

LAW AND JUSTICE: TWO SIDES OF THE SAME COIN

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Abstract. *To protect human rights in a peaceful democratic state, it is essential to achieve justice in addition to achieving law. In providing accomplishment of justice of crucial importance is the function of the institution of Ombudsman recently widespread all over the West Europe. That institution, however, is very old and originates from the Arab "Muhtasib" the roots of which go back to the times of the Prophet Muhammad in the 7th century. The text abounds in experiences the author has obtained while working as a practicing lawyer, the judge of the Austrian Supreme Court and Austrian Law Protector.*

Key words: *Law, Justice, human rights protection, Ombudsman, The Arab Muhtasib*

(1.)

Law, Legal Review and Human Rights Protection¹

a. Law is supposed to rule man to prevent arbitrary rule of man.

Rule of Law is the basis of democracy.

Human Rights are basic rights guaranteed by law. They are supported by a judicial review by courts following the idea of a hierarchy of norms.

b. The legal Review by a central Constitutional Court was introduced with the Austrian Constitution of 1920. The aim is to guarantee constitutionality with decisions erga omnes more effective than the American Model by decisions incidenter.

This Austrian Model was followed by most West-European countries after 1945 and most East-European countries after 1989 with the aim to secure Constitutionality and Human Rights.²

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¹ Berka, *Fundamental Rights in Europe and North America*, Kluwer Law International 2001, 35; the same, *Der Stellenwert individueller Grundrechte, Politik, Staat und Recht im Zeitenbruch*, Symposium aus Anlaß des 60. Geburtstages von Wolfgang Mantl, 2001, 77.

² Machacek, *Austrian Contributions to the Rule of Law*, N.P.Engel Verlag 1994

c. 1998 was declared by the United Nations as the "Year of Human Rights" to celebrate the 50th anniversary of the Universal Declaration of Human Rights.

In this 50 years half a dozen universal and regional Conventions were developed to protect and promote Human Rights.

We can now speak of a first generation of human rights, created under the influence of liberalism laid down in 1948 in the European Convention on Human Rights.

They guarantee democratic Freedoms from the state.

A second generation of human rights developed with the awaking of Socialism. and laid down in the European Social Chart from 1960.

It made it a duty for the state to provide social security by positive measures.

While the liberal rights were judiciable, the social human rights were more or less a political program and can be seen as a promise.

The idea was distorted in the Communistic States by replacing individual rights by individual duties.

In the meantime, we now have a third generation of human rights. This type of human rights is directed towards protection of the environment, of data and other ultra vires needs.

Now we already speak of a fourth generation, dealing with basic protection against gene mutation and experimental cloning.

The Convent of the European Union is the last attempt to raise the level and cover all aspects.

d. But Human Rights and Law in spite of more and more comprehensive regulations and more and more tools to provoke legal review have finally not proved convincing to secure Justice. It seems that Law is not really enough to satisfy the desire for just arbitration.

(2.)

We therefore now will look on Justice as the second side of the same coin:

a. I first raise the question: What is Justice per se?

I try an answer by stating that Justice is something antic like happiness or satisfaction.

Both categories give our life unrenounceable quality and ought to be assisted by law. Law as something related to both.

But Justice and Appeasement are own categories and are for themselves part of human nature and human dignity.

Let me demonstrate what I want to say:

At the beginning of our life, we get granted the love of our mother as first encounter as a human being. As a gift of nature we possess the ability to explore the surroundings. Growing up we have the chance to find a lifetime partner.

We could say these are inborn natural rights. In modern terminology we speak about the Right to respect our private life and our Family and to develop our Personality.

If a child has brothers and sisters the mother will distribute her love among all of them and what she does will be felt as just.

There will never exist lawful instruments or procedures that go in place of what is offered by nature by a friendly word or by a consoling touch or handshake.

The question is, can a legal procedure satisfy the desire for Justice if it has to decide between two dissenting parties for both of them. Or may one of them blame the decision as Unjust.

Would a person perhaps have more respect for a non-legal review by some dignified outsider offering personal sympathy and mediating arguments for a better understanding of an opinion that he or she dislikes by a judge, if the Mediator gives something similar to a friendly smile or handshake. Could this calm down a grievance in or after legal actions? Does justice or nature ask for such an additional addressee?

b. Out of my experience I will try to give a clarifying opinion:

Justice is essential for the application of law and the handling of legal affairs.

Justice is indispensably connected with fairness, which is the core of the rule of law.

Nevertheless I dare say:

It is not always unjust what is not lawful; and law may even be in contrast with Justice.

