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THE OMBUDSMAN AND PERSONS SUBJECT TO PARTICULAR AUTHORITY RELATIONS – SOLDIERS / CONVICTS / PERSONS IN NEED OF CARE

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THE OMBUDSMAN AND THE CITIZENS IN THE CONTEXT OF SPECIAL AUTHORITY RELATIONSHIP

Reflections on the necessity of the establishment of special Ombudsman institutions with a view to legal policy

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I. Introduction and topic

1. Basic facts

The modern state of the 20th century is characterised by the adoption of a multitude of both traditional and new tasks and functions concerning all areas of human life. In this context the individual citizen faces an overwhelming, hypertrophic bureaucratic body, the organisation and activities of which are in many ways obscure and not understandable. At the same time, the individual depends more than ever on governmental benefits, social services and guarantees. This situation is the reason why many citizens have a new feeling of being inextricably bound to the state and its mercy. This general unease is further aggravated by the shift of national tasks from a national level to supranational institutions, above all the European Communities. This shift renders decision making processes and the application of instruments of control even less comprehensible for the individual than before. Moreover, there are general fears of globalisation and fears of the real abuse of power by international groups and big industrial organisations. Existing institutions for legal protection and control have long since lost the ability to inspire citizens' confidence in the ability of public activities to function and in their legitimacy.

2. The current role of the Ombudsman institution

The introduction of ombudsman institutions can be seen as a reaction to structural changes in the modern state. The starting point is the basic assumption that democracy always needs efficient supervision in order to prevent the political power from exceeding limits established by law. In this context the ombudsman has the important function of an institutional mediator between the citizens and the state. His competence includes examining not only the legality of government actions but also their efficiency and equity. In doing so he is not meant to merely

increase the number existing institutions of legal protection, but to complete them sensibly through personal commitment.

In the view of the social and political conditions prevailing in the states of our world, there can be no serious doubt about the necessity and efficiency of introducing special ombudsmen whose job it is to detect problems that often arise in certain areas of administration. Of course even at this stage, the objection can be put forward that in fact - compared with general administrative law - a more or less intensive legal relationship is set up whenever an administrative regulation meant to settle a clearly defined subject is passed. In this respect the introduction of an ombudsman could be justified for any administrative matter that can be distinguished by factual or typological characteristics. In fact there are already many ombudsmen or comparable institutions in numerous areas of social life, but this spectrum is to wide t be discussed in this paper. It is the opinion of parts of the jurisprudence that there should also "special relationships of subordination", which are characterised by a stronger dependency of the persons who are subject to those relationships on the sovereign power, the execution of the latter being an area that is not subject to legislation. The following exposition will be based on the somewhat controversial thesis on the existence of special relationships of subordination, not only because of its clarity but primarily because of the very real threat it represents to basic human rights. Additionally the question of the necessity of the introduction of a special ombudsman for these areas will be posed again in this unusual context.

Given the complexity of this topic, it is not sufficient to reflect only on a certain national system of ombudsmen and to try to arrive at fundamental conclusions. This would neither present the problem adequately and nor be appropriate to the basic significance of the cause. The following exposition is aimed at elucidating the circumstances that would suggest the introduction of specific ombudsmen without taking into account national ombudsman models. First a few general thoughts about the organisation of the office of an ombudsman will be discussed; these will then be directly associated with his tasks and responsibilities. A short legal introduction to the theory of special relationships of subordination will then be given, followed by an explanation of the various forms of special relations of subordination and their characteristics. The special legal regulations and particularities of authority relationships in institutions as well as in the army are the key elements of the exposition. The problems frequently arise in hospitals, prisons, the army, and particularly the infractions of basic human rights clearly show, why these areas need ombudsmen. It should be pointed out at the

beginning that any form of generalisation tends to distort. Therefore while there may indeed be states that deny having the problems discussed in this paper, that is rather improbable. Many of the special legal relationships explained on the basis of examples in this paper show striking similarities, which justify the assumption that the same or comparable problems exist elsewhere and eliminate the need for further proof. Every imprisonment, for example, means a substantial restriction of personal freedom, and no military alliance in the world can be controlled by means of consensus, where every order must agreed upon by both those who give and receive commands. Of course the intensity of the problems arising in the different areas is likely to vary, but it is a fact that the problems of the sort mentioned above basically do exist. However, it is the responsibility of every nation to find the best solution to these problems, and the introduction of a special ombudsman appears to be an important step in the right direction.

II. The organisation of the office of the Ombudsman

This is neither the right time nor the right place to deal in detail with the organisational theory aspects of the efficient establishment of the office of the ombudsman. Those formal organisational circumstances that are important for our further explanations, however, should be mentioned.

The quality, usefulness and efficiency of every ombudsman's work are not solely dependent on the authority and esteem his position gives him. The organisational premises that determine how the office of the ombudsman is set up are equally important for his success. An ombudsman who in fact has a wide sphere of control but lacks on adequately qualified staff and appropriate rooms and equipment will have serious problems carrying out his tasks efficiently even in a small state. In a larger state, the institution of the ombudsman will become a farce if he is unrestricted in his geographic and factual sphere of competence but at the same time restricted in his factual and personal resources.

