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The Swedish Ombudsman for Children
-An Efficient Tool in the Implementation of the
Convention on the Rights of the Child?

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1. Introduction

It has been one decade since the Convention on the Rights of the Child was adopted by the UN General Assembly, on the 20th of November 1989. For the first time, a legally binding instrument recognising children's civil, cultural, economical, political and social rights, both in peace and in armed conflicts, exists. All countries in the world, except for Somalia and the United States of America, have ratified the Child Convention.

Through the Child Convention, the rights of children are to be strengthened. However, far too many children remain unprotected by the Convention. For example, today 650 million children live in extreme poverty, 250 million children are working and 300 000 children are soldiers.¹

Despite the, towards children, unfriendly reality, the Child Convention should not only be seen as rhetoric. Children's rights are put on the international agenda and the Child Convention makes it easier to hold governments morally accountable in children's issues.

The States, that have ratified the Child Convention, are obliged to implement the rights, stated in the Convention. This obligation requires enormous portions of both engagement and inventiveness, and the measures that need to be taken, in order to realise the Child Convention, are many. One of these many measures is to establish a national Ombudsman for Children.

1.1. Aim, Scope, and Methodology

The aim of this thesis is to analyse how the legal design of the Swedish Ombudsman for Children affects his ability to be an efficient tool in the implementation of the Convention on the Rights of the Child.

The scope of this thesis is to analyse legal aspects of the design of the Swedish Ombudsman for Children. I will deal with four characteristics, denoted features. The features dealt with are the independence, mandate, functions, and powers of the Swedish Ombudsman for Children. For each feature, other Ombudsmen for Children will serve to highlight important principles. It is, however, beyond the scope of this thesis to present all four features, or evaluate the efficiency, of other Ombudsmen for Children than the Swedish. For this thesis, no empirical investigations have been undertaken, and only a few have been studied, in order to analyse the efficiency of the Swedish Ombudsman for Children.

¹ The numbers are taken from Children's Rights: Reality or Rhetoric?, International Save the Children Alliance, 1999.

The first three chapters introduce the concept of children's rights and how these have developed into the Convention on the Rights of the Child. Some important aspects of this Convention will also be presented.

I will then turn to discuss how the Convention on the Rights of the Child can be implemented. The establishment of the Swedish Ombudsman for Children, a tool in the implementation of the Convention, is described in chapter six.

In chapter seven, the analysis of the four features, and how they affect the efficiency, of the Swedish Ombudsman for Children is made. In chapter eight, other Ombudsmen in Sweden are briefly presented. In the conclusion I discuss and propose how to make the Swedish Ombudsman for Children more efficient.

The method used in the creation of this thesis has mainly been to study statutory instruments establishing the Swedish and other Ombudsmen for Children. In addition, for the Swedish Ombudsman for Children, preparatory work has been studied. International recommendations on the design of national human rights institutions, and recommendations on the design of Ombudsmen for Children, have been used in the analysis of the Swedish Ombudsman for Children. Since Ombudsmen for Children have existed only for a short period of time, the literature on the subject is limited. Moreover there is not an agreed terminology on the subject.

A letter was sent to 14 Ombudsmen for Children, recognised by UNICEF², in which I requested the founding legislation, information on the four features, and possible evaluations of each Ombudsman. Information from eight Ombudsmen for Children was received (Australia, Austria, Belgium, Finland, Iceland, Israel, Norway, and Sweden). The founding legislation was received in most cases, while information on the four features and evaluations was found to be limited and not very useful for this thesis. Information from the 15th Ombudsman for Children recognised by UNICEF, the Ombudsman for Children in New Zealand, was collected at his office in Wellington, New Zealand. This information is more complete, and has therefore been used frequently throughout chapter seven. Finally interviews have been made with the Commissioner for Children in New Zealand, members of his office, members of the office of the Swedish Ombudsman for Children, and the Head of Department for Civil Defence Co-ordination, Director Christina Salomonson.

The masculine is used in a gender neutral way throughout the thesis.

1.2. Why Should Children Have Rights of Their Own?

The first question to be examined is *why* children need to have their own rights. A variety of scholars with different perspectives have argued about children's rights for well over a century. The early concerns for children and their rights resulted in separate institutions for children, a system of compulsory education, juvenile courts, and distinct penal systems. In the 1960s an ideological discourse started to move rapidly. The liberationist movement opposed those who were pleading for increased protection as the only way to advance the status of children. More and more ground was gained by the liberals and the emphasis shifted from protection to autonomy and from welfare to justice. Children's rights were to be protected rather than the children themselves. At the same time courts, in some countries, began to recognise the personality of children. One of the most famous cases was and is the English *Gillick* case, which made the public aware of the child's right to autonomy. According to this case a child has the right to make his own decisions "when he reaches a sufficient understanding and intelligence to be capable of making up his own mind on the matter requiring decisions".³

Meanwhile, the debate was going on whether to draft a special convention on children's rights or not.⁴ The Declaration of the Rights of the Child, which was the latest international document on children's rights, adopted in 1959, was not seen as sufficient anymore considering the development mentioned above. There was now a greater awareness of the psychological needs of children.

It was however not obvious, that children's rights should be protected in a separate convention. One objection was that children, as human beings, were already covered by a number of existing human rights norms, e.g. the two UN Human Rights Covenants.⁵ Special norms protecting children in particular had also been agreed on and included in several of the human rights treaties. Some people also argued that it would be disadvantageous for children if their rights were singled out in a special convention, since special treatment can sometimes result in discrimination. Another argument against a convention idealises adult-child relations: it emphasises that adults, and parents in particular, have the best interests of children at heart. Furthermore, childhood was often seen as a golden age. Children should avoid the

² Found on www.unicef-icdc.org/information/digests/ombudswork

³ M. Freeman and P. Veerman (eds.), *The Ideologies of Children's Rights*, 1992, p. 3-4

⁴ The following arguments from the debate are found on www.savechildren.or.jp/alliance/real2.html, unless nothing else is stated.

⁵ International Covenant on Civil and Political Rights, adopted Dec.16, 1966, 999 U.N.T.S. 171 and International Covenant on Economic, Social, and Cultural Rights, adopted Dec.16, 1966, 993 U.N.T.S. 3. They both entered into force 1976.

responsibilities and adversities of adult life, why it was not necessary to think in terms of children's rights.⁶

However, it became evident that the existing human rights norms were inadequate to meet the special needs of children. The strongest argument in favour of a convention was reality itself. There were reports on grave injustices suffered by children such as infant mortality, deficient health care for children, and limited opportunities for basic education. There were also shocking accounts of how children were exploited as prostitutes or in harmful jobs, about children in prison or in other difficult circumstances, about children as refugees and victims of war. The carefree nature of a child's life seemed to be exaggerated. Also, more people had woken up to the fact that the interests of children were not necessarily identical to those of their guardians. Instead it was clear that many children were badly treated within the framework of the family itself. A laissez-faire attitude towards the family became more and more unacceptable.

After lengthy discussions the Convention on the Rights of the Child was adopted thirty years after the 1959 Declaration. The ideological conflict between those who see children's rights in welfare terms and those who wish to promote a child's will is however still present in the Convention. One example is that although Article 12, in the Child Convention, is giving the child the right to be heard, article 3 directs that the best interest of the child is to be a primary consideration. Also the Preamble may undermine both a child's autonomy and welfare, since it acknowledges that "due account" should be taken of "the importance of the traditions and cultural values of each people for the protection and harmonious development of the child".⁷ This means that even though children's rights now are recognised, other interests decided by adults can still trump them. On the other hand, to respect a child's autonomy is to treat that child as a person and as a rights-holder but at the same time note the dangers of complete liberation.⁸

2. From Declarations to a Convention

Janusz Korczak was advocating children's rights long before the first international declaration could be agreed on. He claimed that, among other rights, a child had the right to be him- or herself, the right to make mistakes, the right to be taken seriously, and the right to live in the

⁶ M. Freeman and P. Veerman (eds.), *The Ideologies of Children's Rights*, 1992, p. 30

⁷ M. Freeman and P. Veerman (eds.), *The Ideologies of Children's Rights*, 1992, p. 5

⁸ M. Freeman, *Whither Children: Protection, Participation, Autonomy?*, *Manitoba Law Journal* Vol. 8 1994, p 331

presence.⁹ This chapter will show the progress of global human rights instruments that, in their entirety, are specifically directed at the rights of the child. There are also regional documents focusing on children's rights¹⁰, but these will not be further dealt with.

1924 Declaration of Geneva

"I believe we should claim certain rights for children and labour for their universal recognition." Egelantyne Jebb, founder of Save the Children, expressed these words in 1923. She then went on to declare the rights of children in five points. This declaration was adopted by the League of Nations in 1924 and became known as the Declaration of Geneva.¹¹ The emphasis in this Declaration was on children's material needs.

The 1948 Declaration of the Rights of the Child

In 1946, a major Save the Children conference was organised in Geneva. Taking account of the experiences of the Second World War, some slight, but significant adjustments were made to the Geneva Declaration and the 1948 Declaration of the Rights on the Child was thereby produced. Although the adjustments were done by an NGO and it remains unclear whether the text was adopted by the UN General Assembly¹², this Declaration contributed to the development of children's rights.¹³

The 1959 UN Declaration of the Rights of the Child

The work of the UN, following the Second World War, concentrated upon the production of the Universal Declaration of Human Rights, which was adopted in 1948. Although the rights of children were implicitly included in this Declaration, it was felt by many that the special needs of children justified an additional, separate document. On 20 November 1959 the UN General Assembly adopted the Declaration of the Rights of the Child. This comprised ten

⁹ See B.J. Lifton, *The King of Children*, London, Chatto and Windus, 1988, pp. 355-356 for the whole list.

¹⁰ The African Charter on the Rights and Welfare of the Child entered into force on 28 November 1999. By establishing this Charter the Organisation of African Unity has become the first regional organisation to approve a text dealing exclusively with children's rights. The Charter is more than an adaptation of the UN Child Convention, since it sets out rules in important areas such as war, marriage, begging, and imprisonment. The European Convention on the Exercise of Children's Rights entered into force on 25 January 1996, (European Treaty Series, No.160). This Convention does not deal with substantive children's rights, but instead supplements the UN Child Convention and contributes to its effective implementation by granting children a certain minimum of procedural rights.

¹¹ League of Nations, *Official Journal*, Special Supplement 21, 1924, p. 43. The Declaration was adopted on September 26th, 1924

¹² M. Koren, *Tell me!*, 1996, p.165

articles and the guiding principle of "working in the best interests of the child" was incorporated.¹⁴ In contrast to the formulations of 1924 and 1948, the child was through this Declaration clearly acknowledged as a subject of law with specific rights. Children's liberties however were not embraced at all. Instead the focus was on duties to children.¹⁵

The 1989 UN Convention on the Rights of the Child¹⁶

Declarations are statements of general principles and intent. They carry no specific obligations and are not binding in law *per se*, but provisions therein may on the basis of subsequent practise become international customary law. Furthermore there is often no procedure to ensure implementation.

When 1979 was proclaimed as the International Year of the Child, voices were raised to convert the 1959 Declaration of the Rights of the Child into a fully binding human rights treaty. The Government of Poland took the initiative and submitted a draft Convention on the Rights of the Child to the UN Commission on Human Rights in 1978. The response to their proposal was, however, full of objections. In 1979 a working group was set up by the Commission to consider the question of a Convention on the Rights of the Child. So began a decade of debate and discussion, where government representatives, intergovernmental organisations such as the International Labour Office and, belatedly, UNICEF and a number of non-governmental organisations (NGOs) were involved. Actually, the contribution of the NGOs to the drafting of the Child Convention had an impact without parallel in the drafting of other international instruments.

Eventually, in 1989 the draft text of the Convention was submitted to the General Assembly of the United Nations. It was adopted, without modifications on 20 November 1989, exactly 30 years after the 1959 Declaration.

On 2 September 1990, the Convention on the Rights of the Child entered into force under international law, following its ratification by the necessary 20 states, one of which was Sweden. A monitoring body, the Committee on the Rights of the Child, to which ratifying States should send their reports on the implementation of the Child Convention, could thereby be appointed and start functioning.

¹³ The text of this Declaration is included without any commentary in: Detrick, S. (ed.), *The United Nations Convention on the Rights of the Child. A Guide to the "Travaux Préparatoires"*, Nijhoff/DCI, Dordrecht, 1992, p. 641-642

¹⁴ This Declaration was adopted on November 20th 1959, Res. 1386 (XIV). For the text see *Yearbook of the United Nations*, 1959, p.198-199

¹⁵ M. Freeman and P. Veerman (eds.), *The Ideologies of Children's Rights*, 1992, p. 4

¹⁶ The facts in this text are taken from www.savechildren.or.jp/alliance/crc_hist.html

3. The Substance of the Convention on the Rights of the Child

In this chapter some basic facts about the Child Convention will be shown, together with a presentation of the Committee on the Rights of the Child and of the problem with reservations.

3.1. General Principles

The Convention has four underlying principles that are explicitly expressed in Articles 2,3,6, and 12:

States shall ensure that each child enjoys full rights without discrimination or distinctions of any kind;

The child's best interest shall be a primary consideration in all actions concerning children whether undertaken by public or private social institutions, courts, administrative authorities or legislative bodies;

Every child has an inherent right to life and States shall ensure, to the maximum extent possible, child survival and development; and

Each child has the right to be heard in all matters that affect the child.

The choice of these articles as general principles, was made by the UN Committee on the Rights of the Child during its first session in September-October 1991, when it agreed guidelines on how the initial reports by governments should be written and structured. It was made clear that the Committee wanted governments to report on the application of these articles separately, but also when reporting on the realisation of all other Articles.¹⁷ Considering the child's right to be heard it is surprising that children were given no opportunity to input their views on the content of the Convention.¹⁸

3.2. What rights are to be found?

The rights of the child, recognised by the Child Convention, can be subdivided into five groups, in line with the traditional classification of human rights. Civil and political rights are usually called the first generation of rights, whereas cultural, economic and social rights belong to the second generation of rights. Since it is difficult to draw a line between civil and political rights, these rights will be put in the same group. It is worth to note, though, that often it is not easy, to refer any right, to only one group.

¹⁷ Preface by T. Hammarberg, in B. Franklin, *The Handbook of Children's Rights*

¹⁸ M. Freeman and P. Veerman (eds.), *The Ideologies of Children's Rights*, 1992, p. 5

Civil and political rights- Examples are the right to a name and to acquire a nationality (Art.7), the right to life (Art. 6), freedom of opinion (Art.12), and freedom of access to information (Art.17). These rights usually impose a passive role on the State, in which it must abstain from interfering in the lives of citizens.

Cultural rights- Article 31 is recognising the right to rest and leisure, to engage in play and to participate fully in cultural and artistic life.

Economic rights- Articles 32 and 36 give children the right to be protected from economic and all other forms of exploitation.

Social rights- The right to education (Arts. 28 and 29), health care (Art.24), and social security (Art.26) are social rights.

Article 4 states in general terms that States Parties, in order to implement cultural, economic and social rights, shall undertake measures to the maximum extent of their available resources. This provision implies that, compared to civil and political rights, cultural, economic and social rights are progressive rights rather than absolute, and that the State must play a more active role in implementing these rights.

The Child Convention is the first human rights treaty to include all the above five groups of rights. It also contains rights belonging to the group of humanitarian rights. All rights are of equal importance and even interdependent, pursuant to the spirit of the Child Convention. One right has thus no *raison d'être* without the others.¹⁹ This is however a controversial issue, which will not be dealt with in this thesis.

In several human rights treaties derogation clauses are incorporated. This kind of clause permits States parties to suspend implementation of specific rights in cases of armed conflicts or public emergencies. The Child Convention however, has no derogation clause. This means that States parties have the obligation to fulfil the rights in the Convention no matter what situation the country is in.²⁰

Finally, a subdivision of the rights can also be done according to objectives (Right of Self-determination, Right to protection, and Specific rights) and by using the three P's (Provision, Participation, and Protection).²¹ UNICEF has simplified the understanding of the Child

¹⁹ E. Verhellen and F. Spiesschaert (eds.), *Children's rights: monitoring issues*, 1994, p. 5

²⁰ G. van Bueren, *The International Law on the Rights of the Child*, 1995, p. 398

²¹ E. Verhellen (ed.), *Understanding Children's Rights- Collected papers presented at the first International Interdisciplinary Course on Children's Rights*, 1996, University of Ghent (Belgium), p. 35-37

Convention by pointing out that it covers four broad areas of rights: Survival rights, Development rights, Protection rights, and Participation rights.²²

3.3. The Committee on the Rights of the Child

As has been mentioned before, the Child Convention established a Committee on the Rights of the Child to monitor its implementation (hereinafter called the Child Committee). The Child Committee is made up of ten “experts of high moral standing and recognised competence” in the field of children’s rights. The members serve in their personal capacity. Consideration should be given to equitable geographical distribution and to the principal legal systems (Art. 43). Even though there is no qualifying criterion relating to age and nothing to prevent a child taking a seat on the Child Committee, all members of the Child Committee are above the age of 18. This is despite the fact that children are recognised by the Convention, by virtue of articles 12 and 13, as having competence in the field of children’s rights.

The method of monitoring is that of State reporting, combined with the provision of technical advice and assistance (Arts. 44 and 45). A current question is whether to draft an additional Protocol, which would incorporate an individual petitioning system, similar to the one under the African Charter on the Rights and Welfare of the Child.

