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HIERARCHICAL STRUCTURE OF OMBUDS-INSTITUTIONS?

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Hierarchical Structure of Ombuds-Institutions?

Lecture given on the General Assembly of the EOI on 1st April 2006

I am glad to follow the invitation of the Board to discuss some ideas on the hierarchical structure of ombuds-institutions in the course of today's General Assembly. It is my goal to develop criterions, to set up hypotheses and by doing so I hope to give enough incentives for a vivid discussion. But please don't expect me to present universal remedies or even comprehensive solutions. Comparative studies on ombuds-institutions all over the world have made clear to me that the crucial idea of that important institution – *the completion of legal protection against public administration by an independent institution which is easily accessible for all citizens* - can be implemented in many different ways. A special approach respectively concept which has turned out to be successful in one country is not also necessarily suitable for an incorporation into another legal system with a different political tradition and other economic and social conditions. Any legislative body drafting an act on an ombudsman has to work out a tailor-made concept.

Permit me to begin with a circumscription of a term respectively with a *definition*. The word "hierarchy" is Greek in origin. In general it is defined as an *established structure with clearly determined relations based on subordination and superiority,* as it was common in the feudal system of the middle ages. That can be demonstrated by a *pyramid*: on the top there is the emperor or the king, in the middle you find the aristocracy and nobility, and on the bottom there are the peasants and bondsmen. The Catholic Church with the pope as its head is also organized strictly hierarchically. An important focus of the democratic movement of the new ages was on building back unnecessary hierarchies, which at least holds true for the secular sector. However, even modern democracies cannot do without any hierarchies. With respect to armed forces they are undoubtedly inevitable. On the web-site of the Austrian Ministry of Defence I read the following sentences: "It is essential to keep order. Every successful business is based on streamlined structures and is characterized by hierarchical order – the same holds true for the Austrian armed forces." As we know, public administration is organized according to hierarchical principles since every public authority is under the supervision of the respective superior authority and is bound to its instructions; in this context it is the government that represents the top of the pyramid. This model can not at all be seen as contrary to democracy; moreover it offers the opportunity to implement responsibility of the executive power to the parliament, which is elected by the people, and to the public because the government can be held responsible for everything that happens in its own house, respectively in the pyramid. That implies far-reaching consequences, such as the resignation of a minister of transport in Japan after a negligent engine driver had caused a serious railway accident.

But the same thing, which is an elixir of life or - in other words - which is essential for the armed forces and public administration, is a poison for *judiciary.* The *independence of judges* is an inevitable element of every state based on the rule of law, in which all representatives of state authority, even a Mr. Bush, Mr. Putin or Mr. Chirac, are subject to the law – a fact about which not only Mr. Berlusconi is worried from time to time. In a democratic, constitutional state based on the separation of power the law is set in force by a legislative body elected by the people, it is implemented and enforced by the executive branch and in cases of disputes independent courts have to decide on the basis of the constitution and other legal provisions which solution is provided by the law in the individual case. Judicial independence does not only involve an independence from other authorities of the state but does also comprises an independence between the various courts. Of course one has got the right to challenge decisions of trial courts and to appeal to superior courts at appellate level; insofar you can apply the pyramid model even in the field of judiciary. On the other hand it is common knowledge that appellate courts are reluctant to interfere with cases still pending before trial courts. Superior courts are not allowed to tell minor courts how to rule in a special case. Only when a trial court has issued its decision and on condition that a remedy has been filed in time the appellate court is entitled to review the case and may modify or reverse the decision in case the appellation turns out to be justified or may give order that a case has to be brought before the trial court again for reconsideration. So the various levels of the court system combined with the possibility of appellation focus at the protection of the rights of the individual and shall guarantee a certain uniformity in jurisdiction but do not represent a real hierarchy based on subordination and superiority.

