

The Ombudsmen as human rights protection mechanisms

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Good morning. I am especially pleased to be taking part in this symposium on strengthening fundamental rights architecture in the EU, which is being organised by the Union's Agency for Fundamental Rights very soon after the Treaty of Lisbon entered into force, the Union's Charter of Fundamental Rights, including the right to good administration, became legally binding. I want to thank the organisers and, especially, Mr Kjaerum for giving an opportunity to contribute to the deliberations of this important initiative.

My intervention will focus on the institution of the ombudsman and other similar bodies and on the role that these institutions can play in promoting and protecting human rights. In my presentation, I will give particular emphasis on the role of national ombudsmen and on their cooperation through the European Network of Ombudsmen.

The ombudsman has proved to be a very flexible institution. It has been prudently adapted to different legal, political and cultural environments throughout the world. Some national ombudsmen have been established with a specific mandate for human rights. Many others deal with human rights issues as part of a general mandate to supervise the public administration.

As the former Commissioner for Human Rights of the Council of Europe, Alvaro Gil Robles stated: "*Through their independence, flexibility and non-conflictual approach to the relations between individuals and the public administration, Ombudsmen have a key role to play in the protection of individual rights. (...) Whilst explicit reference to human rights protection may be absent from the mandate of certain ombudsmen, it is clear that human rights violations by state authorities constitute, at the same time, serious cases of maladministration, and as such fall within the concerns of even the most narrowly defined institutions*".

In the case of the European Ombudsman, Article 228 of the Treaty on the Functioning of the European Union empowers me to investigate complaints about maladministration in the activities of the Union institutions, bodies, offices, or agencies. From the very beginning of the European Ombudsman's activity, the term "maladministration" has been interpreted broadly and in a manner that makes it possible to include respect for the rule of law, for principles of good administration, and for fundamental rights in the Ombudsman's remit. This means that allegations that the institutions have breached a fundamental right fall within my mandate.



The entry into force of the Lisbon Treaty and the legally binding nature of the Charter of Fundamental Rights strengthens the EU commitment to human rights. In addition, the respect and promotion of the rights guaranteed under the Charter, and in particular, the interpretation and application of the right to good administration, as laid down in Article 41, are within the priorities for my new mandate.

In practice, however, few of the complaints that I receive allege violation of human rights. That is mainly because the EU organs do not exercise the classic coercive powers of the State. There are no Union prisons, for example. Nor are the EU institutions and bodies responsible for providing general public services such as education, health and welfare, though they do have certain responsibilities towards their staff in this regard. Nonetheless, the European Ombudsman has dealt with complaints raising a wide range of human rights issues, including age and race discrimination, the principle of presumption of innocence, the rights of children, and the rights to a fair procedure, freedom of speech of EU officials, privacy and health.

Most citizens encounter problems that involve alleged breaches of fundamental rights when dealing with a national, regional or local authority in Member States. As a result, the activities of authorities in the Member States are likely to generate many more complaints involving fundamental rights.

Consequently, the role of ombudsmen in the Member States is of crucial importance since they are competent to deal with complaints against public authorities of the Member States. National ombudsmen very often deal with alleged breaches of civil rights, socioeconomic rights, as well as discrimination and equality issues, protection of people with disabilities, children, and prisoners.

Furthermore, national ombudsmen enjoy a wide range of competences. Some Ombudsmen, especially those created after the collapse of the communist regimes in Europe, are Human Rights Ombudsmen/Defenders or Commissioners (depending on the different terms used in each instance), that is, they have a special mission to protect and promote human rights. Indeed, in countries where democracy and the rule of law were recently established, it is not rare for national legislators to extend the ombudsman's scope of action beyond individual administrative acts. Let me give you some examples.

The Portuguese Provider of Justice and the Spanish Defender of the People can bring an action to the Constitutional Court, to determine the constitutionality of a law. A Commissioner for Civil Rights Protection was enacted in Poland in 1987 and was empowered to seize directly the Constitutional Tribunal and ask for the nullification of laws.

It transpires from the above that ombudsmen can play an important role in the protection of fundamental rights as a mechanism that is complementary to the courts. For this reason, my institution has always given high priority to co-operation with ombudsmen in the Member States. Very early on, in 1996, a flexible form of voluntary mechanism of co-operation was set up, on equal terms. Its purposes are to (a) promote the flow of information about EU law and its implementation; (b) encourage the spread of best practice; and (c) facilitate the transfer of



complaints to the appropriate ombudsman.

This co-operation has evolved into the "European Network of Ombudsmen". The Network consists of 94 offices in 32 countries, covering the national and regional levels within the Union, as well as the national level in the applicant countries for EU membership, plus Norway, Iceland, and, most recently, Switzerland.

It co-operates on a daily basis in case handling, and on a continuing basis in sharing experiences and best practice through (a) seminars and meetings, (b) a regular newsletter, (c) an electronic discussion forum and (d) an electronic daily news service. Ombudsmen benefit significantly from the exchange of best practice with their colleagues in other countries and from sharing information about how international and European human rights standards can be best applied.

One of the purposes of the Network is to enable ombudsmen in the Member States to obtain, through my office, information and guidance concerning EU law, both generally, through the various communication instruments, and in relation to specific complaints. Naturally, the answers provided by the European Ombudsman in response to such queries are not legally binding, but their practical value and impact can be considerable and the procedure has great potential for future development, particularly as regards the Charter. As I have already mentioned, the Lisbon Treaty gives the Charter the same legal value as the Treaties. It is thus part of Union law, which the European Ombudsman applies at the Union level and which national Ombudsmen must apply at the Member State level, when applying EU law.

The same applies as far as the right to good administration is concerned. It is true that the scope of Article 41 is limited to the EU Institutions and bodies. However, it is perhaps not yet sufficiently appreciated that the case law of the Court of Justice on which Article 41 is based, concerns general principles of EU law. It is, therefore, also binding on the public authorities of the Member States, when they are acting within the scope of EU law. In that sense and to that extent, citizens and residents of the Union are already entitled to the same right to good administration vis-à-vis administrative authorities in the Member States as vis-à-vis the EU institutions and bodies.

In this respect, as far as the interpretation and the application of the different rights enshrined in the Charter are involved, the European Ombudsman would welcome the assistance of the Agency for Fundamental Rights. It is entirely possible that the FRA might conduct research on various fields that are of particular interest not only to the European Ombudsman but also to his colleagues in the Member States.

One such field for research could be related to the right of access to documents at the Union level, a fundamental right guaranteed under Article 42 of the Charter. Giving effect to this right necessarily entails decisions about documents that originate from (and which are often also held at) the national level. Following the decision of the Court of Justice in *Sweden v Commission*, the governments of the Member States are increasingly involved in deciding on access to such documents.



It would therefore be very helpful to have research that would (i) take stock and analyse the activities of national institutions controlling government decisions on access to official documents and information and (ii) evaluate possibilities for cooperation between the national and European Union control authorities. I am persuaded that such research could also lead to a better overall architecture for ensuring enhanced access to documents and information about Union matters both at Union level and in the Member States.

Thank you for your attention.