

Anna CHAMRÁTHOVÁ\*

## How opinions of the Czech Ombudsman influence the decision-making of administrative courts

### 1. Introduction

One of the main roles of the Czech Ombudsman<sup>1</sup> is to defend persons against the wrongful conduct of authorities and other institutions exercising state administration.<sup>2</sup> A similar role is also ascribed to administrative courts. It is thus, due to the resemblance of their mission, possible to examine whether their opinions are alike and how they affect each other during their functioning. Since the Ombudsman has a very little option but to respect the judiciary opinions,<sup>3,4</sup> the paper shall focus on how the Ombudsman and their opinions can affect the decision-making of administrative courts. It will describe the possible means how the opinions of the Ombudsman can become known to the administrative courts and analyse their efficiency. Then it will focus on the difficulties occurring while trying to assess the efficiency and will mention possible improvements.

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\* Masaryk Univeristy in Brno.

<sup>1</sup> The official Czech term is the Public Defender of Rights.

<sup>2</sup> § 1 Public Defender of Rights Act (Law No. 349/1999 Coll., on the Public Defender of Rights, as amended).

<sup>3</sup> They themselves admitted the fact, e.g., in P. Varvařovský, et al., *Veřejné cesty – místní a účelové komunikace*, Brno 2011, pp. 14-15, 21 or 47-48.

<sup>4</sup> The jurisprudence in the Czech Republic is not officially the source of law but it gains very similar position in practice. See T. Pondikasová, *Postavení judikatury: nezávazná interpretace nebo pramen práva?*, [in]: M. Večeřa et al., *Nové trendy v soudcovské tvorbě práva*, Brno 2015, pp. 33-64.

## 2. Means of the Ombudsman's influence and their efficiency

To understand the position of the Czech Ombudsman towards the administrative courts, it is necessary to explain at least the basics of the system of Czech administrative courts. There are eight regional courts which have a department for administrative matters and thus represent administrative courts of the first instance. They deal mostly with the administrative actions of individuals against the activity of administrative authorities. The highest administrative judicial authority is the Supreme Administrative Court which, among other issues, deals with the cassation complaints against the decisions of regional courts in matters of administrative justice.<sup>5</sup> The Supreme Administrative Court issues about 3,500 decisions a year.<sup>6</sup> The important decisions of the Supreme Administrative Courts which ensure unity and lawfulness of decisions made by administrative authorities and administrative courts are published in the Court Reports of the Supreme Administrative Court. There may also be published decisions of regional courts which fulfil the described criteria.<sup>7</sup>

The means which the Ombudsman can apply to directly affect the decision-making of the Administrative Courts are very limited. They can file an action against the decision of administrative authorities in cases in which they are of the opinion that there is a serious public interest to file the action<sup>8</sup> or file some kinds of disciplinary actions.<sup>9</sup> The particular thing is that they can file an action against decisions of administrative authorities, not against other grievances as the inaction of the administrative authority or its unlawful interference. Such a kind of action was filed only once by the Ombudsman and there were many complications for them to win the case and persuade the court to agree with them.<sup>10</sup> Thus, this can be a very powerful tool of the Ombudsman, regarding their influence on the decision-making of the Administrative Courts; however, it remains nearly unused.

The means of indirect influence of the Ombudsman are more varied. First, the Ombudsman is among the institutions which decisions recom-

<sup>5</sup> <http://www.nssoud.cz/-p-General-Information-p-/art/557?menu=173>, Accessed: 2 November 2017.

<sup>6</sup> <http://nssoud.cz/main2Col.aspx?cls=Statistika&menu=190>, Accessed: 31 May 2017.

<sup>7</sup> *Intra* note no. 5.

<sup>8</sup> § 66 (3) Code of Administrative Justice (Law No. 150/2002 Coll., Code of Administrative Justice, as amended).

<sup>9</sup> § 1 (8) Public Defender of Rights Act. The paper is not concerned with these actions as they are closely related to individual specific cases and not to promoting general opinions of the Ombudsman.

<sup>10</sup> Judgement of the Supreme Administrative Court of Nov. 21, 2013, 9 As 122/2013-22, judgement of the Supreme Administrative Court of June 18, 2015, 9 As 294/2014-114 and judgement of the Supreme Administrative Court of July 14, 2016, 9 As 24/2016-109.

mended for publication in Court Reports of the Supreme Administrative Court are sent to and they can express their opinion whether the publication is convenient or not. The Supreme Administrative Court then can decide not to publish a decision, influenced by the opinion of the Ombudsman.<sup>11</sup> The courts can also take into consideration the opinions of the Ombudsman contained in their statements, reports, and recommendations or expressed publicly otherwise during the decision-making process. There are two ways of how the decision of an administrative court can contain the opinion of the Ombudsman. Either their opinion can be presented to the court by a participant of the court proceedings or the court can mention the opinion because it deems it appropriate. The latter means the opinion of the Ombudsman is concerned not with the case dealt with, but with a similar one. Such a situation also happens when the participant actively searches for the Ombudsman's opinion and then presents it to the court. However, a participant often presents the Ombudsman's opinion in cases which were investigated or referred to by the Ombudsman earlier.