The reports, which States Parties are under a duty, in accordance with Art. 42, to make widely available to the public in their own states, should provide the Child Committee with sufficient information on how the Child Convention is implemented nationally. In General guidelines the Child Committee has pointed out what these reports should contain. For example, the Child Committee requests information from reporting States on “any independent body established to promote and protect the rights of the child, such as an Ombudsperson or a Commissioner”.²³ If some facts are missing, the Child Committee can request further information from the State Party. When the Child Committee has evaluated a State report, concluding observations are drawn up by the Child Committee. These include suggestions and recommendations on how to proceed with the implementation of the Child Convention.²⁴

The Child Committee can, as stated in Article 45, call on UN-organs, NGOs, and other competent bodies, to provide expert advice and to submit reports on the implementation of the Child Convention, in areas falling within the scope of their activities. In addition the Child Committee shall transmit to these bodies the reports from States Parties, that contain a request

²²M.G. Flekköy, in E. Verhellen and F. Spiesschaert (eds.), *Children’s rights: monitoring issues*, 1994, p. 23

²³ General Guidelines regarding the form and contents of periodic reports to be submitted by state parties under Article 44, Paragraph 1(b), of the Child Convention, CRC/C/58, 20 November 1996.

²⁴ G. Van Bueren, *The International Law on the Rights of the Child*, 1995, p. 393

or indicate a need for technical advice or assistance. These bodies may also attend meetings of the Child Committee. This approach of implementation through co-operation underlies the whole philosophy of the Child Convention. The intention behind the Child Convention is thus to encourage progress, rather than passing judgement.²⁵

3.4. Reservations²⁶

Reservations allow States to relieve themselves of the legal obligation to implement specific rights even in “periods of normality”. According to Article 51(2) in the Child Convention, reservations that are incompatible with the object and purpose of the Convention shall not be permitted. Still, States are making reservations contrary to the spirit of the Child Convention, invoking either religious or national laws as reasons for not considering themselves bound by provisions of the Convention. The breadth of reservations which some States have attached to their ratification is limiting the realisation of the Child Convention, which is a problem. Even though not all kinds of reservations made by States should be “permitted”, other States seldom object to such reservations. It is argued that ratification with a reservation is better than no ratification at all.

According to the Vienna Convention on the Law of Treaties²⁷, which applies to treaties between States, objections do not affect the validity of the reservation *per se*, but only the legal effect of the reservation for the “treaty relations” between the reserving and objecting State. Hence, if a State party objects to a reservation made by another State, that reservation is not in force in relation to the objecting State. The issue of consent is appropriate for many areas of international law, for example fishing rights and environmental pollution, but not necessarily for human rights obligations. Although human rights treaties are part of the public international legal regime, human rights treaties have distinguishing features compared to other international treaties. They do, for example, not establish relationships between the States Parties *inter se*, since human rights are of an absolute nature. States Parties to human rights treaties are rather bound by the substantive provisions of the treaties and are therefore unaffected by the actions of other States. With other words, reciprocity does not have a place in the human rights system, except in relation to procedural matters. If a State makes a

²⁵ T. Hammarberg, Making reality of children’s rights, 1995, p. 10

²⁶ This chapter is based on G. van Bueren, The International Law on the Rights of the Child, 1995, p. 396ff and D. O’Donnell, The reservation generation, International children’s rights monitor, 1992-Vol. 9, No.1, p. 8-14

reservation there is in reality very little that the other States parties can do. It is hardly effective for children living within the jurisdiction of a reserving state, if the only effect of an objection is to render non-recognition of the reservation by another State party. Maybe human rights treaties ought to be governed by a separate treaty regime, since one of the cornerstones of the Vienna Convention is reciprocity.

Another problem with reservations is that the object and purpose test (Art. 51(2) in the Child Convention and Art. 19 in the Vienna Convention) is difficult to apply to the Child Convention, considering the complex range of issues involved. Nor is there any clause in the Child Convention conferring jurisdiction on the International Court of Justice over the interpretation and application of the treaty.

Despite the fact that the issue of reservations is, traditionally, an issue between States, the Child Committee has decided to ask governments about the reservations in all cases. The opinion of the Child Committee is that reservations regarding Articles 2 (non-discrimination), 3 (best of the child), 4 (state obligations), 6 (right to life), and 12 (right to be heard) are unacceptable.²⁸ An important statement on reservations was also made in Vienna on the 1993 World Conference on Human Rights: States parties were recommended to review their reservations with the view of repeal. If the reservations were deemed necessary, they should be precise and focused.²⁹ Finally, the UN Commission on Human Rights has stressed the importance of strict compliance with the obligations of States parties under the Child Convention.³⁰

4. Methods of National Implementation

According to article 4, States Parties are under a duty to undertake all appropriate legislative, administrative, and other measures for the implementation of the rights in the Child Convention. Articles 41, 42, and 44:6 are also dealing with the implementation of the Convention. Implementation encompasses both positive actions and negative obligations for the State.³¹ The question of which measures are appropriate is within the discretion of each State Party. However as shown above, the exercise of the State's discretion may be subject to the scrutiny of the Child Committee.

²⁷ Vienna, 23 of May 1969, 1155 UNTS 331. Art.20 (4c) states that "an act expressing a States consent to be bound by the treaty and containing a reservation is effective as soon as at least one other Contracting State has accepted the reservation".

²⁸ T. Hammarberg, Making reality of children's rights, 1995, p. 10

²⁹ www.savechildren.or.jp/alliance/real7.html

³⁰ UN Doc. CRC/C/2.

³¹ M. Black, Monitoring the rights of the children, Innocenti Global Seminar, UNICEF, 1994, p. 13

For the Child Convention to become reality, political will is the keyword. In Sweden this “will” has found its expression first of all in the ratification of the Child Convention. Prime Minister Göran Persson stated further in his “government declaration” in 1998, that the Convention shall be obeyed. Another expression of political will is the governmental proposal 1997/98:182, National Strategy for the Realisation of the Child Convention, which was adopted by Parliament 26 March 1999. There is also a network of parliamentarians, established in 1992, that works with NGOs on children’s issues. The group has drafted joint bills, initiated debates and held seminars.³²

4.1. Implementation by Legislative measures

Once the political will is there, different kinds of measures can be taken in order to implement the rights of children. Certain principles, for example the introduction of free primary education, would be difficult to envisage being implemented without legislation as a first measure. However, the concept of appropriate legislative measures does not comprehend the obligation for a State Party to incorporate the Child Convention into its domestic law.³³ Incorporation is nevertheless desirable, according to the Child Committee, as it provides one of the most effective forms of implementation.³⁴

4.2. Implementation by Administrative measures-An Ombudsman for Children

Governmental regulations, authorised by or within limits of legislation, are one example of an administrative measure. Another example is the establishment of an Ombudsman for Children (OC). The implementation of the Child Convention is such a task, that some States have felt the need to create new institutions to monitor the implementation-work. To have a monitoring body makes it easier for the State Parties to submit adequate reports to the Child Committee. It is also important that someone monitors the conditions for children in order to see if measures taken by the State are of advantage to children. The Ombudsman for Children is such a tool that can be used in the purpose of monitoring.³⁵

The word monitor comes from the Latin word “monere”, which means “to warn”. In traditional usage the word is a noun, describing something or someone that warns or reminds.³⁶ “Monitoring” will here be used in the broad sense of “keeping a constant

³² Article in *Barnen och Vi*, RB, 1/97

³³ See generally Jackson, *Status of Treaties in Domestic Legal System*, AJIL 310, 1992

³⁴ See concluding observations of the Child Committee on the Report of Norway, UN Doc CRC/15/Add23, 1994

³⁵ M.G. Flekkøy, *A Voice for Children: speaking out as their ombudsman*, 1991, p. 184

³⁶ M. Black, *Monitoring the rights of the children*, Innocenti Global Seminar, UNICEF, 1994, p. 13

surveillance upon”.³⁷ A monitoring body is not seen as a passive recipient of information, but includes active development of, for example, interventions, extensions of information bases, etc.³⁸

There are arguments against establishing an Ombudsman for Children, that can be summarised as follows: The Ombudsman would threaten parental authority; the Ombudsman might become an excuse for other groups and bodies responsible for children to diminish or relinquish their responsibilities; and that funds thus allocated should rather be used to strengthen these existing efforts or services for children.³⁹

Nevertheless, the value of creating an Ombudsman for Children has received both regional and international recognition. As early as 1977 the Council of Europe urged an official instance to safeguard the interests of the child in a number of fields.⁴⁰ Shortly before the Child Convention entered into force, the Stockholm Statement recommended to “encourage establishment of the position of a Children’s Ombudsman in each country...”. A couple of months later, the Council of Europe recommended the countries “to envisage the appointment of a special ombudsman for children who can inform them of their rights, counsel them, intervene, and, possible, take legal action on their behalf...”.⁴¹ Pursuant to an Executive Directive concerning the implementation of the Child Convention, the role of UNICEF and its National Committees was to, together with other NGOs, parliamentarians and religious leaders, establish national monitoring mechanisms such as an Ombudsperson or Commissioner for Children.⁴² Again, within the Council of Europe, in close collaboration with UNICEF, a European Strategy for Children was adopted in 1996, calling upon all States to make children’s rights a political priority. Among the many recommendations is the appointment of a “commissioner (ombudsman) for children or another structure offering guarantees of independence, and the responsibilities required to improve children’s lives, and accessible to the public through such means as local offices.”⁴³ The establishment of a

³⁷ M.G. Flekkøy, Models for monitoring the protection of children’s rights, Meeting Report, UNICEF, 1990, p. 3

³⁸ M.G. Flekkøy, Children’s rights: reflections on consequences of the use of developmental psychology in working for the interests of children. The Norwegian Ombudsman for Children: A practical experience, Gent University, Children’s Rights Centre, 1993, p. 436

³⁹ M.G. Flekkøy, A Voice for Children: speaking out as their ombudsman, 1991, p. 185. These arguments are not heard in Norway anymore, but in other countries.

⁴⁰ CoE, Explanatory Memorandum, Doc. 4376, 3 October 1979, p.5

⁴¹ Both the Stockholm Statement (Swedish Save the Children Conference, August 1989) and the CoE recommendation (Doc. 6142, 12.A.e.ii) were found in E. Verhellen and F. Spiesschaert, Children’s rights-Monitoring issues, 1994, p. 21

⁴² CF/EXD/1992-012. Found in The best interests of the child in the EU, Report from a Conference held in the Swedish Parliament, Stockholm, May 28-29, 1997, p 58.

⁴³ Parliamentary Assembly’s Recommendation 1286, 24 January 1996, point 7 iv. Found in S. Jeleff (ed.), The child as citizen, Council of Europe Publishing, 1996, p 105. The European Strategy for Children grew from the

permanent body in a given country, to monitor children's rights, is constantly advocated also by the Child Committee.⁴⁴

4.3. Implementation by the Courts

No matter which measures have been taken to implement the Child Convention, children's rights still can be violated. When an alleged violation of children's rights in the Child Convention arises, the question is whether a court can solve this conflict. In other words, can the courts implement the Child Convention? If the Child Convention is incorporated within domestic law, it is directly applicable. This means that it should be possible for individuals to invoke the provisions of the Convention before the national courts and the courts should apply the Convention in the process. In contrary to many other countries, international law is not directly applicable in Sweden. Instead the legislation has to be adapted to the commitments, which various international agreements imply. This means that the courts are not bound by the rules of the Child Convention as by Swedish law. Nevertheless, Swedish law has to be interpreted in a treaty-friendly spirit by courts and authorities. In that way the provisions of the Child Convention will penetrate Swedish rules, even when they are not adapted to the international children's rights.⁴⁵

5. The Ombudsman in General

Before analysing the Ombudsman for Children, some points will be made about the Ombudsman in general. "Ombudsman" is a Swedish term with an original meaning of "ambassador" or "delegate", used especially to denote the messenger from the King to the people. Recently, the opposite is more nearly the case. It has become the name for a person or an office, that deals with complaints from a defined, circumscribed group of people or individuals within a group, speaks on behalf of that group and tries to improve conditions for individual members as well as for the group as a whole.⁴⁶

The Swedish roots of protecting the individual against arbitrariness and encroachment by the authorities can be traced to the National Code of Magnus Erikson, drafted about 1350: "(The king should swear) to be loyal and faithful to all his countrymen, so that he shall not deprive anyone, poor or rich, in any way, of his life or limb, without a lawful inquiry as laid down in

suffering of the children of the former Yugoslavia. The Strategy recommends governments, for example, to evaluate every new law with the help of a child impact statement.

⁴⁴ See for example CRC/C/SR.235, at 13, para 53 and the concluding observation of Sweden's first report.

⁴⁵ S. Ek, The Children's Ombudsman, in Verhellen (ed.), *Monitoring Children's Rights*, 1996, p. 512-513

⁴⁶ M.G. Flekkøy, *Models for monitoring the protection of children's rights*, 1990, p. 3

the law and the justice of the country, or deprive him of his property, except according to law and lawful trial.”⁴⁷

As early as 1713, the idea that it was necessary to control the activities of the authorities was formally recognised. King Karl XII appointed the Chancellor of Justice, whose duty was to overlook and control the administration, including correspondence. This provided the first opportunity for people to send in complaints and be protected against injustice.⁴⁸ In 1809 the Parliament appointed two Ombudsmen, one of civil affairs and the other of military affairs. These Ombudsmen were to “institute proceedings before the competent court against those who in the execution of their official duties have, through partiality, favouritism or other cause committed any unlawful act or neglected to perform their official duties properly.”⁴⁹ There are now four Parliamentary Ombudsmen of Justice, in Sweden, who have the task of observing whether courts and authorities do their work in an unbiased and impartial manner and respect the fundamental rights of the citizen. Chapter seven will continue the presentation of today’s Ombudsmen in Sweden.

Ombudsmen only exist in democracies and are now present in 75 countries throughout the world. In established democracies the role of ombudsmen mainly relates to the shortcomings of large bureaucratic government institutions in applying complex rules and regulations. The establishment of an ombudsman in new democracies is, however, often an expression of a commitment to a more democratic constitutional state, where the role of an ombudsman is likely to focus more on the need to protect and assert basic human rights.⁵⁰

Although, traditionally, ombudsmen do not preclude children from access to their services, neither do they explicitly address themselves to the concerns of children. Moreover, ombudsmen rarely promote their services in ways that will allow children to become aware of their existence. In addition, the issues facing children are often different from those affecting adults. The nature of the rights of children and the mechanisms necessary for seeking respect for those rights are also different.⁵¹

6. The Swedish Ombudsman for Children

Sweden is usually seen as a country regarding the child as a person, who has the right to be respected. In the domestic arena this is reflected, for example, in its family policy and in

⁴⁷ J. Hersch (ed.), *Birthright of Man*, Paris, Unesco, 1969, p. 110

⁴⁸ M. Koren, *A children’s ombudsman in Sweden*, *International Journal of Children’s Rights*, Vol. 3, no. 1, 1995, p. 2

⁴⁹ J. Hersch, *Birthright of Man*, 1969, p. 193.

⁵⁰ G. Lansdown, *Ombudswork for Children*, *Innocenti digest*, UNICEF, 1997, p. 2

legislation prohibiting parents to strike their children. Internationally, Sweden played an important role in the drafting of the Child Convention, for example stressing the urgency of legally binding rules and of having good implementation machinery to make the Child Convention effective.⁵² Sweden was the first developed country to ratify the Child Convention. No reservations were made. Sweden participates in a similar way in the activities of the Council of Europe, concerning children's rights.

Nevertheless, it was felt that legal safeguards for children were neglected in Swedish society and that knowledge of children in medical and social services and in schools had been eviscerated.⁵³ These arguments were used in favour of creating an Ombudsman for Children. The issue on establishing an OC was raised in the Swedish Parliament 1987 and turned soon into a constructive debate. The discussions about the new Office came to focus on especially two concerns. Firstly, the establishment of an OC could imply a risk of the ombudsman-idea being watered down, as a result of more and more groups in the society acquiring their own ombudsman for the protection of vested interests. Every creation of a new ombudsman could lead to a dilution of the status and work of the ombudsman institution, and eventually he or she would be regarded as just one of the many representatives for the interests of special groups.⁵⁴ The second concern was if the OC should have legal power to intervene in individual cases⁵⁵ Three years later the Government appointed an investigative Committee, to examine the need for a national Ombudsman for Children.

6.1. The Report of the Investigative Committee

The point of departure according to the directive for this investigation was: "How can a service like a Children's Ombudsman further the efforts of Sweden to strengthen the rights of the child in the spirit of the Child Convention?"⁵⁶

Despite the concern about establishing yet another ombudsman, the report agreed that especially children, on account of their exposure and vulnerability, ought to have an ombudsman of their own. Since people below 18 years of age do not have the right to vote, they are unable to directly influence general decisions affecting their situation. As a

⁵¹ G. Lansdown, *Ombudwork for Children*, Innocenti digest, UNICEF, 1997, p. 3

⁵² S. Detrick, ed. (1992), *The UN Convention of the Rights of the Child. A guide to the Travaux Préparatoires*, Kluwer, Dordrecht, p.49.

⁵³ L. Sylwander, in S. Jeleff (ed.), *The child as citizen*, 1996, p. 44

⁵⁴ L. Sylwander, in S. Jeleff (ed.), *The child as citizen*, 1996, p. 45. The same scepticism was put forward in the Norwegian debate.

