European Ombudsman

'The principle of good administration in the recommendations of the European Ombudsman', Speech by the European Ombudsman, Professor P. Nikiforos Diamandouros, at the EUNOMIA Project Capacity-Building Seminar on 'Ombudsman's Intervention: Between the Principles of Legality and Good Administration', Sofia, Bulgaria, 17 September 2007

Speech - **City** Sofia - **Country** Bulgaria - **Date** 17/09/2007

1 Introduction

Dear friends and colleagues, I would first like to thank the Ombudsman of the Republic of Bulgaria , Mr Ginyo GANEV and the Greek Ombudsman, Mr Yorgos KAMINIS, for their kind invitation to take part in this seminar.

As the first Greek Ombudsman, I took part in setting up the EUNOMIA Project, which started officially in January 2001. As European Ombudsman, I continue to be involved in the Project through membership of its Steering Board, alongside the Greek Ombudsman and the Council of Europe's Commissioner for Human Rights, Mr. Thomas Hammarberg. I am strongly committed to the objectives of the EUNOMIA Project and delighted to contribute to their realisation through events such as this seminar.

It is a particular pleasure to be able to share with you some ideas about good administration and legality. The questions " *what is good administration?* " and " *how does good administration relate to legality?* " are ever-present in my work as European Ombudsman. I know that the same, or similar, questions also preoccupy many national and regional ombudsmen.

This seminar is, therefore, at the cutting edge of modern ombudsmanship.

I shall begin, however, by looking backwards, to the reasons for the spread of the ombudsman institution in Europe. Knowledge of where we have come from can explain otherwise puzzling variations in the practice of ombudsmanship, including variations in approaches to good administration and to the relationship between good administration and legality.

Such comparative knowledge is particularly important in understanding my own institution.

Having been in operation for little more than a decade, the European Ombudsman is a relative late-comer. As such, it has been able to draw inspiration from the range of ombudsmen in Europe.

After looking at the development of the ombudsman institution, I shall explain the normative framework of my own work. To anticipate: for the European Ombudsman, good administration and legality overlap, but are not identical. As I like to tell lawyers in the European institutions (including those in my own office), there is “life beyond legality”. What it consists of, I will try to explain later.

2 Legality, “maladministration” and human rights

In broad outline, the development of the ombudsman institution in Europe has taken place in response to three kinds of historical and social developments. Without too much risk of distortion, we can think of ombudsman institutions as having been established in three successive waves, with the second wave continuing alongside, perhaps even merging with, the third wave.

As everyone knows, the word “ombudsman” is of Swedish origin. The world’s first ombudsman was established in Sweden in 1809, as part of a constitutional settlement that ended a period of absolute monarchy. The new institution was to be independent of Government, supervise the application of the laws by judges and other public officials and prosecute in cases of illegal conduct (1) .

By the middle of the 20th Century, only one other country had established an ombudsman: that was Finland, which set up an Ombudsman in 1919, after gaining independence from Russia. The Finnish institution was based on the Swedish model, with power both to supervise the courts and to prosecute officials.

The characteristics of the two institutions created during this long first wave forged an enduring and essential link between the ombudsman and the principle of the rule of law, which requires all public authorities to act according to law and to avoid illegality.

The second wave of development began when Denmark established the world’s third ombudsman office in the mid-1950s. During this wave, ombudsmen were established to help tackle problems arising from the major expansion of public administration that occurred during the twentieth century, especially after the Second World War, when the social welfare and regulatory functions of the State grew exponentially.

Even in countries where democracy and the rule of law were deeply entrenched, the scale and complexity of the new administrative activities presented difficult challenges. The current Danish Ombudsman, Hans Gammeltoft-Hansen, has explained the point clearly, in relation to his country:

" *The relationship between citizen and administration … changed both quantitatively and qualitatively. It became difficult for the citizens to get their bearings in the system of rules, the political control of the administration was reduced and the established judicial control mechanisms … proved to be inadequate.* " (2)

Ombudsmen were subsequently established in many other countries to help tackle citizens' problems in dealing with modern administration. A key part of the reasoning underpinning this expansion was, as in the Danish case, the perceived inadequacy of existing judicial controls. That was true, for example, in the United Kingdom, where the development of judicial review of administrative action was in its infancy when the Parliamentary Commissioner for Administration was set up in 1967. It was also true in France, where the *Médiateur de la République* was created in 1973, notwithstanding the existence of a long-established system of administrative courts, applying a highly sophisticated and widely-admired body of administrative law.

