

European Ombudsman Institute

Европейский Институт Омбудсмана

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**VARIA** 40 (E)

Dr Peter KOSTELKA

**AUSTRIAN OMBUDSMAN BOARD -  
FOSTERING DEMOCRACY BY MEDIATION  
BETWEEN CITIZEN AND THE STATE**

(or: THE IMPORTANCE OF OFFICE DAYS AND THE PRESENCE IN THE MASS-MEDIA)

VARIA 40 (E) abbreviated version

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or:

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## Introduction

The spread of the ombudsman idea is based on the conclusion that there is a need of a "new quality of legal protection and remedy" in order to overcome deficiencies and shortcomings as to the efficiency of traditional systems of legal protection and bureaucratic obstacles, which exist in the context of these systems. In about 125 member states of the United Nations there are ombudsmen respectively similar institutions. So in more than two thirds of the UN-member states we can find such controlling bodies.

The Austrian Ombudsman Board being a child of a state dominated by political parties and being born under specific parliamentary conditions has gradually become a sort of institution for the protection of citizens' rights with especially Austrian characteristics in the course of the past 26 years of its existence whereas younger ombudsman institutions in Central and Eastern Europe have been created as institutions for the protection of civil rights respectively fundamental human rights right from the beginning on and hence had the function of an engine generating the development of civil society<sup>1</sup>.

In Austria there is no other institution of the state which provides services that could be consumed by any citizen as easily as those of the Austrian Ombudsman Board since no formalities or fees have to be considered when filing a complaint with the board or asking for help. But it is also these citizens that do actually influence the ombudsman's work. Primarily it is the complaints and stories about grievances in public administration told by citizens concerned by maladministration who make the ombudsman and his staff take measures. It is the citizens who articulate which requirements must be met by the state and a good public administration, which effects are implied by certain administrative measures and it is also these citizens who want to know whether certain administrative measures and decisions are in compliance with the law and hence have to be accepted or not. But there are also citizens who contact the ombudsman without being affected by acts of maladministration just in order to draw the attention to certain general grievances and shortcomings; in this context the ombudsman will be free to start an ex officio review procedure. The Austrian Ombudsman Board as well as every parliamentary ombudsman has got the function of an institution that has to be accessible easily for everybody who is subject to the law and has to confront public administration with alleged grievances to uncover acts of maladministration in a constructive way in order to pave the way for a process of consideration and improvements in the future or has to confirm correct administrative decisions. The ombudsman both has to act as

somebody who provides help and assistance to the individual and as a supreme body of the state drawing conclusions from intentional acts of maladministration or errors of public officers, which may lead to new general guidelines for public authorities. With respect to his experience in the context with the application of legal provisions in force the ombudsman has also got to give impulses for amendments and alternative legislative solutions.

According to the opinion of the European Council ombudsman institutions as such are an important part of "bonne gouvernance" respectively "good governance"<sup>2</sup>. So in easy speech one could say that the ombudsman has to guarantee that the law does not only come from the people as the real sovereign of a state but that the law does also come back to the people again. In this context the ombudsman board has been entrusted with the function of an institutional link between the citizens and the state.

#### Consultation days of the ombudsmen in the capitals of the federal states, at local authorities and in local communities

There has always been some controversy in parliament, in the mass media and in jurisprudence concerning the organization of the Austrian ombudsman institution as a board consisting of three incumbents who decide on their allocation of business and standing orders; also the Austrian Convent (Österreich-Konvent), which is working on a general revision of the Austrian constitution, will deal with this issue<sup>3</sup>. My colleagues and me hold the view that the "board-system" has proved to be very worthwhile. One has to state that this sort of organization offers the opportunity for personal contacts with citizens and for individual care for their legal problems to an extend, which is quite unique when compared to other national ombudsman institutions.

