European Ombudsman

'Human rights and non-judicial remedies – The European Ombudsman's perspective', Speech by the European Ombudsman, Professor P. Nikiforos Diamandouros, at the London School of Economics and Political Science, London, 30 November 2005

Speech

1 Introduction

Let me begin with some brief information about the office that I have held since April 2003.

The European Ombudsman was created by the Maastricht Treaty, to enhance relations between citizens of the Union and the European Community institutions and bodies. The first Ombudsman was elected by the European Parliament in 1995 and began work in September that year, so we are now celebrating our 10th anniversary.

Originally, the mandate was limited to the European Community, but the Treaty of Amsterdam brought the Union's "third pillar" (that is, police and judicial co-operation in criminal matters and, in particular, Europol) under the Ombudsman's supervision.

The eventual fate of the Treaty establishing a Constitution for Europe remains uncertain, following the negative results of the French and Dutch referendums earlier this year. Its text defines the Ombudsman's mandate as comprising the Union's institutions, bodies, offices and agencies. This formula would extend the mandate to the Common Foreign and Security Policy, including bodies such as the European Defence Agency, as well as to the European Council, which, under the current Treaty, is not a Community Institution.

The subject of my lecture today is the European Ombudsman's perspective on human rights and non-judicial remedies. Although the mandate is confined to the Union level of governance, my perspective on human rights and non-judicial remedies ranges more widely, encompassing the variety of national experiences in Europe and indeed the spread of the ombudsman institution as a global phenomenon.

The reasons for this broad approach are both personal and institutional. I am by training a political scientist who specialises in the study of democracy whilst, institutionally, the European Ombudsman co-operates closely with ombudsmen in the Member States and candidate

countries through the European Network of Ombudsmen.

In both capacities, as an academic and as European Ombudsman, I have a keen interest in understanding the differences and similarities among Ombudsman institutions, so as to facilitate mutual learning and promote the development of effective new ombudsman institutions in the enlarging European Union and its close neighbours.

2 The development of the ombudsman institution

The world's first parliamentary ombudsman was established in Sweden in 1809 to check the legality of public officials' behaviour. The originality of the institution lay primarily in its independence of the Executive. This was guaranteed by the fact that the Ombudsman is elected by, and reports to, Parliament. Not until 1919 was the Swedish model copied by another country, Finland. Then nearly half a century passed before a third Ombudsman was established, in 1955, in Denmark.

The Danish model differed from the two earlier ones in that the Ombudsman was not given power either to prosecute civil servants under the criminal law, or to supervise the work of the courts. Moreover, the Danish example showed that an Ombudsman could work within a parliamentary regime characterised by ministerial responsibility for the detailed work of the administration.

In the 1960s and early 1970s, a first wave of global expansion began when older democracies, such as Norway, New Zealand, the UK and France, adopted the ombudsman institution as a way of tackling citizens' problems in dealing with public administration, which expanded greatly and took on new roles, especially after the Second World War, as the social role of the state grew exponentially.

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

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

After 1989, the transition from communism to democracy in Central and Eastern Europe resulted in a large increase in the number of ombudsman institutions in these regions. The encouragement and support of the Council of Europe was a major contribution to this development. At the same time, the earlier waves of expansion acquired greater momentum and brought the institution to an ever growing number of countries around the globe.

The spread of the ombudsman institution has been particularly impressive in the European Union. When the Maastricht Treaty was negotiated, national ombudsmen existed in only a bare majority of the Member States; 7 out of 12. The combined effect of enlargement and of new

offices having been established is that, today, there is a national ombudsman in 23 of the 25 Member States and all four candidate countries (Bulgaria, Croatia, Romania and Turkey) have either established such an ombudsman, or announced their intention to do so.

3 Democracy and the rule of law

How should we understand the significance of the rapid spread and development of the ombudsman institution? In trying to answer that question, my starting point will be the two major parameters - democracy and rule of law - that profoundly affect and shape the broader political and institutional context in which the ombudsman institution functions and which condition its capacity to serve citizens and to enhance their ability better to enjoy their rights.

Let me begin by stressing the obvious point that, even though, in contemporary European legal culture, rule of law and democracy are thought of as forming an inseparable and, so to speak, natural pair, they are analytically distinct.

