European Ombudsman

'The role of the Ombudsman in future Europe and the mandates of Ombudsmen in future Europe', Speech by the European Ombudsman, Prof. P. Nikiforos Diamandouros, to the 9th Round Table meeting of European Ombudspersons and the Council of Europe Commissioner for Human Rights, Copenhagen, 31 March 2005

Speech

1 Introduction

Ladies and gentlemen, friends and colleagues!

I would like to thank the Parliamentary Ombudsman of Denmark, Hans Gammeltoft-Hansen, and the Commissioner for Human Rights of the Council of Europe, Alvaro Gil-Robles, for giving me the opportunity to present you with my thoughts on the role of the Ombudsman in future Europe and the mandates of Ombudsmen in future Europe.

The Nordic setting for this, the 9th Round Table meeting of European Ombudspersons and the Council of Europe Commissioner for Human Rights, is a particularly appropriate one for such a presentation. As you all know, Sweden created the world's first parliamentary ombudsman in 1809 and Finland followed suit in 1919. In 1955, aided by the historical moment defined by rising post-World War II concerns with democracy, human rights and the social role of the state, Denmark created what was eventually to become the internationally emulated model of parliamentary ombudsmanship. In that sense, the 50th anniversary of the Danish Ombudsman is not just an important anniversary for Denmark, but also for ombudsmen throughout the world for whom the Danish model of the modern ombudsman institution has been an inspiration.

The success of the Danish model has often been attributed to its attractive combination of easily-identifiable basic features and a very considerable flexibility that allows it to adapt to the legal, political and institutional context into which it is inserted. This success is linked to the fact that the conditions initially favouring its emergence have spilled over to a wide range of countries in Europe. Today, over 100 countries, including all but one of the EU Member States, have a parliamentary ombudsman or similar institution, and regional ombudsmen exist in many countries, including six of the EU Member States.

The recent transitions to democracy in Central and Eastern Europe have led to a sharp increase in the number of parliamentary ombudsman institutions. All the new EU Member States from this region have such an institution, and the candidate countries for EU membership, including

Turkey, either intend to establish an ombudsman or have already done so.

To make qualified projections about the future of ombudsmanship in Europe requires a brief examination of what 'European ombudsmanship' - if indeed it makes sense to use such a term - currently implies, and how it has developed in recent years.

A detailed analysis of this is clearly not possible here. The simple method that I propose to adopt, in order to, at least, obtain an indicative overview, is to ask to what extent the basic features of the prototype ombudsman model are generally recognisable in ombudsman institutions in Europe today.

I am sure that you all know the essential features of ombudsmanship, but I shall nevertheless briefly attempt to summarise them for the purposes of this presentation. To my understanding, the key features are:
- the personal dimension of the office, built around a publicly-recognised office-holder;
- the independence of its work;
- free and easy access for the citizen;
- a primary focus on the handling of complaints (i.e., its reactive mode);
- use of proactive means to achieve goals;
- a review function that encompasses legal rules and principles; principles of good administration; and fundamental and human rights;
- a general mandate to supervise the entire reach of the public administration (but rarely extending to include the courts); and
- a lack of power to issue binding decisions; and a distinct preference, instead, for working through use of persuasion, moral authority and, in some cases, the authority of the government or assembly by which the ombudsman is appointed.

My visits to all the EU Member States, as well as to the candidate countries for EU membership, have left me with the strong impression that ombudsmen in Europe have, to a very considerable extent, these basic features in common. Important variations do exist, but in most cases these can be attributed to the particular context in which the ombudsman operates, or to attempts to enhance the prototype model.

I have also been struck by the high level of importance accorded to the institution in many countries. In light of the new ombudsman institutions that have been set up in Europe over the last 10-15 years, I think it is safe to say that the office of parliamentary ombudsman continues to be recognised as a central and effective source of protection for the individuals in their dealings with the administration.

This is clearly illustrated by the fact that ombudsmen in the new democracies of Central and Eastern Europe have almost all been entrusted with a mandate to promote human rights. The sensitivity of issues relating to human rights in these countries cannot be overestimated. Their ombudsmen therefore not only have the important specific task of ensuring respect for human rights in individual cases, but also have a general responsibility in contributing to the rebuilding of trust and confidence in government and the nurturing and empowerment of civil society.

