THE OMBUDSMAN INSTITUTION AND THE QUALITY OF DEMOCRACY

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THE OMBUDSMAN INSTITUTION AND THE QUALITY OF DEMOCRACY

By Professor P. Nikiforos Diamandouros, European Ombudsman

This occasional paper is based on a lecture of the same title, which was delivered at the University of Siena's Graduate School in Political Science on 17 October 2006. I was delighted to accept the invitation[1] to give the lecture, because it gave me the opportunity to share with fellow political scientists some thoughts linking my current professional preoccupations as European Ombudsman with my long-standing academic interest in democracy and its quality.

Revision of the lecture for publication as an occasional paper has involved some updating (for example, to take account of the accession of Bulgaria and Romania to the European Union on 1 January 2007), as well as the addition of references that could be helpful to the reader. I have not, however, developed the substance of the argument beyond the scope of the original presentation.

The central thesis of the paper is that the ombudsman institution both reflects, and contributes to, the maintenance and improvement of the quality of an evolving European constitutional order that embodies pluralist democracy and the rule of law as fundamental principles.

The first two sections of the paper serve as an introduction. Section 1 briefly outlines the origins of the ombudsman institution and its recent development, especially in Europe. The next section examines the significance of the institution from the perspective of two parameters, democracy and rule of law, that form and shape both the context in which it functions and its ability to serve citizens effectively. The main part of the paper, section 3, consists of an analysis of the contribution that the ombudsman institution can make to the quality of democracy. There are, of course, many ways to approach the question of "quality". I do so primarily by way of a comparison between ombudsmen and courts, which allows me to explain the distinctive contribution of the former in terms of norms and procedures.

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[1] For which I would like to thank Rector Focardi, Dean Cardini, Professor Pierangelo Isernia, Director of the Graduate School in Political Science, and my old friend and colleague, Professor Cotta.

1. The origins and spread of the ombudsman institution in Europe

The word "ombudsman" is of Swedish origin and the world's first parliamentary ombudsman was appointed by the Swedish Parliament in 1809. The functions of the institution were to supervise the courts and other public authorities, to deal with complaints from citizens, and to prosecute officials and government ministers who behaved unlawfully. The originality of the institution lay primarily in its independence of the Executive, guaranteed by the fact that the Ombudsman is elected by, and reports to, the legislature[2].

During the next century and a half, just two more countries established ombudsmen with general competence: Finland in 1919 and Denmark in 1955[3]. The Danish model differed from its Swedish and Finnish predecessors in that the Ombudsman was not given power to supervise the work of the courts, or to act as a prosecutor. In the Danish version, the role of the ombudsman is to investigate and report on complaints against public authorities other than the courts, but with no power to make legally binding decisions.

To introduce a theme I will develop in detail later, it is not as evident as people nowadays often assume that democracy and the rule of law always co-exist. Where they do co-exist and are both strong, however, the public authorities normally accept an ombudsman's findings and recommendations, even without a legal obligation to do so.

During the second half of the twentieth century, the ombudsman institution spread globally and new offices continue to be created. For example, the youngest national offices of the EU Member States are those of Luxembourg (2004) and Bulgaria (2005)[4]. According to the International Ombudsman Institute (IOI), the professional association representing ombudsmen at an international level, ombudsmen now exist in approximately 120 countries around the world[5].

The spread of the ombudsman institution has been facilitated by its flexibility, which makes it readily adaptable to different constitutional, cultural, legal and political environments. Flexibility implies diversity and there is indeed great diversity amongst ombudsmen, even within the European Union. However, we can say with a high degree of confidence that the core function of an ombudsman is to handle complaints against public authorities and that ombudsmen do not make

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[2] See Bengt Wieslander, *The Parliamentary Ombudsman in Sweden*, The Bank of Sweden Tercentenary Foundation, 1994.

[3] A constitutional amendment was adopted in 1953 and implementing legislation was enacted in 1954. The first ombudsman took office in 1955, see S. Hurwitz, "The Danish Parliamentary Commissioner for civil and military administration" (1958) *Public Law* 236.

[4] As in the case of Denmark above, the dates are when the first Ombudsman took office.

[5] See the website of the International Ombudsman Institute: http://www.law.ualberta.ca/centres/ioi

legally binding decisions, relying instead on moral authority and the ability to persuade and convince.

The pace of development has been particularly striking in Europe. When the Treaty of Maastricht created the office of European Ombudsman in the early 1990s[6], there were national ombudsmen in only a narrow majority of the Member States of the European Union: 7 out of 12. Three of the five Member States that were then without a national ombudsman, that is, Belgium, Greece and Luxembourg, subsequently established an ombudsman office and all the countries that joined the Union on 1 January 1995 and 1 May 2004 had national ombudsman offices at the date of accession. The result is that, at the beginning of 2007, following the accession of Romania and Bulgaria, 25 of the 27 Member States have a national ombudsman, as do two of the three candidate countries, Croatia and the Former Yugoslav Republic of Macedonia (more commonly referred to simply as Macedonia). The Turkish Parliament adopted a law to establish an Ombudsman in 2006, but no Ombudsman has yet been elected.

