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A PROTECTION OF RIGHTS CLOSER TO THE CITIZEN - THE OMBUDSMAN AT THE LOCAL AND REGIONAL LEVEL

(Lecture at the Congress of Ombuds-persons at local and regional levels of Europe of 13 – 15 November in Messina, organized by the Council of Europe)

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A Protection of rights closer to the citizen – The Ombudsman at the local and regional level

(Lecture at the Congress of Ombuds-persons at local and regional levels of Europe of 13 - 15 November 1997 in Messina)

Dear participants of the Congress,

Heraclitus's maxim "PANTA RHEI" (all things are in perpetual flux) also applies to the topic we are looking at here: what yesterday was deemed to be impossible is today quite feasible, and what today is regarded as truth may well tomorrow prove to have been deceptive. Moreover, it is obvious that we cannot afford to be dogmatic in our search for what is right, a relative concept conditioned by circumstances and time. It is equally misguided to insist always on villages having their own ombudsmen, in line with the philosophy of "small is beauty", as to claim that the only possible approach is a central ombudsman for fifty million people. Neither is correct.

You will probably be no more surprised than I am that the plethora of legislation is viewed as adding to the alienation of the state from its citizens and that consequently it is felt that there is a need to set up an ombudsman-type institution. The trend in Europe is currently towards deregulation; it would therefore be logical no longer to need the ombudsman, since everything in theory should be more straightforward, more transparent and more accessible for every citizen.

My own view, however, is that laws are not dreamt up simply to keep lawyers happy; nor are they passed in order to keep parliamentarians amused or to annoy citizens. It is my firm conviction that in all parliaments of all countries in this continent, laws are made in the sincere belief that they will be of service to society as a whole, by promoting and protecting

smaller or larger groups including the whole population itself and that they will be of benefit both to individuals and the community by laying down what is permissible and what is not. It cannot seriously be claimed that a third or a half of the laws could simply be swept aside at no cost. The ordinary citizen has never, neither two hundred years ago nor now, had a complete understanding of the legal system. Perhaps a hundred years ago it was still possible for an expert to have complete mastery of the subject.

But we now live in a society where the professional domain is highly compartmentalised. Neither doctors nor technicians know all the ins and outs of their subject. Quite understandably, legal professionals cannot be au fait with all areas of the law. The problem is not the fact that there is a plethora of laws, but that there is no access for citizens to this plethora. Furthermore, only a small percentage of laws and regulations are relevant to each citizen. Today, when there is virtually no limit to the technological possibilities of communication, parliaments which are there to represent the people, on whom incidentally they ultimately depend, should be duty bound to offer them free, straightforward and rapid access to the legal system. In Austria, the whole of the federal and Lander legislation is available on Internet. This is a positive start, but it is just a start and apart from the fact that not every household has access to Internet, there is no systematic break-down, no thesaurus or commentaries and no case-law. And even if all that were available, would the ombudsman then be superfluous?

Hardly, since ordinary people - and indeed civil servants - have a particularly strong tendency to regard themselves as above the law and not subject to it; this is the principal cause of conflicts.

You may be thinking that all this is somewhat irrelevant since I was supposed to be talking about the role of the regional ombudsman in Vorarlberg. I would like to say at this point that copies of the legal basis for the Vorarlberg regional ombudsman can be found on the information tables in German, English, Italian, Spanish and Russian (Remark: These texts now can be found on the website <http://www.OminEurope/info>). It obviously would be pointless my just reading these out to you. In order to understand the situation in Vorarlberg, we have to take a somewhat broader view. I hope you will forgive me for having included in this broader view my own thoughts on what I feel is perceived as the disadvantage of the flood of legislation, which is not merely a modern phenomenon.

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Quite frequently, citizens threaten the administrative authorities with "I shall take this to the ombudsman!" It sounds a little like Paul saying to the Governor Festus, "I appeal unto

Caesar". Clearly, it is right that citizens wish to go to the ombudsman, to turn to a higher authority for advice in order to assert their rights or find out why they are not within their rights in a particular situation. Whether or not they can qain satisfaction is a question of quantity and quality.

Let us look first of all at quantity:

Citizens would be left high and dry in the two extremist scenarios, ie if, for example, there were only one ombudsman for 50 million or more citizens or if each village had its own ombudsman. Both are misguided. Consequently:

Point 1. The ombudsman's territorial area should be small enough to ensure that each citizen – along the lines of an "I appeal unto Caesar" approach - at least on one occasion for each application may be given an appointment for a personal consultation with the ombudsman. If citizens have come up against resistance from the administrative authorities, they should not have to endure the same treatment from the ombudsman.

and

Point 2. The ombudsman's area must be at least big enough to allow, as a general rule, for a qualified ombudsman to be recruited from among its population or to enable the local or regional authority to appoint a highly qualified person as ombudsman, which becomes less feasible the smaller the area is.

