

The Art of the Ombudsman: Navigating Strategic Choices and Principles

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Dear Ombudsman colleagues

It is my great pleasure to be here today in the company of so many friends and peers from around the world. I would like to express my thanks to the International Ombudsman Institute, and in particular to our host for the invitation to speak to you this morning.

We are meeting at a time of intense geopolitical disruption, the fallout of which no one can predict. The slender threads of democratic norms and values become even more fragile as the collective memory of the roots of genocidal 20th century wars begins to fade.

Yesterday we witnessed the attempted assassination of the Slovakian Prime Minister and now await its political aftermath.

We watch - in plain sight - the devastation of Gaza, and of its people in the wake of the horrendous October 7 attack on Israel. We witness the ugly rise of anti-semitism, the grinding, ongoing war in Ukraine and multiple armed conflicts around the world. We witness the weaponising of migration, the cynical forging of alliances between populist strongmen, and all the while our sublime and beautiful blue planet is ever more threatened.

In the United States, we witness the sordid trial of a former and possibly next President. Separately, we witness its polarised, conservative leaning, Supreme Court debating Presidential immunity from criminal prosecution for conduct involving official acts in office, immunity which the former President claims should be total.

Faced with this, we would not be human if we did not question our own worth and value as Ombudsmen, the extent to which our generally soft law powers can ever hope to impact on the world in a way that can hold back anti-democratic impulses, the undermining of the rule of law, the climate crisis, let alone the unquenchable desire of man to inflict death on their fellow men.

So when we talk about Ombudsman values, I put resilience and belief in amongst independence, fairness, impartiality and trust. It is through the exercise of that resilience and that belief that we can make decisions as to how we inhabit and exercise our role, how we make choices as an artist would, as the conductor of an orchestra would, how we choose our instruments and how we play them.

It is also important that we frame our work in a way that enables us to make those strategic choices with confidence and with strength.

As an Ombudsman I see the role as fundamentally about the prevention of abuse of power. When most of us hear that phrase we think of corruption, or of very serious maladministration but an abuse of power can also be the failure of a government body to reply to a citizen, or to incur stressful delays in dealing with a matter, or to be careless in the administration of a grant or benefit.

When we see our role as lending our power to the powerless citizen to enable them to deal with a powerful administration as an equal then we can confidently direct and organise our work through that simple prism. We can make those choices and adopt those strategic positions.

I also see my role as one that protects the administration from itself. The institutional urge to serve its own interests can be a strong one, the desire to defend itself from criticism is equally strong. Group think can set in and with it the failure to see risk, to see the bigger picture.

An administration may focus on legal or political risk without fully considering the wider public interest. It is our job to coax it away from the security of black and white decision making and into greyer, messier, reality.

Before I outline the way in which the office of the European Ombudsman uses its powers, I want to reflect on what I said earlier, about the role of our soft power institutions in a world enveloped in crisis. How do we continue to assert that role when administrations are distracted or preoccupied by those crises?

Recently, my Office has been concerned about the delays in dealing with access to documents or freedom of information requests at appeal stage by the European Commission, the executive body of the EU. At one level, it would seem a rather unimportant concern given the challenges the Commission is currently dealing with, from the war in Ukraine, the middle east crisis, Chinese industrial power, the next US election, populism etc, etc. How do we set about persuading the Commission to commit to legal time limits on access requests when there are so many ostensibly more important things to worry about?

Yet when I considered this, I realised that elements of those crises were caused precisely because of a failure to deal with certain problems when they were still small, allowing them to build to a point where they became overwhelming.

Russian dominance of parts of the European energy supply was enabled by a complacent approach to lobbying and to the phenomenon of the revolving door, through which former politicians or administrators use their network to advance the interests of private interests – in this case, Russian

energy companies. No one really cared or paid attention until Russia invaded Ukraine and the damage caused by decades of indifference to ‘small things’ became apparent.

Similarly, with COVID. In 2005 the European Centre for Disease Prevention and Control was created, its title suggesting an equivalence of power, of capacity, with the US Centre for Disease Control. In effect it was a weak agency and designed to be so, dependent on the voluntary, and often reluctant, support of the EU member states to give it the necessary information on which to build real defences against a possible pandemic.

The failure therefore in non-crisis times to deal with the gap between the misleading title of the ECDC and its weak reality significantly impacted on the crisis that did inevitably emerge. At the height of the pandemic my Office investigated the ECDC to alert the legislators to where the gaps lay in order to allow them to deal with them through the legislative process.

This was an own initiative investigation, not prompted by a complaint, but rather informed by our strategy of using our powers to effect maximum impact, in this case by highlighting the defects in the agency that citizens believed was something that it was not.