In the two EU Member States where there is no national ombudsman, that is to say, Germany and Italy, the institution exists at the regional and local levels. Moreover, the Committee on Petitions of the German *Bundestag* fulfils a similar role to that of a national ombudsman and, indeed, is a full member of the IOI. As regards Italy, a draft law to establish a national ombudsman was presented to the Chamber of Deputies on 2 November 2006. I very much hope that this important initiative will bear fruit, and that I shall soon have the pleasure of welcoming a colleague from this country to the European community of ombudsmen, and to the European Network of Ombudsmen, which serves as the central mechanism promoting co-operation between and among national and regional ombudsmen within the Union.

2. The Rule of law and Democracy

How should we understand the significance of the rapid spread and development of the ombudsman institution, especially in Europe? In trying to answer that question, my starting point will be to focus on the two major parameters - democracy and the 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.

[6] The Treaty negotiations were concluded in December 1991; the Treaty was signed on 7 February 1992 and entered into force on 1 November 1993. The first European Ombudsman was elected on 12 July 1995.

To begin with, let me emphasise that although, in contemporary Europe, rule of law and democracy are thought of as forming an inseparable and, so to speak, natural pair, they are clearly separable and analytically distinct.

2.1 The rule of law[7]

Rule of law describes a condition in which all members of society live under the law, and where no one is outside or above the law. Its historical origins are to be found in European feudalism, and, more specifically, in 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 ordinary law and not to extraordinary or exceptional arrangements.

A crucial condition relating to the generation of the rule of law and underpinning its existence is that its general principles are necessarily the product of judicial decisions, in other words, that the courts constitute the foundation upon which the rule of law is built and on which its development and evolution depends.

A further dimension associated with the rule of law is that, under conditions characterised by its acceptance, the constitution of the state is effected on the basis of what Max Weber described as "legal-rational" rules, which serve as the legal foundation of power and of the state.[8]

Finally, the evolution of the rule of law has, over time, resulted in social and political arrangements, whose distinctive characteristic is that the relationship between rulers and ruled is not direct and immediate, but is rather mediated by structures or institutions enjoying legal recognition and authority, by placing effective limits on the ruler and thus excluding the arbitrary exercise of power. This characteristic of the rule of law and of the pattern of mediated exercise of power that it

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[7] For a classic statement on the rule of law, see A. V. Dicey, *Introduction to the Study of the Law of the Constitution* (London: Macmillan, 1961), 183-205 and passim. See also David Lindsay Keir, *The Constitutional History of Modern Britain since 1485* (Princeton, NJ: Van Nostrand, 1963), 293-98; Harold J. Laski, *Parliamentary Government in England* (London: Allen and Unwin, 1963), 360-87; and Andre Mathiot, *The British Political System* (London: Hogarth Press, 1958), 195-204. For more recent analyses focusing on the relationship between the rule of law and democracy, see Guillermo O'Donnell, "Why the Rule of Law Matters", *Journal of Democracy* 15:4 (October 2004), 32-46; and José Maria Maravall and Adam Przeworski, eds., *Democracy and the Rule of Law* (Cambridge: Cambridge University Press, 2003).

[8] For Weber's treatment of legal-rational rules as a quintessential dimension of the modern state, see Max Weber, *Economy and Society*, edited by Guenther Roth and Claus Wittich (Berkeley, CA: University of California Press, 1978), 213-26 and passim. On the significance of a legal-rational tradition for democratic regimes, see Yossi Shain and Juan J. Linz, *Between States: Interim Governments and Democratic Transitions* (Cambridge: Cambridge University Press, 1995), 10-14.

is associated with was astutely captured and extensively analysed by Montesquieu in his *Spirit of the Laws*, under the apt term "corps intermédiaires".[9]

2.2 Democracy

In contrast to the rule of law, democracy as we know it today is quite a recent phenomenon that is associated with the transformation of subjects into citizens and the progressive extension of the suffrage.[10] Its emergence was linked to the political and socio-economic upheavals that shook Europe and the American colonies during the "long century" that began in the last quarter of the 18th Century and lasted well into the 20th.

Definitions of democracy can be long and elaborate.[11] 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:

- fair elections, including the classical political liberties, such as the freedoms of expression and association;
- flowing from these political liberties, the existence of more than one legal party having the right freely to contest elections; *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 with parliamentary institutions, or the mere holding of elections. Even a cursory look around the world

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[9] For Montesquieu's treatment concerning the mediated exercise of power and the concept of "corps intermédiaires", see Baron de Montesquieu, *The Spirit of the Laws* (New York: Hafner, 1962), 66-70 and 120-25.

