

# The Ombudsman: Master Bridge Builder or Quixotic Defender of Human Rights?

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## Introduction

As pointed out by Dr. Wuyts – a former Belgian federal Ombudsman - more than 10 years ago<sup>1</sup>, it still seems unclear which role an Ombudsman is expected to play; although the Ombudsman starts to belong to the European constitutional tradition, apparently there is not yet a common understanding of the ombudsmen's main functions, nor a common pattern of response to their work<sup>2</sup>. In order to withhold one single meaning about the notion "Ombudsman", for the purpose of this paper we will rely on the definition given by the International Ombudsman Institute which comprises six criteria<sup>3</sup>. Thus, we limit this paper to the study of public Ombudsmen, and even to Public parliamentary Ombudsmen excluding local Ombudsmen, just in order to make it possible to compare the discretionary powers, the role and the status of Ombudsmen in different countries.

In Belgium the institute of "Ombudsman" only introduced 'out of necessity' after several so-called Black Sunday elections. In these elections – the national parliamentary elections of November 24<sup>th</sup> 1991 and local elections of October 9<sup>th</sup> 1988 - the extremist right-wing parties gained dramatic victories. Suddenly the country's political elite detected a wide gap between the citizen and the government and its agencies. Their mutual relationship on different levels had to be reviewed and reshaped. The first Ombudsman in Belgium was a local level one; it was created in Antwerp in 1989; then the Flemish region created its first Ombudsman in 1991 and reshaped it in 1995; the Walloon region created its Ombudsman in 1995 and the Federal level saw its first Ombudsman in 1995 as well. The French Community followed in 2002 an Ombudsman and the German Community has issued its legislation on the Ombudsman only in 2009. The main objective of these different Ombudsmen was to bridge the gap between the administration and the citizens.

So, given their *raison d'être*, the role of the Ombudsmen in Belgium has been that of a "mediator" or rather of an institution that builds bridges between citizens and the government. They provide a channel through which complaints are filtered and more often than not are resolved to the satisfaction of the citizen.

Lately a shift in the ombudsman's role can be observed and some crucial questions with regard to their position have arisen. This happens not only in Belgium but in most European countries, especially in those countries where the Ombudsman from the start is not merely a bridge builder but also a staunch defender of human rights. In this paper we put the (dys-)functioning of the Ombudsman in the center and wonder what happens when either the citizens or the public services

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<sup>1</sup> H. Wuyts, *De Ombudsman in Perspectief*, in: TBP, 1999/6, 415-417.

<sup>2</sup> See: Peter Bonnor, *Ombudsmen and the Development of Public Law*, in: *European Public Law*, 9(2): 237-267, June 2003; Howard Gadlin, *The Ombudsman: What's in a Name?*, in: *Negotiation Journal*, 16(1): 37-48, January 2000.

<sup>3</sup> See: The International Ombudsman Institute, *Information Booklet, IOI*, Faculty of Law, University of Alberta, Edmonton, Alberta, Canada, Appendix I, *Membership By-Laws*, 11, 1996.

are dissatisfied with the actions or inactions of the Ombudsman. We will compare the Belgian situation with those in Ireland, Portugal, France and The Netherlands.

## 1. Ombudsmen and Administrative Appeals - a difficult relationship

Much has already been written about the (uneasy) relationship between the Ombudsman and administrative appeal procedures<sup>4</sup>. However it's still worthwhile to have a comparative look at the relationship Ombudsman – administrative appeal and discover that in some countries this might differ widely from what we are most used to. In some common law countries, like Australia e.g. notwithstanding the existence of an Administrative Appeal Tribunal<sup>5</sup>, the legislation on the Ombudsman<sup>6</sup> empowers the Ombudsman to investigate the administrative actions of Government agencies. This can be done either in response to a complaint from a member of the public, or under the Ombudsman's so called "own motion" power. The Australian Ombudsman acts to safeguard the public in its dealings with Government agencies and to ensure that public administration is accountable, lawful, fair, transparent and responsive. He also has got the power to compel the production of documents and to interview officers about their actions, although most investigations are conducted in a cooperative framework without the need to exercise formal powers. If the Ombudsman thinks that there has been an error or deficiency in the actions of an agency, he can recommend that the agency take a specified action to remedy the error or deficiency. If the Ombudsman thinks that an agency has not taken adequate steps to redress any defective administration, he can report to the Prime Minister or Parliament.

In most countries, however, Ombudsmen can not intervene when an administrative appeal procedure is going on. Let us therefore take a closer look into Belgium, The Netherlands, France, Portugal and Ireland.

### i. *Flemish Ombudsman*

The Flemish Ombudsman suspends the examination of a complaint when an appeal to a judicial body or an organized (administrative) appeal about these facts is launched<sup>7</sup>. The Ombudsman must inform the complainant about the suspension and about the reason of it.

### ii. *Ombudsman of the Walloon Region*

Also in the Walloon Region, the examination by the Ombudsman of a complaint is suspended when this complaint is the object of an administrative or jurisdictional appeal<sup>8</sup>, and the complainant must, if needed, be informed about it.

### iii. *Ombudsman of the French Community*

In the French Community, all interventions by the Ombudsman must be preceded, as is included in the other Belgian Ombudsmen's legislations as well, by the provided internal administrative appeals as well as by *démarches nécessaires* (necessary steps) to the involved services in order to obtain

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<sup>4</sup> See e.g. L. Veny, I. Carlens and B. Verbeeck, *Between a Rock and a hard Place*, EGPA, Malta, 2009.

<sup>5</sup> See (Australian) Administrative Appeals Tribunal Act, 1975

<sup>6</sup> The (Australian) Ombudsman Act 1976

<sup>7</sup> See article 13, §3 Flemish Ombudsman Decree of 7 July 1998, further referred to as "Flemish Ombudsman Decree"

<sup>8</sup> See article 11 Walloon Ombudsman Decree of 22 December 1994, further referred to as "Walloon Ombudsman Decree"

satisfaction<sup>9</sup>. As a consequence, the Ombudsman must refuse to treat a complaint when this has not happened<sup>10</sup>. Furthermore, the examination of a complaint is suspended when the complaint constitutes the object of a penal procedure<sup>11</sup>.

#### *iv. Ombudsman of the German-Speaking Community*

The examination procedure is suspended when the basis of the complaint is the object of an administrative or judicial appeal procedure. In this case, the Ombudsman has to inform the complainant immediately<sup>12</sup>.

#### *v. Belgian Federal Ombudsman*

As to the Belgian Federal Ombudsman, article 13 of The Federal Ombudsman's Act stipulates that the examination of a complaint is suspended when about the facts an appeal to the tribunal or an administrative appeal is launched. Here, too, the Ombudsman has to inform the complainant immediately about the suspension.

#### *vi. Netherlands*

In the Netherlands, too, administrative legislation limits the actions undertaken by the *Nationale Ombudsman*<sup>13</sup>. The possibility to intervene in pending judicial cases by the Dutch Ombudsman is allowed due to the absence of any prohibition in the legislation, while the prohibition to intervene in pending administrative cases is the result of the rule that all administrative means must be exhausted and to the mere establishment of the suspension of the deadlines for access to the Ombudsman in the case of the commencement of a juridical procedure<sup>14</sup>.

#### *vii. France*

In France, where the *Médiateur de la République*, can, theoretically, only receive complaints through a member of the *Assemblée* or a senator, the situation is different: the French Ombudsman can be asked to intervene before, during and after a judicial decision is taken. However, the Ombudsman's intervention does not suspend the deadlines that are to be respected when going to an administrative tribunal. On the other hand, the French Ombudsman can not intervene in cases that constitute the object of a pending judicial procedure<sup>15</sup>.

