yet, but only the authorised organ, the Agency could encounter problems when performing this function because some provisions are insufficiently precise (for example, those stipulating the deadlines for submitting the annual financial reports of political parties). The duty of the Agency, on the basis of this Law, as opposed to its other duties, is not continuous but "occasional", consisting in verifying

the accuracy and completeness of the reports on financing election campaigns (which election participants are obligated to submit within 10 days of the election date) and controlling the balance sheet, reports on property and reports on contributions exceeding the sum of 6,000 dinars, which all the registered political parties are obligated to submit. If it should observe instances of unlawful conduct, the Agency may submit a request for initiating misdemeanour proceedings. If a political party should receive an enforceable sentence for a violation, the Director of the Agency shall decide on whether that party should lose the right to receive funds from the budget in the following year.

The Agency submits an annual report on its work to the National Assembly (by 31 March for the preceding year). This report must contain a part dealing with the implementation of the Strategy, the Action Plan and sector action plans. This report is also submitted to the Government. There are no provisions, however, stipulating what happens next with that report. The Agency can also submit special reports, acting of its own initiative or at the request of the National Assembly.

### **The State Audit Institution**

The Law on the State Audit Institution ("The Official Gazette of the Republic of Serbia" no. 101/2005) is one of the rare regulations that the representatives of the people have adopted based on a proposal submitted by their colleagues, and not by the Government. However, four years were to pass before the first, not entirely complete report on auditing the balance sheet. During those four years, we had to wait for the members of the State Audit Institution to be elected, then for its premises to be provided, for the Rules of Procedure regulating its work to be approved by the National Assembly, for its staff to be employed.

The State Audit Institution has found its place in the Constitution as "the highest state body for auditing public funds in the Republic of Serbia", which is "independent and subject to the monitoring of the National Assembly, to which it is accountable". In addition to this, the Constitution states that the State Audit Institution controls all budget spending (that of the Republic, its autonomous province and local government units), and that the National Assembly shall review the budget balance sheet proposal, having obtained the opinion of the State Audit Institution. It is interesting to note that the position of the State Audit Institution, as determined by the Constitution, is weaker than that stipulated by Law – whereas the Law defines it as autonomous and independent, the makers of the Constitution opted for the weaker of the two attributes. Also, while the supervisory role of the National Assembly over the work of the State Audit Institution can only indirectly be inferred from the formulation of the Law, through the latter's obligation to submit reports to the Assembly, it is expressly mentioned in the Constitution.

The State Audit Institution is made up of the President, Vice-President, Council, audit and supporting services. The highest body is the five-member Council, which includes the President and the Vice-President. Members of the State Audit Institution Council are elected on the basis of a proposal submitted by the Finance Committee. The National Assembly decides on whether there are any reasons to relieve a Council member of duty, based on a proposal submitted by a minimum of 20 representatives of the people (which is then reviewed by the Finance Committee before the National Assembly votes on the matter in the course of a plenary session), or the Finance Committee itself, and the State Audit Institution's Council may also inform the National Assembly if any reasons for dismissing a member of the Council member have become evident.

The State Audit Institution performs duties that can be classified in the following way:

- 1) planning and executing audits;
- 2) passing subordinate and other acts, taking positions and voicing opinions in connection with the implementation of particular provisions of the Law;
- 3) submitting reports to the National Assembly (the annual report on the work of the State Audit Institution, special reports in the course of the year, a report on auditing the budget balance sheet, the balance sheets and financial plans of compulsory social insurance organisations, and the consolidated financial reports of the Republic), submitting reports to other assemblies pertaining to the subjects of auditing within their competence;
- 4) providing expert assistance to other state bodies "in a manner that does not reduce the independence of the Institution", giving advice to other beneficiaries of public funds;
- 5) commenting on regulations that are in the process of being drafted and on issues from the sphere of public finances, and giving recommendations for amending regulations;
- 6) adopting auditing standards pertaining to public funds, publishing auditing manuals, developing training programmes for state auditors and certified state auditors, organising examinations for acquiring those professional titles, accreditation of foreign certificates and the like;
- 7) cooperation with international auditing and accounting organisations for auditing in the public sector.

The subject of auditing conducted by the State Audit Institution is as follows:

1) the income and expenditure regulated by budget regulations, public revenue and public expenditure; 2) financial reports, financial transactions, accounting, analysis and other records and information possessed by the subjects of auditing; 3) the regularity (conformity) of the business operations of the subjects of revision with the law, other regulations and the given authority; 4) the purposefulness of managing public funds; 5) the system of financial management and control; 6) the system of internal control, internal auditing, accounting and financial procedures; 7) the acts and actions of the subject of auditing that produce or may produce financial effects on the income and expenditure of beneficiaries of public funds, the property of the state, taking loans and providing guarantees, and the purposefulness of the use of the funds at the disposal of the subjects of auditing; 8) the regularity of the work of persons authorised for planning, realising and monitoring the business operations of beneficiaries of public funds; 9) other areas stipulated by special laws. The State Audit Institution can audit any act pertaining to the former, current and planned business operations of beneficiaries of public funds.

Not only does the State Audit Institution have broad authority, the circle of subjects to which it can be applied is also broad. These include direct and indirect beneficiaries of the Republic and lower-level budgets, the funds at the disposal of compulsory social insurance organisations (for example, pension and health-care funds), special budget funds, the National Bank of Serbia – that part of its operations that concerns the use of public funds and operations with the state budget, public companies, firms and other legal entities established by direct and indirect beneficiaries of public funds; legal entities where direct and indirect beneficiaries of public funds have a share in the capital, that is, management; legal entities founded by legal entities where the state has a share in the capital, that is, management; legal entities and physical persons receiving grants and other non-refundable financial assistance or guarantees from the Republic, autonomous territories and local government units; subjects that accept, safeguard, issue and use public reserves; political parties, in accordance with the law regulating the financing of political parties; beneficiaries of EU funds, donations and assistance provided by international organisations, foreign governments and non-governmental organisations; parties to international treaties, agreements, conventions and other international acts, in connection with their implementation, when it is stipulated by an international act or decided by an authorised body; other subjects using resources and property controlled by and at the disposal of the Republic, its autonomous province, local government units or compulsory social insurance organisations. This already broad circle of subjects of auditing can be broadened further by auditing the business operations of legal entities that deal with the subjects of auditing, but only within the scope of their business dealings with those subjects (for example, the business operations of a firm that acts as a provider of services to a ministry on the basis of a public procurement contract).

The subjects of auditing are obligated to give the State Audit Institution access to the documents that are necessary for auditing, to consider the opinion of the auditor about their business operations and to undertake the measures required to eliminate irregularities established by the auditors. The actual auditing procedure is a multiphase one, presupposing that the subject may comment on the findings, and that joint meetings should be held for the purpose of resolving conflicts. In the course of the auditing procedure, relevant international standards must be applied.

It is illusory to expect the State Audit Institution to perform all the duties entrusted to it every year. That is why this institution should be viewed as the supreme controller of public finances, whose task will be made that much easier if internal control and internal auditing in the public finances sector function well. Also, the legislator stipulated that the State Audit Institution should operate on the basis of a work programme that determines what is to be the primary subject of its investigation in the course of the year, but also sets some priorities that must be included in that list, such as the budget balance sheet audit.

In view of the above, it is obvious that the State Audit Institution has enormous potential when it comes to fighting corruption. The influence of the State Audit Institution in this respect is, first of all, preventive. But there is also a very strong investigative component that brings the State Audit Institution closer to repressive anti-corruption organs. The basic difference between repressive bodies and the State Audit Institution is that the primary goal of auditors is not to discover violations and abuses of law. They investigate processes within the framework of organisations that spend public funds – if, in doing so, they discover that something is wrong, they will search for the reason, not for the culprit and his/her motives. Naturally, it may happen that auditors discover violations of some formal obligations, for example, in the course of a public procurement procedure. In such a case, the State Audit Institution shall be obligated to immediately submit a request for initiating an infringement procedure. If there is reason to suspect corruption, auditors file criminal charges. However, in many situations auditors will establish that public funds have been spent uneconomically or mismanaged, which is not punishable by any regulations whatsoever.

The reports made by auditors, therefore, contain their opinion on whether public funds have been handled lawfully and purposefully (auditors will refrain from voicing an opinion if some vital information was not accessible to them), and recommendations on what should be done to eliminate irregularities and the deadline for doing so. The deadline may be between 30 and 90 days. After that, the subject of auditing submits the so-called “response report”, whose veracity may also be checked by the State Audit Agency. If the State Audit Institution is of the opinion that the irregularities and inappropriate conduct have not been satisfactorily eliminated, it will be considered that there are grounds for further action and the State Audit Institution will



then approach the body that can undertake measures against a subject of auditing that has committed a violation (for example, the Government, if the said violation has been committed by a public company), and this organ shall inform the State Audit Institution about the measures that have been undertaken within 30 days.

In the case of a serious violation of the obligation of conducting business operations properly, the State Audit Institution will address the Finance Committee of the National Assembly, which is to decide on recommendations to be given and measures to be undertaken. In the case of such violations, the State Audit Institution also submits a proposal on the dismissal of the person in charge, and the body authorised to decide on this shall inform the Institution on what it has done about it within 15 days.

The law also regulates the matter of submitting reports to the National Assembly, and to a certain extent, the way the Assembly should deal with the reports. To begin with, the State Audit Institution submits a report on its work in the preceding year to the National Assembly, by 31 March at the latest. During the year, the State Audit Institution submits special reports on particularly important or urgent matters that cannot be delayed. Also, the State Audit Institution is obligated to provide information to the National Assembly when the Assembly requests this. The report on auditing the balance sheet is to be reviewed by the Finance Committee, following which the Committee draws its own report, containing its opinions and recommendations, and forwards it to the National Assembly to be reviewed in the course of a plenary session. The National Assembly then decides on the recommendations and measures proposed, and on the deadline for their implementation, and it may request additional explanations concerning some facts and circumstances from the State Audit Institution.

On the basis of its authority, the State Audit Institution can be of great help to other anti-corruption institutions, especially in connection with the implementation of the Law on Public Procurement and the Law on Financing Political Parties.

In the case of public procurement, the State Audit Institution can ascertain whether it has been conducted in accordance with the law, but can also establish whether it was necessary in the first place, which is what makes it unique. Specifically, in many cases of public procurement, corruption may occur, and cause damage, as early as the planning phase, when a decision is made to purchase something that is unnecessary or to undertake work that is unnecessary. Purposefulness must also be reviewed when it comes to the conditions and criteria that are subject to evaluation (for example, why it was decided that aesthetic characteristics would carry the same number of points as the length of the guarantee period or the price), whether the object of procurement was really needed as urgently as it was claimed, etc. Also, some kinds of procurement are totally exempt from the law, but not from the control of the State Audit

Institution – such is the case, for example, with confidential purchases and purchases made using loans provided by major international financial institutions. Finally, the State Audit Institution is also authorised to check the execution of public procurement contracts, while the role of other organs, first of all the Commission for the Protection of Rights, ends at the moment when a contract is concluded.

As regards the Law on Financing Political Parties, the authority of the Agency ends with verifying the accuracy of reports on financing submitted by political parties. However, the subject of the State Audit Institution's reviews could also be the observance of other obligations and prohibitions, such as: the obligation to regulate, through internal acts, financial control and the right of party members to be informed about financial matters; the prohibition of receiving financial assistance from legal entities that have outstanding debts to public revenues, keeping records of free services and gifts received, the prohibition of spending funds received for the purpose of financing regular work during an election campaign, the obligation of paying cash donations into an account, etc. On account of this kind of authority, the State Audit institution is a natural ally of the Anti-corruption Agency when it comes to exercising control over political parties.

### **The Commissioner for Information of Public Importance and Personal Data Protection**

The Commissioner is an independent state body whose authority is defined by two laws, the Law on Free Access to Information of Public Importance ("The Official Gazette of the Republic of Serbia", no. 120/2004) and the Law on Personal Data Protection ("The Official Gazette of the Republic of Serbia" no. 97/2008). The Commissioner is an "autonomous state body, independent in exercising his/her authority". The Commissioner has a deputy (in fact, one deputy for each of the two areas) and an expert service. The Commissioner and his/her deputies are elected by the National Assembly, acting upon a proposal given by the authorised Committee, for a period of seven years. A proposal for relieving a person who performs the function of the Commissioner, if the conditions for doing so have been fulfilled, may be submitted by a minimum of one-third of the representatives of the people, and before it is brought before the Assembly, it is reviewed by the authorised Committee (the one dealing with culture and information).

Neither of the two laws in whose implementation the Commissioner participates is predominantly anti-corruption in character. Both laws primarily aim to realise and protect human rights. However, the importance of access to information of public importance for fighting against corruption is so great that it places the Commissioner among anti-corruption independent organs.

The authority of the Commissioner (pertaining to information of public importance) is two-fold. His/her basic duty is to decide on complaints lodged by persons seeking information who have reason to believe that their rights have been unwarrantedly denied them. As a result of the

Commissioner's decisions, information that has been withheld from the public because it points to work of poor quality or unlawful work may come to light. However, for the Commissioner to be publicly engaged in this way, it is necessary that someone should request such information from a public institution that possesses it, and that the said institution should refuse to give the petitioner the required information (either through a decision rejecting the original request or simply by ignoring the request).

The Commissioner's second line of authority is connected with efforts to increase the transparency of the work of administrative bodies. It is for this purpose that the Commissioner has been authorised to stipulate the content and the manner of publishing the bulletin, to monitor whether administrative bodies fulfil their obligations and to inform the National Assembly and the general public of this, to initiate the passing of regulations that are of importance for realising the right of access to information, undertake measures aimed at training employees and acquainting them with their obligations in the sphere of access to information, etc. Performing those tasks is very important for changing the atmosphere of the culture of secrecy in public services, increasing the scope of information that administrative bodies should proactively make available to the public, and increasing the level of awareness of the public on how to control administrative organs. Owing to this, through his/her activities the Commissioner exerts preventive influence against the establishment of corruptive relationships and abuse, for in this way, the risk for those whose work is of poor quality that they may be exposed to the view of the public and suffer the consequences is increased.

By the end of March every year, the Commissioner submits to the National Assembly an annual report on the steps taken by administrative bodies for the purpose of implementing the Law on Access to Information of Public Importance, and also on the measures taken by the Institution and the expenditures incurred; if need be, he/she may also submit special reports. Further steps to be taken by the National Assembly in connection with these reports are not regulated by law.

### **Strengthening the Oversight Role of the National Assembly in the Context of Fight Against Corruption**

The National Assembly, as the highest representative body, has an important role to play when it comes to fighting against corruption. This role has been recognised by the National Anti-corruption Strategy, adopted in December 2005. The first mode for realising this role is the adoption of anti-corruption laws, including a review of the effects of each new law passed on the fight against corruption. The second mode is exercising the oversight function that the National Assembly has on the basis of the Constitution and the law, both in relation to the Government and in relation to independent state bodies that submit reports to it.

Whether the National Assembly will actually perform its supervisory function, and to what extent it will do so, depends on the political will, the urgency with which the laws that are on the agenda are passed, and the resources that the National Assembly will have at its disposal. However, apart from these factors, it is very important “to pave the way” by means of regulations (for example, within the framework of the Law on the National Assembly and the Rules of Procedure of the National Assembly), as well and as thoroughly as possible, for exercising the supervisory function. What should be considered in this respect is the introduction of the following rules of procedure:

- It should be obligatory for the National Assembly to review the annual and special reports submitted by independent organs; no such obligation is currently prescribed for the National Assembly or any of its committees, except for the reports submitted by the State Audit Institution.
- This review should commence and end within a stipulated period of time (for example 30 to 90 days from the day a report is submitted). In some cases, when the reports or the issues to which they point are more complex, the review should probably take more time; possibly, a subcommittee should be established and additional data gathered.
- A deadline should be set for the National Assembly to take action in case an independent state organ fails to submit a report despite being legally obligated to do so. In such cases, the National Assembly would initiate procedures for relieving the responsible persons of duty, or for bringing the management of the said organ to account.
- It should be stipulated which body within the National Assembly is to review these reports. In the nature of things, it would be logical for these reports to be reviewed by the authorised committees of the National Assembly, and if need be, the Assembly as a whole should discuss the measures proposed. However, it should be stipulated which particular committee is to be authorised to review the reports of which state organ. In cases when there are dilemmas concerning this issue, because the tasks performed by a state body are not closely connected with any of the existing committees of the National Assembly, a mechanism should be envisaged for determining the authorised working body (for example, the Speaker of the National Assembly could decide which committee it should be).
- It should be obligatory to invite a representative of the corresponding independent body to attend the session in the course of which its report is reviewed, as well as representatives of those public institutions that are mentioned in the report as not adhering to the law or as obstructing the independent body in question from exercising its function. The purpose of these invitations would be to clarify all contentious issues and to obtain additional information, so that the committee could take action and propose measures.