If the state expects ombudsmen to work effectively, it must ensure that they can actually accomplish their assigned tasks. In addition to providing the necessary resources, the state must place restrictions on the geographic and factual sphere of competence of the ombudsman, beginning at the stage of creating the legal premise for this kind of institution. As a rule it is justified to assume that the domestic circumstances and conditions of each

nation will, from the beginning, appear to suggest the choice of a decentralised organisation. It is generally known that regional and local ombudsmen are already operating successfully in some states.

Under certain conditions, both a territorial decentralisation and a sectional organisation of the institution of the ombudsman will be necessary. The staff of an institution of the ombudsman is rarely so large that allocating the responsibilities according to different subject matters is enough to ensure the successful fulfilment of the real work load. It is more likely be necessary to separate the tasks in terms of sectional criteria and to set up a special ombudsman with independent authority for sectional problems wherever the number of complaints or the nature of the task itself requires it.

In practice many things are still at sixes and sevens particularly in the field just mentioned. The following exposition about special relationships of subordination should demonstrate the urgent need for both special ombudsmen and the appropriate action on part of the policy makers.

III. Theory and practice of special authority relationships

1. Introductory remarks on legal theory and definition

The theory about special relationships of subordination has it origins in German 19th century administration theory, of which *Otto Mayer* was the founder and leading advocate. This theory is based on the concept of integrating each citizen into a complex authority relationship to the state as a sovereign with almost unrestricted authority. This integration manifests itself in a certain submission of the individual to the state and its institutions, the significance of which tends to vary but generally increases in modern welfare states. In former times the possibility to exercise power directly over each individual citizen was much more important (e. g. in the framework of the policy of compulsory military service), whereas today this submission is often expressed in the application of a multitude of economic and technical instruments of power. The general relationship of subordination is weakened on the one hand by the concession of a sphere that is protected by constitutional rights and not subject to infringement, and on the other hand by legal binding, which limits state "power". In view of the structural changes in the relationship between citizens and the state, it consequently seems

more efficient in terms of terminology to talk about varying grades of (and therefore relative) dependency rather than submission. Introducing a new term in an attempt to represent the new quality of this relationship, however, does not change the advanced institutionalisation of the relationship between citizens and the state.

Within the set of general relationships of subordination, the smaller subset of special relationships of subordination can be distinguished. The doctrine that prevailed in the past said that the particular features of these special relationships was an additional, stronger dependency that went beyond the general relationship of power. Originally, that is the era of absolutism, there were indeed spheres that were not subject to legislation, where individuals could not assert a title. Civil servants, but also soldiers and pupils, for example, were seen as part of the internal affairs, which was characterised by diminished constitutionality. Thus a restriction of their rights by exercising special state power was not possible from the start. The characteristic elements of the special relationship of subordination were hence on the one hand that the execution of state power was not bound to law and on the other hand the personal character of this relationship. In the meantime this extreme attitude has all but been abandoned, one reason being the impression that there are now comprehensive laws governing the relationships between the individual and the state. One example is The German Federal Constitutional Court, which, beginning with a decision from 1972 concerning legal protection in prisons[1], has repeatedly maintained that in a state based on a democratic constitution and a parliamentary system, the decision of all fundamental questions directly concerning its citizens must be based on law[2]. The court thus clearly rejected the notion that particular authority relationships do not need to be subject to legislation. Today the term 'special relationship of subordination' is only used as a synonym for a number of determined relations of rights and duties, which have similarities. For the individual, the particularity of these relationships of rights and duties manifests itself above all in the form of special restrictions of the rights guaranteed by the constitution, the reduced validity of the strict constitutional requirement of a specific law in the context of administration, and the limitation of the possibilities of legal protection.

The principal difference between general and particular relationships of authority is therefore not so much the lack of legal authorisation to exercise state power, but rather in the differences between the groups of people obliged and in a modification of the degree of

[1] BVG (Federal Constitution) 33, 1.
[2] BVG 40, 273 (249).

individual obligation. At this point it should be emphasized again that the particular authority relationship is not necessarily non-legislated and therefore elementary power. Power of this kind cannot exist in a modern constitutional state because of the principles[3] that govern it. In both the general and the particular authority relationship the basis for the individual obligations to the state is the same, namely positive law. The law can set very different norms for the conditions under which an individual is required to behave in a certain way. The legislator must act within the framework of the limits set by the constitution (i. e. its basic values) and above all in this context the commitment to fundamental rights. Hence it would be wrong to assume that one group of obligations is based on the general duty to obey, but the other on the special authority relationship. In a liberal, democratic state governed by the rule of law, which is based on the principle that every public action is bound to law (principle of legality; principle of the rule of law), special rights and duties that can be subsumed under the term of special authority relationships, can only be created by law. But it is not at all true that certain legal consequences (e. g. the existence of the right of intervention through the state, which is not laid down by law) can necessarily be derived from the institution (the term) of the special authority relationship itself. For citizens this means that they can still enjoy their general freedom of action, apart from standardised restrictions of the free development of their personality (e. g. the law can authorise instruments of state to infringe on the rights of the individual in certain cases) laid down by positive law (i. e. explicitly). Where the authority of executive organs laid down by law ends, the fundamental personal freedom of the individual continues to exist in its form. The principle of the rule of law implies that the individual concerned must be able to appeal in a regular proceeding against obligations that are contradictory to the constitution, and against illegal coercive acts. Should the court find an illegality, the concerned acts of instruments of the state must be annulled and/or the consequences eliminated. This also applies - at least from a legal theory standpoint- also to special authority relationships. The vital issue in this context concerns the determination of the range of special legal obligations to tolerate and the authorisations to intervene which restrict the general freedom of action.

