

**EQUITY – THE SUPPLEMENTARY FUNCTION
OF THE OMBUDSMAN**

by

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1. Introduction

Our topic today, “The Citizen Before State Institutions,” shows me the necessity of ombudsmen. It is a simple fact that states need institutions and authorities. However, at least in Austria, it is also a fact that people are increasingly distrustful of all kinds of institutions like courts, administrative bodies, state companies and everything else that is somehow connected to the "state".

The gap between the state and its citizens is somehow getting wider. It might be better, then, to discuss the topic “The Citizen and *His/Her* Institutions.” The lack of identification between citizens and their state or community creates the need for ombudsmen.

2. Development of Ombudsmanship in Europe

2.1 Historical Roots

Traditionally, the Swedish Ombudsman of 1809 is considered the first ombudsman institution. According to Pickl, however, the roots of ombudsman systems are far older, reaching back to the 7th century, when under the caliphate the *Muhtasib* was installed to monitor the authorities.¹ Even today, the official name of the Pakistan Ombudsman is *Mohtasib*.

The ombudsman concept spread slowly in Europe. In 1919, Finland installed their parliamentary national ombudsman, followed by Denmark (1955), Norway (1962), the United Kingdom (1967), Portugal (1976), Austria (1977), Spain (1981), The Netherlands (1982), Ireland (1984), Iceland (1987), Poland (1988), Cyprus (1991) and Hungary (1992).²

2.2 Survey of the Different Forms of Ombudsman Institutions

In my opinion, the European ombudsman offices mentioned above fulfill the criteria stated in the directive of the International Law Commission and the International Bar Association.³ A 1974 resolution of the International Bar Association defines “ombudsman” as follows:

An office provided by the constitution or by action of the legislature or parliament and headed by an independent high-level public official who is responsible to the legislature or parliament, who receives complaints from aggrieved persons against government-agencies, officials and employers or who

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acts on his own motion, and has the power to investigate, recommend corrective action and issue reports.⁴

Besides parliamentary ombudsmen, there are ombudsman offices acting at regional or local levels. In Europe, there are 58 ombudsman offices in 19 countries.⁵ Some ombudsmen are appointed by the government, others by local parliaments.

All these monitoring bodies differ from each other in their jurisdiction, competencies, and methods of investigation. These differences make it impossible to make a methodical description of all the European ombudsman institutions. However, they do share some characteristics which influence their rapid development. From the viewpoint of the citizen, they are accessible, credible, work quickly, and put bureaucrats on an equal footing. From the viewpoint of authorities, ombudsmen are accepted, non-coercive, non-partisan, inexpensive and useful.⁶

2.3 Ombudsman: European Council/European Union

With a view to supplementing the usual procedures of judicial control, and bearing in mind the complexities of modern administration, the Committee of Ministers of the Council of Europe recommends that the governments of member states consider the possibility of appointing ombudsmen.⁷ In 1985, the Council of Europe decided to begin regular conferences with the ombudsmen of Member States to discuss and exchange views and experiences on the protection of human rights in relation to acts of administrative authorities.⁸ Accordingly, the Council of Europe organizes “Round Table Conferences” every two years, with the last one in Portugal in 1994.

According to the Treaty on European Union signed in Maastricht on February 7, 1992, an Ombudsman shall be appointed by the European Parliament.⁹ The European Ombudsman is seen to assist implementation of the principle of subsidiarity. This European Ombudsman has to uncover maladministration in the activities of Community institutions and bodies, except for the Court of Justice and the Court of First Instance when they are acting in their judicial capacity.¹⁰

At this point it seems necessary to step down from the supranational level to domestic levels of government. *Pars pro toto*, I shall briefly introduce the Austrian ombudsman institution, *Volksanwaltschaft*, as it is established in the Austrian Federal Constitution.

2.4 Austrian Ombudsman Board (*Volksanwaltschaft*)¹¹

The Federal Law of February 24, 1977 legally created the office of the Ombudsman for the Republic of Austria. Since 1981, the Austrian Ombudsman Board has been incorporated as the Seventh Main Section of the Austrian Federal Constitution.¹² The Lower House of Parliament elects three Ombudsmen for six-year terms. Candidates are nominated by the three political parties with the largest number of seats in the Lower House of Parliament.

Except for eligibility to serve in the Lower House of Parliament, no further special qualifications — for example, a law degree — are required of Austrian Ombudsmen.

However, in order to retain full autonomy, even from Parliament which cannot revoke their position, the Ombudsmen may not be members of any government or general representative body, nor practise any other profession. The Ombudsmen supervise the federal administration, including its activity as holder of private rights, as well as the regional and local administration in seven of nine Austrian counties (*länder*) and their communities.

Everyone, no matter their age, race, religion or citizenship, may lodge a complaint with the Austrian Ombudsman Board against alleged maladministration, provided that they are directly affected by the grievance and there is no (or no longer) recourse to any legal remedy. As in all other European countries, there is no time limit to lodge a complaint, nor any formal rules of procedure before an Ombudsman.