- It should be envisaged, at least in the form of a broad outline, what the reviewing of a report should consist of. In order for the situation to really change for the better, it will not suffice to simply have those reports before the representatives of the people, for them to give their opinion merely on the basis of their personal impressions, and then to take a vote on it. The duty of the authorised committee should be to establish whether the report in question does contain all the essential data (for example, whether it is explained in the report how the state body in question fulfilled each one of its duties entrusted to it by law, and if it has not done so, why not). The committee, naturally, should have the opportunity to check the accuracy of each piece of information given in the report. The authorised committee should be entitled to request additional information if necessary.
- It should be stipulated that the reports submitted to the authorised committee are considered to be public documents from the moment of delivery (when they are published on the Website of the National Assembly), so as to give any person that knows of any inaccuracies contained in them an opportunity to call them into question (by means of a written notice sent to the committee), so that the committee could check the accuracy of the data in the course of a session dedicated to reviewing the report in question.
- What should also be stipulated is a course of action for the authorised committee after reviewing a report, both in the case of the report and the work of the state body in question being completely satisfactory, and in various situations when the report shows that the law was not followed in every respect, whether the responsibility for this falls on the independent state body itself or on those who prevented it from having all the necessary conditions for its work.
- Also in need of regulation is the conduct of the authorised committee in a situation when the report being reviewed points to the need for passing or amending an act. In such a case, the committee could decide to undertake measures for the purpose of passing or preparing acts from the sphere of jurisdiction of the National Assembly, that is, request the authorised body to undertake such measures. The content of the decision would vary, depending on who is authorised to take further steps. If it is an act that should be adopted by the National Assembly (for example, amendments to an existing law), the committee's decision would obligate itself or particular persons to start work on preparing a proposal of that act (for example, establishing a working group made up of members of the committee or employees of a National Assembly service and a representative of the independent state body in question). If it is another body that is supposed to pass or amend some or other of its regulations (for example, the Government passing a decree or a ministry introducing changes to its rules of procedure), the committee would forward its conclusions to that organ.

- It should be stipulated that the authorised committee, having adopted a report which points to a violation of the law on the part of bodies and organisations whose work is supervised by the National Assembly, or individuals elected by the National Assembly, is to pass a decision containing a proposal detailing measures from the sphere of authority of the National Assembly to be undertaken. In view of the fact that the National Assembly supervises, first of all, the work of the executive branch, it is to be expected that the scope of measures which could be envisaged by this decision would be connected, first of all, with the authority of the National Assembly in relation to the Government and its members. For example, it could be an initiative for a vote of confidence in a minister (for which it is necessary to gather the signatures of at least 60 representatives of the people), an initiative for relieving of duty a public official from another organ, for which the National Assembly is authorised, or an initiative directed at the Government, proposing to relieve of duty officials that it appoints itself (for example, the manager of a public company).
- What should also be stipulated is a deadline for the National Assembly to review, in the course of a plenary session, the implementation of a committee's decision. It would probably be best to do it in the course of the next session of the National Assembly. This would ensure that all representatives of the people learn about the proposal initiated by the committee's decision and make it possible for other representatives of the people to support the realisation of this proposal.

## EXAMPLES OF THE WORK OF ANTI-CORRUPTION COMMISSIONS/AGENCIES

### AN EXCERPT FROM THE WORLD BANK WORKING PAPER 2004:

*Anti-Corruption Commissions Panacea or Real Medicine to Fight Corruption*  
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John R. Heilbrunn

### **ANTI-CORRUPTION COMMISSIONS PANACEA OR REAL MEDICINE TO FIGHT CORRUPTION**

#### **Hong Kong's ICAC: The Universal Model**

Since 1974, the Hong Kong Independent Commission Against Corruption has enjoyed resounding success in fighting corruption. The ICAC was established after a botched investigation into corruption in the colonial police led to Police Superintendent Peter Godber's flight from prosecution. Shortly thereafter, Governor Sir Murray MacLehose empanelled a commission under the chairmanship of Justice Alastair Blair-Kerr.<sup>6</sup> The Blair-Kerr Commission concluded that corruption was systemic in Hong Kong; high level officials as well as police officers on the street were accepting bribes. In response, the Blair-Kerr Commission recommended the establishment of a special agency to investigate allegations of corruption, prevent bribery in business and government, and educate citizens about corruption through outreach programs. To enact these changes, the Crown Colony established an independent commission to investigate allegations of corruption. In 1974, the ICAC commenced operations.

Political authorities recognized that "an essential part of the strategy was to ensure that the legal framework within which [the ICAC] was contained was as strong, clear and effective as it could be made."<sup>7</sup> Existing legislation was revised and new laws were passed to set up an

anti-corruption agency with a mandate to investigate any allegations of corruption and forward evidence to colonial prosecutors. The Prevention of Bribery Ordinance (PBO) prohibited the payment of bribes to civil servants. The PBO, which had originally been passed in 1948 and revised once in 1971, was amended to strengthen its powers. In October 1973, the Independent Commission Against Corruption Act set up an anti-corruption bureau independent of the Colonial Police. Its enabling legislation, the Independent Commission Against Corruption Ordinance (ICACO), established the ICAC and gave it specific police powers to investigate and prevent corruption. Finally, the Corrupt and Illegal Practices Ordinance (CIPO), initially adopted in 1955 to regulate elections, was revised to tighten the definition of what behaviors would be considered illegal in Hong Kong.<sup>8</sup> These laws composed the core of Hong Kong's reforms to fight corruption and the ICAC's success attests to their efficacy.

As a comprehensive bundle, the new laws criminalized corruption by defining a lengthy list of offences that include the obstruction of justice, theft of government resources, blackmail, deception, bribery, making a false accusation, or conspiracy to commit an offence. Most pertinently, the legislation reinforced the PBO by giving authorities discretion to conduct searches, examine bank accounts, subpoena witnesses, audit private assets, and detain individuals. Section 10 of the ICACO permits officials to seize passports, property, and incarcerate suspects when evidence suggests a risk of flight. Although such powers violate fundamental tenets of due process embedded in Western legal thought, the unusual circumstances in Hong Kong required special provisions to prevent suspects from escaping prosecution by passing through the territory's porous borders.

Putting into operation stringent laws requires solid budgetary support. For example, in 2001, the ICAC was appropriated the equivalent of U.S. \$90 million, an amount that is viewed as fully justified when compared with the costs of unchecked corruption.<sup>9</sup> This allocation pays the salaries of approximately 1,200 officers who work on a contractual basis at the ICAC. Employment contracts for ICAC staff members are independent of civil service rules and made on the basis of mutual consent. Officers join the ICAC through a special examination and cannot enter the Hong Kong government after they leave the Commission. The agency benefits from low turnover; over half of its officers have been with the ICAC for over 10 years,

and a stable employee base has contributed to the development of internal expertise in fighting corruption.

The ICAC controls corruption through three functional departments: investigation, prevention, and community relations. Largest among the departments is the Operations Department that investigates alleged violations of laws and regulations. Almost three-fourths of the ICAC's budget is allocated to the Operations Department and many talented officials gravitate to that department. The Corruption Prevention Department funds studies of corruption, conducts seminars for business leaders, and helps public and private organizations identify strategies to reduce corruption. The Prevention Department has funded several thousand studies for public sector agencies and businesses in Hong Kong.<sup>10</sup> These studies inform an interested public about how corrupt officials adjust to changes in laws and regulations. The Prevention Department therefore regularly reviews laws and suggests revisions on the basis of conclusions from its studies. The Community Relations Department informs the general public of revisions of laws and regulations. Its role is to build awareness of the dangers of corruption by poster campaigning, television commercials, and even films dramatizing the investigation and apprehension of corrupt officials by ICAC officers.

The ICAC's reporting hierarchy includes the Special Regional Administrator, the ICAC Director, and three oversight committees. This system requires that the ICAC submits regular reports that follow clear procedural guidelines for investigations, seizures of property, and the duration of inquiries. Since the ICAC has no prosecutorial role, its investigations try to have the highest levels of integrity that its three oversight committees seek to ensure. The three committees are the Operations Review Committee, the Corruption Prevention Advisory Committee, and the Citizen Advisory Committee on Community Relations. Members are nominated in recognition of their distinguished reputations in the larger community and they meet at regular intervals to review the ICAC's activities and issue a report to the Hong Kong Special Administrator. These reports are published and disseminated on the internet.

Each oversight committee responds to the competencies of the three ICAC departments. The Operations Review Committee (ORC) examines reports on current investigations, cases over 12 months old, cases involving individuals on bail for more than 6 months, and searches authorized under Section 17 of the Prevention of Bribery Act. The ORC enforces a level of accountability that prevents the ICAC from evolving into a tool of repression or political favoritism. For example, the ORC maintains both a supervisory and advisory role over any investigation and a case cannot be dropped without its approval.

The other two committees examine and approve outreach strategies to increase public awareness of the costs of corruption and what may be done to combat it. The Corruption Prevention Advisory Committee receives reports on strategies to demonstrate the costs of corruption to private sector actors. Activities of the Prevention Department complement those outreach programs of the Community Relations Department. Hence, the Citizens Advisory Committee has a crucial role in the content of films, billboards, and other forms of advertising to educate the public. Again, the distinguished composition of both of these committees endows them and the ICAC with a high degree of credibility.

When first established, the ICAC had marginal success; domestic constituents mocked its efforts and its signals lacked credibility. However, the repatriation and successful prosecution of Peter Godber increased the ICAC's credibility and Hong Kong's citizens began to report incidents of bureaucratic corruption. Since that time, the ICAC has built an impressive record of investigations that have resulted in numerous convictions. Nowadays, Hong Kong ranks one of the least corrupt jurisdictions in East Asia, and this reputation is despite its free-wheeling market economy.



## Singapore's CPIB: the Investigative Model

Corruption was commonplace in Singapore throughout its colonial history. When police inspectors stole 1,800 tons of narcotics during the 1950s, Crown administrators passed the Prevention of Corruption Ordinance and established the Corrupt Practices Investigation Bureau (CPIB).<sup>11</sup> This ordinance was intended to signal investors that the administration in Singapore would not tolerate corruption. However, enforcement was spotty, the CPIB weak, and Singapore kept its reputation for freewheeling and corrupt capitalism. In response, in the 1970s, Singapore reorganized the CPIB and gave it considerable powers to curb endemic corruption. The reorganized CPIB concentrated its activities on investigation and enforcement. Evidence of the CPIB's success in reducing corruption is present from Singapore's highly favorable investment climate that "typically ranks among the top twenty recipients of foreign investment in the world in absolute terms."<sup>12</sup> This success in attracting investments attests to that government's ability to overcome the perverse effects of reputation in the persistence of corrupt behavior.<sup>13</sup>

A capacity to reverse reputational costs is all the more remarkable given Singapore's history. In 1959, the British granted Singapore autonomy from Malaysia and independence followed shortly thereafter. At independence, the People's Action Party implemented a set of reforms to regulate citizens' behavior and impose strict punishments for corrupt practices.<sup>14</sup> The PAP Government recognized that a credible commitment to fighting corruption was essential to attract investors to Singapore and build an environment conducive to economic growth. Hence, it declared a set of reforms to deter potentially corrupt officials and attract foreign investors. Despite the proclaimed reforms, corruption continued to be a serious problem in Singapore into the mid-1970s when another series of scandals again implicated police officials in the narcotic trade.

These scandals prompted the government of Lee Kwan Yew to strengthen laws and revamp the CPIB to end venality in Singapore's public sector. The CPIB was devoted entirely to the investigation of corrupt acts and the preparation of evidence for prosecution. Since the 1970s, it has grown from nine investigators to its present staff of over 75 law enforcement professionals.<sup>15</sup> Indeed, corruption

in Singapore has been reduced to levels that rival the Scandinavian countries.

The CPIB derives its power from legislation that grants it remarkable discretion. First, the 1960 Prevention of Corruption Ordinance gave it a mandate to investigate allegations of corruption and prepare cases for prosecution. This original ordinance has been amended seven times and renamed the Prevention of Corruption Act (Chapter 241 of the Statutes of Singapore). The 1989 Confiscation of Benefits Act expanded government powers to seize assets of civil servants accused and convicted of taking bribes. This legislation prohibits illegal payments as well as the solicitation and acceptance of bribes. Later, the Confiscation of Benefits Act was strengthened and renamed the Corruption, Drug Trafficking and Other Serious Crimes Act of 1999.<sup>16</sup> These acts give the CPIB discretion to seize assets and establish the preconditions wherein an individual convicted of corruption is punished by lengthy prison terms and substantial fines.

Among the CPIB's unique characteristics are its small size, narrow police emphasis, and service to a semi-authoritarian regime. With only 75 staff members, the CPIB lacks the presence of Hong Kong's ICAC, and it has accordingly a narrow investigative function. The CPIB has relied on deterrent strategies; for example, a conviction for corruption may carry a \$100,000.00 fine and up to five years in prison.<sup>17</sup> Finally, the CPIB was an effective support of Lee Kwan Yew's semi-authoritarian regime that made economic growth its primary policy objective. Indeed, the fact that Singapore has been ruled by a semi-authoritarian regime since independence renders this commitment and threat of punishment more credible.

The organization of Singapore's CPIB is a strict hierarchy. At the top is the President who receives all reports and may act as the final arbiter of whether the CPIB takes action against alleged corruption. Below the President are the Director, Deputy Director, Assistant Directors, and special investigators of the CPIB. Reports are sent up the hierarchy from the investigative branches of the agency to the President. The CPIB's relatively narrow functions account for fewer employees and a high rate of successful investigations leading to conviction.

Fighting corruption is contentious and Singapore's political leadership encountered resistance when seeking an appropriate ministerial location for the CPIB. Between 1955 and 1970, the CPIB reported to four different ministries demonstrating the difficulty implementing a meaningful set of reforms to combat corruption.<sup>18</sup> Although the agency has moved from ministry to ministry since being established, its present location in the Executive branch has endowed it with a great deal of influence. The CPIB is now an integral component of an apparatus of state agencies with a mandate to reduce corruption in public and private life alike in Singapore.

Whereas some observers argue that putting the CPIB directly in the Executive branch indicates a high level of commitment on the part of Singapore's political leadership, it might also be seen as part of the structure of semi-authoritarian rule.<sup>19</sup> Its reporting hierarchy reinforces the executive's influence while reducing the CPIB's independence. Indeed, countervailing measures that might control the CPIB, or at a minimum place some constraints through oversight mechanisms, are absent. This lack of accountability of a police function is consistent with the semi-authoritarian nature of Singapore's government.

A litmus test to assess an anti-corruption commission's accountability might be the activities of oversight bodies. In Singapore, oversight mechanisms are less clearly defined with the CPIB than in Hong Kong's ICAC. The CPIB reports to an Anti-Corruption Advisory Committee that reports directly to the President. However, since the CPIB was established, public sector corruption has declined with each consecutive year. One commentator has noted that while legislation may not have eliminated corruption, it "is a fact of life rather than a way of life. Put differently, corruption exists in Singapore, but not a corrupt society."<sup>20</sup>

Singapore is a special case since its anti-corruption commission created a climate conducive for international investments while its citizens live under a semi-authoritarian regime that in some circumstances would be inimical to high levels of economic growth. Despite the centralization of power, the CPIB demonstrates that a government's commitment to combating corruption is critical for meaningful reform. In Singapore, this commitment firstly signaled

domestic constituents that corruption would not be tolerated, and secondly, international investors receive assurances that their investments were secure. However, what is crucial about this type of agency is that it operates without the accountability constraints active in a democratic polity. Absent are the committee systems and multiple reporting mechanisms that work in Hong Kong. Although it would be an error to attribute the extent of foreign investment to the CPIB, it is part of an overall picture of stable property rights and rapid economic growth that has come at a high cost to political freedom.

### **The New South Wales ICAC: the Parliamentary Model**

Prior to 1980, corruption had been uncommon in New South Wales, Australia. However, the narcotics trade in Southeast Asia presented huge profits for smugglers who bribed police and judges in countries throughout the region. New South Wales was vulnerable to these pressures and in the 1980s it was revealed that a chief magistrate, a cabinet member, and numerous public officials had accepted bribes from drug traffickers.<sup>21</sup> A recognition of the influence of narcotics smugglers prompted law enforcement officials in NSW to contact their counterparts in Hong Kong. After a series of consultations, it was decided to establish an anti-corruption agency.

In 1987, political leaders in NSW decided to establish an agency that would have many of the same core functions as the Hong Kong ICAC, with a crucial difference of an emphasis on prevention.<sup>22</sup> Despite their decision, the New South Wales Parliament held extensive debates on the proposed commission and whether it was the best means to respond to a rash of scandals involving the police and narcotics money. The first bill lapsed when the NSW Parliament went into recess without having reached closure on its debates over the measure. In 1988, the NSW Parliament again took up debate on the legislation and passed the initial ICAC bill in July. This bill underwent further amendments before being sent to the Premier in August. In September, the Premier announced the nomination of Commissioner Ian Temby; and in March 1989 the NSW ICAC commenced operations.

Legislation governing the ICAC has been amended four times since March 1989. In 1990, the ICAC's methods and scope of investigation were clarified. An extension of the definition of corruption to include Members of Parliament was added to the law in 1994. Amendments inserted new language into the code of conduct for Members of both Houses of Parliament. Over the course of 1996, further amendments were passed to improve witness protection powers.<sup>23</sup> Even with these changes that reinforced the NSW ICAC, a series of scandals in the police involving bribery and protection schemes again led to the establishment of an independent investigative agency called the Police Integrity Commission in 1997.<sup>24</sup> Although the Police Integrity Commission is independent from the ICAC, the anti-corruption agency lends its expertise on prevention and public outreach. The dual commissions attest to difficulties that anti-corruption agencies face in circumstances involving the large profits available from drug trafficking.