Well, what is about ombuds-institutions? The question arises in countries with several ombuds-institutions being active at various levels of a state, such as in Australia, Austria and Russia, where ombuds-institutions do not only exist at national level but also at provincial level, or in the Netherlands, in Switzerland and nowadays especially in Italy, where there are even ombudsmen and ombudswomen at local respectively municipal level. Lately this issue had been discussed in the context with a projected revision of the constitutional act on the "Human Rights Commissioner of the Russian Federation" as well as the Human Rights Ombudsman in Bosnia-Herzegovina. Is it allowed to put a regional ombuds-institution under the control of a national ombuds-institution? Shall the Human Rights Commissioner of the Russian Federation coordinate the activities of Human Rights Commissioners at "minor" state levels, the so called "Subjects of Russian Federation", and shall he even be entitled to give them binding instructions? And who shall represent the "guild" of ombudspersons in international committees? Is it necessary that suggestions of the Ombudsman of the Serbian Republic Srpska are approved by the national ombudsman? Would the installation of such a filter respectively an exclusive right of representation assigned to the national ombudsman, which at the same time excludes his col-

leagues at provincial or local level, not be contrary to our idea about the jurisdiction and functions of ombuds-institutions in a federal state?

In order to answer this questions, we must consider *the functions an ombudsman or ombudswoman has got in a constitutionally democratic state based on the separation of powers*. Obviously that institution does not really go with Montesquieue's concept of separation of legislative power, executive power and judiciary very well. The business of an ombuds-institution is of great variety and partly contrary to the traditional functions of a state, such as legislative activities, public administration and jurisdiction. The ombudsman's activities cannot be classified as one of these activities. Ombuds-institutions existing nowadays have got in common that they are institutions of a state, which stand outside public administration and start review activities upon a motion of concerned citizens whereas these activities focus on guaranteeing and restoring legality, correctness and fairness of public administration activities; in this context ombuds-institutions are not permitted to modify or reverse decisions and ordinances of public authorities, but after reviewing a case they are allowed to give advice, to conduct mediations, to articulate criticism whenever it is necessary, to make recommendations and to submit a report to parliament at least once a year.

On the basis of profound considerations we come to the conclusion that there are different sorts of ombuds-institutions. When such an institution had been established for the first time in 1809, the Swedish deputies passing the respective constitutional act considered the prosecution of negligent civil servants or even judges and bringing in charges against such persons being the main duty of the "Justitieombudsman". It did not take a long time until this *function of a prosecutor* , which on international conferences had repeatedly given rise to critical comparisons with the "prosecution" in communist countries, was replaced by a modified approach as to everyday business, according to which the ombudsman restricted himself to critical remarks, admonishments and statements on his different views in cases of minor maladministration. In 1919 Finland established the ombudsman mainly in accordance with the Swedish model. Even today in both countries the ombuds-institution is qualified as a part of the "controlling power of Reichstag" and hence is seen as a kind of extension of the parliament. Parallels concerning the conception of the German petition committees can easily be seen although there is one difference: formally the ombudsman is not a part of the parliament.

It was not until the 1950ies that ombuds-institutions spread all over the world, just after Denmark had instituted an ombudsman and hence was the third state doing so. For the further development the establishment of an ombudsman in New Zealand in 1962, which was intentionally based on the Danish model, turned out to be of great importance and influenced Great Britain and other states adhering to common law tradition. The "Danish – New Zealand model" is different from the "Swedish – Finnish

model" for there is a greater focus on *the protection of the rights of the individual.* It is based on the conclusion that citizens in a modern, highly technocratic state adhering to the principles of competition and productivity have to be provided with an institution easily accessible which helps to settle disputes with public administration and to overcome bureaucratic obstacles and by doing so uncovers malad-ministration and strongly criticises negligence in public administration. Some time later, when ombuds-institutions were established in Canada and Australia, several incumbents put the emphasis on the ombudsman's role as a *mediator between the citizen and public administration.* In some cases the name of the ombuds-institution indicates that the respective states or provinces focused on the function of an advocate for the citizens when they established this new institution: "Volksanwalt" in Austria, "Defensor del Pueblo" in Spain, "Protecteur du Citoyen" in the Canadian Province of Quebec. However, the activities of an ombudsman must not be one-sided and only be against public administration; though his focus is on the citizen asking for support in legal matters it must also seen as his duty to protect public authorities against unjustified complaints. The ombudsman is not an "anti-authority".