#### *viii. Portugal*

Just like his French colleague, the Portuguese *Provedor de Justiça* does not face such an incompatibility problem as the legislation remains silent about it; indeed, the Portuguese Ombudsman is allowed to intervene before, during and after administrative appeals are being launched.

#### *ix. Ireland*

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<sup>9</sup> See article 15, § 2 French Community Ombudsman Decree of 20 June 2002, further referred to as "French Community Ombudsman Decree"

<sup>10</sup> See article 16, § 1 French Community Ombudsman Decree

<sup>11</sup> See article 17 French Community Ombudsman Decree

<sup>12</sup> See article 20 German-Speaking Community Ombudsman Decree of 26 May 2009, further referred to as "German-Speaking Community Ombudsman Decree"

<sup>13</sup> Jan Marinus de Meij, Inge Cornelia van der Vlies, *Inleiding tot het staatsrecht en het bestuursrecht*, p. 261-262

<sup>14</sup> See article 12: 1, §2,2 Dutch Ombudsman Act

<sup>15</sup> See article 11 French Ombudsman Act of 3 January 1973, further referred to as "French Ombudsman Act"

In Ireland, the Ombudsman may not investigate matters which are already subject of court proceedings or where the person has a specific right, in law, to appeal to the courts<sup>16</sup>.

## 2. Discretionary powers of the Ombudsman?

Keeping in mind that decision-making is not the Ombudsman's main task – he is supposed to investigate and make recommendations to parliament – , we shouldn't forget he sometimes *has to* decide a case *in fine*. And even then his decisions usually are not binding and can, in most cases, be considered to be merely advisory. But, indeed, Ombudsman services make *other* decisions too; they can decide the inadmissibility of a complaint or deem it '*obviously unfounded*' (50% in Flanders)<sup>17</sup>; they can in some circumstances also refuse to handle a complaint. Therefore the Ombudsman does seem to possess in some cases the discretionary power to decide, just like an 'administrative body'. Does this mean they're also bound by rules of "decent administration" e.g. reasonable delay, motivation, ... just like administrative bodies? Let's find out by briefly comparing different legislations.

### *i. Flemish Ombudsman*

The Flemish Ombudsman can refuse to treat complaints on several grounds. He has to inform the complainant in case he's not competent to intervene, and notify him as well about the, according to him, competent body<sup>18</sup>. Furthermore, the Flemish Ombudsman does not handle a complaint when the facts mentioned in the complaint, have occurred more than one year before introduction of the complaint<sup>19</sup>. Other reasons of refusal are: (1) identity of the complainant is unknown; (2) no steps undertaken by the complainant to get satisfaction from the concerned administrative body; (3) clearly unfounded complaints; (4) personnel matters in administrations; (5) facts being the object of a judicial procedure<sup>20</sup>.

The Ombudsman decides whether a complaint is admissible or not. The refusal by the Ombudsman must be motivated<sup>21</sup>, just like all other administrative decisions taken by any Belgian administration. The complainant must immediately be informed about it in writing.

### *ii. Ombudsman of the Walloon Region*

The Walloon Ombudsman can refuse to handle complaints on similar grounds<sup>22</sup>. The Ombudsman has to inform the complainant within 1 month after receiving the complaint, about his decision to treat it or not. Any refusal must be motivated.

### *iii. French Community Ombudsman*

In the French Community, a complaint is inadmissible when: (1) the complainant's identity is unknown; (2) the Ombudsman is not competent to handle it; (3) it concerns administrative personnel matters; (4) the internal administrative appeal has not been exhausted or no prior steps to get satisfaction have been taken; (5) the facts mentioned have occurred more than 1 year before the introduction of the complaint<sup>23</sup>. The Ombudsman *can* refuse to treat a complaint when it is clearly unfounded and when it has to do with facts that are the object of a penal procedure<sup>24</sup>. Just like the Walloon Ombudsman, the French Community Ombudsman has to inform the complainant in writing

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<sup>16</sup> See Article 5 Irish Ombudsman Act 1980, as amended.

<sup>17</sup> De Nationale Ombudsman (NL) *Jaarrapport 2008, Jaarrapport 2009*

<sup>18</sup> See article 12, § 2 Flemish Ombudsman Decree

<sup>19</sup> See article 13, § 1 Flemish Ombudsman Decree

<sup>20</sup> See article 13, § 2 Flemish Ombudsman Decree

<sup>21</sup> See article 14 Flemish Ombudsman Decree

<sup>22</sup> See article 10 Walloon Ombudsman Decree

<sup>23</sup> See article 16, § 1 French Community Ombudsman Decree

<sup>24</sup> See article 16, § 2 French Community Ombudsman Decree

and within 1 month after receiving the complaint, about his decision to treat the complaint or not. The refusal must be motivated<sup>25</sup>.

*iv. German-Speaking Community Ombudsman*

The German-speaking Ombudsman *can* refuse the treatment of complaints for similar reasons as his other Belgian colleagues<sup>26</sup>. On the other hand, article 13, 1<sup>st</sup> section of the German-Speaking Community Ombudsman Decree stipulates that the Ombudsman must treat complaints when he is competent to do so, when they are introduced in writing or personally, when they are introduced in German or in French and when the complainant's identity is known. This implies that the Ombudsman is forced to refuse the treatment of the complaints when one of these conditions is not met. The Ombudsman must inform the complainants immediately about his decision whether to treat or not their complaint, or about the forwarding of the complaint to another Ombudsman or competent service. The refusal to treat a complaint must be motivated<sup>27</sup>.

*v. Belgian Federal Ombudsman*

The Belgian Federal Ombudsman *can* refuse to treat a complaint when the complainant's identity is unknown and when the mentioned facts have occurred more than 1 year before the introduction of the complaint<sup>28</sup>. He *must* refuse to treat it when the complaint is clearly unfounded or when the complainant has not undertaken any action to get satisfaction from the involved administrative authority or when the complaint is essentially the same as a former introduced and refused complaint and if it contains no new facts<sup>29</sup>. The Ombudsman must inform immediately the complainant about his decision and each refusal must be motivated<sup>30</sup>.

*vi. Netherlands*

In The Netherlands, a complaint to the involved administrative body is necessary too, before complaining to the Ombudsman<sup>31</sup>. As to the possibilities to refuse an examination of a complaint, the Dutch legislation makes a difference between "not competent" and "not obliged". So, the Ombudsman is not competent to start or to continue an examination when it concerns a matter that belongs to the general government policy, a general binding prescription, a behavior against which a complaint or appeal can be launched unless this behavior consists of not taking any decision within the deadline or against which a complaint or appeal procedure is pending, a behavior on which an administrative judge has sentenced, a behavior that is pending at another instance than an administrative judge or a such a behavior that is still open for appeal, a behavior that is under supervision of the judicial power<sup>32</sup>.

