

# ENSURING FAIR TRIAL: THE EU OMBUDSMAN AS A PROTECTOR OF FUNDAMENTAL (HUMAN RIGHTS) IN ADMINISTRATIVE PROCEDURE\*

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**Abstract:** According to Arts. 20 and 24 of TFEU, European citizens are entitled to apply to the European Ombudsman. This right, stemming from European citizenship, is furthermore explained in Art. 228 TFEU, stating that any citizen of the Union or any natural or legal person residing or having its registered office in a Member State can complain in instances of maladministration in connection with the activities of the Union institutions, bodies, offices or agencies.<sup>1</sup> Although classical ombudsmen do not have an express mandate for human rights protection and promotion, the violation of human rights by government institutions and bodies as maladministration falls within their mandate. The paper shows that the European ombudsman as a true classical ombudsman at the supranational level not only uses human rights norms and applies them in human-rights related cases but as well creates human right. The paper thus addresses its role and thus offers a clear view about its position among other EU institutions.

**Keywords:** EU administration, EU Ombudsman, fundamental rights, maladministration

## 1 INTRODUCTION

As the former Secretary-General of the United Nations, Kofi Annan stated "... good governance comprises the rule of law, effective state institutions, transparency and accountability in the management of public affairs, respect for human rights" and "...human rights also come to be seen as an integral element of good governance".<sup>2</sup> His finding, as a broad approach of good governance was strengthened as well by the Council of Europe Commissioner for Human Rights when he pointed out that "...all Ombudsmen have an important role to play in the defence of human rights. Whilst explicit reference to human rights protection may be absent from the mandates of certain Ombudsmen, it is clear that human rights violations by state authorities constitute, at the same time, serious cases of maladministration, and, as such, fall within the concerns of even the most narrowly defined institutions".<sup>3</sup> As early as in 1974, at the meeting of the Parliamentary Assembly of the Council of Europe a Recommendation had already been adopted on the role of the ombudsman and the parliamentary commissioner, taking into account the ombudsman and the parliamentary commissioner as (for) the protection of individuals against the authorities and in principle to promote good governance. It pointed out that the citizens' lives are increasingly governed by the authorities, and where the protection of fundamental rights are supervised by the state, the interferences of public authorities into the lives of individuals threaten their fundamental rights. It stated that the usual forms of judicial remedies are not always able to react with the necessary speed and efficiency to the problems and to the complexity of different fields of the administration thus there is a need for a further guarantee, which is simpler, quicker,

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<sup>1</sup> Except the Court of Justice of the European Union acting in judicial role.

<sup>2</sup> Annual Report of the Secretary-General on the Work of the Organization, 1997. UN Doc. A/52/1 paragraph. s. 22, 27.

<sup>3</sup> Council of Europe Commissioner for Human Rights, 3rd Annual Report January to December 2002, CommDH 2003, s. 7.

cheaper and more efficient, and this could be provided by the ombudsman.<sup>4</sup> Furthermore in another Recommendation adopted in 1985 the Council of Ministers affirmed this view when recommended "...to consider extending and strengthening the powers of Ombudsmen in other ways so as to encourage the effective observance of human rights and fundamental freedoms in the functioning of the administration".<sup>5</sup> In the following, I will highlight the above-mentioned roles attached to the ombudsman-scheme but at the supranational dimension.

## **2 THE EU OMBUDSMAN AS A CREATOR OF FUNDAMENTAL (HUMAN) RIGHT?**

Before the Maastricht and the Amsterdam Treaty, the Court of Justice took up the task to elaborate community law on human rights, and developed jurisprudence that fundamental human rights are general principles of community law. Although the Maastricht Treaty enshrined the human rights as general principles of community law, it had not listed the fundamental rights of citizens: only Article 6 of the Treaty declared that the Union shall respect the fundamental rights and simply referred to the European Convention on Human Rights.<sup>6</sup> However, the latter could have not been enforced versus the EU institutions in such a way as against the Member States. Although the European Commission has proposed that the Community should join the Convention, in March 1996 the European Court of Justice rejected the decision, stating that Article 308 of the TEC did not permit it as "...if action by the Community should necessary to attain, in the course of the operation of the common market, one of the objectives of the Community, and this Treaty has not provided the necessary powers, the Council shall, acting unanimously on a proposal from the Commission and after consulting the European Parliament, take the appropriate measures" does not offer sufficient legal basis for the fundamental institutional change that would be a result of accession to the Convention.<sup>7</sup> This situation has led to the development of the Charter of Fundamental Rights which was adopted by the Nice European Council and later the European Parliament, the European Commission and the Council published a joint statement of the Charter.