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Let us now turn to the quality of ombudsmen:

If an ombudsman is to be credible, it is essential that he or she is able - on an intellectual and professional level - to appreciate and understand the citizens' problem. Ombudsmen have a duty not only to offer citizens the highest professional competence but also to deal with them as equals, with discretion and patience. In other words they must have a personality which unfortunately is rather rare. Unlike politicians (and I bow before their ability as it is an area in which I am not competent), ombudsmen must not answer with a "maybe" or a "yes and no", ie they must not always agree with everybody, but they must answer with a clear yes or no after giving the matter sufficient consideration. In addition, the answer must be in a language that the citizen will understand and must include the reasons why. This leads me to:

Point 3. An ombudsman must be highly qualified and be able to decide on any matter in a conclusive and competent manner, explain the decision and stand by it.

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In my view, the role of ombudsman is fulfilled satisfactorily in the majority of countries. Citizens will not tolerate its being used - or rather misused - in politicians' own interests. If ombudsmen come from one particular political camp, the others will either mistrust them or at least for a long time not give them their full confidence. The smaller the area, the more important it is for ombudsmen to be independent internally and externally so that they cannot be labelled as belonging to one particular camp and thus be discredited. This leads me to

Point 4. Ombudsmen must not be former politicians so as to ensure that their independence in the eyes of the citizens is beyond reproach and that they have the requisite professional competence.

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Ombudsmen should, as a rule, be well paid. A high salary is part of their internal and external independence. There should be no cause for suspicion on this account by the administration that they have acted in a particular way out of envy or resentment. They should be well paid and the population should know how much they earn. In this way, ombudsmen will be constantly aware of their commitment to all citizens, including those less privileged. This leads me to:

Point 5. Ombudsmen must be at least as well paid as the highest paid official in their area of responsibility.

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We shall now look at ombudsmen's accessibility.

First a few words about Austria. The Federal Land of Vorarlberg is the westernmost of 9 regions of the state - the federal Länder. Vorarlberg, like the other 8, has its own parliament. It is approximately 700 km away from Vienna, the Austrian capital. The furthest anyone would have to travel from anywhere in Vorarlberg to get to Bregenz, the capital of the Land, is 100 km. This means that any citizen could see their ombudsman within an hour or so. The federal Ombudsman Board in Vienna was declared competent for ombudsman affairs in their region by the parliaments of 7 of the 9 federal Länder. Regional ombudsmen, accessible at all times, are called upon roughly seven and a half times more frequently than the ombudsman in the more distant capital, although the latter holds consultations every three or six months in the federal Lander. This leads me to

Point 6. The maximum distance between citizens and their ombudsman should be no greater than what can comfortably be managed in a return journey in one day and should not represent any unreasonable costs for the average citizen. The relative

frequency of consultations is not in itself a totally acceptable alternative to ready access to an ombudsman.

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In Europe there are an increasing number of regional and municipal ombudsmen institutions. In the light of the aforementioned points, this is an extremely positive development, since its services to citizens represent a commitment to implement human rights, are milestones along the way to consolidating the rule of law and are a means of preserving peace in the best and deepest sense.

There are some regulations which clearly specify the division of competencies between national and regional ombudsmen with the result that only a little care needs to be exercised to ensure that no citizen falls between two stools. There are also instances of exemplary co-operation without clarification or specific provisions in the constitution or legislation, with responsibility for co-operation or precise arrangements being left to both types of ombudsmen. In every case that I have seen where there are both national and regional and/or local ombudsmen institutions, the basic principle invariably applied is that there are no superior or inferior categories of ombudsmen. There may be different tasks (the one dealing with federal law, the other with legislation in the Land) but nowhere is there a hierarchical structure. And this is how it should be. Which leads me on to:

Point 7. All ombudsmen should be the highest body in their area of responsibility, accountable only - but necessarily - to the relevant parliament.