Rule of law describes a condition in which all members of society live under the law, and where no one can operate outside or above the law. Its historical origins derive from European feudalism, and, more specifically, from the tight and complex nexus of reciprocal rights and obligations which, over time, issued from the contractual relations linking lord and vassal together. Flowing directly from such a situation is the additional principle that, under the rule of law, every person is subject to the ordinary law and not to extraordinary or exceptional arrangements.

By definition, the rule of law implies the absence of the unrestrained (and therefore potentially arbitrary) exercise of power, so elegantly conveyed by the Latin maxim "Quod principi placuit, legis habet vigorem" [=what pleases the prince has the power of law].

(By the way, I promise to speak to you in Latin only once more during this lecture.)

A crucial condition for the generation of the rule of law and its continuation is the existence of a distinctive judicial function, characterised by independence and with responsibility for the development of general legal principles. In other words, the courts are the foundation upon which the rule of law is built and on which its development and evolution depends.

Finally, the evolution of the rule of law has, over time, resulted in social and political arrangements in which the relationship between rulers and ruled is not direct and immediate, but mediated by structures or institutions enjoying legal recognition and authority, thus placing effective limits on the power exercised by the ruler. This characteristic of the rule of law and of the pattern of mediated exercise of power that it is associated with was astutely captured and extensively analysed by Montesquieu in his celebrated Spirit of the Laws , under the apt term "corps intermédiaires".

In comparison to the rule of law's ancient pedigree, democracy as we know it today is a much

more recent phenomenon that is inextricably linked to the political and socio-economic upheavals that shook the European Continent and the American colonies in the "long century" beginning in the last quarter of the 18th century and lasting well into the 20th.

Associated with the gradual expansion of the right of suffrage to an ever increasing number of subjects turned citizens, democracy nowadays enjoys undisputed legitimacy, not only throughout Europe but globally.

Definitions of democracy can be long and elaborate. For present purposes, I shall adopt a minimalist conceptualisation, identifying some basic attributes of democracy that serve as fundamental preconditions for its legitimacy and effectiveness. In my mind, these include:
- the capacity to allow for fair elections, including, of course, the classical political liberties, such as freedom of expression, including freedom of the Press and freedom of association;
- flowing from these political liberties, the existence of more than one legal party having the right freely to contest an election; *and*
- the absence of "veto groups", capable of subverting the popular verdict of an election. Traditional examples of such veto groups are the monarchy, the armed forces, or other parts of the state apparatus unwilling to accept the result of an election as legitimate and final.

An important implication of this analysis is that democracy cannot be simply equated to parliamentary institutions, or to the mere holding of elections. Even a cursory look around the world will provide ample evidence to support the view that the conditions under which elections are held in many countries do not meet the criteria of fairness, free contestation and absence of veto groups. Rather than democracies, these can better be thought of, in the words of the Stanford political scientist, Terry Karl, as "electoral regimes", whose capacity to meet the formal requisites of democracy is still quite limited.

If we move our inquiry to the level of abstract principles informing democracy, I would argue that liberty and equality, two of the most powerful intellectual legacies of the Enlightenment and of the political revolutions this momentous era gave rise to, serve as a solid foundation upon which all modern democracies have been constructed. The relative balance between these two principles built into constitutional formulae and resulting institutional arrangements allows us to distinguish two, historically contingent, variants of modern democracy, which have a particular bearing on contemporary political and intellectual debates.

The first variant, which derives its roots from the Jacobin legacy of the French Revolution, privileges equality as the fundamental organisational principle of democracy. Its attractiveness lies in the elegance issuing from its simplicity. According to the ideal type of this conceptualisation of democracy, the sovereign people constitute the only source of power, whose sole institutional expression is (a mostly unicameral) parliament. In majoritarian systems capable of producing single party cabinets, the party enjoying a parliamentary majority constitutes the natural and logical expression of popular sovereignty and, as such, can legitimately claim a plenary right to exercise power on behalf of the sovereign people.

