

THE OMBUDSMAN AND HUMAN RIGHTS
OBSERVATIONS BASED ON THE EXPERIENCE OF
THE NATIONAL OMBUDSMAN OF THE NETHERLANDS

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INTRODUCTION

This paper deals with the meaning of human rights, with special regard to the human rights conventions, for the work of the Ombudsman. The human rights conventions concerned are the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR; Rome Convention of 1950) and the International Covenant on Civil and Political Rights (ICCPR; United Nations Convention of 1966). The provisions on human rights contained in the two conventions are very similar; thus this paper will refer primarily to certain provisions of the ECHR.

References to the Ombudsman in this paper generally relate to the National Ombudsman of the Netherlands.** Experience in that country may apply mutatis mutandis to the work of Ombudsmen in other countries.

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** Those who wish to obtain further information about the Institute of the National Ombudsman in the Netherlands can request a booklet with a brief description of the Institute from: The National Ombudsman, P.O. Box 29729, 2501 LS The Hague, the Netherlands. Fax (0) 70 - 3 607 572.

I. THE INTERNATIONAL CONVENTIONS ON HUMAN RIGHTS

1. The Status of the International Conventions on Human Rights in the Dutch Legal Order

Both conventions have been ratified by the Netherlands and incorporated in the Dutch legal order. According to the Dutch Constitution, the two conventions on human rights are directly enforceable by the courts. Citizens may invoke the provisions of the conventions in disputes with the authorities (and also in disputes with other citizens as far as certain rights are concerned). The courts are also obliged not to enforce statutory regulations if they are irreconcilable with provisions of international conventions, such as those contained in the two conventions, whether or not they are requested to do so.

Several of the human rights laid down in the two conventions have also been codified in Chapter I (Fundamental Rights) of the Dutch Constitution. This chapter contains, firstly, the classic fundamental rights and freedoms (partly coinciding with similar provisions in the conventions, and partly with other provisions) and also a number of modern or social fundamental rights. The constitutional provisions are reflected or have been elaborated in other legislation.

2. Requirements Concerning Government Actions Vis-a-Vis the Public

The human rights codified in the two conventions involve a number of elementary requirements concerning the relationship between citizens and the state, including both the rights of citizens vis-a-vis the state and the obligations of the state towards citizens. As a result, these elementary requirements have become a direct part of the national legal order in countries where

international conventions have been incorporated in the legal order, such as in the Netherlands. Given the idea of the rule of law, they therefore form part of the norms by which the authorities are bound, and they contain requirements concerning their actions with regard to the public. There are, however, other requirements governing such actions.

According to the rule of law, the primary requirement is that government actions must be subject to the written law. This principle of legality naturally has a much broader scope than the provisions of international conventions (such as human rights conventions) alone. If government actions are to be lawful they must also be in accordance with unwritten legal principles such as those developed in case law and works of legal scholarship, and which therefore also form part of the legal order.

Finally, there are requirements concerning the propriety of government actions which have been developed and applied by the National Ombudsman (see II.1. below), which have not yet been recognized in court rulings, but which are accepted by the relevant government bodies as guidelines for their actions.

3. Fundamental Requirements for Government Actions and the Conventions

Certain fundamental requirements which concern government actions with regard to the public, and which can be reduced to general legal principles, have been embodied in the conventions. An example of a general legal principle which has been fully included as such in a convention is the principle of equality (and the derived prohibition against discrimination), as laid down in Article 26 of the ICCPR.

Usually, however, the general legal principles concerned have a broader scope than the

situations to which the convention provisions derived from those principles relate. An example is the principle of legal certainty. This principle is expressed *inter alia* in the requirement that every detainee should be informed promptly of the reasons for his/her arrest (Article 5, paragraph 2 and Article 6, paragraph 3a of the ECHR). The principle of legal certainty, however, has a much broader scope and touches on one of the basic characteristics of the rule of law, namely the predictability of government actions and the associated clarity concerning citizens' rights and obligations vis-a-vis the authorities. This is also important in situations other than those involving investigation and prosecution (although in these specific situations individual freedom is fundamentally involved). Derived from these requirements of predictability and clarity is the requirement that the authorities should be active in taking steps to provide the public with adequate information.

The principle of legal certainty is also related, for example, to the requirement that government bodies deal with matters within a reasonable period of time. This requirement is enshrined in Article 6, paragraph 1 of the ECHR, where it applies to certain judicial procedures. More generally, however, the authorities may be required to act with due speed as far as decisions and actions involving citizens' rights or interests are concerned. Finally, reference should certainly be made to the norm that government actions should meet the requirement of respect for human dignity. This fundamental norm permeates the conventions, although it also has a much wider scope than the situations regulated in the conventions.

