The surplus value of the ombudsman, in: *The Danish Ombudsman 2005*, part III, p. 103-140, Kopenhagen, 2005

SURPLUS VALUE OF THE OMBUDSMAN

Prof. Dr. Gio ten Berge, Dr. Philip M. Langbroek[1]

Introduction

In this article we will compare the roles of administrative courts and public law ombudsmen[2] in the Netherlands. This comparison will result in the conclusion that ombudsmen in the Netherlands are not merely a supplement to the legal protection offered by the administrative courts, but that they give a specific type of protection to the citizen and a specific contribution to the optimal functioning of government services. We will also pay some attention to the Belgian experiences with ombudsmen. We will focus on the following aspects:

- Conditions for access
- Procedure
- Grounds for review
- Possible outcomes of proceedings

In our closing remarks we will provide a description of the significance of the ombudsman for administrative law in the Netherlands.

Legal protection of citizens against the administration.

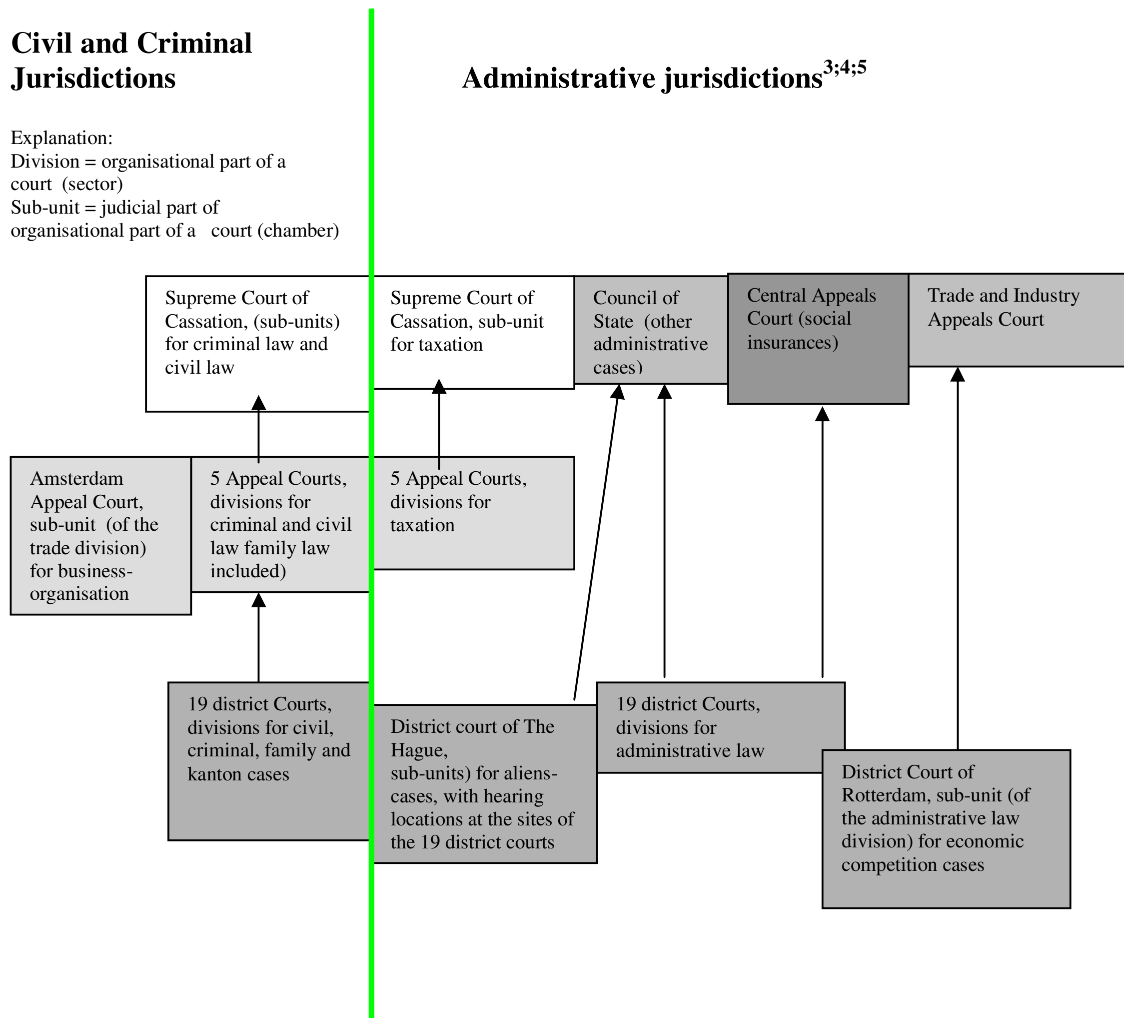
Legal recourse for citizens against actions of the government is organised in the Netherlands according to a dividing line between administrative law and civil law. The general rule is that the civil courts are not competent to deal with actions against the government in cases where an administrative court is or was competent . Administrative courts – again, generally speaking – are competent if there is a decision which is defined as: a legal act based on public law, in written form. This means that for an action against real acts and civil law acts of the government, the civil courts should be addressed.