⁵⁵ M. Sjögren Westerlund and H. Hammar skjöld, *Children's Ombudsman: a survey*, 1995, p. 27-32

⁵⁶ SOU 1991:70, *Ombudsman för barn och ungdom*, p. 28

consequence, children and young people need a representative. Besides this, a creation of an OC would contribute to the fulfilling of Sweden's obligations under the Child Convention.⁵⁷ The role of the Swedish Ombudsman for Children (hereafter called the BO) in the report⁵⁸, is clarified vis-à-vis other functions and organisations involved in childcare. This means that the work of the BO should not undermine the responsibilities of parents or authorities or the activities of non-profit organisations. In relation to the other ombudsmen, questions of competence could arise, as the BO has no restriction on his work, other than the age of the group he represents. The BO should, however, according to the law proposal with 15 paragraphs, deal with general measures to promote children's rights, for example represent children in issues concerning them and find ways for children to participate in society. Furthermore, the BO should have the possibility to give opinions on the drafting of legislation influencing children's situation. The BO should thus not handle individual cases. Matters brought to the BO should, according to the investigative Committee, remain confidential. The confidentiality should, however, not prevent the BO from informing the police about unlawful situations. The BO should, as legal powers, have access to information from authorities and organisations. Finally, the report suggested that the BO should be linked to the foundation "Allmänna Barnhuset", have a staff of three persons and a budget consisting of 3 million Swedish kronor a year.

6.2. The Proposal of the Government

Although the Government agreed on a number of the ideas of the investigative Committee's proposal, there were some distinct differences between that proposal and the final draft of the legislation.⁵⁹ The first difference was that the Government suggested that the Child Convention not merely should be a background factor, but should also guide the work of the BO. Linking the function of the BO so closely to the Convention would ensure realisation of the international duties to which Sweden had committed itself. A second difference was that the investigative Committee wanted a law with 15 paragraphs regulating the BO, while the Government proposed a very short Act and an Ordinance with Instruction for the Ombudsman. The fact that the Government was not willing to create special powers for the BO to get information from authorities and other organisations constitutes a third difference. The final difference was the preference of the Government to link the BO to the Children's

⁵⁷ SOU 1991:70, p. 55-56

⁵⁸ The following text of this sub-chapter is based on SOU 1991:70, p 11-16

⁵⁹ M. Koren, A children's ombudsman in Sweden, *International Journal of Children's Rights*, Vol. 3, no. 1, 1995, p. 112-113

Environmental Council (Barnmiljörådet), which was “the only authority in Sweden which has as its main task to deal exclusively with questions that affect children.”⁶⁰ The BO, appointed by the Government, should hereby be the director of this Council and get a staff of twelve persons.

The draft Act was accepted by the Social Committee of the Parliament, the law was adopted by Parliament on the 13th of May 1993, and on the 1st of June Louise Sylwander was appointed as the first BO.

6.3. The Act 1993:335

The Act to Establish the Office of Children’s Ombudsman in Sweden (hereafter called the Act) includes three sections. In section 1 the Ombudsman is given a broad task of “observing matters relating to the rights and interests of children and young persons”. The Ombudsman shall particularly observe that the statutory instruments and their implementation are in compliance with Sweden’s commitment under the UN Convention of the Rights of the Child. Section number 2 is giving the Government the task of appointing the Ombudsman and an assisting Council. The Ombudsman is Chairman of the Council and directs its activities. The last section, which was amended later, deals with the obligation of the Ombudsman to notify the Municipal Social Welfare Committee in cases of knowledge that for example a person under the age of 18 is being maltreated in the home. The Ombudsman may to this Committee give valuable information for the investigation. Otherwise secrecy applies for information concerning personal circumstances, provided that it is not obvious that the information in question may be disclosed without detriment to the person concerned or his intimates.⁶¹

6.4. The Ordinance 1993:710

The Standing Instructions for the Children’s Ombudsman are included in an Ordinance (hereafter called the Ordinance), with nine sections, adopted by the Government. The first section repeats the task. In the second section it is stated what the BO shall do within the scope of his responsibilities: initiate measures for asserting the rights and interests of children, represent and support children in public debate, propose to the Government legislative or other changes needed in order to provide for the rights and interests of children, and initiate the co-ordination of public measures of prevention in the context of child safety. Questions relating to children at risk shall be given special attention. Finally, the Ombudsman shall give

⁶⁰ Proposition 1992/93:173 om en Barnombudsman, m.m, p. 14

⁶¹ Official Secrets Acts, Chapter 7, section 34

information of the Child Convention, maintain contacts with children, voluntary organisations, public authorities etc., and shall actively observe research and development work relating to children. The activities of the BO shall be reported annually to the Government in accordance with section 3. The Ordinance also contains rules about transaction of business, the assisting Council, appointments and appeals.

7. Analysis of Features Affecting the Efficiency of the BO

In order to analyse the efficiency of the BO, four features will be investigated: the Independence, Mandate, Functions, and Powers of the BO. It can already here be said that these four features interact with and are interdependent of each other, but the aim is to separate them for structural reasons. The following sub-chapters will include, for each feature, a definition. For the BO, the appearance of each feature will be described. Since the features can have varying appearances, features of other OC, principally different from those of the BO, will also be discussed. This is followed by a survey of recommendations and guidelines on how the features should be designed to make an OC efficient. Finally, it will be analysed if the features of the BO are in compliance with the recommendations.

7.1. Independence

In order to gain public and professional confidence and be efficient in the work promoting children's rights, the Ombudsman for Children must be independent and not manipulated by government, political parties, or by any other entity which may be in position to affect the work. Especially the entities the OC is supposed to monitor should not be able to interfere with or restrict the task of the OC to promote and protect children's rights. As will be shown below the majority of OC has in one way or another been formed by the State, which means that the independence can never be total. The establishing documents will identify specific links between the OC and the organ that has established the OC and thereby define the limits for the independence of the OC.⁶² However, although total independence can not be achieved, the aim should be to make the OC as independent as possible.

Several factors can determine the degree of independence of the Ombudsman for Children. The establishment, appointment/removal, funding, sphere of competence, and agenda-setting of the OC are the factors that will be analysed as to how they affect the independence. An

⁶² National Human Rights Institutions- A Handbook on the Establishment and Strengthening of National Institutions for the Promotion and Protection of Human Rights, Professional Training Series No. 4, Centre for Human Rights, United Nations, 1995, p. 10. Hereafter this publication will be referred to as the UN Handbook.

Ombudsman Office run by an NGO is characterised as being independent from the State. Its independence towards the NGO itself is still influenced by the same factors, but this will not affect its independence towards the State. The independence of an OC within an NGO towards the NGO will thus not be analysed.

7.1.1. Establishment

The term establishment, in this thesis, is used to describe the origin of the Ombudsman for Children. As shown above, the BO was established by a Parliamentary law adopted specifically and exclusively for this purpose. This is one of four principally different ways, by which the OC have been established throughout the world.⁶³ Other examples of OC being established by a **special Act of Parliament** are the Norwegian and the Icelandic ombudsman, both created by the Ombudsman for Children Act 1981 respectively 1995.

Some Ombudsmen have been created **through child welfare legislation**. Here, the role of the ombudsman is often linked to implementation or monitoring of that particular act. The Office of the Commissioner for Children in New Zealand, for example, was set up under the Children, Young persons and Their Families Act (CYPF Act) 1989. The main purpose of this Act is to deal with children (under 17 years of age) who are abused or neglected or otherwise in need of care or who have committed offences against the law.

Offices of the OC have also been established **within existing public bodies**, a process, which usually does not require new legislation. For example, a national children's ombudsman was introduced in Austria 1991 within the Ministry of Environment, Youth and Family with no legal basis other than the standing orders of the Ministry.⁶⁴ In Germany the President of the Bundestag and parliamentary groups established a KinderKommission in 1987. This Commission is attached to the Bundestag's Committees on Women and Youth and on Family Affairs and Senior Citizens and has representation from each of these committees. Its legal status is not clearly defined.⁶⁵ In Guatemala the Ombudsman for Children was established *ad honorem* by the Ombudsman for Human Rights, through an agreement, SG-90, of December 14, 1990. The Office of the latter Ombudsman was however created by Parliament in the new constitution.⁶⁶ In Costa Rica there has been an OC within the Ministry of Justice since 1987, organised under the Ombudsman for Human Rights. In order to create a more efficient organisation, the arrangement was replaced 1992 by setting up an Office for the Ombudsman

⁶³ The same grouping is made by UNICEF.

⁶⁴ This information was received from the OC in Austria

⁶⁵ G. Lansdown, *Ombudswork for Children*, Innocenti digest, UNICEF, 1997, p. 12

⁶⁶ M. Sjögren Westerlund and H. Hammarskjöld, *Children's Ombudsman: a survey*, 1995, p. 11

of the Inhabitants in Costa Rica. Through an internal decision by the Ombudsman, No DH-11 July 1993, a unit for children and young persons was created.⁶⁷

As the fourth alternative an Ombudsman for children can be established **within an NGO**. Not many of the NGOs working for and promoting the rights of children see themselves as being a “real” ombudsman for children. There are two significant exceptions to this. In Finland, the Mannerheim League for Child Welfare established a Children’s Ombudsman Office in 1981.⁶⁸ In Israel, an Ombudsman for Children and Youth was established in 1990 by an NGO, the National Council for the Child, after a successful experimental and privately funded project in Jerusalem. Interestingly, Save the Children in Sweden- Rädde Barnen⁶⁹- provided ombudswork for children, but turned its attention to other areas when the BO was established 1993. 1973 the press called Rigmor von Euler “Sweden’s first Ombudsman for Children”. Soon the Children’s Ombudsman became a department within Rädde Barnen with several ombudsmen.⁷⁰

The, within the UN agreed on, “Principles Relating to the Status of National Institutions for the Promotion and Protection of Human Rights”⁷¹, hereafter called the **Paris Principles**, work as international guidelines or recommendations for making the structure and functioning of national human rights institutions optimal. So far, there is not a general accepted definition of the term “national human rights institution”, but the Principles are aiming at bodies established in the constitution or by law to perform particular functions in the field of human rights. In practise it has been recognised that the institutions are all administrative, that is neither judicial nor lawmaking.⁷² Ombudsmen for Children established by a special act or through child welfare legislation do fit in the description of a national human rights

⁶⁷ M. Sjögren Westerlund and H. Hammarskjöld, Children’s Ombudsman: a survey, 1995, p. 16

⁶⁸ The Mannerheim League is an open civic organisation, founded in 1920. The Ombudsman defends the human rights of children in practise, whilst the League works for the rights of children in general. However by helping children in specific cases contributes to the general realisation of children’s rights. This information was received from the OC in Finland.

⁶⁹ Rädde Barnen’s mandate is to implement the UN Child Convention and to combine research and advocacy with concrete assistance programmes. Rädde Barnen is a Swedish NGO struggling to enforce the rights of the child in its programmes in Sweden and in some 20 countries in the world. It is a voluntary, democratic organisation, with no party-political or religious affiliation, based on voluntary individual membership. Rädde Barnen has a total of 250 000 supporters.

⁷⁰ The tasks of the ombudsmen within Rädde Barnen were among others to give information and create an opinion about the situation of children at risk in Sweden, propose measures to improve the life of children, and give help to individual children. Found in A. Nobel-Wennerström, Rädde Barnens Barnombudsmän, Barnombudsmannen 83/84, p. 6-8

⁷¹ Adopted by the General Assembly of the United Nations, resolution 48/134 of 20 December 1993

⁷² UN Handbook, p. 6

institution. They are thus more effective, according to the Paris Principles, than OC with no legal basis.

What promotes the independence of the OC established by law, are the facts that the OC has official status and is permanent until Parliament revokes the Act.⁷³ The stability and continuity of the OC are thought to be better ensured than if the government or another body can disband the OC. Another advantage of creating an OC through the legislative process is the possibility to give an Ombudsman office the kind of legal powers that will enable it to act effectively.⁷⁴

It should here also be mentioned that in addition to establishment through law, it is of importance for the independence of the OC, that as much as possible is regulated in law. This makes the OC comparatively unconstrained by political interference and free to challenge and criticise government policy and practise concerning children.⁷⁵ Any matter concerning the OC, not stated in an act, will thus be subject to the scrutiny of another organ than Parliament. This will weaken the independence of the OC for the same reasons as for why an OC should not be established by anything else than law.

Being located within government could mean that the OC might have an “inside view”, more credibility and closer contacts with government officials. However, their accountability to the same officials they should monitor could compromise the neutrality and objectivity of the OC. Even though this may not be the case in practice, inside agencies are none the less more vulnerable to suspicion that they may be serving other purposes.⁷⁶ The fact also remains, that an OC without a legal basis operating within existing public bodies can easily be disbanded. In spite of documented success within the system, the South Australian OC is in the process of obtaining more independence, by being legislated in a separate Act.⁷⁷ The argument in favour of incorporating the function of an OC within a national human rights institution, is due to the fact that resources may not be adequate to support a range of separate Ombudsman-Offices, whereas an OC within a human rights body would be able to use the resources of the whole body. Furthermore, to integrate children’s rights into the mainstream promotion of all human rights would ensure that discussion of children’s rights is not marginalised or accorded lesser status. Nevertheless, the placement of an OC within a human rights body, which does

⁷³ M.G. Flekköy, Working for the Rights of Children, Innocenti Essays, No 1, UNICEF, Florence, 1990, p 21

⁷⁴ D. O’Donnel, Children’s ombudsman and the promotion of children’s rights, Swedish Save the Children, Stockholm, 1996, p. 18ff

⁷⁵ G. Lansdown, Ombudswork for Children, Innocenti digest, UNICEF, 1997, p. 8

⁷⁶ M.G. Flekköy in E. Verhellen and F. Spiesschaert (eds.), Children’s rights: monitoring issues, 1994, p. 19

⁷⁷ This information was received from the OC in South Australia

not have an exclusive focus on children, might result in children's concerns getting lost in adult agendas and the OC not being particularly independent.⁷⁸

Ombudsmen for Children established within a non-governmental organisation have no legal status and are therefore not seen as being efficient national institutions promoting children's rights pursuant to the Paris Principles. These OC, however, enjoy total independence from the government, which means they have a considerable freedom to challenge and question laws, governmental policy and its operation. In practise however their lack of statutory powers means that they must rely on the openness and good faith of civil servants, as well as their own credibility and persuasiveness. It is worth mentioning that the Government in Finland has proposed that the Parliament should establish a Child Ombudsman Office.⁷⁹

The establishment of the BO seems to be in line with what the doctrine recommends. An Act has created the BO, which is recognised as strengthening the independence and thereby also the efficiency of the BO. According to the Investigative Committee a law is used to express the will of society to give children's rights a stronger position.⁸⁰

7.1.2. Appointment and Removal Procedures

Generally it can be argued, that an institution can never be more independent than the individuals of which it is composed. No matter how much autonomy the Ombudsman office is granted in theory, the OC with staff also need to be independent persons. The procedure of appointing and removing a Children's Ombudsman is thus the next factor that will be dealt with. Several aspects will be included in these procedures: Method of appointment, Criteria for appointment (some points will also be made about the composition of the staff as a whole in the Office of the OC), Duration of appointment, Whether members can be reappointed, Who may dismiss members and for what reasons and, Privileges and immunities.⁸¹

According to both the Act and the Ordinance, the Government appoints the BO and the members of the assisting Council. In practise it is the Minister, under whose supervision the BO will come, who drafts the proposal on who to appoint as BO, to the Government. The Minister can choose to propose anyone as BO and in the process consult whomever he finds

⁷⁸ <http://www.ombudsmen.org/SettingUpOffice.htm> the website of ENOC-European Network of Children's Ombudsmen. From the 16th of January, 2000.

⁷⁹ Answers of the Government of Finland to the questions of the UN Committee on the Rights of the Child, 8/1/96. Found in S Ruxton, *Implementing Children's Rights: What can the UK learn from international experience?* UK, London 1998, p 35.

⁸⁰ SOU 1991:70, p. 97

appropriate. The position as BO is not advertised. The appointment is however established through a collective decision of the Government.⁸² In the report of the Organisation Committee⁸³, it is stated that the following areas of qualifications, among others, should exist in the Office of the BO (that is among the BO, the Council, and the staff): law, health and medical care, psychosocial questions, child psychology, school, and media. There are no specific criteria for which qualifications a BO has to have. According to the Act, the BO should be appointed for a fixed period of time, which is specified by the Organisation Committee as six years. In practise, the BO is reappointed for another three years.⁸⁴ Neither the founding legislation, nor the report of the Organisation Committee gives information about the removal procedure. Again, in practise the BO will normally not lose his appointment, neither his salary, as BO during the period of appointment. He might, however, be transferred to another post. The decision to transfer the BO is often recommended by the Minister, who supervises the BO, but formally made by the Government as a collective.⁸⁵ Finally, the BO does not have any privileges or immunities.⁸⁶

Other examples of how these aspects are dealt with, in countries with legally established Ombudsmen for Children, can be of interest.⁸⁷ The President of Iceland shall pursuant to the establishing Act-Article 2, at the proposal of the Prime Minister, appoint the Icelandic CO for a period of five years. Reappointment for another five years may be the case, yet once only, save in exceptional circumstances. The CO must have a university degree, and if not in law, the staff shall include a lawyer. According to another Article the Icelandic Ombudsman for Children engages his own staff and, when needed, specialists. According to the Act, the King appoints the Commissioner for Children in Norway, for a period of four years. According to the Decree of Instruction however the Council of State appoints the Norwegian Commissioner.⁸⁸ The Commissioner can pursuant to the same decree be reappointed, but not

⁸¹ These aspects are looked at also in the UN Handbook

⁸² Interview with the Head of Department for Civil Defence Coordination, Director Christina Salomonson

⁸³ Delrapport av Organisationskommittén för inrättande av en Barnombudsman, 1993, p. 8-15. The Organisation Committee was appointed by the Government with the task to elaborate details concerning the organisation of the Office of the BO.

⁸⁴ Interview with the Head of Department for Civil Defence Coordination, Director Christina Salomonson

⁸⁵ Interview with the Head of Department for Civil Defence Coordination, Director Christina Salomonson

⁸⁶ It is more common with privileges and immunities in federal states.

⁸⁷ Due to lack of information I will not be able to present other relevant documents, concerning these aspects, than laws and decrees.

