



Juridisk Publikation

STOCKHOLM - UPPSALA - LUND - GÖTEBORG

TUOMAS LIHR

The European Ombudsman: Giving Voice to Civil Society
Actors in the European Union

Särtryck ur häfte 1/2015

Nummer 1/2015

THE EUROPEAN OMBUDSMAN: GIVING VOICE TO CIVIL SOCIETY ACTORS IN THE EUROPEAN UNION

Av Tuomas Lihri¹

The rise of Eurosceptic movements around Europe highlights the crisis of social legitimacy that the European Union faces. Much of the malaise towards European integration seems to originate from a sense of inevitability in distant bureaucratic decision-making processes, where the course of the EU's future is steered with no real public accountability. In response, a myriad of initiatives have been launched to bring the EU closer to its electorate. One of these initiatives is the establishment of a European Ombudsman, whose role in giving voice to civil society actors in the EU is the focus of this article. The article discusses the variety of ways that the Ombudsman has promoted participation rights and transparency in the EU. The activities of the institution have strengthened inclusive and deliberative structures in Europe, which can have a powerful democratic effect in their own right. However, a lot remains to be done by both EU citizens and key institutional players to make Europeans more engaged, and feel more empowered, in EU affairs.

1. INTRODUCTION: TACKLING A CRISIS OF SOCIAL LEGITIMACY

Popular wisdom among Eurosceptics has it that the European Union is turning into a massively illegitimate technocratic dystopia. For example, Timo Soini, the frontman of the Eurosceptic movement in Finland, has referred to the EU as an undemocratic system run by “fat cats in Brussels”.² While many eminent scholars tend to argue that the EU does not actually suffer from a structural democratic deficit,³ it is evident that the integration is facing a serious crisis of social legitimacy.⁴ Simultaneously as the EU's powers have kept growing, many Europeans feel increasingly alienated from its work. The apparent malaise of

¹ LL.B., candidate for LL.M. at the University of Helsinki. This article is based on a seminar paper written for a course on new forms of European governance at the University of Helsinki. I would like to thank my supervisor Dr. Emilia Korkea-Aho for her comments and other contributions to the article.

² Timo Soini, ‘My Speech at the London School of Economics’, <http://timosoini.fi/2013/02/puheeni-london-school-of-economicsissa/>, last visited 10 March 2015. Mr. Soini is the chairman of the Finns Party, which is the most popular Eurosceptic party in Finland.

³ See e.g. Andrew Moravcsik, ‘In Defence of the Democratic Deficit: Reassessing Legitimacy in the European Union’ (2002) 40(4) *Journal of Common Market Studies*, p. 605 or Allan Rosas & Lorna Armati, *EU Constitutional Law: an Introduction* (Hart Publishing 2012), pp. 129–130.

⁴ See e.g. Joseph Weiler, *The Constitution of Europe: “Do the New Clothes have an Emperor?” and Other Essays on European Integration* (Cambridge University Press 1999), pp. 80–86.

the integration has accordingly invoked a lot of anxiety in Europe. In response, member states have reacted by launching an energetic effort to bring the European electorate closer to the EU by strengthening citizen participation rights in EU matters. One of the initiatives adopted in this ethos is the European Ombudsman, whose role in giving voice to civil society actors in the EU is the focus of this article.

I am going to argue that the Ombudsman has been a relative success story in empowering civil society in Europe. Established by the Maastricht Treaty⁵ of 1992 to fight maladministration in EU institutions, the Ombudsman has since stood for a more citizen-friendly EU in a myriad of ways. Despite its humble formal powers, the institution has had a significant influence on European governance because its recommendations enjoy a notable normative force. This authority has enabled it to provide quasi-judicial redress to many complainants who have turned to the institution with individual claims, as well as to promote general policy reform through political campaigns. The influence of the institution has been particularly eminent on rendering EU decision-making processes more transparent and accountable, two aspects which are key cornerstones of any participatory and deliberative democracy.⁶ Although human rights questions often come down to finding a delicate balance between public and private or competing private interests, a starting point for this article is that, more often than not, all actors involved can benefit from more inclusive opinion and idea sharing in Europe.

However, also critical voices towards the activities of the Ombudsman will be presented. These include questions on its obscure mandate, alleged (strategic?) conservatism, and to whom it actually gives a voice. Moreover, the institution's activities can hardly be separated from the larger EU citizenship agenda, which clearly has fallen short in its ambition to tackle the EU legitimacy crisis. While the activities of the Ombudsman have promoted a more inclusive and open Europe, its work can, in a sense, only lay foundations for a more socially legitimate integration. EU citizens, administration and member state authorities have to capitalize on these structures in practice for talks of a democratic deficit to quiet down.