2. Traditional manifestation of the special authority relationship

[3] The fundamental principle is that the entire national administration is bound by law. According to this principle, the law must do more than standardise the amount of public authority executed. Without special legal authorisation the execution of state power is not possible at all.

a. Starting point

It is undeniable that no national legal system has governed the legal relationships of its citizens without differentiating, so that every citizen regardless of his/her profession or social position has the same rights and duties. Such a notion about legal equality is not desirable in theory, nor could it ever be put into practice. What all legal systems have in common is that they embody a plethora of different legal relationships, with the result that there are really only special authority relationships. With every new provision it passes, the legislature creates new ground for differences and thus justifies the many special legal relationships existing. Nevertheless, it is possible to identify a number of legal relationships that have common features or show particularities, which can for example involve certain legal relationships which constitute a particular status of duties or include a restriction in legal protection. The following survey of individual special authority relationships must also be considered in this restricted (because it classifies only according to typological and systematizing aspects) sense.

b. The special authority relationships in detail

aa. The situation of civil servants

The situation of civil servants is seen as the classic case of special authority relationships. In the 19th century, the status of civil servants was still linked to the concept of a strong sense of loyalty and obedience to the state which went far beyond the general duty of citizens to serve the state. Nevertheless, particularly in this area, authority soon had to give way to legislation. Today, the constant influence and obedience that are integral elements of civil servant status, are almost exclusively subject to the rule of law. In individual cases, only the extent of legal determination necessary may present a problem. This also applies to the right of superiors to give subordinates instructions. Many national legal systems, however, provide ways to have the legality of these instructions checked (in Austria e. g. by means of the right of challenging the legality of a superior's orders: Article 18a para. 4 B-VG). Disciplinary law also frequently includes a substantial number of undefined legal concepts and there are still cases in which the disciplinary punishment of a civil servant is based not on law, but exclusively on the established professional code of the civil service.

Attempts on the part of some law makers to legislate the duty of civil servants to be loyal to the constitution have raised particular problems in terms of basic rights. The obligation to recognise a certain constitution and to advocate the values it includes may result in a situation in which, under certain conditions, a civil servant is subject to sanctions because of his/her politics, even if they had no impact on his/her work. Although civil servants theoretically have political freedom of speech and private activities are basically permitted by official regulations, in practice they are in many cases restricted by the political obligation of loyalty. Civil servants are above all required to avoid everything that could make them appear politically biased. Consequently, civil servants in states where this particular obligation of loyalty exists cannot exercise their right to freedom of speech to the same degree as may be granted to other citizens by the legal system in force.

bb. Subordination in the army

Although the military is part of the national administration and the actions of its organs are thus subject to the principle of the rule of law[4], there are still substantial deficits as far as constitutional rights are concerned. This is true not only of states without a well-developed tradition of the rule of law. In terms of the strict validity of the principle of legality, alarming conditions can also be found in sound democracies that grew out of a long historic tradition. The Austrian military law for example contains a multitude of delegations[5] empowering the administration to freely issue further rules without any restrictions as to their content. This is particularly valid for the military obligation to obey orders and its actualisation through the exercise of the corresponding power of command by the superior organ. The internal organisation of the military as well as the training of its members are still not laid down by law.

The particularities of the legal relationships in the army can only be explained by the history of its development. With regard to their interests, soldiers and citizens were always put into different categories. While ordinary citizens were said to pursue private matters, soldiers were

[4] In individual cases military actions must also be correspondingly covered by law. Such actions must comply with the law.