⁸⁸ Applications are studied by the ministry department concerned, and a proposal is submitted to the political leadership of the ministry. The minister may agree or disagree, may send it back for further consideration, and may present this or his own proposal to the Council of State. If the Council of State disagrees with the minister, the proposal may be sent back for reconsideration. When the Council supports the proposal, it is formally

for more than another four years. Someone from the assisting secretariat is the permanent deputy for the Commissioner. A varied professional background should be the base of the Office. According to the CYPF Act (s.416), the government, on the recommendation of the Minister of Social Welfare appoints the Commissioner for Children in New Zealand. The appointment is in practice subject to an appointment process that includes a Parliamentary Committee and a Cabinet Committee. The term of appointment is not fixed in the Act, but is usually five years. The Commissioner can at any time be removed from office by the governor-general for just cause or excuse (s.418).

There are as many different appointment and removal procedures, as there are Ombudsmen for Children. For these procedures to be advantageous for the independence of the OC, they should be designed in a certain way. The UN Handbook on the Establishment and Strengthening of National Human Rights Institution (hereinafter called the UN Handbook) contains recommendations and guidelines on how to establish or strengthen national institutions for the promotion and protection of human rights. As mentioned before the OC is one example of a national human rights institution. The content of the UN Handbook is based on the Paris Principles, analyses of existing human rights institutions in different countries, meetings and conferences both within and outside the UN, and on other experience gained by the UN Centre for Human Rights. Since there are historical, cultural, political and economic differences between the countries in the world, it is recognised that there can not be a single model of a national human rights institution that is ideal.⁸⁹ For a human rights institution to be efficient there are however some basic recommendations that ought to be followed. As the Paris Principles, the UN Handbook is of the opinion that only the institutions established by law can be effective. The UN Handbook thus recommends that the founding legislation sets out all the above mentioned aspects concerning appointment and removal procedures.⁹⁰

What **methods** are used to appoint the Ombudsman for Children, including voting and other procedures to be followed, should be decided by Parliament. To strengthen the independence, the methods should be designed so that the subjects the OC is supposed to monitor and eventually criticise, are not the same subjects, that can appoint the OC. In a broad sense the

accepted by the Council when the King is present. Found in M.G. Flekkøy, Children's rights: reflections on consequences of the use of developmental psychology in working for the interests of children, 1993, p. 116

⁸⁹ UN Handbook, p1

⁹⁰ The following description of the different aspects is based on the UN Handbook, p11-12, unless nothing else is stated

whole society is being monitored, given that the mandate is to promote children's rights or interests. The only thing limiting the workfield of the Ombudsman is the age of eighteen for being considered a child. However, it is the State, that has the final responsibilities for non-violation of children's rights and interests set out in national laws and in the Child Convention. Hence, the State is the main actor to keep surveillance upon, why it can be argued that neither the body with legislative, nor with executive powers should appoint the Ombudsman for Children.

In practise, the choice often stands between letting the Parliament or the Government appoint the OC, since it is customary that officials are appointed by either of these two institutions. In that case, the Parliament is the preferable alternative. The Parliament consists of a political pluralism and is probably not as sensitive as the Government when receiving criticism. If the Government appoints the OC, at least the appointment should not be in the hands of an individual minister.⁹¹ On the whole, it is an important principle that appointment of the OC should not be in the hands of one person only.

To engage an OC who really is suitable for the position, NGOs dealing with children's rights and youth justice issues, along with government department officials (in an advisory capacity only), and other qualified experts should be consulted in the choice of the OC.⁹²

The Commissioner for Children in New Zealand is of the opinion that a Deputy Commissioner also should be appointed, since the Office always needs to have an official voice, while a Commissioner is temporarily absent.⁹³

The **criteria for appointment** should be stipulated. These will include nationality, profession, qualifications, etc. A frequently debated question is whether the OC should have a university degree in law or not. Taking the often broad mandate in consideration, a lawyer might concentrate on children in relation to legislation. Due to this, persons with other professions might be as well or better equipped to promote the interests of children in relation to all areas of society.⁹⁴

The composition of the members in the Ombudsman office can further improve its independence *vis-à-vis* the public organs. Pursuant to the Paris Principles, the composition of

⁹¹ G. Lansdown, Ombudswork for Children, Innocenti digest, UNICEF, 1997, p. 26

⁹² *ibid.*

⁹³ Submission on the Parliamentary Commissioner for Children Bill, from the Office of the Commissioner of Children (New Zealand), June 1999, p. 8

⁹⁴ M.G. Flekkøy, Children's rights: reflections on consequences of the use of developmental psychology in working for the interests of children, 1993, p. 116

the national institution, and the choice of its members, shall reflect the pluralist representation of social forces involved in the promotion and protection of human rights. In particular, the staff should consist of members, who can facilitate co-operation with or who are themselves representatives of: organisations responsible for or concerned about human rights, trends in philosophical and religious thought, universities and qualified experts, parliament, and government departments (only in an advisory capacity though). A representative composition will be difficult to achieve in situations where the Ombudsman for Children has no staff.

With regard to **duration** of appointment, the Ombudsmen for Children are generally granted guaranteed, fixed-term appointments which are not of short duration. On the other hand, with a fixed term a very useful person can not be kept on as an OC. Another disadvantage with having a fixed term is that people with experience enough to serve as an OC are often not very young. If they have to leave whatever job they have and then face the insecurity of trying to get a new job when they are 8-12 years older, many qualified people would hesitate. A fixed term can thus reduce the number of qualified applicants.⁹⁵ However, the Paris Principles recommend that the appointment shall be of specific duration in order to ensure a stable mandate, without which there can be no real independence. The security of tenure will furthermore enable the OC to make long term-plans.

Reappointment for an additional term should be permissible, provided that the pluralism of the institutions's membership is ensured.⁹⁶ A renewable mandate makes it possible to let a useful OC continue with his work.

Powers of dismissal are closely related to the independence of a national institution. To avoid compromising independence, the circumstances under which an Ombudsman for Children can be **removed**, should be specified in as much detail as possible. These circumstances should relate to ascertainable wrongdoing of a serious nature. A removal should only occur in the event of gross misconduct.⁹⁷ Failure to participate in the work of the institution may also be considered as a ground for dismissal. The body or individual capable of removing a member from office should be specified. The same arguments for who should appoint the OC are valid in the case of removal. In view of the nature of the activities of an OC, it is thus preferable that power to dismiss is vested in parliament or at any equivalently high level.

⁹⁵ M.G. Flekköy in E. Verhellen and F. Spiesschaert (eds.), *Children's rights: monitoring issues*, 1994, p. 20

⁹⁶ The Paris Principles

⁹⁷ G. Lansdown, *Ombudswork for Children*, Innocenti digest, UNICEF, 1997, p. 26

The granting of certain **privileges and immunities** to members of national human rights institutions is another legal means of securing independence. Privileges and immunities may be especially important for institutions, which are granted the authority to receive and act on complaints of human rights violations. Members of a national institution should enjoy immunity from civil and criminal proceedings in respect of acts performed in an official capacity.

Against this background, it can be said that the appointment and removal procedures for the BO are not in total compliance with the recommendations above. First of all, the founding legislation does not mention all aspects that should be stipulated in law according to the UN Handbook. Secondly, the contents of the aspects shows that the BO is not independent from the Government, since it is the Government, and in practise a Minister, that both appoints and removes the BO. The BO herself criticises that the Review Committee, a committee appointed by the Government to evaluate the work of the BO, neither discusses a method of appointment, nor the question of reappointment.^{98 99}

7.1.3. Funding

How and from where the Ombudsmen for Children get their financial resources are also factors that can affect the degree of independence. This will be discussed below.

Every year the BO gives supply estimates to the Ministry of Health and Social Affairs, of which the BO is under supervision. The Ministry decides the level of funding of the BO that should be incorporated in the budget proposal of the Government. The budget proposal needs to be approved by the Ministry of Finances, before the Parliament votes in favour of or against the budget. It is very seldom that the Parliament does not accept the budget proposal. Finally the Ministry of Health and Social Affairs allocates the funds, that was approved by the Parliament, to the BO through regulation letters.¹⁰⁰ In the next chapter regulation letters will be more discussed.

Also in other countries the OC are usually funded by public money, allocated either by the Parliament or by a Ministry. The Children's Ombudsmen in Costa Rica and Guatemala have however no official budget, but are financially dependent on the general Ombudsman and

⁹⁸ Remissvar Dnr BO 4.1:174/99 (comments from BO on the report from the Review Committee), p. 14

⁹⁹ Interesting to note is that an official report on how to strengthen the democracy in Sweden proposes both that the Government should not appoint the BO and the other thematic Ombudsmen in Sweden and that officials should have some kind of privileges and immunities.

Human Rights Office respectively, within which they are established.¹⁰¹ Private money finances the Finnish and the Israeli Ombudsmen for Children.¹⁰² Due to lack of information, there will be no further information about the amounts or the allocation procedures in different countries presented here.

In order to secure the independence the same point of departure, as was applied on the appointment and removal procedures, should be used here. That is, the subjects that the OC is supposed to monitor and criticise should not be the same subjects allocating the funds to the Office of the OC. There are several recommendations and arguments on how the funding procedures should be designed to make the OC financially independent, so that no conflicts of interest will arise. For instance, if the funding of the OC is secured over a period of several years and the level of resourcing is decided by parliament rather than the government, it would strengthen the financial independence towards the political party in power.¹⁰³ For the NGO-established OC to gain financial independence, it is important that they have a broad base of financial support.¹⁰⁴ An NGO might be given, by parliamentary decision, a special responsibility to work for the rights of children, in which case it would be an advantage if public funds were provided so that the organisation becomes independent of other sources.¹⁰⁵

According to the Paris Principles the purpose of the funding should be to “enable the national institution to have its own staff and premises, in order to be independent of the Government and not be subject to financial control which might affect its independence”. If the OC have no control over their finances, they will be dependent on the body that exercises such control. The UN Handbook puts emphasis on the link between financial autonomy and functional independence. It is argued that the funding provisions, which should be stated in law and describe the source and nature of funding, are to ensure that the institution is financially capable of performing its basic functions. To make sure that no decision or action taken by the OC will affect the funding of the Office, the budget should be guaranteed over a certain

¹⁰⁰ Interview with the Head of Department for Civil Defence Coordination, Director Christina Salomonson

¹⁰¹ This information was found in M. Sjögren Westerlund and H. Hammarskjöld, *Children’s Ombudsman: a survey*, 1995, p. 13 and 17

¹⁰² This information was received from the OC in Finland and Israel.

¹⁰³ G. Lansdown, *Ombudwork for Children*, Innocenti digest, UNICEF, 1997, p. 26

¹⁰⁴ An illustrative example is when CDF (The Children’s Defense Fund- an American NGO representing children in the legislative process) was supporting the introduction of a tax on cigarettes to fund children’s health programmes, a multinational cigarette company, which was one major contributor of CDF, demanded a change in position or its money back. Fortunately CDF could render the money. Found in M.G. Flekköy, *Models for monitoring the protection of children’s rights*, Meeting Report, UNICEF, 1990, p. 8

¹⁰⁵ M.G. Flekköy in E. Verhellen and F. Spiesschaert (eds.), *Children’s rights: monitoring issues*, 1994, p. 22

period. Especially if the OC has the power to act on complaints, a financial connection between the Ombudsman and the Government can constitute conflict of interests.¹⁰⁶

A preferable solution is therefore that the OC himself is allowed to draft the annual budget of the Office. The budget proposal of the OC should then be given to the Parliament for approval. Besides this the only financial connection between the Ombudsman and the Parliament, would be that the latter has to review and evaluate the financial reports from the OC. The OC is thereby accountable only to Parliament. As a minimum demand, the budget of a national institution should not be linked to the budget of a government ministry.¹⁰⁷

In New Zealand it is the Minister of Social Welfare, who is responsible to Parliament for the financial management and reporting of the Commissioner for Children. The Commissioner is required to draft an annual statement of intent, but this can be modified by the Minister. Moreover, it is the Minister of Social Welfare, who presents the funding bids to the Minister of Finance. The Commissioner has no guaranteed direct audience with or right of submission to the Minister of Finance. Thus, the resourcing of the Commissioner's Office is effectively controlled by the Ministry of Social Welfare, the same agency the OC is supposed to monitor. This has been criticised in terms of weakening the independence and efficiency of the OC in New Zealand. Also, since not all the activities of the Commissioner are directly related to the Department of Social Welfare, it would be reasonable that the Commissioner should be separately funded. Another concern of New Zealand's OC is that financial constraints make it difficult to attract and retain high-quality staff, to conduct research, and to cope with the ever-increasing workload.¹⁰⁸ In case the funding is not adequate and continuing, the operational efficiency of the OC Office will be jeopardised. Moreover the external credibility of the OC can be damaged. When the Ombudsman does not get financed, the public perception of the OC as an independent body can be harmed.¹⁰⁹

In Sweden the funding of the BO is not in accordance with the recommendations above. As with the appointment and removal procedures, the funds of the BO are allocated by the same subject that the BO is supposed to monitor and criticise. The Investigative Committee accounted for two alternatives concerning the funding of the Swedish BO. The first proposal was to place the BO within the "Allmänna barnhuset", a foundation with its own assets. In

¹⁰⁶ UN Handbook, p.11

¹⁰⁷ M.G. Flekköy, Models for monitoring the protection of children's rights, Meeting Report, UNICEF, 1990, p. 8

¹⁰⁸ Submission on the Parliamentary Commissioner for Children Bill, from the Office of the Commissioner of Children (New Zealand), June 1999, p. 6

this way, the money of the foundation would fund the BO. With the second alternative, the Government proposes the Parliament to allocate money via the state budget to the BO. In the latter case, the BO could find it difficult to criticise the Government, why the Investigative Committee preferred the first alternative.¹¹⁰ The proposal of the Government followed however the second option by making the BO the Director of “Barnmiljörådet”, an existing and well-known government authority.¹¹¹

7.1.4. Sphere of Competence and Agenda-setting

The final factors that will be dealt with as affecting the degree of independence of the OC concern the activities the OC is permitted to perform. Independence of an OC can be seen as having the possibility to perform whichever activities the OC finds appropriate in fulfilling the task of promoting and protecting children’s rights, needs and interests. However, there are restrictions in which actions the OC is allowed to take. The first type of restriction is constituted by the mandate and the functions prescribed by the establishing documents.¹¹² Together they set out the limits for the OC’s sphere of competence. The second type of restriction is when someone interferes with the actions taken by the OC within his sphere of competence. Such a restriction will affect the OC’s ability to set his own agenda. The content of the mandate and functions will be discussed in the next chapter.

Sphere of competence

Since the mandates often are very broad, they will not restrict the independence of the OC in a significant way. Therefore the following discussion will be about functions only. The functions of an OC both direct and limit the actions he can take. For example, the OC with the mandate to promote and protect children’s rights can be directed to handle individual complaints, but limited in that he is not allowed to accept complaints concerning family disputes. Each function will interfere with the independence of the OC and narrow his sphere of competence.

All OC, however, have defined functions set out in the establishing documents. In a democratic society it is customary that popularly elected politicians define the aim for the

¹⁰⁹ UN Handbook p15

¹¹⁰ SOU 1991:70, p. 94

¹¹¹ Proposition 1992/93:173, p. 14. This authority already had experiences from working with children’s issues, which included a wide net of contacts, and knowledge about the development and behaviour of children. It was however recognised by the Government that the authority had to broaden its competence, when being an Ombudsman Office.

¹¹² The terms mandate and function will be examined in chapter 6.2.

activities of an official entity like the OC. This procedure is supposed to give the official entities legitimacy. In order not to risk the independence of the OC more than necessary, the functions of the OC should be stated in law as mentioned above. This will ensure continuity in the work of the OC and the possibility to plan in advance. Hence, the sphere of competence is best protected from arbitrary restrictions when it is legally defined.

It is not always enough that the functions are set out in law, to achieve the highest degree of independence. It has to do with the content as well. Functions linked to the implementation and monitoring of the Child Convention will give the OC a broad and adequate sphere of competence and thereby promote the independence of the OC. In New Zealand the role of the OC is, in several ways, linked to the implementation and monitoring of the CYPF Act. This might limit the sphere of competence to such an extent that the independence of the OC will be weakened.¹¹³

In Sweden the functions of the BO are found in an Ordinance, adopted by the Government. For a society that changes fast, it may be desirable to use decrees instead of laws, since they are easier to reformulate.

The danger is, however, that there is less legal and parliamentary control of this kind of instrumental regulation.¹¹⁴ According to the report of the Investigative Committee it was suggested that the functions, in order to give weight to them, were confirmed by law.¹¹⁵ The Governmental bill wanted the main tasks (the mandate) only, to be stated in law, while the functions should be in a decree. Especially the task to monitor the implementation of the Child Convention should, according to the bill, be found in law, since the Child Convention is of such a basic nature.¹¹⁶ The placement of the functions in an Ordinance has been opposed to, in terms of restricting the independence of BO, by the Child Committee in its concluding observations on Sweden's second State Report.¹¹⁷ Also the Review Committee and the BO herself have recommended the functions to be adopted in law to strengthen the independence of the BO, using the Paris Principles as basis for the criticism.¹¹⁸ The question of how the content of the functions affects the independence of the BO will not be considered.

¹¹³ According to the Child Committee the advocacy role of the OC in New Zealand should be directly related to the Articles of the Child Convention. Found in Submission on the Parliamentary Commissioner for Children Bill, from the Office of the Commissioner of Children (New Zealand), June 1999, p. 5.

¹¹⁴ M. Koren, A children's ombudsman in Sweden, *International Journal of Children's Rights*, Vol. 3, no. 1, 1995, p. 113

¹¹⁵ SOU 1991:70, p. 97

¹¹⁶ Proposition 1992/93:173, p. 9

¹¹⁷ This concluding observation can be found in document CRC/C/15/Add.101, January 1999, under point 8.

