



# How to Develop a True European Society: the Ombudsman Institution

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**Abstract.** Since 2004, the European Union has been visibly enhancing its law with direct impact on the citizens' quality of life. Starting with 2006, a new strategy for deepening the cohesion of the European Union this law is about to be implemented. The citizens could and should become more and more aware of the existing and evolving European constitutional order, where the Western-type, pluralist democracy, on the one hand, and the rule of law, on the other hand, are the main pillars of the polity. The ombudsman/mediation around Europe and beyond is a central tenet of this evolving new order. In 2015, the strategy became visible at the level of both the European Union as a whole and of its Member States. The key issue is to enhance the good governance via an ever better public administration.

**Keywords:** quality of democracy, European constitutional order, mediation, European deepening, ombudsman, European society

Public administration is the best place for practice and social science to meet in order to deliver the best services available for the citizens. A review of a list of selected, relevant EU and International documents enables us to better understand the strategic development of a true 'Europe of Citizens'. A short list of such documents would gather:

1/ European Ombudsman, press release No 10/2015 – 'Ombudsman welcomes improvements to Commission expert groups', 3 June 2015;<sup>1</sup>

2/ Speech by the European Ombudsman, Emily O'Reilly, at the 10<sup>th</sup> National Seminar of the European Network of Ombudsmen;<sup>2</sup>

3/ Final Report, Meeting of the Presidents of the Regional and International Networks of the Institutions for Institutional Mediation, Rabat, 6 and 7 July 2015;<sup>3</sup>

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1 European Ombudsman 2015a.

2 European Ombudsman 2015b.

3 Le Médiateur du Royaume du Maroc 2015.

4/ European Ombudsman Institute website, historical section (European Ombudsman Institute 2016a);

5/ Nikiforos Diamandouros, Ombudsman institution and the quality of democracy, CIRCAP: Università degli Studi di Siena Speech on 17 October 2006.<sup>4</sup>

Several events marked year 2015 as one where the implementation of what could be called a strategy for the development and advancement of a Europe of Citizens started.

## I. Implementation and First Steps

First of all, on the 3<sup>rd</sup> of June 2015, in its press release No 10/2015, the European Ombudsman ‘welcomes improvements to Commission expert groups’.<sup>5</sup> The same press release further states that ‘[t]he European Ombudsman, Emily O’Reilly, has welcomed the Commission’s agreement to improve its system of expert groups in response to proposals made by her in an own-initiative investigation. Hundreds of such advisory groups play a crucial role in the development of EU legislation and policy’.<sup>6</sup>

In January 2015, the Ombudsman sent a list of proposals to the Commission on how to address several shortcomings in its expert groups system. This followed a public consultation, during which respondents cited issues such as perceived corporate dominance of certain groups and potential conflicts of interest of certain experts.<sup>7</sup>

The European Ombudsman equally announced ‘a separate investigation’, where it ‘is looking into whether DG AGRI has properly implemented the obligations laid down in its legally-binding framework for ‘civil dialogue groups’.<sup>8</sup>

A second event of this series took place in Warsaw, Poland, on the 27<sup>th</sup> of April 2015, where Ms Emily O’Reilly, European Ombudsman, gave a speech at the 10<sup>th</sup> National Seminar of the European Network of Ombudsmen. The speech is called *Developing the European Network of Ombudsman, towards 2019*. According to Ms O’Reilly, since 2013, the Institution has been striving to focus on three mutually reinforcing objectives, that is impact, relevance, and visibility.

4 Diamandouros 2006.

5 European Ombudsman 2015a.

6 European Ombudsman 2015a.

7 European Ombudsman 2015a.

8 European Ombudsman 2015a.

The key purpose of the Network is, and will remain, to enable Network members to be fully informed of developments in EU law and policy, particularly wherever those developments are of greatest relevance to their work at the national and regional levels, to facilitate access to expertise within the EU institutions for members of the Network, and to encourage co-operation between the European Ombudsman and other members of the Network through parallel investigations on topics of mutual interest.<sup>9</sup>

The European Ombudsman suggests:

that the Network's national, regional, and liaison seminars continue to be held every two years but that they all be held in Brussels; that the EU institutions be invited to play a more active role in the seminars; and that the seminars be web streamed live in order to enable Network staff members throughout Europe to follow the proceedings as well as interested members of the public.<sup>10</sup>

In other words, the ombudsmen across Europe are to become active actors in a citizens' Europe about to be established by their very actions of rendering the local, regional, national, and European administrations truly accountable to the citizens of the twenty-eight member states.

