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Standards of Ombudsman Assessment: A New Normative Concept?

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1. Introduction

Although ombudsman institutions¹ have existed for more than 200 years, on a broader scale they have only been included in the systems of national state bodies during the last 50 – 60 years. For almost two centuries the ombudsman was perceived as an exclusively Nordic experiment. Then in the 1960s the world slowly discovered the powers and flexibility of the ombudsman institution. The real *ombudsmania* burst out with its full powers in the 1990s after the fall of the totalitarian regimes. Negatively, it has often been connected with a rapid and not always premeditated incorporation of this *alien* element into national legal systems.² On certain occasions, an ombudsman institution has been included in the legal systems of countries whose legal conscience was not and sometimes is still not prepared for the ‘soft-law character’ of the institution. This fact can create a stumbling block for its recognition as an equal partner for the administration. Thus ombudsmen, albeit often backed by legal acts or even by national constitutions, have to prove their place within the existing legal system. This is also connected with generally legally non-binding or legally enforceable³ results of the ombudsman investigations (reports).⁴ Normally, the ombudsman can only use the persuasive powers of his personality that are inter alia linked with his working relations with the administration and with his acceptance as an independent assessor. Even if the ombudsman is a person who is respected by the administration and even if there is no doubt about his impartiality and independence, his reports must be supported by clear and appropriate

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1 In this article, the term ‘ombudsman’ also covers women working in this position. For the sake of consistency, the article will not use terms such as ‘ombudswoman’, ‘ombudsperson’, ‘ombudsbody’ or ‘ombuds’ etc. The term ‘ombudsman institution’ is used to when talking about the ombudsman as a state institution.

2 There are still legal systems where for one reason or another a national ombudsman does not exist e.g. Belarus, Chile, Turkey, Malaysia, Japan, Italy, Germany etc. Although these countries do not have an ombudsman at the national level, there might be some other body that fulfils the ombudsman’s role at the regional level (e.g. Italy), or that even fulfils these roles on the national level (e.g. Germany). There are also countries that are currently trying to include the ombudsman in their legal systems (e.g. Turkey) and some countries where the incorporation of an ombudsman institution might take somewhat longer (e.g. Belarus).

3 Special cases can be found, for instance the reports of Local Government Ombudsmen are generally binding unless they are challenged before the courts in judicial review proceedings.

4 The results of ombudsman investigations or the assessment of situations by the ombudsman have several names: reports, decisions, recommendations, draft recommendations etc. As a result of the fact that the ombudsman investigation is not a decision in an administrative law sense, this article will use the general term ‘report’ to describe the written results of an ombudsman investigation, regardless their name.

arguments. The clarity and persuasiveness of these arguments often require clear, transparent and well-known assessment criteria that are used by an ombudsman in an individual case.

This paper thus discusses two particular issues. Firstly, it discusses the types and character of the normative, assessment standards in connection with a different generation of ombudsmen. By doing that it outlines a preliminary taxonomy on a normative basis for the results of the ombudsman investigations. Secondly, the paper points to the importance of lists of normative standards relating to ombudsmen. It also tries to enumerate and describe the function of such lists of ombudsman assessment criteria. By doing so it raises a multilevel argument for more transparency as to the normative standards used by ombudsmen.

2. Traditional perceptions of the development of the ombudsman institution – waves and generations of ombudsmen and legislative standards of ombudsmen's control

In general, ombudsmen have been established as independent complaint investigators with powers to create, when they consider it necessary, individual or general guidance for the administration or other subjects that are included within their competences. Although it is possible to argue that each ombudsman institution in some way copies or reflects some other ombudsman model⁵ it is necessary to take into account the fact that ombudsmen were incorporated into different legal systems and that this usually happened in different circumstances. The development of the ombudsman institutions was not as smooth as it may seem. It has been rather a gradual process with certain phases. In the writings of academics it is possible to distinguish between two and four development waves of ombudsmen and the numbers of ombudsmen models that belong to each wave. These waves reflect the era in which the ombudsman institution has been developed, even though they sometimes reflect 'special powers' that have been bestowed upon particular ombudsmen. Despite the endeavour to organise ombudsmen into individual waves or models, it is possible to observe rather a broad proliferation, diversification, mutation and variation of ombudsman institutions among the ombudsmen belonging to each wave.⁶ 'Waves and models' of ombudsman institutions are often discussed by different authors who come up with different models and variations of ombudsman institutions.

For instance, Gregory distinguishes two main ombudsman models: a 'classical ombudsman of mature liberal democracies' and an 'ombudsman connected with regime transformations in new or emerging democracies'.⁷ Reif also distinguishes two models of ombudsmen but she talks about a 'classical ombudsman', i.e. an ombudsman that complies with the definition of an ombudsman as proposed by the International Bar Association in 1978 and a 'hybrid ombudsman' that is vested with some additional authority.⁸ Diamandouros talks about three historical waves in which ombudsmen have been established. He distinguishes the first wave that included 'classical' Swedish and Finnish ombudsmen. The second wave includes 'dysfonctionnement' ombudsmen that deal with maladministration and the ombudsmen of the third wave, that were established following the transition from authoritarian to democratic systems of government.⁹ Some authors try to move away from this traditional taxonomy and they try to develop a new one.¹⁰ In the latest extensive study on the issue of ombudsmen in Europe, Kucsko-Stadlmayer distinguishes three types of ombudsmen in connection with their powers: the *basic or classical model*,

5 Cf. D. Pearce, 'The Ombudsman: Review and Preview, The Importance of Being Different', in L. Reif (ed.), *The International Ombudsman Anthology: Selected Writings from the International Ombudsman Institute*, 1999, p. 88.

6 R. Gregory, 'The Ombudsman Observed', in L. Reif (ed.), *The International Ombudsman Yearbook*, Vol. 1, 1997, pp. 78 et seq.

7 Ibid.

8 L. Reif (ed.), *The Ombudsman, Good Governance and the International Human Rights System*, 2004, p. 2.

9 N. Diamandouros, speech during the session of *Legality and good administration: is there a difference?* during the Sixth Seminar of the National Ombudsmen of EU Member States and Candidate Countries on 'Rethinking good administration in the European Union', Strasbourg, 14-16 October 2007, Office for Official Publications of the European Communities, Luxembourg, 2008, pp. 22-23.

10 This is for instance the case of K. Heede who moved away from the traditional division of ombudsmen related to their historical development. She tries to move models of ombudsmen to another perspective and creates two different types of ombudsmen when the division criterion is the function of the ombudsman institutions. She distinguishes *control ombudsmen* and *redress ombudsmen*. She also distinguishes certain models of ombudsmen according to their powers to redress individuals or control the administration. For more information on this division see, K. Heede, *European Ombudsman: Redress and Control at Union Level*, 2000, pp. 99 et seq.

the *rule of law model*, and the *human rights model*.¹¹ The thoughts of these various writers can be melted down into the following taxonomy that traditionally divides different ombudsman institutions into so-called 'generations'. However, before going any further one interesting point has to be made. Even though there are different ombudsman generations, development waves or ombudsman models, these ombudsman generations and different types and models of ombudsmen can exist alongside each other. The development of a new generation of ombudsmen does not mean that the older ombudsman generations vanish or are abolished, although the character of an individual ombudsman institution may change.

Based on this previous research into the 'development waves and models of the ombudsmen' it is possible to distinguish three main traditional generations of ombudsmen. 'Life' after these three traditional generations has not stopped and it is necessary to consider a new emerging generation and a new development phase that can be connected with the majority of ombudsmen. Usually, all the previous research has used only historical criteria which were only indirectly combined with the 'legislative standard of ombudsmen's control', i.e. a matter that is controlled by the ombudsman, which should be perceived in connection with a time period in which the ombudsmen were established.¹² Based on these particular criteria of the division of ombudsmen it was possible to distinguish the following ombudsman generations.

