

Leaving the National Arena: Adapting the Recipe to the Supranational Level

P.Nikiforos Diamandouros, European Ombudsman

Back to Roots: Tracing the Swedish Origin of Ombudsman Institutions Friday, June 12, 2009

By enhancing citizens' rights and citizen participation at the European Union level, the European Ombudsman is contributing to the gradual unfolding of a democratic process and to the consolidation of a political order at the supranational level. Like all other ombudsmen, its roots lie in the genius of the Swedish invention. This paper examines why Sweden was alone in the establishment of the Parliamentary Ombudsman in the 19th century, and the widespread democratization that led to its acceptance worldwide throughout the latter half of the 20th century – and ultimately to the supranational model of the European Ombudsman. Although the European Union is not a state, the citizenship of the Union has a social rights dimension, and citizens can and do use their right to address the European Ombudsman as a way to seek redress for individual injustice and to seek greater transparency.

1 Introduction

The 2009 World Congress of the International Ombudsman Association provided an occasion to celebrate the bicentennial of the Swedish Parliamentary Ombudsman and to trace the global influence of the Swedish model of the ombudsman institution.

The present contribution begins with some reflections on the link between the ombudsman institution generally and the two fundamental principles on which most contemporary societies seek to be based: rule of law and democracy. Then I explain what I see as the role and purpose of a supranational ombudsman in the European Union.

2 The ombudsman, rule of law and democracy

My starting point is a question that was put to me by a member of the audience at a recent conference where the 200th anniversary of the Swedish Ombudsman was also being marked: “*Why was no other ombudsman established in the 19th Century?*”

It is a good question. There was a gap of more than a century between the establishment of the first and the second ombudsman offices, in Sweden and Finland respectively. Then another third of a century passed before the Danish Ombudsman was established in the mid-1950s.

After that, the story is one of rapid global expansion. By the end of the 20th century, as everyone knows, the ombudsman had conquered the world. Why did that happen in the period after the Second World War and not in the

long 19th century stretching from the Napoleonic wars to the First World War?

The answer lies, I believe, in a triangular relationship between the ombudsman institution, processes of democratisation, and the development of the rule of law. Since the main focus of this contribution is to be the European Ombudsman, I will merely sketch the argument rather than develop it in detail. Let me start with democratisation.

To begin with, a conceptual distinction needs to be drawn between elections and parliamentary rule, on the one hand, and democracy, on the other.

At a minimum, democracy implies free and fair elections, with a broad suffrage. In that sense, democracy is much more a 20th century phenomenon than a 19th century one. After the Second World War, it became increasingly ascendant and, at present, is, to borrow an immortal phrase of Frank Sinatra, the “only game in town”.

The logic underpinning this historical evolution of democracy is neatly reflected in the work of the British sociologist T. H. Marshall, who, in the years following the Second World War, modelled the development of citizenship in terms of a cumulative historical development, beginning with civil rights, then rights of political participation, and finally social rights.¹

Crucial to Marshall’s thinking was not just a chronology, but a sequential logic of development. Marshall associated civil rights primarily with the courts of justice and the rule of law. Though these were consolidated by the end of the 18th century in the British Isles, in continental Europe their advance occurred in the course of the 19th century. The gradual extension of the franchise ensued and transformed voting from an adjunct of property rights into a political right of citizenship, thereby paving the way for the emergence of political democracy. Finally, in the second half of the 20th Century, social rights also became full rights of citizenship, in the process contributing to what came to be known as social democracy.

Without entering into unnecessary complexities and at the risk of oversimplifying, I want to emphasise two points about this sequential logic that are important for my argument:

First, the quality of democracy, a condition with which the institution of the ombudsman is intimately linked, is profoundly influenced by the extent to which the rule of law is already securely established when democratic institutions and processes are put in place.

Second, the development of social rights as rights of *citizenship* – what we now call the welfare state – was very much the product of democracy.

How does the ombudsman fit into this sequential logic of the rule of law, democracy and rights of citizenship? The basic answer, I believe, is that, in its contemporary form, the institution is closely linked to, and is, indeed, the by-product of democracy. But that answer requires both further explanations and a qualification. Let me start with the further explanations.

¹ T. H. Marshall, *Citizenship and Social Class and Other Essays* (Cambridge: Cambridge University Press, 1950).