Just before I had the opportunity to give a lecture about the role of the ombudsman in the international community on the 4th international ombudsman conference in Canberra in 1988 I had carried out a survey involving all acting ombudspersons at that time. With respect to the question, what they would regard as their main duty, most incumbents replied that their controlling function and their duty to reach fair settlements for citizens would be of the same importance. Norman Geschke, the ombudsman of the Australian Province of Victoria at that time, clearly pointed to that *double function*. He described his duties concisely as follows:

"The complainant says, he has been treated unfair. I check whether that reproach is true. If that is the case I will remedy this matter; if not I will stand up for the authority and will tell about that. I call for a revision of legal provisions or legal practice whenever this will be necessary to do away with revealed grievances."

In special cases the activity of an ombuds-institution is not really different from procedures recently developed for the settlement of disputes in the light of the catch word *"mediation"*. In France and in the city of Paris the ombudsman is called "*Médiateur"* even officially. In other cases, however, the emphasis is on the control of public administration, which – on the basis of respective outcome of review proceedings - may result in critical remarks and recommendations as well as in critical statements in the annual report submitted to the parliament.

As far as I can see, all types described above have got one thing in common: It is nearly always a citizen who gives the incentive for the ombuds-institution to start proceedings; that is even true for Swe-

den and Finland. Hence the proceedings focus on *legal protection in the individual case.* In addition to that, the ombudsman is *independent from other institutions of the state,* he has only got to comply with the law respectively with legal provisions, even if he is responsible for his activities to the parliament. All these facts lead to the conclusion that *this institution is quite similar to judiciary and not predestined for hierarchy,* since hierarchy seems to be adequate whenever the law is to be enforced uniformly all over a state such as in the field of public administration or prosecution.

When considering the question, whether the implementation of a hierarchy with respect to ombudsinstitutions of a country can be acceptable or has to be rejected, a special aspect I have not mentioned so far plays an important role: *the internal structure of state organization.* In this context I would like to remind of the fundamental distinction between federal states and centralized states in the light of constitutional law; it is not necessary to discuss the confederation of states, which is no state as such but an association of states based on international law. In *centralized states* such as France or Poland the power of the state is concentrated at one level, the government in the capital is the nerve centre of all important matters of state activities. On the other hand in *federal states* such as Germany, Austria, Canada, Australia or Switzerland the power of the state is shared out between the federation and the federal provinces. The federal provinces have got a constitution of their own, they determine their own structure, manage their own affairs and participate in the decision making process of the federation. However, it is not possible to make a strict distinction. So especially centralized states can incorporate some elements of a federal state by establishing autonomous regions and by providing such regions with substantial competences, just like in Italy or – to an even greater extend – in Spain. In both of these states mentioned there are also special regions such as "Trient-Oberetsch" (South Tyrol), Catalonia and the Basque region that have got a special status of autonomy which fosters federal elements and blurs the borderline at least as regards the "unitary federal state"

Above I mentioned some examples of countries; in this context I talked about a very important state and this was Russia. Is Russia a federal state or more or less a centralized state with elements of decentralization? When we try to answer this question we must not merely take the text of the constitution into consideration, but we also have to consider the implementation of the constitution in practice. In the era of the Soviet Union the Constitution of the Federation of the Socialist Soviet Republics of 1977 was in force; it proclaimed the federal state (article 70) and in its article 72 it even guaranteed for each republic of the Union the right to leave the Union upon their own free will! As we all know, reality was different. However, this state organization, which was based on federalism and the separation of powers according to the text of the constitution, actually was completely overlapped by the strictly hierarchically structured organization of the communist party with the politburo and the central committee on its top and adhering to "democratic centralism". In this context one of the party's tools was a legion of

prosecutors with a general prosecutor as their head, who guaranteed by intensive supervision that all authorities, even those at the lowest territorial level, orientated their activities towards the goals of the party. Today constitutional law and constitutional practice look different. Though there is a considerable concentration of power in the hands of the president the Constitution of the Russian Federation of 1993 contains a lot of democratic and federal elements which nowadays have got a much better chance to influence everyday life with the regime of the united communist party being overcome. In the long run the autonomy granted to so called lower territorial units, the status of federalism within the system of state powers and also the future development of the institution of the Commissioner of Human Rights will indicate to which extend the idea of federalism will prevail.

