

Presentation by Professor P. Nikiforos Diamandouros, European Ombudsman, at the 10th World Conference of the International Ombudsman Institute, Wellington, New Zealand, 15 November 2012.

Ensuring ethics in Public Administration: Can the Ombudsman remain a credible and relevant recourse for our citizens in the 21st Century, when there are alternative/less formal channels of redress available.

*** Check against delivery ***

Introduction

Honourable colleagues, ladies and gentlemen, I am especially pleased to be able to address you this morning and would like to thank Dame Beverley for inviting me to speak in this important session.

As we all know, the modern Ombudsman is a relatively new institution, associated with the spread of democracy and the rule of law, the growth of the state and especially its welfare functions and - most importantly - heightened concern for human rights.

The Ombudsman, however, also has a long history, with deep constitutional roots in the division of power between the executive and the legislature, as exemplified by the original Swedish formula of 1809.

Where do we then stand, as both a new and old institution? What challenges do we face?

Certainly, one pressing challenge is austerity in public services across the globe, and another - not unrelated - is the increasingly "blurred" or "porous" nature of the boundary between "public services" and the private provision of services resulting from various reforms (in which New Zealand has been a leader) and which are often labelled "new public management".

On the other hand, the citizens whom we serve, and the public institutions whose performance we are tasked to help improve, face diverse challenges, be they technological change; environmental, economic and financial problems; increasing but also ageing population; and many others, including migration.

All these challenges are neatly reflected in the evolving relationship, in each country, between the state and its citizens. In turn, the expectations which citizens hold of the state that serves them is a function of two central parameters: the problems that citizens face and the tools they have at their disposal in order to make their demands known.

Ombudsmen must be both responsive to the changing needs and demands of citizens and at the same time, aware of the pressures and constraints that public institutions face. Failure to meet citizens' expectations may lead to loss of credibility and to seeking solutions elsewhere. Equally, failure to recognize the

limited resources which public institutions have to respond to such expectations may lead to a breakdown in the relationship between the Ombudsman and the state. Such a potential development will also be detrimental to citizens.

What should be the response of the ombudsman community to the challenges which citizens and public institutions face and to the challenges we face ourselves?

In my view, the starting point should be to focus on the essential objectives of the Ombudsman institution: on our “core business” to borrow the language of new public management.

Let me begin with a negative point. In my view, it is not part of an Ombudsman’s core business to serve as the front-line in dealing with complaints about public services. Instead, we should insist that public bodies must establish and operate their own complaints mechanisms and ensure that they are effective. I know that many colleagues share this view and some have already acted upon it over a long period. That implies, of course, that we should not regard public bodies’ own complaints mechanisms as a form of undesirable competition.

Turning now to the positive, for reasons that I shall develop in my remarks, I believe that a core objective of the Ombudsman institution should be to promote and monitor high ethical standards in public administration. Undoubtedly, the challenge in an evolving society is always to maintain or improve standards - including ethical ones.

In my view, the two challenges I have mentioned, austerity and the blurring of the line between public and private, make it even more essential, as well as even more difficult, for the Ombudsman to pursue and achieve this objective.

How this can be done by the Ombudsman – taking into account the issues and concerns I have already alluded to – will be the central theme of my presentation.

Ethics in Public Administration

In the public sector, ethics seek to address the fundamental issues relating to the civil servants’ duty to act as a “steward” for the public. In my mind, “stewardship” thus conceived refers to the core values which should guide the judgment of public servants in the performance of their daily tasks and in their relations with the public.

Most importantly, ethical considerations provide the standards of accountability that can be used to scrutinize the work of civil servants. Sound public administration involves public trust. Citizens expect public servants to serve the public interest, to manage public resources properly on a daily basis, and to make individual decisions fairly. Fair and reliable public services and predictable decision-making inspire public trust. The integrity, transparency, and

accountability of public administrations are prerequisites for, and underpin, public trust, as a keystone of good governance.

Trust depends upon a belief in the integrity of officials, who are expected to conduct themselves in a manner that will bear the closest possible scrutiny. I hasten to add that this obligation is not fully discharged just by acting within the law. Trust also requires that officials make recommendations and decisions only with an eye to serving the public interest, that is, not in order to benefit themselves, their families, or their friends.

On the other hand, misconduct on the part of those who have been entrusted with guarding the public interest and resources has implications for public institutions, in terms of trust and also confidence. Nothing erodes trust faster than unethical conduct, particularly when such conduct could be seen as the result not only of individual acts but also of systemic failure and as evidence of “weak governance”.

In consequence, the importance of articulating the ethical principles and the values that define and underpin a well-constituted, modern public service cannot be overstated. In a democratic legal order, it is essential (i) to provide both public officials and the public at large with a common frame of reference regarding the principles and standards to be applied and (ii) to assist public officials to develop an appreciation of the ethical issues involved in effective and efficient public service delivery.