The Court system
The Netherlands is divided into 19 districts, each with its own court of first instance. The courts generally include administrative, civil and criminal divisions, as well as a division for small claims and minor crime (kanton). In administrative cases there are three courts of appeal: The Central Appeals Tribunal is a special administrative court which hears disputes pertaining to social security matters and the civil service. The Trade and Industry appeals court is a court of appeal which hears disputes in the area of economic administrative law. Finally, the Judicial Division of the Council of State is the court of appeal for cases not specifically assigned to one of the other administrative appeal courts. It deals with cases in the areas of environmental law, physical planning, subsidies, the admission of aliens, and election matters.

The court system is shown in the following chart:

[1] Faculty of Law, Utrecht University, Utrecht, The Netherlands
[2] Although the Swedish word ‘ombudsman’ does not refer to any physical man whatsoever, we will use it as if it does.

The Court System of the Netherlands, May 2005.



Administrative Court Proceedings

The most important Act in the field of legal protection against the government is the General Administrative Law Act[6] (GALA), especially chapters 6, 7 and 8 thereof. The institutional regulation of the above mentioned courts is to be found in a variety of other more specific laws (sometimes supplemented with specific procedural regulations). Since the beginning of

[3] For taxation, a bill is currently before Parliament. It proposes to vest first instance competence for taxation cases at the 5 district courts in the cities where the 5 Appeal courts are located. Hence, the two-tier system for taxation would change into a three-tier system.

[4] The chart does not show the first and only instance competences of the three highest administrative courts.

[5] For more information in English, see: www.rechtspraak.nl/information

[6] See the very instructive study Renee Seerden, Frits Stroink (eds.), Administrative law of the European Union, its member states and the United States, a comparative analysis, with also an extensive description of Dutch administrative law, Intersentia, Antwerp – Groningen 2002

the twentieth century administrative law has been dominated by the concept of the administrative legal act (Dutch: beschikking, German: Verwaltungsakt). So, the GALA is dominated by the regulation of the administrative legal act. The administrative legal act is the most frequently used form of action by government authorities to regulate a single, individual case. It reflects the old scheme of the subordinate relationship between the State and its citizens and lays down the rights and duties of the affected individuals. The GALA defines an administrative act as an order, decision or other sovereign measure taken by an authority for regulation in a particular case based on public law and directed at immediate external legal consequences.[7] We will use the word 'decision' to indicate the legal act under administrative law. The GALA provides directions for administrative authorities on how to take decisions in the form of legal administrative acts and it regulates the legal protection against them by the already mentioned administrative courts.
Section 8:1 states that an interested party may appeal against an administrative legal act. An interested party is a person whose interest is directly affected by a decision. Also administrative authorities and legal persons can be an appellant. The right of appeal to a court is denied for some particular kinds of decisions, such as e.g. the passing or failing of an examination in a school or university context.
These conditions are not applicable for access to an ombudsman.

There also exist a few procedural conditions in order to access administrative courts. Before appealing to a court, at first an objection procedure has to be followed. The same authority that took the original administrative decision has to decide on the objection. Chapter 7 GALA formally regulates this procedure.
Section 8:41 states that for admission to an administrative court a registry fee has to be paid by the appellant. An appeal to an administrative court or an objection to the administrative authority shall be lodged by submitting a notice of appeal or objection, within a term of six weeks.

In conclusion, access to administrative courts is restricted by the following conditions:

1. There has to be an administrative legal act, not belonging to the excluded kinds of administrative acts.
2. The appellant has to have a directly affected interest.
3. A preliminary objection procedure has to be followed, and there are some formal requirements, which are not applicable to complaints proceedings at an ombudsman office, such as the registry fee, the term of appeal, a written notice of appeal.

As a general rule cases are dealt with in single judge sessions in administrative courts. A bench of three judges deals with more complicated cases. The proceedings are of an informal nature and are divided into a preliminary investigating inquiry and the open court session. The proceedings have two faces. On the one hand, administrative court proceedings are primarily of an inquisitive nature, where the judge searches for the substantive truth in the case at hand. On the other hand, there are clear adversarial aspects, like an exchange of written notices and verbal pleadings in the open-court session.
The judge has, also in the preliminary inquiry, his own investigation methods, requesting parties and other persons to provide written information, summoning the parties to appear in person or by means of a legal representative, either to provide information, or to attempt to reach an amicable settlement of the dispute. Furthermore, a judge can also appoint an expert

[7] Seerden/ Stroink,p.107

to conduct an investigation, summon witnesses, or order an inspection to be carried out on the spot.
There are four types of administrative proceedings:

- Simplified proceedings, without a court session;
- Immediate judgement, without a written preliminary investigation by the court
- Normal proceedings
- Provisional remedies, leading to a provisional judgement

But also in normal proceedings, if all parties consent, the court may order that there shall not be a court session. During the last few years some courts have started to experiment, inviting and stimulating the parties to decide on a "time-out" in the proceedings in order to enable mediation efforts, and this also applies to administrative proceedings.