5 Treaty on European Union [1992] OJ C 191/1 (Maastricht Treaty).

6 On the importance of participatory and deliberative structures in society, see Rosas & Armati (n 3), pp. 138–142.

2. THE VISION: A WINDOW ON EU PUBLIC ADMINISTRATION

The entrance of an ombudsman to the European governance⁷ stage was hardly surprising news. Originally an Ottoman innovation made famous by the Swedish Parliamentary Ombudsman system, similar institutions had been set up in all but a few EU-member-states-to-be by the time of its arrival to the supranational scene.⁸ Ombudsmen do not play identical roles in the member states, and for instance the competences granted to Nordic ombudsmen are quite more comprehensive than those of many of their southern counterparts.⁹ Yet the *raison d'être* of ombudsmen has typically been a combination of supervising public authorities and defending citizens' fundamental rights.¹⁰ Their key mission has been to serve as a "window on the administration" by exposing administrative policies and practices to public debate.¹¹ The European Ombudsman received a similar role in the EU.

EC member states agreed on the creation of the Office of the European Ombudsman in the Maastricht Treaty. The purpose of the institution was from the very beginning to strengthen the democratic legitimacy of the accelerating European integration. As Community co-operation deepened and widened, the Maastricht Treaty introduced European citizenship to all persons holding a nationality of a member state to bring the EU closer to its electorate. This was the stage of integration where participation, openness and transparency became buzzwords in the EU idiom.¹² In this ethos, some member states – notably Spain and Denmark – advocated new means to safeguard the rights granted to the new-found EU citizens.¹³ Therefore the appointment of the Ombudsman served as a part of a *quid pro quo* for Europeans, since the right to appeal to the institution was attached to the European citizenship package.¹⁴

7 I use the obscure 'governance' in the sense of the "rules, processes and behaviour that affect the way in which powers are exercised". European Governance – a White Paper [2001] OJ C 287/1, p. 8.

8 For a general discussion on the history of ombudsmen, see Paul Maignette, 'Between Parliamentary Control and the Rule of Law: the Political Role of the Ombudsman in the European Union' (2003) 10(5) Journal of European Public Policy, pp. 677–680.

9 For an illustration of the purposes and competences of a national Ombudsman, see e.g. the regulation on the Finnish Ombudsman in the Constitution of Finland [1999] 731/1999, ss. 109–112.

10 Maignette (n 8), pp. 679–680.

11 Richard Rawlings, 'Engaged Elites: Citizen Action and Institutional Attitudes in Commission Enforcement' (2000) 6(1) European Law Journal 4, p. 6.

12 Carol Harlow, 'Civil Society Organisations and Participatory Administration: a Challenge to EU Administrative Law?' in Smismans Stijn (ed), *Civil Society and Legitimate European Governance* (Edward Elgar 2006), p. 120.

13 Epaminondas A. Marias, *The European Ombudsman* (European Institute of Public Administration 1994), p. 72.

14 Maastricht Treaty art 8e.

Another significant moving factor in the initiative was a prevalent concern on the surveillance of public administration in Europe. As the EU gained influence over individual member states, with little increase in parliamentary control, the Ombudsman was set up under the European Parliament to serve as a parliamentary watchdog over other EU institutions.¹⁵

Paul Magonette has argued that this dual agenda – strengthening both the rule of law and offering parliamentary scrutiny over public administration – has been the key to the success of the institution. Playing a hybrid role in the EU, the European Ombudsman can combine instruments of judicial control with parliamentary monitoring in an original way.¹⁶ A lack of originality has certainly not been a vice of the ombudsmen so far. The status of the institution has been quite adaptive throughout its history, and its agenda has been pursued by more or less formal means. Nevertheless, the purpose of the Ombudsman remains to provide an additional means for individuals to promote their interests and safeguard their rights towards public authorities in the EU. Jacob Söderman, the inaugural holder of the Office, summarized the rationale behind the institution as an embodiment of “the commitment of the Union to open, democratic and accountable forms of administration”, his own role being to “enhance the relations between Community institutions and European citizens”.¹⁷ In practice, the holders of the Office have concentrated on encouraging civil society actors to be more vigilant in common matters by promoting participation rights and transparency in decision-making processes.¹⁸

3. THE PROCEDURE: UNBINDING RECOMMENDATIONS OR ADMINISTRATIVE NORMS?

Unsurprisingly for an institution with such wide principled purposes, the legal framework of the Ombudsman is set quite loosely. The operations of the Ombudsman are governed by the Treaty on the Functioning of the European Union (TFEU)¹⁹, the Ombudsman Statute²⁰ and its implementing provisions²¹. Furthermore, at least its symbolic status was solidified by the Charter of

15 Marias (n 13), p. 71.

16 Magonette (n 8), pp. 677–678.

17 Decision of the European Ombudsman 303/97/PD.

18 Magonette (n 8), p. 689.

19 Treaty on the Functioning of the European Union (Consolidated version 2012) [2012] OJ C 326/1 arts 20, 24 and 228.

20 Decision 94/262 of the European Parliament on the regulations and general conditions governing the performance of the Ombudsman's duties [1994] OJ L 113/15.