Broadly speaking, there are two kinds of reasons why judicial control of administration, although essential to guarantee the rule of law, was considered insufficient in the countries that established ombudsmen during the second wave of development.

First, there are practical obstacles to effective judicial control: in particular, court procedures tend to be lengthy and expensive. In many cases, the sums at stake, although important to the individuals concerned, would be too small to justify the expense of hiring a lawyer and beginning judicial proceedings.

Second, in some countries, the normative framework applied by the courts was not considered adequate to ensure a remedy for all the problems that were thought to deserve a remedy. In New Zealand, for example, (which is culturally, though not geographically, European), the Danish model inspired the creation of an ombudsman in 1962.

The New Zealand Ombudsman was empowered to make recommendations concerning administrative acts or omissions, not only if they were "contrary to law", but also if the Ombudsman considered them to be "unreasonable, unjust, oppressive, or improperly discriminatory"; "based wholly or partly on a mistake of law or fact", or just "wrong".

Other countries that established "second wave" ombudsmen specified the institution's mandate in different ways, such as "maladministration", or "malfunctioning" (*dysfonctionnement*). Underlying the different approaches however, there is, I believe, the same idea, which is that good administration involves more than just the avoidance of illegality.

The third wave of ombudsman institutions was also triggered by social and political change, but of a different kind from the second wave. The change in question was the transition from authoritarian, or totalitarian, rule to democracy. In Greece, Portugal and Spain, for example, ombudsmen were established following the transition from authoritarian to democratic systems of government (3) . More recently, after the fall of communism, ombudsmen were established in many of the new democracies of Central and Eastern Europe (4) . All the former communist States that joined the European Union in 2004 and 2007 had established an ombudsman by the

date of their accession.

Given the historical experiences which formed the background to, and impetus for, these new ombudsman institutions, it is not surprising that many of them were given mandates focused on rights and, specifically, human rights. This focus is reflected in the names of many of the institutions, which include terms such as citizens' rights, fundamental rights, and human rights, or which otherwise indicate the broad role of the institution in the defence of rights, as for example *Defensor del Pueblo* , or *Provedor de Justiça* .

Let me hasten to add that, in my opinion, it would be a profound mistake to think that the three waves that I have described result in distinct types, or models, of the ombudsman institution. But the different waves have tended to result in unspoken assumptions, which affect the way that we understand the key questions " *what is good administration?* " and " *how does good administration relate to legality?* "

I shall try to clarify some of these unspoken assumptions, by being as explicit as possible about the approach of the European Ombudsman.

Let me emphasise that I do so not in order to be prescriptive about the answers to the key questions, but to help shed light on the questions themselves.

3 The European Ombudsman's approach to good administration as a normative concept

Article 195 of the Treaty Establishing the European Community provides, in its English version, for the European Ombudsman to receive complaints concerning "instances of maladministration in the activities of the Community institutions or bodies".

The Treaty does not, however, say what is meant by the term "maladministration". By implication, that is a matter for the Ombudsman to determine.

The European Ombudsman's very first Annual Report, for the year 1995, said that there is clearly maladministration if a Community institution or body fails to act in accordance with the Treaties and with Community acts that are binding upon it, or fails to observe the rules and principles of law established by the Community Courts.

It then mentioned specifically the provision of the Treaty on European Union (at that time, it was Article F: now, it is Article 6) which requires respect for fundamental rights, as guaranteed by the European Convention on Human Rights and the constitutional traditions common to the Member States.

The Report then said that many other things may also amount to maladministration, and gave examples, such as: administrative irregularities and omissions; abuse of power; negligence; unfairness, discrimination, avoidable delay and lack or refusal of information.

The list of examples concluded as follows: " *(t)he experience of national ombudsmen shows that it is better not to attempt a rigid definition of what may constitute maladministration. Indeed, the open ended nature of the term is one of the things that distinguishes the role of the Ombudsman from that of a judge.* "

We can see, therefore, that, from the very beginning, the European Ombudsman understood "maladministration" in a way that encompasses the main concerns of all three waves of ombudsmen in Europe, that is: legality; human rights; and also requirements that go beyond those that a judge would have taken into account if the case had come before a court.