[10] For a classic statement on the historical upheavals that gave rise to modern democracy, see Robert R. Palmer, *The Age of Democratic Revolution: A Political History of Europe and America, 1760-1800*, 2 vols., (Princeton, NJ: Princeton University Press, 1959). For a distinguished political science treatment of modern democracy, see Robert A. Dahl, *Democracy and its Critics* (New Haven, CT: Yale University Press, 1989). For a celebrated work examining the relationship between ancient and modern democracy, see Benjamin Constant, "De la liberté des anciens à celle des modernes", in idem, *Cours de politique constitutionnelle ou collection des ouvrages publiés sur le gouvernement représentatif* (Paris: Guillaumin, 1872), vol. 2, 539-60.

[11] The political science literature on democracy abounds with various definitions ranging from minimalist to highly exacting, complex and maximalist conceptualisations. For illustrative examples of works adopting a perspective similar to the one used here, see, among others, Dahl, *Democracy and its Critics*, 108-15 and passim; Juan J. Linz, "Totalitarian and Authoritarian Regimes", in Fred I. Greenstein and Nelson W. Polsby, eds., *Handbook of Political Science*, vol. 3 (Reading, MA: Addison Wesley, 1975), 182-83; and Richard Gunther, P. Nikiforos Diamandouros and Hans-Jürgen Puhle, eds., *The Politics of Democratic Consolidation: Southern Europe in Comparative Perspective* (Baltimore, MD: Johns Hopkins University Press, 1995), 5-7. On "veto groups", see Scott Mainwaring, Guillermo O'Donnell and J. Samuel Valenzuela, eds., *Issues in Democratic Consolidation: The New South American Democracies in Comparative Perspective* (Notre Dame, IN: University of Notre Dame Press, 1992), 48-49.

provides ample evidence that, in many countries, the conditions under which elections are held do not meet the criteria of fairness, free contestation and absence of veto groups. Rather than democracies, these are better described, in the words of the Stanford political scientist, Terry Karl, as "electoral regimes".[12]

Democracy nowadays enjoys undisputed legitimacy. Indeed, the most frequently heard criticism of the European Union, both from those who favour more integration and those who take the opposite view, is that the Union suffers from a "democratic deficit". Some commentators even go so far as to argue that democracy is impossible at the European level because there is no European *demos*, or people. I believe that this argument is too simplistic, but that it hints at a more complicated point, which has to do with the relationship between democracy and legitimacy. To put it simply, acceptance of the legitimacy of the state in the eyes of its citizens constitutes a prior condition for the smooth operation of a democracy. In fact, I would take this proposition one step further and, following Robert Dahl, argue that if a state is not perceived as legitimate, then democratic elections cannot rectify this problem.[13]

At the level of the abstract principles informing democracy, I would further argue that all modern democracies have been constructed on the foundation of liberty and equality, two of the most powerful intellectual legacies of the Enlightenment and of the political revolutions to which this momentous era gave rise. The relative balance between these two principles allows us to distinguish two, historically contingent, variants of modern democracy.

The first variant derives its roots from the Jacobin legacy of the French Revolution and 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 this variant, the party that wins a parliamentary majority at an election constitutes the natural and logical expression of popular sovereignty and can legitimately claim a plenary right to exercise power on behalf of the sovereign people.[14]

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[12] On electoral regimes, see Terry Lynn Karl, "Imposing Consent? Electoralism vs. Democratization in El Salvador", in Paul Drake and Eduardo Silva, eds., *Elections and Democratization in Latin America, 1980-85* (San Diego, CA: Centre for Iberian and Latin American Studies, 1986), 9-36. For a more recent conceptualisation focusing on the more general issues raised here, see Wolfgang Merkl, "Embedded or Defective Democracies", as well as Merkl and Aurel Croissant, "Conclusion: Good and Defective Democracies", *Democratization* 11:5 (December 2004), 33-58 and 199-213 respectively.

[13] On the relationship between democracy and the legitimacy of the state, see Dahl, *Democracy and its Critics*, 207; as well as Juan J. Linz and Alfred Stepan, *Problems of Democratic Transition and Consolidation: Southern Europe, South America, and Post-Communist Europe* (Baltimore, MD: Johns Hopkins University Press, 1996), 26-33 and passim.

[14] For a discussion of majoritarian democratic systems and of their dynamics, see Arend Lijphart, *Patterns of Democracy. Government Forms and Performance in Thirty-Six Countries* (New Haven, CT: Yale University Press, 1999), 9-30.

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, which is 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 and imparting a dimension of "levelling egalitarianism" that, in turn, raises serious concerns relating to respect for individual rights and the observance of the rule of law.