In countries where the rule of law was well-established before democratisation, the internal functions of the state remained focused on the development and maintenance of the rule of law throughout the 19th century. The social welfare functions of the state emerged later and as a consequence of democratisation. The trend towards the state acquiring a social welfare role first became noticeable in the inter-war period and became pronounced after the Second World War. In the process, existing institutions charged with handling the kind of disputes that arose between citizens and the state in its new social welfare role proved increasingly ineffective. It was the fact that the Ombudsman could so effectively address the problems relating to these disputes that led to its widespread adoption in many mature democracies in the 1960s and early 70s.

In the countries, however, that democratised in the mid-1970s and beyond, the ombudsman institution served as an agent for the protection of those rights – especially human rights – which had not been respected during the period of authoritarian and totalitarian rule and thereby became the catalyst for the consolidation of democracy, rather than its by-product.

And now for the qualification. The very first parliamentary ombudsman – that is to say, the 200 year old Swedish Parliamentary Ombudsman – was established before the first wave of democratisation had even begun. As our Swedish hosts so eloquently reminded us in the opening session of the 2009 IOI World Congress, the institution was created as part of a constitutional settlement that ended a period of absolute monarchy. Whilst the instrument of government adopted in Sweden in 1809 did not democratise the processes of government, it did create a separation of powers, thus strengthening the rule of law.

In that context, it is understandable that the Swedish Ombudsman was given the special powers that distinguish it from the ombudsman institutions established after the Second World War; that is, supervision of the courts' application of the law and prosecution of public officials for non-compliance with the law. It is also understandable that, in Sweden, the rule of law came to be closely associated with the ombudsman in addition to the courts, whilst elsewhere in Europe during the 19th century, the rule of law was identified primarily, or even exclusively, with the courts.

To put the matter somewhat differently and to attempt to answer the question as to why no other ombudsman emerged in the 19th century, I would say that, for reasons peculiar to Sweden's historical development, the ombudsman in this country came to be associated with the rise and consolidation of the rule of law, while in most other European countries, the rule of law was historically linked to the courts and the ombudsman to the rise and consolidation of democracy.

Let me now turn to my main topic, which is the establishment of a supra-national ombudsman in the European Union.

3 The establishment of the European Ombudsman

To begin with, the European Ombudsman should be understood plainly and squarely as a product of the era of post-war democratisation and of the logic underpinning this process.

The office of European Ombudsman was established by the Maastricht Treaty, which was agreed late in 1991 and came into force in 1993.

The Maastricht Treaty was preceded by two inter-governmental conferences running in parallel; one on economic and monetary union, the other on political union. The first resulted in a detailed legal framework and timetable for the adoption of a single currency. The most notable outcome of the second was the creation of the European Union and also of Union citizenship as an additional status for every national of a Member State.

At an early stage in the negotiations on political union, the Spanish and the Danish delegations both put forward suggestions for a European Ombudsman. Their ideas were rather different.²

The Spanish suggestion was part of a broader proposal for the citizenship of the Union. The idea was to appoint a “Mediator” in each Member State, who would have the task of helping citizens to defend their rights before the administrative authorities of both the Union and the Member States. The Mediators would also be able to bring cases before the courts.

The Spanish proposal also envisaged that a European Ombudsman could be appointed, either as an alternative to the Mediators in the Member States, or to reinforce their role.

The Danish proposal was to create a *European Ombudsman* to supervise only the European Union institutions, not the Member States’ administrations.

The Spanish idea was not welcomed by the European Parliament, which saw it as a threat to its own role in dealing with petitions, most of which concern the application of European Union law in the Member States. Nor was the Commission much in favour.

With the support of Spain and the United Kingdom, the Danish proposal survived to the later stages of the negotiations and was eventually included in the Maastricht Treaty. However, one can detect a residual influence of the Spanish proposal in the fact that the right to address the Ombudsman is included in the title of the Treaty on citizenship.

I shall argue later that the link between the European Ombudsman and citizenship of the Union is more than symbolic and, furthermore, that the establishment of the European Ombudsman makes sense in terms of the logic of democratisation.

But first it needs to be made clear that my explanations of the role of national ombudsmen in contemporary societies do not apply in the case of the

² See Carlos Moreiro González, “The Spanish proposal to the inter-governmental conference on political union” and Peter Biering, “The Danish proposal to the inter-governmental conference on political union”, in P. Nikiforos Diamandouros (ed.), *The European Ombudsman: Origins, Establishment, Evolution* (Luxembourg: Office for Official Publications of the European Communities, 2005) pp. 27–37 and 38–51.

European Ombudsman; or, at least, that they do not apply to the same extent, or in the same way. The reason is primarily twofold: first, the European Union is not a welfare state; second, it is not a State at all. I shall explain these points in more detail before turning to what the EU actually is and does.