The following year, the European Parliament called on the Ombudsman to give a definition of maladministration. The Ombudsman proposed, and Parliament accepted, the following:

" *Maladministration occurs where a public authority fails to act in accordance with a rule or principle that is binding upon it* ".

Some commentators have assumed that "binding" means " legally binding", but that is not what the definition says, nor does it correspond to the European Ombudsman's practice. That practice is to find maladministration if a Community institution fails to respect a legal rule or principle; fails to respect human or fundamental rights, or fails to respect principles of good administration.

Let me now focus on each of those three elements in turn, beginning with legality.

Legality

For present purposes, the requirement of legality can be identified with the principle of the rule of law. As I mentioned when discussing what I called the "first wave" of ombudsmen in Europe, the rule of law requires public authorities to act according to law and to avoid illegality. It therefore follows logically that it can never be good administration to act unlawfully. Or, to say the same thing another way, an act that is unlawful is also, *ipso facto* , an act of maladministration.

It is important to be clear, however, that "law" and hence "legality" have a broad meaning in the context of the European Community.

"The law" includes the general principles of law, which are to be found in the case-law of the Court of Justice, such as the principle of equality or non-discrimination, the rights of the defence; proportionality; and the protection of legitimate expectations.

The Court's case law also establishes that fundamental rights form an integral part of the general principles of Community law. Article 6 of the Treaty on European Union, which refers specifically to the European Convention on Human Rights and the constitutional traditions common to the Member States, reproduces, in fact, the wording of the Court's case law on fundamental rights.

Allow me to stress an important point here.

It is in the nature of case law to evolve over time. The full meaning and significance of a judgment may emerge only gradually, as its implications are explored in subsequent cases that involve different contexts and circumstances. There can, therefore, be no fixed boundary between legality and good administration.

Let me give you an example to illustrate this point. In 2001, the European Ombudsman began an own-initiative inquiry into age discrimination in recruitment by the Community institutions. The Ombudsman successfully persuaded the institutions to abandon upper age limits for recruitment. The recommendation to do so was based on a combination of the general legal principle of non-discrimination, which is established by the case law of the Court, and Article 21 of the Charter of Fundamental Rights of the European Union (5) . Subsequently, the Court of Justice has declared that non-discrimination on grounds of age must itself be regarded as a general principle of Community law (6) . A subsequent own-initiative inquiry by the Ombudsman, concerning upper age limits for traineeships was, therefore, also based on the new legal principle announced by the Court (7) .

Human rights and legal rights

At this point, the question that may occur to you is why the European Ombudsman mentions human rights as something distinct from legality, given that the Court's case law refers specifically to the European Convention on Human Rights.

The reasons are both presentational and substantive. In terms of presentation, the protection of human rights, for well-known historical reasons, became a distinct feature of the European legal order following the Second World War. It is appropriate, therefore, to recognise the special importance of human rights by mentioning them expressly, even though, in the Community legal order, such rights are part of the general principles of law and could thus, logically, be subsumed under legality.

Substantively, the Charter of Fundamental Rights is not yet a legally binding instrument. The European Ombudsman has taken the view, however, that the three European Union institutions which proclaimed the Charter at the Nice summit in December 2000 (that is, the European Parliament, the Council and the Commission) should respect its provisions, and that failure to do so would constitute maladministration. The institutions have accepted that position, which enables the Ombudsman to apply the Charter, despite the fact that it is not, as such, legally binding.

"Good administration"

From what I have said so far, I hope you will understand that there is necessarily a great deal of overlap between legality, human rights and the principles of good administration. Those three elements are not to be thought of as separate boxes, containing norms that can be rigidly characterised as belonging to one box and one box only. A better way of thinking of the three elements could be as overlapping circles, whose relative sizes and positions change over time.

Furthermore, as I have already stressed, law does not consist merely of the texts that have been adopted by the legislator or the administration. It also includes the general principles of

law, which should, among other things, guide the correct understanding and application of such texts.

A civil servant who believes that the law requires, or permits, an action that is unjust, unfair, or unreasonable will, therefore, often have misunderstood the law.

Nonetheless, I remain persuaded that, despite the development of legal principles by the Community Courts, there is “life beyond legality” and that maladministration does not, therefore, always imply illegality. Let me try to make explicit the ideas that underlie that view.

The fundamental idea is that the public administration exists to serve citizens. That idea does not deny, but at the same time cannot be reduced to, the classical conception of administrative science that the public administration should identify and pursue the public interest (8) .