It is thus clearly visible that the Ombudsman has very limited means to induce the court to deal with their opinion. They can suggest that the Supreme Administrative Court should issue a statement to unify jurisprudence, but there is no guarantee that the idea will be accepted.<sup>12</sup> There also might be cases when the court is influenced by the Ombudsman's opinion, but does not admit it in the substantiation of its decision.

### 3. Assessment of the efficiency of the means of Ombudsman's influence

Despite the fact that the means of influence of the Ombudsman are fairly numerous, there arises the question how efficient they are in practice. In my opinion, the real efficiency of the described means can be assessed only by an analysis of how many times they were used and how successfully. The problem is that such statistics are often hard to find.

#### 3.1. Direct means

There is only one case when the Ombudsman filed an action against a decision of an administrative authority. The case took quite a long time to settle and three decisions of the Supreme Administrative Court concerning it were issued as the Ombudsman had considerable difficulties persuading

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<sup>11</sup> J. Passer, *Pohled soudů na veřejného ochránce práv*, [in]: M. Přidal (ed.), *Role veřejného ochránce práv v politickém systému České republiky*, Brno 2011, p. 46.

<sup>12</sup> See, e.g., K. Černín, *Opomenutý účastník a jeho opravné prostředky*, [in]: *Stavební řád*, Kancelář veřejného ochránce práv 2009, pp. 22-23.

the courts not only of their opinion being correct, but also proving they had the title to file a motion as there was a serious public interest to file one.<sup>13</sup> Since the Ombudsman has been able to file such a kind of motion for nearly six years<sup>14</sup> and the necessity to prove that there is a serious public interest to file the motion shows to be of immense difficulty, it remains undisputable that in practice this tool (and thus the tools of direct influence of the Ombudsman) of influence on the decision-making of administrative courts seems to be highly inefficient. One way to increase the efficiency of the tool is a legislative change which could alleviate the conditions the Ombudsman has to fulfil to file such an action. Although there has been a draft concerned with the issue dealt with in the Parliament, the body suggesting the draft has decided to withdraw it and currently there is no similar effort.<sup>15</sup> The other way is for the Ombudsman to start filing more of such actions and “learn” during the process how to use the tool successfully and efficiently.

### 3.2. Indirect means

Regarding the indirect influence, in March 2017 the Ombudsman themselves published statistics revealing how often the courts in the Czech Republic agree with their opinions.<sup>16</sup> It analyses how many times a court (the statistics include the Constitutional Court, the Supreme Court, the Supreme Administrative Court and regional courts) mentioned their opinion, if it dealt with it and, in such a case, if it agreed with the Ombudsman. However, the statistics cover only three years (2012-2015) and do not contain the list of individual decisions. It is thus not clear whether the cases dealt with by regional courts covered only administrative agenda or also some of the non-administrative agenda of the Ombudsman. Unfortunately, there are not any similar statistics and there have been about 200 cases of the Supreme Administrative Court from 2004 till now, which contain the words “Public Defender of Rights” (or “Public Defendress of Rights”<sup>17</sup>) in the database of the Supreme Administrative Court.<sup>18,19</sup> Their deeper analysis carried out only by one person (i.e., the author of this paper) is thus

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<sup>13</sup> *Intra* note no. 10.

<sup>14</sup> Law No. 303/2011 Coll., amending the Code of Administrative Justice.

<sup>15</sup> <http://www.psp.cz/sqw/historie.sqw?o=7&T=379>, Accessed: 9 of November 2017.

<sup>16</sup> <https://www.ochrance.cz/aktualne/tiskove-zpravy-2016/verejny-ochrance-prav-a-ceske-soudy-maji-obvykle-stejny-pravni-nazor/>, Accessed: 24 May 2017.

<sup>17</sup> The feminine form of the name of the office is often used when speaking of current Ombudsman.

<sup>18</sup> The database contains the decisions of the Supreme Administrative Courts and some of the Regional Administrative Courts.

<sup>19</sup> In fact, the actual number of decisions mentioning the opinion of the Ombudsman is lower as some decisions only mention the existence of the Public Defender of Rights Act or of the office of the Ombudsman and not their opinion.

extremely difficult to execute. The number of the decisions of Regional Administrative Courts is not detectable as the database does not include all of their decisions. However, we can assume the number will not be very high as the Ombudsman's statistics state eight regional courts mentioned the opinion of the Ombudsman in 34 cases during three years.