The alternative conceptualisation of democracy, again in the ideal-typical form, is characterised by 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 relies on the generation of a dense network of institutional checks and balances or counterweights, that are congruent with the mediated structures of power (or "corps intermédiaires" to repeat Montesquieu's term) that characterise the rule of law. It thus provides better conditions for the observance of the rule of law and for the quality of democracy.

2.3 Accountability and democracy

At the level of constitutional and institutional arrangements, the difference between these two variants of democracy is associated with different forms and conceptions of “accountability”, a word often difficult to translate into other languages.[15]

To be accountable means to have the duty to provide an account: that is, to explain and justify one's actions in terms of appropriate criteria and in sufficient detail. The criteria and level of detail that are required depend on the context. The concept of accountability also includes liability to some form of sanction, if the performance revealed by the account is considered unsatisfactory. The sanction may be legal or, in a broad sense, political. As I will explain later, in a democracy, public criticism can be a significant form of sanction.

In the first variant of democracy, the natural concomitant of the idea that the winners of an election can legitimately claim a plenary right to exercise power on behalf of the sovereign people is that government is accountable only to the sovereign people at the moment of periodic elections. The sanction attached to such accountability is that, if electors deem a government’s performance unsatisfactory, they can vote it out of office. Other forms of accountability are excluded as

[15] On the issue of democratic accountability, see Andreas Schedler, "Conceptualizing Accountability"; Guillermo O'Donnell, "Horizontal Accountability in New Democracies"; and Philippe C. Schmitter, "The Limits of Horizontal Accountability"; in Andreas Schedler, Larry Diamond, and Marc F. Plattner, eds., *The Self-Restraining State: Power and Accountability in New Democracies* (London: Lynne Reiner, 1999), 13-28, 29-52, and 59-62 respectively. See also Leonardo Morlino, "What is 'Good' Democracy", *Democratization* 11:5 (December 2004).

potentially limiting and constraining the sovereign people, as represented by those whom they have elected.

Naturally, democracies that more closely approximate the pluralist variant also provide for the accountability of governments to the people at elections. However, their constitutional arrangements provide, in addition, for continuous accountability between elections.

Both historically and in today's world, rule of law is the most developed and respected basis for such continuous accountability. As the traditional formulation of the separation of powers acknowledges, the judicial branch of government is the fountainhead of the rule of law. It is important to point out, however, that, within pluralist democracies, other forms and institutions of continuous accountability also exist alongside the courts. For example, although not enjoying as long a history as the rule of law, the idea of continuous parliamentary scrutiny of the Executive pre-dates modern democracy.

Modern democracies have also developed other institutions of continuous or horizontal accountability to scrutinise the actions of public authorities, call them to account and provide information, analysis and redress. To give a few examples, there are: public auditors, information commissioners, ethics and standards committees, electoral commissions, data protectors and, not least, ombudsmen. An important aspect of such continuous accountability of public authorities is the implication that it provides citizens with multiple opportunities and structures through which to hold public authorities accountable on a continuous basis. Indeed, it is important to point out that citizenship encompasses a dynamic component transcending legal rights and duties and involving engagement with public authorities to exercise rights, including accountability rights, and to fulfil obligations. Although I shall not develop the theme in detail in this paper, I wish to point out that one additional role of the ombudsman is to seek to improve the quality of this interactive dimension of citizenship on both sides - citizen and administration - for example, by helping to avoid, or to resolve, unnecessary and unproductive conflicts.

3. *The contribution of the Ombudsman to the quality of democracy*[16]

The institution of the ombudsman can help maintain and improve the quality of democracy both directly, through promoting accountability and active citizenship, and indirectly by reinforcing the rule of law and thus the balance between equality and liberty that constitutes so salient a feature of the pluralist variant of democracy. Its capacity to do so depends on being demonstrably impartial and non-partisan in carrying out its functions. This is the rationale for the independence of the ombudsman, which, in constitutional systems where parliamentary scrutiny of the Executive is well-developed, is often secured by a privileged relationship with the legislature[17].

As I have already acknowledged, the courts are the pre-eminent independent mechanism for ensuring the control and accountability of the public authorities. It is important to emphasize though, that whilst the courts and the ombudsman are alike in their independence, they are distinct in other ways and it is instructive to compare them. I have already alluded earlier to the most fundamental distinction: the courts, as the sole authoritative interpreters of the law, 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 non-binding recommendations to the institutions of the state (public administration, public utilities, etc.) falling within their remit. From this fundamental distinction, flow two other very important differences:

- First, a court determines the legal rights of the parties to a case, whereas an ombudsman also takes into account broader principles of good administration, which, for reasons I shall explain later, are inherently open-ended;
- Second, the rules governing court proceedings are necessarily stricter and less flexible than those that apply to an ombudsman's activities.