The federal state involves more than only a special idea about the structure of state organization. Federalism is a *comprehensive idea about the creation of state community,* an idea based on the *principle of subsidiarity* : According to that each community – municipality, region, federal province – shall manage their own affairs; in general only those affairs which cannot be managed by the respective smaller community shall be assigned to the larger one. As regards the federal state that means: The "Länder", the "Subjects of the Federation", the "Provinces", the "Cantons", or whatever the name of the provinces of a federal state might be, shall assign all matters, that lie within their capacity and do not require a uniform regulation by the federation, to their own public authorities and shall have them settled at their own account. Whenever a matter – such as foreign policy, national defence or economic policy – is assigned to the federation as such the federal provinces have to be given the opportunity to participate in the decision making process at national respectively federal level, e.g. by representation in a federal chamber of parliament and by participation concerning the implementation and enforcement of federal law. However, federalism does not stop at the provinces: According to the idea of federalism also municipalities shall enjoy extensive autonomy concerning the settlement of local matters.

In order to avoid misunderstandings as to terminology I would like to remark before this international, multilingual audience that the English word "federalism" has not got exactly the same meaning as the German word "Föderalismus". This has got to do with the fact that in the time of the foundation of the United States of America at the end of the 18th century the so called "Federalists", who after all prevailed at the convent of Philadelphia, called for the establishment of a strong power of the federation, whereas the "Anti-Federalists" under Thomas Jefferson insisted on the sovereignty of the federal states. So when today the English are concerned about the European Union not to become a "federation", they actually oppose tendencies in Brussels they regard as centralistic. We, however, mean the opposite of the centralized state when talking about "federal".

From my point of view the considerations I outlined in the context with the organization of the state lead to the conclusion that *hierarchical structures of ombuds-institutions in federal states as well as in centralized states with elements of decentralization and a strong autonomy of regions are especially inadequate.* Ombuds-institutions in federal provinces, regions or even in municipalities are an essential element of the structure of authorities of the respective territorial units, to the parliamentary bodies of which they report regularly. The election of ombudsmen and ombudswomen by the parliaments of the respective unit without any influence exerted by a national ombudsman or another central authority goes best with the idea of federalism and fosters their *democratic legitimacy* since they are only responsible to their electing body. Mutatis mutandis this also holds true for the petition committees of the German Federal States ("Bundesländer"). We all could understand that the regional parliaments of these federal states would be upset if the members of their petition committees could only be picked from a list of candidates suggested by the German national parliament ("Bundestag")!

Federal structures promote the separation of powers: So a vertical separation of powers is added to the classic, horizontal separation of legislative, executive and judiciary. Sharing out the power of state between various levels paves the way for new tools to balance and control state power. This vertical separation of powers would, however, be undermined by a strong supervision and control exerted by the federation. Perhaps you might argue in this context that a supervision by the federation would be necessary in order to guarantee that the federal provinces manage their matters properly and do not infringe federal law when doing their business. Further you could bring forward that in federal states it is quite normal that one can even appeal against decisions of independent courts at provincial level to a national supreme court which would be in favour of the protection of individual rights and a uniform implementation of federal law. However, all these arguments are not valid if we bring them forward in the context with ombuds-institutions. After all an ombudsman is *not allowed to make binding decisions*, which could be reversed by appellate courts or in the course of supervisory proceedings before a federal authority. More than 40 years ago a New Zealand scholar somehow contemptuously compared the ombudsman to a chained watch-dog: He could bark, but not bite! Of course we all know, that this barking can be very effective. By virtue of the authority of his office to which the parliament appoints him in general and due to his procedural competences as to reviewing a case as well as his professional competence he can make an essential contribution to "good governance", that means to legal and fair administrative conduct, by articulating admonitions and exhortations, by giving advice and by conducting mediation. At the same time he fosters parliamentary control with respect to the level at which he is active. After all, his reports provide the parliament with useful information on the complex bureaucracy of public administration and its deficiencies, which the individual deputy himself can hardly oversee. Instructions "from above" would obstruct the ombudsman in the execution of his duty rather than foster his activities.