As a “classical” ombudsman institution, the Austrian Ombudsman Board is entitled to investigate suspected maladministration *ex officio*. As well, the Parliamentary Committee on Pensions and Civic Initiatives may entrust the Ombudsmen with investigations and/or invite members of the Board to its hearings.¹³

As a supplementary body of the legislature-, the Ombudsmen must submit an annual report to Parliament containing their observations and conclusions regarding approximately 11,500 complaints and requests for inquiries each year.

3. General Functions of an Ombudsman¹⁴

3.1 Control

Taking into account its historical roots, and especially the Swedish model, the essential issue for ombudsman institutions is monitoring the administration.

Despite differences in jurisdiction, procedures of investigation and powers of the European ombudsman offices, all the constitutions or laws that determine the office’s scope provide that the main task for ombudsmen is the control function.¹⁵ Of course, this should not be misunderstood: the ombudsman in the classical form is meant to be a supplement to the political control of parliament and the legal control by the courts.

3.2 Conflict-Solving Function

It is my submission that the judicial system partly fails as a conflict-solving instrument. My reasons are not just the enormous costs and exorbitant length of court proceedings, nor the fact that judicial decisions always create winners and losers in the end.¹⁶

Certificates of judgment, which are necessarily mostly written in standardized but

incomprehensible legalese, create a wish and demand for other conflict-solving institutions. After having lost a trial, paid a lot of costs, and waited a long time for a decision, there are many who still do not understand why they cannot enforce rights they believe they have. The next time, they think twice about whether or not to start a legal proceeding.

However, it is a principle of democracy to ensure full access to the law. The ombudsman, then, is seen as someone who makes a decision that is quick, free and understandable. This role, of "translator" of the law, leads to another function of the ombudsman.

3.3 Mediation

The French word for its Ombudsman is *Médiateur*. This term clearly expresses another function of an ombudsman: not just to "translate" decisions and verdicts for the complainant, but to support political efforts that create a broad basis of understanding of laws and regulations. Entrusted by the legislature and trusted by the citizen, the ombudsman has the duty to help create an atmosphere of social coexistence between state authorities and citizens.

3.4 Advisory Function

Many people come to the ombudsman only to ask for (legal) advice or explanations. Lately, we have seen that state authorities, especially municipal authorities, ask for help where proceedings are pending. Furthermore, the advisory function of the ombudsman extends even to the legislature. In its annual reports to Parliament, the Austrian Ombudsman Board recommends amendments of laws as a result of carrying out hundreds of inquiries.

4. The Supplementary Function

4.1 The "Modern" Citizen and Traditional Administration

A question that arises is: for whom does the ombudsman perform the above-mentioned tasks? The answer follows the principle that administration should not end itself, it must be understood as a service for the public. There is a phenomenon — discussed at many international ombudsman conferences and elsewhere — that an increasing number of citizens do not understand or recognize this service function of public administration.

The rapid change from a society of subjects to a society of consumers has effected new demands on the administration as well as the legislature. At the moment, the modern, demanding and progressive citizen feels ill-treated by an old-fashioned, traditional state. True or not, the public opinion of administrations is that they are slow, lazy and inflexible. Laws are seen as incomprehensible, too strict and depriving people of their liberties.

But for most people, it should be as easy to get a building permit as to buy a new pair of trousers.

4.2 Maladministration

I want to state clearly that I am talking about the situation in Austria, a state with high legal, social, economic and democratic standards. While ombudsman institutions in other countries struggle for basic social and human rights, or mainly fight corruption, we are — in many cases — in the position to care for “luxury” rights.

Therefore, the term “maladministration” (or “nuisance” or “grievance”) covers a spectrum of meanings from lawlessness to unkindness. Quite often the Austrian Ombudsman Board does not judge administration action as illegal but as unkind or inefficient. However, the action is still maladministration.

4.3 Limits of the Rule of Law

Perhaps we finally have to drop the idea of being able to regulate all facets of social life by codified law. As I said before: the public feels that the laws are far away from the needs of the “modem” citizen. Even thirteen years ago, when I was working as an assistant at the university, we found that the pages of one year of the Federal Law Gazettes, placed one after the other, would amount to the length of the equator. The incredible quantity of law makes its enforcement nearly impossible for administration. Add to this the fact that the public service in executing the law is strictly obliged to act within the narrow bounds stipulated by the law, and the conflicts between citizens and public administration become evident.

Nevertheless, I believe that we all agree upon the necessity of codified law and that we should not leave judgments or decisions to the absolute discretion of any state authority.

4.4 Necessity of Equity

However, if we do not want to continue overburdening society with laws, since they cannot solve all conflicts and problems, we must find a supplementary criterion to satisfy the demands of the “modem” citizen.