As with any other professional activity, ethical behaviour in the civil service is promoted both through legal rules and through ethical standards that underpin and, at the same time, go beyond the legal requirements.

In modern democratic orders, the conduct of public bodies and officials is regulated and limited by procedural and substantive law. This applies especially to their competencies and to the exercise of discretionary powers and constitutes an essential feature of the rule of law. The conduct of such bodies and officials is also limited by the obligation to respect the rights of individual citizens, including human rights and fundamental rights. Individual rights also include rights that derive from the application of administrative law principles, for example, proportionality, non-discrimination and legitimate expectations.

In addition, other instruments exist, such as codes of conduct and statements of principles, which are not legally binding. They express important values and standards that are also to be found in the law, but are not encumbered by the limitations and constraints that necessarily attach to legally-binding rules that can be used to impose sanctions.

Even though failure to observe these values and standards does not constitute illegality, a kind of bridge exists, through which the obligations voluntarily assumed by an institution, as for example, when it adopts a code of conduct, may, under certain conditions, crystallise into legally-binding obligations that are subject to judicial review. More frequently, however, failure to respect such

standards is invoked before extra-judicial control mechanisms, such as the ombudsman, and can be taken into consideration when interpreting and applying legal rules.

Any discussion about living up to ethical standards needs, therefore, to involve not just clear and effective legislation, which coexists with moral principles, but also recognition of the importance of independent, well-crafted and strong watchdog bodies and control mechanisms. Unethical behaviour that amounts to illegality can, in principle, be challenged before the courts. Nevertheless, it is crucial that, in parallel, scrutiny be also entrusted to extra-judicial mechanisms including, of course, ombudsmen.

One of the central aims set out in my own mission statement as European Ombudsman is “building trust through dialogue between citizens and the European Union and fostering the highest standards of behaviour in the Union’s institutions.” My role, therefore, is to assist the EU institutions in maintaining that essential trust. This can be achieved in various ways. The obvious one is by monitoring the institutions’ conduct in particular cases brought to me by complainants. Through complaints-handling, I have the opportunity to recommend courses of action that comply with the principles of good administration and are inspired by the highest standards of ethical conduct. This *modus operandi* is the reactive function of the Ombudsman, that is, responding to complaints.

Nevertheless, the Ombudsman’s contribution is broader than merely resolving individual cases. Ensuring good governance, in other words, the proactive function of the Ombudsman which entails proposing changes in the functioning of the administration, is, I believe, equally valuable. This role of the Ombudsman can be conceptualised in three categories: (a) making ethical rules more visible, (b) interpreting legal obligations in the light of ethical principles and (c) engaging with the institutions.

Identifying and codifying the principles that should guide the professional conduct of civil servants in their relations with the public is necessary for two reasons: firstly, doing so enables officials to be fully aware of the rules they should abide by and apply when coming into contact with the public and points them towards the best administrative standards; secondly, it helps citizens understand exactly what they can expect from the administration.

These two considerations underpin the European Code of Good Administrative Behaviour, drafted by my predecessor, Jacob Söderman, and adopted by the European Parliament in 2001. The Code is an example of how legally binding rules can co-exist with ethical principles, as well as of how the Ombudsman can foster high standards of behaviour in the EU civil service through a non-legally binding text. In preparing the Code, the European Ombudsman consulted extensively with colleagues in the Member States of the EU.

The Code brings together into an easily readable and understandable document both legally binding rules and non-legally binding principles. Drawing

inspiration from the case law of the European Court of Justice and the administrative law of the EU's Member States, the Code contains a number of substantive and procedural principles of administrative law, such as the principles of lawfulness and proportionality, the prohibition of discrimination, the rights of defence and the duty to state grounds for decisions. At the same time, it contains requirements, such as courtesy, that are not legally enforceable.

The Code has had significant influence in, and impact on, the administrative culture of the EU civil service. It has also proved to be an important tool of empowerment for citizens. Often, citizens who turn to me make reference to the Articles of the Code when submitting their complaint.

The experience with the Code has led me to the view that European citizens expect people working at all levels of the EU to behave in accordance with high ethical standards. I have therefore recently published a short document of "Public Service Principles" which identifies, in a succinct and easily understandable form, the ethical principles which EU civil servants should apply in handling EU matters and in their relations with citizens and users.

In pursuit of this goal, I first contacted the national ombudsmen within the European Network of Ombudsmen, with an eye to obtaining information on national statements of ethical principles in public life. Subsequently, I held a public consultation on the draft through my website, inviting citizens and interest groups to submit comments. The adopted document identifies five Principles: commitment to the EU and its citizens, integrity, objectivity, respect for others, and transparency.

There is nothing particularly new here. The principles have been brought together from various sources with the aim of presenting them in an easily intelligible form and with the intention of complementing existing instruments that contain general rules and principles governing the behaviour of civil servants.