The major drawback of the egalitarian conceptualisation, deriving directly from its preoccupation

with equality as its major, if not sole, organisational principle, is that it is driven by what I describe as a "unidimensional" logic geared to privileging homogeneity over diversity. Pushed to its logical extremes, such an emphasis on homogeneity, so intimately linked to equality, risks generating a flattening dynamic capable of imparting a dimension of "levelling egalitarianism" to the democracy associated with the unidimensional logic underpinning it. In turn, such a conceptualisation of democracy raises serious concerns relating to the observance of the rule of law and to respect for individual rights, including human rights.

The alternative variant is characterised by the systematic search for the construction of institutional arrangements capable of embodying various combinations of the principles of equality and liberty. Driving this conceptualisation of democracy, again in the ideal-typical form, is a pluralist logic, whose overriding preoccupation is the search for an optimal balance between institutions alternatively expressive of egalitarian and libertarian principles.

Such an overarching balance, which, for its crystallisation, consolidation and entrenchment over time, relies on the generation of a dense network of institutional checks and balances or counterweights, akin to Montesquieu's "corps intermédiaires", provides better conditions for the observance of the rule of law and for the quality of democracy.

It is, therefore, not accidental that in democracies which most closely approximate to the pluralist variant, the role of the judiciary as the fountainhead of the rule of law is most developed and respected and acceptance of the ombudsman as a quintessential example of a non-judicial institutional counterweight enjoys greatest legitimacy. This point deserves further elaboration.

4 Courts and ombudsmen distinguished and compared

To begin with, it is important to emphasise that courts and the non-judicial institution of the ombudsman have distinct, though complementary, functions. The defence and promotion of the rule of law constitute a common ground on which their roles overlap and both institutions stand outside the machinery of public administration, acting as independent mechanisms for its control and accountability. They differ, nevertheless, in two very clear ways.

An ombudsman does not make legally binding decisions

First, the courts are the only authoritative interpreters of the law and are alone equipped with the right to issue legally binding decisions and, its logical concomitant, to impose sanctions. By contrast, ombudsmen, while guided by the decisions and the case law of the courts, can only issue advice and recommendations to the institutions of the state (public administration, public utilities, etc.) falling within their mandate.

This means that an ombudsman's effectiveness is based on moral authority, cogency of reasoning and, ultimately, on publicity and the ability to persuade public opinion, which, in the pluralist variant of democracy, can provide an effective incentive to comply with the

ombudsman's recommendations.

According to Alexander Hamilton, one of the Framers of the US Constitution, the judiciary constitutes the "least dangerous" branch of government. Without the power to give legally binding orders, ombudsmen are less dangerous even than the courts. This makes it possible for them to be more flexible than courts as regards both the procedures they use and criteria for determining the admissibility of cases.

I am also convinced that the important, proactive role played by ombudsmen in many countries, especially the right to take initiatives to tackle systemic problems and to improve the quality of administration, has been facilitated by the fact that the ombudsman’s decisions are not legally binding.

Illegality and maladministration overlap but are not identical

The second distinction between judicial and non-judicial remedies is that the major realm of activity and concern of the courts is to ensure adherence to legality on the part of State and citizens, whilst for the ombudsman the equivalent realm is the promotion of good administration, or, put conversely, the avoidance of maladministration.

To be sure, as the case law of virtually all countries where rule of law and democracy are well entrenched amply demonstrates, illegality and maladministration overlap. On the other hand, the concept of maladministration is open-ended. It describes a situation where a public body fails to act in accordance with a rule or principle that is binding on it, thus extending beyond issues of legality to encompass the idea that public administration exists to serve the citizen and that, in their daily dealings with the public, public bodies need to ensure that citizens are properly treated and enjoy their rights fully.

Put otherwise: principles of good administration demand more of public administration than merely not breaking the law. While illegality necessarily implies maladministration, therefore, a finding of maladministration does not automatically entail illegality.

Choice for citizens in means of redress

These two main distinctions between courts and ombudsmen mean that their co-existence does not lead to unnecessary duplication, as some would aver, but rather provides citizens and users of public services with a clear choice as to how they may exercise their fundamental right to redress. The citizen can decide on the appropriate form of dispute resolution for his or her circumstances. If you want a legally binding decision about your legal rights and obligations, then go to court. By choosing the ombudsman, you avoid costs, normally get a quicker result and have access to more flexible procedures and a broader review criterion than legality.