The Ombudsman is *not obliged* to examine or to continue an examination when for instance the request does not meet certain exigencies, is clearly unfounded, when the complainant's interest or the weight of the mentioned behavior is insufficient, or when the complainant is not the one against whom a certain behavior has taken place, or when the request concerns a behavior against which a complaint can be launched unless this behavior consists of not taking a decision within a time limit or against which a complaint procedure is pending, or the request concerns a behavior on which another judicial body except a judge, has decided<sup>33</sup>. Furthermore the Dutch Ombudsman is not obliged to examine or to continue the examination when the request is introduced more than 1 year after the information by the administrative body of the results of the investigation, or after the treatment of the complaint has been ended by the administrative body in another way, or had to be

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<sup>25</sup> See article 16, § 4 French Community Ombudsman Decree

<sup>26</sup> See article 15, 2nd section German-Speaking Community Ombudsman Decree

<sup>27</sup> See article 17, § 1 German-Speaking Community Ombudsman Decree

<sup>28</sup> See article 9, 1st section Federal Ombudsman Act

<sup>29</sup> See article 9, 2nd section Federal Ombudsman Act

<sup>30</sup> See article 10 Federal Ombudsman Act

<sup>31</sup> See article 9:20, 1<sup>st</sup> section General Administrative Law Act, further referred to as "GALA"

<sup>32</sup> See article 9:22 GALA

<sup>33</sup> See article 9:23 GALA

ended according to article 9:11 GALA<sup>34</sup>. Finally, the Dutch Ombudsman is not obliged to start an examination if the request concerns the same subject as a Parliamentary inquest<sup>35</sup>.

When the Ombudsman decides not to start or to continue the treatment of a complaint, he must inform the complainant as soon as possible about it; this must be done in writing and the decision must be motivated<sup>36</sup>.

#### *vii. France*

In France too, necessary steps have to be undertaken to the involved administrative body before a complaint can be lodged to the Ombudsman<sup>37</sup>. Then, the *Médiateur de la République*, too, has the right to decide whether files are admissible or not<sup>38</sup>. In 2009, almost 50% of the received complaints proved to be not admissible. The French Ombudsman's decisions in case of refusal to treat complaints, are clear, complete and explain why the Ombudsman is not competent to treat any matter and tells the complainant how he has to proceed to find a solution for his case.

#### *viii. Portugal*

In Portugal, too, the Ombudsman must decide on the admissibility of a request<sup>39</sup>; he explicitly has the competence to express a preliminary assessment by refusing requests that are introduced clearly "in bad faith" of unfounded. So, although he enjoys a statute of functional independence, his powers to decide fall under the administrative function<sup>40</sup>. It seems that the lack of legitimacy of a request, can be an obstacle to the development of the procedure. Furthermore, this provision identifies only as causes of archiving: the incompetence of the Ombudsman regarding the matter of the complaint, the absence of grounds in fact and law, to justify the taking of any investigation.

Indeed, most legislations provide limits concerning the Ombudsman's tasks; at least a number of prohibited competences is mentioned. So, in Portugal the *Provedor de Justiça* is not competent to annul, review or modify acts of some public bodies such as Parliament and in the field of Justice<sup>41</sup>. This – principally - absence of power to decide, is the Ombudsman's most important characteristic and reflects his real nature<sup>42</sup>. Furthermore, the Portuguese Ombudsman must not answer to questions 1) when they do not fall under his competence or when he concludes that the question is not founded or when he decides that there are not enough elements to proceed<sup>43</sup>. But, contrary to his extended powers, the Ombudsman is obliged to respect the adversarial principle which prohibits persons subject to his powers to intervene, to be censured without first giving them the opportunity to justify and sustain behavior that the ombudsman considers to be objectionable<sup>44</sup>.

#### *ix. Ireland*

Before an individual is allowed to complain to the Ombudsman, the former must have exhausted the existing complaints machinery.

The Irish Ombudsman may not investigate a number of matters that are listed in an annex to the Act. So, he too will have to decide on whether he proceeds or not; and when he finds himself not competent to proceed, he must refuse to do so and motivate his decision. The Ombudsman won't deal with any complaint that is about a private company, about another individual or about the

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<sup>34</sup> See article 9:24 GALA

<sup>35</sup> See article 12 Dutch National Ombudsman Act

<sup>36</sup> See article 9:25 GALA

<sup>37</sup> See article 7 French Ombudsman Act

<sup>38</sup> See article 9 French Ombudsman Act, which stipulates "when a complaint seems justified to him"

<sup>39</sup> Art. 27, Lei N° 9/91, 9th April, Statute of the Portuguese Ombudsman, further referred to as "Ombudsman's Statute"

<sup>40</sup> David Duarte, *A Discricionariedade Administrativa e a Competência (Sobre a Função Administrativa) do Provedor de Justiça*, in: *Provedor de Justiça, Novos Estudos, Lisbon, 2008, 37*

<sup>41</sup> Art. 22 Ombudsman's Statute

<sup>42</sup> João Caupers, in: *O cidadão, o Provedor de Justiça e as entidades administrativas independentes*, 86.

<sup>43</sup> Art. 31 Ombudsman's Statute

<sup>44</sup> J. Caupers, o.c., 87.

clinical judgement of a doctor. Also no Ombudsman's action is undertaken when: (1) any minister of the Government sends a request in writing to the Ombudsman to cease the investigation; (2) the subject of the complaint is being decided by the courts; (3) legislation gives to the complainant a right of appeal against the decision of the public body to the courts; (4) legislation gives a right of appeal against the decision of the public body to an independent appeal body; (5) it relates to recruitment or to the terms and conditions of employment; (6) it's about a decision relating to immigration or naturalisation; (7) it's a decision relating to a pardon or remission of prison sentences, and, finally, (8) it's about the actions of the Gardai or the administration of a prison.

### 3. Semi-real administrative decisions...?

All complainants receive motivated (negative) decisions regarding their complaint. Issued by a public body and outwardly resembling other administrative decisions, people might expect that these Ombudsman decisions are administrative decisions. Does this mean that an Ombudsman is just another administrative authority whose (negative) decisions are subject to appeal?

The first Flemish Ombudsman<sup>45</sup> was in fact – either on purpose or erroneously – considered to be an administrative authority. Just like other administrative authorities, his decisions were considered to be 'administrative decisions' which meant that a citizen who had received a unfavorable decision, could appeal to the Council of State. Only a few requests to suspend<sup>46</sup> or annul<sup>47</sup> an Ombudsman's decision have been introduced and in only one case, the Council of State decided to suspend the Ombudsman's decision, although the latter one had asked to be left outside the case as he considered himself not to be a separate administrative authority. The Council of State judged the Ombudsman to possess a separate competence to decide in questions regarding the openness of administration and thus rejected this point of view<sup>48</sup>.

#### *i. Flemish Ombudsman*

Subsequent legislation (re)created a Parliamentary Ombudsman against whose decisions no administrative appeal is possible. This Ombudsman too, is sometimes obliged to give negative answers to citizens' requests as the Ombudsman Decree provides a number of matters to which the Ombudsman is not competent. These answers must be motivated just like administrative decisions.

#### *ii. Ombudsman of the Walloon Region*

The Walloon Ombudsman is a parliamentary Ombudsman and is not mentioned among the administrative bodies against whose decisions an administrative appeal to the Council of State is possible. So, his decisions can not be considered as administrative decisions although they have to be motivated just like all other administrative decisions.

#### *iii. French Community Ombudsman*

The same goes for the French Community Ombudsman's decisions. No administrative appeal is possible as these decisions are not considered to be administrative decisions.

#### *iv. German-Speaking Community Ombudsman*

As the Ombudsman is a parliamentary Ombudsman too, his decisions are no administrative decisions and are not open to appeal to the Council of State.

#### *v. Belgian Federal Ombudsman*

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<sup>45</sup> Installed by Decree of 23<sup>rd</sup> October 1991 on openness of administrative documents in services and institutions of the Flemish Government

<sup>46</sup> See Council of State, Ullens, nr. 59 775, 23 May 1996; Boonen, nr. 74 024, 2 June 1998

<sup>47</sup> See Council of State, Wittouck, nr. 59 776, 23 May 1996; Ullens, nr. 69 681, 27 November 1997; Boonen, nr. 116 509, 27 February 2003; Wittouck, nr. 114 365, 10 January 2003.