Agenda-setting

Agenda-setting refers to the activities performed by the OC on a daily basis, within the sphere of competence. Allowing the OC to carry out his day to day affairs within this given frame, with no individual, organisation, department or authority giving instructions will strengthen the independence and efficiency of the OC.

Every year the BO receives so called regulation letters from the Government. These letters confirm the budget of the BO. They also include various tasks that the BO should perform, according to the Government, during the coming year. A reporting obligation is often linked to the assignment. The tasks can be described in more or less detail, but in any case they require both time and resources from the Office of the BO.¹¹⁹

Another example of an OC who is not able to set his own agenda is the OC in New Zealand. The OC is free to regulate the procedures of the Office in such manner as the OC thinks is appropriate according to Section 414 in the CYPF Act. Nevertheless, there is a law requiring the OC, among other officials, to set broad goals for his activities together with the government Minister to whom he is responsible. These goals are the expression of government policy. The OC must then prepare an annual plan with detailed specification of how the Office is to achieve these goals.¹²⁰ Moreover, the Minister can direct the OC to which aspect of an ongoing investigation the attention of the OC should be placed. This can be used by the Minister, in order to avoid a conclusion, which may be critical of the Department or Minister.¹²¹ All this leads to public and professional lack of confidence in the Office of the OC.

In Norway, contrary to New Zealand, no one can instruct or decide what the OC can do or how the OC shall carry out the responsibilities outlined in the special Act.¹²² The Ombudsman for Children Act says in Article 6, that “The King lays down general instructions for the organisation and procedures of the Commissioner and the Panel. Beyond this the Commissioner and the Panel carry out their functions independently”.

To safeguard independence, the OC should have freedom to define his own agenda without political interference. Only the issues of greatest concern to children, not to anyone else, shall

¹¹⁸ SOU 1999:65, Barnombudsmannen-Företrädare för barn och ungdomar, Betänkande av BO-utredningen, p.178 and Remissvar Dnr BO 4.1:174/99 (comments from BO on the report from the Review Committee), p. 8

¹¹⁹ SOU 1999:65, p. 178 (regulation letters are given, by the Government, to all the authorities in Sweden)

¹²⁰ M. Sjögren Westerlund and H. Hammarskjöld, Children’s Ombudsman: a survey, 1995, p. 43

¹²¹ Summary of recommendations in the Commissioner for Children Bill, found in M. Saphira and I. Hassall (eds.), Children’s Agenda, National newsletter, Issue 5, October 1999, p. 4

¹²² M.G. Flekkøy in E. Verhellen and F. Spiesschaert (eds.), Children’s Rights: monitoring Issues, 1994, p. 16

dominate the focus of the OC's work.¹²³ In addition, to strengthen the operational autonomy, the OC shall be free to draft his own rules of procedure. These rules should not be subject to external modification. Nor should any entity, except where specified in the founding legislation, review and influence the content of recommendations, reports, and decisions of the OC.¹²⁴ The principal of non-interference should however not prevent an open discussion about questions concerning children between the OC and the government or other entities.

The Paris Principles outline several methods of operation, which should be used by an OC in his daily work. Some of them are to freely consider any question falling within the OC's competence and develop relations with NGOs.

Non-interference can not only be guaranteed in law, as in the case of the Norwegian OC, but also in the decree or any governmental or presidential document establishing the OC. These guarantees can, however, be quite easily withdrawn. When it comes to the OC within the NGOs, the State has no possibilities to define their agenda.

Not surprisingly, the Swedish system with the regulation letters has been criticised. Already the Investigative Committee stated that the BO should not be given any other tasks than those confirmed by law.¹²⁵ But like any other authority placed under the government in Sweden, the BO is given regulation letters. The Review Committee says that these letters imposing tasks on the BO prevent the BO to act on his own initiatives. Hence it is recommended that the regulation letters shall be open or transparent. This means that they should contain policies and operational goals with further provisions on reporting and financing, as long as they do not limit the right of the BO to define his own agenda within the given sphere of competence.¹²⁶ By this change, the Swedish BO should gain more independence in accordance with the above guidelines.

7.2. Mandate and Functions

The aim of this chapter is to examine how the content of the sphere of competence can influence the efficiency of an OC. It is, as said before, the mandate and the functions of an Ombudsman for Children, that describe the sphere of competence of the OC. All Ombudsmen for Children are in a bigger or lesser extent authorised to deal with children's rights, needs or interests. This authority is here called a mandate. The functions on the other hand, set out the limits on how the OC is to fulfil the mandate. For example, a mandate to promote children's

¹²³ G. Lansdown, *Ombudwork for Children*, Innocenti digest, UNICEF, 1997, p. 26

¹²⁴ UN Handbook, p. 11

¹²⁵ SOU 1991:70, p. 80

¹²⁶ SOU 1999:65, p. 179

rights can be fulfilled by the function to start awareness campaigns. It is not always easy to separate the mandate from the functions. In the following section a few words will be said about the mandate. Thereafter the content of the functions will be dealt with.

7.2.1. The Mandate

Children's Ombudsmen can have a narrow or a broad mandate. An example of a narrow mandate would be to investigate complaints concerning the treatment of children in certain institutions and a broad mandate would be to investigate any complaints where children are the alleged victims. If the OC has a broad mandate, various types of issues are dealt with: physical punishment, child abuse and sexual abuse, visitation rights, guardianship, issues concerning child refugees and migrants, conditions or treatment in schools and in children's homes and the child's right to be heard.¹²⁷

The mandate of the BO is found in the first Section of the establishing Act: "The Children's Ombudsman has the task of observing matters relating to the rights and interests of children and young persons. In particular the Ombudsman shall observe the compliance of Acts of the Parliament, other statutory instruments and the implementation of the same with Sweden's commitments under the United Nations Convention on the Rights of the Child."¹²⁸ Since it is common for OC to have a broad mandate, mandates of other OC will not be illustrated.

To be an efficient Ombudsman for Children, the Paris Principles recommend that the mandate should be as broad as possible. When the Investigative Committee gave the BO a field of activity, restricted only by the recommended upper age-limit of 18 years, several bodies to which this proposal was submitted for comments objected due to the extensive mandate. As mentioned before the Government put emphasis on the Child Convention as the fundamental document and the point of departure for the BO. Therefore the Bill narrowed the mandate by directing the BO to, in particular, work with the rights of children in accordance with the Child Convention.¹²⁹ Still the BO can be considered to have a broad and general mandate, since not only all questions regulated in the Child Convention come within his field of activity, but also other questions related to the rights and interests of children can be dealt with.

¹²⁷ D. O'Donnell, Children's ombudsman and the promotion of children's rights, p. 11

¹²⁸ Interesting to note is that there is no explicit age limit of 18 years, as in the Child Convention. According to the preparatory work, it is recommended that the BO is active in favour of children under 18 years of age, but this should not be an absolute age limit. Sometimes, due to the circumstances and maturity of the person, the BO can give support and guidance also to a person being 18 or a little older. Found in SOU 1991:70, p. 66

¹²⁹ Proposition 1992/93, p. 10

Nevertheless, the Review Committee is of the opinion that the BO concentrates too much on monitoring the compliance of laws and other statutory instruments with the Child Convention, rather than monitoring the implementation of existing laws concerning children's rights in relation to the Child Convention. Moreover, the BO should actively promote the implementation of children's rights¹³⁰ Thus, the Review Committee has proposed that the BO shall urge the implementation and monitor the observance, with a focus on the implementation, of the Child Convention. When performing these tasks, the BO shall represent children.¹³¹

The BO herself has several objections against the proposals of the Review Committee. First of all, to urge the implementation of the Child Convention, is a task for all authorities and local Governments and not for the BO, why it should not be included in the mandate. To monitor the observance of the Child Convention, on the other hand, is clearly a main task of the BO. However, the BO does not agree with the change of focus from monitoring compliance to monitor implementation. When monitoring the implementation it must be possible to propose changes in law when needed. Therefore both parts should be included in the task of observing. Finally, the BO thinks that it is the rights and interests of children, rather than the children themselves as the Review Committee suggests, that should be represented by the BO. To use the term "representing children" would be confusing, since it is not the approach of the BO to represent individuals (as will be discussed below). Moreover, in accordance with the Child Convention, children should have the right to express their opinion in matters affecting them. Thus, a BO represents children best by ensuring that children have the possibilities of representing themselves.¹³²

7.2.2. The Functions

The functions describe, as mentioned, what activities the OC are allowed to carry out in fulfilling their mandate. Where the functions should be stated has been discussed in the chapter concerning independence. Basically it can be said that the activities of the various OC fall into three broad categories. The OC are either providing primarily individual advocacy and representation, or advocating for children both as individuals and as a body, or acting for children as a body with no individual representation.¹³³ The work of the Swedish BO falls into the last category: acting for children as a body with no individual representation (this will

¹³⁰ SOU 1999:65, p. 19

¹³¹ §1 in the lawproposal of the Review Committee, see SOU 1999:65, p. 23

¹³² BO Remissvar, p. 5 and 10

¹³³ G. Lansdown, *Ombudwork for Children*, Innocenti digest, UNICEF, 1997, p. 20

hereafter be called collective advocacy). Pursuant to the Ordinance containing Standing Instructions for the Children's Ombudsman, Section 2, the Office of the Swedish BO shall, within the scope of its responsibilities,

1. initiate measures for asserting the rights and interests of children and young persons,
2. represent and support children and young persons in public debate,
3. propose to the Government the legislative changes or other measures needed in order for the rights and interests of children and young persons to be provided for, and
4. initiate the co-ordination of public measures of prevention in the context of child safety.

The Office of the BO shall devote special attention to questions relating to children and young persons at risk. The Office of the BO shall in the course of its activities give information of the Convention on the Rights of the Child, maintain contacts with children and young persons and with voluntary organisations, public authorities etc., and shall actively observe research and development work relating to children and young persons. Section 3 states that the Office of the BO shall present to the Government an annual report on its activities of the preceding year.

Other Ombudsmen for Children promoting the rights of children as a body, are the OC in Iceland, Denmark and Germany. As such they are fundamentally different in nature from the traditional concept of ombudsmen, for whom the individual casework is the core function. OC falling in the second category are from Norway, New Zealand, South Australia and Costa Rica, while the first category include the OC in British Columbia (Canada), Finland, Israel and Peru.

The three categories reflect the existing ideas and arguments concerning the kind of functions an Ombudsman for Children should have in order to be efficient. These arguments will be dealt with later on. Because of the differences in opinion about whether an OC should deal with individual or collective advocacy it is now time to take a closer look at the two approaches. Collective advocacy will be described and discussed in more detail, since this will be the base for the comparison between the functions of the BO and the recommendations on the performance of the functions constituting collective advocacy.

7.2.2.1. Individual advocacy

Individual advocacy can be carried out in many different ways. It can be done by seeking effective implementation of the law, ensuring that children's complaints are properly investigated, or by seeking changes in legislation to give effect to those rights. By giving examples of individual advocacy this function will be illustrated.

The Commissioner for Children in **New Zealand** can inquire into any matter relating to the welfare of children and has special responsibilities to investigate actions of the “Children, Young Persons and their Families Service” (CYPF Act, para. 411). Anyone may bring a case to the Commissioner. Complaints may concern individual children or issues that affect groups of children. There is one important exception though, the Commissioner does not have the right to investigate any decision or recommendation made by a Court. If the Commissioner accepts the complaint, full details will be asked for. In case of further investigation, a report from the person or organisation being complained about is requested. After examining all relevant information, the Commissioner gives a written opinion to both parties. When the complaint turns out to be justified, the Commissioner may make recommendations according to what is likely to be in the best interests of children. In some cases a report to relevant authorities is given. The Commissioner is however not allowed carrying on a lawsuit on behalf of children generally or in specific cases. Neither has he got the power to enforce his decisions.¹³⁴

A recent case shows how the Commissioner himself can react. The result of a paternity test was revealed live in a New Zealand TV program, in presence of the six-year old child affected by the result. The Commissioner complained that the broadcast violated the right to privacy of the child. The program did not have the best interests of the child at heart, since it failed to consider the consequences of the revealed information. Also, the child was incapable of giving informed consent to the broadcast. This privacy complaint was upheld by the Broadcasting Standards Authority for several reasons, one of which was out of concern for the Convention of the Rights of the Child. “The child’s interests were compromised to his detriment.” TVNZ was ordered to broadcast a summary of the decision and also pay NZ\$ 3500 to the Crown.¹³⁵

Also the **Norwegian** OC accepts individual complaints from anyone, with two notable exceptions: complaints concerning the situation of a child within the family and complaints on judicial or administrative decisions. The OC is moreover not entitled to engage himself in individual cases, as the New Zealand Commissioner.¹³⁶ Instead the OC can provide information to facilitate the complainant’s efforts to obtain redress. The OC can also make a public statement designed to draw attention to a particular state of affairs or propose a change in regulations or legislation.¹³⁷ For example the OC can, in a case regarding an individual

¹³⁴ Brochure “Making a complaint”, which was received from the OC in New Zealand

¹³⁵ CHILDREN Newsletter, No. 31, 1999, p. 3 (from New Zealand)

¹³⁶ M. Sjögren Westerlund and H. Hammarskjöld, Children’s Ombudsman: a survey, 1995, p. 36

¹³⁷ M.G. Flekköy, Working for the Rights of Children, Innocenti Essays, No 1, UNICEF, Florence, 1990, p 12

child, influence public entities such as schools and social services. In the Instructions for the Norwegian Commissioner for Children, rules for how to deal with cases are found. They concern how cases are taken up; rejection, referrals and shelving of cases; and how the Commissioner should make statements on cases.

The **Finnish** OC is a legal counsel, who is competent to handle individual cases concerning children's rights. This function reflects the view of the Mannerheim League that children can not have rights without means of legal redress. In the case of an alleged violation against a child, the OC analyses whether the child has been given adequate legal protection. The OC examines, for instance, if the child has been heard, if consideration to the best interests of the child has been taken, if the Child Convention has been taken into account, and if the child has received adequate care after the violation. There are several methods used by the OC when dealing with cases, that anyone can initiate. Some of them are to give legal advice, give guidance to the proper institution, meet and listen to children, participate in the consultations with authorities, report offences to the police, serve as witness, expert or counsel in court, assist in the preparation of complaints to the Finnish Parliamentary Ombudsman, and undertake special measures of legal protection like appealing to the European Commission of Human Rights.¹³⁸

A quotation from the OC in Israel will speak for itself: "I dealt with every small complaint... If all small complaints could be dealt with successfully, there would be fewer bigger complaints".¹³⁹

As shown, the individual case-work can be carried out according to different models. The Paris Principles deal with the possibility to give national human rights institutions, as they call it, quasi-jurisdictional competence. If a national institution is authorised to hear and consider complaints and petitions concerning individual situations, that may be brought before the institution by anyone, this function may be based on the following principles:

- "a) Seeking an amicable settlement through conciliation or, within the limits prescribed by law, through binding decisions or, where necessary, on the basis of confidentiality;
- b) Informing the party who filed the petition of his rights, in particular the remedies available to him, and promoting his access to them;

¹³⁸ H. Molander, *A Child Against the State: Tasks of the Children's Ombudsman*, In E. Verhellen (ed.), *Monitoring Children's Rights*, 1996, p. 578

¹³⁹ M. Horowitz, in M.G. Flekköy, *Models for monitoring the protection of children's rights*, Meeting Report, UNICEF, 1990, p. 38

- c) Hearing any complaints or petitions or transmitting them to any other competent authority within the limits prescribed by law;
- d) Making recommendations to the competent authorities, especially by proposing amendments or reforms of the laws, regulations and administrative practises, especially if they have created the difficulties encountered by the persons filing the petitions in order to assert their rights.

In the UN Handbook, rather detailed guidelines on the structure and functioning of the complaints mechanism are given¹⁴⁰, from which some important points will be presented here. As usual, an OC can be seen as a national institution and it is recommended that the complaints procedure is regulated in law.

In the settlement of what kind of complaints that will be accepted for investigation, both the object matter (the entity or group of entities against which the complaint can be made) and the subject matter (the type of action which can be the basis for the complaint) must be determined. It is generally accepted that the person against whom the alleged violation occurred should lodge a complaint. Nevertheless, when that person is a child, it is essential that a third party can lodge the complaint. Class actions should also be considered.¹⁴¹ A complaint should usually be submitted as a written statement, although there should be capacity to receive and act on oral complaint. The lodging of a complaint should incur no direct or indirect costs and should in total be easy to make. Anonymous complaints should not be permitted, but confidentiality should be ensured. In case the complaint does not fulfil the conditions for admissibility, the complainant should be informed of the reasons for the rejection.

During the investigation of the merits of a complaint the OC needs trained staff, sufficient financial means and both investigative and adjudicative powers. Sometimes, a settlement through conciliation can be encouraged and achieved, and an investigation is not needed. If a violation of children's rights is confirmed by the investigation, there are different ways for an OC to take remedial action. A recommendation may be submitted, proposing for example the adoption of measures to prevent, or lessen the effects of, the violation. Failure to take account of the recommendation may entitle the OC to refer the matter to another body for consideration. Another remedy would be to order the reversal of a particular administrative

¹⁴⁰ UN Handbook, p. 28-35

¹⁴¹ The meaning of a class action is that an individual affected by a violation is able to complain not only on his behalf, but also on behalf of others who are similarly affected.

decision. The strongest remedial action an OC can take is to make legally enforceable orders and binding decisions. Also, the OC should be able to publicise the results of an investigation and conciliation.

In addition to act on complaints, the OC-Office should have the capacity to initiate its own investigations (*suo moto*). In that way the OC can contribute to ensure that a vulnerable group, like children, is given a public voice and that violations of children's rights become a matter of general knowledge and concern.