The deliberate provision of choice, such as the opportunity to decide between alternative

avenues of redress, constitutes a distinct feature of the pluralist variant of democracy. In turn, the capacity to provide citizens with choice serves to enrich the range of "products" such a democracy can offer its citizens and, thus, enhances its quality.

5 Human rights as an integral part of Ombudsmanship

Having analysed the similarities and differences between courts and Ombudsman in terms of concepts that have global application, I shall now focus on the European Union in explaining the role of ombudsmen in relation to human rights. This may appear paradoxical, given that human rights, by definition, are applicable to all human beings. Remember however, the maxim – and here is my second and final piece of Latin -- “Ubi ius, ibi remedium”.

In fact, it is the converse proposition, which can be loosely translated as “rights without remedies are not worth the paper they are written on”, that matters for present purposes. In other words, discussion of the protection of human rights should make reference to a concrete system of remedies and it is therefore useful for me to adopt, at this point, the institutional perspective of the European Ombudsman.

Human rights in EU law

By the time the European Communities were established in the1950s, the European Convention on Human Rights had already been put in place within the framework of the Council of Europe. Moreover, the logic of the Convention is that primary responsibility for protection of human rights lies with the national legal and constitutional orders. It is thus unsurprising that the authors of the original Community Treaties saw no need to include provisions on human or fundamental rights.

By the early 1960s, however, it was becoming clear that the European Communities were more than just another international organisation. The Treaties had, in fact, established supranational legislative and executive powers, capable of imposing obligations on private persons. Furthermore, EU law has primacy or supremacy over national law, meaning that it prevails over inconsistent national law, including national constitutional law on fundamental rights.

In these circumstances, the only way to safeguard fundamental rights was for EU law itself to recognise such rights and ensure their protection. Because the Treaties were silent on the matter of fundamental rights, the task of working out their implications in this regard fell to the Court of Justice.

Beginning in the late 1960s, the Court established that fundamental rights are an integral part of the general principles of Community law and, as such, are binding not only on the European Institutions and bodies, but also on all the public authorities of the Member States, whenever EU law applies.

To identify such rights, the Court of Justice drew on the constitutional traditions common to the Member States and on international agreements, especially the European Convention on Human Rights and the case-law of the Strasbourg Court of Human Rights concerning the Convention.

In 1996, however, the Court of Justice gave an unfavourable opinion on a proposal that the European Communities should sign the Convention, holding that the EC Treaty does not contain a sufficient legal basis for accession. The resulting gap in international supervision of fundamental rights is difficult to justify, especially to citizens of the former communist States wanting to join the Union.

This situation was undoubtedly one of the elements that led the Cologne meeting of the European Council in June 1999 to launch a process for drawing up a Charter of Fundamental Rights of the European Union.

The Charter was drafted by a Convention, consisting mainly of representatives of Heads of State or Government, the European Parliament and national Parliaments. The European Ombudsman participated in the Convention as an official Observer and successfully proposed that the Charter should include the right to good administration.

The Charter draws together rights already contained in the case-law of the Court of Justice and in a variety of texts including the European Convention on Human Rights; the Council of Europe's Social Charter; the Community Charter of Fundamental Social Rights of Workers; and the provisions of the EC Treaty concerning the rights of citizens. It is thus a broader document than the European Convention on Human Rights, containing not only the classical civil and political rights, but also social and economic rights, such as the right to health care, the rights of the elderly and the protection of the family.

The questions of whether, when and how the Charter should become legally binding were set to one side during the process of drafting of the Charter. Nor was any agreement on these matters reached in the negotiations leading to the Treaty of Nice. Instead, the Presidents of the European Parliament, Council and Commission jointly proclaimed the Charter at the Nice summit in December 2000. Since then, the European Ombudsman has consistently taken the view that the institutions that proclaimed the Charter should respect its provisions and that failure to do so would be maladministration.

An example from the work of the European Ombudsman

At this point, let me draw together and illustrate some of the points that I have made by giving you an example, drawn from my own experience, of how an ombudsman can provide an effective alternative remedy and also help strengthen fundamental rights more generally.

