European Ombudsman

'The European Ombudsman and the European Constitution', Speech by the European Ombudsman, Prof. P. Nikiforos Diamandouros, to the 34th Session of the Asser Colloquium on European Law on 'The EU Constitution: The Best Way Forward?', The Hague, 15 October 2004

Speech

1 Introduction

I am delighted to participate in this 34th Session of the Asser Colloquium on European Law.

I shall begin my contribution by explaining what an ombudsman is, how the ombudsman institution has spread and developed and the relationship between ombudsmen and the courts.

I shall then speak about the European Ombudsman's role in the Convention and the provisions of the Constitution that relate to the Ombudsman.

Finally, I shall consider the Charter of Fundamental Rights and explain why ombudsmen, including ombudsmen in the Member States, have a key role to play in the Charter's implementation.

2 What is an Ombudsman? *2.1 The basic role*

The basic function of an ombudsman is to investigate and report on complaints against public authorities.

The world of ombudsmen is diverse, but there are certain generally recognised criteria that every ombudsman should meet. These are: independence; fair procedure; public accountability; and effectiveness.

As well as exercising a control function over public authorities, ombudsmen are also a resource to help improve the quality of public sector management, especially by dealing with the underlying systemic problems that give rise to complaints.

2.2 The development of the ombudsman institution

The first ombudsman office was created in Sweden in 1809 to check the legality of public officials' actions.

During the next century and a half, just two more countries established ombudsmen with general competence: Finland in 1919 and Denmark in 1955.

In the 1960s and early 70s, a first wave of global expansion began when older democracies such as Norway, New Zealand, the UK and France set up ombudsmen.

They did so in order to tackle citizens' problems with public administration, which expanded and took on new roles in the 20th Century, especially after the Second World War, when the welfare functions of the state grew dramatically.

In two subsequent waves of global expansion, ombudsmen were established in many newer democracies as part of their commitment to respect human rights and the principle of democracy:

From the mid-1970s onwards, ombudsman were established in post-authoritarian states, such as Spain, Portugal and Greece in Europe and in many countries of Latin America.

After 1989, ombudsmen were established in post-totalitarian states; that is, in countries formerly ruled by communist regimes.

This sequence of development is reflected in different names: Ombudsman; Commissioner for Administration; *Médiateur* ; *Defensor del Pueblo* ; Human Rights Ombudsman; Commissioner for Civil Rights.

It also means that the work of contemporary ombudsmen, including the European Ombudsman, is based on three overlapping and mutually supportive elements: legality, good administration and human rights.

2.3 The European Ombudsman

The Maastricht Treaty established the European Ombudsman in 1993 to enhance relations between citizens and the Union level of governance.

The European Ombudsman is competent to deal with maladministration in the activities of Community institutions and bodies.

The institutions are, of course, listed in the Treaty but the category of "bodies" is open-ended and has grown significantly in recent years as new agencies have been established.

The lodestar of the European Ombudsman's work, especially as regards legality and human rights, is the case law of the Court of Justice and the Court of First Instance.

This brings me to an important general point about the relationship between the work of ombudsmen and that of courts.

2.4 Ombudsmen and the courts

The rule of law and respect for individual rights cannot be guaranteed unless there is a strong and independent judiciary.

Where this precondition is met, however, ombudsmen can also play a valuable role in empowering citizens, providing redress and raising the quality of public administration.

To explain why this is so, it is useful to compare some of the different characteristics of courts and ombudsmen.

Decisions of courts are binding and can provide authoritative interpretations of the law. However,

rules of procedure are strict and complex;

proceedings are often lengthy and expensive;

a court case is usually a zero-sum game: that is, one side wins and the other loses; *and finally*

courts can act only when a case is brought before them.

On the other hand:

ombudsmen have flexible and informal procedures. This is possible because an ombudsman normally has no power to make legally binding decisions. (Nor is such a power necessary: where the rule of law and democracy are strong, public authorities usually follow an ombudsman's recommendations);

they can act relatively quickly and cheaply, normally with no cost to the complainant;

they can promote positive-sum outcomes that benefit both the complainant and the public authority;

finally, ombudsmen can be proactive as well as reactive. For example, they can take initiatives to deal with systemic problems in the public administration. They can also organise information campaigns to inform citizens about their rights and how to use them.

The importance of the courts in upholding the rule of law and individual rights means that it is essential not to overload them with unnecessary cases.

Ideally, therefore, going to court should be the last, not the first, resort for a citizen who has a problem with the public authorities.

Where ombudsmen exist, citizens can choose the non-judicial remedy of the ombudsman as an alternative to going to court. This widens access to justice and strengthens both the rule of law and the quality of democracy.

This analysis of ombudsmen and of different remedies informed the European Ombudsman's main proposals for the Constitution.