[5] The legislator is bound by the principle of the rule of law to issue only content defined regulations, which can under certain conditions then be defined more precisely by ordinances issued by public authorities. The legislator must, however, explicitly define the factual scope of the public authorities in the framework of the advancing standardisation of rules. If this exact factual determination by the legislator is missing, it is this type of delegation. The ordinance issued by the authority seems to be covered only by law. In reality its content is up to the administrative authority that issues the ordinance.

said to serve the general good. This separation explains why soldiers have always lived in a closed, institution-like area, the essential traits of which still exist. Some particularities worth mentioning here are the restrictions which apply to soldiers voicing their personal political opinion and their consequent curtailed freedom of speech as well as the fact that the application of disciplinary measures is not sufficiently laid down by law. Article 11 para. 2 of the Convention on Human Rights explicitly states the legitimacy of a restricted freedom of assembly and association for members of the armed forces.

cc. Authority relationships in public institutions

Public institutions are bodies that function as legal entities, dedicated to the fulfilling of certain public objectives and with sufficient means and personnel to do so. This type of institution also exhibits a number of particularities which make it different from other administrative institutions. Like government authorities, offices and institutions, public institutions also provide certain useful services, using their own technical means and the staff to do so. The relationships between clients and institution can be determined by Public or by Private Law. Hospitals are the obvious example of the particular importance of public institutions in modern life; but also for example orphanages, borstal institutions and homes for the elderly are public institutions in this sense[6]. In this context, the fact that institutions have autonomous authority is decisive. All clients are subject to it, regardless of the legal basis for the exercise of this autonomy. Ideally the mutual rights and duties of each institution and its clients are laid down in detail in form of institution rules that are to be qualified as ordinance. If such rules exist, the legality of actions by organs of the institution appear to be at least superficially provided for. In reality, there are still numerous gaps in the laws concerning public institutions and above all medical services which can lead to serious problems of legal protection. The incomplete legal coverage of hospitals has its origins in history. On the one hand, most legal positions in this area were traditionally defined by instruments of private law. On the other hand, there is an increasing tendency to remove hospitals from the organisational structures of the state. Those two factors made the sovereign functions of those institutions less important for a long time. As a result there are still noticeable legal gaps in the internal order of the welfare and health system.

[6] At least in Central Europe Departments of Pensions and Social Security also fall under the concept of public institution.

dd. The relationship between pupils and school

Under the general heading 'school relationships' we find on the one hand the legal positions of pupils, their parents and other persons having the right to educate and bring up minors to school and vice versa, but on the other hand the responsibilities of schools, pupils and everybody else concerned. With regard to the rule of law, the position of schools has always been problematic due to its basic objectives and the means used to achieve them. Not even modern education laws could significantly change this situation. Although the school sector is increasingly governed by an administration that does justice to the requirements of the rule of law, there are still vast and also essential areas in which pupils and parents have neither the opportunity to take part in decision making nor effective legal protection. Prominent examples would be the determination of the curriculum, the problem of introducing experimental school forms or punishment at school. The relationship between teachers and pupils is in many cases still not subject to detailed legal norms.

ee. Prisoners

The legal position of prisoners is an area of conflicts of a special type. Prisoners have always been confronted most intensively with the execution of state power. Even in highly developed democracies, prisoners sometimes suffer from severe restrictions of their basic rights, a situation which is justified by the offender's clear breach of law and the unavoidable character of imprisonment itself. In the case of prisoners, the guarantee of human rights is largely thought to be restrictable without exact dogmatic reasoning. The suitability and appropriateness of measures taken in prisons can therefore often not be examined. The German Federal Constitutional Court, however, ruled differently. The court was given a reason to deal with the effects of special authority relationships on basic rights when a prisoner complained that one of his letters to somebody outside the prison had been confiscated and read. The measures of stopping and examining the letter (it contained disparaging and offensive remarks about the prison director, some members of the staff, and the conditions in the prison) were justified by official and prison regulations .The lawsuit filed in the provincial high court of appeals then in charge was not successful. The measure was confirmed with reference to the legitimacy to restrict the basic rights of prisoners without legal basis only due to the requirements derived from the objective of the institution. In its previously mentioned 1972[7] decision, the Federal Constitutional Court, however,

[7] BVG 33, 1.

categorically rejected the notion that the special authority relationship to which prisoners are subject, justifies the restriction of basic laws that are not laid down by law.

Under the conditions of imprisonment, the freedom of action is largely restricted. Lawmakers are often content with the general authorisation to imprison and do not specify the conditions under which the sentence is to be served. Consequently the internal organisation of prisons is transferred to the administration of the institution, which takes its decisions on the basis of an extensive, general, legal authority. Prisoners are therefore, more than anyone else, dependent first of all on the legislature, which must define the prisoners' personal freedom according to positive law before it can be put into effect. If the legislature does not fulfil this obligation, as is the case in many states, the control function of an ombudsman who follows the criteria of humanity is all the more necessary.

3. Special authority relationships and legal rights[8]

a. General report

Since the special authority relationship, which is a particular form of the general authority relationship does not supersede the latter, it continues to exist in its basic form. Its effect is limited to the modification of the rights and duties relating to the general authority relationship. This means as a rule that the existing duties are increased, whereas the rights of the individual citizen are restricted, and formal options of legal protection against certain forms of actions by the state are excluded from the start. This type of restriction primarily effects the basic rights.