The *first ombudsman generation* is connected with *legality*, that is its legislative standard of control. Ombudsmen of this generation can control and assess whether bodies within their competence exercise their functions in compliance with the law. From a time perspective this generation is the longest one as it is connected with the oldest ombudsman institutions. Modern Swedish ombudsmen were established at the beginning of the 19th century, although their roots are a century older.¹³ In 1919, the Swedish ombudsman became a model for the ombudsman institution in Finland.¹⁴ Although Swedish and Finnish ombudsmen are sometimes described as 'traditional' ombudsmen,¹⁵ in truth the number of ombudsmen that are based on the Swedish or Finnish ombudsman model is quite low.¹⁶ The reason for that is usually connected with the fact that most of the younger ombudsmen were *not created in order to supervise whether the central and local government and the courts follow the law*. These ombudsmen sometimes have the power to enforce a cooperation of administrative bodies.¹⁷ Both Swedish and Finnish law allow the ombudsman to assess whether the courts and other state authorities, including civil servants, have obeyed the law and fulfilled their obligations.¹⁸ Also because of this, Kucsko-Stadlmayer considers that Swedish and Finnish ombudsmen belong among the 'rule of law model'. This model exceeds the 'classical' model and the ombudsmen have additional powers that go beyond the 'soft law' character of the ombudsman and they serve to protect legality.¹⁹ Thus, the main and sometimes the only legislative standard of ombudsmen's control of this generation is compliance with the law and legal rules, i.e. legality or lawfulness.

The *second ombudsman generation* was de facto created in 1954 in Denmark with the establishment of the first post-Second World War ombudsman. The Danish Parliamentary Ombudsman has become

11 G. Kucsko-Stadlmayer (ed.), *European Ombudsman-Institutions: A comparative legal analysis regarding the multifaceted realisation of an idea*, 2008, pp. 61 et seq.

12 In this connection we should not talk about an *object of ombudsman control* but about the *legislative standard of ombudsman investigation*. As the object is usually the 'behaviour' of a particular body or institution within the ombudsman and the legislative standard of ombudsman investigations is narrower and includes and reflects certain specific characteristics of the behaviour of these bodies.

13 The original Swedish 'ombudsman' however dates back to the beginning of the 18th century, when the exiled King Charles XII needed an institution that would ensure that judges and public officials in general acted in accordance with the laws in force and discharged their duties satisfactorily in other respects. See, for instance, <<http://www.jo.se/en/About-JO/History/>> (accessed on 18 April 2013).

14 Cf. Ch. Howard, *The Organizational Ombudsman: Origins, Roles, and Operations – A Legal Guide*, 2010, p. 4.

15 Cf. B. von Tigerstrom, 'Implementing Economic, Social and Cultural Rights: The Role of National Human Rights Institutions', in I. Merali & V. Oosterveld (eds.), *Giving Meaning to Economic, Social, and Cultural Rights*, 2001, p. 140.

16 The Danish Parliamentary Ombudsman was based on the Swedish Parliamentary Ombudsman but the conditions in Denmark led it in a different direction. See H. Gammeltoft-Hansen, *The Introduction and Development of the Swedish Justitieombudsman in Denmark*, The IOI Stockholm 2009 Conference Papers, Back to Roots: Tracing the Swedish Origin of Ombudsman Institutions, Friday, June 12, 2009.

17 See, Art. 21(2), Act with Instructions for the Parliamentary Ombudsmen (Sweden). According to this Article the Parliamentary Ombudsman of Sweden can impose penalties on administrative bodies.

18 See, Section 109 of the Constitution of Finland and Art. 6(1) of the Constitution of Sweden.

19 Kucsko-Stadlmayer, *supra* note 11, p. 63.

one of the most extensively copied ombudsman models.²⁰ The Danish Ombudsman is more flexible than the Swedish Ombudsman who applies objective legal standards to the grievance at hand. The Danish Ombudsman is more flexible and is less constrained by strictly legal norms and expectations.²¹ A common attribute of the ombudsmen of this generation is that their main role is to assess the compliance of administrative behaviour with a *general normative concept*, that is the legislative standard of their control. The general concept is often described as good administration which in the narrowest sense includes only extra-legal requirements for the administration. Ombudsmen of this generation have been mostly established in order to react to societal changes and changes connected with the growth of the public or state administration which can include, for example, a need to react to a lack of transparency on the part of the administration²² or a necessity to offer an individual additional protection against overgrown bureaucracy²³ or insufficient judicial control²⁴ etc. In any case, these ombudsmen were established because it was necessary for the state to react to a new situation in exercising administrative state powers. Writers call ombudsmen of this generation the ‘classical ombudsman.’²⁵ As these ombudsmen search for maladministration or try to support its positive opposite – good administration, the concept of good administration (or another general concept) is the main, sole or at least partial legislative standard of an ombudsman’s control. This of course depends on the legal system in which the ombudsmen are established and their further development. Next to the Danish Parliamentary Ombudsman, we can include in this generation also, for instance, the British Parliamentary Commissioner for Administration, the Dutch National Ombudsman or the Belgian Federal Ombudsman.

A legislative standard of control concerning the last generation of ombudsmen is *human rights*. The *third ombudsman generation* is connected with regime changes and the transition to democracy in Southern Europe, in Eastern Europe and other (by that time) non-democratic regimes around the world. The outset of this ombudsman generation can be roughly placed at the end of the 1970s when ombudsmen were established in Portugal and in Spain.²⁶ This wave continued in the 1990s after the fall of the communist regimes in Eastern Europe. The ombudsman institutions that belong to this generation can also be described as ‘human rights ombudsmen’ as they mostly control and assess whether the administration has acted in compliance with fundamental or basic rights. In this generation ombudsman institutions and human rights are directly connected with political changes from non-democratic to democratic regimes.²⁷ These ombudsmen are usually known by other names, for example defenders of rights, people’s defenders, the protectors of human rights or advocates of the people. Although human rights are part of legal systems and can be connected with legality and good administration, it is necessary to underline that the third generation of ombudsmen can rarely assess compliance with the whole legal system as such and more often deal only with its specialised part, i.e. human rights. Nevertheless, human rights have a different significance for the third generation of ombudsmen as they are usually used as an explicit and sometimes the only legislative standard of control of these ombudsmen.²⁸

Most of the theories on the development of the ombudsman institution often overlook what can possibly be called a *fourth ombudsman generation* – ombudsmen whose most outstanding role is combating corruption among the administration. The anti-corruption element forms a very strong feature in some ombudsman institutions especially in developing countries (in Africa in particular) where democracy is fragile and where the traditional ‘Western’ perception of the ombudsman faces numerous challenges. The

20 Cf. Congress of Local and Regional Authorities, the Council of Europe, Draft resolution – The office of Ombudsman and local and regional authorities, CG(21)6, 27 September 2011, Para. 5 or L. Reif, ‘Transplantation and Adaptation: The Evolution of the Human Rights Ombudsman’, 2011 *Boston College Third World Law Journal* 31, no. 2, pp. 270 et seq.

21 Report by Sir J. Whyatt QC, ‘The Citizen and Administration: The redress of grievances’, as quoted by A. Abraham, in *The Parliamentary Ombudsman and Administrative Justice: Shaping the next 50 years*, p. 5.

22 Cf. S.K. Karanja, *The Schengen Information System and Border Control Co-operation: A Transparency and Proportionality Evaluation*, 2008, p. 415.

23 Cf. D. de Asper y Valdés, ‘The Self-perception of the Ombudsman: A Comparative and Longitudinal Survey’, in L. Reif (ed.), *The International Ombudsman Anthology: Selected Writings from the International Ombudsman Institute*, 1999, p. 245.

24 Cf. Diamandouros, supra note 9, p. 22.

25 Kucsko-Stadlmayer, supra note 11, pp. 62 et seq.

26 The *Provedor de Justiça* was established in Portugal in 1975 and the Spanish *Defensor del Pueblo* in 1981.

27 L. Reif, ‘Building Democratic Institutions: The Role of National Human Rights Institutions in Good Governance and Human Rights Protection’, 2000 *Harvard Human Rights Journal* 13, p. 5.

28 Kucsko-Stadlmayer, supra note 11, pp. 37-38.

ombudsmen of this 'generation' very often do not have clearly defined legislative standards of control. This is mostly connected to one of the previously mentioned standards or a combination thereof. For example, the role of the Ombudsman of Rwanda is to fight injustice, corruption and other related offences. But he should also contribute to strengthening good governance and can even identify laws that hinder the good functioning of government.²⁹ Striving against corruption is visible in the practice of the Public Protector of South Africa whose function is also interrelated with administrative justice,³⁰ and this is also the case with the Inspectorate of the Government in Uganda³¹ etc.³² These ombudsmen are connected with the previous standards of control; however, their main goal is the elimination of corruption and the fostering the anti-corruption policy. As these ombudsman institutions also have powers connected with legal action against perpetrators, they push the perception of the ombudsman in a different direction.³³ From the beginning of the existence of these ombudsmen they have represented a certain *hybrid* generation where the connecting component is combating corruption.