One cornerstone of law and Justice is equity, before and through the law. But Justice is not only infringed upon by inequity.

Justice may also be distorted when equal law is offered but in a discriminatory way. Justice needs more than to comply with regulations.

It is without question a very delicate and sensitive task to make people feel that justice is done and that the settlement of a dispute by an official is felt as just.

Integrity and impartiality of officials are key words that guide, but still are not the only and final answer.

The question is:

Can Justice be at stake by pure law, by Rule of Law per se?

It seems that the ethical Dimension of Law can get lost, when we only rely on Norms.

Justice needs obviously something different to law and additional to a judge.

A person who can be addressed by an individual when he or she believes rightly or wrongly to have been treated unjust in a case of law.

The grievance of such a person, if left alone, may damage the reputation and the credibility even of highest Officials and Authorities.

Therefore, in case of such a grievance it is very important that a complaint can be brought to an independent person of acknowledged reputation, a so-called Ombudsperson.

The Ombudsman should mediate or facilitate.

The Role of an Ombudsperson to clarify alleged injustice can be seen as a part of culture of a country or of sociological engagement in a society.

In any case it is now part of European tradition that we share with and adopted from Arabic Tradition.

From this heritage we know that a human being is more than a bundle of inborn Freedoms and of social demands.

It is, therefore, not really surprising that the fact that law can cause grievance inflicted by those who apply the law was first found out in religion.

Especially it was the Koran that asked its believers to be just on all walks of life.

Just to relatives, neighbours, and strangers. Just at home and on the market. Justice was ordered as a last answer on how to live and behave as a good Muslim.

(3.)

The Arab Muhtasib: ³

That Justice is of decisive importance led in Arab countries to the creation of a special organ, the Muhtasib, who was entrusted by the Sultan with a non-legal review of official actions and behaviour of officials after individual complaints.

The Ombudsman Office in Austria, conducted studies in that area and found the following:

The Swedish Ombudsman, the first of its kind in Europe, - the so-called "Justizkanzler", - introduced in 1719, most likely goes back to an experience of the Swedish King Charles XII, who, after he had lost the battle of Poltava, had to flee as a refugee to Stambul. Here he learned about the "Diwan-al-Mazalim", a Board of Grievances. The holder of this office was entitled and obliged to check on complaints of individuals against authorities.

The Islamic Ombudsman appears to go back to the second Kalif, the reformer Omar, who followed the Prophet in 640 as a guardian of public morals.

Kalif Omar was ambitious to ensure the observance of religious principles - one of them Justice - in daily life.

In practice, the Muhtasib protected people who were victims of injustice, or of discrimination and of unfairness done by officials. This worked already even before administrative systems were introduced.

A "Diwan al-Mazalin" or the "Muhtasib" still exist in a number of Islamic countries. In Pakistan an Ombudsman called "Wafaqi Mohtasib" was created in 1983.

The "Muhtasib" in Islamic countries seems to be the spiritual father of the Swedish Ombudsman, introduced by Parliament in Sweden in 1809.

While staying in exile King Charles of Sweden, as we know, made suggestions to improve the legal system of Sweden by such an extra-legal instrument.

But what about

(4.)

Legal Review of Administration by Courts: ⁴

Is this really not enough for law-consumers?

a. From my experience as practicing Lawyer during 20 years and as a Supreme Justice during further 25 years I know that judicial review of administration in Austria was permanently improved.

The enormous increase of complaints in that time on the other hand is a signal that law consumers are often not satisfied and even in heavy confrontation with the authorities.

The supranational Courts in Strasburg and Luxembourg were also often very critical with the official opinion of Austria as a member state.

³ Pickl, Islamic Roots of Ombudsman Systems, The Ombudsman Journal Number 6/1987, International Ombudsman Institute, Edmonton, Alberta, Canada T6G 2H5

⁴ Nikolaus Schwärzler, Die Volksanwaltschaften und die Gerichtshöfe des öffentlichen Rechts, FS-Adamovich zum 60. Geburtstag

As I also have worked for eight years as a member of the CPT in Strasbourg I could observe similar developments in most other European countries that were members of the Council of Europe.

b. The main source of these tensions mostly were not of lack of legal qualifications of the decision makers.

Just on the contrary, they mostly were caused by formal sticking of deciding authorities to the given laws, outdated interpretations and similar reasons.

These are among others:

The more ways of law are offered to protect rights of an individual, the more bureaucracy will develop and be felt by complainants.

The more instances are offered the more effectivity may decrease. Overburdened decision-makers will lastly no be able any more to decide in due time.