Since the ICAC was established, it has effectively built public trust through its emphasis on leadership in government and the private sector. For example, the ICAC successfully broke up organized rings of car thieves who were active in the "rebirthing of automobiles" in which they bribed civil servants to help them change vehicle identification numbers.<sup>25</sup> Another example of probity in the NSW ICAC was when it was revealed that the Premier who oversaw the agency's creation had offered a civil service job to a supporter of a rival politician as reward for ending obstruction to favored legislation. The Premier was accused of corrupt patronage and subsequently forced to resign.<sup>26</sup> Since its creation, the NSW-ICAC has adopted three principles as the basis of corruption prevention: First, prevention is better than the cure. Second, prevention is better than punishment. And third, prevention is better than management.<sup>27</sup> To complement these principles, the NSW ICAC has published a series of Corruption Resistance Reviews that it disseminates on the internet and through government offices. These reviews help prevent corruption by giving advice to private and public sector actors about the costs of venality. In these reviews, the NSW ICAC has invested considerable effort and resources into improving public support for its duties.

The organizational hierarchy of the NSW-ICAC includes a Commissioner, an Assistant Commissioner, and directors of four

operational units. Operational units include first, the Investigation Unit that conducts investigation analysis and assessments of alleged incidents of corruption. Second, the Legal Unit serves as a liaison to the Parliamentary oversight committees. It provides legal advice on operations, reviews on-going investigations, and drafts information for the Parliament Joint Committee. Third, the Corruption Prevention, Education, and Research Unit operates in areas of corruption prevention, education, research, and the relations with the media. Finally, the Corporate and Commercial Services Unit provides private sector actors with information through its information technology, information services, records and property, and other branches.

Accountability in the NSW ICAC is imposed by a requirement that it submit annual reports and internal and external audits must be prepared on ICAC operations. This provision recognized that effective oversight is crucial if the commission is to be accountable for its actions. The NSW-ICAC operates under the supervision of two committees: a Parliamentary Joint Committee and an Operations Review Committee. Responsibilities of the 11 member Parliamentary Joint Committee include supervision and review of ICAC activities.<sup>28</sup> Members of the Parliamentary Joint Committee represent the parties in Parliament and are selected from either House of Parliament. As part of its responsibilities, the Parliamentary Joint Committee submits regular reports on specific issues or sometimes in response to questions from either House. The Parliamentary Joint Committee is also responsible to answer to citizens' complaints that are made to the office of the Ombudsman or Parliament. While the Parliamentary Joint Committee responds to Parliamentary concerns, it is the Operations Review Committee that holds the ICAC accountable for its actions, investigations, and general comportment as a government agency.

The Operations Review Committee's eight members have a narrow task of advising the Commissioner whether to continue, suspend, or terminate an investigation. Any investigation must first be vetted by the Operations Review Committee after a review of written documentation of evidence. If the Committee finds merit with the

evidence, it gives approval for an investigation to be launched. Follow-up on investigations comes in the form of oversight by this committee that is a critical source of accountability. Every three months it determines the appropriateness of ongoing investigations; it reviews on-going investigations; and it communicates its findings regularly to the Commissioner.

Other methods to enforce accountability include term limits for the Commissioner, budgetary accountability to the Treasury, privacy laws, and freedom of information laws. In addition, the Ombudsman inspects telephone intercepts and records of investigations to prevent any abuses of power. The effect is an agency operating in “the context of a vibrant Westminster-style democratic system” that ensures a high degree of integrity for New South Wales.<sup>29</sup> Although the ICAC has had a mixed record of successful prosecutions, its major contribution has been as a prevention agency that changed the norms of how business is conducted in New South Wales.

### **The United States Office of Government Ethics: the Multi-Agency Model**

Corruption in United States history has prompted reforms and laws against bribery and corrupt acts. Reforms have followed such incidents as the Credit Mobilier scandal of the 1870s, the decades’ long scandals of Tammany Hall in New York City during the 19<sup>th</sup> century, Teapot Dome, the Lockheed and Abscam scandals.<sup>30</sup> Each of these infamous chapters of U.S. history resulted in different reforms. Tammany Hall’s excesses prompted passage of the 1888 Pendleton Act that ended patronage practices and defined codes of conduct for the civil service. Teapot Dome gave impetus to the Progressive Movement’s reforms and congressional oversight of the executive. The Lockheed bribery scandals preceded the 1977 Foreign Corrupt Practices Act (FCPA) that prohibits the payment of bribes by American corporations operating overseas. Hearings and convictions from the Lockheed and Abscam scandals led to the

establishment of the Office of Government Ethics (OGE) as part of a multi-agency approach to fighting bureaucratic corruption.<sup>31</sup>

The United States’ policy environment is characterized by cross-cutting agencies that investigate, prevent, and educate a mammoth public sector on corruption. For its size, the total number of corrupt incidents is relatively low and those cases that have emerged have generally implicated senior elected and appointed officials. The United States Office of Government Ethics (OGE) represents one component of a multi-agency approach to fighting corruption. Its legal foundation is the 1978 Ethics in Government Act with its codes defining conflicts of interest that prohibit senior officials from accepting employment with Federal Contractors, serving on boards of companies that contract with the government, and profiting from their official positions for a period after leaving office. The OGE cooperates with a variety of offices in the executive branch, including the Office of Management and Budget, Government Accounting Office, and police agencies in the Justice Department. Its mandate is to deter conflicts of interest by disseminating information on laws and regulations that govern public sector employment. What distinguishes the OGE is that it forms a part of a multi-agency apparatus that defines corrupt practices and informs elected and appointed officials about laws that the U.S. Congress has passed.

Originally, the OGE was to be housed in the Office of Personnel Management. However, in 1988, the Office of Government Ethics Reauthorization Act was passed to establish the OGE as an autonomous office. This enabling legislation went into effect on October 1, 1989, and officially required the OGE report to the President and Congress. The OGE exercises leadership in the executive branch to inform public servants about conflicts of interest, and to resolve any issues that may occur. In partnership with Federal police agencies and the Justice Department, the OGE fosters high ethical standards for employees and strengthens the public’s confidence that official business is conducted with impartiality and integrity. The OGE’s organizational goal is to create an ethical environment by coordinating multi-agency cooperation while acknowledging the autonomy enjoyed by each individual agency.<sup>32</sup>

The OGE enforces a set of laws that define conflicts of interest and specify penalties for violations. It defines the length of time between when an official may leave office and accept employment with firms that conduct business with the government, the terms under which a government official may advise a private company, and regulates other activities that involve elected or appointed officials and private sector companies. Unlike anti-corruption commissions in many countries, the OGE has no investigative function, but serves to inform public officials about actions that might represent potential conflicts of interest. As a consequence, its role is entirely preventive and its operations are to improve bureaucratic understanding of laws and regulations. Its reports are submitted to the President and Congress for review and when it determines evidence of malfeasance, it submits such evidence to the Department of Justice for investigation and prosecution. Investigation and enforcement are the domain of the Department of Justice with its multiple agencies that perform police and prosecutorial functions. Hence, the OGE serves to disseminate information to elected and appointed officials without any mandate to enforce provisions of laws and regulations.

### Other Experiences

Anti-corruption commissions may be classified according to both their stated and *de facto* functions. The more functions a commission seeks to fulfill, the greater its demand for revenues. Despite the expensive nature of anti-corruption commissions, the successful establishment of Hong Kong's ICAC has encouraged other governments to create similar organizations. Indeed, countries as diverse as Argentina, Bosnia-Herzegovina, Guinea, India, Mauritius, and South Korea have joined others in the establishment of universal anti-corruption commissions. These governments have tried to the extent possible to replicate the three-tiered functions of investigation, prevention, and education. However, in many states, low levels of political commitment, disarticulation among branches of state, and severe budgetary constraints prevent the establishment of a large and expensive anti-corruption commission. As a consequence, policymakers

create those commissions they can and adapt them to local conditions. Such commissions typically fail to reduce corruption.

Among the states that have adopted the universal model, Botswana stands out. Botswana's commission evolved out of a series of scandals in which senior officials in the ruling Botswana Democratic Party were implicated in accepting bribes. In September 1994, the Botswana National Assembly enacted the Corruption and Economic Crime Act to establish the Directorate on Corruption and Economic Crimes (DCEC).<sup>33</sup> Botswana is somewhat unique; the country has a highly developed bureaucratic state that governs without the controls imposed by a dynamic associational milieu or media.<sup>34</sup> The Botswana legislature lacks crucial elements of independence from the executive and is subservient to the president's prerogatives. The DCEC therefore reports to the President who approves the release and dissemination of an annual report. This reporting structure is indicative of centralized executive authority that may account for the government's extraordinary success in managing its diamond reserves.<sup>35</sup> Indeed, effective management of natural resource rents has brought the government substantial revenues that enabled it to overcome the budgetary impediment presented by anti-corruption commissions.

The DCEC has a mandate to investigate, prevent, and educate the public on all issues related to economic crimes and corruption. Its statutes specify that the DCEC is an independent agency that provides community outreach programs to public and private sector actors on the costs of corruption. Although the DCEC's public information suggests that it has an investigative function, annual reports reflect an emphasis on prevention and community outreach. Recently, the Directorate has assumed more of the functions of investigation. For instance, in 2001 the DCEC received 24.8% more reports of corruption than the previous year resulting in over 500 investigations under various sections of the Corruption and Economic Crimes Act.<sup>36</sup> The DCEC however has no role in the prosecution of corruption cases; evidence is forwarded to judicial authorities. However, the numbers of cases actually forwarded for prosecution has been low, which probably reflects the sensitivities of Botswana's government.<sup>37</sup>

Other governments have adopted the investigative model with its enhanced police function that presents a potential for an abuse of state power. For this reason, the investigative model tends to be established in countries with centralized executives free from the institutional uncertainties of regular and competitive electoral cycles.<sup>38</sup> Investigative commissions are common in authoritarian or semi-authoritarian regimes wherein the executive has preponderant influence over the other branches of government. Many African states have established anti-corruption offices with strong investigative offices that report directly to the president.

Among transition economies, Lithuania's Special Investigative Service (SIS) stands out. The Lithuanian government established the SIS in 1997 to investigate alleged incidents of corruption and report to the president and parliament.<sup>39</sup> The agency was intentionally modeled on the Singapore CPIB; its director reports to the President, its officers have unusual police powers to investigate political venality, and, in cooperation with the Government Ethics Agency and the Office of the Ombudsman, the SIS has a free hand to investigate incidents of corruption in the public sector. When the Lithuanian Parliament voted to coordinate its anti-corruption efforts with neighboring Estonia and Latvia, they based their commissions on the SIS. Such an agency strengthens the executive's capacity to extend its influence into society and shape the character of political development.

The parliamentary model presupposes the operation of a functioning parliament with budgetary capacity to fund committees that provide critical checks on executive power. In countries with the parliamentary model of anti-corruption commissions, accountability is to the legislature that receives reports and provides oversight. However, in the absence of independence, a parliamentary commission encounters serious difficulties. For example, Thailand's Parliament established the National Counter Corruption Commission (NCCC) in the late 1970s to report incidents of corruption.<sup>40</sup> However, the proliferation of crony operated establishments (COEs) distributed profits to business interests who had access to the executive.<sup>41</sup> Indeed, the reliance on cronyism undermined the

NCCC and created an economic vulnerability unsurpassed in other Southeast Asian governments.<sup>42</sup> In the years that preceded the February 1997 financial crisis, COEs drove up the price of real estate in Bangkok by borrowing heavily from lenders who operated in the belief that the Bank of Thailand would bail out any serious defaults.<sup>43</sup> However, when foreign banks reversed a \$1.9 billion inflow into Thailand during the first quarter of 1997 to a reported outflow of \$6.2 billion in the second, the Central Bank was unable to weather the crisis.<sup>44</sup>

After the financial crisis, Thailand adopted a new constitution that has established a bicameral legislature with a House of Representatives and a Senate. This legislature has also been relatively weak due to the continued influence of cronies linked so closely to the regime that that corruption in Thailand necessarily involves rent-seeking by privileged groups.<sup>45</sup> Perhaps the single greatest impediment to resolving crony capitalism in Thailand is that the Senate is subservient to the executive who has a decisive influence in determining the commission's composition.<sup>46</sup> This reporting structure prevents any independence of the NCCC from the executive and calls into question any effectiveness of Thailand's anti-corruption efforts. While parliamentary oversight is a potential control on the NCCC, the constitutional weakness of the Thai parliament makes it doubtful that it will ever exert much influence.

Another variant on the parliamentary model focuses on committees that disseminate reports of venality as a strategy to promote prevention and education. An emphasis on public disclosures of venality is exemplified by the Warioba Commission Report in Tanzania. Public outrage with police corruption exploded in the early 1990s when even street vendors had to pay militia in Dar es Salaam bribes, an action that violated "societal norms of economic justice in which the poor ought to pay the least for whatever good or services being sought."<sup>47</sup> In response, the 1995 Law on Ethics for Public leaders empanelled a Presidential Commission of Inquiry Against Corruption, also known as the Warioba Commission. With funding and support from the World Bank, the Tanzanian government released the Warioba Commission Report, which implicated

numerous officials including the former president Ali Hassa Mwinyi, ministers, and high-level civil servants.<sup>48</sup> Since that time, however, the Tanzanian Government has had little success in its efforts to reduce corruption as evidenced by its ranking in the Corruption Perceptions Index (CPI) of Transparency International (TI).<sup>49</sup>

A third variation on the parliamentary model involves governments that have established commissions to oversee executive investigative commissions. In Bulgaria, for instance, the Parliament has established an anti-corruption commission to oversee a second commission that reports to the Council of Ministers. These efforts responded to self-imposed pressures to provide “proof” that the government was taking serious measures to fight corruption as part of its ambitions of joining the European Union. This commitment is evidenced by Bulgaria’s consistent improvement in the CPI from 65 in 1998, to 53 in 2000, to 47 in 2001, and 46 in 2002.

Bulgaria’s apparent success in reducing corruption may not be enjoyed by every country. A duplication of function poses a significant problem in countries where budgetary constraints limit parliamentary operations and the executive has unchecked power. What may therein evolve is a parliamentary anti-corruption commission that operates as a poorly funded second in parallel to the executive commission. Such a duplication of responsibilities has occurred increasingly in Eastern Europe as national assemblies have undertaken oversight functions usually performed by accounting courts, audit agencies, and financial inspectorates that organizationally fall under the executive.

Several countries have implemented the multi-agency approach. Some have constitutions that establish a federal political system. Examples of these countries include Argentina, India, and Nigeria. In these states, an anti-corruption commission is linked to federal authorities and prosecution is conducted by the judiciary. The commissions have had uneven success, as is the case in any large polity. Nigeria’s efforts have been problematic due to powerful interests in federal, state, and local governments that oppose any anti-corruption reforms. Often these interests are members of the legislature, government, or are otherwise powerful people, which shields them from investigations and prosecution.

Among parliamentary countries that have established a multi-agency approach, Uganda is a notable case. The country has had such a strong donor presence as to raise questions of the government’s autonomy. In response to pressures from international donors, the Museveni government established a triad of organizations to fight corruption through its Inspector General of Government (IGG), Auditor General, and Human Rights Commission.<sup>50</sup> Although the IGG is supposed to eliminate bribery in the public sector, Uganda’s falling ranks in the CPI suggest that systemic corruption is persistent and getting worse.<sup>51</sup> The continuity of systemic corruption in Uganda attests to an embedded malfeasance among powerful members of society who profited from privatization policies and access to rents in state marketing boards.<sup>52</sup>

In francophone Africa, Benin has adopted a multi-agency model led by an anti-corruption commission. Its strategy has been for the *Cellule pour la Moralisation de la vie Publique* (Office for the Improvement of Morality in Public Life—CMVP) to work in conjunction with control agencies in public finance, audit agencies in the judiciary, and parliamentary offices.<sup>53</sup> Beninese officials tried to build on international experiences that have demonstrated the need to reduce incentives as well as opportunities for corruption in the public sector. However, sanctions and oversight committees are only effective when officials are adequately paid and their careers hold real promise, which has not been the case in Benin and chronic budgetary shortfalls pose an impediment to reform. Benin’s experiences demonstrate that curbing corruption cannot follow any magic formula; while the use of a watchdog agency may be viable strategy elsewhere, persistent financial crisis made it unlikely that the CMVP could succeed. The question is why would an impoverished, aid-dependent government establish an anti-corruption agency in the first place?

A partial response to the question is the precipitating crisis that the pillage of Benin’s banks and treasury between 1985 and 1988 left the government destitute and it had the acquiescence of its population to implement meaningful reform. The consequences of this crisis drew attention to the damages of clientelism,

patrimonialism, and rent-seeking that had long been practices in Benin's public sector.<sup>54</sup> A lack of accountability is evident in the plight Benin's overwhelmingly rural population (approximately 80% of total population) and the stagnation of plutocratic that fails to circulate or recruit new members.<sup>55</sup> Although the crisis precipitated fundamental regime change, all the impetus for an anti-corruption agency came from the President's office to which the CMVP directly reports.<sup>56</sup> What remains to be demonstrated is whether Benin's government has the political commitment to investigate, prosecute, and punish high ranking individuals accused of corruption.

### Unraveling the Puzzle

The cases explored in this paper suggest some reasons why policymakers create anti-corruption commissions. A significant reason stems from a precipitating crisis that compels political leaders to undertake reforms that their citizens recognize as legitimate. In Hong Kong, New South Wales, and Singapore, narcotics traffickers bribed police authorities and contributed to a deterioration of the rule of law. These scandals caused the precipitating crises that pushed policymakers to establish commissions with broad powers that were independent of the police. A more piecemeal approach is what occurred in the United States as anti-corruption reforms responded to particular scandals involving patronage (Tammany Hall), executive discretion (Teapot Dome), and conflicts of interest (Lockheed and Abscam). In each of these circumstances, successful reforms required a credibly committed leadership willing to enact policies that citizens recognized as desirable. Since the late 1990s, these four types of commission have been replicated in numerous countries with questionable success.