Furthermore special authority relationships often include the option of simplified duties for citizens. These need not have the form of a decree or formal administrative act; they can just as well be effected in the form of commands or service instructions. This fact is, of course, not based on the nature of the special authority relationship itself, since this type of simplified duty is an integral part and inherent characteristic of it. It is much rather the result of a deliberate legal/political decision by the legislature, who simply found that compliance with

[8] In this context legal rights are exclusively the rights a citizen is granted by public law. It is the character of these rights to give the citizens a certain "legal power", which entitles them to call for a certain behaviour by the state in order to safeguard their interests. The prerequisite is the existence of the right to sue or file a complaint.

strict formalisms was not essential in this case. Nevertheless special authority relationships are still exclusively relationships constituted on the basis of law.

b. Basic rights and special authority relationships

The older constitutional doctrine about special authority relationships set forth the opinion, that citizens integrated in this special relationship of administrative law, have only a restricted entitlement to the protection of their basic rights. This view is contrary to the principles of a state under the rule of law, which defines that the special duties of civil servants, soldiers, pupils and inmates of an institution are also the expression of a relationship standardised under positive law. Therefore it is impossible for persons to be subject to restricted legal protection simply because they are in the situation of a special authority relationship. It is also impossible to justify unopposed toleration of interventions in basic rights by citing the nature of special authority relationships.

The fact is that in the decades after the Second World War, legislators (at least in western democracies) really made an effort to improve the legal coverage of special authority relationships in terms of formal as well as material aspects. If such particularities do exist they should be determined by law in terms of content as well as grounds.

The most obvious case of special authority relationships is the restriction of the rights of prisoners. In the most countries of the world, the restricted guarantee of basic rights is considered necessary due to the nature of imprisonment and is hence justified on the whole. The western democracies are no exception. Even the Austrian Constitutional Court voices the opinion in its established court practice that restrictions relating to the nature of imprisonment are not forbidden by the constitution. More recently, though, it has tried to differentiate more carefully in terms of the necessity and appropriateness of restricting the basic rights of prisoners.

The communication with the outside world as well as the internal relationsships of prisoners can regularly be subject to particular restrictions. In comparison to the outside world, the restriction of correspondence, the censorship of letters of complaint, the denial of access to presents and parcels, the restriction of the right of visitation, and other unavoidable restrictions in privacy and family life should be mentioned. Restrictions that affect prisoners in terms of internal relationships in prisons are particularly serious. The possibilities include

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IV. The specialisation of Ombudsmen - a necessity or a political illusion?

1. Basic considerations

The modern institutional state generally claims to be a just state. Hence it is justified to call it a state under the rule of law. This term expresses the double commitment to legal principles, which say that human dignity, the free development of personality in liberty and autonomy are to be protected. The rule of law means hence above all, but not only, the guarantee of basic rights. Furthermore it is realised by the organisation of the state according to the principle of the separation of powers, which includes particularly a system of legal protection that meets the requirements of the time. The most important function of such a system is to take action when the legal rights of citizens have been violated by the state. Furthermore it must be capable of preventing future infringement. Last but not least, a system of legal protection must provide for supervisory bodies responsible for the detection of irregularities in the field of governmental regulations and administrative matters, regularly evoking injustices that have a negative effect on the relationship between citizens and state.

The principle task of the state is to control and to integrate power and at the same time bind power to responsibility. The neutralisation of power is primarily a question of the self-

involved if he/she stays in the corresponding institution. In addition the prospect of success is poor if the complainant is the only witness in the case.

These few indications alone clearly indicate that the problems arising in this context cannot be solved at all or at least not sufficiently by traditional institutions of legal protection. Especially when strictly formalised jurisdiction of public law is less geared[9] to content than definitions, which is often the case, it is often forced to surrender before a decision is reached because of the procedural restrictions to which it is subject. This frequently occurs only for a lack of a proper object of complaint.

In the view of this clear and not very optimistic report, the extraordinary legal importance of each Ombudsman institution for the solution of conflicts related to special relationships of power need not be specially justified. What must be questioned though, is the basic practical and organisational suitability of traditional Ombudsman institutions to meet the demands typical of this type of institution. An overly simplified (and deliberately provocative) definition of the Ombudsman institution is that it is as a rule characterised by an all-embracing competence both material and geographic, in an extended area of government misconduct. At the same time it is restricted with regard to the financial and legal means necessary to fulfil its tasks. The Ombudsman investigates facts of the case, clarifies, reports, mediates and denounces. What he does not do - not even as an interim solution- is to revise decisions handed down by the state. His hands are tied in that case. Consequently it is understandable if doubts are voiced about the conceptual suitability of the Ombudsman to solve the conflicts coming up in the context of special relationships of power efficiently, considering that he is omnipotent in terms of content but restricted in his authority to intervene. This lack of suitability becomes particularly evident in view of the infringements people in institutions - especially in prisons and in army - are subject to, and the necessity to apply countermeasures quickly and autonomously. A reorientation in the sense of a basic redefinition of the ombudsmen's function and his resources are absolutely necessary. Detailed explanations and reasons will be given in the following sections.

[9] An example of this type of gearing to definitions would be if only legal acts complying with certain formal requirements could be the object of a complaint.