The present rate of meetings of the Network is, however, limited to three every two years, which is judged to be too few for the scope of the Network. Therefore, the European Ombudsman proposed to:

explore the possibility of organising regular webinars, videoconferences, or other such solutions to bring Network staff together on a more regular basis; [t]o encourage co-operation that focuses on specific functional activities of staff through these online meetings; [t]o make a dedicated space available in the Extranet for these functional groupings of staff, once established, to share information with each other throughout the year.<sup>11</sup>

These measures are to be the main tools and instruments of a kind of ombudsmen's 'rapid reaction force' throughout Europe since '[t]he development of online meetings has the potential to increase the relevance of the Network to staff members throughout member institutions and to facilitate co-operation. It

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9 European Ombudsman 2015b.

10 European Ombudsman 2015b.

11 European Ombudsman 2015b.

also has the potential to adapt and evolve to meet changing needs, with groups being created, developed, scaled-back, or disbanded as priorities evolve'.<sup>12</sup>

An additional instrument is the Query Procedure, by which – since the Network was created in 1996 – dozens of ombudsman offices have submitted queries to the European Ombudsman about European Union law issues arising during the inquiries conducted by their offices. Since the percentage is, however, low, the European Ombudsman suggests to make the query procedure more visible to the more than one hundred Network members by providing more information on the positive impact that the query procedure has had for the offices that have used it; thus, the relevance of the procedure for ombudsmen and committees on petitions can be greatly increased. Daily relevant members' news are to be broadcast over the Network. This looks like 'internal' European Ombudsman marketing for several national ombudsman institutions, some of which are rather jealous of their 'national' prerogatives. On the other hand, legal prerogatives differ widely over the Network, and different members are striving to develop and defend their scope and means by exploring the extent of their independence among their nation-state institutions.

Furthermore, the European Ombudsman is striving to develop joint parallel investigations.

The excellent collaboration between Network members and the European Ombudsman greatly enhanced my own initiative inquiry regarding Frontex Joint Return Operations. Parallel investigations conducted by several national ombudsman offices and the European Ombudsman on this subject have shown the great potential for enhanced cooperation between Network members on issues of EU law and policy. This is the first time that such co-operation has been achieved through the Network, but [it] demonstrates the potential that exists for further such investigations.<sup>13</sup>

Mrs O'Reilly's conclusion is the following:

I would like to pay tribute to my two predecessors, Jacob Söderman and Nikiforos Diamandouros, for having created and then developed the European Network of Ombudsmen over the last two decades. But as the Network approaches its 20<sup>th</sup> anniversary in 2016, I feel that the time is right to take it to the next level (i) by refocusing its activities on what it was originally created to facilitate – the promotion of knowledge of EU law and policy amongst ombudsmen and committees on petitions throughout Europe, (ii) by finding ways to promote greater cooperation between its

12 European Ombudsman 2015b.

13 European Ombudsman 2015b.

members, and (iii) by transforming the visibility of the Network to a range of key stakeholders, including governments and administrations at the EU, national, and regional levels, the media throughout Europe, potential complainants, and the general public.<sup>14</sup>