The usual procedure, as described above, takes a great deal of time. There exist three other proceedings with a speedier outcome. In evident cases there is the possibility of simplified proceedings. The court may close the inquiry in the appeal procedure, if a continuation thereof is not necessary because:

(a) The court manifestly lacks jurisdiction;
(b) The appeal is manifestly inadmissible (The appellant has no interest, or he does not oppose an administrative legal act, has not paid the registry fee, or has exceeded the term of six weeks).
(c) The appeal is manifestly unfounded or the appeal is manifestly justified.

There exist two remedies for a more rapid result:

1. The appellant can request an immediate judgment on the merits (fast-track proceedings). In these proceedings the parties will be invited as soon as possible to appear at a session of the court. No preliminary inquiry will take place. An immediate exchange of papers substitutes this Inquiry. The whole investigation in the case will take place at the court session and the term for delivering the judgment is shortened.
2. From these immediate judgments on the merits, the provisional remedies should be distinguished. If an appeal against an order has been lodged with the court, or, prior to a possible appeal to a court, an objection or administrative appeal has been lodged, a judge for provisional remedies may, on application, grant a provisional remedy, where speed is of the essence, because of the interests involved. The decision of this experienced judge is preceded by a hearing, in which papers can also be exchanged.

During the 20th century administrative courts developed criteria for proper administration, as instruments to enable them to determine the legality of administrative decisions. The reason for this being, of course, that legal circumscriptions of certain conditions determining competence to issue delegated legislation and to take decisions are often not sufficiently precise to create legal certainty. As a consequence, also court proceedings help to create legal certainty of a procedural nature, as a substitute for unattainable material legal certainty.

These criteria are:

- The prohibition of abuse of power
- The prohibition of arbitrariness
- Carefulness

- Justification
- Fair Play
- Legal certainty
- Legitimate expectation
- Equality
- Proportionality[8]

These criteria are partly codified in the GALA.

Possible court decisions
If the court upholds the appeal, it shall annul all or part of the disputed order. It can order that all or part of the legal consequences of the order shall be void (section 8:72 GALA). If the court upholds the appeal it may direct the administrative authority to make a new order or to perform another act in accordance with its judgment, or it may direct that its judgment shall replace the annulled order or the annulled part thereof. At the request of a party it may order the public body (the legal person) designated by it to pay compensation for the damage suffered by that party. The judgment may also order the public body (the legal person) designated by the court to reimburse the registry fee. The court also has the jurisdiction to order a party to pay the costs which another party has reasonably incurred in connection with the appeal proceedings.
The court may deliver its judgment orally immediately after the closing of the session. Usually the court will deliver judgment in writing within six weeks after the session.

Demanding proper administration via an ombudsman

The National Ombudsman is a complaints instance, but he can also carry out an inquiry at his own initiative.[9] The figure of the National Ombudsman is embedded in the Dutch Constitution: he is a High Office of State, just like Parliament, the King, the Supreme Court and the Council of State. He is appointed by the Lower House of Parliament.[10]

In this section no distinction is made between the National Ombudsman and the decentralized ombudsmen. The General Administrative Law Act (GALA) contains one uniform regulation for all ombudsmen.

In 2005 the GALA was extended with a renewed chapter 9 concerning ombudsmen. By January 1, 2006 the system of ombudsmen in the Netherlands will consist of the National Ombudsman at the national level and local ombudsmen at the decentralized level (municipalities, provinces and water boards). The National Ombudsman was established in 1982. The obligation for decentralized bodies to establish their own ombudsmen was realized in 2005. The new legislation will enter into force by January 1, 2006, but several municipalities have already autonomously established a local ombudsman some years ago. Especially the cities of Amsterdam, The Hague, Rotterdam and Utrecht, but also the municipalities of the province of Zeeland, the City of Groningen, and so on, have had their

---

[8] For an elaboration, see: Philip M. Langbroek, General Principles of Proper Administration in Dutch Administrative Law, in: Bart Hessel and Piotr Hofmanski, Government Policy and Rule of Law, theoretical and practical aspects in Poland and the Netherlands, Bialystok/Utrecht 1997, p. 83-107.
[9] We describe the situation as it is before the new chapter on complaints procedures enters into force on January 1, 2006
[10] J.B.J.M. Ten Berge, The national Ombudsman in the Netherlands, Netherlands International Law Review, Nijhoff The Hague, Library of Congress catalogue cardnumber 79-65199, 1985, p.204-224

own ombudsman institutions for many years. These institutions do differ from that of the National Ombudsman . They are originally based on municipal or provincial regulations. They do not have a very large staff, and they are much closer to complaining citizens *and* to the local offices, agencies and departments over which they have jurisdiction . Nevertheless, the National Ombudsman is the most interesting from a normative perspective because of his longer experience and his greater expertise.

Rules of procedure
Ombudsmen are empowered to investigate complaints about the actions of the administrative authorities and their public servants, which belong to their jurisdiction. The area of competence of the National Ombudsman is the administrative authorities at the national level, as well as the police. The area of competence of the decentralized ombudsmen covers the administrative authorities in municipalities, provinces, water boards and so on. It is the task of ombudsmen to determine whether or not the administrative authority has acted properly in the matter under investigation.