Viewed in this way, there are certain situations for which the conventions codify fundamental principles which, as general legal principles, have a broader scope than the particular situations to which the conventions relate. The relevant provisions of the conventions are an elaboration

of these principles and are, therefore, also a striking confirmation of the importance of the latter. Their special significance lies in the fact that they embody legal norms for situations in which human freedom, especially in relation to the state, is involved in a manner which has a fundamental bearing on the quality of life. The specific importance of these situations is appropriately expressed in the term "fundamental freedoms". This also justifies designating general legal principles, in so far as they have been codified as provisions in the conventions, with the separate name "human rights".

II. THE WORK OF THE OMBUDSMAN

1. Assessment by the Ombudsman in Accordance With the Netherlands National Ombudsman Act.

The Ombudsman is responsible for the manner in which he assesses government actions, and thus for the criteria he uses for his judgement. The Netherlands National Ombudsman Act contains only one criterion, that of propriety. This means that, on the basis of this criterion, the Dutch Ombudsman has a large degree of freedom to develop a system of assessment criteria which he deems fitting for his work, especially with a view to the persuasiveness of his judgements and possible recommendations.

The assessments carried out by the Dutch Ombudsman involve both written law and unwritten legal principles; in this respect, his working methods are no different from those of the courts. Therefore, this is also true of the application of norms contained in the conventions. Where the conventions have been incorporated in the national legal order, the national Ombudsman, if he sees fit, applies provisions from these conventions just as the courts do, although the Ombudsman

is not regarded as an effective domestic remedy as referred to in Article 26 of the ECHR. In this regard, there is no reason to give the Ombudsman special responsibility for promoting and protecting human rights embodied in the conventions; he works in parallel to the courts. However, the Ombudsman's power to institute inquiries on his own initiative provides him with a special opportunity to promote respect for human rights.

Assessment in the light of the norm of propriety enshrined in the National Ombudsman Act means that the Ombudsman does not confine himself to the above-mentioned assessment of lawfulness alone. This may lead to the formulation of requirements which go further than those contained in a judicial assessment of lawfulness. It goes without saying that the persuasiveness of the report in such cases merits extra attention.

2. The Ombudsman and the Conventions

Viewed from the standpoint of the Ombudsman's work, the conventions are particularly important as a codification of norms which may be applied directly by the Ombudsman when he has to judge conduct which falls within the scope of the provisions of the conventions.

In this connection, special attention should be devoted to that conduct of government officials which in practice is rarely, if at all, considered in court proceedings, but which falls within the jurisdiction of the Ombudsman, and to which provisions from the conventions apply. An example in the Netherlands is the conduct of police officers towards persons who are suspected of committing an offence but against whom the case is dropped at a given moment because they are no longer considered to be suspects. In such cases the Ombudsman tends in practice to be the only independent watchdog body which can assess whether certain police actions were in

accordance with, inter alia, the provisions of the conventions.

In addition to the above noted cases of direct application of provisions from the conventions, the conventions also play an important role in highlighting fundamental legal principles - of which they constitute an elaboration - which should also be applied in other situations. This may involve closely related situations: cases which have not yet been brought within the scope of the conventions, but which are connected to the provisions they contain. If government actions of major importance to citizens' rights and freedoms are concerned, however, the relevant norms will generally be laid down in the Constitution or other national legislation. An example from the Netherlands is the assessment of the use of force by the police, where the Ombudsman examines whether the applicable rules have been observed.

Finally, the conventions may be of relevance to the Ombudsman as a source of inspiration in the development of requirements for government action by analogy to the situations to which the conventions relate. For instance, in view of the requirement concerning a reasonable time laid down in Article 6 of the ECHR, which applies to certain judicial procedures, the National Ombudsman in the Netherlands applies the requirement that a minister must deal with an internal appeals procedure with due speed. He also requires the police to carry out their investigations with due speed, to prevent the public prosecutions department later encountering problems of admissibility owing to a reasonable time having been exceeded.

The Ombudsman contributes to the evolution of the law both through the application of legal norms in appropriate cases and by creating norms himself. Naturally, a precondition is that his judgements are made accessible by being published, in case law journals and so on.

III. EXAMPLES OF THE WORK OF THE NATIONAL OMBUDSMAN IN THE NETHERLANDS

1. Direct Application of Norms From the Conventions

Primarily, the National Ombudsman directly applies norms from the conventions in the assessment of police actions; occasionally other forms of government action may be involved as well. The provisions of Articles 5, 6 and 8 of the ECHR are those usually concerned. However, a number of these norms are also laid down in the Dutch Code of Criminal Procedure. Where this is the case, it is sufficient when assessing the lawfulness of the conduct being investigated to make use of the relevant provisions in this Code.