21 Decision of the European Ombudsman adopting implementing provisions, <http://www.ombudsman.europa.eu/en/resources/provisions.faces>, last visited 10 March 2015.

Fundamental Rights of the European Union²². The majority of these provisions pertain to the quasi-judicial complaint procedure under Article 228 TFEU, which leaves a considerable degree of latitude for the Ombudsman's more informal activism.

Under Article 228 TFEU, the formal tasks of the Ombudsman are to receive "complaints from any citizen of the EU or any natural or legal person residing or having its registered office in a Member State concerning instances of maladministration in the activities of the Union institutions", and to "conduct inquiries for which he finds grounds, either on his own initiative or on the basis of complaints submitted to him". All national institutions are, in principle, excluded from the Ombudsman jurisdiction, as are all matters subjected to legal proceedings in EU Courts. The concept of maladministration is famously elastic, but it refers first of all to breaches of administrative law and the principle of 'good administration'.²³ Nikiforos Diamandouros, the holder of the Office from 2003 to 2013, defined the notion of maladministration in a way that requires "respect for the rule of law, for principles of good administration, and for fundamental rights", considering that "maladministration occurs when a public body fails to act in accordance with a rule or principle which is binding upon it".²⁴ It is noteworthy that calls for 'good administration' require a lot more from public officials than merely fulfilling minimum legal standards – a common shortcoming for many courts.²⁵

For the purpose of empowering civil society actors in the EU, one of the crucial elements of the Ombudsman is the *actio popularis* nature of its procedure. Once an instance concerns the fluid maladministration and the nationality or residence requirement of Article 228 TFEU is fulfilled, anyone has access to review by bringing any matter to the Ombudsman.²⁶ In other words, the complainant does not necessarily have to have a personal interest in the case. In fact, inquiries by the Ombudsman have typically been opened on the initiative of civil society actors complaining to promote general interests.²⁷ The demand

22 Charter of Fundamental Rights of the European Union [2012] OC J 326/391 art 43.

23 Peter Bonnor, 'When EU Civil Society Complains: Civil Society Organisations and Ombudsmanship at the European Level' in Smismans Stijn (ed), *Civil Society and Legitimate European Governance* (Edward Elgar 2006), p. 143.

24 Annual Report of the European Ombudsman 2012, p. 13. Available at the website of the Ombudsman, <http://www.ombudsman.europa.eu/en/activities/annualreports.faces>, last visited 10 March 2015.

25 Charles F. Sabel & Jonathan Zeitlin, 'Learning from Difference: The New Architecture of Experimentalist Governance in the EU' (2008) 14(3) *European Law Journal*, pp. 301–302.

26 For a detailed account of the formal and substantive admissibility, see e.g. Marias (n 13) pp. 77–82.

27 The Ombudsman has so far usually taken action when an increasing number of complaints

for a public forum like this is obvious because of the restrictive *locus standi* requirements for individual admissibility in EU courts under Article 263 TFEU. However, the wide admissibility necessarily means that the Office retains a lot of discretion in deciding whether to take further steps in any matter. Under Article 3(1) of the Ombudsman Statute, the Ombudsman only has to conduct “the enquiries which he considers justified to clarify any suspected maladministration”. Therefore no one has an absolute right to further proceedings in the institution.

If the Ombudsman deems that an inquiry should be opened, a procedure that resembles court proceedings follows. After the Office has informed the parties that the matter has been taken under consideration, the institution under scrutiny has three months to submit an opinion on the complaint.²⁸ The complainant is also allowed to comment on the institution’s opinion. The Ombudsman is free to make further inquiries if s/he considers them necessary after receiving responses from the parties, but otherwise s/he closes the case with ‘a reasoned decision’.²⁹ During the process, the Office has wide access to information, since EU institutions and member state authorities are obliged to provide the Ombudsman with any information requested in order to clarify possible maladministration, unless restrictive grounds of secrecy are pleaded.³⁰ Equivalent coercive powers have not been granted to the outcome of the procedure.