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If a state's legal system provides for the setting up of regional or municipal ombudsmen institutions or if such are actually set up by legal provisions, there must be a minimum level of competencies to avoid the creation of token institutions which are of no use whatsoever to citizens. When the authors of the Vorarlberg constitution were considering setting up their own ombudsman for a Land covering some 2,500 km2, the doyen of central European ombudsmen, Dr Jacques Vontobel, Ombudsman of Zurich, was asked for his opinion. He suggested that the ombudsman should not only be competent for complaints, since this alone would not provide enough work in a Land as small as Vorarlberg, but should also be given the task of providing information and advice for citizens. And that is what happened. Approximately one quarter of my work is taken up by complaints, and the remaining three quarters by giving information and advice. However, in so doing I do not draw up any legal documents and consequently am not in competition with legal professionals (lawyers, solicitors, tax consultants). On the contrary, I immediately suggest to citizens whose appeals

or complaints I recommend be referred to the constitutional court or the administrative court that they ask their lawyer to contact me, so I can share with him or her my view of the case. Moreover, lawyers readily accept this. In this connection, it should be noted that there are scarcely any other institutions which have a duty to provide information, since it is quite rightly held that nobody can understand all areas of the law completely. It is always on the cards that incorrect information could be given and could lead to a claim for damages against the authority which appointed the ombudsman. In fact, in the twelve years I have been in office, there has indeed been one complaint against the Land of Vorarlberg. It was claimed that the ombudsman failed to provide the information he was duty bound to provide. Obviously I was somewhat relieved that the complaint was subsequently dismissed in both available courts - everyone has their pride. Despite the risks which are real, I am convinced that it is right for the ombudsman to provide information; it is a system which has proved itself. This leads me on to

Point 8. The ombudsman's competencies must be as broad as possible to be of real assistance to citizens. This cannot be achieved simply by examining complaints but must also include the provision of information and advice.

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Experience has shown that citizens find a great range in the willingness of the administrative authorities to provide information. As a rule, they will only provide information orally and if the person seeking the information wishes to have it in writing, they generally shy away. Such behaviour would be totally untenable for ombudsmen, bringing me to:

Point 9. Ombudsmen must always be ready to provide in writing the information they have given orally, together with copies of all the quoted regulations, the related literature and the quoted case-law. They should also put in writing their own understanding of the problem.

The citizens who come and see me are quite surprised at this approach, since they are not used to it. I generally provide information in writing for a very good reason. The person I am speaking to will be able to remember only part of the information I have provided in the course of conversation, and only part of that will be understood. Consequently, it would be dangerous if the person only partially informed wished to act on this information. I regard the information provided orally as provisional and promise to provide the information in writing as soon as possible. Once citizens have the information in their hands, they can study it at their leisure and act upon it if required, since there can be no misunderstandings given that the information has been provided in writing and is therefore fixed. This is for my own

protection, for the benefit of the citizens and in order to adopt a clear position vis-a-vis the administration which can then discuss my position in a serious way.

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As I said before, no ombudsman can know everything. Nor is there a clear precedent for every problem. Generally ombudsmen state their opinion individually and higher bodies (such as the Constitutional Court and the Administrative Court) as a bench. It seems illogical that one and the same problem should be addressed at an earlier stage in one way and subsequently by a superior body in a completely different and possibly conflicting way. This brings me to

Point 10. The links between the ombudsman as a supreme organ against whose judgment no further appeal is possible and all other such supreme organs should interconnect as completely as possible. Ombudsmen should have the authority to submit to the relevant supreme court for judgment what they regard as fundamental questions of interpretation of legal rules or the constitutionality or legality of regulations or laws.

Such integration into the network of arrangements for the protection of rights created by the setting up of an ombudsman-type institution would not give ombudsmen any additional effective powers; they could not themselves revoke or change any decision taken by the administration, but the establishment of closer links to the supreme decision-makers would clearly increase their standing and their effectiveness.

It has always been the case that independence - even if accompanied by the freedom to issue instructions and all relevant guarantees - is only half the story if there is no provision, in addition, for financial independence. The legal system by which I am bound provides for the ombudsman's own budget. The ombudsman presents his or her estimates to the government for inclusion in the budget, which means that the administration has no authority to amend the budget of the Vorarlberg ombudsman. Only parliament is authorised to do this. If this were not the case, the appropriations allocated for the staff of the ombudsman's office or those allocated for the drawing up of expert opinions could be set so low that the ombudsman would be unable to carry out the tasks laid down in the constitution. Which brings me to

Point 11. Every ombudsman must be financially independent of the administration and the setting of his or her annual budget must be decided upon by parliament alone.