The cases presented in this paper highlight the difficulty of transferring institutional arrangements that operate efficiently in one country to another. One reason governments have established anti-corruption commissions in spite of evidence of their failure in most countries is that they are responding simultaneously to multiple constituencies. Since the late 1990s, an internationalization of anti-corruption movements has been evident in the proliferation of Transparency

International chapters. These non-governmental organizations are influential and have the attention of an international donor community tired of "leakage" of its development assistance. However, the performance of countries like Argentina, Bangladesh, Brazil, Thailand, Tanzania, Uganda, and India that have enacted anti-corruption reforms bespeaks the difficulty of enacting meaningful policies. It is evident that policymakers' incentives in these countries do not include offending entrenched constituents who may oppose sustainable anti-corruption reforms.

Perceived vulnerability to electoral defeat has a major influence on whether any politician will enact controversial reforms, especially anti-corruption legislation. If political leaders believe rightly or wrongly that taking meaningful measures against corruption may result in their loss of office, they have an incentive to block reforms. One method to slow reforms is an anti-corruption commission that communicates a willingness to fight venality while postponing difficult acts. Hence, some governments approach corruption as an educational problem; their activities take a normative approach that stresses the immorality of corruption. Unfortunately, condemnations of the morality or immorality of bribery are far removed from the difficult choices inherent in prosecuting corrupt politicians who may be linked to the political center or enforcing laws that enhance transparency and impose accountability.

Finally, the fundamental difficulty in establishing an anti-corruption commission is the expense of such agencies. Although many governments are reluctant to disclose their specific allocations for anti-corruption commissions, the more functions that the agency seeks to undertake, the higher it costs. Hence, the universal model entails high costs that for many governments, is simply prohibitive for already limited budgets. Perhaps it is the cost of such commissions that is the greatest constraint on their organization and capacity to reduce public sector corruption. However, the arrogation of functions to anti-corruption commissions that are supposedly performed by general auditors, police bureaus, national investigative agencies, procurement boards, or any of the other offices that provide controls on dishonest bureaucrats may dilute government effectiveness and contribute to a deepening of malfeasance.



## Conclusion

Anti-corruption agencies are part of a number of strategies that together can reduce venality in a government. Some of these strategies are absolutely crucial, including first the independence of a commission. Second, commissions need a clear reporting hierarchy that comprises executive officials, parliamentary authorities, and oversight committees. Third, governments must have a commitment to enact reforms that may be politically difficult. How a government is able to enact these strategies requires negotiations among key actors in the government, civil society, and the media. It is apparent from the cases above that the capacity to enact controversial reforms is problematic and many governments fail in their efforts to do so.

The first key variable that might explain a failure to reduce corruption through the establishment of an anti-corruption agency is the absence of laws necessary for its success. Without the legal tools to go after venal officials, a commission cannot succeed. Many governments either fail to enforce existing laws or the commissions have no mandate to enforce laws. Second, a commission must be independent from interference by the political leadership.<sup>57</sup> In some circumstances, a commission linked to the executive branch is used to settle old scores with political rivals. When the agency is linked only to the Parliament, then the security agencies have a disincentive to include parliamentary committees in their investigations. A competitive relationship may evolve among parliamentarians and national crime investigators. The anti-corruption commission thereby loses credibility as nothing more than a tool of the parliament.

Third, a clear reporting hierarchy may seem elementary, but it is not a straightforward arrangement. An optimal hierarchy might be reports delivered to the director of the organization, oversight committees, and then simultaneously shared with the Parliament and the executive. However, some executives prefer to receive reports without the bother of any hierarchy. This arrangement means that the executive branch monopolizes the information and elimi-

nates any accountability from independent agencies. In Ghana, for instance, the constitution stipulates that the Auditor General reports directly to the president in a confidential report that the executive may release at his discretion. As a consequence, the audits lack transparency and the president withholds information that may potentially be damaging to the administration. With the insertion of an unambiguous hierarchy whereby reports are transparent and accountability agencies operate on the basis of information contained therein, an anti-corruption agency is both independent and more importantly, legitimate.

Fourth, the presence of oversight committees is absolutely crucial to the effective organization of an anti-corruption commission. In Hong Kong, oversight committees provide a control over the ICAC and prevent it from any persecution of political opponents. The two committees found in New South Wales attest to the potential of parliaments in controlling potential excesses of anti-corruption agencies. By contrast, the absence of oversight committees in Singapore is evidence of the political nature of the CPIB and its centrality to the semi-authoritarian regime. It is through the activities of oversight committees that an anti-corruption commission links to parliament and civil society groups that fight venality in the public sector.

Finally, some evidence suggests that the size of a country, either geographically or in terms of its population may explain the effectiveness of anti-corruption efforts. Hong Kong and Singapore each have substantial populations living in a small geographic area. An argument that the geographic size of the country determines capacity to control venality has some credence. Despite the facility of that argument, the ability to shift norms from acceptance of corruption, to draft new laws that create rules prohibiting, and implementing credible enforcement bodies is a daunting task that requires a high degree of political commitment on the part of the leadership and its constituents.



## CONFERENCE AGENDA

### CONFERENCE

“National Assembly of the Republic of Serbia and Independent Bodies”

Belgrade 26-27 November 2009

THURSDAY 26 November 2009

Venue: Mala sala of the National Assembly of the Republic of Serbia, Trg Nikole Pasica 13

08:30 -09:00 Registration of Participants

#### 09:00 – 09:40 Opening speeches

Moderator: Secretary of the National Assembly, **Mr. Veljko Odalović**

Speaker of the National Assembly, **Mrs. Slavica Đukić-Dejanović**

Ombudsperson of Serbia, **Mr. Saša Janković**

Commissioner for Information, **Mr. Rodoljub Šabić**

United Nations Resident Coordinator a.i., **Ms. Dorit Nitzan**

#### 09:50 – 11:30 The role of the Parliamentary Committees and the independent/regulatory bodies in the Parliamentary oversight of the Government

Moderator: **prof. Dejan Milenković**, Ph.D., Political Science Faculty, University of Belgrade

Introduction: **Ms. Sonja Vojnović**, Director of Operations of the Canadian Parliamentary Centre

Speakers: **Ms. Gordana Čomić**, Deputy Speaker of the National Assembly of the Republic of Serbia

**Mr. Jørgen Kosmo**, Auditor General of Norway

**Mr. John Williams**, CEO GOPAC, former Chair of the Standing Committee on Public Accounts of the Canadian House of Commons

**Mr. Drago Kos**, Head of the Slovenian Anti-Corruption Council, President of GRECO

**Ms. Marianne Seip**, Political Adviser at the Norwegian Parliament, former State Secretary in the Ministry of Labour and Governmental Administration

Q&A / Discussion

11:40 – 12:00 Coffee break

#### 12:00 – 13:30 Relations between Parliament and independent bodies

Moderator: **prof. Dejan Milenković**, Ph.D., Political Science Faculty, University of Belgrade

Introduction: **Ms. Sonja Vojnović**, Director of Operations of the Canadian Parliamentary Centre

Speakers: **Mr. John Williams**, CEO GOPAC, former Chair of the Standing Committee on Public Accounts of the Canadian House of Commons

**Mr. Rodoljub Šabić**, Information Commissioner of the Republic of Serbia

**Ms. Nataša Pirc Musar** – Information Commissioner of the Republic of Slovenia

**Mr. Jernej Rovšek**, Deputy Ombudsman of the Republic of Slovenia

**Mr. Saša Janković**, Ombudsperson of the Republic of Serbia

**Mr. Bill Burnett**, Former Director, International Technical Cooperation, National Audit Office UK

Q&A / Discussion

**13:45- 14:45 Lunch,**

*National Assembly, Kralja Milana 14, other building, Yellow Hall (Žuti salon)*

**15:00- 17:30 Breakout sessions**

Working group 1 – Audit Institution

*(National Assembly library, Trg Nikole Pašića 13)*

Moderator: **Mr. Zoran Tamaš**, State Audit Institution of Serbia

Presenters:

**Mr. Bill Burnett**, Former Director, International Technical Cooperation, National Audit Office UK

**John Williams**, CEO GOPAC, former Chair of the Standing Committee on Public Accounts of the Canadian House of Commons

**MPs**, members of the Committee of the National Assembly

Working group 2– Ombudsperson

*(Room 3 (Sala 3) of the National Assembly, Trg Nikole Pašića 13)*

Moderator: **Mr. Robert Sepi**, Assistant General Secretary, Ombudsperson

Presenters:

**Ms. Aleksandar Restanović**, Ombudsperson, Head of the Reporting Department

**Mr. Jernej Rovšek**, Deputy Ombudsperson of Slovenia

**MPs**, members of the Committees of the National Assembly

Working group 3 – Information Commissioner

*(National Assembly – other building, Kralja Milana 12, room: Nikola Pašić)*

Moderator: **Mr. Marinko Radić**, General Secretary of the Cabinet

Presenters:

**Mr. Rodoljub Šabić**, Information Commissioner of Serbia

**Ms. Natasa Musar Pirc** Information Commissioner of Slovenia

**MPs**, members of the Committees of the National Assembly

Working group 4 – Anti-corruption agency

*(Mala sala, Dom Narodne skupštine, Trg Nikole Pašića 13 – original hall from the morning session)*

Moderator : **Ms. Zorana Marković**, president of the Anti-corruption Agency

Presenters:

**Mr. Drago Kos**, Head of Anticorruption Council, President of GRECO

**MPs**, members of the Committees of the National Assembly

Q&A, Discussion

End of Day 1

FRIDAY 27 November 2009

Venue: Mala sala of the National Assembly of the Republic of Serbia, Trg Nikole Pašića 13

08:30 -09:00 Registration of Participants

**09:00 – 12:00 Relations between the Government and the Parliament, resources, communication lines, the existing practices and relations between Governments and independent/regulatory bodies**

Moderator: **prof. Dejan Milenković**, Ph.D., Political Science Faculty, University of Belgrade

Speakers: **Mr. Slobodan Ilić**, State Secretary, Ministry of Finance of the Republic of Serbia

**Mr. Peter Pavlin**, Secretary, Ministry of Justice of the Republic of Slovenia,

**Ms. Dragana Lukić**, Assistant Minister, Ministry of Justice of the Republic of Serbia

**Mr. Drago Kos**, Head of the Slovenian Anticorruption Council, President of GRECO

**Ms. Stanojla Mandić**, Deputy Commissioner, Information Commissioner, Republic of Serbia

**Mr. Bill Burnett**, Former Director, International Technical Cooperation, National Audit Office UK

12:00 – 12:15 **Coffee break**

12:15 –13:30 **Standing orders/Rules of procedures solutions and definitions**

Moderator: **prof. Dejan Milenković**, Ph.D., Political Science Faculty, University of Belgrade

Speakers: Canadian experience - **John Williams**, CEO GOPAC, former Chair of the Standing Committee on Public Accounts of the Canadian House of Commons

**Ms. Mirjana Radaković**, Assistant Secretary General of National Assembly of Serbia -Head of the Sector for Working Bodies

**13:30 – 14:00 Conclusions by prof. Dejan Milenković, Ph.D., Political Science Faculty, University of Belgrade**

14:00-15:00 Lunch

*National Assembly, Kralja Milana 14, other building Yellow Hall (Žuti salon)*

Conference end



## GLOBAL ORGANISATION OF PARLIAMENTARIANS AGAINST CORRUPTION

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October 2009

The strategic plan and a funding proposal to develop GOPAC and its regional and national chapters into an effective organisation that fights corruption through improving democratic oversight of governments by Parliaments

## Introduction

GOPAC is a voluntary organisation of parliamentarians and former parliamentarians committed to fighting corruption through improved governance. The way the organisation is structured is described in the appendix that includes:

Mission Statement	Membership & Governance
Global Organization	Regional Chapters
National Chapters	Global Task Forces

GOPAC as an organisation of parliamentarians is unique in that its membership, being elected representatives of the people, is more aligned with government than the NGO sector. GOPAC represents and mobilizes its members (parliamentarians) who have the constitutional authority and responsibility to hold their governments accountable for the delivery of services to their society. No other sector of society has that political capacity.

Parliaments as institutions are unique in their organisation. There are two concepts that are mandatory for success in every other organisation, yet their absence in parliaments is the reason that parliaments work and are effective.

**A parliament has no leader.** This may sound strange at first glance but upon reflection one sees that it is true. A functioning parliament has a number of political parties represented, each with their own hierarchy and leader, but there is no overall leader in parliament, not even the Speaker whose sole responsibility is to maintain order. In the Westminster model of governance, the Prime Minister, the leader of the nation, sits in parliament but does not and cannot speak for parliament. Parliament speaks for itself through votes on legislation and issues before it.

**A parliament has no mission statement.** An organisation that wants to succeed must know why it exists and what it wants to accomplish. The degree to which an organisation can be successful will depend on its capacity to motivate its people to buy into the aims and objectives of the organisation. Not so for parliament. Parliament is overseer of the government and has no obligation to endorse the government's vision for society. As representatives of society, the members hold disparate opinions on many issues, and it is the development of consensus (majority) within parliament that determines the will of parliament and the direction that it takes.

Parliament is not an extension of the executive although in far too many countries it appears to be so. An effective parliament must be able to express an opinion independent of government on legislation and issues before it. When a parliament only endorses the will of its government and imbues legislation and the policies of the government with an aura of democratic respectability, the system of democratic accountability is in peril.

Through participation in GOPAC, Members of Parliament from all parts of the world, have for the first time united in the common purpose to fight corruption. In the last ten years there has developed a real focus to fighting corruption. Governments under the auspices of the United Nations have written the UN Convention against Corruption, now adopted by around 150 countries. There are other conventions and initiatives developed by governments such as the Inter American Convention against Corruption, the African Convention against Corruption, Bribery of Foreign Officials Convention etc. In addition there are international organisations supported by governments such as the Financial Action Task Force that focus on the fight against corruption.

To complement these initiatives the development agencies of governments have funded many programs with the same objective of tackling corruption. There are programs to support civil society organisations that fight corruption, programs to build capacity in parliaments, programs directed towards parliamentarians, but never have parliamentarians themselves become collectively engaged in the fight against corruption — until now, through GOPAC and its regional and national chapters.

Corruption is defined as the diversion of public resources for private gain. It is apparent that corruption thrives when democratic oversight is weak or non-existent. When the voters don't have the capacity through a parliament that is accountable to them, to hold their government accountable for the delivery of services to their society, corruption takes hold and allows diversion of resources from public benefit to private gain.

It is constitutional responsibility of parliament to oversee the executive on behalf of the citizens, and it is the lack of oversight that in large measure allows corruption to flourish. Therefore improving the effectiveness of parliament in its oversight responsibilities should attack corruption at its root. While many see corruption in parliament as part of the problem, parliament cannot be dismissed as the premier institution for democratic accountability. Parliaments may not in many cases be effective in discharging their responsibility of democratic oversight, but that responsibility cannot be assumed by any other organisation. Therefore, if

democratic development is to be achieved, it must be through fixing the institution of parliament rather than bypassing it thinking that it can be replaced by civil society organisations.

While much has been done in the way of capacity building for parliaments as institutions, the focus until now has been on the support services such as training the parliamentary staff and ancillary services. The parliamentarians themselves, who come to parliament from all walks of life but have no training to be parliamentarians, cannot be overlooked. In addition their parliamentary career may be short, only to be replaced by someone else with no parliamentary knowledge, therefore training must be an ongoing commitment.

Development Agencies, by their nature are part of government therefore liaise with governments in the aid recipient countries. Aid agencies may provide capacity building and training to parliaments but do not have a mandate to engage parliament in policy formation and implementation.

GOPAC through its non partisan membership provides a conduit for development agencies to provide training and capacity building to the parliamentarians who want to be effective in their responsibilities, and by doing so democratic oversight improves, corruption is diminished and prosperity starts to take hold.

## Purpose and Goals

The **purpose** of GOPAC is to engage parliamentarians in training and to continue that relationship through leadership and peer support to improve democratic oversight and implement specific legislation that attacks corruption. Examples are the UNCAC and other initiatives that are public policy objectives which have been adopted at the global conferences of GOPAC as agendas to be accomplished through Global Task Forces of GOPAC (see appendix 1)

Moving beyond training of parliamentarians to promote specific legislation is usually beyond the mandate of any development agency that supports capacity building in a parliament, even if such legislation emanates from a convention signed and ratified by the government overseen by the parliament. Development agencies normally deal directly with governments whom they see as their clients on the policy and legislation front. For development agencies to go directly to parliaments that often have opinions at variance with government to promote specific anti corruption legislation would be seen as an end run on governments who often display reluctance to move quickly on such issues.

But GOPAC does not have such quandaries. GOPAC is an organisation of parliamentarians and its members are at liberty to adopt resolutions at their meetings and conferences that promote and pursue legislative initiatives in the anti corruption field. This is the strength of GOPAC; it is not a program to be implemented or accomplished, but an organisation that mobilizes parliamentarians on a continuous basis to accomplish legislative objectives since it is they who have such constitutional capacity.