The Ombudsman primarily seeks a ‘friendly solution’ to conflicts between institutions and complainants, where the institution voluntarily eliminates the source of maladministration.³¹ If a friendly solution is not attainable, the Ombudsman can make ‘critical remarks’ on the institution’s practices or give a report with ‘draft recommendations’ to the institution concerned.³² Draft recommendations typically concern more serious instances of maladministration, which usually means that they have general policy implications beyond the case in question.³³ In either case, the Ombudsman has no binding powers to coerce other institutions to abide with his/her remarks or recommendations. Notwithstanding, the opinions of the Ombudsman have not merely been heavy on symbolism in the past. Other EU bodies have in practice complied with the Ombudsman’s findings almost without exception. The overall

have been lodged on a particular issue in the Union. Magnette (n 8) p. 682, Bonnor (n 23), p. 141.

28 Implementing provisions art 4(3).

29 Implementing provisions art 4(9).

30 Ombudsman Statute arts 3(2)–3(3).

31 Implementing provisions art 6.

32 Implementing provisions arts 7–8.

33 European Ombudsman (n 23), p. 34.

compliance rate for the Ombudsman's decisions has been around an impressive 80 % in the past years.³⁴ In the light of these statistics, the institution's soft law recommendations do not seem so soft, after all. The Office seems to enjoy a notable normative force, even if the stellar compliance rate is undoubtedly dependent on a moderate use of its discretion. This means, for instance, avoiding too political or controversial positions, which might lead to a loss of influence due to the institution's marginalization from power. The Ombudsman has, in fact, been criticized of taking a too conservative and cautious approach to choosing its battles, a theme that will be revisited below.

A final remark on the Ombudsman's legal framework is due to the Charter of Fundamental Rights of the European Union. The Charter received a primary law status after the Lisbon Treaty of 2007, illustrating the *esprit du temps* of growing attention to rights and values in the EU beside the traditionally dominant preoccupation on economic interests. The voice of the Ombudsman is particularly explicit in Articles 41 and 43 of the Charter. These provisions introduce an express right to good administration in the EU, and cement citizens' right to refer cases of maladministration to the Ombudsman. Even though the Charter does not grant any specific new powers to the institution, this can at least be seen as an authority and prestige boost. Taking things a step further, some argue that a *de facto* right to good administration was already established in the EU before the Charter as a result of the Ombudsman's activism on promoting general principles of procedure in administrative matters.³⁵ These kinds of developments evidently blur the boundaries between soft and hard law instruments.

Hence looking at the Ombudsman's legal framework does not necessarily reveal the full scope of the institution's significance on the European governance stage. Despite its humble formal powers, the actions of the Ombudsman are today increasingly seen "more as administrative norms than unbinding recommendations".³⁶ Now, how does one explain this evolution? The answer lies in the rise of so called new forms of European governance.

34 The annual statistics can be accessed on the Ombudsman's website. See e.g. European Ombudsman, 'Putting it Right? - How the EU institutions responded to the Ombudsman in 2013', <http://www.ombudsman.europa.eu/en/cases/followup.faces/en/58401/html.bookmark>, last visited 10 March 2015.

35 Simone Cadeddu, 'The Proceedings of the European Ombudsman' (2004) 68 *Law and Comparative Problems*, pp. 161–162.

36 Paul Craig & Gráinne de Búrca, *EU Law: Text, Cases, and Materials* (Oxford University Press 2011), p. 56.

4. A NEW FORM OF EUROPEAN GOVERNANCE

The Ombudsman forms a part of a larger trend of new approaches to EU governance in recent years. Studies on new governance often start by contrasting the novel initiatives with the principal and conventional instrument for making law and policy in Europe – Community Method legislation. In the Community Method, the European Commission, Council and Parliament create together the rules by which the EU operates through the European legislative process.³⁷ As a relatively hierarchical, un-flexible, distant and slow-moving process, it also embodies many of the reasons why traditional rule-making processes have been under pressure to evolve. Common reasons for a rising demand for new approaches to governance include a breakdown of regulatory authority and legitimacy, as well as the increased complexity and diversity of EU operations.³⁸ Sources such as the Commission's White Paper on European Governance express an atmosphere of uncertainty also in EU institutions on how to tackle the continent's multiform social and economic challenges. In these circumstances, it is not an uncommon argument that the best or most legitimate governance solutions might not be found through traditional, bureaucratic processes, such as the Community Method.

In response, a diverse group of new governance mechanisms have been set up on various EU fields ranging from environmental protection to financial services. By no means a homogeneous group, these methods range from inclusive approaches to legislative harmonization to setting up new networked agencies.³⁹ The one, core common denominator for the initiatives is a shift away from top-down governance to more flexible practices.⁴⁰ New governance methods seek to invite more actors and voices to rule-making processes by engaging and empowering the governed in an interactive way. The policy documents often consist of formally non-binding framework norms and guidelines, and tend to leave discretion to the subjects with regard to their implementation.⁴¹ This can enable quicker and more efficient reactions to the ever-changing realities of day-to-day life. The downside of flexibility is a lack of coercive powers, which is why the instruments seek to obligate and organize actors in other ways, for instance through cultures of peer review.⁴² However,

37 For a more in depth introduction to the Community Method, see e.g. Kenneth A. Armstrong, 'The Character of EU Law and Governance: From 'Community Method' to New Modes of Governance' (2011) 64 *Current Legal Problems* 179, pp. 8–11.