With the declaration of fundamental (human) rights listed in the Charter, the European Union intended to strengthen the Union's commitment to human rights and outline the general human rights policy. This was a very important step, even if the Charter before the Lisbon Treaty itself – for example unlike the provisions of international treaties on similar subject concluded under the TEC – had no legally binding nature, but only gave a base for the EU legislation and legal interpretation. The Charter records in 50 Articles all traditional human rights and among others the right to good administration is declared.

As for the Office of the EU Ombudsman, the Maastricht Treaty established this forum in connection with the European citizenship. The European citizenship was needed to introduce because the early period of European integration gave no role to citizens and for the deepening of integration a sort of identification and means of demonstrating a European 'added value' were required.<sup>8</sup> Also, citizenship offered a direct link between the Union and its citizen. Arising from the European citizenship, any European citizen or any natural or legal person residing or having registered office in a Member State of the Union may, directly or through a Member of the European

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<sup>4</sup>Recommendation 757 (1975) on the conclusions of the Assembly's Legal Affairs Committee with the Ombudsmen and Parliamentary Commissioners in Council of Europe member states (Paris, 18–19 April 1974).

<sup>5</sup>Recommendation No. R. (85) 13 of the Committee of Ministers to Member States on the Institution of the Ombudsman (Adopted by the Committee of Ministers on 23 September 1985 at the 388th meeting of the Ministers' Deputies).

<sup>6</sup> Article 6 of TEU declared "...the Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community law".

<sup>7</sup> According to the Lisbon Treaty the Union can accede to the European Convention of Human Rights and Fundamental Freedoms.

<sup>8</sup> WARLEIGH, A. Purposeful Opportunists? EU Institutions and the Struggle over European Citizenship. In: BELLAMY, R.–WARLEIGH, A. (eds): Citizenship and Governance in the European Union. London, 2001, s. 22.

Parliament, refer a complaint to the Ombudsman in respect of an instance of maladministration regarding the activities of Community institutions or bodies, with the exception of the Court of Justice and the Court of First Instance acting in their judicial role. Under the definition of maladministration the complex of procedural obligations of the administration can be understood which arise in relations with the public, with the citizens, and which procedural obligations can gradually increase. Although in different ways, the definition of good administrative practices (good administrative behaviour) had been used by the European law since the 1960s, enshrined through the activities of the European Court of Justice.<sup>9</sup>

According to the EU ombudsman, in order to prevent an instance of maladministration, the practice of good administration shall be followed. We can see in the office's case-law that after he conducted an own-initiative inquiry in 1998 – where the subject matter was the correct procedure determining the relation between the public officials of Community bodies and institutions – to clarify the term of good administrative procedure, he prepared the so-called European Code of Good Administrative Behaviour. The investigation was initiated because of complaints where the offences could have been avoided with a clear and public record of the obligations of the Community officials. I shall point out that the Code can be seen as one of the achievements of the original intentions regarding the establishment of the office: the Union's commitment to a more accountable and transparent administration. Thus, the institutions and their officials are obliged to respect and to follow the principles of good administrative conduct laid down in this code. However, I see the effects of this code in two directions. First, the code gives the opportunity to the official to avoid an instance of maladministration. Second, European citizens who are familiar with the code, can require from the official during the administrative procedure the basic principles set out in it.

I shall point out that in the Finnish Constitution you can find the concept of good administrative behaviour and thus procedural guarantees cumulated in the behaviour are constitutionally protected as fundamental right. I think, this is an important fact taking into consideration that the first ombudsman, Jacob Söderman, was a former Finnish Ombudsman. If he had not been a former Finnish ombudsman, would have the right to good administration appeared into the Charter? As a EU ombudsman, he wanted as well a similar fundamental right enshrined in the Charter of Fundamental Rights. And the right to good administrative procedure, embodied in the code, had been formulated in to the Charter as a right enjoyed by the European citizens as Article 41<sup>10</sup> with the European office as means set out in Article 43<sup>11</sup>.

