

КОНСТИТУЦІЙНА СПАДЩИНА ПИЛИПА ОРЛИКА
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“LAND SHALL BY LAW BE BUILT”.
THE OMBUDSMAN INSTITUTION, ITS BIRTH AND ITS ROLE
IN PROMOTING THE RULE OF LAW AT GRASS-ROOT LEVEL*

ABSTRACT. Varnitsa, a small settlement on the western banks of the river Dniester, just north of the city of Bendery in today's Moldova, can lay claim to be the simultaneous birthplace of two most important public law concepts, namely a constitution, characterized by separation of powers in government between the legislative, executive and judicial branches, i. e. the first Ukrainian constitution, commonly known as *The Orlyk's Constitution*, created well before for instance Charles-Louis de Montesquieu's *Spirit of the Laws*, as well as the ombudsman institution, i. e. *The King's Highest Ombudsman*, the Swedish predecessor of *The Parliamentary Ombudsman of Sweden*, which in due time became the forefather of all the world's ombudsman institutions.

These two concepts, both so significant and important for The Rule of Law, came about at the beginning of the XVIII century when King Charles XII of Sweden and Pylyp Orlyk, hetman of the Zaporizhian Cossacks, at the same time resided in Varnitsa, both for different reasons involved in constructive constitutional deliberations.

This article focuses in particular on the role of the Ombudsman institution in promoting *The Rule of Law* at grass-root level, the meaning of the old Scandinavian Rule of Law-phrase *Land Shall By Law Be Built* and the importance for ordinary people, i. e. people at grass-root level, that this phrase and *The Rule of Law* in general are followed.

The article also deals with some unfortunate misconceptions, often associated with the functioning of the Ombudsman institution. In addition, it underlines that it is of utmost

* This lecture was originally given in Kristianstad, Sweden, on June 20, 2019, in commemoration of the 300-year-anniversary of Pylyp Orlyk's residing in Kristianstad.

importance for the institution’s success and impact that it itself always follows the law. Statements outside its jurisdiction or criticism, not well founded on law and clear facts, will not only be unacceptable per se but will also undermine its authority and thereby its possibility to be obeyed not only in the situation at hand but also in general.

KEYWORDS: the Orlyk’s Constitution; the King’s Highest Ombudsman; the Parliamentary Ombudsman of Sweden; the rule of law.

Two Concepts, One Birthplace

It is remarkable that Varnitsa, a small settlement on the western banks of the river Dniester, just north of the city of Bendery in today’s Moldova, can lay claim to be the simultaneous birthplace of two most important public law concepts, namely a constitution, characterized by separation of powers in government between the legislative, executive and judicial branches, and the ombudsman institution.

It occurred at the beginning of the 18th century, when King Charles XII of Sweden (1682–1718) and Pylyp Orlyk (1672–1742), the successor of Ivan Mazepa as the hetman of the Zaporozhian Cossacks, resided at the same time in Varnitsa after the battle of Poltava in Eastern Ukraine on the 28th of June 1709.

Following the death of Ivan Mazepa in the early autumn of 1709, Pylyp Orlyk was on April 5, 1710 elected his successor. On the same day he signed a document called *Pacts and Constitutions of Rights and Freedoms of the Zaporozhian Host*, nowadays usually referred to as *The Orlyk’s Constitution* and considered to be the first Ukrainian constitution.

This document established a democratic standard for the separation of powers in government between the legislative, executive, and judicial branches, well before Charles-Louis de Montesquieu’s *Spirit of the Laws*. It limited the executive authority of the hetman and established a democratically elected Cossack parliament called *The General Council*. It was unique for its historic period and was one of the first state constitutions in Europe.