The ombudsman therefore complements the work of the courts both as regards the norms which apply to public authorities and as regards the methods through which those norms are implemented. Allow me to develop both aspects in greater detail.

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[16] Recent research on democratisation is paying increasing attention to the notion of "quality of democracy". For illustrative examples of recent scholarly attempts to treat the subject systematically, see Leonardo Morlino, "What is 'Good' Democracy", passim., 10-32; Guillermo O'Donnell, Jorge Vargas Cullell, and Osvaldo M. Iazzetta, eds., *The Quality of Democracy: Theory and Applications* (Notre Dame, IN: University of Notre Dame Press, 2004); and, in addition to the article by O'Donnell cited in note 8 above, the contributions by Diamond and Morlino, Schmitter, Beetham, Rueschemayer, Powell, and Plattner devoted to this topic in *Journal of Democracy* 15:4 (October 2004), 20-110.

[17] Indeed, in the Nordic countries and the United Kingdom, “parliamentary” is part of the ombudsman’s official title.

3.1 The norms applied in the ombudsman's work

Like a court, an ombudsman not only considers the individual case but also asks how similar cases should be treated by public authorities in the future. One of the characteristics of the ombudsman institution is that it can carry out the task of establishing guidelines for future conduct not only on a reactive, case-by-case basis, but also in a proactive way. For example, the ombudsman may produce checklists of good administrative practices, publish codes of good administrative behaviour and take initiatives to tackle systemic maladministration. Some years ago, for example, the European Ombudsman prepared and published the European Code of Good Administrative Behaviour, following an own-initiative inquiry in which all the Community institutions and bodies took part and which drew on best practice in the Member States[18].

The fact that an ombudsman does not normally have the power to make legally binding decisions means that the effectiveness of the institution is based on moral authority and, ultimately, on publicity and the ability to persuade public opinion. As I have already mentioned, where the rule of law and democracy are both strong (which, in the conceptual scheme that I have developed, means in the pluralist variant of democracy) public authorities normally accept an ombudsman's findings and recommendations. The likelihood of their doing so is, however, much greater if those findings and recommendations are reasoned in a way that is cogent and convincing.

While for the courts the major realm of activity and concern is to ensure adherence to legality on the part of state and citizens, for the ombudsman the equivalent realm is the promotion of good administration and the avoidance of maladministration. To be sure, legality and maladministration overlap. It could hardly be otherwise, since the core principle governing the activities of public authorities is the rule of law. This implies 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.

3.1.1 Legality and fundamental rights

I am using the term "legality" broadly, so as to include respect for fundamental human rights and for legal principles, such as proportionality, equality, legitimate expectations and

[18] See the Ombudsman's Special Report of 11 April 2000 on a Code of Good Administrative Behaviour and two European Parliament resolutions of 6 September 2001: on the annual report on the activities of the European Ombudsman (C5-0302/2001 - 2001/2043(COS)) and on the European Ombudsman's Special Report to the European Parliament following the own-initiative inquiry into the existence and the public accessibility, in the different Community institutions and bodies, of a Code of Good Administrative Behaviour (C5-0438/2000 - 2000/2212 (COS).

The Code is available in all the official languages on the Ombudsman's website: *http://www.ombudsman.europa.eu/code/en/default.htm*

impartiality. In fact, many of the ombudsmen in the European Union have a mandate that is specifically focused on human rights and reflected in titles such as *Defensor del Pueblo*, *Human Rights Ombudsman* and *Commissioner for Civil Rights*. Such ombudsman institutions were established in Greece, Portugal and Spain following the transition from authoritarian to democratic regimes, and in many countries of Central and Eastern Europe after the fall of communism.

More broadly, the domestic law of many countries includes human rights and fundamental principles as part of the positive law that is binding on all public authorities. Moreover, such rights and principles also form an integral part of Community law, to which all the public authorities of the Member States, including ombudsmen, must give effect when dealing with matters that fall within its scope[19]. For all ombudsmen in the European Union, therefore, the norms to be applied to administrative activity must include respect for fundamental and human rights, at least within the scope of Community law.

As has already been mentioned, ombudsmen in the Member States can work proactively as well as reactively and so can help to inform the public administration and the courts about the case law on human rights of both the European Court of Human Rights in Strasbourg and the European Court of Justice in Luxembourg, as well as about Community law more generally.

3.1.2 Legality and maladministration

When "legality" is understood broadly, in terms of a concept of law that includes Community law, legal principles and fundamental rights, the overlap between legality and maladministration is quite extensive. It is not, however, complete. The rule of law requires public authorities to act lawfully: thus, it cannot be good administration to violate the law. However, the converse is not necessarily true. In other words, the fact that a public authority has acted lawfully does not preclude the possibility that it may have failed to comply with the principles of good administration[20]. This brings me to the normative contribution that the ombudsman institution can make to improving the quality of democracy.