A case we dealt with concerning text messages between the EU Commission President and the head of the Pfizer pharmaceutical company concerning the mass purchase of vaccines during COVID, led to a Commission refusal even to acknowledge such messages existed. The Commission has now been taken to court by the New York Times and the damage caused to its reputation by failing to deal with a ‘small’ matter at the start is not inconsiderable.

Therefore, I do not consider that the cases that may now be considered ‘small’ or marginal to the major concerns of the EU are not important, not relevant to the bigger picture. Crises rarely happen overnight but develop over years, over decades and we as Ombudsmen are often involved in some parts of that continuum, alerting the administration to the potential risks of not taking timely action.

No doubt many of us wondered, as I did yesterday, as we listened to presentations on what at this stage are largely reactive investigations and initiatives on the climate crisis, what our Offices might proactively have done decades ago to avert some of the harms we now see. Did we not see what was happening or did we fear the accusation of being ‘political’ of pushing an agenda then, tragically, still on the margins.

This view, this sense of our deeper, more profound role was expressed in an address I made in 2015 to celebrate the 20th anniversary of the Office.

“A narrow description of this Institution as a complaint handling body fails therefore to give adequate expression to its deeper role as an embedder of democracy, as a driver of change in a

culture that still lacks the requisite levels of accountability and transparency appropriate to institutions crafted from the finest European ideals.”

This clarity of purpose has resolved some of the issues around prioritisation of cases. Under my mandate, we have introduced the category of ‘public interest cases’. These are cases that are of particular importance for the public due to the topic concerned or the gravity of the maladministration alleged.

Recent cases include expanding public access to documents related to the EU’s pandemic recovery fund and investigating the decision-making behind the authorisation of pesticides to be used in European agriculture. We aim to inquire into at least 50 such cases every year.

I should point out, that as much of the normal caseload of an Ombudsman, social protection, health care, housing, are not competences at EU level, the type of case dealt with by the European Ombudsman is necessarily different at times in substance but not in process.

The drive to change systems and cultures is also behind our greater use of my power of own initiative. We can target more precisely instances of systemic maladministration, without damaging our ability to deal with standard complaints.

The creation of a specialist strategic team allows us to pay close attention to systemic issues we have identified. We can also quickly move to intervene on other non-systemic issues, sometimes by way of a simple letter seeking an explanation on something that has come to our attention.

And yes, because we are exercising choice, there can be accusations that we are acting in a ‘political’ way. In fact, our initiatives and investigations are based on criteria such as complaint patterns and will always concern issues of undeniable and significant public interest.

There are three criteria in particular that I use for own initiative investigations. One, that the subject is of significant public interest. Two, that we are not replicating the work of another oversight body, and three, that results are achievable, that we are not using resources in pursuit of an unrealistic objective.

It is also important to have clarity about our role vis-a-vis those who come to us seeking redress.

We are clear that our role is not that of a mediator seeking a negotiated, consensual outcome. We are in the business rather of arbitration, that is, judgement, but judgement grounded in a visceral sense of justice.

Our collective offices owe their existence to the natural inclination of powerful administrative states to ignore at times the wishes and rights of the citizens they serve. Our role is to challenge

this and to lend our powers to citizens so they can have a fair fight when challenging the injustice they experience.

But this gives rise to a familiar dilemma; how to gain the trust of citizens while maintaining the trust of the institutions we oversee. This is crucial for an institution that has no binding powers and relies on an intangible moral authority for the acceptance of its recommendations but also, it must be said, relies on an administration that equally possesses and exercises a moral conscience.

We take measures that ensure we stay on course. While the European Ombudsman's founding statute is not overly restrictive as to what constitutes maladministration, we have tried to be clear about what constitutes good administration, by promoting a Code of Good Administrative Behaviour and other guidelines.

The interpretation of these codes and guidelines is still more art than science, but helps to avoid the perception that decisions are made on the personal whim of the Ombudsman.

We also have procedural safeguards. We keep our proposals for solutions confidential until the institution has considered them; we share our draft meeting reports with institutions to review the record before it is shared with complainants; we avoid drawing conclusions on material that either party has not been allowed to comment on. And, of course, we do not always find in favour of the complainant, no matter how convinced they are that an injustice has been committed.

The Office also hosts a biennial Award for Good Administration, which celebrates the successes and innovations of European administration, from guidance that helps civil society organisations document war crimes to the creation of a digital Covid certificate to facilitate cross-border travel during the pandemic. All of this helps to secure the Ombudsman's credibility as an impartial and fair Office.

In cases of substantive disagreement with an institution, we gently remind them that we are not confronting them with some alien set of values, but rather with the texts that they are bound to serve, such as the EU Charter of Fundamental Rights. We make every effort to see and respect their point of view before directing them in a way that we hope will move, as Abraham Lincoln put it, the better angels of their nature.