A third step is the Final Report of the Meeting of the Presidents of the regional and international networks of the Institutions for Institutional mediation, which took place in Rabat on the 6<sup>th</sup> and 7<sup>th</sup> of July 2015.<sup>15</sup> The report is as relevant for the development of the Ombudsman institution as could be a report of conclusions written down by the President of the Association of Ombudsmen and Mediators in Francophone countries, the President of the International Ombudsman Institute in Vienna, and a president of the Mediterranean Ombudsmen Association. The Associations are to implement a mechanism of coordination in order to: facilitate a permanent ideas, experiences and expertise exchange at the international level;<sup>16</sup> mutually assist citizens in need in a third country in their dealings with local administrations,<sup>17</sup> thus following the European citizenship model; establish a Centre of Formation and Experience and expertise exchange in order to disseminate good practices and harmonize national procedures;<sup>18</sup> conduct comparative studies concerning ombudsman legislation and procedures in order to disseminate the ombudsman *acquis* and results.<sup>19</sup>

The implementation strategy is scientifically backed by the European Ombudsman Institute – EOI. The EOI is a centre of competence for information exchange among ombudsmen in Europe. It consists of eighty-nine members, among which forty-nine institutions and forty individual members, with twelve university professors. It is in fact a scientific association founded by relevant Austrian university professors in 1988. It conducts comparative university studies under the patronage of the ombudsman institutions. The aims are the scientific debate of human rights and citizen freedoms, promotion of research, cooperation with national and international institutions, promoting exchange of views among members. EOI has produced relevant ideas about the role of the ombudsman in Central and Eastern Europe. As such, the ombudsman is to be understood as a companion and guarantor of the democratic development.<sup>20</sup> His/her attention needs to focus on fulfilling the basic democratic criteria, namely freedoms and human rights. The Central and Eastern European ombudsman is to be a counter-power even to the power of the national parliament, as a majoritarian

14 European Ombudsman 2015b.

15 Le Médiateur du Royaume du Maroc 2015.

16 Le Médiateur du Royaume du Maroc 2015. 2.

17 Le Médiateur du Royaume du Maroc 2015. 2.

18 Le Médiateur du Royaume du Maroc 2015. 3.

19 Le Médiateur du Royaume du Maroc 2015. 3.

20 See European Ombudsman Institute 2016b.

expression of the political elite.<sup>21</sup> In the Romanian case, as put by journalist Cornel Nistorescu of *Cotidianul*, the fight against corruption would not ensure the democratic development, as some might think, but only purify the ground so that a parallel process of normal society formation should and could take place. In this second process, of democratic development, the ombudsman plays a central role. The ombudsman becomes a means to ensure parliament power in front of the administration (be it executive power in all its manifestations, from the Council of Ministers to the most diverse national administrations), hence means of democratic safeguarding in the era of regulation in both new eastern democracies and equally ancient western European democracies. By his/her action, the ombudsman is to ensure the confidence of the citizen in the public administration in particular and a societal consensus in general.<sup>22</sup>

## II. Values and Principles, Strategy Defined for Developing the Pluralist Democracy

Mrs O'Reilly is accordingly declaring the willingness of the European Ombudsman to promote a Europe of Citizens (see the Open Government Partnership, OGP). In doing it, the European Ombudsman is implementing the values and principles stated by the previous European Ombudsman, Mr Nikiforos Diamandouros in his Università degli Studi di Siena Speech on the 17<sup>th</sup> of October 2006, while giving a lecture on the 'Ombudsman institution and the quality of democracy'.<sup>23</sup> According to Professor Diamandouros, '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'.<sup>24</sup> Why is the ombudsman institution

21 For instance, when taking into account the public positions taken by the ambassadors of Western democracies in Bucharest (ranging from the United States, United Kingdom, the Netherlands, Switzerland, and up to even France and Italy), one could come to the perhaps strange conclusion that the Eastern European ombudsman could even get an informal level support in doing so, of course, if he/she acknowledges the utmost importance of its position as institutional mediator.

22 Put it rather egoistically, the State (as for instance the Romanian State) would enable and empower an ombudsman in order to avoid a general uprising and/or revolution in case of a societal crisis such as a cyclical global economic crisis.

Ensuring the societal consensus is the foremost concern and day-to-day study of the Belgian Federal Ombudsman and of the Belgian 'first-line' mediation departments. The Belgian mediation system is as complicated as the Belgian federal state itself. It provides for a first-line (autonomous departments inside every public administration at all levels of government) and second-line mediation (the Federal Ombudsman institution). This procedure and the coordination mechanisms enhance the chances for a citizen to see his/her rights acknowledged by the public administration at an as low administrative level as possible.