4 The context of the European Union

The EU institutions do not provide the public services typical of the welfare state, such as health, housing, social assistance, education and pensions. Those services are provided by the Member States. Whilst the European Ombudsman receives a few complaints about such issues from members of staff of the institutions, they are a much smaller part of the workload than is the case for most national ombudsmen.

The citizenship of the Union does, however, possess a social rights dimension. It results from the two fundamental rights of free movement of persons and non-discrimination.

When someone exercises the right of free movement, the public authorities of the “host” state must treat him or her in the same way as their own nationals as regards social rights. Naturally, there are exceptions, but the basic principle of non-discrimination on grounds of nationality means that any exceptions must be expressly laid down in the Treaty, or justified by other principles.

Naturally, the social rights dimension of Union citizenship also gives rise to many complaints. However, such complaints fall within the competence of ombudsmen in the Member States, not of the *European Ombudsman*.

Moreover, it is not helpful, in my view, to try to understand the development of the Union, and of the citizenship of the Union, strictly in terms of the logic of democratisation that is associated with the nation-state and its evolution in the 19th and 20th centuries. The reason is that the Union is not a State and concepts of democracy, which have developed in the framework of the State, cannot simply be transplanted to the supranational level.

A more useful point of departure is the observation that the EU institutions exercise public authority: that is to say, they exercise legislative, judicial and administrative powers. The question that then arises is whether and how the exercise of public authority at the level of the Union can be understood as democratically legitimate.

To be sure, the European Parliament and the Council both have democratic legitimacy. Parliament’s legitimacy is the result of direct elections whilst, in the case of the Council, such legitimacy derives indirectly from elections in the Member States.

As we are all aware, these democratic credentials have not yet proved sufficient to legitimate the European Union fully in the eyes of its citizens. Furthermore, there are no easy answers (other than wrong answers) to the question of how to create greater legitimacy. I shall therefore seek to address the question indirectly at first, by explaining in concrete terms four key features of the European Ombudsman’s work. I shall return to it more directly in my

concluding remarks, when I reflect on the implications of the Ombudsman's work for citizenship and democracy at the European Union level.

5 The work of the European Ombudsman

The special features of the European Union that I have described earlier are reflected in the kinds of complaints that are addressed to the European Ombudsman and the way in which those complaints are dealt with.

I begin with an irony of history. As I have explained, the Maastricht Treaty adopted the Danish proposal for the European Ombudsman's mandate, not the Spanish proposal, which, it will be recalled, envisaged the European Ombudsman's involvement in the Member States. In practice, however, most of the complaints sent to the European Ombudsman are, in fact, directed against the Member States' public authorities. This is understandable, because it is the authorities of the Member States, rather than the European institutions, which have primary responsibility for the enforcement of EU law and for guaranteeing the rights it confers on citizens.

This was a problem that immediately confronted the first European Ombudsman, Jacob Söderman, when he began work in September 1995. His strategy to deal with the matter was to establish cooperation with the national ombudsmen. While remaining a flexible and voluntary arrangement, on equal terms, this cooperation has now evolved into the *European Network of Ombudsmen*. The shared objective of members of the Network is to make citizens' and residents' rights under EU law a living reality.

The Network promotes the flow of information about EU law and its implementation and facilitates the transfer of complaints to the body best able to deal with them.

An important aspect of the Network is that national and regional ombudsmen may ask the European Ombudsman for written answers to queries about EU law and its interpretation, including queries that arise in their handling of specific cases. The European Ombudsman either provides the answer directly or, if more appropriate, channels the query to another institution or body.

The query procedure is not just a way to obtain information, but can also help ombudsmen in the Member States to persuade the administrations they supervise to apply EU law correctly.

The second key feature of the European Ombudsman's work that I want to highlight is related to the first. Although the European Ombudsman cannot investigate whether a Member State is correctly implementing EU law, the European Commission does have the power and the responsibility to do so, in its role as the so-called "guardian of the Treaty".³ Furthermore, the Commission invites citizens to complain to it against Member States.

³ See generally, Melanie Smith, *Centralized Enforcement, Legitimacy and Good Governance in the EU* (London: Routledge, 2009). On the European Ombudsman's role see, P. N. Diamandouros, "The European Ombudsman and the Application of EU Law by the Member States", *Review of European Administrative Law* 1, n° 2 (2008), p. 5–37.

Right from the beginning, the European Ombudsman received complaints against the Commission as the guardian of the Treaty. To the surprise of some people, the Ombudsman decided to deal with them.

What emerged was that the procedure used by the Commission to investigate citizens' complaints against Member States was regarded as a private matter between the government of the Member State and the Commission, from which the complainant could be completely excluded.