7.2.2.2. Collective advocacy

Also collective advocacy can be carried out in different ways. Promoting awareness of children's rights; encouraging or undertaking research and; influencing law, policy and practise to achieve greater compliance with children's rights are functions that should be undertaken by an OC in order to be efficient according to Lansdown.¹⁴² The UN Handbook mentions the tasks of advising and assisting government, and promoting awareness of and educating on human rights. The Paris Principles recommend a national institution to have similar responsibilities. These functions are examples of collective advocacy and they will be examined below, divided as by Lansdown. The examination will describe each function and present the recommendations on how the function should be performed in order to make the OC efficient.

1) Promoting awareness of children's rights

For children's rights to be realised people in society need to know about the rights of children. It is stated in Article 42 of the Child Convention, that "States Parties undertake to make the principles and provisions of the Convention widely known, by appropriate and active means, to adults and children alike." A central task for the OC must therefore be to promote awareness of children's rights and how those rights can be enforced.

A prerequisite for the OC to be efficient in promoting awareness of children's rights is that the OC-Office is **visible** and **accessible** to everyone in society. To achieve a high visibility the OC should ensure that his existence is widely known in newspaper, television and radio circles. Also the distribution of facts about the OC-Office and the proceedings and results of its work will promote the visibility of the OC, as will the co-operation and support of other

¹⁴² G. Lansdown, Ombudwork for Children, Innocenti digest, UNICEF, 1997, p. 14

entities, including government departments and NGOs.¹⁴³ In order to be visible and accessible to children, the OC needs to be non-bureaucratic and to address himself directly to children. Information about the OC needs to be written explicitly for children and promoted through all channels that will attract their attention. The OC also needs to ensure that he is a voice for all children.¹⁴⁴

Another way of securing visibility of and access to the OC is to have regional or local offices of the OC. When local branches of the OC were discussed in Norway, the counterarguments were connected with the rule against involvement in family conflicts and the fact that there were already municipal and county services to help with such problems. Yet, a national OC with no local branches might be insufficient in terms of not being close enough to existing problems. Also, for true monitoring, the OC needs to be near the decision making level, whether it is on the municipal, county, region or state level. However, a national OC is always needed, because every country has national administration, politicians, and legislation important for conditions for children, often setting the limits for what can be done on a local level.¹⁴⁵

Promotion encompasses a wide range of activities. What will be dealt with here is dissemination of information and influencing of public opinion. The difference between the two is that the former is more neutral while the aim of the latter is to develop values and attitudes that uphold children's rights. A few words will also be said about the education and other forms of active learning about children's rights.

To be able to **disseminate information** about children's rights, the OC has to collect or produce information. It should already here be mentioned that the collection of information about children and their rights is essential also when carrying out the other functions within the scope of collective advocacy. Information can, for example, be obtained from UN and other intergovernmental organisations and NGOs dealing with children's rights. The advantage of producing own materials is that the OC can incorporate realities in a way, which make these materials more accessible than those produced elsewhere. The information stock should include the fruits of OC's work, for example different reports and recommendations, and the results of research encouraged or undertaken by the OC. However, the collection and production of information are of little value in the absence of a strategy that ensures an effective dissemination of the information. For example, appropriate target audiences should

¹⁴³ UN Handbook, p. 20

¹⁴⁴ G. Lansdown, Ombudwork for Children, Innocenti digest, UNICEF, 1997, p. 28

¹⁴⁵ M.G. Flekköy, in E. Verhellen and F. Spiesschaert (eds.), Children's rights: monitoring issues, 1994, p. 20-21

be identified. Maybe the development of a children's rights culture within society should begin with its youngest members. Furthermore the material should be available in different languages if needed.¹⁴⁶

Also the opinion of people concerning the status of children may require a change. For an OC to **influence public opinion**, information should be disseminated together with well-founded arguments expressed by the OC.¹⁴⁷ The Icelandic OC shall, according to Article 3 in the OC Act, "strive to ensure that the rights, needs and interests of children are given full consideration by public authorities, individuals, societies...In particular the Ombudsman shall take the lead in promoting policymaking discussion on children's matters among the public". In New Zealand the OC is responsible, for increasing public awareness of matters relating to the welfare of children (para. 411g in the CYPF Act). Public statements or other utterances can be made, as long as the OC does not make any comment, that is adverse to any person, unless this person has been given an opportunity to be heard (para. 414).

To increase the efficiency, an OC-Office should identify the areas of its promotional programme, which would benefit from media involvement. The **media** can assist the OC in different ways, one of which is to highlight a particular child issue and express the opinion of the OC concerning the issue.¹⁴⁸

In addition to the above mentioned promotional strategies the Ombudsmen for Children can play a valuable role in **educating** various groups about international and national children's rights standards. They can also go further by developing **training courses**, which transform knowledge about children's rights to operational skills.¹⁴⁹ The Child Committee has consistently urged States Parties to ensure that professionals working with children (for example teachers, social workers, police, judges, doctors and nurses) are trained in the principles and implications of the Convention.¹⁵⁰ In **seminars**, the OC can bring together key people to discuss children's rights. This will stimulate the exchange of thoughts and ideas and could lead to increased co-operation on important issues affecting children.¹⁵¹

The first Norwegian OC considered advocacy via the spread of information and case presentation as his principal weapons, since she had no decision making power or any possibility to revoke the decisions of other authorities. In this way she sought to increase

¹⁴⁶ UN Handbook, p. 18-20

¹⁴⁷ E. Verhellen and F. Spiesschaert (eds.), Children's rights: monitoring issues, 1994, p. 6

¹⁴⁸ UN Handbook, p. 19

¹⁴⁹ The UN Handbook recommends in detail the target audiences for training and also the steps that should be followed in order to make the training efficient, see p. 21

¹⁵⁰ G. Lansdown, Ombudwork for Children, Innocenti digest, UNICEF, 1997, p. 19

¹⁵¹ UN Handbook, p. 22

public knowledge and change the opinions and attitudes of others in such a way as to improve the situation of children.¹⁵²

2) Encourage or undertake research

Another function for the OC should be to **identify gaps** in the information that is needed to evaluate the compliance of a State with the Child Convention. The OC should then **undertake, commission or encourage research** to fill these gaps. The UN Child Committee has consistently argued that without effective data collection it is not possible to assess the extent to which the Child Convention has been implemented. It has also expressed concern at the failure of many governments to take appropriate steps to ensure that necessary information is gathered.¹⁵³ Most countries, for example, still have to carry out the task of establishing an ethnography of children.¹⁵⁴

Pursuant to the Paris Principles, the OC should assist in the formulation of programmes for research on children's rights and take part in their execution in schools, universities and professional circles. The Norwegian OC collects data and information regarding various research projects about children, but has been criticised for not performing any own research. The establishment of a special research branch could strengthen the Norwegian office.¹⁵⁵ In New Zealand on the other hand, the CYPF Act requires that OC undertakes and promotes research into any matter relating to the welfare of children and young persons.

3) Influencing law, policy and practise to achieve compliance with children's rights¹⁵⁶

The content of this function can be summarised as follows. To identify breaches of children's rights, the OC should **monitor the existing and proposed legislation** and furthermore **give assistance in the drafting of new legislation**. In addition to reviewing legislation, the OC should also **keep surveillance upon the policy and practise** in society concerning children. To fulfil the latter task, the OC needs to know the activities of both central and local government and both public and private agencies and other entities. This task can be of practical benefit and may result in improvements in the day-to-day situation of children. Breaches of children's rights can also relate to the allocation of resources, why this should come under the supervision of the OC as well. The role of the OC, when monitoring legal,

¹⁵² M.G. Flekköy, in E. Verhellen and F. Spiesschaert (eds.), *Children's rights: monitoring issues*, 1994, p. 13

¹⁵³ G. Lansdown, *Ombudwork for Children*, Innocenti digest, UNICEF, 1997, p. 18

¹⁵⁴ E. Verhellen and F. Spiesschaert (eds.), *Children's rights: monitoring issues*, 1994, p. 4

¹⁵⁵ M.G. Flekköy, in E. Verhellen and F. Spiesschaert (eds.), *Children's rights: monitoring issues*, 1994, p. 20

administrative and other measures, is too see if they are compatible with domestic children's rights and the principles and standards of the Child Convention.¹⁵⁷ Also possible concluding observations from the UN Child Committee will provide the international framework for this control.

In case a law, policy or practise fails to respect the rights or interests of children, the OC should propose measures to remedy the failures and thereby influence measures, taken by different entities, to be in greater compliance with children's rights. Dr. Hassall claims that "the reason for lodging such a function in an OC-Office is that children's interests are notoriously overlooked or squeezed out as adult parties and interests contend in the development and execution of law, policy and practice".¹⁵⁸

For the OC to monitor law, policy and practise concerning children effectively, the OC should be given the task to advise and assist parliament and government, with the organs belonging to them, in children's rights issues. Considering the presumed expertise in the field of children's rights an OC should be granted a broad advisory role, that is a right to be consulted. A Code of Consultation, stating the circumstances in which the OC should be consulted about policies and actions likely to affect children directly or indirectly, would be valuable.¹⁵⁹ It is of further importance that the OC is able to give advice both at request and on his own initiative.

Also the Paris Principles give support for the OC to promote and ensure the harmonisation of national legislation, regulations and practises with the Child Convention and its effective implementation. Recognised is further the right for a national institution to "submit to the Government, Parliament and any other competent body, on an advisory basis either at the request of the authorities concerned or through the exercise of its power to hear a matter without higher referral, opinions, recommendations, proposals and reports on any matter concerning the promotion and protection of human rights;...".

A capacity to advise is however of little value in case the recipient is not willing to consider and act on the recommendations it obtains. The OC should thus be ensured that appropriate attention is paid, by the government and other entities, to the recommendations given by the OC. For example, it can be established in law that the Government has to present the

¹⁵⁶ This sub-chapter is based on the UN Handbook, p. 23-27 and G. Lansdown, *Ombudswork for Children*, Innocenti digest, UNICEF, 1997, p. 15, unless nothing else is stated

¹⁵⁷ Not all OC have as their mandate to monitor the implementation of the Child Convention. However, since all countries that have established an OC have ratified the Child Convention, the OC should take the provisions in the Child Convention in consideration when monitoring the implementation of national children's rights.

¹⁵⁸ The statement of Dr. Hassall, former Commissioner for Children in New Zealand, was found in M. Sjögren Westerlund and H. Hammarskjöld, *Children's Ombudsman: a survey*, 1995, p. 44

recommendations in Parliament together with an indication whether, and if so how, it intends to take action. If the recipients of the recommendations decide not to follow the advice given by the OC, they should publicly explain why.¹⁶⁰ It can be useful for the OC to keep a record of the follow-up by Government on the recommendations of the OC. An Ombudsman for Children should, however, not have direct control over any area of policy in respect of children. It would not be constitutionally appropriate that an unelected official could make binding recommendations on elected bodies that are accountable for voters.¹⁶¹

An OC can also influence law, policy and practise by making concrete policy proposals and lobbying.¹⁶²

According to both the UN Handbook and the Paris Principles, the OC should **contribute to the drafting of the State report** to the Child Committee and thereby influence the implementation of the Child Convention. The OC-Office, by virtue of its particular expertise, is hopefully in position to ensure that the reports are accurate and detailed. This would in turn ensure that the submitting State receives maximum benefit from the expertise of the Committee. The UN Handbook mentions three models in which the OC would have different roles. In the first model, the OC should supply information to the Government on children's situation in the country. The role of the OC in the second model would be to review the draft of the State report to control its accuracy and completeness. Again, the Government should give due consideration to the OC's comments. According to the third model the OC himself should be entrusted with the task to draft a State report, which in turn should be examined by the Government, before it is sent to the Child Committee.¹⁶³

There are some controversies about whether the OC should only contribute to or actually write the State report himself without interference of the Government. To avoid the problem of being both "judge and jury", Verhellen suggests that States should not be allowed to write their own reports. Instead the best solution would be if every State had a national Child Committee, which independently could write these reports. Maybe the OC could have this function?¹⁶⁴ The Finnish OC is also in doubt whether the State is able to be objective in reporting on its own actions to the Child Committee.¹⁶⁵ It has been suggested that receiving

¹⁵⁹ R. Hodgkin and P. Newell, *Effective Government Structures for Children*, 1996, p. 105

¹⁶⁰ *ibid.*

¹⁶¹ M. Rosenbaum and P. Newell, in G. Lansdown, *Ombudswork for Children*, Innocenti digest, UNICEF, 1997, p. 15

¹⁶² E. Verhellen and F. Spiesschaert (eds.), *Children's rights: monitoring issues*, 1994, p. 6

¹⁶³ UN Handbook, p. 27

¹⁶⁴ E. Verhellen and F. Spiesschaert (eds.), *Children's rights: monitoring issues*, 1994, p. 5

¹⁶⁵ H. Molander, *A Child Against the State: Tasks of the Children's Ombudsman*, In E. Verhellen (ed.), *Monitoring Children's Rights*, 1996, p. 586

this reporting function could strengthen the Norwegian OC. Flekkøy (the first OC in Norway) disagrees, saying that an OC should uphold his independence in relation to the government and not be given the responsibility for the national report to be submitted to the Child Committee. She also doubts whether a government can delegate this responsibility to an OC. In order to ensure that the State report contains all relevant material, the government should however collaborate with the OC.¹⁶⁶

7.2.2.3. Individual or Collective Advocacy?

As stated above not all OC-Offices undertake both individual and collective advocacy, which are interrelated with each other. For example, evidence of individual breaches will direct and inform the need for legislative change. In the following it will be examined whether the OC should undertake individual or collective advocacy, or even both types of advocacy, in order to be efficient.

O'Donnel is of the opinion that an OC should have at least two functions. The OC must be able to receive and investigate individual complaints but also to open an investigation without a formal complaint. He is, nevertheless, also recognising the important role of collective advocacy. To achieve the right balance between collective advocacy and handling individual cases is however difficult. In general, the emphasis on case handling will depend on the mandate. For example, if an OC is created to protect the rights of institutionalised children, handling individual complaints should be given a high priority. If the OC has a broad mandate, setting priorities may be more difficult. On one hand, opportunities to resolve structural or policy problems that have an impact on many children should not be overlooked. On the other hand, the OC should not neglect the needs of individual children who turn to the OC for help. No matter what priorities the OC have, they should ensure ways for children to express their own views on matters of concern to them, and convey to society the views of children. The right of children to be heard lies at the heart of the concept of children's rights.¹⁶⁷

Lansdown agrees that the opportunity for children to challenge breaches of rights is fundamental to the effective recognition of those rights. As shown earlier there are different models on how to tackle violations of children's rights. Due to the risk of being engulfed by casework, the vastness of the issues, and the non-binding nature of their decisions, the OC

¹⁶⁶ M.G. Flekkøy, *A voice for children: speaking out as their ombudsman*, Jessica Kingsley Publisher, UNICEF, London, 1991, p. 219

¹⁶⁷ D. O'Donnel, *Children's ombudsman and the promotion of children's rights*, Swedish Save the Children, Stockholm, 1996, p. 17

being personally responsible for responding to individual complaints is maybe not the most efficient model. A solution might be to develop opportunities for children to challenge breaches of their rights through independent complaints procedures. The role of the OC would then be to monitor the accessibility, availability, and effectiveness of such procedures. In addition, an OC should also advocate for children as a body if children's rights are to be monitored and promoted effectively.¹⁶⁸

Also Verhellen is of the opinion that children should be able to tell their stories in their own words. Only then can the OC be the authentic voice of the children and not just a voice speaking up for children. However, a national monitoring structure has to act on the basis of principles, rather than on a case by case basis. In this context an individual case can be dealt with when the case is principally important for other children in similar situations. Also, an approach based on principles means not getting buried in individual controversies. Children's interests can thus be best monitored as those of a group. The primary and most general function of an OC should therefore be to promote children's issues, trying to change both legislation and attitudes in society to the benefit of children¹⁶⁹

The scholars have obviously not agreed on what kind of advocacy an OC should undertake in order to be efficient. Also according to the international guidelines and recommendations it seems unclear whether the functions should include individual or collective advocacy. In the statements of the Child Committee concerning the functions of an OC, the concepts of promoting children's rights and monitoring the implementation of the Child Convention are repeated. On few occasions, the Child Committee has mentioned the function of individual advocacy. For example, as a comment to the State report of Nepal, the Child Committee encouraged the establishment of an OC "to monitor the realisation of the rights of the child and to deal with individual complaints relating thereto".¹⁷⁰ A national human rights institution should without doubt, as shown above, have functions corresponding to what in this thesis is called collective advocacy. When it comes to individual advocacy, the Paris Principles say that the responsibility for investigating complaints may, not shall, be granted.

The UN Handbook follows the same line, but maintains in the same time that the authority to investigate abuses, given to a national human rights institution, is an indication of the commitment of a government to respect human rights and of its willingness to take international and domestic obligations seriously.¹⁷¹

¹⁶⁸ G. Lansdown, *Ombudwork for Children*, Innocenti digest, UNICEF, 1997, p. 16

¹⁶⁹ E. Verhellen and F. Spiesschaert (eds.), *Children's rights: monitoring issues*, 1994, p. 6-7

¹⁷⁰ The comment to the State report of Nepal was found in SOU 1999:65, p. 99

¹⁷¹ UN Handbook, p. 28

Considering the differences in opinion on what functions an OC should have and the different functions the OC do have, it seems to be difficult to stipulate whether an OC should deal with individual or collective advocacy or even both. The fact that there are many different models of individual advocacy makes the question even more difficult to answer. It is worth to bear in mind though, that even if not all functions are being carried out by an OC, there might well be a need for them all.