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[19] It is worth noting is this context that, at the meeting of the national ombudsmen of the EU Member States held in The Hague in September 2005, Advocate General L. M. Poiares Maduro went so far as to say that, within their field of competence, ombudsmen must disregard any national rules which prevent them from protecting rights under Community law.

[20] A finding of maladministration by the Ombudsman does not, therefore, automatically imply that there is illegal behaviour that could be sanctioned by a court. See the judgments of the Court of First Instance of 28 October 2004 in joined cases T-219/02 and T-337/02, *Herrera v Commission*, para. 101, and of 4 October 2006 in Case T-193/04 R, *Hans-Martin Tillack* v *Commission*, para 128.

In a modern democracy, the public administration should exist to serve citizens, not *vice versa*. This principle can be formulated and expressed in different ways: citizen-friendliness, service-mindedness, or, indeed, as the right to good administration, which is recognised as a fundamental right in Article 41 of the Charter of Fundamental Rights of the European Union.

The basic principle has many ramifications, such as duties to be polite, helpful, fair, and reasonable. In many cases, there is a high degree of overlap with legal requirements, which are authoritatively and bindingly determined by the courts. In other cases, however, principles of good administration may require more of a public authority than merely not to break the law. As I like to say, "there is life beyond legality".

In fact, the principles of good administration (and their converse, the concept of maladministration) are inherently open-ended, because what constitutes good administration, in concrete terms, is highly dependent on detailed information about specific circumstances that may change and develop rapidly. To put it another way, modern administration involves, in practice, extensive discretionary power: that is to say, the possibility to choose lawfully between different courses of action.

Let us step back for a moment from discussing norms to look again at the broader historical picture of changes in the modern state. As I have already explained, some ombudsman institutions were established in the context of transition from authoritarian, or totalitarian, to democratic regimes. Ombudsmen in older-established democracies were mostly created in response to the major growth of public administration during the twentieth century, especially after the Second World War, when the social role of the state grew exponentially[21].

As contacts between public administration and citizens became more frequent and more intensive, so did the potential for disputes. Let me again repeat that the citizen's right to a judicial remedy against the public administration is, of course, fundamental to the rule of law. However, there is lately increasing recognition, not least by judges, that court proceedings are not always the most appropriate way to resolve disputes between citizens and public administration. Broadly, there are two reasons for this.

In some cases, the non-judicial remedy of the ombudsman can provide a cheaper and quicker alternative than court proceedings. In cases that the complainant would otherwise have taken to court, use of the alternative non-judicial remedy helps to avoid an overload of the court

[21] In this context, it is interesting to note that in Sweden, the original home of the Ombudsman institution, it was not until the 1950s that the Parliamentary Ombudsman's attention was drawn to any great extent to the civil service rather than the courts: Wieslander op. cit. (note 2 above) p. 19.

system and consequent delays. Moreover, since the ombudsman's services are free at the point of use, complainants who could not afford to bring judicial proceedings may nonetheless obtain an effective remedy, thus widening access to justice.

In other cases, however, court proceedings would be unlikely to assist the complainant even in theory, because the conditions for a legal remedy would not be met. As I have mentioned already, one of the key features of modern public administration is extensive discretion. Let me give you three very different examples to illustrate the kinds of discretion that exist and how the ombudsman can help ensure that there is "life beyond legality" in the norms that guide the exercise of discretion by public authorities.

3.1.3 Three examples

The first example concerns fair procedure. A former member of the European Parliament complained to the Ombudsman that Parliament had withdrawn his privileges, in particular the badge giving him access to Parliament's premises, without giving him a reason or the chance to explain his point of view. In its opinion on the case, the European Parliament argued that the rights of defence and the duty to give reasons exist only where the decision concerned could be challenged in court. The Ombudsman recognised both that Parliament's power of internal organisation involves extensive discretionary powers and that no judicial remedy would have been available to the complainant. However, the Ombudsman also took the view that every citizen has the right to know the reasons for an administrative decision which adversely affects his interests and to give his point of view before such a decision is made and that Parliament's actions had failed to respect that principle. In so doing, it had violated the principle of fairness and had committed an act of maladministration[22].

The second example concerns public access to information and documents, which is an aspect of transparency. I shall return to the relationship between transparency and the quality of democracy later in this section of the paper. For the moment, suffice it to say that, from a conceptual perspective, adequate information is required for both accountability at and accountability between elections. However, I am persuaded that, historically, the development of rights for the public to have access to information and documents is associated primarily with the latter form of accountability, representing both an addition to the range of checks and balances in

[22] Case 1250/2000/(JSA)/IJH, decision of 19 July 2001: http://www.ombudsman.europa.eu/decision/en/001250.htm

pluralist democracies and an instrument to promote the more effective operation of other checks and balances.