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<sup>9</sup>The principle of good administration is enshrined in Court of Justice judgement of 31 March 1992 in Case-255/90 P, *Burban* (1992) ECR I-2253 and Court of First Instance judgements of 18 September 1995 in Case T-167/94 *Nölle* (1995) ECR II-2589, and 9 July 1999 in Case T-231/97 *New Europe Consulting and others* (1999) ECR II-2403. See Council of the EU: Charter of Fundamental Rights of the EU. Explanations relating to the complete text of the Charter. December 2000. Office for Official Publications of the European Communities, 2001. 58.

<sup>10</sup> Article 41:

1. Every person has the right to have his or her affairs handled impartially, fairly and within a reasonable time by the institutions and bodies of the Union.

2. This right includes:

– the right of every person to be heard, before any individual measure which would affect him or her adversely is taken;

– the right of every person to have access to his or her file, while respecting the legitimate interests of confidentiality and of professional and business secrecy;

– the obligation of the administration to give reasons for its decisions.

3. Every person has the right to have the Community make good any damage caused by its institutions or by its servants in the performance of their duties, in accordance with the general principles common to the laws of the Member States.

4. Every person may write to the institutions of the Union in one of the languages of the Treaties and must have an answer in the same language.

<sup>11</sup> Any citizen of the Union and any natural or legal person residing or having its registered office in a Member State has the right to refer to the Ombudsman of the Union cases of maladministration in the activities of the Community institutions or bodies, with the exception of the Court of Justice and the Court of First Instance acting in their judicial role.

The importance of the Charter – which became legally binding across the EU when the Treaty of Lisbon entered into force – was already emphasised when it was incorporated into the draft European Constitution. In this preliminary draft constitutional treaty an article on citizenship of the Union was included as well. And among the new rights was the right to complain to the ombudsman as a new forum for legal redress, as this new forum would contribute to the achievement of an open, reliable service oriented “government”. It is no surprise that the then ombudsman, Jacob Söderman, actively participated in the framing of that draft treaty, and he was in the opinion that in the next draft a provision should clearly refer to the right to complain to the ombudsman, which would be consistent with the national constitution of several Member States: adopting subsidiarity and openness as fundamental principles would provide the legal basis for the adoption of an open, reliable, accountable and service oriented public administration. Furthermore, it seemed necessary to make citizens aware of the remedies: judicial and non-judicial that include the courts, the ombudsmen and committees of petitions at all levels of the Union. The ombudsman emphasised that the draft constitutional treaty should include the objective of the good administration and the relevant legislation for the adoption of special measures in this context. Although Article 47 of the Charter states that citizens have the right to an effective remedy, it does not specify what remedies are, so it is recommended that there should be a review of the possibilities to all remedies in a separate chapter of the draft treaty. According to him in the chapter first the courts should be mentioned. Protecting the rights stemming from European law the citizen should be informed about the possibility of recourse to national courts as well to defend their rights under European law. In addition, the role of the Court of Justice and the right to complain to the ombudsman or similar body in each Member States should be mentioned.<sup>12</sup> During the drafting process the ombudsman once again submitted his proposal, in which he held that it is important to record in Article 1 the principle laid down in the Maastricht Treaty as well that decisions should be taken as openly as possible and as close to the citizens as possible. Previously he proposed that good administration should be inserted as an objective of the EU, but as another proposal suggested placing this as a right attached to European citizenship, he supported the latter. During the drafting process, Söderman was succeeded by the new European ombudsman, Nikiforos Diamandouros, who followed in Söderman’s steps. He suggested that the ombudsman should be included in the part which lists the institutions of the EU, explaining that the Committee of the Regions or the Economic and Social Committee have been included as well, and all three have the same budgetary and administrative status. Also, the election of the ombudsman by the European Parliament should be emphasised which would be an additional guarantee to the ombudsman’s independence. He drew attention to the fact that although the right to complain had been achieved by recording it in the draft version and the right to good administration had been recorded in the Charter, real and visible results will only be achieved if the constitutional treaty would refer to the non-judicial remedies, too.

The above mentioned events were necessary to be presented to make understand the active role of the ombudsman in connection with creating the fundamental right to good administration. I shall emphasise the following. When looking into the final form of the constitutional treaty, the Charter consisted the second part, stating that European citizen could turn to the ombudsman (Art. II-103, Title V) on the ground of the right to good administration (Art. II-101, Title V). In Article I-49, Title VI on the democratic life of the Union, we could see that the EU Ombudsman, elected by the European Parliament shall receive, examine, and report on complaints about maladministration in the activities of the Union institutions, bodies, agencies, under the conditions laid down in the Constitution. I shall point out that the draft talked about union institutions and bodies, and contrary to the TEU and the Statute, the agencies were included as well. This means that the novelties of the Amsterdam Treaty had been taken into account, too.