Access to ombudsmen is not hindered by formal requirements. Everybody with a complaint against an office, officeholder or public servant within his jurisdiction, can contact the Ombudsman office in The Hague. The complaint will only be admissible when the complainant has first filed the complaint with the administrative body that has caused the distress. A complaint to the National Ombudsman will only be useful after the administrative body has been given the opportunity to deal with the complaint itself. The legal definition of a complaint refers to a written document; however, oral complaints may be made at the office and will be written down by the ombudsman staff.
Ombudsmen and their offices usually have a great deal of telephone contacts. The principal method of dealing with complaints is a thorough investigation with, if possible, a written or verbal exchange of views. Ombudsmen have the necessary investigation powers, but the decentralized ombudsmen do lack some of the binding inquiry powers that the National Ombudsman has (compelling witnesses to cooperate). The ombudsman may not conduct an inquiry into complaints that are suitable for legal action against decisions of administrative authorities, when an administrative court has dealt with an appeal on that subject, or when a civil law suit against the public body concerned is pending on that subject.

Numbers of complaints filed and according to the way in which they are dealt with by the National Ombudsman[11]

	2000	*2001*	*2002*	*2003*	*2004*
Complaints Received	8242	9528	9643	10518	11156
Complaints dealt with	8172	9060	10363	10214	11347
Beyond Jurisdiction	5078	6333	7465	7464	8285
Inquiry	3094	2727	2005	1897	2137
Sent to public body for re-examination[12]			893	853	925
Reports	379	406	413	507	506
Satisfied without	2715	2321	1592	2404	1631 (76%)

[11] Sources: Annual reports 2000-2003.
[12] This was introduced in 2002, based on the argument that public bodies should be enhanced to deal with complaints themselves.

report	(87%)	(85 %)	(79%)	(79%)	
Satisfied because of intervention	1681	2034	1385	1183	1388

Furthermore, the consequence of an inquiry by the Ombudsman is legally of a restricted nature: the Ombudsman delivers a report in which the judgement 'proper' or 'improper' is given. Normally, a report will contain a detailed description of the events that led to the complaints, a description of the internal complaints procedure, an extensive description of the applicable law, and an elaborate check on the lawfulness or unlawfulness of the behaviour which is subject to the complaint. He may also make some recommendations for the public authority concerned.
However, the Ombudsman is not able to conduct any legal act as a response to complaints. Nonetheless, the work of the National Ombudsman is closely related to the terms and concepts of the General Administrative Law Act. The competence of the Ombudsman is linked to the definition of these concepts, and by his reports he also contributes to the development of administrative law in the Netherlands. To date, the National Ombudsman has dealt with 10,000-11,000 complaints annually.

There are two methods of dealing with complaints[13]. The principal method as laid down in the law is an investigation to establish the facts regarding the actions of the administrative authorities and their staff. As a rule, this results in a report. The other method is based on early intervention (brief mediation between an authority and the complainant) by the ombudsman. These are frequently cases in which a complainant has been waiting for some time for a response from the involved authority, or cases that are obvious and the authority can promptly change its attitude and admit its improper behaviour.

When an investigation is opened, ombudsman staff often first try to reach a friendly solution. This method, called the 'intervention method', is quite successful as most of the inquiries started (between 55% and 88%) are closed in this way. The intervention method is the informal approach; ombudsman staff function as mediators, by arranging some contact between the complainant and the office complained of. Often, a meeting with or an explanation and/or excuse by a public servant will suffice. In these cases, no report is drawn up. In principle a report follows when an attempt at intervention is not successful and when a re-examination of the case is not possible. This means that the development of the demands of proper governance is based on complaints where the public authority and the complainant were unable to reach an agreement.

Evidently, local ombudsmen and the National Ombudsman expend a great deal of their efforts on interventions and not on writing reports. Although reports can be expected to be most interesting from a normative perspective, problem-solving methods are of interest from the perspective of having mistakes rectified, and hence for the realisation of the principles of proper governance in practice.

The supplementary function of ombudsmen
There is a wide variety of actions, representing many of the occasions of contact between government and citizens, which can be subject to complaints: administrative legal acts as far as no administrative court is admissible, civil legal acts, correspondence, personal contacts by

[13] Introduction to the National Ombudsman of the Netherlands, an official publication from the National Ombudsman, The Hague 2000, p18, 19

telephone or at a counter, or in another concrete social context. So the main task of the ombudsmen is to provide recourse against individual conduct by persons in government service and against the side-effects of bureaucracy. In this respect also the observations by Bovens and Zouridis in NJB[14] are interesting. They posit that over the last decade government bureaucracy has changed from a street-level bureaucracy with old-fashioned methods to an ICT-system level of bureaucracy with information websites and computer decisions. The confrontation of the moderate citizen with this new model of bureaucracy causes a great deal of specific communication problems, which can only be solved by human contact, preferably with the help of impartial institutions such as the ombudsmen. Specialists in administrative law are nowadays discovering the phenomenon of the so-called "circumstantial administrative law". Administrative acts are surrounded by acts of procedure such as respecting the term of decision-making, acts of preparation and many non-legal acts, and the conduct of politicians and civil servants. Because of the nature of administrative law, with its focus on the legal consequences of acts, this side of administrative behaviour is often not the object of review by the administrative courts. Here it is only the ombudsman who can protect. But the ombudsman is not a judge and he may not act as a judge. Nevertheless, he has a supplementary function with regard to recourse against the administration. This function is fourfold:

1. Administrative acts, against which one cannot appeal to an administrative court, can be the object of a complaint to the ombudsman. Obviously this is not a "genuine" supplementary function, as the ombudsman cannot pronounce any binding judgments. Nonetheless, in almost 90% of cases the administrative authorities do follow the decision of the ombudsman. The conclusion is that, although the ombudsman is not a judge, his decisions have an important effect as far as the complainant is concerned.