Not only with regard to the latest group, but also in connection with the majority of ombudsmen from all the generations it is possible to distinguish a special development. This special development is more a *special development phase* within all existing generations of ombudsmen rather than a new ombudsman generation. It presents itself as a mixture or combination of different legislative standards of ombudsman control and subsequently also in combination with assessment criteria. A number of writers acknowledge this development phase and they admit that it does not fit the traditional ombudsman generations. However, in connection with this latest development stage, the previous generations of ombudsmen have only a theoretical and historical character as nowadays it is very rare to discover a 'pure' legislative standard of control for the ombudsman, i.e. an ombudsman who only deals with the law, good administration or human rights. This development phase is connected with a visible combination and intermingling of these legislative standards of ombudsman control. For instance, the legislative standard of control of the first generation and the second generation ombudsmen can be broadened by including human rights within the remit of these ombudsmen. Similarly, ombudsmen that were originally connected only with the assessment of compliance with human rights can start to assess compliance with legality or good administration. All this might be done either via the *broad discretion* of the ombudsmen concerned,³⁴ because of a *premeditated intention or a subsequent intervention by the legislator*³⁵ and partial changes introduced by the legislator.³⁶ When ombudsmen accept different (additional) functions or roles, this is often described as a *hybridisation* of ombudsmen.³⁷ Although Reif connects this hybridisation with additional powers given to 'traditional' ombudsmen this article uses this term in a broader sense meaning in connection with the *hybridisation of legislative standards of ombudsmen's control*. Because of these new societal developments, a mixture of legislative standards of control and, at the same time, a mixture of assessment standards that make up good administration, legality and human rights can be found in the practice of almost all European³⁸ ombudsmen. Of course, some ombudsmen can approach this challenge somewhat better than others. The hybridisation of legislative standards of ombudsmen's control goes hand in hand with hybridisation of their assessment standards. Despite the hybridisation

29 Law no. 17/2005 of 18/08/2005 modifying and complementing law no. 25/2003 of 15/08/2003 establishing the organization and the functioning of the office of the Ombudsman, Arts 3(1), 3(10) and 9(3).

30 The Constitution of South Africa, Art. 182.

31 The Constitution of Uganda, Art. 225.

32 See also the ombudsman institutions of Namibia, Burundi, Republic of Congo etc.

33 Cf. A. Mukoro, *Pathos and Ethos: The Ombudsman Phenomenon in Africa's Public Services*, No. 70/2008, CAFRAD.

34 This is for instance the case of the National Ombudsman of the Netherlands who has given content to a general normative concept of 'proper' administration. In his opinion, proper administration also includes compliance with human rights. He expressly refers to human rights in his list of 'Requirements of Proper Administration' (*Behoorlijkheidswijzer*) as one of his assessment criteria.

35 The legislator can sometimes change the character of the ombudsman institution which de facto pushes the ombudsman into another ombudsman generation. This is the case with the ombudsman of Ghana or Tanzania. Reif 2004, supra note 8, p. 89.

36 This is for instance the case with the Finnish Parliamentary Ombudsman. His express connection with human rights was included in the Finnish Constitution (Section 109), see also R.-L. Paunio, *The Ombudsman as Human Rights Defender*, Speech at IOI's conference, Workshop 1: The Ombudsman as Human Rights Defender, 10 June 2009, Stockholm.

37 Reif 2004, supra note 8, pp. 60 et seq.

38 The conclusions are built on the latest research on the ombudsman institution in Europe as published in 2008 in the book by Kucsko-Stadmayer, supra note 11. It is possible that ombudsmen outside Europe have slightly different practices. The practice of the hybridisation or redevelopment of the assessment criteria is nonetheless visible, for example, in connection with some Australian ombudsmen (e.g. the Commonwealth Ombudsman of Australia).

of legislative standards of ombudsmen's control we can still describe three main legislative standards: *legality*, a *general concept* that is usually called good administration and compliance with *human rights*. These legislative standards are closely connected to the assessment criteria used by several ombudsmen.

3. Assessment criteria of ombudsmen and their hybridisation

In connection with all ombudsmen generations and the latest development it is possible to point to major types of assessment standards or assessment criteria that are used by ombudsmen. These assessment criteria are directly connected with legislative standards of ombudsmen's control. Before that, however, it is possible to refer to and paraphrase Christensen who in connection with the ombudsman institution divided the basis for the Danish Parliamentary Ombudsman assessment into two main categories: *traditional administrative law* and *something else*. The first category assesses the compliance of the administration with the law. The second measures the administration's activity according to criteria other than strictly legal requirements, for instance requirements relating to staff behaviour (including the requirements of decorum and sufficient qualifications), case processing time, the provision by the administration of extensive and adequate information, the examination and correctness of the basis of decisions, internal planning, efficiency and, finally, the consideration shown towards citizens.³⁹ Together with human rights and legal standards, other standards create three main types of assessment standards that it is possible to find in most of the ombudsmen generations. However, the *hybridisation* of assessment standards is also visible here as it goes hand in hand with the hybridisation of ombudsmen's legislative standards of control.⁴⁰

3.1. Law – legal rules

Law and legal rules are traditional assessment standards for certain ombudsmen. Legal rules are certainly traditional assessment standards in the case of ombudsmen who judge the administration's compliance with the law i.e. the first ombudsman generation. Ombudsmen like the Swedish Parliamentary Ombudsman and the Finnish Parliamentary Ombudsman directly and often *ex constitutio* control the compliance of institutions with the law.⁴¹ Ombudsmen of the third generation are assessors of compliance with human rights. But they necessarily connect their assessment criteria with the law, as human rights are covered by the law whether it is constitutional law, human rights law or even humanitarian law.⁴² Because of this it is not possible to disconnect the third generation of ombudsmen from the law and legal rules as assessment standards. The connection of the second ombudsman generation with the law is not that clear. This connection depends on two simultaneous factors. The first factor is the will of the national Parliament or a bearer of legislative powers. A manifestation of this will is clearly included in legal acts establishing ombudsmen. If the legislator connects the ombudsman with some general normative concept such as good administration it has two possibilities. It can either define this general concept (which is less usual), or conversely it can delimit the concept and leave the rest to the ombudsman or theoretically to other bodies (e.g. the courts) to fill in this concept.

The second factor that connects the second generation of ombudsmen with the law is the will of the ombudsman and his discretion. If the ombudsman decides to connect the general concept of good administration with the law (good administration in a broader sense), i.e. if a breach of the legal norm is also a breach of good administration, then the law will inevitably become a part of his assessment standards. In this case, the perception of the law depends on the decision of the ombudsman and his

39 Senior Legal Adviser, J. Olsen, *Good administrative Practice*, <www.ombudsmanden.dk/om/formidling_og_viden/publikationer/artikler/administrative_practice/> (accessed on 18 April 2013).

40 Corruption cannot be perceived as an individual legislative standard of control. It is only a special type of conduct that at the same time breaches legal and 'other' norms. It is a connecting component of ombudsmen who, when assessing corruptive conduct, use legal rules (often norms of criminal law) or other rules (rules of good administration).

41 For example, in *Beslut* 1606-2003 of 26 June 2006, the Swedish Ombudsman dealt with employees of Gothenburg University who had allegedly breached their duty due to a failure to comply with the judgments of the Administrative Court of Appeal concerning the release of documents. In *Beslut* 4747-2009 of 3 May 2011 the Swedish Ombudsman found an *unlawful* search of an apartment in the actions of by the Swedish Armed Forces.

42 Cf. R. Provost, *International Human Rights and Humanitarian Law*, 2005.

practice. This may include different possibilities, e.g. accepting the law as an obligatory *sine qua non* condition of good administration,⁴³ accepting the law as an existing standard while developing normative categories that can be different from the law,⁴⁴ or adopting a position where the law is not a primary assessment standard as most of the time it does not cover the issues complained about and investigated. Thus, the law or legal rules as a normative and assessment standard can be found in the ‘toolkit’ of the ombudsmen that belong to all the generations.