7.2.2.4. The BO and Individual Advocacy

The functions of the BO do not include individual advocacy. Some debaters felt that a BO with no responsibility to support individual children would be powerless and regarded as a cop-out for the Government and Parliament. It was feared in particular, that children would regard their own Ombudsman as ineffective and would quickly lose interest in the whole idea. The arguments against handling individual cases were several. Sweden already had, for example, social authorities, whose task was to intervene for the protection of individual children. Besides, the activities of these authorities came under the scrutiny of the Parliamentary Ombudsman. If the BO should have similar duties there would be a risk of collisions and duplication between the BO and the two entities. Individual cases would also probably have swamped the Office of the BO and there were not enough resources to deal with the caseload.¹⁷² Hence, it was decided that the BO should work in a general field and consider children as a group when promoting their rights.

Nevertheless, the BO will still be able to receive individual questions concerning children's rights and interests, but when answering them, the general focus should be used. This means that BO can direct the individual to the competent authority or tell him how the Child Convention, according to the BO, should be interpreted. The BO will however not intervene in individual cases by proposing, for example, how a conflict should be solved between the child and another individual or between the child and an authority. The BO will furthermore take an individual case in consideration when it highlights principles, on which changes in law or in official routines should be based.¹⁷³

The opinion of the Review Committee is, due to the same reasons as mentioned above, that the BO should continue with collective advocacy only.¹⁷⁴ As long as the Child Convention constitutes the point of departure for the work of the BO, the BO herself is of the opinion that

¹⁷² L. Sylwander, in S. Jeleff (ed.), *The child as citizen*, Council of Europe Publishing, 1996, p. 45

¹⁷³ Proposition 1992/93:173, p. 11

¹⁷⁴ SOU 1999:65, p. 183

it is more expedient with collective advocacy. Still, the individual cases are useful information sources and can be used as a base for general statements.¹⁷⁵ With regard to the disagreement about whether an OC should handle individual cases or not, it is difficult to judge whether the lack of individual advocacy, as in the case of the BO, is in line with recommendations on how to make an OC efficient.

7.2.2.5. The BO and Collective Advocacy

The remaining issue to investigate in this chapter is whether the collective advocacy of the BO corresponds to the recommended collective advocacy discussed above. This question will be examined through an analysis of what the legal documents and their preparatory work say about the content of the functions of the BO. The activities in practise of the BO will not be dealt with. For the reader to be able to make a comparison between the recommended collective advocacy and the collective advocacy of the BO, the same disposition, as was used in the chapter concerning collective advocacy, will be used here.

The first function included in collective advocacy, in this thesis, is to **promote awareness of children's rights**. As stated above, the first prerequisite in order to be efficient when performing this function is that the BO should be visible and accessible. According to a poll 1997, 41 % of children, 60% of adults, and 91% of the decision-makers had heard of the BO. Among those who knew that the BO existed, three of four were acquainted also with the Child Convention.¹⁷⁶ An explanation to the fact that only two children of five know of the BO, could be that the efforts of the BO, during the last six years, have been directed mainly to politicians and decision-makers.¹⁷⁷ Furthermore, the BO has no local offices, which also limits the visibility and accessibility.

To promote awareness of children's rights effectively it is, as shown above, of importance to disseminate information and influence public opinion. The task of the BO to disseminate information about the Child Convention and the rights therein, is explicitly stated in the Ordinance of the BO. The purpose of this task is, as with the dissemination of all civic information in Sweden, to supply knowledge of rights and duties and thereby to increase the possibilities of the citizens to have an effect on the development of society.¹⁷⁸ Hence, within

¹⁷⁵ BO Remissvar, p. 10

¹⁷⁶ The poll was requested by the BO and undertaken by SKOP 1997. The numbers were found in SOU 1999:65, p. 141

¹⁷⁷ SOU 1999:65, p. 141

¹⁷⁸ SOU 1969:48, Vidgad samhällsinformation, p. 8

the scope of this task is not only to disseminate information about children's rights, but also to influence the public opinion in a way that the attitudes and the behaviours of the citizens show respect for children and their rights.¹⁷⁹

To be able to perform this function, the BO has to collect or produce information. The value of being up to date with research will be discussed later. It has already been mentioned that it is important for the legitimacy of the BO to have a solid and genuine knowledge about the situation of children also when performing the other functions.

In this section, collection of information through contacts and co-operation with appropriate authorities and organisations and not the least children themselves, pursuant to the Ordinance, will be dealt with. The opinion of the Review Committee is that the BO should represent children by using their own perspective as a point of departure, since they should be the experts talking about their own life situation. Thus, in order to be an authentic voice for children and thereby maintain the perspective of children, the BO should in the first hand collect information from children.¹⁸⁰ Direct contacts that the BO has with children are through the Internet, the telephonenumber "BO Direkt", specific projects, inquiries and interviews.¹⁸¹ Parents and professionals working with children, as well as authorities and organisations, which are in contact with children, are other important sources of information for the BO.

According to the Review Committee, the sources of information used by the BO are connected to assignments given to the BO by the Government through, for example, regulation letters. As a consequence, information has been collected from research-results, statistics, authorities and organisations dealing with children rather than directly from children. To be able to represent children the Review Committee therefore suggests that law confirms a continuous contact between the BO and children. In addition, to secure that the BO has a wide net of information sources, which follows the spirit of the Paris Principles, the task to maintain contacts with organisations, authorities and, local governments among others should also be stated in law.¹⁸²

The BO herself does not fully agree with the proposal of the Review Committee. It has already been mentioned in the chapter concerning the mandate that the BO prefers to

¹⁷⁹ There are especially two problems with evaluating the effects of dissemination of civic information. First, it is difficult to measure if the civic information has led to any changes in accordance with the aims. Second, if changes have occurred, it is difficult to assess whether the change is due to the civic information disseminated by the BO. For more information on these matters, see SOU 1999:65, p. 140.

¹⁸⁰ SOU 1999:65, p. 158. To have direct contact with children, when promoting awareness of children's rights, instead of relying on presumptions on what children think or feel, is also an effective way of implementing Article 12 of the Child Convention: the child's right to be heard.

¹⁸¹ SOU 1999:65, p. 148

¹⁸² SOU 1999:65, p. 205

represent the rights and interests of children rather than the children themselves. In any case, concerning the question on which sources of information the BO should use, the BO agrees with that the own views of children are significant. However, to collect representative information from children is very resource consuming. Moreover, the issues that interest children are often linked to the local environment, for example the school, the playground and the traffic. Since it is difficult for the BO to push these kind of questions on a national level, the BO should instead ensure channels, through which children can express their opinions. Finally, when BO is working with questions of legislation, it can not be expected that children can give opinions on legal problems. As a consequence, the BO is of the opinion that what should be stated in law, as one of the functions of the BO, is that information about children's life situation shall be gathered, not from whom this information should come.¹⁸³

Together with collecting information, the BO has also produced own material, in the form of different handbooks and information brochures among other publications.¹⁸⁴

As mentioned above, the collection and production of information is of little value without strategies on how to disseminate the information effectively. Except for a reference to the statistics in the beginning of this section and saying that the task of one staffmember of the BO is to formulate strategies for influencing public opinion¹⁸⁵, this question will not be further dealt with.

A few words will also be said about the aim with disseminating information: influencing public opinion. It is stated in the Ordinance that BO shall represent and support children in public debate. This is done in several ways and often through media, for example awareness campaigns, debate articles, and public appearances. During the performance of this function, the BO has been criticised for not being objective. The reaction of the Review Committee towards this criticism is that the function of the BO should only be to have children's rights and interests at heart, when calling attention to issues affecting children. The responsibility of balancing the rights and interests of different groups in society lies on local and national decision-makers, and not on the BO. Therefore the Review Committee suggests that law should confirm the functions of the BO to inform, influence public opinion, make statements and take initiatives to, for example, seminars, hearings, and investigations.¹⁸⁶

¹⁸³ BO Remissvar, p. 6 and 12. From whom the information comes is, according to the BO, a question linked to the method of operation, rather than to the functions.

¹⁸⁴ See SOU 1999:65, p. 46-49 for the entire list of publications

¹⁸⁵ Delrapport av Organisationskommittén för inrättande an en Barnombudsman, 1993, p. 13

¹⁸⁶ SOU 1999:65, p. 211

A legal right for the BO to make statements and take initiatives was proposed already by the investigative committee. According to the Governmental proposal, it was inherent in the nature of an authority to have this kind of functions, why they did not have to be stated in law.¹⁸⁷

The BO herself, on the other hand, agrees with the proposal of the Review Committee to confirm the right to make statements and take initiatives by law. She is, however, in doubt concerning the confirmation of influencing public opinion by law, since the results of the latter function are difficult to evaluate, without carrying through costly inquiries.¹⁸⁸

Finally, when it comes to educating about children's rights, this is not a task given to the BO. Nevertheless, it is decided in the National Strategy (mentioned on p.11) that, future professionals working with children should be educated and trained in the rights of children.

The next function that should be included in the work of collective advocacy, according to the stated recommendations above, is to **encourage or undertake research**. There is no explicit requirement for the BO to encourage or undertake research, as there is for example for the OC in New Zealand. Instead, the Ordinance gives the BO the function to actively observe research and development work relating to children. This function was meant to fulfil the need for the BO to have knowledge about research affecting children when participating in the public debate, answering questions, making statements, and commenting on law, policy and practise.¹⁸⁹

According to the Review Committee, the role as observer is too difficult and time consuming and should therefore be modified in terms of encompassing only research concerning the Child Convention and its implementation. It is also suggested that law confirms this function. Within the scope of this task the BO is to highlight those aspects of the Child Convention, that have not been subjected to investigation and evaluation. The BO should encourage the research on these aspects, since such research will make it easier to assess the extent to which the Child Convention has been implemented.¹⁹⁰ With this proposal the BO is given, in accordance with the recommendations above, the function to both identify gaps in the information needed in order to see if the Child Convention is being realised and encourage research to fill these gaps.

¹⁸⁷ Proposition 1992/93:173, p. 13

¹⁸⁸ Bo Remissvar, p. 12

¹⁸⁹ SOU 1991:70, p. 62 and Proposition 1992/93:173, p. 11

¹⁹⁰ SOU 1999:65, p. 200-202

The third and final function included in collective advocacy is to **influence law, policy and practise**. Since the Child Convention, according to Swedish tradition, can not be applied as Swedish law, the Government proposed that a special task for the BO would be to monitor the compliance of national legislation and other statutory instruments and their implementation with the provisions of the Child Convention. This task is included in what here has been called the mandate, but as said before, the mandate is not always easily separated from the functions. When the BO finds differences disadvantageous to children, they should be reported to the Government and the BO shall, in accordance with Section 2 in the Ordinance, propose to the Government the legislative changes or other measures needed in order for the rights and interests of children to be provided for. This function is recommended to be established in law by the Review Committee.¹⁹¹

The BO has however no explicit advisory role as recommended above. As a consequence neither a Code of Consultation, nor a legal duty for the Government to pay appropriate attention to the reports given by the BO exist. Important to note in this context is that the BO, according to the Swedish constitution, is a body to which proposed legislation affecting children is referred for consideration.

The BO should also make statements of principle on the compliance of law, policy and practise with the Child Convention, but is not allowed to point out activities or omissions of any entity or individual, as not being in compliance with children's rights. Such matters are to be transmitted to the Parliamentary Ombudsman or to the courts.¹⁹² Other ways for the BO to influence law, policy and practise is to give opinions on how Swedish law should be interpreted in order to be compatible with the Child Convention.

The question of the role of the BO in the drafting of the Swedish State report to the Child Committee is neither dealt with in the preparatory work, nor in the statutory instruments concerning the BO. However, the issue currently received interest when the BO delivered, in connection with the second Swedish State report (1997), a report on her own views of the life situation of children in Sweden to the Child Committee.¹⁹³ As was implicitly shown above, the UN Handbook does not say that national human rights institutions should deliver their own reports on the national human rights situation. In addition, according to the Review Committee it is, in principal, the Government that represents the State externally.

¹⁹¹ SOU 1999:65, p. 25

¹⁹² Proposition 1992/93:173, p. 10

¹⁹³ SOU 1999:65, p. 199

Therefore it is suggested that the BO should not present his own report to the Child Committee, but rather contribute to the State report in accordance with the second model (see p. 46). In reality, this means that the draft of the State report should be referred to the BO for comments and possible comments should then be attached to the final State report.¹⁹⁴ It is worth to mention that the Swedish Save the Children agrees upon the role given to the BO by the Review Committee.¹⁹⁵

The BO herself disagrees with this proposal. On the contrary, she argues that the BO should have an, in relation to the Government, independent role in the reporting procedure. Pursuant to Article 45 in the Child Convention the Child Committee may invite “competent bodies, as it may consider appropriate to provide expert advice on the implementation of the Convention in areas falling within the scope of their respective mandate”. The role of the BO in the reporting procedure should hence be a question between the BO and the Child Committee, and not decided by the Government.¹⁹⁶

In connection to the function of influencing law, policy and practise, the annual reports should be mentioned. It is stated in the Ordinance that the BO should, every year, present to the Government a report on his activities of the preceding year. The report conveys the views of the BO on the status and development of the Child Convention in Sweden from year to year. It also contains recommendations to the Government on how the compliance of Swedish laws, policies and practises can, according to the BO, be increased. Moreover, the report provides the Government with input documentation for its own reporting to the Child Committee. Least but not last, by drawing media attention to the questions that are raised in the annual report, it is used as a tool to influence public opinion.¹⁹⁷

7.3 Powers

The efficiency of the work of the OC can be strengthened also by giving the OC legal powers. As has been mentioned before it may not seem appropriate that unelected officials, like the OC, in democratic societies should have decision-making powers or powers to make binding recommendations on elected bodies. This does, however, not diminish the need to give the OC other kinds of powers that will make the OC more efficient. Power, in this context, refers

¹⁹⁴ SOU 1999:65, p. 200

¹⁹⁵ Remissvar på betänkandet (SOU 1999:65) Barnombudsmannen-företrädare för barn och ungdomar, Rädda Barnen, p. 3 (comments from the Swedish Save the Children on the report from the Review Committee)

¹⁹⁶ BO Remissvar, p. 12

¹⁹⁷ L. Sylwander, in S. Jeleff (ed.), *The child as citizen*, Council of Europe Publishing, 1996, p. 53

to the ability of an OC to perform a certain act or to compel such performance by an individual or other entity. With other words the powers must be enforceable.

The BO has been given no such powers. Nor the OC established within an NGO have, for logical reasons, any powers. They can however resort to take legal action when other methods do not seem sufficient, in contrast to other OC, who do not have the authority to file civil suits.

The OC in New Zealand has according to the Act all the powers as are “reasonably necessary or expedient to enable the Commissioner to carry out the Commissioner’s functions.” In practise this means for example that the Commissioner has the right to gain information that he finds appropriate. However, the only persons obliged to furnish OC with information are the staff of the Department of Social Welfare.¹⁹⁸ The legal powers of the Icelandic OC include access to all information necessary for performing his tasks, and free access to all institutions that deal with children in one way or another. In the event of a dispute concerning these powers the OC may take the matter to court. The same powers, as in Iceland, have been given to the Norwegian OC, with the exception that only authorities and institutions, not individuals, are obliged to provide information to the OC. In Costa Rica and Guatemala the OC have to turn to their respective superior Ombudsman and ask him to request information, since they do not have any powers of their own.

It is not useful, according to the UN Handbook, to set out a list of basic or even minimum powers with which an OC should be vested. Instead the OC must be granted adequate powers to permit the effective discharge of its responsibilities. Provision should also be made for the imposition of legal or administrative sanctions when the free exercise of a national institution’s powers is obstructed.¹⁹⁹

To conduct an efficient investigation of an alleged violation of children’s rights the following powers are recommended: Power to inform the object of the complaint of the allegations made, in order to permit that person or body to reply to such allegations; Free access to all documents necessary for the investigation; Power to compel the production of relevant information; Freedom to conduct on-site investigations if necessary; Power to call parties to a hearing; Power to grant immunity from prosecution to persons giving testimony or appearing as witnesses; Power to hear and question every individual, who can assist the investigation. For the latter purpose, power to summon witnesses and compel their appearance and to

¹⁹⁸ M. Sjögren Westerlund and H. Hammarskjöld, *Children’s Ombudsman: a survey*, 1995, p. 46

¹⁹⁹ UN Handbook, p. 13

receive evidence under oath, is necessary.²⁰⁰ Lansdown wants to give the OC the power to take or support legal action when it is not possible or appropriate for the child to do so on his own behalf.²⁰¹ As a method of operation the OC-Office shall “hear any person and obtain any information and any documents necessary for assessing situation falling within its competence” pursuant to the Paris Principles.²⁰²

It has been, and still is, a controversial issue in Sweden whether to give the BO legal powers or not. The Investigative Committee put in its lawproposal the power of the BO to have access to information under penalty of a fine. This power would point out the importance of the work of the BO and also increase the possibilities for the BO to receive information rapidly. It is important that questions from children can be answered as rapidly as possible, since they have another perspective of time than adults. The obligation to submit information to the BO would be due to any public or private entity, if this entity in any way is linked to the rights or interests of children, falling within the sphere of competence of the BO. Information concerning family and privatelife would be excluded.²⁰³

The Governmental bill, however, did not give the BO any powers at all. Since the BO was not supposed to work on an individual level, it was argued that powers were not needed either.²⁰⁴ In the report from the Review Committee it is again suggested that the BO should receive legal powers in order to be more efficient. This time, it is recommended that the BO should be able to request information, but only from public entities, which should also be obligated to join deliberations at the request of the BO. The purpose of the first proposed legal power is to facilitate the gathering of information of the BO on the activities affecting children’s rights and interests. Thus, the BO can more easily evaluate the implementation of the Child Convention. Deliberations would hopefully lead to an exchange of experiences, a collection of information, and furthermore play a role in the development of new attitudes. In addition, the BO should also have the power to acquaint herself with the documents of authorities and courts, also when they are confidential, when monitoring if their actions are in compliance

²⁰⁰ UN Handbook, p. 32

²⁰¹ G. Lansdown, Ombudwork for Children, Innocenti digest, UNICEF, 1997, p. 30

²⁰² It is not clearly stated in the Paris Principles, whether these powers are enforceable

²⁰³ SOU 1991:70, p. 81

²⁰⁴ Proposition 1992/93.173, p. 11

with the Child Convention.²⁰⁵ The BO herself, together with Rädsla Barnen, welcome the proposal to give the BO legal powers.²⁰⁶

8. Other Ombudsmen in Sweden²⁰⁷

A brief presentation of the other Ombudsmen in Sweden will serve to highlight some important similarities and differences between the BO and these Ombudsmen.