2.The supplementary function is especially manifest with regard to complaints for which – if they would have been of a greater material value - a civil law action would have been appropriate. But civil procedure is difficult and expensive and with regard to social behaviour by government officials in direct personal interaction with citizens it is questionable if the civil courts would be able to handle these small claims adequately. In all these cases the path to a judicial procedure is not accessible in practice, and an ombudsman is the only institution which can offer effective protection.

3. It often occurs that the ombudsman is able to make an important contribution to the proper functioning of the system of administrative recourse. Therefore the ombudsman often intervenes in the objection procedure in order to obtain a more expeditious decision. The objection procedure precedes the procedure before the administrative court. In the same way the ombudsman intervenes in those situations in which the authorities do not promptly or adequately follow up the decisions of the judicial courts.

4. The judiciary has developed criteria for legality and unwritten rules for proper administration over many years. These criteria are partly codified in the General Administrative Law Act. At the beginning of the existence of his office, the Ombudsman relied on these same standards, when they had not yet been elaborated in legal regulations. In 1987 the second National Ombudsman, Mr. Oosting, developed a list of propriety requirements . These criteria fall into two groups. The first group embodies the notion of the rule of law, the requirement that the government should act in accordance with both

[14] NJB2002 P. 65-72

legislation and unwritten legal principles. The second group of criteria for assessment is proper in every other respect, especially concerning the procedure in administrative conduct in relation to the citizens.
In the context of an ombudsman investigation and an ombudsman report and conclusion, these standards of proper administration are in a class of their own. As stated above, the task of ombudsmen is to determine whether or not the administrative authority has acted properly in the matter under investigation. When is an action proper or improper? It is essential for the authority and for transparency that the ombudsmen should provide the reasons underpinning their decisions. These reasons have to be accessible and understandable. The best way to do that is to develop a system of standards for the assessment of administrative conduct in a variety of contexts.

Demands of proper administration[15]
In 2002, the National Ombudsman, Mr. Fernhout, asked the Institute of Constitutional and Administrative Law of Utrecht University to investigate the ways in which the demands of proper administrative conduct operated in his reports.[16] Starting from Mr. Oosting's list we went through the reports from 2001 and 2002. What we found was amazing.

For an ombudsman, dealing with a complaint, the focus is retrospective: the ombudsman judges an administrative act that has taken place in the past. Parallel to legal procedures, the judgments of an ombudsman can also be a reservoir of experience from which general rules can be deduced which administrative bodies have to live up to in their dealings with citizens. As such, the function of the judgments is more prospective: the rules can function as a guideline for future actions of administrative bodies and as a future standard for judging administrative acts by ombudsmen.

In order to fulfil this prospective function, the judgments of ombudsmen will have to meet several criteria. The most important ones are that the judgments must contain sufficiently clear standards and that the judgments are easily accessible for both the administrative agencies and the ombudsman authorities. We found that existing ombudsman judgments were lacking on both accounts.

The National Ombudsman used the list mainly as an administrative tool for classifying rendered judgments for the purpose of its annual report and not as the normative basis for deciding a case. And even as an administrative tool the list had only a limited meaning, since it turned out that there was no clear understanding of how cases should be administered. Through interviews with staff members of the National ombudsman we learned that some believed that a single case should only be administered under a single norm, while others classified a case under as many norms as might seem relevant. Also staff members disagreed as to whether or not particular cases fell under a specific heading.

The basic reason for this was that the list contained the norms for proper administrative conduct only at the most abstract level. As such, the norms are hardly ever directly applicable to concrete administrative conduct. The missing link between abstract norms and concrete

[15] This paragraph is largely derived from P.Langbroek and P. Rijpkema, Demands of proper administrative conduct: a research project into the *Ombudsprudence* of the Dutch National ombudsman, paper for the Ethics conference in Leuven, Belgium, June 2-4, 2005.
[16] The research project was conducted by a team consisting of: J.B.J.M. ten Berge, N.C. Bouwman-de Zoeten, A.M. Hol, Ph.M. Langbroek, R. Ortlep, P. Rijpkema, R. W. Veldhuis and R.J.G.M. Widdershoven. Langbroek coordinated the research project.

judgments are norms in context. The formulation of norms in context is the typical responsibility of judging institutions. In deciding cases, they identify the general aspects of the case that are relevant for their judgment and identify the rules in the light of which these aspects are relevant. Thus the institution explicates the meaning of the abstract rules by identifying the contexts in which they are applicable and the consequences they imply in those contexts. Without this explication, abstract rules remain largely without sense or meaning. This is also true for legal adjudication. It explains the importance that is given in every legal system to the study of case law.