Increase in regulations may enable authorities to pay more consideration to special cases. On the other hand they may open the danger that unintentional nonregulation will make the regulation incomplete and improper.

Legal Review may even be a danger in itself caused by an increasing uneasiness of people about bureaucracy, and the chill of pure law.

We have to ask, can this be improved by a

(5.)

Non-legal Review by an Ombudsperson.

Can a Non-legal Review of administration offer a chance to break through the deadlock between law and justice?

The creation of an Ombudsman came in discussion in most European countries not before the last half of the last century using experience won in Sweden.

The Swedish Ombudsman had been the only one in Europe for more than 100 years.

In 1919 he was accompanied by a national ombudsman in Finland.

After World War II National Ombudsmen were introduced in Denmark in 1955, in Norway in 1962, and onwards from 1967 till 1999 in the United Kingdom, Portugal, Spain, the Netherlands, Ireland, Iceland, Poland, Cyprus, Hungary and B&H.

In Germany, a Petition Board in Parliament covers the competencies of an Ombudsman.⁵

Now we already have Ombudsmen in more than 100 countries of the world.

An Ombudsman was also created for the European Union.⁶

The prerequisites in national systems are often very different.⁷

⁵ Tätigkeitsbericht des Europäischen Bürgerbeauftragten, EuGRZ 1996, 487 Petitions, the Petitions Committee - the Citizens Advocate, German Bundestag, December, 1995, Eighth Revised Edition Report of the Petitions Committee of the German Bundestag, Ombudsman Conference on 10 and 11 November, 1995 in Las Palmas de Gran Canaria on the Organization, the Responsibilities and Procedure of the Petitions Committee Bericht des Petitionsausschusses des Deutschen Bundestages vom 24.6.1997 Drucksache 13/8000

⁶ Mauerer, EG-Ombudsman - Ein Volksanwalt für Europa, Economy-Fachmagazin 9/93, 207, Orac-Verlag

⁷ Messner, The European Ombudsmen and their conflict management capacities, Fifth European Ombudsman Conference, 11 November, 1995, Teneriffa, Canary Islands. Ombudsmann in Europa, Institutioneller Vergleich (Hrsg. Matscher), N.P.Engel Verlag 1994

Some demand as precondition for an appointment a qualified legal education, others not. The competencies are very different. Some work only non-judicial, others also judicial. Some Ombudsman cannot act before all legal remedies have been exhausted, others only when the procedure still is pending.

In Denmark, the Ombudsman himself may initiate the commencement of proceedings.

In Sweden, the Ombudsman has the right to request that civil servants may be prosecuted under criminal law.

The Polish Ombudsperson may even participate in civil, criminal and administrative proceedings.

The Defensor del Pueblo in Spain can submit a basic law appeal against administrative and court decisions.

The Portuguese Provedor can request the review of laws as to their conformity with the Constitution.

The Polish Ombudsman can request an authentic interpretation of laws.

But in spite of these and other differences, all ombudsmen follow the definition that was given in 1974 by the International Bar Association and similarly by the International Commission of Jurists:

"It must be an official provided by the Constitution, by an act of legislature or parliament.

It must be headed by an independent personality who is responsible to the legislator.

He must be entitled to receive complaints of aggrieved persons against government agencies and officials.

He must have the power to investigate on his own motion and recommend corrective action and, finally he must be obliged to issue reports to parliament."

d. The conflict solving tools are generally three:⁸

Non juridical means:

Easy access for help-seeking individuals to the Ombudsperson and discussion of the grievance in a friendly atmosphere to give advice or to find a solution.

Formal means:

After a complaint is brought before the Ombudsperson or after facts about an abuse of administration gets known ex officio the Ombudsperson will enter into a discussion with the respondent administrative authority. The role of the Ombudsperson may be that of a mediator or a facilitator.

Parliamentary Report and public relations work:

Every year and in case of urgency Reports of Ombudsperson will be handed in to the Parliament with suggestions for necessary legal amendments.

Press conferences may be held to inform the media about the work of the Ombudsmen-Organisation and about noteworthy findings that need a public debate.

e. Ombudspersons are not a fourth power in the state system.

The ombudsman is only perceived as a safety net to catch all cases that would otherwise slip through the cracks of classic legal protection systems.

Let me now give a short survey of the Austrian situation.

⁸ Kucsko-Stadlmayer, Volksanwaltschaft als Rechtsschutzeinrichtung, FS aus Anlaß des 75. Jahrestages der Beschlußfassung über das Bundes-Verfassungsgesetz (1995) 359.