23 Diamandouros 2006.

24 Diamandouros 2006. 1.

so important? ‘The acceptance of the legitimacy of the state in the eyes of its citizens constitutes a prior condition for the smooth operation of a democracy. [...] Following Robert Dahl, [...] if a state is not perceived as legitimate, then democratic elections cannot rectify this problem’.<sup>25</sup> The events in Bucharest after the Colectiv fire in autumn 2015 resulting in the stepping down of the socialist government are a good illustration of the issue; one of the main institutional requirements of the non-governmental organizations was: ‘we [the People] want our ombudsman back’.<sup>26</sup> The Romanian Constitution is one of the only fundamental laws in a pluralist democracy where no preamble exists and where the state pre-exists the People – Article 1, ‘The State’.<sup>27</sup> The Romanian state, as shown by ‘its’ Constitution, is not an instrumental expression of the nation/society/national community(-ies) but a transcendent, abstract institution imposed upon the ‘citizens’. Starting from the two underlying principles of modern democracies, equality and freedom, two ideal-types of democracy can be formed. 1/ The Jacobin legacy privileging equality, where the sovereign people constitute the only source of power, whose sole institutional expression is (a mostly unicameral) parliament. The risk is a levelling egalitarianism, with serious concerns relating to the respect for individual rights and the observance of the rule of law (see also Alexis de Tocqueville in his account of the American democracy; American democracy, however, could deter such evolutions by making use of the libertarian principle). 2/ The pluralist logic seeks an optimal balance between the egalitarian and libertarian principles – a dense network of institutional checks and balances as mediated structures of powers characterize the rule of law. ‘There are better conditions for the observance of the rule of law and for the quality of democracy’.<sup>28</sup> In the first form, accountability, that is, ‘to explain and justify one’s actions in terms of appropriate criteria and in sufficient detail’ takes place only at the moment of the elections. All other forms of accountability are rejected as ‘means of potentially limiting and constraining the sovereign people, as represented by those whom they have elected’.<sup>29</sup> The second form implies forms of continuous accountability. 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. 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 – by helping to avoid, or to resolve, unnecessary and unproductive conflicts.<sup>30</sup>

25 Diamandouros 2006. 6.

26 Diamandouros 2006. 6.

27 The Constitution of Romania 1991/2003. 1.

28 Diamandouros 2006. 7.

29 Diamandouros 2006. 7–8.

30 Diamandouros 2006. 8.

**Table 1.** How the ombudsman contributes to the quality of democracy

<b>Criteria</b>	<b>Courts system</b>	<b>Ombudsman institutions</b>
Decisions	Binding (with sanction)	Non-binding (with moral obligation)
Determination of rights (I)	Legal rights of parties in individual cases (legality)	Broad principles of good administration (beyond legality)
Proceedings	Strict and not so flexible	Not strict, more flexible
Establishing guidelines of conduct	Reactive, case-by-case	Proactive
Determination of rights (II)	Adherence to legality	Good administration and avoidance of maladministration
Cost (money)	Expensive (non-free)	Cheaper (free)
Cost (time)	Time-intensive	Quicker proceedings
Access to justice	Limited	Widening access
Results	Rather zero-sum solutions	Positive-sum solutions

Advocate General L. M. Poiares Maduro at the meeting of the national ombudsman of the EU Member States in The Hague in September 2005: ‘ombudsmen must disregard any national rules which prevent them from protecting rights under Community law’.<sup>31</sup> The role of the Romanian ombudsman is, in this respect, essential in a case where a truly constitutional order is missing.