However, Oosting's list does not contain a systematic rendering of norms in context. These will have to be found in the individual judgments. In the last couple of decades there have been periods in which the National Ombudsman has been active in formulating norms in context, several of which have been incorporated in the law. During other periods the ombudsman has been less active. Our analysis of the judgments of the National Ombudsman in the period 2001-2002 revealed that during that period the ombudsman hardly formulated any norms in context. Typically, reports contain a very detailed description of the facts of the case and the decision as to whether or not, given these facts, the conduct of the administrative body was proper .

The absence of norms in context has several disadvantages. First, for the parties involved the judgment may be more difficult to accept, because the finding that the conduct was (im)proper appears more or less out of the blue. Second, the judgment does not offer guidance to administrative bodies as to how they should act in the future in order to meet the standards of proper administrative conduct. Finally, the judgment offers no guidance to citizens with respect to what they can reasonably expect from administrative bodies.

From this point we started to re-read the reports and to develop ourselves a construction of relevant ombudsnorms in context , leading to an adaptation of the list by Oosting, and also to the formulation of about 200 norms in context. One of the features of ombudsreports so far was that most of them referred to the law only and improper behaviour was often found to be contrary to the principle of 'legality'. Next to that, there was a great reluctance to invoke human rights as a ground for impropriety. We have taken the stand that ombudsnorms are of a different character than legal norms. Without disqualifying the importance of legal norms for administrative bodies and citizens, and hence for ombudsmen, we insisted that the demands of proper administration are primarily of an ethical nature and that therefore the judgments of an ombudsman need not necessarily coincide with judgments based on the law only.

For example, when thieves have broken a car window, and the police find a vehicle in a condition where it can easily be stolen, they will deal with the situation by towing the car to a safe parking area. The car owner is notified, but has to pay the costs of towing and parking (about € 200). The Amsterdam district court has determined this form of care (legal representation in relation to the goods in question) by the police to be lawful conduct. The ombudsman, however, said that it would have been easy to trace the name and address of the car owner on the spot and to contact him or her by phone or to call at his/her home if it was in the immediate vicinity, in order to ask the owner what he/she would prefer. The fact that this was not done is contrary to the demand of carefulness, especially concerning service-provision. Thus, the law only demands a minimum, whereas the demands of proper administration may require more than just that from public servants.

This operation led to the advice for the ombudsman to use the following set of general norms:

Human rights
Prohibition of discrimination
Secrecy of written and telephone communications
Inviolability of the House
Privacy
The right not to be detained without legal cause
(Other human rights)

Material demands of proper administrative conduct
Prohibition of abuse of power
Reasonableness
Proportionality
Coulance[17]
Legal certainty
    Duty to follow court judgements
    Legitimate expectations
Equality

Formal demands of proper administrative conduct
Impartiality and absence of bias
The right to be heard
The right to reasoned decisions
Fair play

Carefulness (norms of instruction)
Timeliness
Administrative accuracy
Active and adequate provision of information
Active and adequate gathering of information
Adequate organisational provisions
Comportment
    Politeness and decency
    Service
Professionalism

Other demands of proper administrative conduct

An example of the construction of ombudsnorms in context
In order to provide an example, we have defined Fair Play in general as the principle 'demanding that public offices and public servants give citizens the opportunity to adequately use their procedural opportunities'.

This principle is given different meanings in different contexts. E.g. in the context of dealing with complaints, a public office like mayor and aldermen should identify the complaints part of a letter directed to them, and to act accordingly. Not doing so means withholding the citizen's opportunity to use his right to complain. When a citizen notifies a crime to a police officer, the police officer should give clear information about the competences of the police and the competences of the public prosecutor in such matters, even if the police and the PPD are of the same opinion that the case will not be prosecuted. Not doing so will prevent a citizen from executing his right to go to court to request that this crime be prosecuted. If a public office engages in a legal action for damages against a citizen, it should inform this citizen about his/her position as to his/her rights and obligations and as to his/her rights (and

[17] The French word 'coulance' has not a proper Dutch or English synonym. It refers to the moral need (not a legal obligation) of a public body to reach out to a complainant and offer some compensation in money or goods, for things having gone wrong where no one can be blamed explicitly .

the way in which they should be used) to legal protection against such action. If a citizen announces that he wants to file a complaint against a public servant, this public servant must give his name and position to the citizen, because otherwise the complaint cannot be effectively filed.

We formulated these norms based on an analysis of 15 reports that were originally classified under the heading of the obligation to 'offer adequate help'. However, we took the stance that there is a relevant difference between just helping, like showing someone the way when asked, and acting so as to help citizens to realize their procedural opportunities, even in situations where public administration and citizens are in a conflict situation.[18]

Unfortunately we lack space and time to explain all of these demands of proper administration.

