

RETHINKING GOOD ADMINISTRATION IN THE EUROPEAN UNION: 6th SEMINAR OF NATIONAL OMBUDSMEN OF EU MEMBER STATES AND CANDIDATE COUNTRIES

REMEDIES, REDRESS AND SOLUTIONS: WHAT DO OMBUDSMEN HAVE TO OFFER?

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Introduction and context: The European Network of Ombudsmen

It is a privilege to be here amongst so many colleagues from member and candidate states of the European Union. I am very grateful to M. Jean-Paul Delevoye and Nikiforos Diamandouros, our generous hosts, for their kind invitation to speak today. It is a particular honour to address you in the historic city of Strasbourg, the site of the inaugural meeting in 1996 of the seminar for National Ombudsmen of EU member states and a place inescapably connected in the modern European imagination with those principles of human rights that so inform everything we do as Ombudsmen.

I am mindful too of the context for this discussion offered by Nikiforos' very helpful draft statement in explaining the range of our services and in clarifying the European Union dimension of our work as a European Network of Ombudsmen. What strikes me about that statement is the way it sets the different interlocking components of Ombudsman activity within the overarching EU founding principles of democracy, the rule of law, and respect for human rights and fundamental freedoms. What I want to suggest is that any consideration of remedy, redress and solutions must take account of that broader context in both its parts, the interconnectedness of how we as European Ombudsmen go about our business and the principled context within which we operate. I want to suggest that our core activity of complaint handling, including the delivery of appropriate outcomes to individual citizens, is diminished if it does not pay due regard to what Nikiforos refers to in the statement as working '*proactively to raise the quality of public administration and public services*'.

And I want to go a step further by suggesting that the complete Ombudsman package has even more to offer: the prospect of drawing upon the empirical experience of complaint-handling to drive improvements in service delivery and inform high-level public policy. In this regard, the Ombudsman occupies a privileged position at the interface between theory and practice, policy and process, a position which is shaped and informed by human rights principles but which never loses sight of the richness of individual experience that surfaces in complaints and which lies at the centre of our daily investigative activity.

I want then to tackle this topic of remedy by considering the Ombudsman first as a system of justice, the source of direct benefit to aggrieved citizens. I then want to go on to consider the way in which remedy, conceived as something more than just financial redress or dispute resolution, points towards the larger role of the Ombudsman as a source of wider public benefit - public benefit that comes from the promotion of good

administration and good complaint handling and of improvements in public service delivery, certainly, but that also harbours the ambition of informing public policy.

In doing that, I will draw upon, by way of example, investigations undertaken by my own Office into the administration of the UK tax credit system, and I will conclude by reference to the framework of principle that I have begun to develop with the publication of a set of Principles of Good Administration and of Principles for Remedy.

The Ombudsman as a system of justice

But let me start with the Ombudsman as the source of individual benefit, the overseer of a distinctive system of justice in its own right. We are all familiar with the characteristics of Ombudsman practice that distinguish it from the civil courts and tribunals: its relative flexibility, freedom from binding precedent, absence of formality or cost to the parties. Just as important, though, is the fact that the Ombudsman in carrying out investigations is not just another form of alternative dispute resolution, such as mediation or conciliation.

True, the Ombudsman may be an alternative to the fully-fledged legal process, but the Ombudsman nevertheless shares with the courts and tribunals the essential task of deciding cases, making authoritative findings and putting forward appropriate remedies that do indeed resolve the individual dispute and so bring 'closure'. This is not a form of negotiated justice, whereby the parties are invited to achieve consensus, quite possibly without regard to the rights and wrongs of the situation. On the contrary, there is no escaping the fact that the Ombudsman is in the business of adjudication, not negotiation; and that matters when it comes to the question of remedy.

For Ombudsmen remedy is not just a matter of proposing something to the parties that will leave both feeling bruised and caressed in equal measure, the sort of happy compromise that might give both parties a vague sense of vindication. Instead the Ombudsman has the privilege, and the burden, of using the power of remedy to deliver a form of restorative or corrective justice.

That is what I am doing when I recommend the payment of financial compensation to an individual complainant who has suffered actual financial loss or less tangible injury to feelings. It is what I am doing when I call for an apology or for some other practical intervention to put things right, unravel a bureaucratic tangle or reverse an implausible administrative decision. In this situation I am aiming to perform the conjuring trick of putting the clock back, restoring the parties to the position they would have been in (in fact should have been in) if things had worked out properly the first time without stain of maladministration leading to injustice. It is also what I am doing when I take the further step, scarcely available within the court system, at least not in the English common law world, of ensuring that others in the same maladministrative boat are similarly compensated.

In essence, this is the Ombudsman as the provider of individual benefit through the exercise of a distinctive system of justice, one different in important respects from the courts or tribunals, but a system of justice all the same. And of course with that judicial territory goes the obligation of taking a principled approach to the provision of remedy, more art than science no doubt, but not entirely arbitrary either, as though at the personal whim of the Ombudsman and dependent simply on what she or he had for breakfast. But more of that later.