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The Volksanwalt in Austria:⁹

The Ombudsman was introduced in Austria in 1982. The new institution got the name "Volksanwalt". After 6 years the institution had proved successful and in 1988 it was included into the Austrian Constitution.

a) The Organization and Structure of the Austrian Ombudsman-Board:¹⁰

The Ombudsman Board is one of the organs of the Republic established under the Federal Constitution.

It is organized on a collective basis and has three members. They are elected by Parliament for a term of six years. They may be reelected once.

Each of the three largest political parties represented in Parliament has the right to nominate one ombudsman. But this does not mean that the ombudsman is linked to a particular party after his or her appointment.

The Ombudsman are under the constitution independent, cannot be dismissed and are only bound by the law.

The position of the chair rotates every year. All-important business is deliberated and decided jointly by all members of the Board.

The members of the Ombudsman Board distribute all incoming business among themselves with each of them handling all matters in his or her purview autonomously.

b) The Competences:¹¹

The review competence of the Ombudsman Board covers the entire system of public administration. The Ombudsman Board is also concerned with the manner in which an authority deals with its customers.

It has however no review competence in regard to the jurisdiction of courts.

The Ombudsman Board has also no competence for dealing with any legal issues or grievances between private individuals or between individuals and private enterprises.

The Ombudsman Board is entrusted with the task of examining all alleged or presumed grievances arising in connection with the public administrative system.

Recommendations have to be met by the authority within 8 weeks. Otherwise the authority has to give good reasons why they refuse to follow the Opinion of the Ombuds-Board.

By making recommendations to Parliament the Ombudsman is also an instrument for the further development of the legal system.

c) The Aim of the Review Procedure¹²

The aim of the Ombudsman Board is to ensure that administration is handled in an appropriate and correct manner. By the Grievance Control Mechanism citizens seeking help by criticizing the conduct of an administrative authority, benefit by getting answers that the otherwise could not force.

⁹ The Austrian Ombudsman Board, its Functions and Activities, Volksanwaltschaft March, 1995

¹⁰ Kohlmaier, Reflexions of the Austrian Ombudsman Board, Meeting of the European Parliamentary Ombudsmen 15 - 17 September, 1993, Helsinki, Finland

¹¹ Adamovich, Über den Ausbau der Zuständigkeit der Volksanwaltschaft und damit zusammenhängende Vorschläge, Die Arbeit der Volksanwaltschaft (Hrsg. Korosec); 23

¹² Morscher, Zusammenarbeit zwischen Volksanwaltschaften, FS-Koja, Wien-NewYork 1998, 317

As the function of the Ombudsmen Board is to examine proceedings it may only accept a complaint after the proceedings in question have been terminated.

Nevertheless the Ombudsperson also is a mediator between citizens and administrative authorities.

Complaints about pending proceedings are possible, where the grievance is the length of the proceedings

d) The Way and Means of Review: ¹³

The Ombudsman Board has the right to inspect all relevant files and may also procure evidence itself.

No fees are charged.

The most frequent channel to appeal to the Ombudsmen is by submission of a complaint in writing. But you may also speak to an ombudsperson in private. Special Appointment dates are held in locations throughout Austria.

The submission of a complaint is an informal procedure.

The Ombudsman Board may also take up a matter on an ex-officio basis.

Quite often the Ombudsman Board is contacted by citizens with special questions and problems that do not result in review proceedings. In such cases, general advice and information are offered.

The aim of the Ombudsman Board in such a case is to increase the level of legal certainty among citizens.

Generally, the Ombudsman Board will always try to ensure that mistakes are either corrected by the administrative authority or that its effects are eliminated.

If a serious case of misconduct has occurred, the Ombudsman Board decides to make a formal finding of grievance. This is frequently accompanied by a recommendation for the respondent authority.

Another very important task of the Volksanwaltschaft is its constitutional duty to report to the Parliament

The Ombudsman Board also regularly informs the public about its observations and criticisms with the help of the media. In cases where a law is found to have loopholes or to trigger off practical consequences, suggestions are submitted to the legislator to amend the law in question.

e) In Austria we had, within the first 12 years, till 1990, 65.000 complaints that reached the "Volksanwälte". One fourth to one third of the cases brought help through the Ombudsman institution.

Now the number of complaint per anno is about 8 to 10.000.

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Final Remarks:

The Ombuds-Boards in the last years got partners in different institutions and also in the Media. Such developments may even distort into Show Business, especially in the TV, when they get out of hand and put officials on the pillory.