<sup>48</sup> See: Council of State, Wittouck, nr. 59 776, 23th May 1996

The Belgian Federal Ombudsman law remains silent about the nature of the Ombudsman's decisions. So, as he is a parliamentary Ombudsman, his decisions can hardly be considered to be administrative decisions.

*vi. Netherlands*

The same goes for the Dutch Ombudsman. His decisions are not considered to be administrative decisions. So no appeal against them is possible.

*vii. France*

In France, there has been an on-going debate concerning the Ombudsman's real nature and his functioning. Some argued that the Ombudsman was strictly attached to the executive power as it was not a legislative nor a judicial organ; so it had to be an independent administrative authority<sup>49</sup>. Others argued that the Ombudsman could not enter into this tripartite power scheme, not only because of its foreign origins but rather because it has been created to control the administration once more; giving it the status of administrative authority would mean submitting it to a heavy and very procedural administrative law system which would make it inefficient<sup>50</sup>.

*viii. Portugal*

In Portugal, similar questions have been raised in the academic world<sup>51</sup>. The main doctrine argued that there was no reason to follow the French reasoning for the Portuguese Ombudsman's status is quite different from the French one's; the *Provedor de Justiça* exercises external control functions on the administration but this fact does not make him an administrative organ. Given the facts that the Portuguese Ombudsman is not an administrative organ, neither a parliamentary organ, neither a tribunal, the doctrine came to the conclusion that the *Provedor de Justiça* was surely not an independent administrative authority for he is, though independent, not an administrative authority. He could be considered to be an *independent public organ*<sup>52</sup>.

*ix. Ireland*

The Ombudsman Act remains silent on the Ombudsman's behavior while answering negatively to citizens requests. As to the application of the rules of decent administration on the decisions issued by the Ombudsman, the Ombudsman herself sees no reason why the general obligation stated for "organs of the State" in Section 3 of the ECHR Act 2003 – to discharge their duties and functions in a manner compatible with the ECHR – cannot be factored into her assessment of complaints made against public bodies within the Ombudsman's remit<sup>53</sup>.

#### 4. Appeal procedures against an Ombudsman's decision

Complainants really can't be blamed when they expect an Ombudsman's decision to be just like any other administrative decision and therefore expect to have the possibility of appeal to a kind of administrative tribunal. However, most legislations remain silent about the possibilities to appeal against the Ombudsman's negative decisions or clearly state that no appeal is possible.

Just in order to compare, let us take a look at the United Kingdom where a distinction between appeal and judicial review is made. Let it be clear, there is no right of appeal against decisions of the

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<sup>49</sup> E.g. Guy Braibant, *Le Droit administratif français*, Paris, Dalloz-Sirey, 1999, 595p.

<sup>50</sup> Gaudemet (Yves). *Le Médiateur est-il une autorité administrative ? À propos des rapports du Médiateur et du juge administratif*, in *Service public et libertés. Mélanges offerts au Professeur R.-E. Charlier*, Paris, Éditions de l'Université et de l'Enseignement moderne, 1981, p. 117-130.

<sup>51</sup> See: Vital Moreira, *As Entidades administrativas independentes e o Provedor de Justiça*, in : *O Cidadão, o Provedor de Justiça e as Entidades Administrativas Independentes*, Provedoria de Justiça – Divisão de Documentação, Lisbon, 2002, 93-117.

<sup>52</sup> See: V. Moreira, o.c., 112-113.

<sup>53</sup> Emily O'Reilly, o.c. 2007.

Parliamentary Ombudsman in the United Kingdom. The reasoning is that the office is independent of Government and Parliament and decisions on cases cannot be overruled by a government minister or a parliamentary committee. But, as a first step, there *is* an internal complaints procedure which includes complaints about a decision. Complainants may contact the member of staff that they have been dealing with, or alternatively his/her manager, the Deputy Ombudsman or they may telephone or e-mail the dedicated complaints helpline. Secondly, decisions of the Ombudsman are subject to judicial review, as confirmed by a court case in 1994<sup>54</sup>. During 2009-10, only nine applications for judicial review were issued against the ombudsman's office, this due to the complexity and expensiveness of the procedure. An applicant must seek leave from the High Court before bringing such a case forward and, moreover, judicial review is primarily concerned with the issue of whether the correct legal basis was used to reach a decision rather than the merits or otherwise of that decision.

Judicial review has rarely been used to challenge the findings of the Parliamentary Commissioner<sup>55</sup>. However, in April 2004, the High Court gave representatives of the Equitable Members Action Group leave to challenge the Ombudsman's decision in the case concerning the regulation of Equitable Life. So, this group has dropped judicial review proceedings following the decision of the Ombudsman to conduct a further investigation into the matter.

By way of comparison:

*i. Flemish Ombudsman*

There is no provision in the Ombudsman's legislation that explicitly excludes appeals against the Ombudsman's decisions; these appeals are excluded by the absence in the Council of State legislation of 'Ombudsman decisions' among the administrative decisions against which can be appealed<sup>56</sup>. There is also no mention of any possibility of internal administrative appeal. It might however be possible and reasonable that, when a citizen is complaining about the treatment of his case by the Ombudsman, the Ombudsman will reconsider the case.

*ii. Ombudsman of the Walloon Region*

It's the same for the Wallonian Ombudsman legislation. The Ombudsman's decisions are not subject to appeal because they are not mentioned in the Council of State legislation.

*iii. French Community Ombudsman*

Neither is there an appeal procedure possible against the French Community Ombudsman's decisions.

*iv. German-Speaking Community Ombudsman*

The legislation does not provide any appeal possibilities against the Ombudsman's decisions.

*v. Belgian Federal Ombudsman*

As the Belgian Federal Ombudsman is a Parliamentary Ombudsman, his decision can not be considered to be an administrative decision and, as a consequence, no law allows any appeal against it. However, although the law remains silent about it, a voluntary reconsideration of a request is always possible.

*vi. Netherlands*

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<sup>54</sup> R v Parliamentary Commissioner for Administration ex p Dyer (1994) (All ER 375)

<sup>55</sup> See Roy Gregory & Philip Giddings, *The Ombudsman, the Citizen and Parliament*, Politico's, 2002, pp429-33.

<sup>56</sup> See article 14, Coordinated Laws of the Council of State

In the Netherlands, the Ombudsman – and he is the only one to do so – admits in his annual reports that in modern complaints management, a complaint must be considered as ‘free advice’. Complaints indeed have a significant signaling function, even when after examining it, the complaint proves to be unfounded. This goes too for complaints about the *Nationale Ombudsman* or his staff. In 2009, the Dutch Ombudsman received 35 letters that could be considered to be a complaint<sup>57</sup>; in 2008 there were 28 complaints about himself or his cooperators, in 2007 there were 42 such complaints<sup>58</sup>. The Ombudsman deals with such complaints according to Chapter 9, Title 9:1 of the General Administrative Law Act, which is similar to an internal appeal to an administrative authority. As there is no other possibility to appeal against an Ombudsman’s decision, these complaints are handled with the utmost care; people who are disappointed about the Ombudsman must have, according to the Ombudsman himself, a possibility to find someone who listens to them. So, a grief about a decision taken by the Ombudsman is not considered as a complaint but as a request to reconsider the case. Of course the Ombudsman must verify whether this request is founded or not. Sometimes the Ombudsman decides to review the examined decision. As complaints about the functioning of the Ombudsman and his service can be noted: no careful or too little effective examination, too little progress, partisan stance by the examiner, administrative inaccuracies which would have led to an invalid decision by the Ombudsman.

vii. *France*

In France, ever since the French Council of State judged that the Ombudsman was indeed an independent administrative authority, and as a consequence the decisions taken within the framework of its mission, the *Médiateur*’s decisions are not open to appeal to an administrative judge; on the other hand, acts relating to its organization, e.g. the appointment of staff, can be appealed. If the Ombudsman would merely be a “common” administrative body, his decisions would be open for appeal; but, by making him an “independent” administrative authority, he does not have to carry the – sometimes heavy – load of administrative rules, including the *corrolarium* of the administrative appeal possibility.

viii. *Portugal*

The Portuguese legislation provides that the acts of the *Provedor de Justiça* are not susceptible to appeal and can only be the object of a complaint to the Ombudsman himself<sup>59</sup>. Although the law does not stipulate what the Ombudsman has to do then, we must believe he will take the request once again into consideration.

ix. *Ireland*

As a common law country, the situation in Ireland differs from that in the other countries. There is no appeal against Ombudsman decisions, other than Judicial Review (where applicable) or where schemes (like the Pensions Ombudsman) have an appeal procedure in place.