The European Ombudsman participated as an Observer in both the Convention chaired by Valéry GISCARD D'ESTAING, which drafted the Constitution and in the earlier Convention (chaired by Roman HERZOG) which drafted the Charter of Fundamental Rights, proclaimed at Nice in December 2000.

In both Conventions, the Ombudsman pushed for the deliberations to focus not just on power structures, but also on citizens.

As regards the judicial protection of human rights, the Ombudsman supported both the Union's accession to the European Convention on Human Rights and a legally-binding Charter of Fundamental Rights, arguing that the two should be seen as complementary, not as alternatives.

The Constitution does indeed provide for both these types of protection.

The Ombudsman also emphasised that good administration is essential for citizens to be able to enjoy their rights as an everyday reality and called for the Constitution to provide for a law on good administration that would apply to all the Union institutions and bodies.

Such a law would implement the citizen's right to good administration, contained in Article 41 *(II-101)* of the Charter of Fundamental Rights and put an end to the present confusing situation, in which different Union institutions apply different codes of good administration.

As Commissioner DE PALACIO pointed out in the European Parliament's debate on the Ombudsman's Annual Report (25 September 2003), this call has been answered in Article III-304 *(III-398)* of the Constitution, which provides for European laws to ensure an open, efficient and independent European administration.

Furthermore, the Secretary General of the European Commission, Mr O'SULLIVAN, has mentioned 2006 as a possible date for the Commission to bring forward a draft proposal for such a law.

Finally, the Ombudsman called for the Constitution to set out clearly the remedies available to citizens if their rights under Union law are not respected, including both the right to go to a national court and the right to an effective non-judicial remedy.

3.2 The European Ombudsman's place in the Constitution

As regards the role of the European Ombudsman, the outcome was very positive.

In Part 1 of the Constitution, the European Ombudsman is mentioned in both Article I-8 *(I-10)* of the title on citizenship and fundamental rights (title II) and Article I-48 *(I-49)* of the title on the democratic life of the Union (title VI).

The Ombudsman thus constitutes the link between the Union's commitments to human and fundamental rights and its democratic commitments and aspirations.

Article I-48 *(I-49)* also makes clear that the European Ombudsman is elected by the European Parliament, rather than appointed. This change better reflects reality, as well as having symbolic importance for the Ombudsman's independence.

Furthermore, the demise of the "pillar" structure of the Union means that the Ombudsman's mandate is broadened to include all the Union Institutions, bodies, offices and agencies.

The Articles on the European Ombudsman in the Charter of Fundamental Rights and in Part III of the Constitution (II-43, III-237 *(II-103, III-335)*) also incorporate these changes.

3.3 Judicial and non-judicial remedies in the Member States

As regards, judicial remedies, Article I-28 *(I-29)* answers (if somewhat obliquely) the Ombudsman's call for the Constitution to inform citizens of their right to go to a national court. It requires Member States to provide *"rights of appeal sufficient to ensure effective legal protection in the fields covered by Union law."*

However, neither the Convention nor the IGC found time to act on proposals to strengthen non-judicial remedies in cases where Member States fail to comply with Union law.

Nonetheless, I remain convinced that ombudsmen at all levels have a vital role to play in ensuring the full and correct implementation of Union law, including the Charter of Fundamental Rights, to which I now wish to turn.

4 The Charter of Fundamental Rights *4.1 Implementation of the Charter at the Union level*

In relation to the Union level of governance, the European Ombudsman has actively promoted the Charter ever since its proclamation by the European Parliament, the Council and the Commission at the Nice summit in December 2000.

In dealing with complaints and in own-initiative inquiries, the Ombudsman has consistently taken the view that failure to respect the rights contained in the Charter is maladministration.

The Constitution incorporates the Charter as its Part II and explicitly foresees that the Union courts will be called on to interpret the Charter *[revised Charter Preamble]* .

Naturally, the European Ombudsman will follow the case law of the Union courts, when it appears.

4.2 Implementation of the Charter by the Member States

The Charter is also addressed to Member States *"when they are implementing Union law."* [II-51 *(II-111)*]

I do not intend to enter a complex legal debate about the precise meaning of that phrase in its specific context. If necessary, the Court of Justice may, in future, give an authoritative legal interpretation.

For present purposes, it is enough to point out that, in general, the concept of implementation includes not only transposition into national law of Directives (or "Framework laws", as they will become under the Constitution), but also the application of such national law by public

authorities in the Member States.

In accordance with the principle of subsidiarity, the task of implementing Union law and policy mostly falls, in fact, on national, regional and local authorities and other public organisations in the Member States.

If citizens are to enjoy their Charter rights in practice, therefore, it is essential for the different public authorities of the Member States to follow the Charter even when they are acting under national law, at least if the national law concerned implements Union law.

4.3 Remedies against Member States

Rights also depend on the existence of effective remedies.