38 Craig & de Búrca (n 36), p. 177.

39 Sabel & Zeitlin (n 25), p. 274.

40 Craig & de Búrca (n 36), p. 159.

41 Craig & de Búrca (n 36), pp. 159–160.

42 See Emilia Korkea-Aho, *New Governance and the EU courts: The Experimentalist Architecture of Judicial Decision-Making* (University of Helsinki 2011), p. 323.

the rise of new governance does not mean that Community Method legislation has become a Neanderthal approach to European governance. Contemporary EU governance is rather characterized by a mixed and evolving combination of hierarchical and non-hierarchical governance.⁴³ Consequently, the interesting question in governance studies is often how different methods collaborate. In the case of the Ombudsman, its role as a watchdog of public administration can largely be seen as complementary to legislative and judicial mechanisms.

Some of the characteristics that make the Ombudsman a typical new form of governance have already been hinted at above. The most obvious illustration of this is the strong binding force its resolutions enjoy sociologically. Leaning on public naming and shaming as virtually its only sanction, the soft-law actions of the Ombudsman have both provided redress to complainants in individual cases and led to general policy reforms. Examples of both will be provided below. Another feature, which makes the Ombudsman ideal to tackle some of the criticisms towards conventional governance, is that the institution is so easily accessible. In addition to minor admissibility requirements, the cheapness, (relative) quickness and lightness of its procedures make it an efficient and democratic resource for reacting to issues arising when dealing with EU authorities.

Furthermore, the Ombudsman's loose legal framework and toolkit of flexible and dynamic measures is the key to its success in empowering civil society in the EU. The Office is equipped to engage in more extensive activism than for instance courts, as its mandate is not limited to formally binding rules and principles. As a result, it can ask institutions to consider citizens' interests a step further than fulfilling simply the minimum requirements of the law. In the words of the incumbent Ombudsman Emily O'Reilly, the Ombudsman can instruct institutions "to do whatever is possible within the law" in order to achieve (reasonable) citizen-friendly outcomes.⁴⁴ This sort of advocacy is highly valuable in promoting open-ended goals like good administration, since courts alone have a poor record in giving current and corrigible meaning to them.⁴⁵

Not everyone, however, is enthusiastic about the ascent of the institution. Some argue that especially through its more informal codifying activities, the

43 Armstrong (n 37), p. 19.

44 Annual Report of the European Ombudsman 2013, p. 2. Available at the website of the Ombudsman: <http://www.ombudsman.europa.eu/en/activities/annualreports.faces>, last visited 10 March 2015.

45 See Sabel & Zeitlin (n 25), pp. 301–302.

Ombudsman is now operating well beyond its official mandate and authority.⁴⁶ Here the cure for battling the crisis of legitimacy appears as poisonous – a threat of another elite player gaining undue legislative influence over popularly elected entities in the EU. Moreover, the normative sociological status of the institution also poses some challenges from a rule of law perspective. If the Ombudsman has developed into a court-like power, what legal remedies and guarantees does it offer to its subjects? What are the checks and balances over its powers? Is it already doing too much? Needless to say, how the powers of the institution are used comes down to the staff at the Office. The following two chapters will examine concrete instances where the Ombudsman has used its powers to empower citizens arguably in quite efficient ways.

5. DECISIONS UNDER THE QUASI-JUDICIAL COMPLAINT PROCEDURE

Under the Treaty provisions governing the operation of the Office, the most orthodox of the Ombudsman's activities is the complaint procedure under Article 228 TFEU. These quasi-judicial decisions have empowered civil society actors in a number of ways. First, the passive influence of the proceedings should not be underestimated. At times, filing a complaint to the Ombudsman has led institutions to revise their positions in disagreements with individuals already before the Ombudsman has taken further action in the matter.⁴⁷ Other indirect impacts include higher reasoning standards in decision-making. In cases where the Office does not find maladministration in its inquiries, its involvement has, in any event, led to individuals receiving more detailed reasons for the standpoints of the administration.⁴⁸ This is crucial for an effective monitoring over EU institutions, since adequate reasoning facilitate individuals in deciding whether or not to contest official decisions.⁴⁹ Besides these general effects, the influence of the complaint procedure has culminated on a couple of particular issues. The perennial battle of the Ombudsman seems to be on the access to documents in the EU. One can hardly over-emphasize the importance of transparency and openness for enabling civil society to get involved in governance. The European Court of Justice has, for instance, underlined these issues as preconditions for an effective exercise of all democratic rights.⁵⁰

46 Cadeddu (n 35), p. 162.

47 Bonnor (n 23), p. 145. For a case in point, see e.g. Decision of the European Ombudsman 303/97/PD.

48 Cadeddu (n 35), p. 171.

49 See Deirde Curtin, *Executive Power of the European Union: Law, Practices, and the Living Constitution* (Oxford University Press 2009), pp. 208–209.