## 5. Redefining the Ombudsman’s role

One of the Ombudsman’s main tasks is helping citizens in their search for justice and to improve the relationship between the citizens and the administration. The International Bar Association calls the Ombudsman “an office provided for by the constitution or by action of the legislature or Parliament and headed by an independent high level public official who is responsible to the legislature of

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<sup>57</sup> See National Ombudsman’s Report 2009

<sup>58</sup> See National Ombudsman’s Report 2008

<sup>59</sup> Art. 36 Ombudsman’s Statute

parliament, who receives complaints from aggrieved persons against government agencies, officials and who has the power to investigate, recommend corrective action, and issue reports".<sup>60</sup> By doing so, we can discover groups of Ombudsmen who are dealing in the same way with their objectives. Some talk about "models", like the Scandinavian model, the British model and the "continental" model, but in this context these models can not be recognized.

Talking about the essence of mediation by an Ombudsman, it is clear they must try to conciliate the points of view of the complainant and the involved services; they will try to find a solution by consultation with the administrative authorities.

*i. Flemish Ombudsman*

The Flemish Ombudsman's task is to examine complaints, to forward people to competent instances, to make proposals and recommendations, and to inform the Flemish Parliament about the breaking of their deontological code by members of the Flemish Parliament<sup>61</sup>. Furthermore he must examine information delivered by whistleblowers<sup>62</sup>.

*ii. Ombudsman of the Walloon Region*

The main role of the Walloon Region's Ombudsman consists of helping any person, natural or legal, who is experiencing difficulties with the Walloon regional authorities. He must try to conciliate the points of views of the complainant and of the involved administrative body<sup>63</sup>.

*iii. French Community Ombudsman*

The French Community Ombudsman's mission is to treat complaints of the citizens who are confronted with a problem with an administrative service of the French Community, and who can not find a solution, after all necessary steps have been undertaken. The preparatory documents on the French Community's Ombudsman decree show that the accent must be put on finding a solution in case of inadequate – not illegal – functioning of administrative authorities as well as on the consultative competences – not decisional – of the "médiateur". So, the *médiateur* is an intermediate who proposes concrete solutions to concrete problems<sup>64</sup>.

*iv. German-Speaking Community Ombudsman*

His main tasks<sup>65</sup> may be quite similar to these of his colleagues but he has got the specific task to monitor the application of Children's Right Convention, Handicapped Rights Convention and the Equal Opportunities directives<sup>66</sup>.

*v. Belgian Federal Ombudsman*

The Federal Ombudsman examines complaints, assesses the functioning of federal administration when asked to do so by the federal parliament, makes recommendations in order to improve the functioning of the administration, and, finally reports to the Parliament<sup>67</sup>.

*vi. Netherlands*

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<sup>60</sup> Quoted in W. Haller, "The Place of the Ombudsman in the world community" (1988) *Fourth International Ombudsman Conference Papers*, Canberra, 29.

<sup>61</sup> See article 3, § 1 Flemish Ombudsman Decree

<sup>62</sup> See article 3, § 2 Flemish Ombudsman Decree

<sup>63</sup> See article 12, § 1 Walloon Ombudsman Decree

<sup>64</sup> See French Community Council, Piece 249-1, 2001-2002, 2-3.

<sup>65</sup> See article 3, § 1 German-Speaking Community Ombudsman Decree

<sup>66</sup> See article 3, § 2 German-Speaking Community Ombudsman Decree

<sup>67</sup> See article 1 Federal Ombudsman Act

The *Nationale Ombudsman's* main task is to investigate the actions of administrative authorities and decide whether or not they were proper. He has the jurisdiction to do so. There are two avenues that can lead to an investigation: a petition<sup>68</sup> or an initiative of the ombudsman himself. This last option provides the opportunity to focus on problems of a more structural kind in the practices of administrative authorities. This can be done either as an extension of investigations into specific cases or as a separate investigation in its own right.

*vii. France*

It might seem strange but the French Ombudsman's task is to receive complaints about the functioning of State administrations in their relations with the administered, of territorial public collectivities, of the public institutions and of any other organism invested with a mission of public service<sup>69</sup>. So, no signs of mediation in the text of the law.

*viii. Portugal*

The *Provedor de Justiça's* main function is to defend and to promote the legitimate rights, the freedoms, the guarantees and interests of the citizens, ensuring (by doing so), through informal means, justice and legality of the exercise of public powers<sup>70</sup>.

*ix. Ireland*

In Ireland, the Ombudsman's main function is to investigate complaints from members of the public who feel that they have been unfairly treated by certain public bodies<sup>71</sup>. According to the Irish Ombudsman, the community of Ombudsmen in the United Kingdom and Ireland has been asking some very serious questions about whether they ought to step forward to the human rights coal face. The enactment of specific human rights legislation in both jurisdictions has led to calls for the promotion of a human rights culture<sup>72</sup>. Few years earlier, she considered it to be her role to contribute towards the achievement of a service which is fair and accountable and to work with the public bodies to help them change the way they do business so as to provide better service to the public<sup>73</sup>.

## 6. The Ombudsman at risk...

Before further dissecting the formal and legal position of the Ombudsman it's worthwhile to examine briefly - by way of practical illustration - some major clashes between an ombudsman service and the government it monitors. Of course, confrontations between the Ombudsman and the public services are quite common and in some way inevitable.

An Ombudsman is frequently called upon to play the role of an *investigator* and as such has to investigate all kinds of problems within and complaints against public services and administrative authorities. Most often this results into recommendations to change policies or make structural adjustments. The situation becomes more tense when an investigation brings individual malpractices to light which in turn calls into question personal and political responsibilities. At other times the Ombudsman will act as a *mediator* but even his best efforts might still lead to unsatisfactory results if he's thwarted by one of the parties involved. This can be problematic, especially when the Ombudsman also has to rely on the recalcitrant party in the future to function properly. Finally the

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<sup>68</sup> See article 9:18 GALA

<sup>69</sup> Article 1, French Ombudsman Act, as amended

<sup>70</sup> See article 1 Ombudsman's Statute

<sup>71</sup> See Ombudsman Act 1980, as amended

<sup>72</sup> Ms Emily O'Reilly, *Human Rights and the Ombudsman*, presentation at Biennial Conference, University of Warwick, 27 April 2007.

<sup>73</sup> Ms Emily O'Reilly, *Righting Wrongs and Protecting the Public's Right to Know*, Royal Hospital, Kilmainham, 06 October 2005

Ombudsman might take on the role of *protector of fundamental rights*. As such the Ombudsman's actions might sometimes bring him into conflict with public services or institutions who claim – justly or unjustly – that they are better placed to protect the rights of 'their' citizens.