The document names King Charles as *The Protector of Ukraine* and was “confirmed” by him. This gives strong reason to believe that he was involved in the deliberations leading to its coming into being¹. At the same time, reasonably with Hetman Orlyk likewise involved, the idea started to grow in the King’s mind to shape an institution which on his behalf was to monitor that the judges, military officers and civil servants in Sweden were observing the laws of the country and the rules laid down for them, i. e. an Ombudsman institution.

¹ A fact well worthy of thorough scholarly discussion and research, given the King’s role as autocratic ruler, responsible only to God Almighty.

The Background

In the year of 1697 and at the age of fifteen, Charles had become King of Sweden. Three years later, in the autumn of 1700, he won a fabulous victory over Tsar Peter's allegedly tenfold stronger Russian army at Narva at the present border between Estonia and Russia – a victory that forever made him a hero of his time as well as the subject of a famous Voltaire biography. However, nine years later, in 1709, the Poltava battle took place on the banks of the river Vorskla, where he was thoroughly defeated by Tsar Peter, a defeat that tarnished his hero's aura with tragedy – and eventually gave rise to the world's very first Ombudsman institution.

Following the defeat at Poltava, Charles proceeded to Bendery in present-day Moldova and for five years became the sometimes welcome, sometimes undesired guest of the Sultan. In fact Sweden, a mighty European power at the time, was governed at distance from this region until the autumn of 1714, when Charles finally decided to return to his kingdom and undertook a spectacular two-week horse ride to Stralsund in Pomerania on the Baltic Coast, then a Swedish city.

A year before this ride, in October 1713 and in the castle of Timurtasch, Charles signed an ordinance by which he established the institution of *The King's Highest Ombudsman*. As mentioned, the task of this Ombudsman was to ensure that the judges, military officers and civil servants in Sweden were observing the laws of the country and the rules laid down for them. Having at that time been away from Sweden since he left thirteen years earlier for his campaign against Russia, the King obviously felt the need to have someone monitoring the state of affairs in his home country on his behalf.

Timurtasch, where the ordinance was signed, is situated in present-day Turkey, just south of Adrianople or Edirne. However, correspondence kept in the Swedish National Archives shows that the decision was preceded by thorough deliberations, including a close examination of the arguments for and against the use of the Swedish word *Ombudsman*, by then already in existence for centuries. This correspondence is undated, but it is reasonable to believe that before King Charles left the Bendery area, the idea was born in his mind to set up an Ombudsman institution, a concept, according to some scholars not only rooted in Ottoman administrative tradition as well as the *Quran*, but arisen even further back in the shades of history.

After arriving from Poltava in late July 1709, Charles and his followers soon took up residence outside Bendery in the village of Varnitsa on the western banks of the Dniester. The location is known and the spot is now in the care of the Moldovan National Museum. Here he stayed until 1 February 1713, and thus Varnitsa in Moldova, together with Timurtasch, could claim to be the

birthplace of the Ombudsman concept as well as of the word *Ombudsman* in its current internationally recognised sense.

The Bendery Riot

The event resulting in the King's departure from Varnitsa is in itself worthy of a place in the history books. It is referred to as *The Bendery Riot* or, in Swedish (with a Turkish loan-word) *Kalabaliken i Bender*. It is famous not the least because it allegedly is the last time in European history when a crowned head took part in the fighting himself, weapon in hand. It came about when the King's hosts had become less enthusiastic about having to care for their eminent guest, who totally ignored all suggestions that he should return home or, at least, leave a country, which felt it had by then already housed him for far too long. The King left, under guard and eventually for the castle of Timurtasch, but not until a horde of thousands of janissaries had set the royal house on fire and the King and his few men had been overpowered while making a rush for a safer house close by.