This statement of ethical principles complements these other instruments because, unlike them, it is neither legally binding, nor drafted with the idea that it could be made legally binding in the future. It is intended to help civil servants focus on the spirit in which the law and other applicable rules should be understood and applied, as well as serve as the starting point for reflection when a situation appears not to be covered by the law or other applicable rules.

This is useful because, whilst ethical principles include compliance with legal rules, they are not limited to such compliance. Put otherwise, to say "I broke no legal rule or principle" constitutes a necessary, but not a sufficient condition for ethical conduct.

It follows that the relevant question for an official considering a particular course of conduct should not be: "Am I doing the minimum necessary to comply with the ethical principles?" but rather "would a reasonable person think this is how an official should behave in the light of the ethical principles?" Such an approach

will promote good administration and make maladministration less likely to occur.

In parallel, by clearly setting out the fundamental principles and values, which the behaviour of EU civil servants should reflect, the statement aims to promote citizens' trust in the European civil service and the institutions it serves.

Whenever possible, when dealing with complaints, I try to propose interpretations and solutions that are not imposed by legal provisions alone, but also take into account ethical standards. Even if I sometimes still receive replies from Institutions which can be summarised as “our position complies with the law and we will not change it unless ordered to do so by a court”, the institutions of the EU have over time become increasingly more willing to accept my suggestions.

Let me provide you with a concrete example, which will hopefully be useful for present purposes:

Avoiding conflicts of interest is an issue that concerns both law and ethics. There are countless rules defining conflict-of-interest issues in the public administration, and also in the private sector. They range from legal provisions to recommendations and guidelines. In 2008, an NGO, Friends of the Earth Europe, complained to the Ombudsman that two high-ranking European Commission officials had accepted VIP tickets from a sportswear supplier for the opening game of the Rugby World Cup in Paris in 2007. The complainants alleged that this could have resulted in a conflict of interest, since both officials dealt with anti-dumping cases in which the sportswear supplier could be interested.

In its opinion, the European Commission pointed out that it had already developed a set of rules and principles regarding ethics. The two officials had asked for permission to accept the tickets, and this had been granted in accordance with the existing rules.

Drawing inspiration from OECD recommendations on the matter, I took the view that, in order to maintain public trust and confidence in its activities and to protect staff from unjustified suspicion, the Commission should do its utmost to avoid not only actual conflicts of interest but also apparent conflicts of interest.

The Commission acknowledged that it would have been better not to have allowed the officials to accept the tickets and informed me that it was updating its internal rules relating to the acceptance of gifts. In this case, it is clear that the Commission did not infringe any legal provision and was under no legal obligation to review its rules. Nevertheless, it accepted my proposal with a view to improving ethical standards.

Engaging in a regular and structured dialogue with the Institutions for which I serve as an external mechanism of control constitutes a central part of my deeply held view that the Ombudsman should not be regarded as an institutional

expression of a culture of blame, which tends to breed a defensive mentality in the institutions and staff. My objective rather is to promote a *culture of service* to citizens and of active respect for their rights. An integral part of my efforts to achieve that aim is a systematic examination of the follow-up to all the critical and further remarks I issue to the institutions each year. These remarks contain constructive criticism and suggestions that I have made to the institutions involved and are meant to serve as a stimulus for them to reflect upon whether the handling of a complaint has provided any information that can be used to raise the quality of their administrative practice in the future.

The overall results of these follow-up studies have been very encouraging. Most institutions have adopted a constructive and positive approach both to criticism and to suggestions, and have introduced real improvements in a wide range of their administrative practices. Where the follow-up is considered to be exemplary, I identify the case involved as a “star case” and include it in a special section in my annual report highlighting the institution's behaviour and meant to further motivate its staff.

Dear colleagues, ladies and gentlemen, I hope the preceding analysis has given you some indication of how I think an Ombudsman can help maintain and indeed improve ethical standards in public administration, even in a complex, difficult and ever-evolving world.

Promoting an administrative culture of service to citizens requires more of a moral than a financial investment on our part. It asks of us to be proactive, to be imaginative and to be creative in thinking of ways through which we can contribute to bringing about changes in the mindset of the public administrations for which we are each responsible. Such ways include, but are certainly not limited to, systematic networking with colleagues and continuous engagement with the public; persuading administrations that acting proactively can be a winning - and low-cost - solution to enhancing citizens' trust.

Above all, however, promoting an administrative culture of service to citizens demands of us the intellectual ability and administrative capacity to ensure that, within our own institutions, we adopt flexible and user-friendly procedures and maintain the highest ethical standards. That is the necessary foundation on which to build the moral and political capital that we need in order to live up to the added responsibilities and heavy expectations associated with our being viewed as important institutional counter-weights to executive power, endowed with moral authority capable of contributing substantively to the deepening of the rule of law and to the enhancement of the quality of democracy within our respective legal and political orders. And that is worth striving for, especially in changing and challenging times.

Thank you for your attention.