50 See Joined Cases C-39/05 P and C-52/05 P “Sweden and Turco v Council” REG 2008 p. I-4723.

Perhaps the most famous transparency decisions of the Ombudsman are the so called Statewatch cases, where the civil liberties organization actively pursued a wider public access to EU documents through the Ombudsman.⁵¹ A textbook transparency case is a matter where the Council refused Statewatch access to certain documents of the Council of Justice and Home Affairs on broad grounds in 1996. The Council justified the non-disclosure by arguing that the documents contained “record(ed) detailed national positions”, and “maintaining the confidentiality” of Council deliberations outweighed Statewatch’s interest in the case.⁵² The Ombudsman, however, did not approve such vague reasoning. First of all, he proclaimed that the Council had failed to “comply with the requirement to provide the complainant with the particular reasons” for its decision. Secondly, he stated on a more general note that a reference to ‘national positions’ as a justification for non-disclosure unacceptably “implies that access should be refused to every document which contains detailed national positions”. As a result, the Ombudsman asked the Council to reconsider its position, and the Council released many of the documents it had first withheld.⁵³ Thus the Ombudsman was able to promote both the openness of public administration and intervene in wanting reason-giving standards to information requests at the same time.

Furthermore, the Ombudsman has contributed to openness and transparency in the EU by promoting higher-quality document registers in institutions. For example, the Ombudsman criticized with unusually stern words the Commission’s deficient register of annual reports, since he regarded their publication as “a key mechanism of accountability to, and communication with, European citizens”.⁵⁴ The Commission has since mended the publishing practices of its reports.⁵⁵ Other institutions have not been spared from criticism on inadequate document registering, either. For a case in point, the Ombudsman deemed the Council’s practice of excluding from its register all preliminary, restricted and confidential documents as maladministration, as this practice prevented “citizens to make proper use of their right to access to documents”.⁵⁶ After the foregoing complaint, the Council substantially extended its register by including *inter alia* preliminary documents to the register.⁵⁷ Due to the considerable developments resulting directly from the Ombudsman’s

51 For a general review of the cases, see Bonnor (n 23) pp. 148–152.

52 Decision of the European Ombudsman 1057/25.11.96.

53 Bonnor (n 23), p. 149.

54 Decision of the European Ombudsman 668/2007/MHZ.

55 Curtin (n 49), p. 225.

56 Decision of the European Ombudsman 917/2000/GG.

57 Curtin (n 49), p. 228.

activities in this field, the Office can be portrayed as the pre-eminent route to make information public in the EU – “a catalyst for openness and transparency”, if you will.⁵⁸

Other key areas for the Ombudsman’s quasi-judicial decisions include citizens’ rights under the infringement procedure of Article 258 TFEU. In these proceedings, the Commission is dependent on the activity of individual complainants to obtain information on possible breaches of EU law, but complainants traditionally possessed no formal rights in the process.⁵⁹ A landmark decision of the Ombudsman, where a civil society organization accused the Commission of maladministration for not opening infringement proceedings against the United Kingdom, changed all that in 1997.⁶⁰ In his decision, the Ombudsman emphasized the importance of a right to a reasoned decision to those who participated in the process. “As a matter of good administrative behaviour”, the Ombudsman considered, “the Commission should have informed the registered complainants of its decision before, or at least at the same time as, announcing the decision publicly”. Moreover, the Ombudsman noted that the parties involved ought to have a “possibility to put forward their views and criticism concerning the Commission’s point of view before it commits itself to a final conclusion that there is no infringement of Community law”. After the decision, the Commission introduced rights to complainants in infringement proceedings, and also started to acknowledge the interests of the wider public in the proceedings by striving for increased publicity for all pending matters.⁶¹ The Commission notably gave full credit for this development to the activism of the Ombudsman.⁶²

However, one controversial notion rises when looking at these cases. To whom does the Ombudsman actually give a voice? This is a Marxist critique in the sense that it emphasizes the inequality of arms between different social groups.⁶³ Not unimportantly, nearly all of the Ombudsman’s landmark cases have been brought to the institution by the professionals of civil society organizations. Does the Ombudsman then really give a democratic voice to citizens

58 Curtin (n 49), p. 215.

59 Citizens work as ‘co-guardians’ of community law in these proceedings. Bonnor (n 23), pp. 152–153.

60 Decision of the European Ombudsman 303/97/PD.

61 This was attained i.a. by making more frequent use of press releases and placing more information on the internet. Craig & de Búrca (n 36), pp. 410–411.