National development of the Ombudsman institution

The reason why the Ombudsman institution, thus established by the King in 1713, sometimes is not mentioned as the Forefather of all the world's Ombudsman institutions, is its very close connection with the executive power, its not being as independent as an Ombudsman is nowadays supposed to be. Its role in relation to the development of the Ombudsman concept is nevertheless significant. Strong under King Charles and his predecessors, the monarchy grew weak soon after his death in November 1718, while Parliament grew correspondingly strong. As a result, this 1713 institution – in May 1719 renamed *The Chancellor of Justice*, in Swedish *Justitiekanslern* – in reality became an institution of Parliament rather than of the King. When, however, the Swedish King again became absolute ruler in the latter part of the XVIII century, the institution again being associated with the executive power. But Parliament did not forget its worth².

After a coup d'état following another lost war against Russia, the new Swedish Constitution of 1809 therefore established *The Parliamentary Ombudsman of Sweden*, in Swedish for short *Justitieombudsmannen*, as a new independent institution of Parliament.

This 1809 body is still, more than 200 years later, a well-functioning institution in Swedish society, keeping public servants in check with its inspections and its criticism in individual complaint cases, helping others with useful advice and examples of good governance, only on very rare occasions

² *Justitiekanslern 300 år* (Göransson U red, Uppsala 2013).

exercising its original role as a prosecutor bringing wrong-doers before a court of law³.

International development

Ombudsman institutions, more or less formed after this Swedish 1809 body, today exist in more than 100 countries all over the world. The first institution outside Sweden was the one in Finland, established in 1918 when the country became independent of Russia, and the first institution outside the Nordic countries was the one in New Zealand, established in 1962. This development has been due in particular to the world-wide information activities of the first Danish Ombudsman, Professor Stephan Hurwitz, who took office as *Folketingets Ombudsman* in the year of 1955⁴.

Some other *Ombudsman* institutions, aside from the Nordic ones, also use the word Ombudsman in their names. The institution in Bosnia and Herzegovina is accordingly labelled *Ombudsman za Ljudska Prava*, The Human Rights Ombudsman. Denominations without the word *Ombudsman* are for instance in Spanish-speaking countries commonly *El Defensor del Pueblo*, The Defender of the People. Other examples are the Quebec institution, which is called *Le Protecteur des Citoyens*, The Citizens' Protector, the Albanian institution called *Avokati Popullit* and the Moldovan one labelled *The Parliamentary Advocate*. The Ethiopian institution has been given a very poetic name, in English translation *The Guardian of People's Tears*⁵.

The Rule of Law at grass-root level

Land Shall By Law Be Built is an old Scandinavian phrase, found in medieval Danish and Swedish Codes⁶. However, it is equally well known in Scandinavia today, and it is just as applicable in all countries that claim to accept and favor *The Rule of Law*. Its roots can be traced back to old Roman law and even further back in history.

The phrase means that the Law should rule, that a reasonable interpretation of the Law shall rule society as well as the activities of each public servant – be it a Minister, a judge or an ordinary administrative officer. All of these should always do their best to sensibly follow the Law. And if the Law happens to be bad, then the Law should be changed.

The phrase means that each public servant should honestly try to understand the true meaning of the law in question and to sensibly try to implement it with due regard to the facts at hand.

³ It might be mentioned that also *The Chancellor of Justice* – with closer connection with the Government – remains an integral and well-functioning part of the Swedish constitutional framework.

⁴ *The Danish Ombudsman* (Gammeltoft-Hansen H ed, København) 2005.

⁵ *Ibid.*

⁶ This English phrase is a direct translation of the Swedish original *Land skall med lag byggas*.

The phrase means that a public servant should not follow the advice of the party secretary, nor the rule of friendship, nor the rule of self-interest, nor the law of Money, whether paid above or under the table, but let a reasonable interpretation of the Law prevail.

The phrase means that a public servant should follow the words of the law in the way in which the lawmaker has intended it to be implemented – always, however, in line with the Constitution as well as signed and ratified international instruments.

Thus, it is the duty and the privilege of each public servant to follow *The Rule of Law* without him or her badgering or bossing or bullying the citizens, but by serving them in accordance with the Law – fairly, properly and impartially. To serve, that is why they are labelled public servants.