The direct contact and communication with people in the course of consultation days in Vienna and the Austrian Federal States (Bundesländer) demonstrate that the ombudsman board is not a part of anonymous bureaucracy and represent the "unique selling point" of the ombudsman board. Since the Austrian Ombudsman Board is a national ombudsman institution which is obliged to conduct review proceedings in the field of federal public

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<sup>1</sup> Mauerer, Ombudsman in old and new democracies, lecture held on the conference of the European Ombudsman Institute (EOI) on 26th June 2003

<sup>2</sup> On 17th June 1999 the Conference of Local and Regional Authorities in Europe (CLRAE) - a section of the European Council - passed the recommendation (61) and resolution (80) on the role and function of ombudspersons and recommended the establishment of ombudspersons not only on national but also on regional and local level

administration and in addition in the field of local administration in seven federal states it has always been the intention of the ombudsman board both to make clear that the headquarters of our institution are in Vienna but that at the same time our scope of competence and activities also comprise the whole federation and the federal states.

It is especially the parliamentary ombudsman who has the mission to support those who are not supposed to have the power to deal successfully with bureaucratic obstacles and maladministration themselves by offering the opportunity for a personal talk. There are a lot of people who really want to discuss their case with an incumbent of the Austrian Ombudsman Board in person and who do not only want to correspond with the ombudsmen in writing. Personal meetings with incumbents of the board in the course of consultation days can be directly arranged by the office of the respective ombudsman; the consultation days as such are announced by local media and on the home page of the board.

Obviously it is easier for people living or working in Vienna to contact the members of the board personally and to arrange a personal meeting with an ombudsman because due to the number of inhabitants of the city and with respect to the fact that the ombudsmen's headquarters are located in Vienna it is in this town where most of the consultation days are held.. In 2002 there were 263 consultation days, 129 of which were held in the federal states. In 2001 101 consultation days out of 229 were in the federal states. However there were 1.260 consultation days which were organized outside Vienna in the past 11 years offering 17.000 inhabitants of rural areas the opportunity for personal talks about their case and legal matters. When going back to the very beginning of the ombudsman institution in 1977 one will find that there were about 35.000 persons who had met members of the ombudsman board in capitals of the federal states, in provincial towns and bigger villages in the course of consultation days; one could say that is the capacity of a medium sized football stadium of a well known football team.

Considering these figures a single ombudsman, who has not even got an official car at his disposal, would have been obliged to travel through the federal states for a total time of five years in the course of the past 11 years in order to hold the same number of 1.290 consultation days that all together had been held by the three board members during that period. Since actually there is a board of ombudsmen it is quite easier to manage consultation days and to provide a high frequency of personal contacts respectively meetings with an ombudsman. After all there are about 40 consultation days held by each of the members of the ombudsman board in the federal states; so each ombudsman is "on the

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<sup>3</sup> e.g.: Welan and Stoitsits in : Die Arbeit der Volksanwaltschaft / The work of the Austrian Ombudsman Board

road" for about two months per year. On first sight that does not seem to be dramatic, but one has to take into consideration that consultation days are often linked to special events and meetings with representatives of authorities or mass media and of course a lot of coordination work with regard to the ombudsman's agenda concerning his activities in Vienna has to be done.

In the course of consultation days one makes a great variety of experiences, since people often tell the ombudsman about their most private problems because they know very well that the ombudsman will keep all information strictly confidential so that nobody must be afraid of negative consequences; against this background the communication with an ombudsman is quite different from that with a judge, a prosecutor or even a deputy. A personal talk makes it easier to express one's feelings, one's attitude and the whole way of thinking about problems. A letter sent to the ombudsman by a person who hopes that his/her problem will be well understood and handled in the right way generally cannot meet the standards of a personal talk. Even if it is often the little problems and shortcoming of everyday life that are articulated at consultation days it is especially these problems that often make the ombudsman realize what kind of needs and sorrows people do actually have. This confrontation with "real life" makes clear that frequently people are not interested in things like formal legality of public administration or the fact of correctness as to the detailed application of legal provisions in force; they simply want fair decisions of public authorities. They expect that their case is decided in a fair way and that justice is done.