According to the statistics, the Supreme Administrative Court mentioned the opinion of the Ombudsman in 38 cases while it agreed with the opinion in 22 cases and did not deal with the opinion at all in 12 cases. It disagreed with the opinion only in 4 cases. The regional courts agreed with the opinion in 19 cases and just mentioned its existence without dealing with in 15 cases. There was no direct disagreement. I have already mentioned that to analyse the whole jurisprudence which somehow deals with the opinions of the Ombudsman is impossible. Nevertheless, it is possible to analyse the decisions of the Supreme Administrative Court published in the Court Reports of the Supreme Administrative Court which contain the opinion of the Ombudsman as there are only 28 of them. The Supreme Administrative Court agreed with the opinion in 12 cases, disagreed with it in 3 cases and just mentioned its existence without dealing with it in the rest of cases.<sup>20</sup> It is obviously difficult to reach extensive conclusions from such insignificant data but, in my opinion, it is possible to conclude that when the administrative courts deal with opinions of the Ombudsman, they usually tend to agree with them.

However, it should be stressed that such cases seem to be quite rare. If the number of approximately 200 decisions of the Supreme Administrative Courts which mention the Ombudsman is stretched from 2004 to 2017,<sup>21</sup> the result is about 15 such decisions a year. The Supreme Administrative Court issues about 3,500 decisions a year.<sup>22</sup> Even though the role of the Ombudsman is not to replace administrative courts or the task of the administrative courts to find and argue with the opinions of the Ombudsman, I am of the opinion that, regarding the vast amount of activity the Ombudsman executes in the area of improvement of quality of public administration,<sup>23</sup> the courts should reckon with their opinion more often.

<sup>20</sup> In one of the cases (judgement of the Supreme Administrative Court of 21 June 2012, 1 Ao 7/2011-526), the Supreme Administrative Court plainly refused to perform evidence by a report of the Ombudsman, stating that it could not bring anything concerned with the fact, only to present the opinion of the Ombudsman on the case, which indirectly implies the Court thought the opinion of the Ombudsman on the case insignificant.

<sup>21</sup> As mentioned in the previous note, the actual number of decisions dealing with the opinion of the Ombudsman is even lower.

<sup>22</sup> *Intra* note no. 6.

<sup>23</sup> According to, e.g., V. Sládeček (the main Czech author on the subject of the Ombudsman), the activities of the Ombudsman can be, concerning their subject matter, closely akin to the decision-making of the Administrative Courts. V. Sládeček, *Zákon o Veřejném ochránci práv: komentář*, 2<sup>nd</sup> ed., Praha 2011, p. 19.

There are also situations when the decision presents an opinion opposite to the Ombudsman's one without even mentioning the existence of the latter.<sup>24</sup> It is obviously impossible to demand that the courts should actively search whether the Ombudsman has an opinion on a problem the court is solving at the moment and then cope with their arguments. Notwithstanding the current situation when the differences between the opinions of the authorities concerned with the appropriate functioning of the public administration and enjoying a considerable amount of respect from the public do exist, this cannot be regarded as a positive phenomenon. Since people relying on the opinion of the Ombudsman can appeal to administrative courts, the different point of view of the courts can hardly help to increase their trust in both institutions.

It is impossible to assess the frequency, let alone efficiency of the remaining means of the indirect influence of the Ombudsman, i.e. suggestions whether to publish a decision in the Court Reports of the Supreme Administrative Court or to issue a statement to unify jurisprudence, as there is no available statistical data. Indeed, gathering such data seems to be hardly possible as the recommendations of the Ombudsman to the Supreme Administrative Court can be highly informal and their existence may not even be officially mentioned.

From the information mentioned beforehand, it can be derived that also indirect means of the influence which the Ombudsman has on the decision-making of the administrative courts are in practice rather inefficient. The question is how the influence of the Ombudsman on the administrative courts can be increased or whether it can be increased at all. I judge the detailed analysis and statistics of individual decisions of administrative courts dealing with opinions of the Ombudsman would be appropriate but in this respect. Such an analysis could serve as an important indicator of the actual influence of the Ombudsman on the decision-making of the administrative courts and also as an indicator of the efficiency of the activity of the Ombudsman themselves. The knowledge that their opinions are dealt with and respected by the administrative courts would surely help to increase their prestige in the eyes of the public and the public authorities. In this respect, the differences between the opinions of the administrative courts and the Ombudsman could present a possible risk for the authority of the Ombudsman.