### The 'investigator' clash... evaluating the Ombudsman...

In October 2007 a report of the Flemish Ombudsman, Bernard Hubeau, brought about the resignation of a key member of the Flemish Executive.<sup>74</sup> The Ombudsman had stated that the 'political staff' of the minister was responsible for acts of 'improper governance' more precisely with regard to the allocation of consultancy fees. Once the Ombudsman's report became public the minister had no choice but to resign from office; it would take (only) a full year for the politician in question to stage a political comeback in parliament. The Flemish government reacted promptly and positively to all of the Ombudsman's recommendations and the public image of the Ombudsman as an impartial and independent investigator seemed well-established.<sup>75</sup> After nine years of shaping and strengthening the role of the Ombudsman in Flanders, Bernard Hubeau left the office of Ombudsman on the 1<sup>st</sup> of January 2008 to become full-time professor at Antwerp University. His successor, Paul Arteel, was appointed in September 2008 but would resign a little over eight months later. The search for a new Flemish Ombudsman recommenced and ended only recently when in the beginning of July 2010 the appointment of Bart Weekers was announced.

The long and difficult search for a new Ombudsman has somewhat dented the public image of the Ombudsman which in October 2007 was at an all-time high. Also the sudden and unexpected resignation of Mr. Arteel in April 2009 raised some concerns. Although details about the circumstances leading up to the resignation were sketchy at best, one aspect did surface: the evaluation of the Ombudsman by parliament which wasn't favorable and which was carried out after a period of six months – instead of the prescribed twelve probationary months – because of upcoming elections.<sup>76</sup> This brings us to one of the first - crucial - questions: how, when and by whom is the functioning of the Ombudsman evaluated?

#### *i. Flemish Ombudsman*

The Flemish Decree on the Ombudsman states in article 4, §3, that with a first-time appointment the Ombudsman has to go through a 'probationary period' of one year; not later than 45 days before the end of this period the Ombudsman will be evaluated by the Flemish Parliament. The Ombudsman has a mandate for six years which can be renewed one time only. Not later than 90 days before the end of the mandate the Ombudsman is evaluated by Parliament.<sup>77</sup>

#### *ii. Ombudsman of the Walloon Region*

No evaluation procedure is mentioned in the Decree of 22<sup>nd</sup> December 1994 concerning the institution of Ombudsman of the Walloon Region.

#### *iii. French Community Ombudsman*

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<sup>74</sup> Report Flemish Ombudsman 9th October 2007 – Case N° 2006-0002 KL, [http://www.standaard.be/extra/pdf/Verslag\\_Ombudsman.pdf](http://www.standaard.be/extra/pdf/Verslag_Ombudsman.pdf); X, "Ombudsman verwijt Fientje Moerman onbehoorlijk bestuur", *De Standaard* 9 oktober 2007; W. WINCKELMANS, "Ombudsman kraakt Fientje Moerman", *De Standaard* 10 oktober 2007.

<sup>75</sup> X, "Vlaamse regering voert aanbevelingen ombudsman uit", *De Standaard* 19 oktober 2007.

<sup>76</sup> X, "Ex-Ombudsman voelt zich onheus behandeld", *De Standaard* 28 mei 2009.

<sup>77</sup> Article 4, §4 Decree 7th July 1998 on the institution of the Flemish Ombudsman Service.

The Ombudsman and the deputy-Ombudsman of the French-Speaking Community are evaluated by the 'Bureau' of the Parliament halfway their respective mandates.<sup>78</sup> The evaluation consists of hearing the Ombudsman and deputy-Ombudsman.

*iv. German-Speaking Community Ombudsman*

No evaluation procedure is mentioned in the Decree of 26<sup>th</sup> May 2009 on the installation of the Institution of the Ombudsman of the German-Speaking Community.

*v. Belgian Federal Ombudsman*

No evaluation procedure is mentioned in the Law of 22<sup>nd</sup> March 1995 on the institution of the Federal Ombudsmen.

*vi. Netherlands*

No evaluation procedure is mentioned in the Law of 4<sup>th</sup> February 1981 on the National Ombudsman.

*vii. France*

No evaluation procedure is mentioned.

*viii. Portugal*

No evaluation procedure is mentioned.

*ix. Ireland*

No evaluation procedure is mentioned.

As this small *prima facie* comparative study indicates it's not common practice to evaluate an Ombudsman during his on-going mandate. So far only the Flemish Ombudsman and the Ombudsman of the French-Speaking Community are subjected to an evaluation procedure.

### The 'mediator' clash ... resignation of the Ombudsman

Even though 'formal' evaluation procedures don't often appear in Ombudsman legislation, it's inevitable that an Ombudsman's actions are directly or indirectly evaluated – albeit informally - when for instance his demands for a larger budget or more people on his staff are met or when his mandate is renewed. Sometimes an Ombudsman draws his own conclusions from the way his Office and the recommendations of his Office are treated by the administrative authorities he monitors. For instance in 2008 a local Ombudsman of a Flemish town received a complaint concerning the manner in which the city allocated home address numbers; the Ombudsman made several recommendations to provide more transparency but had to re-formulate those recommendations a year later after another (similar) complaint. According to the Ombudsman the procedure favored by the city's administration was too informal - requests for a house number could be made by phone – and left too much room for home registration fraud. At the end of May 2010 the local Ombudsman made it clear at a municipal council meeting during which the Ombudsman's annual report was discussed that she had felt it her duty to file a complaint concerning this matter with the provincial governor and with the public prosecutor's office. As a result of this conflict with the municipal

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<sup>78</sup> Article 9 Decree 20th June 2002 on the installation of the Institution of the Ombudsman of the French Community *juncto* article 84 Parliamentary Regulations (F-S C).

authority she resigned as Ombudsman. The mayor's office released a press statement which countered the allegations of the Ombudsman and explained why only one of the Ombudsman's recommendations in this matter was deemed appropriate and applicable by the administration.<sup>79</sup>

It's obvious that once the Ombudsman in question filed a formal complaint with the tutelage and judicial authorities the role of mediator became defunct. The Ombudsman as bridge-builder can only function on a solid basis of trust; both the complainants as well as the administrations must be able to trust the Ombudsman to handle the complaints objectively. Once the Ombudsman himself becomes the complainant he obviously can't mediate the conflict anymore. This leads to the question whether or not the Ombudsman can be dismissed or temporarily suspended when for instance his 'neutrality' is compromised.

*i. Flemish Ombudsman*

The Flemish decree on the Ombudsman stipulates no less than 9 circumstances in which the mandate of the Ombudsman must or can come to an end.<sup>80</sup> First of all, the mandate terminates *ipso jure*: (a) after a negative evaluation at the end of the probationary period; (b) after a negative evaluation at the end of the mandate; (c) when the Ombudsman is deemed to be permanently work disabled. Furthermore, parliament ends the mandate (d) at the Ombudsman's request; (e) when the Ombudsman accepts a public mandate which is incongruous with the Ombudsman's mandate; (f) when the Ombudsman no longer fulfills the appointment requisites. Finally, parliament *can* end the mandate (g) in mutual agreement; (h) when the Ombudsman reaches the age of 65; (i) for serious reasons.

*ii. Ombudsman of the Walloon Region*

The Walloon Regional Parliament can dismiss the Ombudsman:<sup>81</sup> (a) at his own request; (b) when he reaches the age of 65; (c) when his health condition endangers the exercise of his mandate; (d) when the Ombudsman accepts a mandate or assignment incongruous with the Ombudsman's mandate; (e) for serious reasons. Apart from the above, Parliament can also take administrative measures like temporary suspension and a temporary wage cessation.