Nor can it be reduced to the goal of efficient, effective and economical delivery of public services.

In the contemporary world, individuals are no longer content to be passive subjects - “ *les administrés* ” - who wait patiently for the administration to decide. They are citizens, who understand both that they have rights and that public administration involves the balancing of conflicting interests and principles.

To win public trust and acceptance, the pub lic administration needs not only, for example, to be respectful and courteous towards citizens, but also to be accountable and responsive. That implies readiness of the administration to explain and to justify its conduct through genuine and meaningful dialogue with citizens, both about matters that affect them personally and about the public interest.

I have expressed the idea of service to citizens in general terms because my experience, both as a citizen and as a national ombudsman, lead me to believe that the conception of public administration that I have outlined has relevance for many European countries. As European Ombudsman, however, my responsibility is the Community institutions and bodies. At this level, I can say with confidence that citizens and civil society organisations have very high expectations of how they should be treated by the administration and very low willingness to accept a passive role as “ *les administrés* ”.

I am increasingly persuaded that, in order to meet European citizens’ expectations, what needs to be created and carefully nurtured in the Community institutions and bodies is a culture of service, in which administrators
- act openly fairly, reasonably, carefully and consistently;
- take into account and balance all the interests involved;
- avoid unnecessary delay;
- are courteous and helpful, as well as sensitive to individual circumstances, needs and preferences;
- acknowledge mistakes and offer apologies where appropriate; *and*

- aim for continuous improvement in their performance.

I see no reason of principle why the concept of a “culture of service” could not be adopted by the legislature, or declared by the courts to be a legal principle, but, in fact, that has not happened at the level of the European Union.

Nor indeed has the “European Code of Good Administrative Behaviour”, which the European Parliament approved and asked the European Ombudsman to apply, been adopted as a legally binding text.

At present, therefore, although the case law of Community Courts is continually developing and it is not excluded that the Community legislator might, in the future, adopt a European administrative law, the idea of service to citizens is not enshrined in Community law.

I could stop at that point, with the conclusion that, as Community law now stands, there is indeed life beyond legality as regards good administration.

I am tempted, however, to go further and to share with you two considerations that lead me to think, at least tentatively, that the continued existence of conceptual space for life beyond legality is something positive for citizens.

4 Why life beyond legality is worth preserving

The first consideration is that law and legality continue to be closely associated with blame and sanctions. I put this forward not as a conceptual point about the nature of law, but as an observation, based on my experience as an ombudsman, about the way that many administrators view the world. I would add that it is also a view shared by a significant number of complainants.

Blame and sanctions are, of course, necessary in some cases. Corrupt officials should be punished. Lazy or incompetent officials should be disciplined. But a culture of service is not a culture of blame. If we tell civil servants that good administration is a legal obligation and that poor service is illegal, are we not likely to re-inforce a defensive culture in which complaints are regarded as a threat?

Another danger is that, by defining requirements of good administration as legal obligations, we may encourage administrators to focus on rules that can be applied mechanically, rather than engage in the more demanding task of exercising judgement in applying principles. Judgement, after all, involves the risk of being wrong.

Here is an example to illustrate my concerns. There is a European institution which has a code of good administrative behaviour requiring letters to be answered within 15 days. In my experience, administrators take that seriously, as they should. The precise rule is appropriate and effective. Whether it would be made any more effective by defining it as a legal obligation is

questionable, but that is not my point.

The code provides for exceptions, one of which is that correspondence need not be answered if " *it can reasonably be regarded as improper, for example, because it is repetitive, abusive and/or pointless* ". To my mind, that is a principle that should rarely be invoked and which requires a convincing explanation of why it applies in the particular circumstances. I was disturbed, however, to find evidence that some administrators had seized on the word "repetitive" and tried to convert the principle into a mechanical rule that a second letter about the same issue can be ignored.

In an administrative culture where such attitudes exist, the attempt to promote a service culture through law might only reinforce a narrow and legalistic approach.

At the same time, it might also encourage the tendency of some complainants to regard their complaint as a denunciation, rather than as an instrument for seeking practical redress, or a constructive solution to a problem.

The second consideration concerns the relationship between the work of the Ombudsman and the work of the courts. As European Ombudsman, I see myself as the partner of the Community Courts in relation to all three elements of good administration. Our joint task is to ensure that the Community administration takes rights seriously and embodies a culture of service to citizens, both in its understanding and application of the law, and in the exercise of its discretionary powers.