## The goals of GOPAC are:

1. To build awareness among parliamentarians through national chapter development that parliament is the first line of accountability for governments therefore in the front line of the fight against corruption;
2. To engage parliamentarians through regional chapter development in the fight against corruption by providing them with peer support, knowledge, skills and information necessary to accomplish legislative and public policy objectives;
3. To promote the work of the Global Task Forces (GTF's) that engage parliamentarians to advance specific policy objectives in their parliaments such as the UNCAC;
4. To provide leadership, motivation and co-ordination to all GOPAC members around the world through its Global Board of Directors;
5. To build strong relationships with official donor agencies and others whose objectives range from humanitarian aid to economic development since virtually all issues addressed by donor agencies stem from poor or corrupt governance. Therefore donor agency/ GOPAC co-operation is mutually beneficial.
6. To fund a small professional secretariat to co-ordinate and organize the activities of the volunteer members such as workshops, training seminars and regional and global conferences.

## Inputs and Outputs

### Outputs

1. **To educate parliamentarians** to improve their ability to perform their democratic responsibilities of representation, legislation and oversight and to engage them on an ongoing basis through participation in a formal organisation.
2. **To build national chapters** of GOPAC in parliaments to engage parliamentarians committed to good governance and the fight against corruption. By doing so we build a coalition of parliamentarians who become more proficient in their responsibilities - representation, legislation and oversight. Enhanced capacity of parliamentarians also supports the objectives of donor agencies such and improved parliamentary oversight of government and its finances, democratic development and legislative initiatives in the anti corruption field. The national chapters provide
3. **To build regional chapters** along cultural, linguistic and geographic bases, such as Africa (APNAC), Latin America (LAPAC) and other chapters around the world that provide leadership, motivation, continuity and identity to the anti corruption agendas being pursued in parliaments and promoted by development agencies. All organisations require leadership, motivation and vision. Through the hierarchy of national and regional chapters and the global board, GOPAC provides opportunities for leadership for parliamentarians beyond their national parliament. The hierarchy of GOPAC (its regional chapters and global board) also provide greater credibility to the anti corruption agenda promoted by parliamentarians in their own country. It brings larger agendas, more focused and professional approach and engages global expertise in the fight against corruption. With the enhanced stature of parliamentarians as leaders on a regional basis they also have better access to the media and by extension, the public at large.

- 4.
5. **To build global Task Forces (GTF'S)** to advance specific anti corruption legislation such as UNCAC, Codes of Conduct for parliamentarians and others
6. **To build a strong global executive** to lead the organisation.
7. **To work with official donor organisations** towards common goals. For example GOPAC works with UNODC in Vienna to advance the implementation of the UNCAC. GOPAC works with IMF and FATF on the anti money laundering agenda.
8. The fight against corruption needs champions and leaders with international recognition and stature; spokespeople and leaders who can command international media attention, and when they speak, the world listens. Through participation in GOPAC, parliamentarians from any part of the world have an opportunity to rise to positions of democratic leadership on the international stage by promoting the anti corruption agenda. By doing so they demonstrate to the next generation of leaders that providing honest leadership and good governance is far better than seeking power for private gain. The additional benefit is that in strengthening democratic governance today, it makes it more difficult to engage in corrupt practices in the future.

## Outcomes

The outcomes from building GOPAC into an active organisation of parliamentarians range from short term and immediate through to long term and permanent improvements in society. Starting with:

With an ongoing program of **education for Parliamentarians** in their responsibilities of representation, legislation and oversight, a cadre of parliamentarians will grow in size and understanding. GOPAC would like to see seminars for new parliamentarians held in every country after each election. It would only take a few elections to achieve a majority of parliamentarians in the parliament who had attended the seminars and therefore more aware of their authority and responsibilities. We already see that participation by parliamentarians in regional meetings and seminars sponsored by GOPAC raises their appreciation of the need for better governance and how they can bring that about. If seminars can be organised in a more consistent basis they would soon become part of the political fabric of a country and its parliament.

Parliamentarians understand that the political game is about building coalitions. Governments stay in power by building a coalition big enough to hold the opposition at bay. Parties that lack a majority in parliament must work harder to stay in office and to maintain their legislative agenda in the face of a majority in parliament that has a different opinion on the issues and who understand that it is their responsibility to exercise democratic oversight of the government

## THE MISSION STATEMENT

### The Mission:

To make parliaments more effective as democratic institutions of oversight of government.

To achieve that mission, GOPAC has three pillars or agendas:

1. **Peer support for parliamentarians** who are travelling the difficult and sometimes dangerous road of fighting corruption and to be an effective and credible voice to support them.
2. **Education for parliamentarians.** We send our young people to university to be lawyers, doctors, accountants and engineers but who teaches parliamentarians how to be competent in the work of democratic representation, legislation and oversight of government?
3. **Leadership for results.** Parliamentarians need to be leaders in the fight against corruption. Parliament has the constitutional authority and responsibility to hold government accountable for the way it manages its society. Parliamentarians should therefore be able to fulfil that mandate given to them by the electorate.

### Membership and governance structure of the organisation

Membership in GOPAC is open to parliamentarians, former parliamentarians, and those democratically elected but denied the right to take office. The constitution of GOPAC also allows parliaments to join but the criteria for membership has not been adopted. Membership in the national chapter also grants membership in the regional chapter and the global organisation. The global board has the power to cancel any membership.

All national and regional chapters and the global organisation are governed by adopted constitutions.

### National Chapters

Each chapter elects a Board and Executive to manage the affairs of the chapter. It is recommended that a chapter enter into an arrangement with a credible NGO to act as the secretariat for the chapter.

## Regional Chapters

Each national chapter appoints three members (the chair and vice chairs, for example) to sit on the Regional Board. The term of office is from one regional conference to the next. The Board elects an executive from its members with no more than one executive member from any national chapter if possible.

A regional chapter needs to enter into an arrangement with a credible NGO to act as the secretariat for the chapter.

## Global Board & Executive

Each regional chapter appoints three members (the chair and vice chairs, for example) to sit on the Global Board. The term of office is from one global conference to the next.

The Global Board may recognise a regional chapter in formation (a national chapter operational but no regional chapter formed) and grant it one seat on the Global Board.

The Board elects an executive of seven people from its members with no more than one executive member from any regional chapter. The chair cannot serve more than two terms, whereupon the position must be filled by someone from another chapter.

The global organisation is served by a professional secretariat located in Ottawa, Canada

## Global Conference and Board Meetings

GOPAC is governed by resolutions adopted at the bi-annual conference to which all members and observers are invited. There will be a meeting of the Board to which all GTF members and observers are invited in alternate years between global conferences.

## Roles within the organisation

The Global Executive supported by the secretariat provides leadership for the organisation and organises the global conferences in conjunction with the regional chapter, and the national chapter and parliament of the host country. The Board is consultative through virtual meetings and meets face to face at global conferences and once in between.

Regional chapter membership boundaries are self determined along geographic, cultural and linguistic lines to provide a strong anti corruption voice in the region and to co-ordinate parliamentary anti corruption activities within the region.

National chapters provide the opportunity for individual parliamentarians to join with their colleagues in parliament to develop an anti corruption agenda through promotion of appropriate legislation and improved parliamentary oversight of government.

The regional and national chapters are self governing and self funded.

GOPAC operates in three official languages, English, French and Spanish. A fourth, Arabic, was used at the 3<sup>rd</sup> global conference in Kuwait.

## Agendas

### Global Task Forces (GTF's)

At the 2<sup>nd</sup> global conference in held in the East African Parliament Building in Arusha, Tanzania in September of 2006, and in accordance with the objectives of the organisation contained in article 3.2 of the constitution, GOPAC adopted resolutions calling for task forces to be created to advance eight specific agendas.

The resolutions and task-forces are summarized as follows:

1. **International Conventions against Corruption:** Recognizing the importance of the UN Convention against Corruption in promoting international cooperation in combating corruption, GOPAC will establish a Global Task Force to engage and motivate GOPAC regional and national chapters and parliamentarians through workshops and other means to advance the ratification and implementation of UNCAC and other international conventions against corruption. The GTF will promote the work of key organizations including UNODC, the World Bank, IMF, OECD, FATF, OAS, AU, U4 and other international organizations active in the field.
2. **Anti Money Laundering/Combating Terrorist Financing/Repatriation of Assets:** The loss of wealth by developing nations through corruption is a major impediment to growth in these countries. Therefore, GOPAC will establish a Global Task Force to engage and motivate GOPAC regional and national chapters and parliamentarians through workshops and other means to push for stronger international regulations governing international financial transactions and prompt repatriation of illicit funds invested elsewhere. The GTF will promote the work of key organizations in this field including the World Bank, IMF, FATF and the International Compliance Association.
3. **Code of Conduct for parliamentarians:** In many parts of the world parliamentarians are seen as a source of corruption, not a solution to it. In response to this perception, GOPAC will establish a Global Task Force to consult with parliamentarians and others to develop a draft Code of Conduct for parliamentarians to be considered at subsequent global conferences. The GTF will also work with orga-

nizations interested in this issue to research and develop position papers on the subject for consideration.

4. **Parliamentary Immunity:** Recognizing that parliamentary immunity is both essential to a well functioning democracy, but also seen in many jurisdictions as providing protection for corrupt parliamentarians, GOPAC will establish a Global Task Force to develop a global assessment of parliamentary immunity and consult with regional chapters, national chapters and members on proposals for consideration at future global conferences. The GTF will also work with organizations interested in this issue to research and develop position papers on the subject for future consideration.
5. **Parliamentary Oversight:** Recognizing that effective parliamentary oversight of government is essential for good governance and combating corruption, GOPAC will establish a Global Task Force to develop practical assistance and training for GOPAC regional and national chapters and parliamentarians through workshops and other means on issues related to parliamentary oversight. The GTF will also engage organizations with complementary interests such as the World Bank Institute (WBI), to develop educational opportunities and materials for parliamentarians with emphasis on the importance of parliamentary oversight.
6. **Access to Information and Media (Now called Public Participation):** Legitimate access to information regarding state activities is severely limited in many countries. GOPAC will establish a Global Task Force to gather information on successful experiences and best practices to assist in identifying ways to improve information accessibility. The GTF will engage GOPAC regional and national chapters and parliamentarians through workshops and other means to promote independence of the media where access to information is constrained and media lack independence. The GTF will also engage organizations with complementary interests, to develop awareness of this important agenda within parliaments and the public at large.
7. **Resource Revenue Transparency:** In many countries, the exploitation of natural resources and government corruption are inextricably linked. GOPAC will establish a task force of the Board to push for changes to international accounting standards for sovereign nations that will require the publishing in the Public Accounts, as a separate line item, all resource revenues received from resource

extraction activities. At the Kuwait conference in November 2008, this task force was elevated to a Global Task Force to engage GOPAC regional and national chapters and parliamentarians through workshops and other means to promote full transparency in resource revenue. The GTF will promote the work of key organizations in this field such as E.I.T.I., Revenue Watch etc.

- 8. Development Assistance Loans and Grants (Now called Parliaments and Development Assistance):** For development assistance to be effective it must be complemented by improved accountability and governance. GOPAC will establish a task force of the Board to impress upon all International Financial Institutions and official donors the need to include in their lending and grant agreements to sovereign states, governance provisions that ensure that parliaments are informed of the provisions of these agreements, the reporting on these agreements, and, where practical, engage parliamentarians in the approval process prior to concluding the agreements. This task force has been elevated to a Global Task Force to engage GOPAC regional and national chapters and parliamentarians through workshops and other means to promote full transparency in development assistance. The GTF will promote the work of key initiatives in this field such as the Paris Declaration and the Accra Principles.

## Methodology

GOPAC, as an organisation of parliamentarians, brings political capacity to the table. Parliaments have the constitutional authority and responsibility to hold governments accountable for their governance but parliamentarians often lack the knowledge and capacity to perform that function effectively. GOPAC through peer support for parliamentarians (its members) can foster an attitude of self development and create demand for higher standards of parliamentary performance. GOPAC through education and leadership of its members also creates a coalition of parliamentarians committed to the anti corruption/improved governance agenda, that can be molded into a political force exerting demands for improved standards of governance.

Parliamentarians are very aware of their own often short tenure in office and their lack of capacity to fulfill the functions of their office properly. Meanwhile GOPAC members recognize the tremendous depth of knowledge and expertise that exists within international organisations,

official donor organisations, academia, NGO's and others working in the fields of governance and development. GOPAC therefore seeks to harness that knowledge and skills available to improve the representative, legislative and oversight capacity of parliamentarians for the benefit of their societies. GOPAC also acknowledges the significant contributions, monetary, administrative and research that it has already received.

GOPAC, as a voluntary organisation, has little in the way of financial resources and relies on international organisations and donor organisations for the bulk of its program delivery and other costs. It also acknowledges the significant financial, organizational and administrative support that it has received from the parliaments (and governments) that hosted its three global conferences (Canada, Tanzania and Kuwait). GOPAC believes that by engaging parliamentarians in an organised way in the anti corruption/improved governance agenda it sets the stage for enhanced effectiveness of all foreign aid investments. GOPAC therefore considers grants to the organisation and its chapters as foundational investments by donor organisations that have a high potential to deliver results all across the development spectrum. Improved governance and adherence to the rule of law also contribute directly to higher foreign direct investment which, in turn improves standards of living and the return on foreign aid.

Many organisations have difficulty in engaging parliaments since multiple party (democratic) parliaments by definition do not have a single leader or a common vision; and there is always tension between the governing party or coalition and the opposition. Parliaments with one party or a dominant party are also difficult to engage by virtue of their lack of independence from the executive.

GOPAC, by building a non partisan coalition of parliamentarians committed to the anti corruption/good governance agenda, offers a conduit into parliaments that can be engaged by those wanting to contribute to improvements in the representative, legislative and oversight fields of governance by parliaments.

## Growth and acceptance of GOPAC

Since its inception at the founding conference in the House of Commons, Ottawa, Canada in 2002, GOPAC has grown with members now in nearly ninety countries and a number of functioning regional chapters and chapters in development. In addition, there are a significant number of national chapters, primarily in Africa and the Arab region which are

advancing anti corruption agendas in their own countries. With its clearly drafted program that focuses entirely on the anti corruption/good governance agenda, GOPAC readily appeals to parliamentarians who wish to be identified with honesty and integrity in governance.

That clearly defined program also demonstrates to the international community interested in development and improved governance that parliamentarians through membership in GOPAC are also committed to the agenda and want to develop the skills and resources to deliver beneficial results with lasting benefits.

GOPAC was invited by the United Nations Office of Drugs & Crime (UNODC) in Vienna to host a parallel meeting of parliamentarians in conjunction with the Conference of State Parties (CoSP) in Jordan (2006) and Bali (2008); and we expect an invitation to do the same in Doha in 2009.

The 3<sup>rd</sup> Global Conference in November 2008 held in the National Assembly in Kuwait was covered by national and international media demonstrating that GOPAC is perceived to be a credible player on the international governance stage. 175 parliamentarians from fifty five countries with 85 international organisations and NGO's as presenters and observers attended the conference. GOPAC is also sensitive to governance agendas other than the Global Task Forces by holding a workshop on gender issues at the global conference in Kuwait.

The conference adopted a number of resolutions giving leadership to the Executive and Board on the development and direction of the GTF's, and through the conference declaration, GOPAC stated its commitment to be a leader and motivator of parliamentarians to achieve progress on the anti corruption/good governance agenda

## **The future for GOPAC**

Building on the momentum generated at the 3<sup>rd</sup> conference in Kuwait GOPAC is ready for its next stage of development by moving its agenda forward to develop its national and regional chapters to promote the work of the Global Task Forces (GTF'S).

## **The National Chapters**

The National chapters will look to the GTF's for agendas to pursue within their own parliaments. While not locked into the GTF's, national chapters will likely find that GTF's are the easiest way to achieve credibility through adoption of agendas that are embraced by parliamentarians elsewhere. The endorsement of GTF's by GOPAC, IFI's, ODO's, NGO's and others also gives credibility to the GTF's. This will raise the profile of the national chapter, the regional chapter, GOPAC and the GTF's within the parliament. It is expected that by hosting regional GTF members (parliamentarians from other jurisdictions) and experts to lead seminars, awareness, capacity and coalition building for change will be enhanced. Led by regional GTF members, the national chapter will seek ways through collective action to advance the GTF agendas within their respective parliaments and to raise awareness of the issue in their media.

As parliamentarians they all meet at the parliament therefore meeting costs of the chapter will be minimal. Participants will also donate their time since they are already paid by their respective parliaments.

## **Regional Chapters**

The role of the regional chapters is largely organisation, co-ordination, motivation and leadership of the national chapters and their members. It is important that a regional chapter be supported by an NGO in the governance field to act as a secretariat. The valuable contribution already made by Transparency International in supporting some national and regional chapters is fully acknowledged. Much of the work in a region will be achieved through meetings and training seminars in the individual parliaments. The focus will be to disseminate the knowledge of the GTF members and expert agencies to the parliamentarians who need that knowledge and tools to 'bridge the gap' (see GTF's #3 below). There may be also sub regional meetings on GTF agendas where it is deemed appropriate.

The regional chapters should organise annual regional meetings to:

1. Build peer support among members;
2. To create working relationships with the IFI's, ODO's, NGO's and other expert agencies;

3. To update members on progress of all GTF's;
4. To inform members on the progress of other regional chapters and the global organisation;
5. To identify and develop leadership talent;
6. To develop motivation and agendas for ensuing year.