The Ombudsman as a public benefit resource

As we all know, and this is the critical point, the business of Ombudsman remedy does not stop there at this core activity of delivering individual benefit, as it well might with the courts or tribunals. It is of the essence of Ombudsman practice that it engages not just with the question of individual benefit but with the larger matter of public benefit too. It is not enough just to provide a retrospective cure for maladministration; it is necessary too to have in mind prospective prevention in the wider public interest. I want to suggest that this (what we might call) 'Ombudsman dividend', the little bit of extra return you get on your Euro investment, operates at three levels.

First, there is the ability of the Ombudsman to share expertise on good administrative practice and good complaint handling. This after all is the Ombudsman's special territory, the field of expertise to which the Ombudsman lays claim in the face of all-comers. That sharing activity will very often be closely implicated with the resolution of an individual dispute and represents the most basic of the public benefit initiatives available to the Ombudsman. However, in addition to recommending ways in which the particular complaint might be avoided in future, the Ombudsman has the capacity to identify patterns of maladministration thrown up by an entire sequence of complaints and so to propose principles of practice that will bring about substantive future improvement of administration and complaint handling either within a particular organisation or even a whole sector.

Secondly, let's not forget the wider-reaching ability of the Ombudsman to influence and contribute to the improvement, not just of administration and complaint handling, but of public service delivery itself. In part, this ability is the natural concomitant of improving internal administration: there is, I would want to maintain, an inescapable symbiosis between good administration and the improvement of outward-looking service delivery. Yet beyond that, there is also scope for the Ombudsman to extract the lessons yielded by a comprehensive 'database' of complaints in such a way that she can present a compelling narrative of ineffective service delivery and so bring about insight, a shift in awareness and, if necessary, a change of 'culture' within the public sector. This 'influencing' work is no doubt more remote from the resolution of individual complaints than a more conventional 'system of justice' role might entail, but it is nevertheless part and parcel of the remedial action available to an Ombudsman and ultimately rooted in the core activity of complaint handling. Remedy in other words is not just about the here and now (although it is certainly at least about that) but it is also about the there and then, the future where citizens' encounters with the state have yet to take place and where the Ombudsman is a beacon of hope that things will one day be better.

Thirdly, and most ambitiously, there is the prospect of drawing upon the experience of complaint handling not just to improve administration and improve services and change culture, but to inform policy debate on aspects of public service delivery. Here the degree of abstraction from the facts of a particular case or sequence of cases is greater still, no doubt, yet it finds its origins in the bedrock of complaints handling, whilst nevertheless having as its target the highest level of policy direction and so potentially the highest level of impact, the greatest benefit to the largest number of citizens. This is in effect the gilt-edged Ombudsmen dividend that can transcend the limits of individual redress and effect real and sustainable change for the users of public services at large, in other words the entire citizen body.

This to my mind is the Ombudsman at her or his most challenging, the 'advocate of the people', the 'public defender', not just in the nooks and crannies of an individual dispute

but in what an English author (C.P. Snow) once famously called 'the corridors of power'. From the small acorns of individual complaints should sturdy Ombudsman oak trees grow.

Public benefit in action: tax credits

Let me give an example of how this cumulative remedial effect can work in practice to the public benefit. The example I will give is drawn from my own quite recent experience. In June 2005 I completed a special report into the UK Government's new system for operating tax credits. That report focused in particular on the social group intended to benefit from the reform: low-income families with children, and low-income earners. Drawing directly on the experience of the individual complaints referred to me, I identified an underlying pattern of dissatisfaction that stemmed to a large extent from the Government having adopted a 'one size fits all' system, a system designed to require minimum human intervention and relying instead on Information Technology.

In short, I found that this 'blanket' approach took no account of the very different circumstances and needs within the target group. The result was that the new system often had harsh and unintended consequences for the most vulnerable users of the system, frequently leading to debt recovery action by the Government to retrieve overpayments caused by the malfunctioning of its own reforms and, irony of ironies, casting into debt those most in need of financial support and intended to benefit from the reform in the first place.

On top of investigating the many, many individual complaints (which at one stage accounted for a quarter of all complaints referred to my Office), I made twelve detailed recommendations aimed at improving the administration of the system in its entirety. But I did not stop there: instead, I dared to ask the bigger policy question of whether a financial support system that included a degree of inbuilt financial insecurity could ever in its wildest dreams meet the needs of very low-income families and earners. Now, two years later, in a second follow-up report, published last week, I drew attention to the impact of that financial insecurity on that especially vulnerable client group and to how it is leading to confusion and hardship, and in some cases even to a desire to opt out of the tax credits system altogether. The picture that emerges is one of a tax credit system that, even when working as intended, runs counter to the key policy objective of helping tackle child poverty and of encouraging more people to work by 'making work pay'. That simply cannot be right.