The broad conclusion of these brief introductory remarks is, therefore, that it makes perfect sense to talk about 'European ombudsmanship'. I was therefore delighted by the decision to include a reference to ombudsmanship in the draft constitutional treaty for the European Union. Part 1 of the Constitution mentions the European Ombudsman in both Article I-10 of the title on citizenship and fundamental rights and in Article I-49 of the title on the democratic life of the Union. Ombudsmanship is thus recognised as an essential link between the Union's commitments to human and fundamental rights and its democratic commitments and aspirations.

To address the issue of how European ombudsmanship might develop in the future, I have chosen to focus on two topics in my speech today: the proactive nature of ombudsmanship and how ombudsmen can achieve results through partnerships with other institutions and bodies.

2. The proactive nature of ombudsmanship

The proactive work of ombudsmen manifests itself both in the review function of ombudsman institutions, and in the way that ombudsmen operate.

In terms of the substance of ombudsmen's review, I would like particularly to underline the frequent application of open-ended principles of good administration. These principles generally allow the ombudsman to assess issues more flexibly and in a more forward-looking fashion than courts of law, for example, are able to. As my predecessor, the first European Ombudsman Jacob Söderman stated in his 1997 Annual Report, *"...the open ended nature of the term [maladministration] is one of the things that distinguishes the role of the Ombudsman from that of a judge."* In fact, the application of such open-ended principles of good administration may even influence the development and application of recognisable legal rules and principles.

I am aware that the Danish experience is a prime example of how an ombudsman can proactively contribute to the development of legal rules. I have even been informed that several of the legal rules contained in the Danish Public Administration Act of 1985 are essentially codified rules that had been formulated in decisions and recommendations issued by the Danish Ombudsman.

In this respect, I would like to recall a question posed by the former Danish Ombudsman, the late Professor Lars Nordskov Nielsen, on the occasion of the Danish Ombudsman's 40th anniversary, which remains just as topical ten years later. Professor Nielsen asked *"...whether the Public Administration Act should... form the sole basis for the Ombudsman's assessment of whether a matter was dealt with correctly"* .

The same question could today be posed for Europe more generally, where over recent years we have seen a very notable tendency to create written instruments - whether binding or not - containing rules on good administration. The culmination of this was arguably the introduction of a right to good administration in the European Union's Charter of Fundamental Rights (Article 41).

Such efforts to clarify and reinforce principles of good administration in written instruments can

only be good for the citizens. For ombudsmen however, they do raise the question of whether we are moving into a phase where we will content ourselves with merely supervising the correct implementation of already formulated legal rules of good administration, or whether we will continue to apply a broad and flexible concept of good administration capable of contributing to the continuous improvement of administrative behaviour.

The late Professor Nielsen strongly advocated the importance of guarding the principle of good administration as a flexible basis for review, and I for my part certainly follow that advice in my daily practice as European Ombudsman. It is my impression that this approach is also applied by national ombudsmen throughout Europe, who mostly appear to steer clear of a legalistic model of review. I have furthermore been encouraged by recent decisions of the Court of First Instance of the European Court of Justice in Luxembourg, in which the Court - which itself applies a concept of 'sound' or 'good' administration - appeared to recognise the importance of maintaining a flexible principle of 'good administration' as applied by ombudsmen.

I personally welcome this, in particular given that ombudsmen function as the link between the highest and most fundamental principles - such as human dignity and equality before the law - and the perhaps prosaic but nevertheless crucially important norms of day-to-day administrative behaviour towards citizens (replying to letters, politeness, service-mindedness and so forth). Indeed, this combination distinguishes the ombudsman from the many specialised bodies that we have seen established over recent years (data protection supervisors and anti-fraud offices, to give but two examples).

Thus, it is not only my expectation but also my hope that an important role for ombudsmanship in future Europe will be to contribute to the development of administrative cultures based on flexible principles of good administration and capable of enhancing the capacity of public administration to adhere to best practice and to render high quality services to the user.