### **The Global Task Forces (GTF's)**

The agenda of each GTF is global in nature therefore will be headed by an international committee, preferably outside the leadership structure of the national and regional chapters and the GOPAC Board. The GTF members will be appointed by the Executive of GOPAC for terms concurrent with the global conferences with potential renewals. It is expected that they will be of sufficient calibre to be leaders that uphold GOPAC as a credible international organisation and be able to present their GTF position to governments, parliaments and others.

The GTF's which have no autonomous authority report to the Executive and Board of GOPAC. Each GTF will be large enough to have a member from each major area of the world (around ten to twelve) and will be supported by the secretariat in Ottawa, Canada. GTF members will be expected to contribute their knowledge and leadership to the GTF through virtual meetings and an annual face to face meeting, and also to be the point persons (animators) in their own region. The GTF's will be work closely with international organisations, development agencies, academia, NGO's and others that identify with the particular agenda of a GTF.

GTF members will be expected to identify and develop a team of parliamentarians in their own regions who will work with the GTF member, expert agencies and parliaments in the region. It is expected that these parliamentarians in the region will have credibility within their parliament and will want to commit time, energy and their reputation to the GTF.

With technical assistance, the GTF will develop papers and position statements that are perceived as credible and noteworthy. The papers will focus on the following:

- A mapping project to set out current standards in a country or region. (Drawing largely on existing material.)

- An iteration of best practices that should be achievable in the country or region. (Drawing largely on existing material.)
- 'Bridging the gap' proposals on how to move from current practices towards best practices in the country or region, using technical expertise where required and available.
- Development of toolkits and training seminars for parliamentarians (and others) on how to bridge the gap, likely through legislation and improved oversight.
- Benchmarking on progress towards best practices.

Upon approval of the GTF position statements by the GOPAC Executive & Board, GTF members will be expected to raise the profile of the adopted papers within the GOPAC membership, parliaments and the public at large through the media.

GTF members will be parliamentarians therefore expected to donate their time since they are already paid by their respective parliaments.

### **Roles of the Global Conference, Board, Executive and Secretariat.**

The Biannual Global Conference:

Is hosted as a partnership between GOPAC, one of its regional and national chapters and the parliament of the host country. GOPAC intends to hold each conference in a different region in odd numbered years. The conference:

1. Is the highest authority of GOPAC;
2. Provides opportunity for peer support, education and development of agendas for GOPAC to accomplish, and;
3. Approves policies, position statements and a conference declaration that give direction to all other organs of GOPAC between conferences.
4. Will be the location of a pre and post conference Board Meetings.



#### The Board:

1. Is a consultative board that meets face to face annually at the same time as the GTF`s and provides guidance to the executive;
2. Determines membership fees and approves applications for membership;
3. Approves reports and policy statements submitted by the executive, and;
4. Approves the annual budget and rules regarding contributions, donations and gifts to GOPAC;
5. Approves the location of the global conference and its agenda;
6. Considers and makes recommendations to the conference on proposals to amend any of the Articles.

#### The Executive:

Is the administrative organ and takes its direction from the Board;

Is responsible for all matters pertaining to the organization, except where a responsibility or task has been expressly vested in another organ;

Proposes the strategic plan and budget of the organization to the Board;

Organises the biannual conference in conjunction with a regional chapter and national chapter and the host parliament;

Supervises the Secretariat, and;

Borrows money if required within the limits of the constitution.

#### The Chair:

Is a parliamentarian who donates his time and effort to the leadership of GOPAC;

Represents GOPAC at meetings and conferences as required;

Provides leadership to the organisation, the executive and board, and chairs the meetings, and;

Is supported by the secretariat in management and policy development.

#### The Chief Executive Officer (CEO):

1. Represents GOPAC in the absence of the Chair;
2. Is responsible for the development of the strategic plan by the secretariat and its presentation to the Executive & Board;
3. Is responsible for the execution of the strategic plan;
4. Is responsible for relationships with all stakeholders;
5. Is responsible for marketing GOPAC as a credible organisation of parliamentarians engaged in the field of anti corruption/good governance.
6. Is responsible for fundraising activities and reporting to funders, and;
7. Is responsible for the management of GOPAC and the secretariat which may be delegated in part to the Executive Director.

#### The Global Task Forces (GTF`s):

1. With assistance of the secretariat, regional and national chapters:
2. Will work with experts and expert agencies to develop policy papers and position statements on the GTF for approval by the Board;
3. Are responsible for implementing the section of the strategic plan that pertains to the GTF;
4. Are responsible for developing coalitions of parliamentarians within each region and regional chapter to move towards achieving the objectives of the GTF, and ;
5. Members will participate in virtual meetings, annual GTF meetings and the global conference.

#### The Secretariat:

The secretariat located in Ottawa, Canada maintains a full time professional staff under the leadership of the CEO, John Williams, the former Chair of GOPAC and a retired Member of the Canadian Parliament. He is assisted by Dr. Martin Ulrich, the Executive Director and a former senior civil servant in the Canadian Government. There are also Program Officers and other staff. The secretariat is located within the Parliamentary Centre,

an NGO in the field of democratic development that provides accommodation and administrative services to GOPAC under contract.

It is the role of the secretariat:

1. To support the Chair, Executive, Board, CEO and GTF's of GOPAC.
2. To maintain minutes of meetings and all financial and other records of the organisation in an appropriate manner;
3. To support and assist in all work of the organisation;
4. To provide liaison between GOPAC, its committees and expert agencies, funders and other organisations;
5. To organise meetings and conferences including the preparation of papers, position papers, draft communiqués for consideration.

### Seven steps to create a national chapter of GOPAC

1. Three or four parliamentarians decide that it would be beneficial to create a chapter of GOPAC within their parliament.
2. Each of the three or four parliamentarians commit to finding four or five more parliamentarians to participate. This brings the number to around twenty members. They also reach out to the local offices of the official donor community and civil society.
3. They hold a meeting and constitute themselves as the founding members and adopt the model constitution for a national chapter, with or without change.
4. They elect an executive in accordance with the constitution.
5. They select an NGO such as transparency international to act as the secretariat of the chapter.
6. They advise the regional chapter and GOPAC secretariat in Ottawa that they are in existence.
7. They adopt a workplan from the global task forces or a local agenda in consultation with local representatives of donor organisations and civil society.

## CONSTITUTION, RULES AND REGULATIONS

### NATIONAL CHAPTER

#### The Preamble

**RECOGNIZING:** The supremacy of parliament as the institution to whom a government is answerable and accountable.

**AWARE:** That corruption poses a grave danger to the well being of people and to the development of their society.

**ALARMED:** That corruption diverts scarce resources from basic human needs and destroys confidence in the integrity of our institutions.

**CONCERNED:** That it is essential that we develop healthy, balanced relations between the state, civil society and the marketplace and that parliament can be strengthened as effective institution of accountability in approving the policies and actions of government.

**ACKNOWLEDGING:** That corruption can best be controlled by strengthening systems of accountability, transparency and public participation in the governance process.

**REALIZING:** The great value of parliamentarians coming together to create a proactive strategy, to share information, experience and lessons learned, and to develop initiatives to strengthen their parliament in the fight against corruption.

**REITERATING:** Our commitment to promote legislation to strengthen society and uphold transparency and accountability by:

Building the commitment and capacity of parliament to exercise accountability with particular relation to financial matters

Sharing information lessons learned and best practices.

Undertaking projects to reduce corruption and promote good governance

Cooperating with International Financial Institutions and organizations in civil society with shared objectives

Recognizing that the rule of law is paramount in the development of a healthy, free and productive society.

Do hereby resolve to form a national chapter for Parliamentarians against Corruption as a tool for strengthening Parliament's effectiveness as the first line in the fight against corruption.

## CONSTITUTION, RULES AND REGULATIONS OF

The National Chapter

### ARTICLE 1: NAME

The name of the National Chapter of the Global Organisation of Parliamentarians against Corruption (GOPAC) shall be ..... registered under the laws of .....

### ARTICLE 2: REGISTERED OFFICE

The registered office of ..... shall be situated at .....

## ARTICLE 3: NATURE AND OBJECTS OF THE ORGANIZATION

The National Chapter agrees to collaborate with other national chapters of GOPAC within the regional chapter known as ..... Regional chapter of GOPAC and be directed by decisions made at the regional and global levels that pertain to this national chapter

The National Chapter is a non profit organisation with the main objective of bringing together parliamentarians and others within the country to combat corruption, promote transparency and accountability in order to ensure high standards of integrity in public transactions

The objects for which the National Chapter of the Global Organisation of Parliamentarians against Corruption (GOPAC) is established are:

1. To fulfill the objectives of GOPAC within the country for the establishment of standards of conduct designed to promote transparency, accountability and good governance;
2. To promote the rule of law and the accountability of state institutions;
3. To develop capacity in parliaments and parliamentarians within the country to oversee the activities of the government and other public institutions thereby making them more accountable;
4. To foster and facilitate the exchange of information, knowledge and experience among its members;
5. To share information on lessons learned and best practices on anti-corruption measures;
6. To encourage parliament and parliamentarians to develop and enact legislation that promotes good governance, transparency and accountability;
7. To promote measures aimed at dealing effectively with corruption and to raise general awareness on the issue of corruption at all levels of society;
8. To educate parliamentarians and policy makers on the existence, nature and ways of combating corruption;

9. To advocate for the inclusion of anti-corruption measures in all government programs and work for the improvement of the capacities of national and regional institutions to deal effectively with corruption;
10. To work with national and regional bodies in the mobilisation of resources for anti-corruption programs, including;
  - supporting the activities of national chapters and similar organizations within the regional chapter and the global organisation (GOPAC);
  - information sharing through the use of websites, e-mail and other services;
  - sponsoring anti-corruption workshops;
  - liaising with and working in co-operation with international organisations, parliamentary institutions, civil society, and other organisations on all matters aimed at improving governance, transparency and accountability;
  - conducting research and disseminating information on best practices, and;
  - promoting the causes of members in furtherance of the aims and objectives of the organization;
11. To do all other things as are incidental or conducive to supporting and promoting the realisation of any of these objects, including the capacity to raise money from public or private sources.

#### **ARTICLE 4: MEMBERSHIP**

1. Full membership shall be available to the following, upon application and payment of
  - an annual subscription:
  - Parliamentarians and former Parliamentarians;
  - Democratically elected Parliamentarians who have been denied their right to take office.
2. The following upon application shall be members with observer status: institutions; individual donors, NGOs, the Supreme Audit Institution and other organizations that
  - support similar objectives as this organization or provide funding for its activities.
  - The annual subscription fee is to be determined by the Board of Directors and shall cover the period from January 1<sup>st</sup> to December 31<sup>st</sup> of each year.
  - Membership shall be subjected to the approval of the Board of Directors of the regional chapter.
  - Full membership in a national chapter also includes membership in the regional chapter and in the Global Organisation of Parliamentarians against Corruption

#### **ARTICLE 5: TERMINATION OF MEMBERSHIP**

1. Membership shall terminate upon death, removal, or voluntary withdrawal from the organisation.
2. A member must give the Executive Committee written notice of his/her decision to withdraw from the organization.
3. A member may be suspended or removed from the register of members by a decision of the regional Board of Directors if a

member is more than one year in arrears of subscription payment OR by the Global Board of Directors of the Global Organisation of Parliamentarians against Corruption for cause as determined by the Board of Directors of GOPAC

4. A member who has been suspended or removed from the register may appeal his/her suspension or removal to the Global Board of Directors within three months of the date of the decision of the Board. The Board will set up a special committee to hear arguments and render a decision that is binding on all parties.

#### **ARTICLE 6: CODE OF CONDUCT**

1. All members shall behave and conduct their affairs in a manner consistent with the values that the national chapter, regional chapter and GOPAC promotes and defends, as well as strive to uphold the integrity of those values.
2. A member must avoid actual, potential and perceived conflicts of interest.
3. A member must report to the executive of the regional chapter and to GOPAC all actual, potential and perceived conflicts of interest as soon as the member becomes aware of any circumstances which may give rise to a conflict of interest.
4. The evaluation of a breach of the values of the organisation will be made by the Board of Directors of GOPAC in consultation with the executive of the regional chapter, who shall have full authority to decide on the appropriate sanction that may be imposed in any given case.

#### **ARTICLE 7: ORGANS**

The organs of the National Chapter are: the Board of Directors, the Executive Committee, the regional chapters, GOPAC, the Global conference and the Global Secretariat.

#### **ARTICLE 8: BOARD OF DIRECTORS**

1. The Board of Directors shall be comprised of a Chair and other members who must be elected from a list of current members. The term of office of a member of the Board shall last no more than two years.
2. At least one month prior to an election the Board shall create a nomination committee to present a list of candidates for the Chair, executive committee and the Board taking gender considerations into account.
3. In the case of death, absence, resignation or removal of a Board member, the Board may nominate a substitute to hold office for the remainder of the member's term.
4. The meetings of the Board shall take place on a periodic basis, the timing of which is to be decided at Board's discretion.
5. Meetings shall be called by the Chair who shall give reasonable notice of the meeting. Should the Chair be unable, unwilling or refuse to call a Board meeting, a meeting can be called by a quorum of the Board provided they give reasonable notice to all members of the Board including the Chair.
6. The Chairperson cannot serve in that position for more than two consecutive terms.
7. The Board shall have authority to decide on any matter of importance to the organization as well as the authority to guide the implementation of its decisions in accordance with the aims and objects of GOPAC and the organisation.
8. A quorum for the Board of Directors shall be 1/2 of the members.
9. Founding members shall fill Interim positions on the Board.
10. The Board has power to adopt its own agenda at its meetings.
11. Decisions are made by majority vote and each Board member shall have one vote. In the event of there being no majority the Chairperson has a casting vote.
12. Minutes will be kept of meetings and decisions made which must be signed by the Secretary or in the secretary's absence an officer designated by the Board.

In addition, the Board shall have the power to do the following:

- Consider the reports of the Executive Committee and decide whether to give formal approval to the actions of the Executive.
- Determine the annual subscription to be paid by a member.
- Establish rules in relation to contributions, donations and gifts to the organization.
- Approve an annual budget and any supplementary matters.
- Approve membership applications, as well as take decisions on expired memberships and may be consulted by the Board of GOPAC on motions to suspend or remove of a member.
- Consider and make recommendations on proposals to amend any of the Articles.

#### ARTICLE 9: THE EXECUTIVE COMMITTEE

1.

a) The Executive Committee is the administrative organ of the organization and shall be comprised of a chair person, a vice-chair, a secretary and a treasurer elected from the current membership and who are also members of the Board.

b) The term of office of a member of the Executive shall be no more than two years.

c) Interim vacancies on the Executive Committee are to be filled by the Board of Directors from its current members.

2. The Executive Committee is responsible for all matters pertaining to the Organisation, except where a responsibility or task has been expressly vested in another organ

3. In particular it shall have the following functions:

- To receive all applications for membership, or affiliation to the organization and to forward such requests with a recommendation to the Board of Directors;

- To summon a meeting of the Board of Directors in case of an emergency and to fix the date and place of that meeting;
- To propose to the Board the annual work program and budget of the Organisation;
- To organise a calendar of activities in conjunction with the Regional Chapter and with the Global Organization for Parliamentarians Against Corruption (GOPAC) and other regional chapters;
- To supervise and administer the secretariat. In particular, to ensure the implementation of decisions taken and plans approved by the Board of Directors;
- To inform the Board about the activities of the Executive Committee through a report by the Chairperson;
- To act as the official communication organ of organization;
- To facilitate and promote communication between members;
- To enter into contracts on behalf of the organization;
- To borrow, raise, receive and spend funds for the objects and purposes of the organisation;

4. The borrowing powers of the Executive Committee cannot be exercised unless:

- Prior approval has been obtained from the Board;
- The source of borrowed funds is the Regional chapter or GOPAC;
- The loan is secured with the organization's funds or assets;
- Prior approval has been received from the Board of Directors of GOPAC.

5. The Executive Committee may delegate any of its powers or duties (except borrowing powers) to its own sub-committee.

6. A quorum for the Executive Committee shall be three.

7. The manner and timing of a meeting is to be decided by the chairperson. The secretary at the request of the chair shall call meetings. In the absence of the chair person the executive committee shall appoint one of its numbers to chair a meeting.

8. Decisions are made by majority vote and each member is entitled to one vote. In the event of there being no majority, the chair or his substitute has a casting vote.
9. Minutes will be kept of meetings and decisions made which must be signed by the Chairperson and Secretary.

#### **ARTICLE 10: THE CONFERENCE**

1. The national chapter shall collaborate with the regional chapter and with GOPAC to organize a global conference if it is to be held in the country, to which all members, nationally, regionally and global, and observers shall be invited
2. The expenditure for staging the conference shall be the joint responsibility of GOPAC and the host regional and national chapters.
3. The date and place of each conference shall be determined by the Board of GOPAC in consultation with the Regional chapters and any affected national chapters
4. The Conference shall debate any issue which fall within the scope of the Organisation's objects or any related matter and make recommendations provided appropriate notice has been given
5. Elections and decisions at the Conference are made by majority vote of members present and each member is entitled to one vote. In the event of there being a tie, the President of the Conference or his substitute has a casting vote

#### **ARTICLE 11: SECRETARIAT**

1. The Secretariat of the organization is situated at .....
2. The followings shall be the function of the Secretariat:
  - To be the headquarters of the organization;
  - To keep records of membership and to promote new membership and affiliations;
  - To co-ordinate and facilitate the activities of the various organs of the organization. In particular, to provide a supporting role to the executive committee;
  - To collect and disseminate information concerning the organization and its members;
  - Ensure that the organization's membership is well informed of the programs and activities of the national chapter;
  - To maintain liaison and co-ordinate activities between the organization and other groups or institutions;
  - To co-ordinate the organization's representation at conferences;
  - To handle finances, keep the records and archives of the organization.