Ombudsmen must not only be accessible, they must also be known. The value of ombudsmen extends only so far as people are aware of their existence. The population and each individual citizen must know that they are there. This means that the ombudsman must engage in some publicity. Part of this is accounted for by the (obligatory) reports to parliament. However, this presentation of reports takes place only once a year and is therefore not enough to remain firmly anchored in the public's consciousness. In weighing up all aspects and interests, ombudsmen may and should reach out to the public bringing to their attention matters which may be of particular interest, those from which particular lessons may be learned, and those which concern an especially blatant breach of the law. In this way they can help the citizen become more knowledgeable and make the rule of law more effective. Publicity inevitably leads to more work since it gives a higher public profile to ombudsmen. The latter of course must accept this, but with one proviso, namely that with the increase in claims, there is a corresponding growth of cases for which the ombudsman is not competent. Nevertheless, citizens, fully or partly aware of this, still bring the matter to the ombudsman. With the constantly rising number of complaints, the number of instances where the ombudsman is competent becomes disproportionately smaller and the number of instances where he or she is not competent disproportionately larger. Ultimately, the number of cases for which ombudsmen are not competent becomes so high that they are unable to carry out their proper job, ie dealing with the cases for which they are competent. In such a situation, ie when public awareness of the ombudsman has reached saturation point, further publicity should be avoided. This leads me to

Point 12. Every ombudsman must engage in publicity until the level of awareness reaches its optimum point (and must then keep it at that point). This effort should also be of an informative and educational nature.

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If ombudsmen are to be credible, they must have the authority to examine suspected abuses of their own motion. It is not unusual in practice for ombudsmen to be given information on a matter, where the person providing the information is not directly affected by or involved in the case in question. The guarantee of the rule of law would be significantly undermined if ombudsmen had to leave suspected violations of the law unchecked. This brings me to

Point 13. Giving ombudsmen the authority to examine suspected abuses of their own motion is a measure of the seriousness which legislation attaches to the setting up of a control body.

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The important role played by the ombudsman in Vorarlberg derives from a particular parliamentary provision, the legal setting up of a parliamentary committee for ombudsman affairs. This ombudsman committee comprises 14 (out of a total of 36) members of parliament, 7 from the ruling party and 7 from the opposition parties. It is chaired by the opposition. This committee sits every four months and hears the ombudsman's reports (so far the reports are presented orally). Over the years it has emerged that there is no need to make the sittings confidential. From the positive experience I have had, I have no specific point to make about the setting up of a separate ombudsman committee, but would like to stress its usefulness.

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The powerlessness of ombudsmen is proverbial and talk of soft law refers often to ombudsmen. The most frequent option assigned to them is the authority to make a recommendation to the administration whose fault has been identified by the ombudsman. But a mere recommendation without any follow-up is much too weak a measure. In my view, the administration to whom the recommendation is addressed should at least be obliged to respond within a given time. This response should be either notification that the recommendation has been or will be complied with, or written reasons why the recommendation will not be complied with or at least not in a timely fashion. This leads me to

Point 14. Together with the authority to examine abuses, ombudsmen should also be given the authority, as a minimum means of remedy, officially to submit recommendations with the authority being obliged in the event of non-compliance with the recommendation to provide in writing the reasons for failure to comply.

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Following an amendment, the legal rules governing the appointment of ombudsmen in Vorarlberg provide for the post of ombudsman to be advertised without stipulating any particular qualifications. The reason for this goes back a long time. When most ombudsmen institutions were set up in Europe, part of the population viewed the administration very much as the enemy. Senior posts in the administration were regularly filled by lawyers who began very much to epitomise this view of the administration as the enemy. It was only

natural therefore that there was a desire for the controller of the hated administration not to be from among their ranks. During a hearing I attended with a party prior to being selected the first time, I was told straightaway that they did not want a lawyer. In this party's view, a journalist who was capable of speaking to the citizens would be a better prospect. Since then, this idea has changed and it is acknowledged that it is only rarely possible to fight successfully against a powerful foe with inappropriate means. With its top people the administration personifies the sum total of competent knowledge, and it would be counter-productive to confront them with an inexperienced and ignorant partner. This leads me to

Point 15. If ombudsmen, whether national, regional or local, are to serve the citizens, society and the whole state effectively, they must be equal to those in charge of the administration, and have an innate awareness of what is just and fair, over and above formal justice.

To sum up: local ombudsmen have much more chance than regional ombudsmen of being nearer and more accessible to citizens. This is the great advantage of an ombudsman institution. There is no hierarchy of ombudsmen; local ombudsmen in their area of responsibility have the same rank as national ombudsmen. They both have to be equally competent as regards their basic knowledge and in their own field; ultimately, each will be judged on his or her personality. In the same way, what the minister says in the second act of Beethoven's Fidelio applies to all "The brother is seeking his brothers - if he can help, he will gladly do so!" The ombudsman who wishes to do this, can do it and does do it is a real ombudsman indeed.

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