Furthermore, the fact that the complainant had no judicial remedies against the Commission was understood as meaning that the courts had given the Commission unfettered discretion in the handling of complaints.

Over the years, the Ombudsman's work has succeeded in modifying this situation, first by ensuring procedural guarantees for complainants and later by making clear that, although the Commission has discretion not to pursue every case, both the Commission and the Member State are bound by the rule of law. The process has also become more transparent, although there is room for much more improvement.

Transparency is the third aspect of the European Ombudsman's work that I wish to highlight.

Public access to documents held by the EU institutions and bodies is a fundamental right. Applicants who are denied access to a document may go either to the court, or to the Ombudsman. Furthermore, the European Code of Good Administrative Behaviour, which the Ombudsman drafted and which applies during investigations, contains a general provision requiring information to be made available on request.

The Ombudsman's work in the field of transparency has been strengthened by the courts' confirmation of the Ombudsman's legal interpretations in a number of high profile cases and by effective co-operation with the European Data Protection Supervisor. The Ombudsman has also been active in the legislative process for the revision of the EU Regulation governing the right of public access, which is on-going at the time of writing.

The final aspect of the Ombudsman's work that I will mention concerns the involvement of stakeholders and the public generally in EU policy-making.

There is an increasing trend for EU legislation to provide quite elaborate arrangements for consultation of stakeholders before decisions are made. I shall give just one example. The law on energy saving products, which led to the Commission imposing a ban on incandescent light bulbs, contains many provisions to ensure that different interests, and different views about the public interest, are taken into account in the policy-making process.

The number of complaints about consultation of stakeholders and the public in the policy-making process is small at present, but I expect it to become a growth area in the future, especially if the Lisbon Treaty enters into force, because the Treaty contains a general commitment to public debate, open dialogue and broad consultation.⁴

⁴ See the new Article 11 of the Treaty on European Union.

6 The role and purpose of the European Ombudsman

In reflecting on the significance of the four aspects of the European Ombudsman's work that I have mentioned, I would first emphasise that they result from complaints that citizens have chosen to address to the European Ombudsman. They demonstrate therefore that citizenship of the Union is a reality, not merely an aspiration.

Furthermore, they also show that the existence of the European Ombudsman helps give citizenship a dynamic quality.

Citizens can and do use their right to address the European Ombudsman not only as a way to seek redress for individual injustice, but also to seek greater transparency. In turn, transparency makes it possible for citizens to scrutinise the activities of the Institutions, evaluate their performance and call them to account. It also allows citizens to participate meaningfully in public activities and to make effective use of other political rights, especially freedom of speech.

Furthermore, citizens can and do use their right to address the Ombudsman to push for more transparent, citizen-friendly and citizen-centred processes of decision-making in the Union. In the terminology of A. O. Hirschman, they are exercising "voice", (rather than opting for exit).⁵ Indeed, they are often using the Ombudsman as a mechanism to exercise voice, in order to call for more opportunities to exercise voice and for more transparency, in order to make the exercise of voice effective.

In other words, by enhancing citizens' rights and citizen participation at the European Union level, the European Ombudsman is contributing to the gradual unfolding of a democratic process and to the consolidation of a political order at the supranational level.

To put the matter somewhat differently: the establishment of the European Ombudsman inscribes itself in a logic of democratisation that is different from the logic driving the operation of most ombudsmen at the nation-state level but is nevertheless recognisably democratic through its clear and direct links to citizenship, the observance of the rule of law in the exercise of public authority and the legitimacy that these imply.

By creating the citizenship of the Union, the Maastricht Treaty committed the Union not only to respecting a list of rights, but also to enhancing the legitimacy of the Union's institutions and functioning through political participation by citizens.

The European Ombudsman is one mechanism that citizens can use for this purpose and also an active agent seeking to encourage citizens to make use of their political rights and helping them to do so.

In other words, the European Ombudsman is one of the actors in a long, tortuous but enormously challenging and rewarding learning process about how to legitimate supranational governance and how far such legitimation can

⁵ Albert O. Hirschman, *Exit, Voice, and Loyalty: Responses to Decline in Firms, Organizations and States*, (Cambridge, Mass: Harvard University Press, 1970).

constitute part of an alternative way of conceptualising democracy and democratisation in a political and institutional context lying beyond, and transcending, the nation-state.

We have, in certain ways, come a long way from the original institution — yet the original recipe continues to retain its integrity and relevance, thereby paying tribute to the genius of the Swedish invention, to which we all remain profoundly indebted.