#### **ARTICLE 12: NATIONAL CHAPTERS**

1. A national chapter must be affiliated to GOPAC and the regional chapter in its geographical location.
2. A national chapter must operate in a democratic and transparent manner and shall seek to bring together parliamentarians and former parliamentarians who are committed to working against corruption
3. A national chapter shall have the capacity to raise funds but has no power to borrow funds except from the regional chapter or GOPAC in the manner prescribed.

4. A national chapter must be non-partisan, non political and must be open to persons of both genders and all faiths.
5. In its fight against corruption, a national chapter shall seek to develop a national strategy, monitor national developments and encourage the emergence of a broad alliance against corruption.
6. The national chapter shall have a constitution which shall not depart from the aims and objectives or be inconsistent with GOPAC` s constitution.
7. A national chapter shall have an executive consisting of president, vice-president, secretary and a treasurer.
2. All cheques of the organisation shall be signed by the treasurer and one other member of the executive committee designated by the Board as a signing officer.
3. A national chapter may maintain its own bank account.

#### **ARTICLE 15: ACCOUNTS AND AUDIT**

1. The Executive Committee shall prepare a budget, keep books of accounts which are to be audited annually.
2. Budgets and work plans shall be presented to a meeting of the Board of Directors to be approved annually.
3. The Secretariat shall prepare an annual report showing amount and sources of funding received and spent in the fiscal year.

#### **ARTICLE 13: FINANCIAL PROVISIONS**

1. Monies are to be used for the fulfilment of the organization’s objectives and to maintain it as an autonomous entity.
2. Sources of finance shall include the following:
  - Funds raising activities;
  - Donations and grants;
  - Subscriptions as established by the Board;
  - Contributions, including those from governments, government agencies, corporations or other business entities, international organisations, individuals and other organisations;
  - Any other sources determined by the Board of Directors of the Regional Chapter of GOPAC to be appropriate;

#### **ARTICLE 16: AMENDMENTS AND REPEAL OF ARTICLES**

1. This constitution may be modified, enlarged, abridged or supplemented from time to time by a special resolution passed and supported by two- thirds majority of members present voting at a national meeting or a special meeting of members called by the Board of Directors.
2. Any member proposing to amend the constitution shall submit the proposal in writing to the Executive Committee at least one month before the general or special meeting.
3. The Executive Committee shall communicate all such proposals to the Board who shall cause a proposed change to the constitution to be mailed to all members two weeks prior to the commencement of the meeting or date of the special meeting. All changes adopted shall be included in an amended constitution.

#### **ARTICLE 14: BANK ACCOUNT**

1. The Executive Committee shall by a general resolution keep a bank account in a financial institution and all financial transaction, shall be carried out in the name of the organization.



## ARTICLE 17: DISSOLUTION OF THE ORGANIZATION

1. A decision to dissolve a national chapter requires a resolution passed at a special meeting called by the Board and supported by three quarters of the votes of active members present in person or by proxy.
2. The decision by a national chapter to dissolve must be presented to the Board of the Regional Chapter and to GOPAC within thirty days and be accepted by both organisations before the decision can be considered final.
3. In the event that the organization is dissolved or disbanded, its assets and funds shall be transferred to GOPAC.

## ARTICLE: 18

The following words shall bear meaning given below:

“Parliamentarian” means a member elected or appointed to serve in a parliament or in a Congress or Legislative Assembly

“Board” means the Board of Directors

“Committee” means the Executive Committee

“Chair” means chairperson

## ANNEX:

### The 'Hour Glass';

**John G. Williams, FCGA**  
Chair – Global Organization of  
Parliamentarians against Corruption  
(GOPAC)  
Member of Canadian Parliament,  
1993 - 2008  
Member of the Canadian Academic  
Accounting Association

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### An M.P.'s Image of Government Accountability to the Parliament<sup>178</sup>

As a parliamentarian for nearly fifteen years with more than a passing interest in parliamentary procedure, I hope that my observations on the concept of democratic accountability of governments may, in some way add to the understanding of the role of Parliament in a functioning democracy. By raising ideas and concepts not normally considered, I also hope to start a dialogue that will help to re-invigorate Parliament, the premier institution for democratic oversight and accountability of Government because we see that Governments that are accountable to their citizens stay away from corruption and serve their citizens through economic development and provision of social services.

It is not hard to see the gulf between the developed world and the underdeveloped world. Health and prosperity are the order of the day for the vast majority of citizens in the developed world, while poverty, illiteracy, unemployment and lack of access to housing, health care, food, water, education, skills development and other basic needs are the grinding reality on the other side. Is there a reason for this? I believe so. The answer appears direct. The developed world is better governed.

<sup>178</sup> Interview given during the visit to Belgrade

To understand why this is so and to fill in the shortcomings needed to bring governance in the underdeveloped world up to an effective standard seems however to be a task beyond our capacity.

The developed world now spends more than US \$ 100 billion annually on foreign aid, yet there appears to be no end to the poverty and despair which the aid is supposed to alleviate. There are campaigns to “make poverty history”, to “cut infant mortality by two thirds by 2015” and so on. Slogans abound to keep our attention on the plight of the destitute of the world. Yet, although there may be some regional successes, real sustainable progress towards lasting prosperity in a general sense is sometimes difficult to discern. Why does it seem that all this money goes into a bottomless pit?

In September 2000, at the *United Nations Millennium Summit*, eight Millennium Development Goals (MDGs) were agreed upon to be achieved by 2015. Nearly 190 countries subsequently signed up to them and the target of accomplishing them by 2015. Despite this almost universal commitment, in a speech at the United Nations on July 31, 2007 billed as a call to action, the Rt. Hon. Gordon Brown, Prime Minister of Great Britain said:

*Seven years on it is already clear that our pace is too slow; our direction too uncertain; our vision at risk.*

*The Millennium Development Goal to be met in 2015, is to reduce infant mortality by two thirds. But unless we act, it will not be met by 2015, not even by 2030, not until 2050. The Millennium Development Goal of 2000, to be met in 2015, is primary education for every child. Unless we act it will not be met by 2015, not even by 2050 but at best by 2100.*

*And unless we act, the planet will by 2015 be suffering not less but more environmental degradation and millions of people will still be struggling on less than one dollar a day with millions of children still hungry....*

*...The calendar says we are half way from 2000 to 2015. But the reality is that we are a million miles away from success.*

This is not really a resounding vote of confidence that US\$100 billion of foreign aid every year is getting the job done. Thankfully, however, there was no hint in Prime Minister Brown's speech of conceding defeat in the most important human endeavour of all – helping our fellow human beings. While the speech was billed as a call to action, there was, unfortunately, no response from the governments of the underdeveloped world saying they would now play their part, nor even an acknowledgement

that they had a role to play in helping to alleviate the suffering of their citizens. It seems through their silence and inaction, that they expect the resolution of the human tragedy in their part of the world to be solved by generous and increasing transfers of wealth from the developed world.

I acknowledge that there are some specific exceptions to the slow progress in development. China and India are prime examples of countries that are lifting themselves out of desperate poverty towards sustained prosperity. But it is interesting to note that their catalyst for progress is the adoption of a more capitalist (competitive) model for industrial development, not reliance on foreign aid.

In response to the set of circumstances set out here, the focus of this article is to suggest that the way to resolve the development gap is through development of an accountability framework for governments. I suggest that the role of an accountability framework that develops and maintains effective governance and the delivery of services to the citizens of a nation is a fundamental part of the process leading to economic development. It is worth mentioning that properly regulated capitalism (fair competition) is the best accountability model we have found to enhance productivity and efficiency in the production of goods and services. Accountability is also the foundation for the creation of wealth and prosperity. Where accountability is absent, in governance as elsewhere, the aims and objectives of the organization tend to become corrupt, focusing on self enrichment and self preservation of those with power, rather than serving the needs for which it was created.

I do not criticise the good intentions inherent in foreign aid. Nevertheless, I have come to believe that while foreign aid by itself is laudable, by itself, it is not sufficient. Unless there are improved governance structures and more capacity for the citizens in the underdeveloped world to hold their governments accountable, we cannot expect much in the way of return for our investment in foreign aid or real progress towards meeting the MDG's by 2015 or even much later.

I give credit to Mr. James Wolfensohn, former president of the World Bank, for making the fight against corruption part of the international development agenda. Prior to his tenure at the World Bank, corruption was privately acknowledged but publicly ignored in the debate on how to create development and prosperity. No one was prepared to condemn corruption overtly until Mr. Wolfensohn made it a topic of serious debate. Even today, the debate is still largely on the generic and abstract concept of corruption. Indicators are being developed, knowledge is gained,

and the realization that grand scale corruption kills development and prosperity is demonstrated and acknowledged. We are, despite this, not yet ready to demand action against those in power who are so obviously and without accountability, raping and destroying the economies of their own countries.

The global community first found the courage to talk frankly about the generic problem of corruption and the havoc and despair that it was wreaking upon the lives of the disenfranchised — witness the humanitarian campaigns for Africa and the MDGs. Later on, in the search for ways to combat corruption, it became accepted that improved governance requires more accountability for governments in a direct sense, not mere generic comment. We now recognize that governments accountable to their people provide better governance and respect for the rule of law, which are not only fundamental to fighting corruption but are indispensable to the development of economic growth. This recognition has engendered a number of international instruments aimed at improving accountability: the *United Nations Convention Against Corruption* (UNCAC), the *OECD Convention on Combating Bribery of Foreign Public Officials*, the *Inter-American Convention Against Corruption* and the *African Convention against Corruption*, among others. Despite the remedies available in these modern international codes of behaviour, many are still reticent to designate a government as corrupt and demand that it be cleansed. We are still very much at the stage of one size fits all in the fight against corruption. For example, the UNCAC, a public commitment by the world in principle, has not yet become significantly effective in addressing the problem of corruption even with more than 125 countries having ratified it. The more corrupt the country, the greater chance the convention will not move beyond the stage of signature and ratification and a press release proclaiming an unswerving commitment to the fight against corruption. There is no accountability in such actions and the developed world should not be taken in by them.

Governance improved by greater accountability accomplishes two agenda simultaneously. It reduces corruption and creates greater prosperity. In fact, it also improves the return on the foreign aid investment. So why isn't more being done to improve governance in the countries that so desperately need it? The answer usually lies in corrupt governments having an aversion to the remedy that would cause them to clean up their act, thereby losing their wealth, privilege and power, coupled with our failure to condemn their behaviour.

As part of my effort to explain the lack of accountability in government, I have developed an image to conceptualize the accountability of a democratic government, which I call the "Hourglass Model". This image is shown at page 23. The essence of the model is that a developed democratic society organizes itself in a way similar to the shape of an hourglass, with a service triangle constituting the bottom of the hourglass and an inverted triangle, the governance triangle, constituting the top. It is interesting to note that the image of the hourglass was first introduced into art by the Italian painter Ambrogio Lorenzotti. The connection of interest derives from the fact that this was the painter whose three most celebrated tableaux, painted onto the walls of the Palazzo Pubblico in Siena, the current City Hall of that ancient municipality, are entitled *The Allegory of Good Government*, *The Allegory of Bad Government and its Effects on Town and Country* and *The Effects of Bad Government in Town and Country*. Even today, public life can be held to imitate the art of the early Fourteenth Century.

The service triangle is the one that most people recognize, since they see it and interact with it on a daily basis. It usually reflects their known work environment which is normally an organizational pyramid. But, the service triangle by itself is not sufficient. Accountability needs to be diffuse, spread among as many people as possible each in some way having the capacity to exercise accountability to ensure that the leaders are also accountable and cannot dictate their own terms.

Governments should be no different. Regrettably, even in the developed world, many people cannot differentiate between Government (in the sense of the Executive Branch, or Cabinet) from Parliament or Legislature in the Westminster model used in Canada or the Congress present in the American model of government. The latter, under whatever name, is the institution to which democratic accountability is owed. Nor can most citizens explain the differing roles of these Branches of Government. This lack of knowledge or understanding demonstrates a failure of our educational system to teach the basic concepts of our democratic system of representative and responsible government on which so much of our prosperity depends. Since the final repository of accountability in a democracy is vested in the people, surely it behoves us to teach the important principles of democratic governance to a far wider audience within society. How can we protect and defend such fragile concepts of democracy and pass them on from one generation to the next if people

do not understand why they exist, and the pre-eminent role they play in maintaining good governance, peace and prosperity.

We must ask: what is accountability that permeates the institutions of democratic States and keeps them working well? I characterize it as a force beyond one's control, which causes one to think and act in a certain way. We find it operating in all aspects of a modern well-managed society. A functioning society works by virtue of a matrix of accountabilities too numerous to count. There is no shortage of relevant examples. We obey the rules of the road if we want to avoid accidents, traffic tickets and more serious charges. Our employers require performance in return for paying wages and salaries. Financial markets are, or as recent experience has shown, should be based on applied regulations and investor expectations. We pay our bills on time to avoid bill collectors and to protect our credit rating. Professions and trades demand standards of performance from their members. There are health inspectors checking restaurants and food stores, building inspectors checking construction and the so on. Governments issue myriad regulations focused on the necessary and proper management of society. It may be no wonder that some people complain about regulated societies but it is the unbiased application of the regulations that make modern societies work.

At the bottom of the service triangle are the people (society) who are served, organized, managed and held accountable by the bureaucracy of government including the courts. At all times, it is the force beyond their control that cause people to behave in an organized manner; thereby ensuring that they have room to live in a peaceful and prosperous way while at the same time allowing everyone else to do the same.

Next on the hierarchy of the service triangle is the apolitical permanent public service which takes direction from government to provide the complex diversity of services demanded by societies today. Each government department has a specific role to play with the authority of the state to support it. Enormous powers and authority are given to the public service but they also are subject to a force beyond their control that causes them to behave in a responsible manner. They all report to their respective deputy ministers and department or agency heads, who ensure their professional behaviour and the fair application of the rules. Once more, there is a force beyond the control, their superiors, who hold them accountable for their performance. Laws and regulations are to be applied consistently and fairly. The courts have the authority to adjudicate civil disputes and to fine and/or imprison people for offences against the State.

The transition from the administrative delivery of government services to the political arena of policy and political accountability occurs at the deputy minister / minister and Cabinet levels. Ministers are a force beyond the control of their deputies and hold them accountable for the management and administration of their departments because ministers are politically accountable for their respective departments.

Moving up the hour glass, we see that ministers are appointed by the Prime Minister and are directly accountable to him, not to Parliament. They are appointed by the Prime Minister and serve at his pleasure. Again, that force beyond one's control is present in that a minister knows he is dispensable should he incur the displeasure of the Prime Minister or it is politically expedient for the Prime Minister to replace him.

The Prime Minister and his ministers form the Government. It is disappointing to many, especially parliamentarians outside cabinet that they have so little power over ministers. But like the deputy ministers who, as accounting officers, have responsibility to account for the administration of their department before Parliament, ministers must answer to, but are not accountable to Parliament. Parliament may censure a minister's performance and call for his resignation, but it is only the Prime Minister who has the power to remove him. The House of Commons cannot resolve to dismiss a particular minister. Constitutionally, it can only resolve to dismiss the entire Government. The House may try to engage public support for its desire to see a minister removed, and if sufficiently successful, the Prime Minister will act. But, Parliament oversees the government as a whole, and can only decide if it has confidence or lack thereof in the government and dismiss the entire government if it is so inclined.

Executive power and the power to govern are vested in one person — the Prime Minister. He chairs the Cabinet, controls its agenda, appoints Ministers to sit at his pleasure, and controls all level of government. His Ministers assist him, speak for him and answer questions as appropriate. As a cabinet they are led by the Prime Minister and collectively decide Government policy while individually managing their departments upon his direction. But, the convention is clear, a minister philosophically at odds with his cabinet colleagues and the Prime Minister is required to resign from cabinet before speaking out; the Prime Minister is in charge. The Prime Minister, and by extension his ministers, are accountable collectively to the House of Commons which should be a force beyond their control and they may govern as long as they enjoy the confidence of the House.

That is the service triangle; a standard organizational model showing a government serving its citizens and managing society through legislation and regulation, always being mindful that there is a governance triangle above them which holds everyone involved accountable for their role the stewardship of the nation.

The concept of accountability: a force beyond one's control, which causes one to think and act in a certain way, is prevalent throughout the service triangle, as it is throughout all society. The bureaucracy and cabinet are structured like any other organization. There are supervisors, managers and overseers all the way up the line holding subordinates accountable for their performance. But at the top of the service triangle, there is a single person and the overarching question: who holds the Prime Minister accountable? Where is the force beyond his control that causes him to think and act in a certain way?

Let us now look at the upper part of the hour glass, the governance triangle for the answer. It is the existence of the governance triangle and its capacity to hold the Government and the Prime Minister accountable that differentiates between dictatorships and democratic governments.

The first line of democratic accountability of a government is to the Parliament. In the Westminster model of governance there is a duplication of roles by having members of the Government, that is Cabinet ministers, sitting in Parliament. This blurs the distinction between the executive and legislative branches of government. The compensating feature is that the Government has ongoing accountability to the House of Commons, which can vote "no confidence" at any time. This system contrasts sharply to the presidential style where the executive enjoys a fixed term in office and can usually only be removed in the most egregious of cases.