2. The Ombudsman and prisoners

The numerous complaints of prisoners filed with the European Commission of Human Rights before the 11th Additional Protocol to the European Human Rights Convention went into effect paint a dark picture of the conditions prevailing in the prisons of the signatory countries. Points of criticism were the poor medical care, insufficient food and accommodation, the absence of continuing education, and the uncontrolled terrorisation by inmates and prison wardens, whose brutality was and still is at the centre of many complaints by prisoners. Although not all of those complaints were or are justified, there is no doubt that every single day people detained in the prisons of this world are victims to injustices, many of them gross. Prisoners are in a particularly unfortunate situation. Since they were found guilty and sentenced, supervisory bodies and authorities usually think they are no longer credible. Even where there are reportedly institutions for complaints or controlling bodies, they are not very efficient. That is not very important, when measures only include the withdrawal of more or less unimportant privileges such as restricting correspondence or removing a radio. The situation suddenly changes, however, when vital interests of prisoners, possibly even their lives and health, are at risk.

In a report of the Human Rights Convention issued in February 1996, the attention of the President of the Russian Federation was clearly drawn to the continuing disregard of generally recognised principles of ethics and humanity and the vast number of violations of human rights in the prisons of the Russian Federation. Many incidents ended tragically. In July 1995; for example; eleven people died due to inhumane prison conditions in the prison for pre-trial confinement of Nowokusnezk. One year earlier, about a hundred people had staged a spectacular mass suicide attempt in order to call attention to the unbearable conditions in the same prison.

There has been little or no improvement in the situation of prisoners in the Russian Federation since the publication of this report. It is still characterised by a humiliating lawlessness and an absence of a guarantee of human rights. In his latest report on his work in 1998, Oleg Mironov, the Human Rights Commissioner of the Russian Federation, explicitly emphasizes that there are still many unsolved problems in the institutions and offices related to imprisonment, particularly as concern the creation of civilised prison condition for inmates and the guarantee of the right of life and health. In many Russian prisons the conditions are comparable to medieval torture. This general report is verified by many complaints in the

daily practice of the Commissioner. Items on the agenda include overcrowded prison cells; poor hygiene and a lack of medical care, which is carried out by distributing "leftovers" (what could not be sold on the free market goes to prisons); and prison wardens' unwarranted use of physical violence on inmates. Masked members of special units apply "special methods" in order to make prisoners awaiting trial confess or make an incriminating statement about another person.

The violations of human rights need not be so striking to demonstrate the necessity of a special Ombudsman for prisons. Even in Central European prisons it can definitely happen that suspects or convicted persons are kept in painful irons if guards deem their behaviour inappropriately violent or aggressive. Furthermore, non-violent sanctions on prisoners sometimes have even more serious consequences. The forced separation from family, partner and friends that every imprisonment naturally entails, is hard enough in itself. Additionally depriving inmates of all contact with them in the form of letters or visits can have extremely negative psychological effects.

In the face of the increased dangers inmates are naturally exposed to in prisons, the key to any success is an autonomous controlling body that can react quickly. If it can only react after a formalised complaint procedure, which has to be presented before another authority, it is usually too late.

The establishment of a special Ombudsman for prisons seems more than necessary in the view of the specific problems. An Ombudsman institution of the general type is usually unable to provide real help in precarious situations. The proceedings are relatively slow and complicated, and Ombudsman institutions are generally overworked due to their large sphere of competence. In many cases they are only informed about these situations after the fact (and hence too late). Furthermore, in very large states the area of competence has to be limited to a manageable size so that it can always be reached by public transport. This may require the setting-up of several ombudsmen of this type. At the same time it must be guaranteed that ombudsmen responsible for prisons not only react to complaints, but that they also can and must act on their own initiative. Consideration could be given to legislation stipulating that prison conditions must be subject to regular inspections. Ultimately, the Ombudsman must have a framework within which he can apply immediate measures if he thinks it is necessary, for example to improve prevailing conditions of an incarceration.

3. The Ombudsman and public institutions

In prisons it is the external processes and circumstances that are inseparably connected to the institution, and its internal processes which make the setting-up of a special Ombudsman necessary. In institutions with other than a penal objective, this necessity results in most cases from the particular personal characteristics of the inmates. The physically challenged, those in poor health, minors, orphans, and frail or elderly people are usually much less capable of protecting and voicing their interests than the rest of the population.

A sick person for example, is torn away from his/her normal social surroundings under very difficult conditions. He or she is integrated into clinical processes which function according to their own laws and are unfamiliar to the patient, who becomes an object of the doctors' treatment. When patients are admitted to a ward, the effort of adapting often robs them of their energy and causes psychological stress. The situation is further aggravated by the loss of self-esteem, caused by the anonymity of the ward and subordination to its routine. The lack of regard for his or her social position is increased by restricted communication, and the patient is confronted with the problem of finding his new identity within the clinical organisation. In hospitals people are considered good patients if they accept everything that happens to them without question, if they do not voice their own expectations, and if they talk only if it is important for the smooth running of the system. The patients suffer from the depersonalisation and the complexity of the structure of a hospital as well as the emotional instabilities that are primarily due to illness and aggravated by the stay in hospital. It is therefore necessary to establish an organ that safeguards the interests of the patient with expert knowledge but is free from the physical and emotional strains mentioned above.