62 Bonnor (n 23), p. 156.

63 For a Marxist critique on human rights in the sense of inequality of arms, see e.g. Marie-Bénédicte Dembour, *Who believes in human rights?: Reflections on the European Convention* (Cambridge University Press 2006), pp. 122–125.

in Europe, or only provide another forum to already active elite players? The institution has certainly empowered organizations like Statewatch in a more tangible sense than the groups of people dealing with EU officials who perhaps have never even heard of the existence of a European Ombudsman. As a result, the actors with the least agency in EU affairs, who could have the most to gain from an easily accessible institution, might end up marginalized from the platform provided by the Ombudsman. If this is the case, one cannot *bona fide* argue that more voices are heard in public debates and discussions in Europe thanks to the Ombudsman.

6. POLITICAL CAMPAIGNS: DRAFT RECOMMENDATIONS AND LOBBYING

The political campaigns of the Ombudsman have been equally important as its quasi-judicial decisions in its objective to empower civil society. Draft recommendations have been the principal tool of the institution to seek general policy reform in the past. One of the more famous Ombudsman initiatives was its draft recommendation to European institutions, bodies and agencies in 1998, which aimed to promote transparency and public access to documents. In the recommendation, the Ombudsman noted that the institution had received numerous complaints in which the “instances of maladministration could have been avoided if clear information had been available about the administrative duties of the Community staff towards the citizens”. Consequently, he recommended that all institutions “should adopt rules concerning good administrative behaviour of its officials in their relations with the public”.⁶⁴ This led to almost all EU institutions adopting voluntarily parallel internal rules of procedure, and the motion culminated in a binding Community Method instrument concerning public access to European Parliament, Council and Commission documents.⁶⁵ The Treaty of Lisbon has since introduced the right of public access to EU documents to primary law.⁶⁶ This progression is a neat illustration of the complementing interaction between new and conventional modes of governance.

The crown jewel of the Ombudsman’s draft recommendations has undoubtedly been the European Code of Good Administrative Behaviour. Drafted in 1997 (but updated frequently since), the Code aims to serve as “a guide for civil servants in their relations with the public”, and help “individual citizens to

64 See Decision of the European Ombudsman OI/1/98/OV.

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

66 TFEU art 15(3).

understand and obtain their rights”.⁶⁷ Despite being a formally non-binding document, its purpose is to “encourage the highest standards of administration” by providing a wide set of administrative rules. The provisions range from general procedural rights and public service principles to more detailed rules, especially on access to documents. The prestige of the Code was enhanced when the European Parliament endorsed it in 2001, and it seems like a natural source to concretize the abstract right to good administration provided in Article 41 of the Charter of Fundamental Rights. However, initiatives like the Code are the sort of activities that have evoked concerns about the institution exceeding its mandate. Some argue that by the Code, the Ombudsman has seized an undue role of “codifier of good administration”.⁶⁸ While others might deem this as an overstatement, the Ombudsman has expressly pursued the enactment of a law on good administration based on the principles laid down in the Code.⁶⁹ This is not totally dissimilar to introducing a bill.

More informal political measures that the Ombudsman has resorted to include press releases. Through this way of public naming and shaming, the institution participates in the EU legislative process as a kind of a lobbyist. For a case in point, the Ombudsman harshly criticized the Commission’s proposal for a revision of a regulation concerning access to documents in the EU with a press release in 2008.⁷⁰ He argued that “the Commission’s proposals not only ignore the lessons of the past, but also the new promises to citizens, civil society and representative associations made in the Treaty of Lisbon”. Consequently, he called upon the European Parliament to use its role as co-legislator to address some of the issues he saw in the proposal.⁷¹ The Parliament did, indeed, propose numerous amendments to the Commission’s original proposal, which the Ombudsman went on to promote via yet another press release.⁷² It goes without saying that the objective of the public addresses was to influence the outcome of the legislative process. While proactive action is often the most

67 For the latest version, see European Code of Good Administrative Behaviour [2012], <http://www.ombudsman.europa.eu/en/resources/code.faces#/page/1>, last visited 10 March 2015.

68 Cadeddu (n 35), p. 163.

69 See e.g. Annual Report of the European Ombudsman 2004, p. 20. Available at <http://www.ombudsman.europa.eu/activities/annualreports.faces>, last visited 10 March 2015.

70 European Ombudsman, Press release No 7/2008, ‘Ombudsman warns that citizens’ right of access to documents is at risk’, <http://www.ombudsman.europa.eu/press/release.faces/en/241/html.bookmark>, last visited 10 March 2015.