I received a complaint from a former civilian expert employed by the European Union Police Mission in Bosnia and Herzegovina, who had been dismissed for misconduct, without having

the opportunity to give his views on the supposed facts. He complained against the Council on the grounds that it had refused to reply to him, or to accept any responsibility for the matter.

After examining the legal framework, I took the view that the Council is responsible for ensuring that the EU Police Mission respects the rule of law and the fundamental rights recognised by the Charter.

I therefore criticised the fact that the right to good administration, which includes the right of every person to be heard before any individual measure which would affect him or her adversely is taken, had not been respected in the complainant's case. I also successfully asked for the Council's help to ensure that the Police Mission paid the complainant up to the date when his contract would have ended normally, had he not been dismissed.

The outcome of the case was therefore that the individual received redress whilst, at the same time, both the Council and the EU Police Mission received guidance as to their general responsibilities in relation to fundamental rights and the rule of law.

The complainant's financial claim was relatively small and he had no contractual relationship with the Council. These aspects of the case, together with the fact that the EU Police Mission was established under the Common Foreign and Security Policy, would have made it difficult for a court to provide a cost-effective remedy, or to dig so deeply into the general relationship between the Council and the Police Mission. The case thus illustrates neatly the way that an ombudsman can complement the role of the courts.

Ombudsmen in the Member States and human rights under EU law

The fact that fundamental rights are an integral part of EU law combined with the primacy of Community law has very important implications for ombudsmen in the Member States, be it at national, regional or local level.

Primacy requires all public authorities in the Member States to apply Community law fully and correctly. Since ombudsmen supervise public authorities, they have a key role to play in ensuring the fulfilment of this obligation. Less obvious perhaps, is that, since ombudsmen themselves are public authorities, they must, within their field of competence, act to protect rights that derive from EU law. Indeed at the Fifth Seminar of the National Ombudsmen of EU Member States, held in The Hague in September this year, Advocate General Maduro went so far as to say that, within their field of competence, ombudsmen, like courts, must disregard any national rules which prevent them from protecting such rights.

I referred earlier to "three waves" when discussing the global expansion of the ombudsman institution. Ombudsmen whose institutions were established in the second and third waves naturally see protection of fundamental or human rights as part of their responsibilities. Indeed, human rights are a core part of the mandates of the ombudsmen established in Central and

Eastern Europe after the fall of communism.

The idea that the ombudsman protects human rights is also widely shared in the institution's Nordic homeland. Human rights protection has been explicitly added to the legal responsibilities of the Finnish and Norwegian ombudsmen and the Swedish ombudsmen's task of preventing encroachment on fundamental rights and freedoms of citizens includes ensuring the direct application of the European Convention on Human Rights.

Furthermore, at the seminar in The Hague that I mentioned a few moments ago, the Swedish Chief Parliamentary Ombudsman pointed out that 25 European governments had adopted the Charter of Fundamental Rights with the intent to make it a legally binding document. The implications he drew from that fact were that the Charter has at least full political legitimacy and may be regarded as the expression of a common legal standard within the Union, and that ombudsmen may adjudicate cases concerning the implementation and application of EU law with reference also to the Charter.

6 Human rights and European integration

The role of ombudsmen in the Member States is especially important because the implementation of EU law and policies is largely the responsibility of administrations in the Member States. In practice, therefore, respect for rights depends largely on the quality of their everyday work and on the extent to which supervisory bodies, including ombudsmen, succeed in promoting high quality administration and providing effective remedies when needed.

In recent years, moreover, co-operation among the various Member States' administrations and the EU institutions has continued to grow in scope and intensity, especially in fields related to security. Looking at the list of 41 EU institutions, bodies and agencies that we invited to one of our 10th anniversary events held in Brussels a fortnight ago, I was impressed at how many of them (15) have been created within the last five years.

Bodies such as the European Police College, the EU Borders Agency, the European Network and Information Security Agency, Eurojust and the European Aviation Safety Agency have strong national representation. Networking is essential to their functioning. They constitute the visible EU tip of the increasing intensity of co-operation among administrations at all levels of the European Union.

