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The Commissioner of Citizens' Rights of the European Parliament

IS THERE A CLASSIC PARLIAM- MENTARY OMBUDSMAN?

(SPEECH OF THE DAY ON THE OCCASION
OF THE 20th ANNIVERSARY OF THE AUSTRIAN
OMBUDSMAN BOARD - VIENNA, 4 JUNE 1997)

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(VIENNA - 4 June 1997)**

SPEECH OF THE DAY

by

Jacob SÖDERMAN

The Commissioner of Citizens' Rights of the European Parliament

"IS THERE A CLASSIC PARLIAMENTARY OMBUDSMAN?" *)

In 1987, Mr V Pickl, then Director of the Austrian Ombudsman Office, wrote an article in the Ombudsman Journal, in which he argued that the idea of an Ombudsman had Islamic roots. From time to time, this has been mentioned, sometimes to question the importance of the Swedish initiative to elect an Ombudsman with a constitutional mandate in 1809, which is often referred to as the classical Ombudsman or the classical Parliamentary Ombudsman.

It is quite true that in the Islamic tradition of law there is the idea of a high official that deals with complaints addressed to the Ruler by the people. It is also true that the Swedish King Karl the XIIth wrote the letter to his government initiating the establishment of a High Ombudsman, when he was a guest or a prisoner in the Court of the Turkish Emperor in the beginning of the 18th century; almost 100 years before the date used as a mark for the Swedish invention of the Ombudsman's office. He seems to have been inspired by the practice of a high official dealing with the peoples' complaints in that court. He was there because he and his army had lost the battle against the Russian czar and his troops at Poltava in 1712 and he had to flee to Turkey.

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Yet this was not the establishment of the Ombudsman's office as we know it today. In fact, in many Royal courts in Europe, there were high officials dealing with complaints to the King, some of them as the Justitia Mayor of Aragon clearly inspired by the Islamic example, others clearly set up just for practical reasons. No, the invention of the Swedish Ombudsman idea came into force in a constitutional reform of 1809 when the Swedish legislative body, the Ständerna, was given the right to elect an Ombudsman of Justice, after having disputed over that right with the King during almost the whole earlier century.

When the Parliament was given the right to elect the Ombudsman of Justice, he was meant to be totally independent from the King, his government and the administration. The main idea was to give the Ombudsman the right to supervise the legality of the administration on behalf of the legislative power but at the same time independently from that body. The legislative power did not have the right to intervene in the activities of the Ombudsman, especially not in his dealings with a specific case. It could however comment on his doings when dealing with his annual report.

The Swedish Ombudsman was also given broad powers, the right to supervise not only public administration, but also the judiciary. He was entitled not only to make recommendations, but also to prosecute or decide on the prosecution of a civil servant or judge, if needed. He should not only act on complaints, but also had the right to take own initiatives. I believe it is important to underline that the Ombudsman does not comment on the merits of a court decision and seldom on an administrative one. He concentrates on matters of procedure, for example whether a person has been given a fair hearing or whether there have been legal rights for a search or if the decisions are properly reasoned.

Lastly, I would like to stress that this particular Ombudsman, which I would consider the classical Parliamentary Ombudsman, acts in a very public way. His files and findings are usually open for anyone to study. The Ombudsman is elected for a given period, during which his suspension requires very strong reasons. He can be reelected.

For a long time, the Swedish had only one follower. Finland, which gained independence in 1917, established a Parliamentary Ombudsman in its Constitution of 1919. Then it was only in 1955 that Denmark set up its Ombudsman's office, which became the very model for most of the Ombudsmen's offices, at least in the Commonwealth countries as well as for the European Ombudsman.

The Scandinavian model is often referred to, but the Danish and the Norwegian office created in 1962 are in fact of a clearly different model. You might say more modern if you want, but in fact looking only at its powers, it is a much weaker alternative in many ways.

The Danish Ombudsman's office has no power of prosecution, but it can initiate proceedings through a prosecutor. It does not basically supervise the rule of law, it concentrates more on possible maladministration in the activities of traditional public administration. It has no right to supervise the judiciary and it deals with its cases mostly in a confidential way. This is the model that conquered the world; starting in New Zealand in 1963 and then having followers in many countries in the 60.s and 70.s. By the end of 1995, there were Ombudsmen's offices under different names in 75 countries, including 27 European countries. Today, 12 of the Member States of the European Union have an Ombudsman's office on the national level, since Belgium and Greece recently decided to establish theirs.

In Luxembourg and Germany, there is the right to petition the Parliament on the national level. In Italy, there are only Ombudsmen on the regional and municipal level so far, law proposals are pending in the Italian Parliament from time to time.

Why was it the Danish model that was to be the basis for many of the Ombudsmen's offices? I think there were three reasons. First of all, it was a more flexible and lighter control system than the Swedish model, especially the supervision of courts and the right to prosecute have been largely disputed in many countries. Secondly, its focus on preventing maladministration and solving disputes between citizens and the administration as well as the development of better standards for administrative behaviour seems to have attracted countries with an established parliamentary democracy. Thirdly, the first Danish Ombudsman, Stephan Hurwitz was an effective salesman of the Ombudsman idea on the world stage.

Of course, many countries have contributed to this model with their own modifications; France and the United Kingdom with the political filter - a complainant must get the consent of a Member of Parliament or a Senator to be accepted -, Spain with its developed and effective net of regional Ombudsmen in the autonomous communities and you, here in Austria, with your board of three Ombudsmen with a constitutional mandate and independent right to supervise public administration.