The role of the Ombudsman⁷

It is the task of an Ombudsman to monitor that public servants are serving the citizens in accordance with the Law as thus mentioned. By fulfilling this task, the Ombudsman will promote and strengthen Human Rights and Fundamental Freedoms in his or her country – an issue of fundamental concern in today’s Europe.

Relevant articles of a country’s constitution normally prescribe that the Ombudsman, whatever the name of the institution happens to be, should supervise the protection of Human Rights and Fundamental Freedoms within the territory of the country, as well as promote and protect those rights and work for the redress of infringed rights.

This monitoring task implies that the Ombudsman *is not* the primary public authority for the promotion and protection of Human Rights and Fundamental Freedoms in the country. That is *every public authority* within its sphere of reference, and that is the task of *each public servant*, be it a Minister, a judge or an ordinary administrative officer.

It is a common conception in many countries and among many ordinary citizens as well as high-level officials and politicians, that once an ombudsman institution with a human rights mandate is established, this institution will be primarily responsible for the human rights situation the country. However, this is in fact a *misconception*. The role of the Ombudsman is to supervise, to monitor, to follow, that *all others*, those primarily responsible, are doing their duty, and it is for the Ombudsman to take due action, when this is not the case.

⁷ Orton F and Petrossyan G and Khorozyan T, *Human rights, Good Governance and the Rule of Law: Role and Relevance of the Human Rights Defender of Armenia. Manual for Trainers* (United Nations Development Programme 2005).

The Ombudsman vs Public institutions

The role of an Ombudsman is also often *misunderstood* as that of an adversary, a foe, an enemy, of public authorities, public servants and the Government in general. But in fact it is the other way around. The Ombudsman is in reality there to promote – to help if you wish – the Government and its bodies to sensibly follow the Law of the Land, the very laws and regulations created by Parliament and the Government – in the best interest of these institutions and of the citizens of the country.

It should be assumed that the very objective and wish of these institutions – the Parliament, the Government, all other public authorities – are that the Law should be sensibly followed, that it is their aim, too, that *Land Shall By Law Be Built*. There is thus every reason for them to welcome well-founded advice and criticism by the Ombudsman, when irregularities have taken place. Similarly, they should also feel secure that the Ombudsman will dismiss unsubstantiated complaints, praise good practices and suggest reasonable ways to handle unclear situations.

It should further be stressed that the Ombudsman must in principle not be regarded as an agent of a complainant or the ally or the adversary of a particular body, whether governmental or a non-governmental. The Ombudsman is *the servant of the Constitution and of the Laws of the Land*, the legislation adopted by Parliament and Government, carrying out his or her duties with the help of his or her three “eyes” [I:s] – Independence, Impartiality and Integrity.

It goes without saying that it is of utmost importance that the Ombudsman institution itself always follows the law. Statements outside the institution’s jurisdiction or criticism, not well founded on law and clear facts, will not only be unacceptable per se but will also undermine its authority and thereby its possibility to be obeyed not only in the situation at hand but also in general.

The Importance of Public Knowledge

It is important that the citizens know, what they have a right to expect from public authorities and public servants, and that they are aware, that they can turn to the Ombudsman, if they are denied this right. It is equally important that public authorities and public servants are aware of their duties and responsibilities as well as of the fact that the citizens have the right to turn to the Ombudsman, if the authority or servant does not deliver properly in line with *The Rule of Law*. Finally, it is also important that every public authority is aware of the Ombudsman’s normally very strong investigative powers as well as of his or her right to publicly criticize wrong-doers and his or her duty to follow up, when concrete proposals from his or her side are not followed.

The Importance of the Rule of Law

The Rule of Law – Land Shall By Law Be Built – means order and stability in society. It means reasonable predictability concerning authority decisions. It means enforceable and enforced decisions. It means a safeguard against discretion not foreseen by the Law. It is an effective antidote against *corruption*. It opens to investments from abroad – foreign investors will be reluctant to invest their money in a country where they are not sure that a breach of a contract will result in punishment or other sanctions.