At the level of the European Union institutions and bodies, the principal legal framework for public access is Regulation 1049/2001 regarding public access to European Parliament, Council and Commission documents[23]. That Regulation concerns the right of public access to documents. It does not impose a general obligation on the Institutions to respond to requests for information, as opposed to access to an existing document[24]. However, the European Code of Good Administrative Behaviour, which was mentioned in section 3.1 above, does specify that institutions shall provide members of the public with information on request[25]. Such an obligation cannot, of course, be absolute. As a principle of good administration, it amounts, essentially to the presumption that information should be provided unless the institution can offer a good reason not do so.

As European Ombudsman, I applied this principle in a case where the complainant had asked the European Central Bank whether it had intervened to soften the fall in the value of the US Dollar and the rise in the value of the Euro. I took the view that since the complainant was not seeking to exercise a legal right to obtain an existing document under the Bank's own rules of access to documents, the Bank had discretion as to whether to release the information or not. However, if the Bank was not willing to release the information, the principle of good administration required that it should clearly and unequivocally explain its reasons for the refusal. The Bank did indeed provide such reasons and I therefore found no maladministration[26].

The third and final example is a case in which the complainant was unhappy at how a visitor group had been treated by the European Parliament[27]. Among other things, according to the complainant, the official who received the group was not fully acquainted with the programme of the visit, lacked enthusiasm for Parliament, had no interest in encouraging the group, and was not even properly dressed. When I sent the complaint to Parliament for an opinion, the response was an immediate apology, an offer to receive the group again in a professional way, and a description of

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[23] Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents, 2001 OJ L 145 p. 43.

[24] See in this regard the Order of the Court of First Instance of 12 October 2006 in Case T-307/05, *Fermont v Commission*, para 26.

[25] Article 22 of the European Code of Good Administrative Behaviour.

[26] Case 3054/2004/TN, decision of 1 July 2005:
http://www.ombudsman.europa.eu/decision/en/043054.htm

[27] Case 2909/2005/BU, decision of 15 November 2006:
http://www.ombudsman.europa.eu/decision/en/052909.htm

the measures Parliament had taken to prevent any repetition of such an incident. The complainant expressed satisfaction with Parliament's response and so I was able to close the case.

The norm of good administration relevant to this case is easy to formulate: the quality of service provided to the citizen must be of an acceptable level. That is, of course, an open-ended norm and its application is highly context dependent. One can imagine circumstances in which violation of the norm could give rise to legal liability and where a judicial remedy would be appropriate. But that was, of course, not the case here. The case is thus an illustration of how the work of an ombudsmen complements that of the courts at the normative level, by allowing the requirements of good administration to be open-ended, so that they may evolve to meet citizens' increasingly high expectations of standards of service by public authorities, without necessarily implying that citizens have a legal right to enforce such standards through actions for annulment, or for damages.

3.2 The procedural flexibility of the ombudsman

As regards procedures, let me first recall that as well as reacting to complaints, an ombudsman can also work proactively to promote the rule of law, respect for rights, and an administrative culture of service to citizens. Success in the proactive role makes it less likely that disputes between citizens and the public administration will arise and more likely that the administration itself will speedily resolve those disputes that do arise.

Furthermore, the fact that the ombudsman does not have power to make legally binding decisions allows the institution to have more flexible procedures and broader criteria for the admissibility of cases. The availability of the ombudsman remedy thus extends the scope to obtain redress and to exercise "voice", to use Hirschman's term[28], both as regards individual circumstances and as regards matters of public interest.

Once again I shall illustrate these abstract propositions through some examples. Before doing so, however, I need to avoid a possible misunderstanding that could arise from linking what I have said as regards discretion with the idea that the ombudsman remedy can provide a way to exercise "voice". It is not the role of the ombudsman to assist or support applicants for limited public resources, such as jobs, grants or contracts. For the ombudsman to intervene, the complainant must put forward some plausible arguments that there is maladministration by the public authority. To say, for example, "I am the best candidate and so should get the job" does not

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

justify any action by the ombudsman. With that clarification, let me give you some examples of how the ombudsman remedy can both help citizens exercise their legal rights as well as provide opportunities to exercise "voice" and call institutions to account, in ways that go beyond legally enforceable entitlements.

In one case, an NGO made a rather generally phrased application to the Commission for access to documents concerning certain negotiations in the World Trade Organisation and complained to the Ombudsman against the Commission's handling of the case. The outcome of the complaint was a friendly solution in which the Commission supplied the complainant with a full list of the relevant documents, so facilitating a more precise application[29]. This kind of positive-sum solution to a problem would be difficult to achieve through legal proceedings, which tend to be governed by a zero-sum logic.