The unavoidable authority relations in the context of medical care constitute an area of conflict of a special type. Even in a country like Austria, where particular importance is attributed to formal constitutional principles, this area is still not sufficiently covered by law, neither in terms of content nor in terms of procedural law. The reasons for this situation are above all the specific responsibilities in this context. Treatment and care are to a high degree dominated by specialist rules and criteria which can be adopted by the system of laws in order to guarantee the smooth operation of internal processes. They cannot be replaced by a set of norms far removed from the field. In this context laws cannot provide more than a binding statement of principles for the questions if and generally how certain measures are to be

applied. It is not by chance that there is no other complex of norms that includes so many general objectives as medical law[10].

In the case *Herczgfalvy versus Austria*[11], the European Court of Human Rights also emphasized the importance of the principle of legality particularly for the patients of psychiatric hospitals. At the same time, it excluded the possibility of reducing the duty of legal determination in the context of special authority relationship. The case was as follows: Herczgfalvy, who had been sentenced to a long prison term, committed further criminal offences during his imprisonment and was therefore retained after having served his original sentence. Consequently he was declared *non compos mentis* and admitted to an institution for the criminally insane. During his stay in the psychiatric hospital Herczgfalvy was forced to undergo compulsory treatment, among other things force-feeding and tranquillizers. He was also isolated part of the time and strapped to a hospital bed. Furthermore his correspondence and access to media was severely restricted. The European Court of Human Rights stated in this context that particular attention was necessary in the investigation of the treatment of patients in psychiatric hospitals because of their typical inferiority and helplessness. It went on to say that if patients were incapable of taking their own decisions, it was up to the medical staff to choose therapeutic methods on the basis of the recognised rules of medical science. This would require a detailed justification of the medical necessity of therapeutic measures. In regard to the restrictions in correspondence and the right of information, the European Court of Human Rights ruled that they must be laid down by law. That means that these kinds of interventions must be based on a sufficiently accessible and in terms of context precisely formulated legal basis. The regulations must provide for a minimum degree of protection from arbitrary actions[12].

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[10] See also *Kopetzki*, Unterbringungsrecht I (accommodation law) (1995) p. 370ff.
[11] Europäische Grundrechte-Zeitschrift 1992, 535
[12] According to the European Court of Human Rights this requirement is only met if the regulations concerned contain details about type, objective, duration and extent of the authorised restrictions, and possibilities of appeal.

4. The Ombudsman and subordination in the army

The relationship of military subordination has traditionally been seen as part of the special relationships of subordination. For quite some time one of its most salient features was that it included quite a pronounced restriction of civil rights and liberties in comparison to the relationship between citizens and the civil state authority. In this connection, the restriction of soldiers' basic rights was based merely on the regulations of the military organisation. Even after the entry into force of the German Constitution there were still proponents of the thesis that the relationship of military subordination represents in itself an institution presupposed and recognised by the Constitution and as such it must be seen as a general and immanent restriction of basic rights. For understandable reasons, this view no longer holds today because it would put a practical end to the effectiveness of basic rights in a relationship of military subordination.

The total or at least extensive subordination of the military area to the civil authority of the state was accompanied by a process of rethinking. Almost all European democracies eliminated the special position formerly held by the military and incorporated the army in the system of general administration. Even if the standard of material and procedural legality still differs from the standard reached in the area of civil administration, this integration has made the relationship of military subordination lose a lot of its former rigidity and severity.

The rigid disciplinary responsibility that the soldiers are subject to proves to be a constant source of serious problems. With the aim of enforcing and maintaining the special military order, it allows far-reaching restrictions of the conscripts' personal liberties. Even in the armies of the Western States any violation of the soldiers' obligations to perform services and professional duties entails quite harsh administrative penalties and disciplinary measures, with confinement and prison sentences being no exception. Insofar as the disciplinary penal law of the military is prescribed by law, both the grounds for imposing a punishment and its degree can be reviewed on the basis of an objective criterion within a procedural process. In this connection, the efficiency of legal protection depends greatly on the quality that the available institutions for legal protection have themselves. There is a very strong possibility that a special court composed of members of the military will decide cases of violations of military service regulations differently than an independent court.