With regard to these expectations of citizens the ombudsman has got the obligation to call public authorities not only to do what they are obliged to do under existing legal provisions but also to consider all options in order to reach a fair and widely acceptable solution in the specific case. Sometimes it takes a lot of time and it may imply quite an effort for the ombudsman himself to get a personal impression of a complainant and his case, and on first sight it might seem to be easier and more efficient to have this work done by members of the staff of the ombudsman board; but actually the personal contact with citizens makes the ombudsman realize that for an ombudsman institution there are special standards for assessing a legal case since the individual and his/her specific problems have to be the most important factor whereas legal considerations as such should not prevail.

The constitution does not oblige public authorities to apply legal provisions restrictively by taking merely the wording of relevant provisions into consideration without considering the special circumstances of an individual case. Such an - widely accepted - approach based on

the rule of law as set forth in article 18 of the Austrian Federal Constitutional Act (B-VG) is wrong. It is not only legality which has to be a constitutional standard for the application of law by public authorities but also equity<sup>4</sup>. Moreover the rule of law involves the obligation to consider aspects of equity whenever the law provides some margin of discretion. Especially in the field of social law there are unwritten obligations of providing assistance for citizens asserting legal claims; in this context one has to take recourse to the "obligation of social application of the law" as developed by the courts<sup>5</sup>.

One also has to accept that both in the course of review proceedings of the ombudsman board and on consultation days the ombudsman is often confronted with actual limits of the law. We also have to realize that the construction and institution of legal relationships and legal claims have led to a certain decay of morality and fairness with regard to human relations both in private and public life. In this context public authorities are also partly victims, especially when people try to settle their private conflicts by legal means and remedies and attempt to abuse the legal system for private revenge. If you get to know to all these tragic stories of conflicts between neighbours involving complex legal proceedings that often take several years to come to a final decision<sup>5</sup> you will realize the importance of trying to bring all parties involved together again in order to reach a friendly settlement of a dispute. That however requires the personal engagement of a politically responsible person, who - just like the ombudsman - must also have the function of a mediator.

The position and approach of the ombudsman does at any rate require a clear and consistent attitude towards the legal, political and democratic function of the ombudsman board as well as the consciousness as to the fact that the board's mission is of high complexity since it implies discretion and options with regard to various aspects. The obligation to call public authorities to grant redress for damages and grievances even beyond the traditional legal protection system and to propose both the authorities and the legislative bodies to implement necessary improvements must be regarded as a mission which can only be carried out by an institution that is capable of demonstrating authority, competence and integrity and whose legitimacy is directly deduced from the citizens and is based on the constitution.

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<sup>4</sup> See Öhlinger, Die Verwaltung zwischen Gesetz, Bürgernähe und Billigkeit / Public administration between law, service and equity, ZfV 1999, 678

### Public relation activities on TV

An ombudsman has to make public what he considers being an act of maladministration and which improvements should be implemented. Taking into consideration that the Austrian Ombudsman Board is not able to impose legally binding sanctions on authorities and being aware of the fact that it has got no legal remedies at its disposal to enforce its legal opinions one has to realize that the efficiency of the ombudsman board depends on its capability of convincing authorities to follow and respect the recommendations of the board more or less voluntarily. In this context it is the reputation and popularity of the ombudsmen, the public consciousness about their dedication to the protection of civil rights and the significance of their arguments which all together lead to an increase of the acceptance of the board. Besides the consultation days there is a second element characteristic for the Austrian Ombudsman Board and representing a difference with regard to other European ombudsman institutions which has contributed quite a lot to an increasing confidence in our institution: For more than two years we have got again a "window to the public" on television, which we still keep open.

Due to the efforts of the former Federal Chancellor Dr Bruno Kreisky in 1979 a weekly broadcast on TV with members of the Austrian Ombudsman Board and their staff came on the air at prime time<sup>6</sup>. The live broadcast, which always took 22 minutes, was part of the program of the ORF (Austrian Public Broadcasting Corporation) until 1992; it had up to one million spectators and until 1983 there had been even an additional 45 minutes' broadcast on the radio.