Such an analysis is, in my opinion, the first step to the proper assessment of the efficiency of the means of Ombudsman's influence on the deci-

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<sup>24</sup> This occurred while solving the question whether the parents are the participants of one specific kind of administrative proceedings which concern their child. Although the statement of the Public Defender of Rights of 5 May 2014, 6584/2012/VOP/EN analysed in detail why parents are the participants and even the relevant Ministry was of the same opinion, the judgement of the Regional Court in Hradec Králové, Department in Pardubice of 21 September, 2015, 52 A 81/2015-50 is based on the opposite opinion.

sion-making of the administrative courts. After the assessment, it would be possible to consider steps to increase the influence. It can be recommended that the Ombudsman should promote their effort in making their opinions well-known. I do not deny the Ombudsman does present their opinions in every possible way (webpages, statements for the press, publicly presented recommendations, etc.) but it is noticeable that when the opinion of the Ombudsman on a specific problem is publicly well-known, the administrative courts respect it and do not resist or hesitate to use argumentation of the Ombudsman to support theirs, even without the impulse of the participants.<sup>25</sup>

The vast knowledge of the Ombudsman's opinions on various issues can help to influence the courts not only in the way described, but also can encourage participants of the court proceedings to support their argumentation with the opinions of the Ombudsman generally and not only in the cases when the Ombudsman investigated the issue prior to the court proceedings. If it was known that the courts tend to agree with the opinions of the Ombudsman, people would be more encouraged to use the argumentation of the Ombudsman and their influence would thus increase, regarding the fact that the Ombudsman themselves is not able to induce the administrative courts to deal with their opinions by the indirect means but when the participants present an opinion of the Ombudsman to the court, it should somehow deal with it.

It would be advisable that the administrative courts were willing to deal with arguments of the opinion of the Ombudsman when such an opinion is presented to them by the participants as it would help to mitigate the undesirable differences between their opinions. Unfortunately, without the willingness of the courts to be influenced by the opinions of the Ombudsman, the indirect means of the Ombudsman's influence are rather useless as the administrative courts are not obliged to deal with the arguments presented by the Ombudsman.

#### 4. Conclusion

The Czech Ombudsman has a very limited access to the administrative courts, their ability to influence their decision-making directly is thus rather small. Although there is a vast variety of means how to introduce an opinion of the Ombudsman to the courts indirectly, it seems the partic-

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<sup>25</sup> The Ombudsman has been very active, e.g., on the issue of roads accessible to the public, permissions to place gambling machines or Visapoint (Czech highly ineffective system used to applying for visas) and their opinions were adopted by the Supreme Administrative Courts in, e.g., its judgement of 30 November 2015, 6 As 213/2015-14 (roads), judgement of 24 February 2015, 6 As 285/2014-2 (gambling) or judgement of 26 April 2017, 3 Azs 237/2016-37 (Visapoint).

ipants of the court's proceedings or the courts themselves bring the opinions into the proceedings quite infrequently.

In spite of quite a high potential of the efficiency of the means of the Ombudsman they are not as efficient in practice as they could be as the direct means are not used (even though the situation can change) and the indirect means do not ensure by their nature a high degree of efficiency. The situation in the assessment of their efficiency is further complicated by the fact that there are not sufficient relevant statistical data showing how many times the indirect means are used and how successfully and which are the decisions concerned. Regarding some more subtle indirect means (e.g., the court is influenced by the Ombudsman's opinion, but does not mention it in the decision), it is not even possible to gather such data by their nature.

It is obvious that the Ombudsman and their opinions somehow do affect the decision-making of the administrative courts. However, the actual extent of their influence is due to the lack of data in the area problematic to estimate, let alone determine, although it is possible to assume a rather small significance of the influence. The administrative courts mention opinions of the Ombudsman quite rarely and deal with them in even fewer cases. In such situations, they do tend to agree with them; nevertheless, due to the small number of such cases, there can occur (and there also do occur) the situations when the opinion of the Ombudsman is different from the opinion of an administrative court.

Even though the Ombudsman is an institution of informal, not legally binding, and rather auxiliary and supplementary protection of people, and from this point of view their opinion might not seem important to the administrative courts, the discrepancy in the opinions of institutions with quite similar missions and enjoying a considerable amount of social authority can hardly be seen as a positive phenomenon.

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HOW OPINIONS OF THE CZECH OMBUDSMAN INFLUENCE  
THE DECISION-MAKING OF ADMINISTRATIVE COURTS

**Abstract:** The paper deals with the possibilities the Czech Ombudsman has to influence the decision-making of the administrative courts in the Czech Republic. It describes both direct and indirect means of their influence, with the emphasis on the indirect means, as the direct means are very limited in the Czech Republic and are rarely used. The first part is concerned with the enumeration of means of how the opinions of the Ombudsman can become known to the administrative courts and their description and analyses the efficiency of the means described. The second part deals with the problems which occur while trying to assess their efficiency and mentions possible improvements.

**Keywords:** OMBUDSMAN, ADMINISTRATIVE COURTS, MEANS OF INFLUENCE