The Prime Minister and the cabinet, ie the government, have the authority to govern, subject to the consent of Parliament, which should exercise that accountability as a force beyond the government's control, which causes the government to think and act in the best interests of society. A question fundamental to democracy is: how well does Parliament exercise that authority today? When the governing party has a substantial majority, does a government back-bench M.P. have the authority to take on a minister or the Prime Minister? More than likely any dissent in the governing party ranks will be dealt with harshly to bring the dissident to caucus discipline and order. This is a signal to others who may harbour similarly independent ideas. The Prime Minister appears to the public to be now solely in charge, not only of Government but also of Parliament. Need we ask why? Because the more a Prime Minister can influence

Parliament to exercise its power pursuant to his lead, the more unfettered power he has and democratic accountability is diminished.

As members of the institution of democratic accountability for Government, parliamentarians have four collective responsibilities to discharge as representatives of their constituents:

1. To approve legislation normally requested by government for the effective management of the country;
2. To approve the budget requested by Government, that is the taxation policies that raise funds to pay for Government and the running of the country;
3. To approve the appropriations legislation, known as the Estimates, the line by line spending authority given to government by Parliament; and
4. To ensure that Government reports to and is held accountable by Parliament.

When Parliament exercises these four collective responsibilities effectively, the first line of democratic accountability is in place. Unfortunately, party discipline and modern process management seems to have led government to believe that obtaining parliamentary approval is just another obligatory public relations step on the way from conceptualization of policy to its implementation. Just 'a minor process obstacle' to quote an unnamed federal bureaucrat who was commenting to the Clerk of the House of Commons on the importance of parliamentary approval of legislation.

The emergence of political parties was the beginning of the concentration of power within Parliament, when supporting a particular public policy took precedence over members' capacity to represent the disparate local opinions. When society moved from the agrarian to the urban and needs became more regimented, members of Parliament realized the benefits of coalition building to achieve policy objectives. This led to the development of political parties. Literacy improved and public communication through newspapers developed, allowing political parties to communicate their ideas to the electorate. In return, they hoped to receive the endorsement of their policies through the ballot box. By contrast, political parties have today become both a blessing and a curse. When they compete fairly for voter support in order to form the government, they are a blessing in that they present options to the electorate. On the other hand, requiring

candidates seeking election and elected members wanting to advance within the party to adhere to the party's policies stifles the opportunity for open debate within the party.

Elections involve citizens in choosing their parliamentary representatives and their governors. Between elections, Parliament is the institution that grants the collective political approval of society to Government initiatives through authority delegated to them by their constituents at election time. That one political party, having gained power, uses it to entrench its superiority to the domination or exclusion of the others, leads to the danger of dictatorship. Today, all may not be well in a Parliament even in a multi-party state. Advertising, opinion polling, focus groups, strategic leaks of proposed policies, management of the media, all allow Government, using the popular expression, to leap over Parliament and take the policy debate directly to the people. How can the oversight by Parliament to ensure, that legislation meets the needs of the people be maintained if that Government has already massaged public opinion into accepting its initiative? This question is even more meaningful if one realizes that party discipline will deliver the required votes in Parliament to implement the Government's program?

Such a version of democracy can have the appearance of a sham. What may be next? Electronic voting, first in the chamber, then from the constituency since representatives say they need to be close to the people where they can be more effective? In the meantime, future generations will refine public debate into virtual debate in a virtual chamber where everyone (?) can be engaged. In truth, it will be only the motivated and politically aware who, having mastered the science of political manipulation through mass communication will be engaged, and an Orwellian environment will have materialized. Parliament as an institution of accountability of government will be neutered and the governance triangle that holds government accountable will be in serious jeopardy.

By then we would have come the full circle in development of democratic governance: from autocratic government, to the evolution of democratic government to the perception that we still have democratic government, to benevolent authoritarian government that pays lip service to democratic principles and back to authoritarian government. In our desire to make Government more open and accountable to the public, we have actually set in motion a process whereby Government is actually less accountable than before.

When Parliament loses or gives up its effective constraint on the executive, the people lose their capacity for democratic oversight and their ability to hold the government accountable. Parliament is no longer a force beyond the government's control, which should cause the government to think and act in the best interests of society.

I consider the concept of a seesaw to illustrate the balance of democratic governance. On one side are the Government and the Prime Minister, with Parliament at the other, society acting as the fulcrum. There is the power of the Prime Minister with authority to govern being roughly matched by the collective power of Parliament to hold him accountable. It is difficult to keep it in balance and when that balance tilts too far in favour of the Government and the Prime Minister, democracy is threatened.

The balance is difficult to maintain because all power to govern is vested in the Prime Minister and his Cabinet, while Parliamentarians collectively have responsive power to hold him accountable for the way he governs. The Prime Minister has the power to decide and act while parliamentarians only have the power of response and persuasion.

Modern governments are ready to disengage from diminishing accountability to Parliament, while claiming legitimacy from the people, only because Parliaments are allowing them to do so. Ministers see their role as one of being vaguely answerable in Parliament. There is no need to adequately answer questions in Parliament, or be accountable to Parliament. The thrust and parry of genuine debate is gone, replaced by speeches supporting the party line since votes are almost always dictated by party whips. There is little hope that opinions can be changed through sound argument, leaving only the proverbial ten second sound bites for television as the score.

It is important to note that Parliament is higher up the hour glass than government. As the overseer of government it is not necessarily restricted by the Access to Information legislation or other laws of general application. Parliament is governed by its own rules and when it wants to know what government is doing, it is not restricted in its demand for information. When Parliament wants information from government, it must be able to get the information. Parliament is not merely a self-appointed special interest group with the annoying habit of asking awkward questions at inopportune times. It is the legitimate and constitutionally authorized voice of the people, elected to know and watch what the government is doing. As a counterpart, it is incumbent upon Parliament to act with prudence in exercising its legal powers and unlimited access to information.

We are now witnessing governments that seem to be able to treat Parliament with disdain that entails few repercussions. Why? The Executive Branch has surrounded itself with sufficient support in Parliament to provide a loyalty base through party discipline, strong enough to thwart attacks by an opposition with fewer votes. Among various motivations, party discipline is the most perceptible.

No issue or citizen is beyond the reach of Parliament, therefore parliamentarians should not lament their own lack of capacity to hold Government accountable. Rather, they should exercise their substantial powers before they atrophy or are supplanted by new conventions that allow Government to reverse the roles of who is accountable to whom.

The next part of the governance triangle consists of independent media, civil society and political parties. These are the conduits between the people, their elected representatives and their government. A two way flow of information exists here. Much more voluble and less orchestrated than parliament but is vital to a functioning democracy. Given appropriate access to information, independent media have the capacity to analyze and disseminate information and opinion to society. Even in an age devoted to entertainment, the role of the media is to inform and educate the public and to reflect the public's opinion in a collective, yet uncoordinated way back to Parliament and the Government. Independent media is nothing less than the dialogue of the people. It deserves protection from Government in the vital role of critiquing public policy and the actions of Government.

Sharing the dialogue with the independent media between society, their elected representatives and Government is civil society. People structure associations which reflect their aspirations and desire to participate in an organised manner. From large business corporations that provide our goods and services to local parent groups that demonstrate desire to be involved in their children's education, the diversity of civil society is immense. People are able to choose their friends and should be able to choose their causes too. Business groups, labour groups, churches, charities, special interest groups, recreational organisations, the list goes on but each provides an opportunity for a person to have a larger voice by combining it with others of a similar mind. These larger voices play a vital role in communicating clear, reasoned policies for public debate and are heard by government and parliament for possible inclusion in public policy.

Political parties also form part of the dialogue among the people, Parliament and the Government. Political parties engage the least number of people compared to the media and civil society, yet are the most powerful of the three links between the people, their parliament and government. It is political parties that develop public policy. It is political parties that provide the way for people to acquire political power and allow them to keep it. Political parties appeal to the public for membership and support. Each party and its leader is independently capable of appealing to society for the power to govern. People have a right to be governed in the way they choose and political parties are the way for differing ideologies to be presented and appeal for support. By virtue of their independence, they are a force beyond the control of each other, and through their capacity to appeal for voter support, they cause each party to think and act in a way that they think best appeals to the electorate.

At the top of the democracy triangle rest the people. Through free and fair elections they can choose the governors and the way they want to be governed. They are informed by the media, have the power to organise in civil society and to be engaged in the political process. They are the ultimate guardians of democratic oversight of their government. The adage that you can fool some of the people all the time and all the people some of the time, but you cannot fool all the people all the time is indeed true. When ultimate authority is vested in all the people they will ensure that Government responds to their needs in an ethical way.

The competitive struggle between political parties for voter support ensures that political parties focus on the needs of the public. In the absence of that competitive struggle one party will dominate and the rules will soon change to entrench that dominance. Gone will be the competition and the accountability that comes with it. The focus will no longer be on serving the people but on keeping the political structure in place. Political power becomes consolidated in the hands of a few who will use patronage in all its forms to retain power. From there corruption, abuse of power, bribery and theft of resources will ensue. The focus of Government will be for the benefit of those in power, not society at large.

The balance of competing powers in a democracy needs to be protected and maintained. The competition for votes and power in free and fair elections ensure that the focus is always on the betterment of society because the people make the choices. The political desires of a society can be summed up in three concepts: peace, prosperity and hope for a better tomorrow. In a democracy, political debate deals with how that can best be achieved. Where democracy is weak or non-existent, there is no

real debate and those who achieve power use it for personal gain at the expense of the people whom they are supposed to serve.

The entire hour glass concept points toward accountability as the glue that holds a society together and ensures results from everyone: who is either tasked to perform or has a responsibility to behave in a certain way. From the bottom to the top, there is accountability for everyone; for society as a whole, to the bureaucracy. The bureaucracy must perform to their minister's satisfaction. Ministers themselves are duty bound to run their departments well. The Prime Minister in turn holds ministers accountable because he feels Parliament, the force which *should* be beyond his control demanding accountability from him. Parliament should be demanding accountability from Government, because they feel pressure from the general public who are informed of their performance, or lack thereof, through the independent media. At election time the people have the capacity to judge and replace their elected representatives if they so choose.

Many people thrive on responsibility and some get to answer for the failure of others, such as Ministers in the House, but who can say they enjoy the experience of being held accountable for failure under their watch. When people know that their shortcomings and failure to perform or behave properly will be questioned with judgement being passed, they are more likely to meet the accepted standard. Accountability is the motivator that promotes not only adherence to rules, but also better performance.

It all works well until a Prime Minister, who chafes under this accountability, starts looking for ways to shift the burden and is allowed to do so by a Parliament that bends to expediency and fails to exercise its authority to adequately oversee the work of the Executive Branch. The members of the governing party are expected to be sympathetic to the Government's agenda since they were elected on the same platform, but that does not exempt them from the responsibility of adequately scrutinising proposed legislation, budgets and appropriations. Problems arise when they see failures or failings in governance yet do nothing; but there is little reason for them to hold Government accountable for failures that are not resonating large in the public domain.

Prime Ministers have found many ways to mitigate the pressure from Parliament. The number of parliamentarians is not large; he knows each one. Why not co-opt the members of parliament, or at least a majority, into the Government's agenda. The opportunities for the Prime Minister



to influence their thinking abounds. Loss of confidence will cause an election and who needs to be blamed for bringing down the government? There is always some exotic travel that needs a traveler and the Prime Minister picks the volunteers. Cabinet positions are, of course, only for those who support the Prime Minister. Most of all, there is the peer pressure of caucus solidarity. Who wants to be ejected from caucus, ostracized by their peers and have to explain to their voters why they chose to abandon the party that elected them and swim alone with the sharks. Comfortable obscurity can seem better than public attacks from people considered friends till one breaks ranks. Peer pressure, except for the bravest, is a force beyond a member's control that causes him to think and act in a certain way and allows accountability to manifest itself in a perverse way.

Many Parliaments and Legislatures are under some kind of pressure to give way to the government, even in robust democracies where they are buttressed by an independent media and an engaged society. The way to better governance of a society is not simply by choosing between the right policy and the wrong policy. Policy options abound and the government has the right to choose its policies since it has the mandate to govern. It is parliament's role to scrutinise government's policies presented to it as legislative proposals and approve them if it sees fit. Parliament is not an alternative Government; it is the overseer of Government.

Parliament does not act in isolation, it represents the varied opinions of society and has the responsibility to bring these opinions into focus as a force beyond the control, we hope, of Government that causes

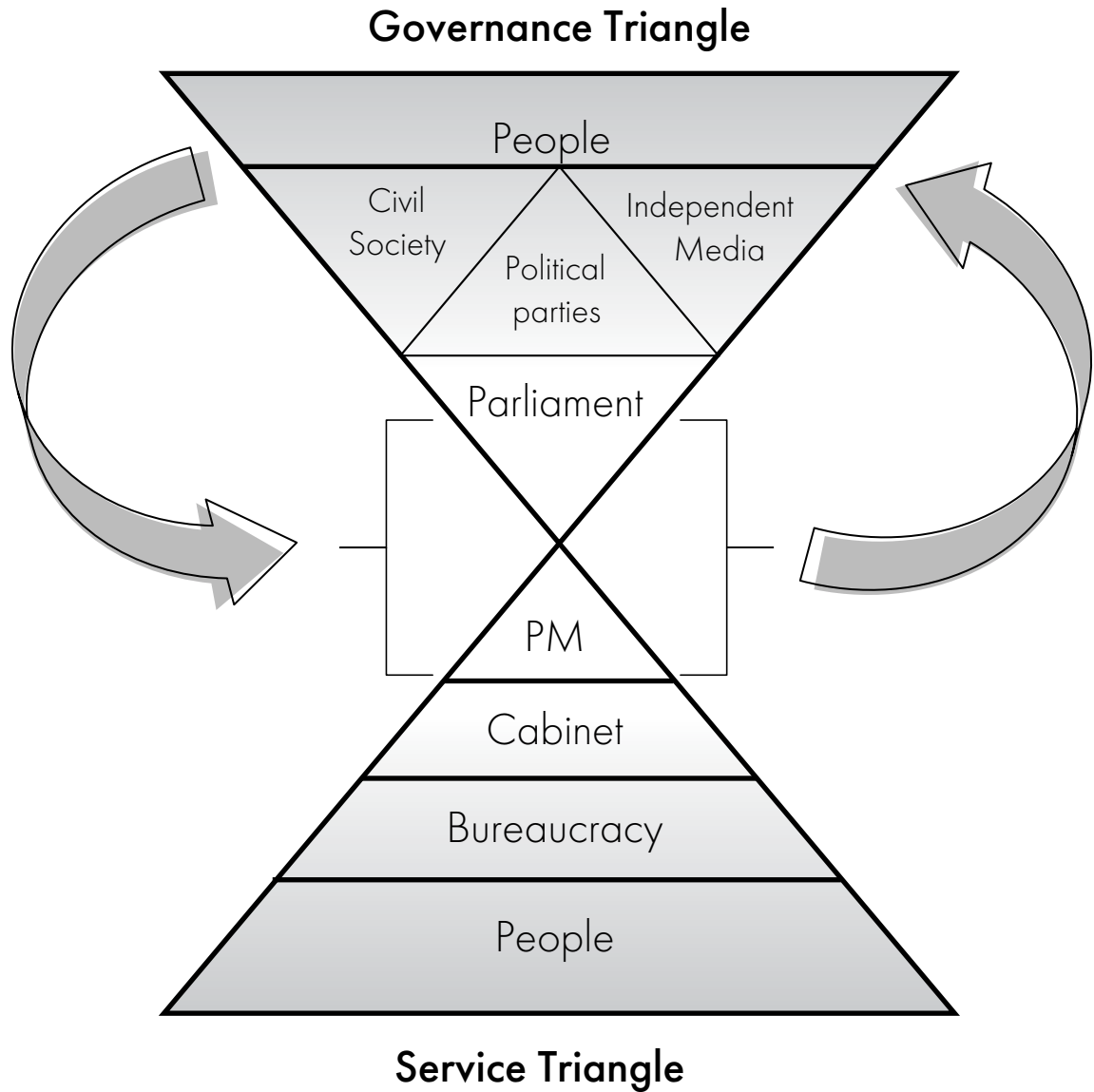
Government to work for the betterment of society, and in doing so, Parliament itself is also held accountable by the people.

There is a nefarious trend for governments to be reaching beyond their parliaments and going directly to the people. This should cause parliamentarians some concern, since the perception of the relevance of Parliament is threatened. Even in a healthy democracy, Parliament has to be mindful of the pressure to mitigate its power or to marginalise its capacity to hold government accountable. So far parliament has done a reasonable job and we even see in some countries, parliaments regaining power where before there had been puppet parliaments or dictatorships.

But fundamentally, the concept is clear: when Parliament fails to hold government accountable for the way it governs society, government will turn inward to look after itself and fail in its responsibilities to society, and when Government fails, its society will fail too. The connections are quite clear. Therefore, we need to ask why so little emphasis is being placed on developing governance, strengthening the institution of parliament, educating parliamentarians and engaging societies where there is such an obvious need in the underdeveloped world.

In the speech cited above, Gordon Brown was right! We must help the destitute of the world, even if we miss the MDG targets in 2015. However, he failed to call for more democracy and accountability on the part the corrupt leaders in the underdeveloped world who steal billions of dollars that rightfully belong to their citizens. That omission renders the accomplishment of the MDG's much more difficult.

# HOUR GLASS CONCEPT OF GOVERNANCE AND ACCOUNTABILITY







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