Belgian Ombudsmen[19]

The Belgian situation is more or less the same as the Dutch one, but paying attention to the matter is justified because Belgian ombudsmen, especially the ombudsman of the Flemish Community, regularly provide a great contribution to the body of knowledge concerning the functioning of the ombudsman.[20]

Functions
In Belgium there are many ombudsmen. The three communities, Flanders, Wallonia and Brussels have Dutch-speaking as well as French-speaking ombudsmen. At the federal level there exists a committee of federal ombudsmen. Also some municipalities, government services and – government companies have their own ombudsman. Each ombudsman has his own statute, formalized in a decree by the responsible representative authority. All statutes have the same features; they contain guarantees for independence, impartiality, and expertise. They establish, in some form, the main functions of an ombudsman, which are:

a. A body for referral to administrative recourse, or another body, which has to deal with the complaint in the first echelon.
b. Supplementary individual legal protection, with regard to administrative bodies by carrying out an investigation and delivering a decision or by intervention
c. A record of structural shortcomings in public administration in his annual report
d. The ombudsman is competent to give advice and recommendations to administrative bodies in the specific investigated case or in general in order to ameliorate the government organisation.
e. Finally, the ombudsman has the task of developing standards of proper administration and developing ideas for the best practices of good government administration

[18] The results are published in Dutch in: P. Langbroek and P. Rijpkema, (red.), Ombudsprudentie, over de behoorlijkheidsnorm en zijn toepassing, BJU, The Hague 2004. For the research process and its outcome in English, see footnote 15.
[19] We thank the Flemish ombudsman Mr.B. Hubeau and members of his office for checking this section.
[20] E.g.: Normconform ombudswerk: een zoektocht naar ombudsnormen / Red.: Nan Van Zutphen, Karine Nijs, Chris Nestor, Erwin Janssens, Bernard Hubeau, Annemarie Hanselaer, Guy Cloots; Eindred. Karine Nijs en Johan Meermans. - Brussel: Vlaamse Ombudsdienst, 2002 (VlaamseOmbudsdienst. Reeks Werkdocumenten; ISBN 90-76833-04-4;

Procedure
Access to an ombudsman depends on the existence of a complaint against the way a governmental body has treated a citizen; this refers to a much wider concept than an administrative act. In the statute regulating the Flemish ombudsman a complaint has been defined as the manifest expression (verbally, written or electronically) in which a dissatisfied citizen makes his discomfort known as regards a performance or subsidy or the omission of such acts. A complaint is not purely a request for an answer. A complaint has to deal with a certain shortcoming on the part of a governmental body in the eyes of a complainant. Just like the treatment of complaints in the Netherlands, two procedures are followed. The official procedure is an investigation, resulting in a written report. In practice, however, the intervention procedure has been developed. This may result in a written conclusion that the investigation has been halted because the dispute between the citizen and the government body has been resolved. The official procedure is not an adversarial procedure as regulated in procedural law for the judicial courts, but an inquisitorial procedure by the ombudsman and his office, gathering written information, hearing by telephone, sometimes hearings in person. Of course, the principle of equal defence is maintained (audi et altereram partem). In his essay on the relationship between the ombudsman function and "contentious" proceedings, the Flemish ombudsman has deliberated that the surplus value of the ombudsman influences the decision processes by influencing the factual interactions of the government functionaries, for example by maintaining the reasonable term for decision making, or by insisting that functionaries reconsider a case informally.[21]
Of course, the ombudsman is not a judge. He is not allowed to deliver a decision where the administrative court is competent. An investigation of a complaint will be suspended if an appeal is lodged with the courts.
The power of ombudsmen is limited, because they cannot deliver binding decisions.

Ombudsnorms:
The task of the ombudsman is to establish whether or not a complaint is well founded .
Especially the Flemish Dutch-speaking ombudsman has been a pioneer in generating a standardization of ombudsnorms for Belgium. In 2004 he organized a conference for Belgian ombudsmen to discuss a report by his ombudsman institution, in which a survey of standards of ombudsnorms has been elaborated.[22] The standards recommended are:

1. Conformity with the law
2. Adequate reasoning
3. Equality, impartiality
4. Respecting justified, faith
5. Correct treatment
6. Active provision of government services
7. Prompt and easy physical admissibility by telephone, and so on
8. Effective provision of information
9. Administrative accuracy
10. Respect for privacy
11. Promptness, respecting a reasonable term for decision or answering a request
12. Helpfulness
13. Professionalism
14. Efficient and effective coordination

[21] B. HUBEAU, "'Una via, sed lex': Enkele overwegingen over de relatie tussen de ombudsfunctie en het reguliere contentieux", in R. ANDERSEN and B. HUBEAU (eds.), De ombudsman in België na een decennium. Een zoektocht naar de meerwaarde van de ombudsfunctie in de samenleving, Brussels/Bruges, Interdisciplinair Centrum voor de Ombudsmanstudies/Die Keure, 2002, 84 etc.
[22] Normconform ombudswerk: een zoektocht naar ombudsnormen: a search action to standards for ombudsmen, Brussels, 2004.