The Courts make legally binding decisions. They have power to annul legal acts and to make enforceable awards of damages. The logic of judicial procedures leads to an adjudication, in which the Court determines authoritatively the legal rights of the parties.

The logic of the European Ombudsman's procedures is more complex and involves flexibility between two modes of operation. On the one hand, there is a dispute-resolution mode, which focuses on problem-solving, conflict-reduction, possibilities for compromise and win-win outcomes. On the other hand, there is an adjudicative mode, in which I find either that there is maladministration, or that there is no maladministration. That mode is governed by a logic analogous to that of the Court, in which one party wins and the other loses.

The appropriate balance between the two modes depends on the case and some cases may involve switching between the two modes more than once.

In my view, the European Institutions are encouraged to co-operate with me in the dispute-resolution mode by the knowledge that an Ombudsman inquiry is not exclusively focused on the question " *what are the legal rights of the parties?* " To put the same point more formally, a n administration characterised by a culture of service to citizens should regard a complaint as an opportunity to put the principle of service into practice. Willingness to co-operate with the Ombudsman to achieve a satisfactory resolution of the complaint is an important expression of commitment to that principle.

If there were no life beyond legality - if, in other words, maladministration necessarily implied illegality - institutions and complainants alike would be encouraged to regard my inquiries not as an opportunity to seek a win-win solution, but as a surrogate, or even a rehearsal, for a judicial procedure in which the only relevant question would be: " *has the institution behaved legally?* " Such an outcome would, I believe, significantly diminish the contribution that the European Ombudsman can make, as a partner of the Community Courts, to enhancing relations between the European institutions and European citizens.

5 Conclusion

Friends and colleagues, let me bring my remarks to a conclusion by emphasising that successful ombudsmanship involves, among many other things, adapting the institution prudently to the constitutional, legal and administrative cultures in which it is to operate. The flexibility and diversity of the institution is part of its strength.

There is, therefore, both space and the need for ombudsmen in different countries to adopt different approaches.

At the same time, however, despite some setbacks, we have now largely overcome the profoundly traumatic political divisions of Europe and have greatly moderated the deep social and economic divisions of the 19th and early 20th centuries. Many countries, including my own, Greece, have made rapid progress, showing that late-comers can have advantages, in that they can profit from already accumulated experience, and can converge rapidly with the "early-starters" by what social scientists often call "leap-frogging".

In these circumstances, I believe that the three waves that I described earlier are indeed destined to converge, in the sense that the rule of law, human rights and a culture of service in the public administration represent values and aspirations that we all share.

Thank you for your attention.

(1) See Bengt Wieslander, *The Parliamentary Ombudsman in Sweden* , The Bank of Sweden Tercentenary Foundation, 1994.

(2) Hans Gammeltoft-Hansen, "Trends leading to the establishment of a European ombudsman", in P. Nikiforos Diamandouros (ed.), *The European Ombudsman: Origins, Establishment, Evolution* (Luxembourg: Office for Official Publications of the European Communities: 2005) pp. 13-26 at 17-18.

(3) The Portuguese Ombudsman was created in 1975 (Decree-Law n.º212/75, April 21) and subsequently included in the Portuguese Constitution of 1976 (Article 23). The Spanish Constitution of 1978 made provision for the office of Ombudsman (Article 54) and the first Ombudsman was appointed in 1982. In Greece, the Ombudsman was established in 1997

(Article 1 of Law n. 2477/97 - see now Law n. 3094/2003) and subsequently included in the Greek Constitution of 2001, in Article 103 (9). The first Greek Ombudsman took office in 1998.

(4) The Polish Ombudsman is an exception, having been established in 1987, shortly before the fall of communism in that country.

(5) See decision on OI/2/2001/(BB)OV, 27 June 2002.

http://www.ombudsman.europa.eu/decision/en/01oi2.htm [Link]

(6) Case C-144/04 *Werner Mangold v Rüdiger Helm* [2005] ECR I-9981 para. 75.

(7) See decision on OI/3/2006/BB, 8 December 2006.

http://www.ombudsman.europa.eu/decision/en/06oi3.htm [Link]

(8) See generally, Jocelyne Bourgon "Responsive, responsible and respected government: towards a New Public Administration theory, *International Review of Administrative Sciences* , Vol. 73 No 1 (2007) 7-26.