*iii. French Community Ombudsman*

The Parliament of the French-Speaking Community can dismiss the Ombudsman:<sup>82</sup> (a) at his own request; (b) when he reaches the age of 65; (c) when a health condition forms a serious and irreversible threat to the exercise of his mandate; (d) when the Ombudsman accepts a mandate or assignment incongruous with the Ombudsman's mandate; (e) for serious reasons or in case of a negative evaluation half-way the mandate. Apart from the above, Parliament can also take administrative measures like temporary suspension and a temporary wage cessation.

*iv. German-Speaking Community Ombudsman*

The Parliament of the German-Speaking Community can prematurely terminate the Ombudsman's mandate: (a) at his own request; (b) when his health condition seriously endangers the exercise of his mandate; (c) when the Ombudsman no longer fulfills the appointment requisites; (d) when the Ombudsman accepts a mandate or assignment incongruous with the Ombudsman's mandate; (e) in mutual agreement; (f) for serious reasons.<sup>83</sup>

*v. Belgian Federal Ombudsman*

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<sup>79</sup> Press Release "Huisnummering in Sint-Niklaas helemaal niet problematisch", 2nd July 2010.

<sup>80</sup> Article 7 Flemish Ombudsman Decree 7th July 1998.

<sup>81</sup> Article 5 Walloon Ombudsman Decree

<sup>82</sup> Article 8 French-Speaking Community Ombudsman Decree.

<sup>83</sup> Article 13 German-Speaking Community Ombudsman Decree of 26<sup>th</sup> May 2009.

The Chamber of Representatives can dismiss the Ombudsman:<sup>84</sup> (a) at his own request; (b) when he reaches the age of 65; (c) when his health condition seriously endangers the exercise of his mandate; (d) when the Ombudsman accepts a mandate or assignment incongruous with the Ombudsman's mandate; (e) for serious reasons.

*vi. Netherlands*

The House of Representatives dismisses the Ombudsman: (a) the first month after he has reached the age of 65; (b) at his own request; (c) when his health condition seriously endangers the exercise of his mandate; (d) when the Ombudsman accepts a mandate or assignment incongruous with the Ombudsman's mandate; (e) after losing his Dutch citizenship; (f) when he is convicted for committing a crime by an irrevocable judgment which may include a custodial sentence; (g) when following a irrevocable judgment he is placed under guardianship or is declared bankrupt; (h) when his actions or inactions have been detrimental to the trust placed in him according to the judgment of the House of Representatives.

Apart from dismissal the House of Representatives can in some specific circumstances decide to change the status of the Ombudsman to inactive in view of pending criminal or bankruptcy procedures.<sup>85</sup>

*vii. France*

The ombudsman's mandate can only be ended before the end of its normal duration after a special commission establishes unanimously an impediment threatening the functioning of the Ombudsman.<sup>86</sup> This Commission consists of the vice-president of the Council of State, the first president of the Court of Cassation and the first president of the Court of Auditors.

*viii. Portugal*

The Ombudsman's mandate will only cease before the end of the four-year term lease in case of:<sup>87</sup> (a) death or permanent physical disability; (b) loss of the requirements for being elected a Member of the Parliament; (c) supervenient incompatibility; (d) resignation.

*ix. Ireland*

The Ombudsman's mandate will end:<sup>88</sup> (a) at his own request to be relieved; (b) when he's removed from office by the President but only in cases of stated misbehavior, incapacity or bankruptcy and then only upon resolutions passed by parliament calling for his removal; (c) when attaining the age of 67 years; (d) when he's nominated either as a candidate for election to either House of Oireachtas, the European Assembly or a local authority or is appointed as a member of the European Assembly or a local authority.

### The 'protector' clash... report of the Ombudsman

On rare occasions a clash between the Ombudsman and a public service can evolve into trench warfare. This is most likely to happen when the public service in question takes on a principled stance as - self-appointed - protector of citizen's rights and views the Ombudsman not as an

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<sup>84</sup> Article 6 Federal Ombudsman Law.

<sup>85</sup> Article 4 Dutch National Ombudsman Law.

<sup>86</sup> Article 2 French Ombudsman Law.

<sup>87</sup> Article 15 Statute of the Ombudsman.

<sup>88</sup> Article 2 Irish Ombudsman Act 1980.

investigator or mediator but as a 'false' protector of citizen's rights. The problem is that the public service may be earnest in its protests against the involvement of the Ombudsman but it can quite as easily be a cover to obscure any wrongdoings by the public service.

To illustrate this we can refer briefly to the all-out confrontation between the Irish Ombudsman and the Health Service Executive (HSE) as described in a recent report of the Irish Ombudsman.<sup>89</sup> Source of the conflict was an investigation of complaints against the HSE made in 2008 by two agencies which provide 'guardian ad litem' services.<sup>90</sup> Although 'guardians ad litem' are appointed by the courts under the Irish Child Care Act of 1991, the responsibility for meeting their fees is a matter for the HSE. When there is a disagreement about the fees the case can be referred back to the courts to have the costs 'measured or taxed'; however it's significant to note that only the HSE can make such a referral. A routine investigation into the complaints left the Irish Ombudsman critical of the HSE for its failure to refer the costs issues back to relevant courts. The response of the HSE after reviewing the draft report of the Ombudsman on this matter was quite 'harsh': "*the final draft of the Report of the Ombudsman is ultra vires the Ombudsman Act 1980 as amended and that it is not open to the HSE in law to accept the findings or the recommendations contained in that final draft*". In other words, the HSE claimed that the Ombudsman's report was 'illegal' and furthermore stated that amongst others the report represented an interference with the operation of the courts in relation to cases dealing with children. On another level the HSE expressed concern that some general findings of the report when taken out of their context would be construed as suggesting that the HSE was failing in its statutory obligations to protect children at risk. The Office of the Ombudsman met with representatives of the HSE to discuss the finalization of the report but in November 2008 HSE solicitors asked the Ombudsman to refrain – temporarily - from reporting to parliament. In the event that the Ombudsman didn't agree to this, the solicitors stated that: "***it will be necessary for us to bring an application to the High Court on an ex parte basis to restrain delivery of the report to the Oireachtas***".<sup>91</sup>

Even from a distance it's quite remarkable to observe how a rather routine investigation led to a threat of a court injunction being made by a public body to prevent the Ombudsman from communicating with parliament. Although the threat of judicial review by the High Court never completely materialized, it did make the Office of the Ombudsman pause and seek legal counsel. Legal proceedings delayed the Ombudsman's report for months and legal costs of about 52 000 Euros made a serious impact on the Ombudsman's budget. The events described above make it clear that the decision to make the Ombudsman's findings public is a crucial one. It's therefore interesting to examine how the obligation of the Ombudsman to report to parliament is construed and who can make the final decision on publicizing the Ombudsman's reports.

#### *i. Flemish Ombudsman*

According to article 18 of the Flemish Ombudsman Decree 1998 the Ombudsman is obligated to report in writing at least once a year – before the 30<sup>th</sup> of June – to the Flemish Parliament. The identity of complainants and of employees of administrative authorities may not be mentioned in this report. The report itself is made public by the Flemish Parliament. Apart from this, the Ombudsman may at all times be heard by Parliament at the request of the Ombudsman himself or by parliamentary request.

#### *ii. Ombudsman of the Walloon Region*

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<sup>89</sup> Office of the Ombudsman, "Gagging the Ombudsman? Aftermath of an Investigation by the Ombudsman of the Health Service Executive", July 2010, <http://www.ombudsman.gov.ie/en/Reports/InvestigationReports/15July2010-GaggingtheOmbudsman-AftermathofanInvestigationbytheOmbudsmanoftheHealthServiceExecutive>

<sup>90</sup> Guardians ad litem represent the interests of minors involved in court proceedings.