In order to protect the rights of citizens and residents and provide them with effective remedies, co-operation among administrations needs to be matched by co-operation among ombudsmen, who are well placed to intervene when EU law is not applied correctly by public administrations, so as to provide an effective remedy and help avoid similar failures in the future by educating and encouraging public authorities to apply EU law correctly.

The European Ombudsman has always given high priority to co-operation with ombudsmen in the Member States and organised a seminar for the national ombudsmen in 1996, at which it was agreed to set up a flexible form of voluntary co-operation, on equal terms, with the aim of promoting the flow of information about Community law and its implementation and the transfer of complaints to the body best able to deal with them.

The initial concrete step was the creation of a network of liaison officers to act as a first point of contact within each ombudsman's office for other members of the network. A pattern was established for organising seminars of the national ombudsmen, every two years in principle, as well as regular meetings of the liaison officers. To date, we have developed effective means of communication through a lively website and internet discussion forum, an electronic daily news service and a biannual newsletter.

The result is that we can now truly speak of a "European Network of Ombudsmen", comprising some 90 offices in 29 countries throughout Europe, which co-operates systematically to ensure the effective transfer of complaints, exchange information about EU law, and encourage the spread of best practice.

From the very beginning, Iceland and Norway were included as countries that belong to both the Schengen area and the European Economic Area and thus share important concerns about, for example, the rights of individuals as regards free movement and the operation of the Schengen Information System. The network has subsequently expanded in two other ways:
- Regional ombudsmen were invited to join because in the Member States where they exist, regional authorities are in practice responsible for the implementation of many aspects of EU law.
- At the fourth seminar in 2003, it was decided to invite ombudsmen from countries that are candidates for EU membership to join the network.

The fifth seminar held in The Hague in September this year thus brought together not only the Member States of the European Union, but also two of the four candidate countries, as well as Norway and Iceland.

The European Network of Ombudsmen naturally contains a great deal of diversity. The member institutions comprise those of the ombudsman's original Nordic homeland, including the rather different Swedish and Danish varieties; ombudsmen created at various times as part of the first wave of global expansion, second wave ombudsmen such as those of Spain and Portugal and ombudsmen in post-communist central and Eastern Europe, created as part of the third wave.

Diversity results from one of the keys to the success of the ombudsman institution - its flexibility - which enables ombudsmen to adapt prudently to different constitutional, legal, cultural and political environments and to complement the fundamental role of the courts in the protection and promotion of human rights.

7 The limits of the ombudsman institution

There are limits, however, to what we should expect of the ombudsman institution. The fundamental limit, simply put, is that where the rule of law is weak, a non-judicial institution cannot function as an effective substitute for the courts.

To understand why this is so, we need to revisit the concepts of the rule of law and of democracy and examine the extent to which different combinations of the two provide a hospitable environment for the ombudsman to serve as an institutional counterweight, capable of defending the rights of citizens, combating maladministration and protecting human rights. For the sake of clarity, I shall address this issue schematically, by identifying two combinations or scenarios, with each involving a different temporal sequence concerning the relationship between the rule of law and democracy.

In the first, which is more typical of more mature democracies, the introduction of the rule of law historically preceded democracy. In all such cases, the prior existence of the rule of law as the fundamental underpinning of the organisation of the state along legal-rational lines made it easier to confront the inevitable tensions, turbulence and occasional upheavals associated with the introduction of democracy.

The resulting positive articulation of rule of law and democracy made it easier for the ombudsman to emerge as an institution distinct from, but complementary to, the courts, capable of serving as an effective non-judicial mechanism of accountability and control geared to the enhancement of the rule of law and to the protection of human rights.

In turn, this complementarity made it possible to offer citizens a broader range of choice when it came to choosing between alternative mechanisms of redress and deciding on how best to exercise these rights, thus also contributing positively to the quality of democracy.

In the obverse scenario, where democracy was introduced in countries where the rule of law tradition was weak, fragile, or, in the worst of cases, simply lacking, the prospects for the ombudsman to serve as an effective mechanism of accountability and to contribute to the deepening of both rule of law and democracy have been less bright. Where democracy cannot count on the norms and values associated with the culture of respect for reciprocal rights and obligations generated by the rule of law, and where, as a consequence, the courts cannot effectively serve as the cornerstone for the construction of a system of institutional checks and balances and of a dense network of counterweights, the power of the executive branch of government can easily remain unrestrained. Such an environment is by definition inhospitable for the ombudsman institution and severely circumscribes its capacity to serve as an effective mechanism of control and accountability, capable of protecting the rights of citizens, including human rights.