Examples include:

a. As regards Article 5 of the ECHR:

- the condition of reasonable suspicion, as a requirement for the lawfulness of stopping or arresting people;
- the statutory requirements governing arrest in cases where a person is not caught in the act;
- the requirement that an arrested person should be informed promptly of the reasons for his/her arrest;
- the requirement that a detainee should immediately be brought before the competent authority;
- the requirement that a person remanded in police custody should not be deprived of his/her liberty for longer than is reasonably necessary.

- b.
 - the rules concerning the duties and status of independent courts, which prevent a public prosecutor imposing a punishment without the involvement of the courts, and which also imply, inter alia, that in cases where a proposal is made by or on behalf of the public prosecutor for settlement out of court in consideration of a fine, acceptance of which leads to the decision not to prosecute, the suspect should be informed about the consequences which acceptance of such a proposal will have on his/her access to the courts;
 - the basic norm of presumptio innocentiae.
- c. As regards Article 8 of the ECHR:
 - the requirements of protection of privacy with regard to the provision by the police or judicial authorities of information to the news media about suspects or victims, or of personal details from government records to third parties who have no legal right to them;
 - the requirement of respect for privacy in cases involving entering a dwelling against the will of the occupant.
- d. As regards Article 26 of the ICCPR and Article 14 of the ECHR:
 - the requirement of prohibition of discrimination on any ground such as race, colour, nationality, age or sex, or (as occurred in one fiscal case) type of relationship.

2. Assessment of Government Conduct in the Light of Other Fundamental Requirements

As indicated under I.3. above, there are fundamental requirements governing the conduct of the authorities which have not been elaborated in the form of specific provisions in the

conventions, but which can be associated in one way or another with norms in the conventions, or with principles which partly underlie the conventions. However, it should be noted that, given the specific importance of the situations regulated in the conventions, the term "human rights" should be confined to the matters dealt with by these conventions only, to prevent the concept from eroding or being misused. A requirement with relevance to the lawfulness or propriety of government actions does not therefore necessarily belong to the category of human rights. Some of these requirements are closely related to those included in the conventions, while others are not.

The examples given below of the fundamental requirements and situations involved in the assessments carried out by the National Ombudsman take account of these considerations; some of the norms concerned are explicitly laid down in national legislation (the Constitution or other legislation).

a. As regards the protection and safeguarding of individual rights and freedoms:

- the use of handcuffs as a violation of the integrity of the body, searches or the use of force by the police, always viewed in the light of the requirements of reasonableness and moderation and the requirement of being in accordance with applicable statutory regulations;
- the question of whether powers concerning surveillance or investigation have been used in accordance with the purpose for which they were assigned;
- the quality of the conditions of or in police cells (which in certain cases may fall under Article 3 or Article 9 of the ECHR);
- the right of parents to visit minor children held in a police cell.

b. As regards the provision of information (from the standpoint of adequacy and promptness) to the public on rights and obligations of essential importance to them:

- the provision of information to people who are to be examined, by clearly informing them beforehand whether they are to be questioned as a witness or as a suspect, and by informing a suspect at the start of the examination that he/she is not obliged to answer questions;

- the provision of information to interested parties concerning whether or not their telephone has been tapped, in connection with alleged violation of the privacy of telephone calls;

- the provision of information (from the point of view of date and content) to voters resident abroad concerning forthcoming elections and their participation in them;

- the provision of information to interested parties on avenues of appeal open to them.

c. As regards the relationship between the authorities and the administration of justice:

- the requirement that government bodies promptly carry out orders made by independent courts;

- the requirement of due speed, which means that government bodies should deal with internal appeal procedures within a reasonable period of time, so that access to independent courts is not barred for too long, and that they should produce their defence to an appeal within a reasonable period of time in the event of an appeal procedure before an administrative court in which they act as defendant.

d. As regards the implementation of statutory regulations:

- the requirement that government bodies comply with applicable statutory regulations

concerning the maximum period within which decisions must be made;

- the requirement that government bodies take adequate steps to enforce statutory regulations designed to protect certain individuals or interests and which, if such steps are not taken, are not adequately complied with (e.g. preventing members of the public taking the law into their own hands or tolerating the violation of statutory provisions only in special cases).

e. As regards the handling of complaints:

- ensuring that the provisions of the conventions relating to judicial proceedings and which may be deemed of comparable importance for complaints procedures (such as impartiality, examination and cross-examination, reasonable time) are also applied and complied with in such procedures.