3.2. ‘Other’ norms

Assessment standards or criteria that are based on ‘something else’ can include different concepts. It can include errors or derelictions in the discharge of duties by administrative authorities,⁴⁵ some ombudsmen assess whether institutions, within their competence, have complied with principles of good administration,⁴⁶ proper administration⁴⁷ or even good governance.⁴⁸ Common law ombudsmen often assess compliance against the opposite of good administration – maladministration.⁴⁹ Thus, the ‘other’ norms are equal norms of good administration in a narrow sense.⁵⁰ As described above, it is the legislator which has the primary decision as to whether the remit of its national, local or specialised ombudsmen will cover good administration or some other general concept. Traditionally, this broad concept is connected with the second generation of ombudsmen. Usually, ombudsmen belonging to this generation have to give contents to the concept and they use these contents as assessment criteria.

However, recently, thanks to hybridisation, broader concepts are also visible in different generations of ombudsmen. It is mostly the concept of good administration or maladministration that finds its way into the remit of ombudsmen who orient themselves on compliance with the law and on compliance with human rights. For instance, since the constitutional changes in 1995, the Finnish Parliamentary Ombudsman, an ombudsman of the first generation, also covers the concept of good administration as this had received a legal dimension in Finland.⁵¹ Also, for instance, ombudsmen that are traditionally perceived as being of the third generation, i.e., human rights ombudsmen, can be connected with concepts such as good administration. An example of such a practice is the Czech Public Defender of Rights or the Ombudsman of the Republic of Latvia. According to the Czech Public Defender of Rights Act, the ombudsman judges the behaviour of the administration also against principles of a democratic and lawful state and good administration (*principy demokratického právního státu a dobré správy*). For that reason this ombudsman has also developed its own list of principles of good administration.⁵²

3.3. Human rights

Compliance with human rights as the most important assessment standard and model behaviour is mainly connected with the youngest generation of ombudsmen which were established after the fall of authoritative or undemocratic communist regimes. This is the case with the Polish Human Rights Defender, the Slovakian Public Defender of Rights or the Portuguese *Provedor de Justiça*. The reasons why these ombudsmen are connected with this concept are obvious: years of former dictatorship and regular breaches of human rights. Human rights as assessment criteria however find their way into other ombudsman generations as well. According to many authors, the hybridisation of ombudsmen is

43 This is for instance the approach of the European Ombudsman. cf. N. Diamandouros, *Legality and good administration: is there a difference?*, Speech by the European Ombudsman at the Sixth Seminar of National Ombudsmen of EU Member States and Candidate Countries on ‘Rethinking Good Administration in the European Union’, Strasbourg, 15 October 2007.

44 This is for instance the practice of the Dutch National Ombudsman. The National Ombudsman in his *Annual Report 2005* explained that there could be two specific normative standards (law and proper administration) that do not need to be the same.

45 J. Andersen, *Principles of Good Administration, Ombudsmen, the Treaty of Amsterdam and European Intefration*, Seminar organised by the European Ombudsman and the French Ombudsman, Paris, 9-10 September 1999.

46 Cf. the Commonwealth Ombudsman of Australia, also the Czech Public Defender of Rights.

47 Cf. the National Ombudsman of the Netherlands or the Flemish Ombudsman of Belgium.

48 Cf. Ombudsman of Malta.

49 Cf. the Parliamentary Commissioner for Administration (UK), the Irish Ombudsman but also the European Ombudsman.

50 This is not the place for a debate on the term ‘good administration’.

51 See Art. 21 of the Finnish Constitution. For more on good administration in the practice of the Finnish Parliamentary Ombudsman see T. Arjola-Sarja, ‘The Ombudsman as an advocate for good administration’, in Office of the Finnish Parliamentary Ombudsman, *Parliamentary Ombudsman 90*, 2010, pp. 93 et.

52 <www.ochrance.cz/stiznosti-na-urady/pripady-a-stanoviska-ochrance/principy-dobre-spravy/> (accessed on 18 April 2013).

most visible with regard to human rights. One of several examples is the Dutch National Ombudsman. The National Ombudsman assesses whether or not the administrative authority in question has acted properly.⁵³ Since 1987, when the National Ombudsman developed the first requirements of proper administration in the so-called Oosting's list, human rights have been inseparable criteria against which the National Ombudsman judges the properness of administrative behaviour.⁵⁴ Similar connections between human rights and 'older' ombudsman generations can also be found in other ombudsman systems. For instance, a connection with human rights is visible in the approaches of the European Ombudsman, the Finnish Parliamentary Ombudsman, the Belgian Federal Ombudsman or the Norwegian Parliamentary Ombudsman (*Sivilombudsman*) etc. Next to the broad hybridisation and the connecting of the ombudsman institutions with human rights via the legislator and the practice of individual ombudsmen, we can also see a development that pushes 'all' ombudsmen into the position of 'human rights' institutions. This is the case with the so-called Paris Principles, which the UN General Assembly annexed to its Resolution 48/134 and which characterise an ombudsman as a human rights institution.⁵⁵

As seen above, thanks to the hybridisation of ombudsmen's legislative standards of control and their assessment criteria, it is not possible to simply state that an ombudsman is using only legal or only extra-legal assessment standards. Furthermore, this specification of the ombudsman's assessment standards is usually different from the corresponding specification for most of the existing ombudsmen. Indeed we can organise ombudsmen into certain waves or models with some general criterion but such an organisation does not necessarily reflect all the possible specific aspects of ombudsman institutions as ombudsmen really come in all shapes and sizes.⁵⁶ In connection with the assessment criteria used by the ombudsman it is possible to characterise them as a certain mixture of legal norms, principles of good administration, ethical or moral principles and standards of good administrative behaviour whose quality depends on the particular generation of ombudsmen and the will of the legislator.

4. New normative taxonomy of an ombudsman

Even though the historical method of the taxonomy of the ombudsman is connected with the legislative standard of the ombudsman institution, when taking into consideration the modern development of the ombudsman institutions and their mutual cohesion, this is not always satisfactory. This lack of satisfaction is connected with the *hybridisation of assessment standards*, the *hybridisation of their legislative standards of control* and subsequently the *hybridisation of ombudsman institutions* as such. During the last few decades the hybridisation among ombudsmen has shown that ombudsmen are not connected with only one type of assessment standards, whether it is an ombudsman of the first, the second or the last generation. Because of that, a traditional taxonomy dealing with generations of ombudsmen could be better replaced by a taxonomy that does not only connect the legislative standard of ombudsman institutions with the historical establishment of the ombudsman institution but also with the character of hybridisation as the hybridisation of the ombudsman institutions and their assessment standards also reflects the historical development. However, hybridisation brings into this taxonomy another component and naturally a challenge – a *level of necessary relativity*. In order to overcome this relativity it would be important to closely research the development of the assessment standards of the ombudsman institutions in connection with hybridisation. Thanks to this hybridisation of assessment standards and of the legislative standard of ombudsmen it is possible to distinguish three groups of ombudsman institutions that can partially, if not completely, replace and develop the original three historical generations of ombudsman institutions. It is possible to talk about:

53 Art. 9:27(1), General Administrative Law Act.

54 Cf. P.M. Langbroek & P. Rijpkema, 'Demands of proper administrative conduct: A research project into the ombudsprudence of the Dutch National Ombudsman', 2006 *Utrecht Law Review* 2, no. 2, pp. 85 et seq.

55 The Paris Principles define the minimum conditions which have to be met by national human rights institutions if these are to be considered legitimate.

56 A. Abraham, *The Future in International Perspective: The Ombudsman as Agent of Rights, Justice and Democracy*, 2008 *Parliamentary Affairs* 61, no. 4, p. 682.

1. *Ombudsmen mainly assessing compliance with the law.* In order to do that, this group of ombudsmen use the law as the primary assessment standard. They must closely follow its development not only in connection with the statutory changes but possibly also in connection with the changes that are brought to the law by the case law of the courts, including the constitutional courts, and, depending on the approach of the state to international law, also to the international institutions that create rules which are binding on the state. If these ombudsmen want to exercise their roles and functions properly they must closely keep track of the newest legal developments. They are put in the position of institutions that assess given rules which they cannot change. The other normative standards fulfil only a secondary role in the practice of these ombudsmen. To a certain extent, these ombudsmen can substitute the courts. These ombudsmen assess compliance with the law both openly and explicitly.