The ombudsman institution can help to increase the quality of democracy both directly, by a contribution to rendering the politicians more accountable and by promoting active citizenship, and indirectly, by enhancing the rule of law, that is contributing to the establishment of an equilibrium between equality and liberty in the case of the pluralist democracy. His capacity to be successful in this task depends on the non-partisan and impartial way of dealing with the affairs brought to him.<sup>32</sup> When comparing the ombudsman institution to the tribunal system, a clear-cut distinction exists between the binding decisions of the latter versus the non-binding recommendations of the former. A tribunal can only take into account the legal aspects, while the ombudsman studies the case by virtue of larger principles of good administration. Secondly, the judicial proceedings are necessarily stricter and less flexible than the rules applied to the ombudsman institution proceedings, which are normally unrestricted by law. The ombudsman is as such complementary to the activities of the tribunal system.

<sup>31</sup> Diamandouros 2006. 11.

<sup>32</sup> Diamandouros 2006. 9.



The non-binding character of the ombudsman's recommendations results in the necessity to take their moral authority as base for their implementation and, subsequently, to be able to go public and convince public opinion. While the tribunals deal with the adherence of the citizens and of the state to legality, the ombudsmen deal with promoting good administration and avoiding maladministration.

Tribunals are not the best places and institutions to efficiently solve the conflicts between the citizen and the public institutions. The first reason is that petitioning the ombudsman is a cheaper and quicker way to seek justice than seeking justice in a tribunal. The second reason is that the tribunal system incurs the risk of overloading when all citizens are compelled to use it to seek justice against the public administration;<sup>33</sup> see the Belgian case in fiscal law. Furthermore, the ombudsmen can act with great discretion and with almost total flexibility, which a tribunal cannot. The services provided by the ombudsman are free and offer efficient remedies, thereby widening the citizens' access to justice. In a pluralist democracy, the different public administration bodies are to serve the citizens and not vice versa. This principle takes the form of citizen-friendliness, service-mindedness or even straight, good administration.

### **III. Issues of Institutional Mediation in a Young Eastern European Democracy. Between Romanian Practice and Belgian Theory, a Modus Vivendi of Euro-Atlantic Good Practice**

The most comprehensive ombudsman institution from the point of view of its functions is the Swedish 1809 model. There, the ombudsman could survey the tribunals and the public authorities, manage citizen complaints and impeach officials and ministers on charges of illegal action.<sup>34</sup> Prosecution was kept in the Belgian federal model.<sup>35</sup> The Danish 1955 model, as well as the remainder of the ombudsman European institutions, covers areas related to public administration bodies but not to tribunals.<sup>36</sup>

As already stated above, Western-type democracies combine the rule of law with democracy. In an ideal-type, egalitarian/Jacobin democracy, intermediate groups are not allowed between the sovereign people and its representatives;

33 Diamandouros 2006. 12

34 Diamandouros 2006. 2.

35 The Belgian Federal Ombudsman contains a DNA-type [National Anticorruption Department, Romanian institution] unit but acting under secretive and confidential procedures.

36 Diamandouros 2006. 2.

therefore, the people practically are only sovereign during elections but not in between. In the pluralist model, where equality coexists with freedom (and rule of law), the link between the sovereign people and the power is not direct but mediated by several networks of different legitimate groups and institutions. Because legitimate, these intermediate institutions can put limits to the authority of the state administration, therefore rule out the possibility of the arbitrary use of power. The American Federal Constitution did not provide for the constitutional review. However, the US Supreme Court introduced it in the 1803 *Marbury c/ Madison*, with the following justification: the judges have to apply the law, the Constitution included, and so a constitutional review is needed. Until 1865, this review was rather circumspect. In the 20<sup>th</sup> century, the Supreme Court defended the federated states' rights against the US Government and against the US Congress, and the 'government by the judges' was denounced. But the system continues to function, and nobody complains finally... Excesses were few and incidental.<sup>37</sup>