What is the best system, what should an Ombudsman really do, is there at all a classical Parliamentary Ombudsman?

In 1974 The International Bar Association defined the "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 acts on his own motion, and has power to investigate, recommend corrective actions and issue reports."

This remains one of the best attempts to define an Ombudsman's office.

In a comprehensive and interesting paper presented by Sir John Robertson, former Parliamentary Commissioner of New Zealand, at the 6th International Ombudsman Institute Conference on 21 October 1996 in Buenos Aires, he states rather pessimistically that there is no pure model of an Ombudsman's institution, because each country has integrated the concept into its constitutional and political framework to meet its own requirements. He also states:

"that too much attention has been given to arguing between the models being developed around the world". And concludes his remarks by saying: "the real test in the end is how independent it is to criticise executive government processes, to hold government accountable for its mistakes and achieve credibility and trust both with the government and the governed"

Listening to the presentation of the paper, I agreed with much of its message. The passage I have just quoted made me slightly doubtful. I detected a sense of resignation in the face of the actual development of the Ombudsman institution in some countries with a poor record in the human rights' field.

A too pragmatic attitude might lead to a watering down of the requirements for an Ombudsman's office, to a level at which for example the Chinese ministry

dealing with complaints or Fidel Castro himself could start calling themselves an Ombudsman's office.

Even if the very classical Parliamentary Ombudsman's office exists in only a few countries and all peoples must have the right to shape their models to control public power within their constitutional landscape, there should always be an idealistic and firm international opinion on the very basis for a successfully working Ombudsman's office. This opinion should include:

the constitutional mandate, an election by the Parliament with a secret ballot, a true guarantee of independence, the free access for the complainant and the right to an own initiative, a broad mandate and sufficient powers to investigate and report under the overall surveillance of the legislative power.

I can well understand that this is not feasible in all countries under all circumstances, and I respect their right to decide for themselves, but there should still be an optimal goal to strive for, based on the features of the classical Parliamentary Ombudsman. The international Ombudsman movement must have a true commitment to constitutional democracy, rule of law and human rights, even with a slightly idealistic overtone. Perhaps one never reaches the stars, but the stars have shown the way to many seafarers in troubled waters.

In Europe today, there are two major challenges for the Ombudsmen's offices and similar bodies: one is the increasing need to know and apply international and community law and the other is the rapid change in public administration through privatisation and contracting out public services. Earlier, the main international challenge was the supervision of international human rights' conventions on the national level. Due to the active role played by the Council of Europe since 1985 with its bi-annual Round Tables for Ombudsmen, this activity is an established practice in most ombudsmen's offices.

The European Convention on Human Rights being incorporated as national law in most of the Member States, there is no problem of authority to execute the supervision.

More recently, the need for a closer look by the national Ombudsmen at how Community law and European citizens' rights, established by the Maastricht Treaty, are applied on the national level, has been introduced by the European Ombuds-

man's office. Although there is much to do especially concerning the provisions dealing with the freedom of movement for European citizens, I do not think that this will be too heavy a burden on the national Ombudsmen. I am very glad to be able to confirm that the Austrian Ombudsman Board has cooperated fully from the beginning of this international activity.

The reshaping of the public sector as a means of modernisation, a possibility to make savings or a political belief is leading to profound changes in the way public activities are dealt with. I believe that we have only seen the beginning of this.

Maladministration, bureaucracy or the maltreatment of a customer is not only restricted to public activities, unfortunately it also exists in the private sector. For the citizen who is entitled to a public service, there is no difference if he or she is being maltreated by a public institution or a private company.

It is therefore necessary in a society of law to secure the right for the citizens to complain, even if a public activity is handed over to be run by a private company or an association. To me, there is an obligation for the national Ombudsmen to be active and to initiate the necessary changes in laws or even in the constitution to guarantee an effective supervision of the citizens' rights in this field. This should apply regardless whether the actor is public or private, in cases where the activity is traditionally public and when it is basically run with public funds. In looking for more flexible ways of public service, the citizens' right for a fair treatment should not be forgotten.

It has been said that the Parliamentary Ombudsman institution is the most important single constitutional development of this century. The Swedish Ombudsman, Claes Eklundh, sometimes quotes an old religious Swedish text that states that Christ is God's Ombudsman on earth. When I was the Parliamentary Ombudsman in Finland, I had an assistant who liked to say that the Ombudsman is like Santa Claus, he comes from the North and does only good things for people.

Sometimes the Ombudsman is compared with Batman, Superman or Robin Hood. Well, he is none of them. This illustrates the need and hope of people that somewhere behind the grey and massive administration there should be someone to help the average citizens achieve their lawful rights.

I do wish to underline that no Ombudsman can replace a professionally run public administration and its services or a well working judiciary, which are the cornerstones of a democratic society. An active and dedicated Ombudsman's office

can raise the quality of administration from the citizens' point of view and give it a more human and social face by helping citizens gain their lawful rights.

Doing this successfully has made it a unique tool for the citizens in our time. Let us keep it that way!

I wish to congratulate the Austrian Ombudsman Board from the bottom of my heart on its 20th anniversary, for its profound achievements and much-appreciated results during its first two decades. It has continuously struggled for a more human and social Austrian public environment. I hope that you will look at the future with hope, belief and strength to clear up all the disputes and problems that might arise on your path.

Thank you for your attention.