2. *Ombudsmen mainly assessing compliance with a general concept, i.e. something else (e.g. good administration, good governance, proper administration).* These ombudsmen are not required to keep track of the latest changes instigated by the national or international legislator. They are the creators or the developers of normative standards. Although there is a certain perception of what a general concept is (e.g. the perception of good administration by the international institution), the ombudsman institution is not bound by this perception. It is usually entitled by the national legislator to give content to the general concept. Of course, this content can cover situations not covered by the law but it must not go against it. These ombudsmen must thus acknowledge the borders of the valid and applicable law so that they do not develop standards that go against them. They are entitled to develop the normative system that is presumed by the legislator. These ombudsmen do not try to substitute the courts as they generally assess compliance with a concept that is unknown or is not assessed by the courts. They do not explicitly assess compliance with the law. However, as the legal requirements or the law are reflected in the general concepts, any breach of the law usually also leads to a breach of a general concept that can be assessed by these ombudsmen.

3. *Ombudsmen mainly assessing compliance with the human rights.* These ombudsmen are in a same position as those from the first category. They cannot create 'new' human or fundamental rights. They must apply existing human rights as they are described in the documents of the national legislator or those of the documents international institutions that are binding on national legislation. As such they do not create an independent normative standard. They may, however, point to breaches of human rights and theoretically be at the pre-trial stage or even a precondition for court proceedings. Although the application of the other normative standards is not excluded, they represent only a minor interest of these institutions. In these situations it then depends on how broad the ombudsman's competence is to cover issues other than human rights.

This taxonomy on the one hand reflects the latest development in the evolution of the ombudsman institutions. On the other hand, it also underlines the fact that today we cannot talk about a 'pure' assessment standard of ombudsman institutions.

5. Codification of ombudsmen's assessment criteria and their functions

If we look at all types of ombudsmen it is possible to observe the tendency of the majority of ombudsmen to underline and define their own positions. Ombudsmen usually repeatedly explain their functions, reiterate their goals and underline their working methods. This is visible through numerous interviews, articles and publications which they produce and subsequently publish. It is necessary to take into consideration the fact that in comparison with administrative courts, the numbers of complaints that reach the ombudsman are not that high and if they are increasing then they are only increasing very slowly.⁵⁷ Setting aside questions like why ombudsmen have the need to redefine their position or what

⁵⁷ In the Netherlands the National Ombudsman receives on average 13,251 complaints per year. In the last five years these numbers were: 2007 – 13,242; 2008 – 13,073; 2009 – 12,222; 2010 – 13,979 and in 2011 –13,740 (*Annual Report 2011*, p. 35). In the case of the UK Parliamentary Ombudsman the situation is slightly different. The average number of complaints per year is approximately 18,089 but

are the reasons for this behaviour, it is possible to observe the tendency that a redefinition of the position of certain ombudsmen often incorporates the development of lists of assessment standards. These lists of assessment standards are not connected with all ombudsmen but when we look at the European national ombudsmen we can usually observe that the *ombudsmen who mainly assess compliance with a general concept* have done something that would expressly and on the outside define their own assessment standards.

In Europe, these lists can be found in a number of countries that *include inter alia* England, Wales, Ireland, Gibraltar, the Netherlands, Belgium, the Czech Republic, Malta, or the European Union etc. In the case of some ombudsmen it is possible to find that these ombudsmen work with certain internal principles, albeit these are not published in one list or promoted in ways other than in ombudsman decisions. This is for instance the case with the Danish Parliamentary Ombudsman,⁵⁸ the Latvian *Tiesībsargs*⁵⁹ but also for instance the Ombudsman of Peru.⁶⁰ Last, but not least, in the case of some ombudsmen it is not possible to find this tendency. These ombudsmen usually do not belong among the ombudsmen who *mainly* assess compliance with a *general concept*. Despite the fact that only a limited and relatively small, though still increasing, number of ombudsmen have developed a list of assessment standards, such organised assessment criteria can assist in the ombudsman's visibility and they do provide an in-depth explanation of his mission. In the case of ombudsmen who have actually developed their own list of assessment criteria, it is possible to identify various functions that can be connected with these lists and the assessment standards incorporated therein. These functions are directly connected with the reasons for the creation of these principles.

The first function can be labelled as a *codifying function*. By developing a list of assessment standards, ombudsmen *codify* and explain the inner mechanisms of their 'report-making' processes. The criteria that are used by the ombudsman as assessment standards do not usually come with the establishment of the ombudsman institution. They are usually created during the initial years of the ombudsmen's 'lives.' The ombudsmen usually need some time and necessary practice in fulfilling their functions to be able to create and develop such lists. A decision to adopt such a list mostly rests with the ombudsman in question but sometimes there might be propositions by other state bodies or institutions.⁶¹ The time when ombudsmen decide to establish such lists differs from ombudsman to ombudsman. For example, in the UK it took the Parliamentary Ombudsman more than 40 years to develop the Principles of Good Administration, including the Principles of Good Complaint Handling and Principles for Remedy.⁶² In the case of the Ombudsman of Malta this development lasted only 9 years after the establishment of the institution.⁶³ A very rapid development and adoption of ombudsman's standards was also the case with the Dutch National Ombudsman, where the first list of standards was developed in 1987 by the second National Ombudsman, Oosting, which occurred only 6 years after the National Ombudsman was incorporated into the Dutch legal system.⁶⁴ However, the ombudsman who was the quickest to develop and announce his own assessment principles was probably the European Ombudsman. Following his establishment by the Maastricht Treaty, it took him only 5 years to create the draft of the European Code of Good Administrative Behaviour. The Code was also adopted by the European Parliament in 2001 and

the number of complaints has rapidly increased during the last two years. In the last five years these numbers were: 2006/07 – 14,510; 2007/08 – 12,532; 2008/09 – 16,317; 2009/10 – 23,667 and 2010/11 – 23,422 (*Annual Reports of 2006/07-2010/11*). In the case of the Slovakian Public Defender of Rights the average is 2,372 complaints per year with a slight decrease. In the last five years these numbers were: 2007 – 2,343; 2008 – 2,541; 2009 – 2,882; 2010 – 2,517 and 2011 – 1,577 (*Annual Reports of 2007-2011*).

58 Kucsko-Stadlmayer, *supra* note 11, p. 157.

59 The 2007 *Annual Report* of the Latvian Ombudsman enumerates a number of principles of good administration that include an objective and fair consideration of a question within a reasonable period of time, a person's right to express an opinion, to become acquainted with court materials, to request a reasonable decision and compensation in the form of damages, etc. p. 46.

60 Based on an interview with Mr C.A. Castro, Commissioner of the Office of the Ombudsman of Peru.

61 This was for instance the case for the European Ombudsman and the Code of Good Administrative Behaviour. The idea for the Code was first proposed by Mr R. Perry MEP in 1998. *The European Code of Good Administrative Behaviour*, Office for Official Publications of the European Communities, 2005, p. 6.

62 The office of Parliamentary Commissioner for Administration (today called the Parliamentary and Health Service Ombudsman) was created in 1967. The List of Principles of Good Administration was published in 2007. See, <www.ombudsman.org.uk/improving-public-service/ombudsmansprinciples/principles-of-good-administration> (accessed on 18 April 2013).

63 The Guidelines for Good Governance of the Ombudsman of Malta can be found on his internet site <www.ombudsman.org.mt/index.asp?pg=ombguide> (accessed on 18 April 2013).