In such circumstances, the ombudsman is faced with the unenviable prospect of becoming marginalised and potentially ignored. The likely end result is the gradual delegitimation of the institution, as its incapacity to serve its avowed purpose leads to the erosion of its moral

authority and robs it of its raison d' être. The same outcome may also obtain in cases where unrealistic expectations are created by failure to take context into account when relying on foreign models to guide the design of institutions.

Examples of these processes can be found in certain new democracies of Southeastern Europe. In this region, for historical reasons, the rule of law never acquired deep roots and the states which issued from the demise of the Ottoman empire retained to the very end, in the early 20th century, its highly patrimonial character (*Weber: sultanistic regimes*). Moreover, as the result of long periods of authoritarian and totalitarian rule, familiarity with democratic practices ranged from the very limited to the non-existent and the introduction of democratic practices effectively coincided with, if it did not precede, efforts to establish the rule of law.

In these circumstances, formidable challenges face the ombudsman institution as it seeks to carve out its proper role within the institutional landscape. The experiences of ombudsmen in Southeastern Europe to date constitute telling evidence of the tortuous road the institution will have to travel on its way to becoming an effective instrument of control and accountability, capable of substantively contributing to the defence of citizens' rights and to the quality of democracy in each country in the region.

8 Conclusion

My analysis of the limits of the Ombudsman institution should not be understood negatively, but to the contrary, as a positive contribution to effective policy-making. I will conclude this lecture with three observations that I trust will demonstrate this point.

First, I would like to emphasise the important contribution that the ombudsman institution can make to the strengthening of democracy and of the rule of law and to the protection and promotion of human rights. There is abundant evidence of the institution’s success in a wide variety of constitutional, political and legal environments, not only in Europe but around the world.

The second observation is that I am not calling in question the value of establishing institutions that seek to promote and protect human rights in contexts where there is a struggle to establish either the rule of law, or a functioning democracy, or both. My argument is, rather, that we should not be misled into thinking that by labelling such institutions "ombudsmen" and equipping them with a formal legal mandate, we can realistically expect them to function in the same way and with the same degree of effectiveness as ombudsmen in well functioning democracies, with a long tradition of the rule of law.

Let me illustrate this point with a concrete example. In some countries of Southeastern Europe, where meaningful counterweights to the power of Executive government are lacking, there have been calls to equip the ombudsman with prosecutorial powers, similar to those enjoyed by the Swedish and Finnish ombudsmen. Such a course of action is based on a misreading of the vastly different historical circumstances and temporal sequences that gave rise to the

ombudsman institution in these two countries and fails to appreciate the dangers to the institution's very viability in these recent democracies that would result from involvement in what are bound to become political conflicts and struggles to rein in an Executive that is culturally and politically resistant to all forms of restraint.

The third observation concerns ombudsmen within the enlarged European Union and, more specifically, the challenges of trying to promote the rule of law and democracy in a multi-level system of governance. I remain deeply convinced that success in this difficult task is possible only when ombudsmen at all levels, European, national, regional and local, effectively collaborate and co-ordinate their efforts, with an eye to serving citizens better. It is for this reason that the European Ombudsman attempted to convince the Convention on the Future of Europe and the ensuing Intergovernmental Conference to include in the Constitutional treaty an explicit recognition of the rights of European citizens to have access to non-judicial means of redress, when seeking to defend their rights.

Even though the final text of the Constitutional treaty did not contain such a provision, the strengthening of non-judicial means of redress, as an alternative remedy alongside the courts, must remain a strategic goal for the ombudsman community within the Union. Success in this direction would not only make it easier for all ombudsmen and similar bodies to help citizens know their rights better and to also better enjoy their rights. It would also substantively enhance the capacity of ombudsmen, whether at the European national, regional or local levels, to contribute to the deepening of the rule of law and to the improvement of the quality of democracy in the Union. And that certainly constitutes a goal well worth pursuing.