71 The key point in the proposal was a restrictive definition of “document”, which, according to the Ombudsman, would have meant “access to fewer, not more, documents”.

72 European Ombudsman, Press release No 6/2009, ‘Ombudsman welcomes European Parliament’s suggestions to improve public access to EU documents’, <http://www.ombudsman.europa.eu/press/release.faces/en/3838/html.bookmark>, last visited 10 March 2015.

efficient way to influence law and policy, such measures definitely lie on the more ambiguous side of the Ombudsman's tools in terms of staying within its mandate.

Despite the Ombudsman's pro-citizens' rights ethos, it should finally be noted that the institution does not by any means seek citizen-friendly reforms at any costs. Civil society actors have, for instance, often been frustrated with the difficulties in accessing Commission documents regarding alleged infringements. Pleading exceptions to disclosure on 'inspections, investigations and audits', the Commission has regularly refused access to this documentation, and the Ombudsman has time and again accepted the practice.⁷³ Throughout the history of the institution, it seems that the holders of the Office have in fact been quite careful not to take up too political battles and cross the limits of their leverage. Because of this alleged conservatism, some argue that the institution has actually not lived up to its potential, wasting the opportunity to pursue citizen-friendly amendments even more vigorously.⁷⁴ This reading of the Ombudsman puts forward an image of too cautious an advocate for openness and inclusion, which has taken up, and perhaps won, battles of marginal importance, leaving the critical underlying structures of governance unaffected.

7. CONCLUSIONS

There exists thus a sense of dissension on the activism of the Ombudsman. Some feel that it is already doing too much in breach of its mandate. Others wish for even more decisive action. In any event, there seems to be a consensus that, for better or for worse, the Ombudsman has emerged as a player to watch on the European governance stage. I tend to think that the Office has promoted citizen-friendly reforms quite skilfully and successfully in a way that has not alienated the institution from power by too radical stances, or burnt bridges with the big institutional players in Europe. The institution's impact has been particularly strong on developing the understanding of transparency from a passive citizen's right to access documents to a broad and proactive duty for institutions to make sure information about its policies and actions are widely available and genuinely accessible.⁷⁵ This kind of openness is a cornerstone for enabling participation in the democratic process beyond a mere right to vote in elections.

73 For a case in point, see Decision of the European Ombudsman 2821/2004/OV.

74 See Rawlings (n 11), p. 20.

75 Curtin (n 49), pp. 214–215.

Contemporary theories of democracy often emphasize the importance of participatory and deliberative structures in society.⁷⁶ While new governance methods in general and the EU citizenship agenda have clearly fallen short in their effort to tackle the crisis of social legitimacy, the Ombudsman's activities have definitely helped to provide opportunities for civil society actors to make their voices heard in the EU. In a sense, however, this is only where the work for a more inclusive democracy starts. EU citizens bear a lot of responsibility to make use of their rights, and engage in processes themselves, for talks of a democratic deficit to quiet down. At its best, a transparent and receptive environment can have a powerful democratic effect. Such an environment can get people's minds going, get them to ask questions, and make them want to participate in democratic decision-making processes themselves. Having said that, building structures for participation does not necessarily or automatically result in influence.⁷⁷ It is all very well and important to promote general principles of procedure, but civil society's contributions should also be taken seriously by key institutional players and actually influence the outcome of debates. Only then can one actually start to speak of more open idea-sharing and empowerment of the people.

What is most troublesome when reading especially Eurosceptic discussions on the EU is a sense of inevitability in distant bureaucratic decision-making processes. People sometimes seem to feel that the course of Europe's future is steered steadily and unavoidably from Brussels with no real public accountability or possibility to influence policy outcomes. Hence it would seem that the crisis of social legitimacy can be overcome only when Europeans start to feel that their opinions and ideas are welcomed to EU fora. Furthermore, drawing on analogy from law and society studies on court proceedings, strengthening participatory rights could in their own right also make policy more acceptable. Studies have found that regardless of how trials end, parties tend to find the verdict more legitimate if their procedural rights are respected and they have had a decent opportunity to make their case.⁷⁸ Maybe the EU could also benefit from this phenomenon by simply offering its citizens more opportunities to make their voices heard on common issues. The work of the Ombudsman certainly has, at the very least, furthered this symbolic purpose. 🙏

76 Rosas & Armati (n 3), pp. 138–142.

77 On mistaking structures as outcomes, see David F. Kennedy, *The Dark Sides of Virtue: Reassessing International Humanitarianism*, (Princeton University Press 2004), pp. 116–118.

78 Kaijus Ervasti, *Laki, konflikti ja tuomio* (Edita 2012), pp. 236–243.