64 See J.B.J.M ten Berge et al., *Vereisten van behoorlijkheid: Een analyse na tien jaar ombudsman*, 1992, pp. 12 et seq.

subsequently by some other Union institutions.⁶⁵ The 'codification' of assessment standards can happen in two main ways: either by originally developing one's 'own' ombudsman standards when they are drawn from the experiences of the ombudsman in question as acquired during his investigation of complaints or by 'borrowing' assessment standards already developed by other ombudsmen. This is for instance the case with the Public Services Ombudsman of Wales or the Ombudsman for Bermuda who adopted the Principles of Good Administration as developed by the Parliamentary and Health Services Ombudsman (UK).⁶⁶ Another influential code of assessment criteria is the European Code of Good Administrative Behaviour of the European Ombudsman that is referred to by various ombudsmen.⁶⁷

A 'codification' of assessment standards helps the ombudsmen to create more consistent reports and casework which might lead to strengthening the acceptance of the ombudsman institutions and the predictability of their reports. This also holds true in connection with the fact that ombudsmen do not necessarily need to follow their own previous reports. It also brings about a certain impetus for the unification of internal processes within ombudsman offices. In most countries, ombudsmen receive thousands of complaints each year and it is unthinkable that only one person will deal with these complaints. Complaints are dealt with by authorized investigators who can come from different backgrounds, have different experiences or a different level of education. So even if these principles are not published, as soon as they are developed and used within the ombudsman's office they ease the working processes of the ombudsman, his reasoning and last, but not least, the consistency of the decisions rendered. However, these assessment standards have to avoid excessive abstraction or inflexibility as they have to react to developments within the administration and they have to possess a certain level of dynamism. This is for instance the case with Requirements of Proper Administration of the Dutch National Ombudsman (1987) that were remodelled due to the changes in Dutch administrative law and the growth of the experiences of the ombudsman in 2007. The latest more substantial change occurred in December 2011 when the National Ombudsman, in cooperation with the majority of the Dutch local government ombudsmen, agreed to adopt an updated list of requirements of proper administration that functions as assessment criteria which are applicable to their investigations.

The codifying function is closely connected with what might be called the *defining function*. If the ombudsman assesses compliance with the law or with human rights his assessment standards are rather clear-cut. Here the law is determined by the legislator and it cannot be redeveloped by the ombudsman. In these cases he assesses the behaviour of the administration judged against the particular valid norm of the law or some constitutional principles or human rights. In the case of ombudsmen who *mainly* assess compliance with a *general concept*, the situation is mostly a different one. In these situations it might be unclear what exactly is maladministration, good administration or proper administration. These general concepts entail a certain level of uncertainty. An interesting aspect concerning ombudsmen dealing with these concepts is the fact that two different ombudsmen dealing with the same concept, for instance maladministration, must not necessarily define the contents of this concept in the same way. Of course, good administration can be derived from certain general principles of the democratic state but the way in which these principles have been transformed into the list of individual ombudsmen depends on the ombudsmen or some other bodies that try to give ombudsmen a helping hand. If we look at maladministration we can find that definitions of this term might have different connotations with different ombudsmen. Two examples could be given in connection with the meaning of maladministration. In the UK, the traditional definition of maladministration is known as 'Crossman's catalogue' which states that maladministration is 'bias, neglect, inattention, delay, incompetence, ineptitude, perversity, turpitude and arbitrariness and so on' and was provided by the Cabinet minister Crossman during

65 The Draft of the European Ombudsman was adopted with certain changes in the Resolution on the European Ombudsman's Special Report to the European Parliament following an own-initiative inquiry into the existence and the public accessibility, in the different Community institutions and bodies, of a Code of Good Administrative Behaviour (C5-0438/2000 - 2000/2212 (COS)). Other Union institutions that have adopted this Code are for instance the European Centre for the Development of Vocational Training or the European Environmental Agency etc.

66 Cf. Ombudsman for Bermuda, *Fifth Annual Report*, 2010, pp. 2 et seq. or Public Services Ombudsman for Wales, *The Principles of Good Administration*, March 2008, pp. 1 et seq.

67 E.g. the Ombudsman of Malta, the Czech Public Defender of Rights.

debates in Parliament when establishing the UK Parliamentary Ombudsman.⁶⁸ Also the English courts have tried to express their opinion on the contents of maladministration. For instance, Lord Denning stipulated that maladministration includes inter alia 'faulty administration or inefficient or improper management of affairs, especially public affairs'.⁶⁹ Although these definitions were helpful and probably also partially limiting, the Parliamentary Ombudsman adopted another approach. She did not try to define maladministration as such, but the content of its opposite – good administration. For that she developed the Principles of Good Administration that give content to and define the concept. In the case of the European Union the situation was somewhat different. The definition of maladministration has been created by the European Ombudsman who stated that 'maladministration occurs when a public body fails to act in accordance with a rule or principle which is binding upon it'.⁷⁰ The European Courts leave this issue entirely in the hands of the European Ombudsman although they sometimes use the term maladministration in their decisions.⁷¹ The European Ombudsman, however, has also approached maladministration in the European sense from a different perspective, i.e. via developing principles describing good administrative behaviour. If we compare these two lists of principles of good administration we can see a similar general idea behind them but their external appearance is different; the almost statute-like Code of the European Ombudsman and the general user-friendly statements of the Principles of the Parliamentary Ombudsman. Nonetheless, by creating their own lists of assessment standards ombudsmen obviously define concepts that are connected therewith. By defining these concepts they explain what general concepts such as maladministration or good administration etc. mean. They de facto give content to these legal terms and thus they interpret legal acts in a *non-binding* or even *quasi-binding* but respected way.

The third function can be described as an *informing function*. It can be perceived at three different levels: in connection with administrative bodies, in connection with other bodies and in connection with individuals. The first level of this informing function is connected with an ombudsman giving information to bodies and institutions within his competence. By publishing lists of non-legal assessment standards ombudsmen inform public bodies and institutions that these principles are, alongside the law and human rights (or not), the standards to which these bodies should adhere. By publishing these standards ombudsmen often de facto summarise their practice and they differentiate the criteria of what they consider to be good administration, proper administration, 'bad administration', maladministration or some other general concept. The ombudsman clarifies that these principles are going to be used when judging administrative behaviour.

Thus they create a normative system for these bodies. By publishing these lists, bodies and institutions can adjust their working methods so that they can be in accordance with the ombudsman's assessment criteria. In this connection it is appropriate to underline that the principles of good administration as prepared or published by the ombudsmen are not only 'their own private principles' as ombudsmen have not created the 'substance' of good or proper administration. Assessment standards are often based on previous ombudsmen's experiences and they can be derived from the values that are fundamental to democratic society, the administration and national legal systems in general. Sometimes the publication of these standards can also have negative consequences. The publication or use of very strict or disproportionate assessment standards by ombudsmen may lead to a reduction of their persuasive powers because very strict ombudsman's rules that can be above the law may not meet with the sympathy of the administration. And for the ombudsman's work, the fact that the administration is content with his working methods is of the utmost importance. The second level is connected with other state and also non-state bodies. The ombudsman informs such bodies that these are his assessment criteria and he is going to use them in his work. The third level of this function is connected with individuals or complainants that are not content with the administrative actions of the state authorities within the ombudsman's remit. The

68 Richard Crossman was a Cabinet minister in Harold Wilson's 1964 Labour Government. He was responsible for introducing the institution of the Parliamentary Ombudsman in the UK constitutional system. He provided this general definition of maladministration as a Government spokesman during debates on the 1967 Parliamentary Commissioner Act.

69 *R v Local Commissioner for Administration for the North and East Area of England ex parte Bradford Metropolitan City Council* [1979] 2 All ER 881.

70 1997 *Annual Report of the European Ombudsman*, p. 23.

71 Cf. Joined Cases 176/86 and 177/86, *Houyoux and Guery v Commission*, [1987] ECR 4333.

publication of these lists of assessment standards enables individual complainants to be aware of these ombudsmen's criteria and that this is the way in which they expect the bodies and institutions within their jurisdictions to act, or conversely the way in which they do not expect them to act. Individuals can sometimes follow these standards as a checklist, although in most cases the standards of the ombudsmen should not be approached in this particular manner. The lists thus inform individuals as to what kind of behaviour they can expect from the administration.