The Rule of Law is a cornerstone in any modern democracy. Without it, all sweet talk about Human Rights and Fundamental Freedoms is wasted as not in touch with the everyday life of the citizens. Without it, Human Rights and Fundamental Freedoms can not be duly implemented and violations neither duly sanctioned nor usefully corrected.

The well-off people, the people at top level, those in power, they may manage without *The Rule of Law*, they will always be able to further and promote their own interests. Thus, *The Rule of Law* protects in particular ordinary people, people at grass root level, the man in the street and the woman in the field, the office employee and the factory worker, offering them an orderly and decent life.

The Rule of Law is a very popular concept in today’s Europe. Politicians and other prominent and influential members of society emphasize it in their speeches, it is repeated daily, it has become a politically very correct mantra. However, few speakers explain what they mean by *The Rule of Law*, and many speakers seem not to have reflected on its implication nor to have pushed for its implementation.

And yet it is all so very simple. Everybody should be equal before the Law. Nobody should be above the Law. Everybody should be bound by the Law. *The Rule of Law* is a hallmark of a modern European democracy. *The Rule of Law* shall prevail. *Land Shall By Law Be Built*.

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Франк Ортон

“ЗЕМЛЯ МАЄ БУДУВАТИСЯ ЗА ЗАКОНОМ”.
ІНСТИТУТ ОМБУДСМЕНА, ЙОГО СТАНОВЛЕННЯ І РОЛЬ
У ЗМІЦНЕННІ ВЕРХОВЕНСТВА ПРАВА
НА РІВНІ ПРОСТОГО НАРОДУ*

Анотація. Варниця, невелике поселення на західному березі Дністра, трохи північніше міста Бендери сучасної Молдови, може претендувати на те, щоб вважатися місцем народження одночасно двох найважливіших публічно-правових концепцій, а саме – конституції, що встановлювала розподіл владних повноважень в уряді між законодавчою, виконавчою та судовою гілками влади. Вона стала першою українською конституцією, відомою як Конституція Пилипа Орлика, і була створена ще задовго до, наприклад, трактату Ш.-Л. Монтеск'є “Про дух законів”. І другою концепцією є інститут омбудсмена, “Верховний Омбудсмен Короля”, шведський попередник Парламентського Омбудсмена Швеції, який свого часу став “пращуром” усіх світових інститутів омбудсмена.

Ці дві концепції, надзвичайно значущі й важливі для верховенства права, виникли на початку XVIII ст., коли король Швеції Карл XII і гетьман Запорозького козацтва П. Орлик одночасно проживали у Варниці та з різних причин були залучені до конструктивних конституційних дискусій.

У цій статті особлива увага приділяється ролі інституту омбудсмена у зміцненні верховенства права на низовому рівні – рівні простого народу, а також значенню стародавнього скандинавського правила щодо верховенства права – “Земля має будуватися за законом” і важливості дотримання цього правила й верховенства права загалом для простого народу, тобто звичайних людей.

У статті також розглядаються деякі невдалі й неправильні уявлення, часто пов'язані з функціонуванням інституту омбудсмена. Крім того, наголошується на тому, що для забезпечення ефективного й впливового функціонування окремого інституту вкрай важливо, щоб цей інститут сам завжди дотримувався вимог закону. Заяви за межами його юрисдикції або критика без належної й повної обґрунтованості на підставі закону і незаперечних фактів є не тільки неприйнятними самі собою, а й здатні підірвати авторитет такого інституту та, тим самим, перспективи юридичної поваги до нього не тільки в певній ситуації, а й загалом.

Ключові слова: Конституція Пилипа Орлика; Верховний Омбудсмен Короля; Парламентський Омбудсмен Швеції; верховенство права.

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