It is an accepted fact that individual soldiers can assert their rights only insofar as they can resort to established procedures designed to review military acts with regard to their legality. Given the concentration of state authority that a conscript is subject to, fast-working and effective procedural protection procedures prove to be by far more important for conscripts than for citizens with a general relationship to the State. Some States attempt to take this fact into account by trying to assure the soldiers' legal protection through specific procedures designed to consider the particularities and specific needs of the military organisation concerned. The General Service Regulations of the Austrian Federal Army for example, provide soldiers with a specific right of complaint. Pursuant to this, every soldier has the right to make an oral or written complaint about shortcomings and ills in the military that concern himself, in particular about injustice done to him or restrictions of his official authority. He can also present his personal wishes and state the reasons therefor. The complaint is dealt with either at the level of units or troops or by the Complaints Committee for military matters established at the Federal Ministry of Defence, depending on the nature of the complaint (ordinary or extraordinary). Even though the procedure for dealing with complaints has been designed along the lines of the procedural regulations laid down in the Austrian Administration Procedure Act which provides that an authority is obligated to explore the real subject-matter of the cause ex officio, resort to the Courts of Public Law for determination of the complaint is excluded in both cases. Even if many Western States have already made quite extensive provisions to the effect that the military is placed under the primacy of the rule of law and created instruments for legal protection, the example of Austria, which was chosen because of its good legal protection status, presents quite clearly the weaknesses inherent in the system. Even if there is a theoretical possibility for a soldier to make a complaint, only very few will do so in practice for psychological reasons. Like no other organ are soldiers in a relationship of subordination to their superior officer and are bound by his orders. A legal remedy that is directed against the superior and must be dealt with through the official channels carries the seed of future reprisals in itself. Furthermore, it is to be feared that even the best control within the system will never be pursued with the same relentless fervour, and therefore lack sustainable efficiency, as independent external control would be.

The situation in military organisations where no effective formalised legal protection exists must be labelled as catastrophic. In this respect, reference should be made again to the already mentioned report presented by the Human Rights Representative of the Russian Federation, Oleg Mironov, in 1998. In his report, Mironov clearly highlights the continuing

and consistent violation of human rights within the forces of the Russian Federation and in other troop formations and sections. In particular, he denounces the brutal treatment of young men who perform their National Service. Apparently, it has become a mass phenomenon to beat them up without reason. Given the dimension of human rights violations that occur in relationships of military subordination, Mironov comes to the conclusion that the office of a Special Representative should be established to defend the rights of the soldiers. In 1996, the chairman of the Human Rights Commission set up by the President of the Russian Federation, Sergey Kowaljow, addressed an open letter to Boris Yelzin tendering his resignation. In this letter he explained among other things that the situation in the Russian Army had become intolerable since the beginning democratisation of the country. Instead of modernising and reforming the military system, a fall-back to the times of the Middle Ages could be seen. Recruitment occurred by force and the soldiers and officers were impoverished, ragged and hungry because they lacked money, food and accommodation. Degradation, maltreatment and corruption had become more common in the army than ever before.

Not only the existence of such situations that bluntly violate the most basic human rights of soldiers but also the extreme physical and mental strains that soldiers are exposed to in a relationship of military subordination in general make the establishment of a specific military Ombudsman not only advisable but rather indispensable. The Ombudsman's material authorisation to act and his powers should be all the more far-reaching, the less the military area of the country concerned is committed to the principle of legality. This is the only scenario that really provides a guarantee for the efficiency of his actions. In these countries, non-binding recommendations or mere duties to report certainly fall short of establishing effective barriers to acts of force or violence against soldiers or averting human rights violations.

The office of the Parliamentary Commissioner for the Armed Forces of the German Bundestag, which was established in 1959 along the lines of the Swedish "militieombudsman" as laid down in the Reich Constitution since 1915, serves as a particularly shining example of the success that the work of a military Ombudsman can have. The latter not only intervenes when instructed by the Parliament to do so but also acts at his own discretion on the basis of his decisions. His field of competence includes the basic rights of soldiers and the principles of the Internal Management of the Federal Army. In order to be able to perform the duties conferred to him, he is supported by a department of the Bundestag Administration with numerous employees. Without such support no effective control would

be possible – not even within such a relatively well-structured organisation as the German Army is from a legal protection point of view. The number of petitions alone that the Parliamentary Commissioner and his personnel consider every year is an impressive indication of the necessity to establish such an office. The number has nearly quadrupled since this institution was set up in 1959 and today it exceeds the 10,000 mark by far.

V. Conclusion

The aforementioned examples have shown that there are legal relations between citizens and the State regulated by administrative provisions which differ from other legal relations established under public law insofar as the individual concerned is exposed not only to a lightened but to a more intense form of state authority. These legal relations are, as a rule, accompanied by a decrease in legal protection for the people concerned. At the same time there is a higher frequency of shortcomings and a danger of violations of civil rights and liberties. The structure of, disposition to, frequency and intensity of the problems suggest that both the formal and informal institutions for legal protection available do not suffice to protect citizens subject to such relations sufficiently and effectively.

The hypothesis advanced at the beginning of this paper that the establishment of specific offices of Ombudsmen whose field of competence includes all problems that occur in a certain field of administration in large numbers is without any doubt indispensable, has in my mind proved to be more than justified. This applies to all States and does not depend on the form of government, the structure of the Federation or the established objectives of the State or State functions. As a matter of fact, any discussion about the necessity and significance of these institutions for legal protection is superfluous. The real task ahead is to establish them as soon as possible and endow them with the rights they need to fulfil their functions.

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