### **3 THE PROTECTION OF FUNDAMENTAL (HUMAN) RIGHTS BY THE EU OMBUDSMAN**

Although classical ombudsmen do not have an express mandate for human rights protection

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<sup>12</sup> SÖDERMAN, J. The Convention, the Charter and the Remedies. EPC Dialogue: The Convention and the Charter of Fundamental Rights, The European Policy Centre, Brussels, 25 February 2003.

and promotion, the violation of human rights by government institutions and bodies as maladministration falls within their mandate, thus the European ombudsman as a true classical ombudsman at supranational level uses human rights norms that are part of the applicable legal system and applies them in human rights related cases. Hence within his mandate the European ombudsman can inquire in human rights matters when European citizens complain about maladministration comprising a breach of community human rights law by community institutions, bodies, offices and agencies..

We can see since the first annual report that the European Ombudsman constantly represented the view that three types of errors may give rise to an instance of maladministration and which may even to some extent partly cover each other. These types can be identified as a failure to comply with a legal norm or principle, failure to prevail the principle of good administration and failure to respect human and fundamental rights. For example, the European Ombudsman often referred in the past during his investigations to Article F of the Maastricht Treaty which ordered the Community institutions and bodies to respect fundamental rights.

I shall point out that the European ombudsman's activities are multiple concerning the field of the protection of fundamental rights. First, it promotes the respect of the Charter. Second, during the investigation of the possible instance of maladministration, he takes into account the rules and principles set out in the Code. The ombudsman conducted own-initiative inquiries regarding the Charter and the specific rights were used as well in the handling of submitted complaints. Third, even before the Charter became legally binding, the ombudsman has already stated that the violation of the rights in the Charter constitutes maladministration. We should mention the opinion of the Court of First Instance in the Tillack-case when it pointed out that the principle of sound administration, does not, in itself, confer rights upon individuals except where it constitutes the expression of specific rights such as the right to have affairs handled impartially, fairly and within a reasonable time, the right to be heard, the right to have access to files, or the obligation to give reasons for decisions, for the purposes of Article 41 of the Charter of Fundamental Rights of the European Union, proclaimed on 7 December 2000 in Nice.

When looking at the subject matter of human rights related cases we can observe that they vary from gender, age, disability and other kind of discrimination to professional certification, nationality, language, employment, health care or environmental issues. The cases show that the ombudsman successfully refers to the rights set out in the Charter against the main institutions, too.. For example the EU ombudsman forwarded a special report to the European Parliament about the indirect gender discrimination against women in the use of national experts at the European Commission and as a result the Commission abolished the disputed rule. In addition, he cited among others Article 21 of the Charter when he has recommended the abolition of age limit in the trainee program of the European Parliament and the Parliament annulled the age limit. Moreover the ombudsman pointed out on the ground of Article 41 of the Charter and the European case law that good administration behaviour laid down in the 'Commission Communication on the relation with the complainant in respect of the infringement of the community law is applicable as well after the letter of formal notice has been submitted and the Commission adopted this opinion.

#### **4 CONCLUSION**

First, the European ombudsman as a non-judicial forum uses the decisions of the Court of Justice – which applies among others the European Convention on Human Rights and the United Nations human rights treaties for its decision – during the investigations, thus helps next to the judicial way to enforce community human rights law. Second, as we could see, the European office has not only fulfilled but I may say, overachieved the expectations of its establishment: we can see the ombudsman as a creator of fundamental right, because placing the right to good administration into the Charter of Fundamental Rights was the achievement of the European ombudsman. This clearly shows that he not only can form soft law but can create specific fundamental rights. The two directions underline the ombudsman's role that the office is a part of the protection system of the fundamental rights. As for the Lisbon Treaty, Art. 6 states that "...the Union recognises the rights, freedoms and principle set out in the Charter of Fundamental Rights of the European Union ... which shall have the same legal value as the Treaties". The commitment to the binding nature of the Charter in the Lisbon Treaty reflects the gradual understanding that citizens should be placed at the heart of the European issues which shows the success of the European Ombudsman as well. I wish

to underline, that the Charter was the first international legal document with explicit declaration of the right to good administration which was achieved by the active contribution of the EU ombudsman.

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