In response the Government is making some changes, most of which it is too early to evaluate. What is important for this session, however, is the way in which this case demonstrates the escalating scale of remedial action, from the resolution of an individual dispute, through the resolution of a number of similar disputes, to the identification of a pattern, and finally the formulation of proposals for remedy that encompass the improvement of administrative practice, including complaints handling systems, the refinement of service delivery and the process of informing broader policy development. As I said in my 2005 report, the design of the system is, in the end, a matter for Government and Parliament, not for me. It is not the place of the Ombudsman to usurp the function of the legislature and the executive. I do, however, see it as my role, as a sort of public interest whistle-blower, to call time out, invite further reflection and leave no one in Government in any doubt that the irrefutable evidence of complainant upon complainant is that these adverse, no doubt unintended, consequences occur time and time again, and they simply must be taken account of in future policy development.

A framework of principle

By way of conclusion, and lest the approach to remedy I am advocating be mistaken for an inappropriate vision of the Ombudsman as populist campaigner going into daily battle on a gleaming white charger, let me return to the minor matter of sobering principle. First there is the question of what counts as good administration in the first place, both at the point of evaluating, retrospectively, the treatment of the individual citizen and of assessing, prospectively, the options for systemic improvement. If I am to make authoritative findings of maladministration, I regard it as incumbent upon me to explain transparently what I consider to be the hallmarks of good administration. At the same time, if I am serious about asking public bodies to learn the larger lessons yielded by complaints and so incorporate those lessons into their future administrative practice, I see it as part of my job to distil for them the key elements of good practice and to hold up to them for future evaluation a picture of good administration against which they can judge themselves and be judged by the public and by me. That is what, in both aspects, my Principles of Good Administration (you should have a copy of these) set out to achieve. They talk about good administration in terms of what I regard as the key elements of good practice: getting it right, being customer focused; being open and accountable; acting fairly and proportionately; putting things right; and seeking continuous improvement.

In the remedial context, it will almost invariably be a failure to live up to these principles that has led to the individual complaint in the first place, and it will be a re-examination of systems and structures in the light of these principles that will help chart the path to future improvement.

In addition, however, if the Ombudsman is to tackle remedy at the various levels I have mentioned, from the small and particular to the large and generic, there must also be a foundation of remedial principle on which to build. Those under scrutiny must know where they stand and against what standards they are to be judged. In my mellower moments, I have described it as a question of achieving 'shared understandings'. It is in that spirit that I have begun in recent months to make more explicit the rules of engagement, as it were, so that no one can say they haven't been warned. When it comes to the business of remedying individual hardship and injustice, and indeed of tackling broader systemic change, I want public bodies to have to hand the tools to put things right themselves. I also want them to know how I will set about the remedial task if they don't pick up the baton.

I have for that reason published a set of Principles for Remedy (you should all have copies of these too) that talk about good remedial practice in just the same terms as the Principles of Good Administration: getting it right; being customer focused; being open and accountable, and so on. This is not a checklist to be applied mechanically but it is a serious guide to the cast of my mind when it comes to remedy, and it is the cast of mind I want public authorities to share, almost without thinking about it.

So much then for the principles I support on good administration and remedy. Let me conclude, appropriately enough here in Strasbourg, with a word about human rights. I have spoken elsewhere about the UK experience of human rights in an Ombudsman setting, and many of us have no doubt been exercised since we met in Athens by the question of to what extent a national Ombudsman institution should take to heart the language and principle of fundamental human rights. I want to suggest finally that human rights principles, the sort of thing Nikiforos has reminded us lie at the centre of the European project, constitute the very texture of the policy influencing I have prescribed

as the top level of remedial action for an Ombudsman. In other words, human rights principles might be said not only to frame the principles that inform good remedy-making and good administration and for that matter good complaint handling but they are also the values that underpin any high-level policy recommendations that flow from the Ombudsman's investigation.

That underpinning will not always be explicit: when I suggested that the UK Government should think again about its tax credit reforms, I did not couch those observations in explicitly human rights terms, but in a different time and place I could have done so, and might indeed do so on another occasion. But the underlying sentiment expressed in those policy observations was at root shaped by human rights observations, they were expressions of doubt about the success of the Government in this instance in paying due regard to the individual dignity of some of the most vulnerable in society, in respecting, to a greater or lesser extent and no doubt indirectly, their rights to found a family, to enjoy a meaningful private life, to develop their personalities according to their own design and to participate fully in civic and social life.

That in my view is at the end of the day what human rights principles are all about; it is what the European endeavour is all about; and it is what we as Ombudsmen in Europe are all about, as we grapple with individual complaints and with the remedies that will make a real difference.

I know that my colleagues from Norway and Slovenia are poised to offer their own reflections. I very much look forward to hearing what they have to say.

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