But not all problems resolve themselves through clear vision, good judgement and careful management. Very often the biggest challenge lies in changing a culture or a mindset, even within our own Offices.

Administrative cultures aim for durability, predictability and impartiality but that risks rigidity, inflexibility, a determination to do things exactly as they've always been done.

Culture change takes time. It requires an Ombudsman to use the design skills of an architect, to plan a strategy, to identify the barriers to culture change and then create and deploy the most effective tools to break them down and render transformation.

The strategic use of communication, of persuasion, is vital. We are influencers. An investigator closes the file and the critical challenge to mediate the work to maximum effect then begins.

Sometimes a quiet approach is more effective than a shaming tweet or press release. Sometimes it's the other way around. The Ombudsman may choose noise, a whisper or silence just as a conductor might choose a drum, a piccolo or silence.

Culture change also involves the cultivation of allies and champions within and without the institutions to drive reform, a coalition of influence to overcome administrative resistance or inertia. And it means large investments of time and resources to, for example follow up on initiatives and decisions over years, even decades.

In the last 10 years we have carried out three own-initiative inquiries into how the European Commission has regulated conflicts of interest inherent in officials moving from the public to the private sector, each time trying to push the culture change needed a little further.

Some of the measures that we recommend involve restrictions on civil- servant freedom to choose a career as they wish, measures resisted at times by an institutional mind-set that minimises the risks involved, such as corruption and reputational damage.

Recent cases involving the movement of regulators to the very industries they regulated not only damages citizen trust but encourages a damaging Eurosceptic narrative. This happens when those charged with deciding on such moves fail to see beyond narrow legalities, fail to pay attention to, or simply ignore, the much bigger picture.

Raising awareness of these risks is not just a matter of legal argument, but also of engaging with institutional personnel, such as staff unions and senior managers, with specialist civil society organisations, with the media and even directly with citizens through social media channels. The Ombudsman is not a court, but the court of public opinion is a very good test of our reasoning and of our values.

What are the opportunity costs of such an intense focus on changing institutional culture and norms? Clearly, one has to balance resources and priorities. A good investigator knows when to stop, when to fight the urge to inspect one last file, to examine one last piece of evidence.

In some cases, we have to draw a line knowing that the full redress demanded by the complainant - demanded even by the circumstances of the case - would absorb the precious time and energy required for others.

There are objective limits to what the office can do and there is no simple formula for these decisions, only the pole star, the guiding star that is your vision and your mission.

But, while fundamental, clarity of vision is still not enough. Mirages and dreams too can have a certain clarity. Organisational values and procedures are needed to provide the strong container for that vision, the norms of good governance to keep ourselves true to our mission, to set priorities, and, essentially, to keep ourselves honest.

The key values are trust, transparency, accountability and integrity, the same values to which we hold public institutions to account. A system of good governance that embodies these values represents the moral compass that allows us to navigate strategic choices and difficult dilemmas with a degree of confidence and ease.

Without them, the office of an Ombudsman can quickly become a hollow shell, losing the trust of both citizens and institutions. As institutions to some degree on the periphery, we cannot always rely on public scrutiny and pressure to maintain high standards. In other words, we need to be good even when no one is watching.

Our procedures must guard against slipping into an unchallenged self-belief that can compromise our mission. We must be above suspicion, impose the highest standards on ourselves before they are demanded of us if we fail.

This is a dilemma for all of our offices just as it is for the administrations: how to achieve and retain a clarity of moral vision that at the same time invites and welcomes challenge, discussion and debate.

One final point: all of the above, the strategic thinking, the persuading, the planning, the prioritising, all of this can work only if, each of us as Ombudsmen work in an administration that agrees to play the game. It works only if, in exchange for each of us doing our work independently, fairly and effectively, the administration respects our role and implements our decisions.

It works only if the administration itself respects the rule of law. It works only if the individual Ombudsman also respects it in its fullest and broadest sense.

In more than two decades as an Ombudsman, at national and European level, I have witnessed wonderful Ombudsmen rendered powerless because the administration does not welcome oversight. But I have also witnessed Ombudsmen captured by the political system, consciously or unconsciously playing not the Ombudsman game, but rather the game of those who have appointed them, trading in their values in order to maintain their position, avoiding conflict, avoiding sensitive cases and investigations, keeping their heads down.

A friend of mine sometimes reflects on what he would like said about him at his funeral and it's a good way for all of us to frame our future legacies. Because at the end, there are no excuses, there is no tortuous rationale for failure to act as we should have, all there is is the record itself and, eventually, the judgment of history,

Networks such as the global IOI and the European Network of Ombudsmen help us to reflect on all of this. We learn from each other, we support each other, but most importantly, we try to give each other the courage to carry on, come what may.