My colleagues and me have made great efforts to establish the broadcast "Volksanwalt - Gleiches Recht für alle" (Ombudsman - justice for everybody), which at present is on the air in the early evening once a week. Every Saturday at 5:45 p.m. 600.000 spectators on the average have got the possibility to watch a confrontation between members of the Austrian Ombudsman Board with officers of public authorities for 35 minutes and can see what the Austrian Ombudsman Board is able to reach and which results it wants to reach. The respectably increased popularity of the ombudsman board has immediately led to an increase concerning the number of complaints against public administration lodged with the board. Since the broadcast has come on the air in January 2002 the number of applications respectively complaints has increased for 64%. Whereas in 2001 there were 9.032 people

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<sup>5</sup> Oberndorfer, ZAS 1973, 206



contacting the board there were 14.851 persons doing so only one year later. Luckily in 2003 the caseload stagnated on the level of the preceding year. The cooperation with the ORF is accepted by the citizens. After all every eighth review proceeding is directly linked to the broadcast.

The positive public response to the launch of the new broadcast in January 2002 implies the chance to attract the attention of spectators and authorities to a fair way of public administration as it is defined by the Austrian Ombudsman Board and hence to foster our approach. It is principally characteristic for democracies, that public administration is accountable for its actions and omissions and that in this context its representatives must be ready to take part in discussions and disputes. These representatives can expect not to be pilloried by the ombudsman or the presenter of a broadcast just only because the claims of a citizen had to be rejected due to binding legal provisions since it is clear that it cannot be the intention to reach arbitrary results by exerting pressure via mass media. This effect cannot only be reached by the public but also merely in the public. In the broadcasting there is public control by the spectators not only with regard to the public administration but also to the ombudsmen themselves. It is also the ombudsmen who have to consider the opinion and criticism of the spectators.

There are also additional other factors which mirror the new general interest in the activities of the Austrian Ombudsman Board. Whereas in 2001 there were no more than 48.000 visits of the homepage of the Austrian Ombudsman Board the number of internet users interested in the information about or consultation days and annual reports on our homepage nearly doubled (95.000 users; 380 visits each working day). The number of applications filed via e-mail also even doubled (1999:203; 2002:4.721; 2003: 8.428). In this context the Austrian Ombudsman Board seems to have the same problems like other institutions which are generally accessible for everybody: In 2002 only 2.493 out of 8.428 e-mails (10 e-mails per day) could be linked to a review procedure; the rest had to be seen as "electronic garbage" (virus, spam, etc.).

Regardless of the appreciation for the "new media" and new means of communication which nowadays have become a part of our every day life, we should not forget all the people who want to articulate their problems and needs via traditional channels of communication. Since 1977 about 67.000 persons have contacted the Austrian Ombudsman Board by telephone. In 2001 the information service of the ombudsman board, that can be contacted daily between 8 a.m. and 4 p.m. had to deal with 4.682 telephone calls. In 2002 the number increased to

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<sup>6</sup> Bauer / Rossmann: Die Österreichische Volksanwaltschaft und die Medien / The Austrian Ombudsman Board

7.645 calls, which had to be handled in the 250 working days of that year (about 30 calls a day).

In this context the free service line (0800 223 223) of the ombudsman board is of special importance. It guarantees that there is no regional discrimination of people who contact the ombudsman board by telephone. This free service does not only provide an easier access to the ombudsman board but it also clearly mirrors the Austrian Ombudsman Board's function as a controlling body not only in the field of federal public administration but also with regard to the public administration of 7 federal states and their local communities. In 2003 the service line cost the ombudsman board a total amount of € 16.000. The free service line also guarantees that inhabitants of the federal states can contact "their ombudsmen in Vienna" under even better conditions as if they had their headquarters in the respective capital of a federal state.

We consider the interest of the population in the Austrian Ombudsman Board's activities, which has constantly increased since 2001, being an indicator for confidence in our efforts and a confirmation of our approach concerning the effective implementation of a good and comprehensive service for citizens, which comprises more than only calling for better standards of administration. We cannot change the people, especially the people engaged in politics, with all their faults, but we can try to shape the institutions which form the framework for their activities in a way that selfish interests of political actors can be converted in a way that makes them useful for the welfare of the individual and the community.