Another example concerns the fact that the Council of the European Union does not always meet in public when legislating. In dealing with a complaint on this matter, I took the view that the principle in Article 1 (2) of the Treaty on European Union that decisions should be taken "as openly as possible" applies to the Council and that the Council's own past actions made clear that steps to increase the transparency of its legislative activity had to be taken, and could be taken, under EU law as it stands at present. Since the Council gave no valid reasons why it should not meet in public whenever legislating, I found maladministration and made a Special Report to the European Parliament. Parliament then adopted a Resolution approving my recommendation that the Council should review its position[30].

The underlying arguments in favour of the Council legislating in public were not relevant to my finding of maladministration and so my Special Report does not deal with them. However, those arguments, which derive from the concept of accountability, are very relevant to the topic of this paper and I will explain them here. They reflect the Council's dual identity as an intergovernmental and a supranational institution. On the one hand, transparency in the legislative process in the Council reinforces accountability at the national level, by allowing citizens of each Member State to see what the governments they have elected are doing at the European level. Whilst there can be no guarantee that this will make it easier for the Council to reach agreement, such transparency is essential to counter the argument that the EU undermines accountability, and hence democracy, at the national level. On the other hand, transparency in the Council's legislative meetings also allows

[29] Case 415/2003/TN, decision of 27 February 2004:
http://www.ombudsman.europa.eu/decision/en/030415.htm

[30] Case 2395/2003/GG, Special Report of 4 October 2005
http://www.ombudsman.europa.eu/special/pdf/en/032395.pdf

European citizens and residents, regardless of their nationality, to monitor the work of a European institution, thus helping to counter the perception that the Union is technocratic and elitist.

Whether or not one considers the principle of openness laid down in Article 1 (2) of the Treaty on European Union to be, in an abstract sense, legally binding on the Council, it is clear that the citizens who complained to me would not have had a sufficient legal interest to bring the matter before a court. However, there is no requirement that a person who complains to the European Ombudsman must be individually affected by the alleged maladministration. This means that *actio popularis* complaints to the Ombudsman are possible: that is to say, any citizen has a legitimate interest in calling a Community institution to account for an act of maladministration, even if he or she is no more affected by it than any other citizen.

As this case showed, a complaint to the Ombudsman can be quite an effective mechanism to exercise voice, even if, in this particular instance, it could not lead to a decision that would be legally binding upon the Council.

Similarly, the European Ombudsman provides complainants with opportunities to challenge the European Commission's actions as "guardian of the Treaty", which go beyond their strict legal rights, since the case law of the Community courts is clear that individuals may not challenge a decision by the Commission not to bring infringement proceedings against a Member State, nor are they party to infringement proceedings[31].

4. Conclusion

By way of conclusion, I shall draw together the various preceding elements into an overall assessment of the contribution of the ombudsman institution to the quality of democracy. Let me first emphasise, however, that, although I have focused on the ombudsman and the advantages of non-judicial remedies, the courts are the bedrock of the rule of law. Indeed, I would go so far as to say that, in the absence of a well-functioning judicial system, the scope for the ombudsman institution to help improve the quality of democracy is very greatly diminished. Where, however, the courts function well, the ombudsman can perform and fulfil a distinct but complementary role in modern democratic regimes. Rather than lead to unnecessary duplication, as some would aver, the availability of both judicial and non-judicial remedies, each with different characteristics and competences, allows applicants to choose the more appropriate remedy for their case.

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[31] See Case 247/87 *Star Fruit v Commission* [1989] ECR 291; Case C-87/89 *Sonito and Others v Commission* [1990] ECR I-1981; and Case T-191/99, *Petrie and Others v Commission*, ECR 2001 Page II-3677. For more information on

The deliberate provision of choice, and hence of the opportunity to decide between alternative avenues of redress, constitutes a distinct feature of the second, pluralist, variant of democracy that I discussed in section 2.2 above. 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. The development of the ombudsman institution in Europe thus contributes to, as well as being a product of, the success of pluralist democracy in our continent.

The effective realisation of human rights, especially (but not exclusively) cultural, economic and social rights, depends in large part on the quality of public administration. This is why the Charter of Fundamental Rights of the European Union includes the right to good administration as a fundamental right of citizenship. Moreover, although the principles of good administration may sometimes require more than respect for legal rights and obligations, they never require less. Unlawful administrative behaviour, using that term broadly to include violation of legal principles and of fundamental rights, is always maladministration. Thus an ombudsman's work with complaints not only empowers citizens and strengthens democracy, but also widens access to justice and so helps reinforce the rule of law.

In these ways, the ombudsman institution reflects, as well as helps maintain, the quality of constitutional order that embodies pluralist democracy and the rule of law as fundamental principles.

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how the European Ombudsman supervises the Commission in its role as guardian of the Treaty, see the Ombudsman's Annual Report for 2005, section 2.8.2