¹³ Mauerer, Das Verfahren vor der Volksanwaltschaft, Fünfte Internationale Ombudsman Konferenz vom 11. bis 16. Oktober 1992 in Wien, Austrian Ombudsman Office A-1015 Vienna, Singerstrasse 17

The official Ombuds-Boards got assistance in the last years in different countries also by Special Ombudspersons, with additional competences and new names like the Commissioner in the U.K. or the Rechtsschutzbeauftragtem what is my function in Austria,

Lastly, I also have to mention the European and the International Ombudsman Institutes.¹⁴

Both see it as their task to collect and give information on the numerous Ombuds-Institutions and to promote European and global the Ombudsman-Idea by publications.

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Summary: ¹⁵

The facts show in all countries that procedures get more and more complicated and that the backlog of procedures is permanently growing.

Defects of procedures inevitably happen and tension of officials with law-consumers gets part of daily life.

The result is not only distrust against administration but also a growing crisis in democracy itself.

The ombudsman is not only a network against injustice; he is also a mirror showing Parliament deficiencies of administration and of legislation.

He is a bridge and a chance to combine Law and Justice for the sake of a peaceful democratic society.

(9.)

I want to finish with the following

Allegory

In Arabia many years ago there lived a Beduin Sheik who was very rich, as he had 17 camels. He had three sons of 20, 19 and 12 years of age. He was already very old and new he would have to die soon. So he made a last will as follows.

I want that my oldest son shall inherit 1/2 of my camels as he will have to be responsible for all our family-members, my second oldest son will have to be his help and therefore he shall get 1/3 of my camels. My third son is still a child and the older sons will have to take care of him; nevertheless he shall get 1/9 of my camels.

A short time later he died and his sons wanted to split the heritage according to the testament. The difficulty was that the heritage of 17 camels made it impossible to the heirs to follow the last will of their father just by a division. So they went to the Judge to ask for a decision.

The Judge first addressed the sons and said: I suggest you sell all camels and split the money. But the oldest son said: I will respect the last order of my father that does not order us just to sell our heritage. My father wanted us to keep the camels as our property.

¹⁴ Soderman, Gibt es den klassischen Parlamentarischen Ombudsmann, Euopäisches Ombudsmann Institut, VARIA 16 (D)

¹⁵ Maurer, Equity - The Supplementary Function of the Ombudsman, Occasional Paper 1955, September, 1996, ISSN 7116349

Well the Judge said to the sons why don't you rent your camels to a merchant and share what he will pay. Thiswise you keep the property and have an income that you can share in the ordered splitting.

But now the second son disagreed and said, as I am a merchant myself I need my camels for my work.

Now the Judge got impatient and said to the sons, the only solution then will be you slaughter the camels and eat or sell their meat.

But the youngest son started to weep and said I have grown up with the camels, I love each one of them. They must not die.

Now the Judge said this was my final suggestion. Your case cannot be solved by law.

So the three sons went back to their tents in the desert rather in despair. While they set together they suddenly saw that a rider on a camel approached and then they recognized that it was the mullah whom they knew to be a wise man. So they decided to ask him for his advice. When they had told the mullah about their problem he said after thinking a while:

I will try to help you. I give you my camel too, that you have 18 camels on the whole.

I now follow the last will of your father how you shall split the heritage.

1/2 shall go to the oldest son. 1/2 out of 18 makes 9 camels

1/3 shall go to the second oldest son. 1/3 out of 18 makes 6 camels and

1/9 shall go to the youngest son. 1/9 out of 18 camels makes 2 camels.

9 plus 6 plus 2 makes 17 camels; that leaves 1 camel that is the one that belongs to me.

He took his camel and road on it away.

All were happy with this solution, that they felt to be just, but could not have been offered by law.

PRAVO I PRAVDA: PISMO I GLAVA ISTE MONETE

Rudolf Machacek

Za zaštitu ljudskih prava u miroljubivoj demokratskoj državi, pored ostvarivanja prava bitno je i ostvarivanje pravde. U obezbeđivanju ostvarivanja pravde sastoji se bitna funkcija u novije vreme širom Zapadne Evrope rasprostranjene institucije ombudsmana. Ta institucija je, međutim, veoma stara i vodi poreklo od arapskog "muhtasiba" čiji koreni sežu sve do doba proroka Muhameda u 7. veku. Tekst je bogat iskustvima koja je njegov autor sabrao kao praktikujući pravnik, sudija austrijskog Vrhovnog suda i austrijski zaštitnik prava.

Ključne reči: *pravo, pravda, zaštita ljudskih prava, ombudsman, arapski muhtasib*