In certain cases, a fourth *educational function* is visible. Undoubtedly, ombudsmen's published standards can have a certain influence. Ombudsmen do not publish their principles or their assessment criteria only on a whim; their publication is or at least should be part of their general goal to contribute to the creation of better and more human administrative services and better and fair administration. Here we can see the biggest difference between these standards and general or particular guidance that may be established by the ombudsman. While general guidance or specific recommendations cover a problem stemming from one or several complaints and their usual role is to point how the same problem can be prevented from arising again, i.e. *protection a posteriori*, the assessment criteria of the ombudsmen do not try to deal with the existing problem but try to prevent hypothetical, future problems, i.e. *protection a priori*. They also usually cover the administration or offering services to the public as a whole. As they are mostly introduced in a comprehensible and non-complicated way, they can leave an impact on the officials and functionaries of administrative or public bodies. It is possible to identify three types of bodies that can actually be influenced by the ombudsman's standards. First of all, they are (and they should be) bodies within the ombudsman's jurisdiction, because they are a primary target of the ombudsman's investigations. Secondly, these standards can also influence other state bodies lying outside the ombudsman's traditional competences. Last, but not least, the lists of ombudsman's standards can have an impact on other ombudsman institutions whether in the same country or outside.

Bodies within the ombudsman's remit should be acquainted with the principles which the ombudsman uses. That is for instance the case with the Code of Good Administrative Behaviour that has been drawn up by the European Ombudsman. After it had been drawn up by the European Ombudsman it was adopted by the European Parliament in 2001. Article 1 of this resolution states: 'In their relations with the public, the Institutions and their officials shall respect the principles which are laid down in this Code of good administrative behaviour (...).'⁷² The institutions of the EU should therefore take this Code into account while dealing with individuals.⁷³ If we look at the practice of most Union institutions, the Code, as drafted by the European Ombudsman, has been taken as a model for good administrative behaviour by a considerable number of these institutions.⁷⁴

Bodies that lie outside the ombudsman's remit can also be influenced by the ombudsman's standards. Although that is not usual, it may nevertheless occur. One such example, which still exists,⁷⁵ is the Administrative Justice and Tribunals Council (UK)⁷⁶ that was influenced by the Parliamentary Ombudsman's Principles of Good Administration when developing its own Principles for Administrative Justice. In the introduction to its work the AJTC states: 'The Principles build on previous work in this field, and in particular on the Parliamentary and Health Service Ombudsman's Principles of Good Administration.'⁷⁷ Although the Principles for Administrative Justice of the AJTC are broader than the Parliamentary Ombudsman's principles the value of latter principles was also visible for a body that keeps under reviews the administrative justice system, including the ombudsman system. Another type of body that is usually outside the remit of the ombudsman is the courts. Although courts usually do

72 For the Code of Good Administrative Behaviour see, <www.ombudsman.europa.eu/en/resources/code.faces> (accessed on 18 April 2013).

73 Whether they really do so is a different question.

74 The only problem with this Code is the fact that a number of Union institutions, including the Commission and the Council, have not adopted this Code but have adopted their 'own' code of good administrative behaviour. However, the reasons for this might be entirely political.

75 Since July 2011 there has been a discussion about abolishing this advisory non-departmental public body due to the reforms of public bodies in the UK. In December 2012 a draft order abolishing the AJTC was laid before Parliament. In March 2013 the AJTC was still active. However, its document *A Research Agenda for Administrative Justice* takes into account its possible abolition. See, <http://ajtc.justice.gov.uk/docs/AJTC-RA-Mar2013_WEB.pdf> (accessed on 18 April 2013).

76 According to a definition published on the internet site of the AJTC, the AJTC is a body that keeps under review the administrative justice system (in the UK) as a whole with a view to making it accessible, fair and efficient.

77 *Principles for Administrative Justice*, November 2010, p. 2.

not devote much attention to the ombudsman's assessment standards, on rare occasions they may even consider the ombudsman's assessment criteria.⁷⁸

The ombudsmen community is relatively broad but that does not mean that *ombudsmen cannot influence themselves*. Usually, that happens through several international ombudsman networks. The same applies to ombudsmen's assessment standards. Assessment standards or principles used by ombudsmen may have a certain impact on the development of certain principles in the same country (e.g. local government ombudsmen) or outside. This is the case, for example, with the Code of Good Administrative Behaviour of the European Ombudsman that partially influenced the adoption of the Guidelines for Good Governance of the Ombudsman of Malta that also draws from the Principles of Good Administration of the Parliamentary Ombudsman (UK). In this connection it is also appropriate to mention the influence of the European Ombudsman and the European Network of Ombudsmen that connects over 90 ombudsman offices in 32 European countries.⁷⁹ Another example is the former practice of the Municipal Ombudsman of Amsterdam who in his *Annual Report 2010*, in the part entitled '*Behoorlijkheidsvereisten*', refers directly to the Requirements of Proper Administration of the Dutch National Ombudsman as standards that are applied in his investigations.⁸⁰ The same can be said about the already mentioned Public Services Ombudsman for Wales who adopted the Principles developed by the Parliamentary Ombudsman (UK) as being 'valid for all public services'.⁸¹

6. Character and status of the ombudsmen's normative standards

In most cases, the status of ombudsmen's assessment standards may seem apparent and clear. That, however, might be misleading. Ombudsmen do not have the power to make binding or enforceable decisions. Their general guidance, their reports and their assessment standards do not have a different status; they all remain on the level of non-binding recommendations. They only have persuasive authority that results from the fact that the assessment standards are based on the experiences of the ombudsmen and on the status of particular ombudsmen in each and every legal system. Their persuasiveness is not backed up by any legally binding provisions. This leaves a great deal of scope for the administrative bodies and their discretion. They can decide whether the reports of the ombudsman and his recommendations are going to be complied with or not. If they do not comply with them, nothing really happens as non-compliance with this type of document does not entail any real legal sanction. It may lead to the simple conclusion that the ombudsman's assessment standards and anything that is adopted by the ombudsman do not have legal force and are thus not the law. That is it, end of discussion. With this simple logical argument, it is possible to presume that the assessment standards of the ombudsman do not have the character of legal norms. They miss two important qualities of legal norms – general binding authority and the fact that their breach does not include any legal sanction. Precisely the same argument can be used in connection with human rights, since human rights as assessment criteria of the ombudsman are, if we break them down into norms, also 'merely' legal norms.

When we talk about good administration as assessment standards of the ombudsman the situation might be slightly different and not at all clear. The assessment criteria of the ombudsmen are much closer to good administration norms than legal norms. This raises the question of what is good administration? Nonetheless, norms of good administration do not have legally binding authority at least until the moment when they become law. They also exist only in the form of recommendations and other legally non-binding moral norms. At least in connection with the ombudsman *mainly* assessing the compliance with a *general concept* it seems that norms used by ombudsmen are good administration norms. That, however, does not deal with the situation where ombudsmen assess compliance with the law. As ombudsman institutions are usually built on the same criteria and especially thanks to the hybridisation of assessment

78 For example, that might be the case for the Court of Justice of the European Union when dealing with Art. 41(1) of the European Charter of Fundamental Rights and especially with the issue of 'fairness' and the right to have one's affairs dealt with fairly.

79 See, <www.ombudsman.europa.eu/en/atyourservice/enintroduction.faces> (accessed on 18 April 2013).

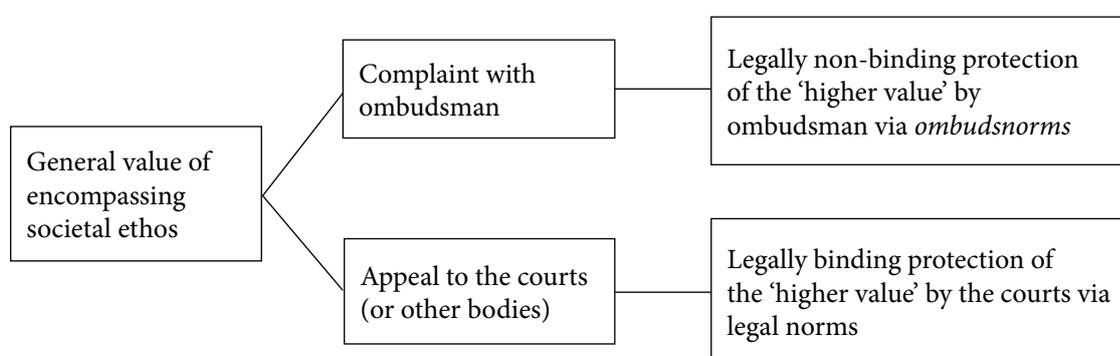
80 This situation however changed in December 2011 when the National Ombudsman, in cooperation with the majority of Dutch local government ombudsmen, redeveloped the list of Requirements of Proper Administration. See, <www.nationaleombudsman.nl/behoorlijkheidswijzer> (accessed on 18 April 2013).