Understandably, citizens who believe that a Member State is not respecting Union law often seek a remedy at the Union level.

Some citizens complain to the Commission, in its role as guardian of the Treaty. This can eventually lead the Commission to refer the matter to the Court of Justice under Article 226 of the EC Treaty. Many complainants, however, hope that the Commission will solve their case quickly in the administrative stage of the Article 226 procedure, without going to Court.

Citizens also petition the European Parliament concerning infringements. In practice, it often falls to the Commission to examine these cases as well.

Finally, many citizens complain to the European Ombudsman against public administrations of the Member States, but such complaints are outside the mandate.

My expectation is that when the Constitution comes into force and the Charter becomes legally binding, many more citizens are likely to try to bring cases to the Union level.

I believe that it would be more effective and in accordance with the principle of subsidiarity for most such cases to be dealt with locally, in the Member State itself. That would also avoid overloading the Commission's Article 226 procedure and the European Parliament' petitions procedure.

4.4 The need to strengthen non-judicial remedies in the Member States

Citizens who wish to protect their fundamental rights against public administrations of the Member States can, of course, bring proceedings in national courts.

But for reasons that I have already explained, going to court should be the last, not the first, resort for a citizen who has a problem with the public authorities.

I also know from experience that few citizens who seek a remedy at the Union level are satisfied by the information that their only recourse is a judicial remedy in the Member State.

I therefore firmly believe that an essential element of subsidiarity in remedies is to strengthen non-judicial remedies in the Member States.

I am reinforced in this belief by the fact that ensuring full and correct implementation of Union law is not just a matter of providing effective remedies, vital though that is.

It also involves the difficult and painstaking task of strengthening the capacity of public authorities of the Member States to follow the law, observe principles of good administration and respect human rights.

Ombudsmen are particularly well suited to combining such reactive and proactive functions and to creating synergies between them.

For example, by publicising criteria of good administration (such as the Code of Good Administrative Behaviour that I mentioned earlier) ombudsmen can:

make their own findings more easily understandable; *and*

help both citizens and the administration focus on their mutual expectations in a way that promotes trust and more effective communication.

4.5 The role of the European network of ombudsmen

The current situation in the European Union is that there are ombudsmen in all 25 Member States, either at national or regional level or, in some countries - such as Spain - at both levels.

For my part, I am working actively to deepen our existing co-operation with them through the European network of ombudsmen.

The Network also includes ombudsmen in the candidate states and the wider Schengen area, embracing more than 90 offices in 30 countries.

It ensures that complaints are rapidly directed to the competent ombudsman and facilitates exchange of information about best practice and developments in European law.

I am already working with our partners from the Member States in the Network, to assist and encourage them in ensuring the full and correct implementation of Union law.

I believe that, with the co-operation of the European Parliament and the Commission, we could put in place, by the time the Constitution comes into force, a comprehensive, coherent and effective system of non-judicial remedies in the Member States, to help citizens enjoy their rights under Union law vis-à-vis public authorities in the Member States, including their fundamental rights under the Charter.

This would:

enhance choice for citizens by providing an alternative remedy;

strengthen subsidiarity;

spare Union institutions from overload; *and*

contribute to administrative capacity building in the Member States, where needed.

5 Conclusion

In conclusion, I would like to share with you a few general reflections about constitutions, that I believe are particularly relevant to the future Constitution of Europe.

Every constitution can be looked at from two perspectives.

The first sees it as a way of allocating public authority between different institutions and different territorial levels of government.

From this perspective, the constitution can be understood as both the result of competing political forces and as a framework within which political competition takes place.

During the Convention that drafted the Constitution for Europe, we heard a lot of debate from this perspective. We shall no doubt hear more during the process of ratification.

Such debate is normal and healthy in any democracy, but it should not exclude the second perspective.

From the second perspective, a constitution is a framework for relations between individuals and public authorities - of all kinds and at all levels of governance.

In a democracy, the two perspectives are inseparably linked through the idea of citizenship.

The future Constitution represents a major step forward along the road of creating a genuine citizenship of the Union, as a complement to national citizenship.

The Charter in particular is an instrument with great potential to translate fundamental values and principles into reality by empowering citizens and strengthening democracy at all levels of the Union.

To achieve this potential requires proactive intervention by institutions, to make citizens aware of the new possibilities opened for them by the Charter and to encourage and assist public authorities at all levels of the Union to make the rights and aspirations of the Charter the touchstone for their actions.

It is towards the realisation of this goal that institutions should strive and, as European Ombudsman, I pledge myself to work hard for its achievement.

Thank you for your attention.

(1) The numbering of articles is as in the draft Constitutional Treaty prepared by the

Convention. Numbers in *(brackets and italics)* are those in document CIG 87/04 (6 August 2004), produced following the agreement in the IGC on 18 June 2004.