I can provide the following example. Someone lodged a complaint with the Austrian Ombudsman Board against the municipal council of a small Austrian village. The problem was that the village raised the price for a piece of real estate although the mayor of the village had promised it to her for a much cheaper price. The Ombudsman had to tell her that, according to civil law, the promise of the mayor without a corresponding council resolution was not binding. Therefore, the administrative action of this municipal council was legal, and she would lose a court trial in all instances.

It is not hard to understand that she felt herself unjustly treated by these state authorities and tricked by the law. If we consider the headnote from the point of law, she should have known the specific article of the Civil Law. But would such a judgment be equitable? I might say that it would not be fair at all. Considering the maxim “equity does not suffer a wrong to

be without a remedy”, we find a solution to this conflict.

4.5 Ombudsman and Equity

Following that maxim, the Ombudsmen recommended that the municipal council discharge its resolution and pass a new one according to the mayor’s promise. The reason for this recommendation, as stated by the Austrian Ombudsman Board, was that a citizen of a community must be able to trust the promise of her mayor, and since the mayor is elected by the community council, the council must keep the promises of its chairman. The actions of the municipal authorities were classic examples of maladministration.

Only the personal authority of the ombudsman can make such a recommendation based on equity effective, because sanctions cannot be imposed if an administrative body fails to comply with the recommendation.

Some regret this lack of effectiveness. In my opinion, there is no reason for regret. Without changing the continental development of the law, the ombudsman has, besides its general functions, a supplementary duty to correct unfair or unjust decisions *ex aequo et bono* whenever possible within the framework of the laws. Such publicly-uttered recommendations gain more and more importance as a contribution to improve relations between “modern” citizens and their state.

Of course, there are many others besides ombudsmen who judge court decisions or administrative actions, such as journalists or television. However, the equity they apply is often not at all based on the constitution and the laws.

5. Conclusion

Whether or not you call it “ombudsman”, a constitutional institution, applying non-judicial rules of procedure, with the ability to judge administrative actions not only by codified law but by equity as well, seems essential for democratic states.

Our rapidly changing society requests up-to-date laws. A legislator cannot or perhaps should not comply with the individual interests and needs of citizens as fast as they want and expect. An ombudsman may point out urgently needed reforms and already existing ways of practising a “consumer-friendly” administration.

Endnotes

¹ V. Pickl, "Islamic Roots of Ombudsman Systems" 6 *Ombudsman Journal* 101 (1987).

² See M. Mauerer, "Die parlamentarischen Ombudsman-Einrichtungen in den Mitgliedstaaten des Europarates" (The Parliamentary Ombudsman Institutions of the Members of the Council of Europe) in *Ombudsman in Europe*, Franz Matscher, ed. (Kehl am Rhein: N.P. Engel, 1994) at 3.

³ See supra note 2 at 125-126 (note 13).

⁴ See N. Schwärzler, "The Austrian Ombudsman (Volksanwalt)", in *Public Administration in Austria*, Federal Chancellery (ed.) (1992).

⁵ See M. Oosting, "Regional Report: Europe" in *The Ombudsman Concept*, L.C. Reif, ed. (Edmonton: International Ombudsman Institute, 1995) at 47.

⁶ See D. Jacoby, "The Future of the Ombudsman", *ibid.* at 211.

⁷ Recommendation No. R(85) 13.

⁸ Resolution (85) 8.

⁹ Article 138e: Treaty Establishing the European Community, Article 20D: Treaty Establishing the European Coal and Steel Community, Article 107d: Treaty Establishing the European Atomic Energy Community.

¹⁰ See M. Mauerer, "Ein Volksanwalt für Europa" (An Ombudsman for Europe), in *Economy-Fachmagazin*, 9/93, at 207.

¹¹ See N. Schwärzler, supra note 4; M. Mauerer, supra note 2; M. Mauerer, *Der Ombudsmann (Volksanwalt) in Österreich*, Working Paper, 2nd Austria-Seminar (Havana, April 12-16, 1993).

¹² Article 148 a-j.

¹³ 100b, paragraph 2 of the Federal Law Governing the Rules and Procedure of the Lower House of Parliament (Nationalrat).

¹⁴ See V. Pickl, "Europäische Ombudsman-Einrichtungen aus rechtsvergleichender Sicht" in *Europa im Aufbruch: Festschrift Schwind*, Morscher & Seidi-Hohenveldern, eds. (Manz/Wien, 1993); V. Pickl, "Die Institution des Ombudsmannes und ihre politischen Dimensionen" in *Recht als Aufgabe und Verantwortung - Festschrift, Klecatsky, Marscher, Pernthaler & Wimmer*, eds. (Manz/Wien, 1990); V. Pickl, *The Ombudsman - Idea and Reality*, Report of the Fifth International Conference (October 11-16, 1992, Vienna, Austria) at 217.

¹⁵ See Mauerer, supra note 2.

¹⁶ See Pickl, supra note 14.