81 Public Services Ombudsman for Wales, *Principles of Good Administration*, March 2008, p. 1.

standards it is improbable that the norms of other ombudsmen will have a different character. But do the ‘ombudsnorms’, as they are called by some academics,⁸² create a new normative concept?

The unclear character of ‘ombudsnorms’ also raises several other questions. The most interesting one is why are the recommendations of ombudsmen followed and why do the administrative authorities change their administrative processes so that they can be in accordance with ombudsmen’s recommendations? If it is not the law, what is it? If it is not legally binding, why do they do this? When we look at the practice of most established ombudsmen we can perceive that the instances of compliance with the ombudsman’s recommendations and the ombudsman’s reports are rather high and in some legal systems this number is close to 100%.⁸³

Ombudsmen’s assessment criteria can often contain legal norms but that fact does not make them legally binding. The most logical view would be to consider that the norms used by ombudsmen protect some general value that is also protected by legal norms but they do it in a different way, i.e. ‘ombudsnorms’ offer this non-binding protection by the ombudsman alongside the legal norms that are protected by other state institutions. Usually, an individual then has an opportunity to protect this general value in two separate ways, either by traditional mechanisms of protection – the courts, tribunals or other bodies – or by ombudsman institutions (or other alternative dispute resolution mechanisms). This twofold protection of this general value can be described in the following scheme.⁸⁴



Hence, ombudsnorms can be characterised as a specialised type of norms and that create a normative concept that is different from legal norms, although it reflects and protects the same general values. ‘Ombudsnorms’ are thus a combination of legal norms (including human rights norms) and good administration norms. This mix of norms is also visible in connection with lists of assessment standards as these lists are legally non-binding but they are usually followed and even adopted by administrative bodies. As the ombudsmen do not have legislative power, their ‘codification’ of the assessment standards and ombudsnorms does not create legally binding norms. For instance, the adoption of the *Behoorlijkheidswijzer* of the Dutch National Ombudsman can be indirectly implied from the Dutch General Administrative Law Act,⁸⁵ but the ‘wijzer’ itself does not have legally binding force.

However, the lists of ombudsmen’s criteria and individual standards may receive a different status as soon as they are codified by the legislator or used by the courts in their casework. It is not excluded that the legislator will give them, in due time, the status of law. Although this is rather a rare practice, it

82 These theorists are usually connected with the Netherlands or Belgium. (Cf. Ph. Langbroek & M. Remac, ‘Ombudsman’s assessments of public administration conduct: between legal and good administration norms’, 2011/2012 *The NISPAcee Journal of Public Administration and Policy* IV, no. 2, pp. 87-15). It is rather rare to find a reference to an ‘ombudsnorm’ in the writings of English (or common law) legal scholars. Similarly, theorists of the continental legal system are rather careful when using this concept. (D.C. Dragoş et al., ‘The Romanian Ombudsman and its Interaction with the Courts – an Exploratory Research’, 2010 *Transylvanian Review of Administrative Sciences*, no. 31E/2010, pp. 58-75).

83 Cf. *Annual Report 2011/12 of the Local Government Ombudsmen (UK)* states that the compliance rate in 2011/12 concerning their reports and recommendations was 99%, p. 13. Also other ombudsmen refer to a high degree of compliance with their reports. According to the *Annual Report 2011: Een vertrouwde overheid* of the National Ombudsman (the Netherlands) 90% of his recommendations were complied with in 2011, Scheme 9, p. 42.

84 The term ‘encompassing societal ethos’ is borrowed from J. Habermas, *Between Facts and Norms, Contributions to a Discourse Theory of Law and Democracy*, 1996.

85 See, Art. 9:27(1), General Administrative Law Act.

may sometimes happen.⁸⁶ Probably the only developed and published list of ombudsman's standards that has a slightly different status is the European Code of Good Administrative Behaviour of the European Ombudsman. On 6 September 2001 it was adopted as a resolution of the European Parliament and although the resolutions of the European Parliament are not legally binding, it gives the Code of Good Administrative Behaviour a *specific legalistic feeling*. Still, as proven by the General Court of the European Union and confirmed by the Court of Justice of the European Union even this Parliament's resolution does not give this Code the status of a binding source of Union law.⁸⁷

From previous examples we can distinguish two characteristics of 'ombudsnorms'. They are legally non-binding and they are persuasive, i.e. they are followed. The third characteristic of ombudsnorms is their flexibility. Ombudsmen only rarely want their standards to become binding law. This flexibility of the ombudsnorms in contrast to the rigidity of legal norms offers them a possibility to stretch these norms to cover different situations. An important role is here played by the discretion of individual ombudsmen as well. In this case, it is also possible to paraphrase the former UK Parliamentary and Health Services Ombudsman Ms Abraham and to say that the general legally non-binding character of these assessment standards is to their advantage because that character gives them that much needed flexibility.⁸⁸

Thus, ombudsnorms can be characterised as legally non-binding and flexible norms of behaviour that ombudsmen consider to be proper and fair and which, despite their lack of legal binding authority, are mostly followed by the administrative bodies to which they are directed.

7. Conclusions

This article tries to broaden the academic literature and also the academic debate about ombudsman institutions and their powers and roles. As the explanatory articles on the ombudsman institutions have mostly been written by the ombudsmen themselves or members of their staff, another 'non-ombudsman personal' view on this topic can point to the specifics of these institutions as seen from the 'outside'. Nonetheless, not every point of ombudsmen's assessment standards can be covered by one single article. And there are still some issues that could be covered by further research and questions like 'under which conditions and when can the ombudsman's principles become the law?', 'are ombudsman's assessment criteria a part of the law?' immediately come to mind.⁸⁹ Even without answering these questions, the issue of ombudsmen's assessment standards and their interconnection with the law, good administration, human rights and other normative systems is interesting. In general, it can be concluded that the development and subsequent publication of lists of assessment standards that ombudsmen use in their work definitely has a certain value. This is the case when ombudsmen deal with a general legislative standard that is different to the law.

Concepts such as maladministration, good administration or proper administration are not always as clear as they could be, and for individuals and sometimes even the administration itself they can create a certain obstacle. Since it is the ombudsman who primarily works with these concepts then it is the ombudsman who should define them. It is also possible to observe that ombudsmen do not use the same standards. Despite the fact that these institutions might be called an ombudsman and that they have certain similar functions, such as the investigation of complaints, they can and they certainly do use different assessment criteria. What these criteria are depends on the legislator, the character of the legal system, the development and needs of society and the practice of particular ombudsmen. The character

⁸⁶ Probably the best example is the influence of the European Ombudsman during the adoption of the Charter of Fundamental Rights of the European Union. Art. 41 of the Charter right to good administration reflects not only the practice of the European Courts but also the practice of the European Ombudsman. Cf. J. Wakefield, *Right to Good Administration*, 2007.

⁸⁷ Cf. Order of 24 April 2007 in Case T-132/06, *Gorostiaga Atxalandabaso v Parliament*, not published in the ECR, Para. 73; or Judgment of 11 May 2012 in Case T-121/08, *PC-Ware Information Technologies v Commission*, [2010] ECR II-1541, Para. 90. And Judgment of 19 February 2009 in Case C-308/07 P, *Gorostiaga Atxalandabaso v Parliament*, [2009] ECR I-1059, Para. 73.

⁸⁸ Based on an interview with Ms Abraham, the former Parliamentary Ombudsman (UK).

⁸⁹ The question of to what extent ombudsmen's assessment standards overlap with the standards of the judiciary will be partially covered, at least concerning three different ombudsman systems, by my PhD thesis (due to be completed at the end of 2013).

of these standards also depends on a mixture of the practice of the ombudsmen in question, the needs of society and the possible impact of the legislator.

Ombudsmen's assessment criteria have their value, whether they are published or not. Ombudsmen investigate and point to the aches of the administration. Their standards help them in this role. Although they do not create an entirely new normative system, they help to raise the interest of the administration and subsequently the better and more 'user-friendly' character of its work. In a certain way the lists of assessment standards also help ombudsmen to offer a standardized, predictable and flexible view of their work and their assessment processes. It is indeed possible to work without these standards, but it is often much easier and much more transparent to work with them. ¶