The Parliamentary Ombudsman of Justice (JO)

According to the Swedish constitution (RF 12:6) the Parliament appoints at least one Parliamentary Ombudsman to scrutinise the application of laws and other legal instruments in public bodies. The term of appointment is four years and a removal can only occur due to the lack of confidence in the JO of the Parliament (RO 8:10). The Parliament assesses from year to year the budget of the JO. A report from the JO is given annually to the Parliament. The work of the JO is regulated in the Act (1986:765) with Instructions for the Parliamentary Ombudsmen. A special task for this Ombudsman is to examine whether the activity of courts and administrative authorities is in compliance with the rules in the constitution about impartiality, objectiveness and the rights and freedoms of the citizens. Another task is to observe deficiencies in the legislation and come up with remedies. The supervision of the JO is carried out by examining complaints from the public together with inspections and other investigations that according to the JO are necessary. To be able to fulfil his tasks, the JO has the right to enter and inspect public bodies and he has the power to require individuals under penalty of a fine to give certain statements or information. A JO is moreover allowed to prosecute an official who, by neglecting his duties, has committed a criminal offence.

The Chancellor of Justice (JK)

The Chancellor is the Ombudsman of the Government according to the Constitution (RF 11:6). He is appointed and funded by the Government, which should also get the annual report. In the Ordinance (1975:1345) the Chancellor is given the task to observe the rights of the State. A whole range of other tasks are found in different legal instruments, one of which

²⁰⁵ SOU 1999:65, p 197-198

²⁰⁶ BO Remissvar, p. 9 and Remissvar på betänkandet (SOU 1999:65) Barnombudsmannen-företrädare för barn och ungdomar, Rädsla Barnen, p. 2 (comments from the Swedish Save the Children on the report from the Review Committee)

is to supervise the observance of the laws within public organs (Act 1975:1339) and another is to guard the freedom of press and speech.

The Consumer Ombudsman (KO)

Questions concerning marketing, conditions in consumer agreements, and safety of products can be directed to this Ombudsman, who is appointed by the Government and who should be a lawyer.²⁰⁸ The budget is decided by Parliament. Different Acts contain the tasks of the KO and his activity is to a great extent initiated by the public and affected parties. The KO has the powers to make impositions under penalty of a fine, plead a cause in court and also assist a consumer in court under some circumstances.

The Equal Opportunities Ombudsman (JämO)

The JämO was established to promote the equal rights of women and men concerning work, employment, and other working conditions in accordance with the Act (1991:433) of Equality. The JämO is appointed by the Government but gets its resources from the Parliament. According to the Ordinance (1991:1438) with Instructions this Ombudsman should induce the employers to follow the rules of the Equality Act. If this is not done in a voluntary way the employer could face an imposition under penalty of a fine from the JämO. The JämO also has the right, in some cases, to plead a cause in the Labour Court. Moreover, by informing the public or by other measures this Ombudsman should actively work in the interest of achieving equality in the working life.

The Ombudsman against Ethnic Discrimination (DO)

The DO, who is appointed by the Government, should act for that nobody gets discriminated due to race, colour, national or ethnic origin, or religion in working life or in other areas of society. The activities of this Ombudsman are to be found in two new laws. According to the first one, the Act (1999:130) on measures against ethnic discrimination in working life, the DO should promote ethnic manifoldness in working life and supervise the observance of this Act. Employers are for these purposes obliged under penalty of a fine to give requested information to the DO. In case of a dispute, the DO has the power to plead a cause of an individual employee in the Labour Court. This is valid also for a person in search for a job.

²⁰⁷ The presentation of the various ombudsmen in Sweden is based on the laws and decrees of each ombudsman, SOU 1999:65, p. 115-127, and The Swedish Ombudsmen, published by the Swedish Institute, 1998, found on <http://www.si.se/eng/esverige/ombude.html>

²⁰⁸ Lagen (1970:417) om marknadsdomstol, §11

The Act (1999:131) on the Ombudsman against ethnic discrimination gives the DO a consultative function to help discriminated persons to claim their right. The DO should also by discussions with authorities, companies and organisations together with information and influencing of public opinion take initiatives to measures against ethnic discrimination. Interestingly, the Government proposed during the drafting that the tasks of the DO outside the working life should be regulated in an Ordinance. But in order to make the DO more independent the tasks ended up in an Act instead on the proposal of the Arbetsmarknadsutskottet. The budget is assessed by the Parliament.

The Ombudsman for Disabled Persons (HO)

According to the Act (1994:749) on the Ombudsman for Disabled Persons, the task of the HO is to observe questions dealing with the rights and interests of disabled persons. The aim is to secure full participation of disabled persons in society and equality in the living conditions. In this work the HO is looking for imperfections in the legislation concerning disabled persons. Another function of the HO is to examine the compliance of the Act (1999:132) on the prohibition of discrimination in working life against disabled persons. This law is quite similar to the one of the DO and the functions and powers of the HO are on the whole equal to the ones of the DO. The HO can however, also require persons to join deliberations. The HO has moreover a broad mandate to maintain contacts with disabled persons and other valuable “sources of information”, and to be up to date with research and progress in the area of disability both nationally and internationally. This Ombudsman is appointed by the Government and funded by the Parliament.

The Ombudsman against Discrimination due to Sexual Orientation (HomO)

This last and latest Ombudsman is also appointed by the Government. The task of the HomO is to observe the compliance of the Act (1999:133) on prohibition of discrimination in working life due to sexual orientation. This law is quite similar to the discrimination-laws mentioned above concerning the functions and powers. In accordance with the Ordinance (1999:170) with Instructions for the HomO, the HomO should act for that discrimination due to sexual preferences does not occur in any area of society. This goal should be achieved via information, research, influencing of opinion, and proposing changes in legislation. The reason for establishing an Ombudsman in this area was according to the Government to change attitudes towards homo- and bisexuals in society.

8.1. Differences and Similarities

So far this chapter has shown that there are similarities between the eight different Ombudsmen in Sweden. But there are also fundamental differences. In the following some attention is paid to the independence, functions, and powers of the other Ombudsmen. This can serve as a comparison to the design of the BO. It is worth to note that the BO herself questions the differences between the various Ombudsmen. The opinion of the BO is that the same constitutional principles should found the design of the thematic Ombudsmen.²⁰⁹

Independence

Head of the JO is the Parliament, while for the thematic Ombudsmen and JK it is the Government. Also when it comes to the legal status there is a clear difference between the JO and the thematic Ombudsmen. The activities of the JO are regulated in the constitution and in an Act with Instructions. The other Ombudsmen, however, are established partly through regular Acts and partly through Ordinances with Instructions for each Ombudsman. The JK is somewhere in-between, since this entity is mentioned in the constitution, but its activities are found in several laws and decrees.

Functions

The function of the JO and the JK is strict legal supervision of the observance of laws and other legal instruments. Their work is concentrated on handling individual cases. Except for the duty to supervise, the JK should also supply the Government with advice and investigations in legal matters. The work of the JämO, DO, HO, BO, and HomO however focus on the monitoring of the implementation of certain legislation and to the realisation of obligations according to international human rights instruments. This work is done mostly by influencing of public opinion, consultations, and giving information. These Ombudsmen should also observe the development in their respective area, both nationally, especially regarding the application of the legislation, and internationally, for example within the UN, CoE and EU. The KO, JämO, DO, HO and HomO also handle individual cases. The BO is the only Ombudsman not having this function. Another significant difference between the JO/JK and the thematic Ombudsmen is that the latter all work with policy questions. They are all to promote the development of their own area, for example the BO should take initiatives to measures whose purpose is to claim children's rights and interests.

Powers

All the Swedish Ombudsmen, except for the BO, have the right to issue impositions under penalty of a fine, in case they for example do not receive requested information. The JO and the JK have the right to prosecute and the KO, JämO, DO, HO, and HomO all have the right to plead a cause in court. The HO has moreover an explicit right to request persons to join deliberations.

In summary the BO is different from the other thematic Ombudsmen in two respects. The BO can not handle individual cases and nor has the BO any legal powers. In these respects the BO has a weaker position as compared to the other thematic Ombudsmen. As discussed above, the JO can represent individuals, before court, whose rights have been allegedly violated by a court or authority. Also children can be represented by the JO. If the BO was given the function to handle individual cases, there would be an overlap in the activities of the BO with those of the JO. However, the other thematic Ombudsmen can plead a cause in court, and thus it should not be impossible to give the BO the same function.

9. Conclusion

My aim with this thesis is to investigate if the BO is an efficient tool in the implementation of the Convention on the Rights of the Child. Efficiency could refer to the ability of the BO to fulfil the functions within the scope of the mandate. From this definition follows that the mandate is the point of departure when evaluating the efficiency of the BO. The mandate of the BO is to observe any matter relating to the rights and interests of children. Especially the compliance of law, policy and practise with the Child Convention shall be observed. Thus, the first part of the mandate is not explicitly linked to the Child Convention and can therefore direct the work of the BO to other issues than those comprised by the Child Convention. The very broad mandate of the BO could be beneficial to the rights and interests of children, but not for the efficiency of the BO as a tool to implement the Child Convention. In practise however, the first part of the mandate of the BO will not make the mandate significantly broader, since the Child Convention encompasses a multitude of aspects concerning children's rights. In my opinion the mandate of the BO is unnecessarily broad, but still adequate, for the effective monitoring of the implementation of the Child Convention.

The provisions of the Child Convention are usually regarded as quite vague and can thus be difficult to implement. Since the Child Convention is not applicable as Swedish law, the

²⁰⁹ BO Remissvar, p. 2

provisions in the Child Convention have to be transformed into Swedish legislation, and thereby the provisions become more specified. This is due to the fact that Swedish laws are preceded by preparatory work, which indicate the aim of the law and how it should be interpreted. Furthermore, precedents support the interpretation of the law. All members of the Swedish society have to act in compliance with Swedish laws and there are several mechanisms ensuring that they do so. Importantly, a law can also play a major role in influencing public opinion.

The resources of the BO, like of any institution, are limited and therefore the attention of the BO should focus on especially important aspects within his mandate. In my view, to monitor the compliance of Swedish law with the Child Convention is of utmost importance for the implementation of the Child Convention and should constitute the main task for the BO.

An effective BO shall contribute to the realisation of children's rights stated in the Child Convention. To measure this efficiency is far from easy, since the Child Convention contains a complex range of issues. Moreover, even if the respect for children's rights has increased, it is difficult to establish a connection between the improved situation for children and the activities of the BO. One way to evaluate the impact of the actions taken by the BO would be to analyse how recommendations from the BO have affected decisions made by the Government. Such an evaluation could turn out to be very informative, but falls beyond the scope of this thesis.

Instead, to evaluate the efficiency of the BO, I have dealt with the design of legal aspects.²¹⁰ In my opinion an independent BO with a mandate, functions, and powers, that are adequate, has all the qualifications necessary to be efficient in the promotion and protection of children's rights. My view on the design of the mandate has already been presented in the beginning of this chapter. In the following I will discuss how the BO can gain independence and which functions and powers that are necessary for the effectiveness of the BO.

From the previous analysis I conclude that the BO is not independent from the Government. The lack of independence is due to that the BO is an authority placed under the Government and thus constitutes an entity through which the Government perform its policies. This is particularly unfortunate since the Government, as mentioned before, is the body that the BO should monitor most closely. In my opinion, the best solution to this problem would be to

²¹⁰ Also other factors, like the personality of the BO, influence his possibilities to be efficient. This has not and will not be dealt with in this thesis.

place the BO under the Parliament.²¹¹ However, this solution would lead to a deviation from the constitutional distribution of responsibilities between the Government and the Parliament. As shown above, the Parliamentary Ombudsman is fundamentally different from the BO, since his position is regulated in the Swedish constitution. To place the BO under the Parliament would thus require changes in the constitutional law.²¹²

To change the constitution is perhaps an unrealistic measure to strengthen the independence of the BO. An alternative solution, as the Review Committee agrees to, could be to increase the degree of independence of the BO in relation to the Government through additional legislation. This legislation should clearly state all the aspects of the appointment and removal procedures discussed above. Moreover, law should confirm the functions of the BO. It is of further importance for the independence of the BO, that the regulation letters do not interfere with the ability of the BO to make priorities of his own. This should include the freedom of the BO, both to set his own agenda and to design his own budget within the frame of his funds. The frame of the funds of the BO should, in my opinion, be decided by the Parliament and secured over a period of several years.

It can be argued that a close link between the BO and the Government will improve the possibilities for the BO to influence law, policy, and practise concerning children's rights. I, however, think that it is more important that the independence of the BO from the Government is evident, since this makes it easier for the BO to criticise the Government. An independent BO will also gain more public confidence.

As discussed above, there is no consensus on whether an OC should represent children as individuals or as a collective. My belief is that if the BO is to monitor the compliance of Swedish laws with the Child Convention effectively, the concept of collective advocacy is best suited. To represent children as individuals is very resource consuming and would

²¹¹ The role of the OC in New Zealand is linked to the implementation and monitoring of the CYPF Act. The OC is required, pursuant to the CYPF Act, to monitor if the performance of the Minister and the Department of Social Welfare is in accordance with the CYPF Act. When their action (or non-action) turns out to be adverse to the children involved, a conflict of interests will arise, since the OC is responsible to the Minister of Social Welfare. The ability to act on behalf of children is therefore, according to many, hampered. A Bill from 1992 aimed at strengthening the position of the OC, recommends in order to solve this problem that the OC should be established through a separate act and placed under authority of Parliament. The OC himself gives strong support for the Bill. In view of the present situation he does not see his Office being obviously separated from the body he is required to monitor, nor is he free from political interference.

²¹² All thematic Ombudsmen, except for the BO, have expressed wishes to be placed under the Parliament. See Article in Dagens Nyheter, the 9th of October, 1998.

prevent the BO from focusing on the key issue of monitoring the compliance of Swedish laws with the Child Convention.

A prerequisite for effective monitoring is that the BO maintains genuine knowledge about the situation of children in relation to the Child Convention. Information shall be obtained through communication and co-operation with entities dealing with the situation and rights of children. This process would, in my view, be highly facilitated if the BO was given enforceable powers. Like the other Swedish thematic Ombudsmen, the BO should have access to information and documents and be able to require persons to join deliberations. Another important source of information is the results of research in the field of children's rights. It is desirable that the BO promotes research on issues where there is a lack of information. If this function is to be carried out effectively, the BO needs additional resources to fund such research. Knowledge about children's rights can also be acquired by extracting the general principles from individual cases. Last but not least, according to the Child Convention, children have the right to be heard in any matter affecting them. Children shall therefore be a key source of information for the BO. Still, as discussed above, the BO seems to be of the opinion that obtaining information from children is too resource consuming. Perhaps, with regard to the focus of the BO on legal aspects, it is reasonable that the views of children are not the most important source of information.

The knowledge of the BO on children's rights and situation should provide a solid base when performing the functions of influencing law, policy, practice and public opinion. These functions are interrelated since a law affects public opinion, and a change in public opinion can lead to legislative changes.

When the BO performs the function of influencing law, policy, and practice it should be ensured that proper attention is given, by the recipient, to the recommendations of the BO. For example, in my view, the Government could be obliged to make a statement of intent in relation to the recommendations given by the BO in his annual report. If the Government disagrees with some of the recommendations the Government has to explain why in public.

To influence policy, practice, and public opinion the BO should have the right to make statements on any matter concerning the rights of children, except for those dealing with individual cases. Moreover, education of professionals working with children is of utmost importance to change public opinion in matters concerning children's rights.

I agree with the opinion of the BO that the Government should not interfere if the BO writes a report of his own on the situation of children's rights in Sweden to the Child Committee. This is a matter purely between the BO and the Child Committee. In the design of the State report a

dialogue between the Government and the BO is desirable. I feel that it would be of help, for the efficiency of the BO, if the Child Committee was more offensive when drawing up concluding observations on the State report.

A BO who only carries on collective advocacy will not fulfil all the needs for children in relation to the Child Convention. Other mechanisms should be established, especially to secure that the violated rights of individual children are remedied. I propose that one of the Parliamentary Ombudsmen should, within the scope of his mandate, be authorised to deal exclusively with alleged violations of children's rights. In principle, the JO can already today handle cases concerning individual children, but an exclusive focus on children would increase the accessibility of the JO for children. Moreover, on the local arena there should be prosecutors, specialised in the indictment of alleged violations of children's rights. Also, local Ombudsmen for Children can play an important role in helping children, the rights of whom have allegedly been violated. The work of the local BO should rely on co-operation and dialogue with local authorities and other entities. Some BO-offices were however established locally, for example the one in Lund dates back to 1986.

In conclusion the efficiency of the BO as a tool to implement the Child Convention can without doubts be improved. Most importantly, the independence of the BO should be strengthened and enforceable powers should be given to the BO.

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