<sup>91</sup> Office of the Ombudsman, "Gagging the Ombudsman? Aftermath of an Investigation by the Ombudsman of the Health Service Executive", July 2010.

An annual report concerning the Ombudsman's activities is delivered to the Parliament of the Walloon Region.<sup>92</sup> The Ombudsman can also write intermediary reports if and when he deems it necessary. The identity of complainants and of employees of administrative authorities may not be mentioned in these reports. The reports are made public by the Parliament of the Walloon Region.

*iii. French Community Ombudsman*

An annual report concerning the Ombudsman's activities is delivered to the Parliament of the French-Speaking Community.<sup>93</sup> The Ombudsman can also write intermediary reports if and when he deems it necessary. The identity of complainants and of employees of administrative authorities may not be mentioned in these reports. The reports are made public by the Parliament of the French-Speaking Community.

*iv. German-Speaking Community Ombudsman*

On the 31<sup>st</sup> of March each year, by the latest, the Ombudsman delivers a written report to the Parliament of the German-Speaking Community concerning the Ombudsman's activities of the previous year. If and when he deems it necessary, the Ombudsman can also deliver intermediary reports.<sup>94</sup> The identity of complainants and of employees of administrative authorities may not be mentioned in these reports. The reports are made public by the Parliament of the German-Speaking Community. The Ombudsman may also at all times be heard by Parliament at the request of the Ombudsman himself or by parliamentary request.

*v. Belgian Federal Ombudsman*

Annual reports are delivered – 31<sup>st</sup> of March by the latest – to the Chamber of Representatives. The Ombudsmen can also deliver tri-monthly intermediary reports if and when they deem it useful.<sup>95</sup> The identity of complainants and of employees of administrative authorities may not be mentioned in these reports. The reports are made public by the Chamber of Representatives. The Ombudsmen may also at all times be heard by the Chamber of Representatives at the request of the Ombudsmen themselves or by request of the Chamber.

*vi. Netherlands*

A report is sent annually to both parliamentary Chambers, to the executive branch of government, to the local authorities and in some cases to certain public services mentioned in the report. The Ombudsman himself is responsible for making his report public and available to all. If he deems it necessary the Ombudsman can also deliver a report immediately after closing an investigation.

*vii. France*

The Ombudsman presents a report annually to the President of the Republic and to Parliament. The report is then published and is the subject of a communication between the Ombudsman and each of the parliamentary assemblies.<sup>96</sup>

*viii. Portugal*

Article 23 states that every year, the Ombudsman shall send a report to the Parliament on his activities and such report shall be published in the official journal of the Parliament. Of particular note is article 35 which expressly stipulates:

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<sup>92</sup> Article 16 Walloon Ombudsman Decree.

<sup>93</sup> Article 21 French Community Ombudsman Decree.

<sup>94</sup> Article 23 German-Speaking Community Ombudsman Decree.

<sup>95</sup> Article 15 Federal Ombudsman Act

<sup>96</sup> Article 14 French Ombudsman Act.

*“1- If sufficient evidence of criminal, disciplinary or regulatory offences arises in the course of the proceeding, the Ombudsman shall inform, as the case may be, either the Public Prosecutor or the authority that is hierarchically competent to initiate disciplinary or regulatory proceedings.*

*2- Where the circumstances so require, the Ombudsman may decide to issue statements or to publish information concerning the conclusions reached in the proceedings or any other matter related to his activity, using, if necessary, the State-owned media for that end, and benefiting in any event from the legal regime governing the publication of official statements, according to the respective laws.”*

#### *ix. Ireland*

The Ombudsman shall present a report on the performance of his functions to each House of Parliament and he may from time to time present such other reports with respect to those functions as he thinks fit.<sup>97</sup> The publication of any matter by the Ombudsman in making a report to either House of Parliament is absolutely privileged.

## Conclusions

It's fascinating to note how an institution like the 'Ombudsman' which in most European countries is well-known and legally well-developed can still assume a variety of identities. Although they are all confronted with the same type of problems, the reaction of a particular Ombudsman is inevitable determined by the pre-existing legal framework. In other words the statutes play a crucial role in determining the outcome of a clash between the Ombudsman and the public service or between the Ombudsman and the dissatisfied complainant. As to the Ombudsman's relation with administrative appeals, this relation still remains a difficult one in most countries. The 'silent' discretionary powers have attracted the legislators' attention: complainants must be informed within a reasonable delay about the refusal to handle a complaint. All decisions must be motivated. These general rules of decent administration are applicable on the Ombudsman's decisions which therefore appear similar to regular administrative decisions. Although complainants might be convinced of having to do with an administrative decision, in most cases, it is not and the complainant has no possibility to appeal against such a negative decision. They can, however, complain about this decision to the Ombudsman himself and ask him to reconsider their case.

Ombudsmen's roles and missions can vary enormously; every country seems to stress its own priorities in the Ombudsman's tasks. There is however a noticeable shift in the position of the Ombudsman from a mere mediator towards a protector of fundamental rights.

It's also noteworthy to observe that only a few of the Ombudsman institutes compared above allow a mid-term evaluation of the Ombudsman. In Flanders and in the Belgian French-Speaking Community a newly appointed Ombudsman is in effect 'on probation'. On the one hand this might be considered to be a way to insure that an Ombudsman has to perform from the onset in a professional and efficient manner. On the other hand – especially due to the haziness of the evaluation procedure – the threat of a negative evaluation might also be (ab)used to put undue pressure on the Ombudsman Service and compromise his role as investigator / protector.

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<sup>97</sup> Article 6-(8) Irish Ombudsman Act 1980.

While the dismissal of an Ombudsman shows a lot of similarities in the legal statutes under review, some countries are – from a legal point of view – better equipped than others to deal with an Ombudsman who has gone ‘rogue’. The Ombudsman of Flanders, of the Walloon Region, of the German-Speaking or French-Speaking Community and of the Belgian Federal State can be dismissed for ‘serious reasons’ but it’s completely unclear what those reasons might be. The same can be said of the ‘stated misbehavior’ which can lead to the dismissal of the Irish Ombudsman. In the Netherlands as well as in Ireland one reason for dismissal is however expressly stated: ‘bankruptcy’. It might be assumed that this falls into the category of ‘serious reasons’ but – again from a legal point of view – it’s always preferable to have this precisely stipulated in the Ombudsman’s statute. Also interesting is the fact that only in the Dutch National Ombudsman’s statute the lack of trust is mentioned as a legal ground for dismissal.

Finally it’s remarkable how most countries stipulate that not the Ombudsman but Parliament itself is responsible for the publication of the Ombudsman’s reports. Of course, in practice, most Ombudsman Services operate a website on which – at the least - the annual reports are available to public scrutiny. But only the Dutch National Ombudsman is legally obligated to ensure that his reports are disseminated to other administrative authorities and to the public. More and more often administrative authorities feel threatened by the publicity given to an Ombudsman’s investigative report. In Flanders such a report led to the dismissal of a minister and in Ireland the Ombudsman’s report prompted a public service to make legal threats to stop an Ombudsman from ‘going public’. If anything, the above teaches us one very important thing: even though the Ombudsman is already in most countries a well-established and well-respected institution, it’s often in the sidelines of the Ombudsman’s statute that pressure is building and in the end it’s left to the person actually holding the office of Ombudsman how to deal with this kind of (undue) pressure. It’s he or she who finally defines the role of the Ombudsman as an objective investigator, an impartial mediator or a brave protector of citizens’ rights.