15. Careful treatment of complaints
16. Open communication

Evaluation

In this part of our contribution, we will deal with the surplus value of the ombudsmen in three steps, (1) summing up the findings of the comparison between ombudsmen and administrative courts, as has been done above, followed by (2) attention for the interpretation activities of the GALA by the National Ombudsman and (3) the value of ombudsmen operations for good administration

Comparison of administrative courts and ombudsmen
Administrative courts and ombudsmen are different institutions. Both are institutions with the purpose being to protect citizens against government activities. Administrative courts operate within the legal positive administrative law system. Their focus is limited to one kind of government act, the administrative orders, giving binding rules in single cases (binding decisions under administrative law, i.e. administrative legal acts). Administrative courts deliver a binding judgment with legal consequences. But government activity comprises more than the taking of decisions under administrative law. There exist many more categories of acts. Authorities and citizens are interacting and communicating in a broad variety of occasions of contact, like correspondence, hearings, information at counters, the use of force by the police, detention in police cells and the treatment of persons in custody. In municipalities, the character of interactions can be more specific. The ombudsmen in the larger cities such as Amsterdam, Rotterdam and The Hague receive many complaints about car parking problems, the quality of roads and public gardens, the functioning of the social services, and so on. For complaints about all kinds of conduct, the ombudsmen are accessible, even for administrative acts for which there is no administrative remedy. Added to this, the lack of formal admission requirements and the informal procedure mean that the ombudsman's assistance has the character of help from the next-door neighbour , and one can seek assistance concerning all kinds of problems, not necessarily legal problems. The results of ombudsman interventions are no less effective than those of judges. Administrative authorities follow the conclusions and recommendations of ombudsmen. Finally, a remarkable conclusion is that ombudsmen support the optimal functioning of administrative organisations in so far as they influence the conduct of civil servants and officials within the framework of administrative proceedings.

The Ombudsman and administrative law
Administrative courts and ombudsmen are both working on the same playing field, the area of contact between government and society, which is pre-eminently the domain of administrative law. Administrative courts and ombudsmen mutually influence each other and the legislation. Ombudsmen also interpret the most important codifications of administrative law.

In his 2003 annual report the Dutch National ombudsman provided a survey of the cases in which he had interpreted articles of the General Administrative Law Act. These cases can be divided into two more groups:

1. *Basic legal concepts.* The competence of ombudsmen, just as the competence of the administrative courts, depends on basic legal concepts like the definition of public organs, which are natural and artificial persons empowered to create and enforce positive, binding

public law. The borderline with the competence of the administrative courts depends on the definition of an administrative decision. In some cases citizens ask ombudsmen for help even before they can appeal to a court. In those cases ombudsmen are forced to provide an interpretation of the concepts in question before an administrative court does so. If, later on, the highest administrative courts come up with another interpretation, the ombudsman adapts his interpretation following the view of the highest administrative courts.

2. *Norms of conduct for administrative authorities*. Another field of interpretation are the norms with which administrative authorities have to comply. As already said above, many of the grounds for review, which are developed by administrative courts, are also important for other kinds of acts. Section 3:1 GALA states that some sections with codified principles of due administration shall apply mutatis mutandis to acts of administrative authorities other than administrative orders in so far as they are not incompatible with the nature of the acts. Also here there is a common field of judgments relating to sections in paragraphs 3.2, 3.5 and chapter 2. Sometimes the ombudsman develops norms, which are later codified in the GALA. Examples are decision making and answering requests within a reasonable time (article 4:13 GALA) and the obligation for enforcement supervisors only to use inspection powers after showing their identification card (5:11) and using these powers in a proportional fashion (inspection powers include entering houses and other places, summoning information, taking samples and so on). Generally speaking, inspection powers are used by civil servants who are assigned by the administrative authority under whose responsibility they work to carry out that function. Finally, we can mention the regulation on dealing with citizens'complaints addressed directly to the administrative authorities. This chapter is exclusively the object of ombudsmen's interpretations.

We can conclude that the administrative courts as well as ombudsmen deal with the interpretation of the most important administrative law codifications and, in doing so, ombudsmen also inspire the administrative courts. Of course, regarding this function the National Ombudsman is dominant, because of his expertise and his national authority.

Ombudsmen and good administration

Observing the British situation, Gavin Drewry states: "most individual ombudsman cases have limited significance, but ombudsmen are a deterrent to misadministration and cumulatively their decisions help to propagate principles of good administrative practice." [23] The same can be said about the Dutch situation. But there is more than just that.

Ombudsmen, together with the administrative courts, contribute to the pillars of wisdom of good administration. Their judgements and reports are a source of ethics for public administration. That is why the work of ombudsmen is important for the development of concrete, ethical codes of conduct. A clear example is the code of good administrative behaviour of the European ombudsman. The European ombudsman belongs, together with the major ombudsmen in many European countries, to an extended family, which are developing codes of conduct for good administration, visualizing the concept of a European human right, as laid down in the proposed European constitution. The operation of this ethical concept of good administration as a human right is not only based on administrative legal rules, but is also based on complaints concerning a great variety of interaction between government authorities and citizens.

[23] Parochial stopgap or global panacea, in administrative law facing the future, old constraints& new horizons, Peter Leyland and Terry Woods, London, Blackstone Press 1997, p.83.