With regard to ombudsmen's working methods, it is well known that most ombudsmen have formal proactive powers of inquiry in addition to their main responsibility for handling complaints. These include the power to conduct inspections and the power to initiate so-called own-initiative inquiries. Furthermore, most ombudsmen have the power to recommend changes to laws and administrative practices. In addition to the formal proactive powers, ombudsmen naturally also have the important role of providing public officials with guidance as to how they themselves and the public administrations in which they serve can continuously improve their relations with individuals. This is what is sometimes referred to as an ombudsman's "educational" role.

My impression from visiting colleagues at the national level across Europe is that these proactive powers are very widely used in the newer ombudsman institutions and are increasingly being deployed by the older institutions as well. Indeed, I am aware that a 1996 amendment to the implementing laws for the Danish Ombudsman's office introduced an explicit competence to conduct own-initiative inquiries, a practice that had already begun in 1988.

Particularly important in this respect are issues of legitimacy, raised, somewhat inevitably, by the use of proactive working methods increasingly employed by ombudsmen. A first aspect

concerns the public officials' perceptions of the ombudsman's use of his or her proactive powers. Unlike complaint-handling - where the ombudsman is simply responding to an individual's use of his or her rights - the employment of proactive working methods inevitably involves the risk that officials might wonder whether the ombudsman's actions are truly necessary and justified. In my view, the increasingly positive response of public administrations to such proactive activities by ombudsmen suggests not only that the actual initiatives are well perceived, but also that a broad proactive role of ombudsmen is generally considered natural and legitimate.

A second aspect concerns general recommendations, i.e., recommendations that address systemic issues rather than specific administrative decisions regarding individuals. In the classical approach, compliance with the ombudsman's general recommendations which approaches 100% is considered to be essential. The concern underlying such a view is that if the administration starts to reject the ombudsman's recommendations, the authority of the institution may suffer irreparable damage.

Current developments suggest that a more risk-oriented reform approach with respect to general recommendations appears to be emerging. Here the rationale is that the ombudsman's role as a catalyst of continuous reform reduces the relevance of a near-to 100 % compliance rate. In fact, there are those who contend that an ombudsman whose recommendations are always accepted is likely to be perceived as an ombudsman who is overly concerned with ensuring that his or her recommendations are within the limits of what the administration will accept.

It is my impression that many national ombudsmen, especially those established more recently, are moving in the direction of the risk-oriented approach. It may well be, therefore, that one interesting development in European ombudsmanship is the emergence of ombudsman models characterised by the greater willingness to build more risk in the calculus of decisions relating to general recommendations designed to address issues regarding systemic maladministration.

These observations, I should stress, only relate to general recommendations - in respect of recommendations in cases concerning individual grievances and claims, the view remains that such recommendations should normally always be followed.

3. Achieving results through partnerships

To state that ombudsmen do not work alone, that they depend on their institutional interlocutors, and that good and constructive relations with these interlocutors should be maintained and developed, is perhaps to state the obvious.

Despite this, the extent and nature of such partnerships is one of the areas in which particularly significant variations exist among ombudsman institutions in Europe. I would therefore like briefly to attempt to identify key issues and to offer one or two modest goals for the future.

The courts naturally constitute the fundamental redress mechanism for ensuring respect for the rule of law. Where ombudsmen exist, citizens can choose the non-judicial ombudsman remedy as an alternative to going to court. However, courts and ombudsmen are, or can be, linked in

several direct and indirect ways.

An important indirect link between courts and ombudsmen is the mutual use of decisions. That is to say, ombudsmen apply the courts' case-law and courts may turn to the ombudsman's reports to obtain inspiration for their interpretation of the law. It is extremely difficult to make any predictions as to whether this indirect interchange will develop in future Europe. The most we can say is that a development in that direction appears to be a plausible eventuality, given that principles of good administration have increasingly been formalised into written instruments.

Such a development may, in fact, also be supported by the positive experiences with the direct link that can be found in some, albeit only a few, European countries. In Spain, Portugal and in Poland, for instance, the ombudsman has the power to refer questions regarding the validity of legislation to a constitutional court. I understand from my colleagues in those countries that this power is extremely useful and that it adds to the effectiveness of their overall work. This power naturally requires the exercise of great care and skill to avoid the appearance of taking sides in political controversies.