Such a system is a break put on the legislator. There also was an incomprehensible check against the representatives of the sovereign people in a Jacobin rationale. During the last years, the same issues of conflict between the two types of democracy involved the Romanian institutions of Parliament and Judiciary. The issue is the not so constitutional character of the DNA, as a special prosecution unit. This is why DNA had to be directly defended by the Western ambassadors in Bucharest for the sake of a rather pluralist democracy versus a rather egalitarian one. The egalitarian principles strangely appeared among the defenders of the parliamentary regime versus the presidential regime, which a lot of citizens interpreted as the conflict between a democratic pluralist approach against a rather populist and Jacobin democracy (perhaps Belarus-type). Therefore, nuances are indeed essential in a democracy. The public and political discourse has to be carefully analysed, and the parliamentary mediation, i.e. the Ombudsman institution, acquires an important role as the fight against the corruption of the political and administrative elite has to be paralleled by the building of a true and open democratic society. The human rights of whatsoever citizen have to be upheld by an institution, even when that citizen is a felon. This is a fundamental principle of the rule of law. A strong and independent ombudsman can defend and contribute therefore to the building of pluralist democracy by helping to bring down the excesses of the public administration. If the ombudsman is under constant strain by the parliament, if a majority of the members of parliament can dismiss him/her anytime, his/her independence is rather illusory. Therefore, the French have implemented since 2008 (Constitution of 4 October 1958, 2008, 71-1) a system with only one mandate of six years but with a total independence. The French *Défenseur des Droits* [Rights Defender]

37 Cadart 1979 and Pactet 1989.

cannot be revoked by any institution.<sup>38</sup> As previously stated, the ombudsman helps the state become legitimate if he/she is able to properly exert his/her tasks. According to Robert Dahl,<sup>39</sup> if the state is perceived as illegitimate by the citizens, democratic elections cannot solve this problem.

## IV. Conclusions

1/ One might note the importance of the ombudsman institution as a central tenet of the European institutional development strategy; the ombudsman is important for both the national-level pluralist democracy and the constitutional order at the European level;

2/ A global expertise and good practices exchange is taking place among ombudsmen at the international level. Much is to be learned from American county ombudsmen, for instance, or from the Namibian national ombudsman;

3/ The integration inside a truly integrated European network of ombudsmen could enable the members to be informed exhaustively on the evolutions in matters of European law and European policies, in particular on those issues interesting and relevant for the national and regional level;

4/ The institution of the European Ombudsman can facilitate access for the members of the European Network of Ombudsmen to the administrative expertise inside the European institutions (including by making extensive use of the query procedure); the European Ombudsman has the willingness, according to the 2014 Strategy, to help the members by receiving their information requests and specific help requests to hand in to the relevant European institutions for appropriate answer delivery;

5/ Meeting once per year in Brussels does not necessarily promote an integrated European citizen democracy and/or society; therefore, the Network should encourage the continuous cooperation between the European Ombudsman, on the one hand, and the/or variable geometry ad hoc regional and national ombudsmen groupings with the aim of conducting parallel investigations and delivering joint comparative reports, on the other hand, with the result of writing down good practices and finally harmonizing administrative practices across Europe at the highest denominator for the citizens;

6/ A grassroots democracy could be enabled under true auspices of the subsidiarity principle;

7/ The ombudsmen re-discover the good *acquis* in governance of the European Middle-Ages (see Diamandouros' argument for the feudal roots of the rule of law and pluralist democracy) and similarities and differences between European

38 French Organic Law No 2011-333 of 29 March 2011 concerning the Rights Defender, 2011. 1.

39 Diamandouros 2006. 6.

traditional values and those of other regions, with a positive impact on the development of a mutual understanding of cultures around the Globe;

8/ In the Romanian case, the ombudsman can complement the fight against corruption in politics and public administration in two essential ways. The first one is making extensive use of the Query Procedure of the European Ombudsman in order to enlighten the national administration and higher courts of the judicial system when dealing with citizen rights and freedoms; the second one is to help and constrain the public administration to act in a citizen-friendly way and urge the government to promote service-mindedness across all its units;

9/ The Central and Eastern European ombudsman is to be understood as a companion and guarantor of the democratic development. The Central and Eastern European ombudsman is to be a counter-power even to the power of the national parliament, as a majoritarian expression of the political elite;

10/ With a view to the East European experience, the ombudsman becomes a means to ensure parliament power in front of the administration (be it executive power in all of its manifestations, from the Council of Ministers to the most diverse national administration), hence means of democratic safeguarding in the era of regulation in both new eastern democracies and equally ancient western European democracies.

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