The independence of provincial or regional ombus-institutions from the interference and supervision of central institutions seems to be of essential importance in those cases in which the majority of people in lower territorial units represent an *ethnic, religious or an other minority* at national level. We can find examples for such communities not only in Russia or Bosnia-Herzegovina but also in Italy or in Switzerland. Here federalist structures extraordinarily foster a better integration of political minorities which necessitates a special restraint from interventions of the central power.

Last but not least I have to draw your attention to the correlation between federalism and democracy. Federal structures and decision making processes improve the possibility of democratic participation because these structures imply small units so that one can keep a good overview concerning all essential matters of everyday life and administration. The deputies of provincial and regional legislative bodies have closer relations to the people electing them than deputies of a national parliament. Also *the ombuds-institution contributes to democratization* by offering an easy access for all citizens whereas small units pave the way for a more intensive contact between the ombudsman and his "clients". Against this background it becomes clear that local – or in Switzerland also cantonal – ombudspersons frequently receive their clients themselves and also deal with the clients' problems themselves, whereas a national ombudsman of a populous state has to leave the detail work, which is so important for the clients concerned, to members of his staff; just like an *ombudsmanager* he merely supervises the activities of his staff, gives instructions and takes care of external affairs and matters of representation. It is said that there are national ombudsmen who have not ever met a real complainant! The *mutual trust* between an ombudsperson active at a "lower level" and his/her clients must not be impaired by instructions respectively the supervision of a national human rights commissioner residing on Mount Olympus and being far away from local affairs. The ombudsman shall only be responsible to his own parliament its deputies that receive, discuss and assess his/her reports and - in case it should turn out to be necessary - impose sanctions against the ombudsperson, e.g. by curtailing his/her budget or refusing re-election.

There are no objections that *within an ombuds-institution* there is one ombudsman acting as chairman and representing the institution. So in Sweden there are four justitieombudsmän and in Austria there are three Volksanwälte whereas one of them is more or less the chief ombudsman. However, especially with regard to Austria I would not talk about a hierarchy; the general equality of these ombudspersons is clearly demonstrated by the fact that the chair rotates between the incumbents annually (as an outsider I am not able to say whether that also has got to do with party politics!). However, a certain hierarchy exists when a deputy ombudsman is appointed, who is exclusively responsible for matters assigned to him by the chief ombudsman respectively is entitled to act for the ombudsman in case of his absence, such as in the Netherlands and in the Canton of Zurich.

An ombudsman at the municipal level who is granted the necessary independence discharges duties which under quantitative aspects are equivalent to those of a national ombudsman. So there is no justified reason for the *exclusion of acting ombudspersons from international committees and conventions* merely because they are active at a lower state level. In the light of these considerations the very restrictive practice of the International Ombudsman Institute has to be questioned.

In some states the ombudsman has got the right to initiate review proceedings concerning the validity of legal provisions before the constitutional court. For example that holds true for Austria, Spain, Portugal, Poland, Hungary and the Ukraine. Given that right it seems to make sense that also a provincial or regional ombudsman would be entitled to file an application at the court directly without the interference of the national ombudsman. Under the Austrian Constitution the regional ombudsmen ("Landesvolksanwälte") are provided with this competence according to article 148i in combination with article 148e of the Austrian Federal Constitutional Act. That is in conformity with the characteristics of a federal state, for that represents an aspect of the participation of the federal provinces in the decision making process at national level. In my opinion the regulation in Bosnia-Herzegovina saying that ombudspersons of lower territorial units may only file applications concerning cases infringements of human rights at supreme courts via the national ombudsman acting as a "filter" does not seem to be quite adequate (article 14 in combination with article 6 of the Preliminary Draft Organic Law for the State Ombudsman).

The effectiveness of an ombuds-institution especially depends on the professional competence and the charisma of the incumbent. Besides really outstanding ombudspersons there might also be ones who can only be qualified as "good" with respect to their way of discharging theirs duties. But I am sure that this has nothing got to do with the level at which they are active in a state. Regional and local ombudsmen – in this context I clearly remember one outstanding example - can also set international standards and can become idols even for national ombudsmen.

Walter Haller, 23th March 2006