It is my impression that European ombudsmanship has reached a stage of maturity, if you like, that makes it appropriate to revisit the issue of ombudsmen's access to courts. If relevant safeguards are built into any such system of direct access - for instance allowing the courts to reject the ombudsman's request for an interpretation - access to courts could well be both acceptable and useful within most European jurisdictions.

In terms of ombudsmen's relations with governments and parliaments, I shall only touch on the issue of legislation. In line with my previous remarks concerning the tendency towards increased focus on proactive working methods, such as own-initiative inquiries, one may envisage the possibility of increased dialogue between ombudsmen and their respective governments and/or parliaments when legislation relating to the ombudsman's broad concerns is being drafted and discussed. I am aware that, for instance, the Swedish Ombudsman is systematically consulted on relevant legislation, and that the Estonian Ombudsman has the right to speak at the parliament's and at the government's sessions when they discuss law proposals.

Again, in some countries, such a practice may well be perceived as constituting too close an involvement in the political process and the potential controversies often associated with it. On the other hand, it is my impression that ombudsmen are increasingly perceived as highly-relevant sources of information in the implementation of laws. By way of example, reports from ombudsmen in candidate countries for EU membership have on several occasions been used by the European Commission to obtain information as to the state of implementation of legislation relating to rights.

It may well be, therefore, that the ombudsmen's cumulative knowledge and experience with respect to the implementation of laws will be increasingly taken into account at the level of the drafting of laws.

The final interlocutors that I would like to mention are really better referred to as colleagues. They are the family of ombudsmen, at the European, national, regional and local levels, whose co-operation is exemplified by this week's events in Copenhagen. As most of you are aware, ombudsmen in Europe have regularly met in seminars organised by the European Ombudsman and in roundtables organised by the Council of Europe, to discuss issues of common interest.

The European network of ombudsmen, which was created by my predecessor, Jacob Söderman, consists today of almost 90 offices in 29 countries, and co-operates on a daily basis in case handling, and on a continual basis in sharing experiences and best practice through seminars and meetings, a bi-annual newsletter, an electronic discussion forum and an electronic daily news service. The intensity of such co-operation will continue to increase in the future, both at the geographical level, as the EU grows, but also at a substantive level, as the implementation of EU law at the national level becomes an ever more important area of concern for national ombudsmen. Future co-operation among ombudsmen at the European, national, regional and local levels might increasingly take the form of joint inquiries, the creation of common channels for provision of information and advice, and the development of new ways of sharing information and best practice.

4. Conclusion

In concluding these thoughts on ombudsmanship in future Europe, it is important to again remind ourselves of two great achievements affecting us all: first, the unequivocal recognition of ombudsmanship in the Constitution for Europe and second, the incorporation in the Constitution of a Charter of Fundamental Rights containing a right to good administration. I would like to pay tribute to the untiring efforts of my predecessor, Jacob Söderman, in helping to obtain these two important successes.

The fact that European policy-makers have chosen to reinforce ombudsmanship so significantly is not merely based on a shared vision for the future. It is also a response to the very high credibility that ombudsmen in Europe have, over the past several decades, given to the concept of ombudsmanship through their effective promotion of the rule of law and good administration.

In my view, the fact that we may now refer to ombudsmanship as part of the European legal and political tradition also implies that efforts must be made to ensure that citizens' rights are equally well protected irrespective of which ombudsman they turn to. To be sure, ombudsmen will continue to apply different working methods, prudently adapting their individual offices to their respective political-institutional environments and cultures. The level of rights enjoyed by the citizens however, ought to be the same across the board. To ensure this is clearly not only the task of ombudsmen themselves, but requires a continuous dialogue with the legislators who ultimately will be called upon to provide the ombudsmen with the necessary legal powers and resources to achieve this goal.

I, for my part, look forward to intensifying my co-operation with my ombudsman colleagues throughout Europe so that we can all together help in making rights a living reality for all citizens.

Thank you for your attention!