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Demands of proper administrative conduct
A research project into the *ombudsprudence* of the Dutch National Ombudsman

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1. Introduction

In the autumn of 2002, the Dutch National Ombudsman asked the School of Law of Utrecht University to develop a research project in which the norms used by him and by local Ombudsmen would be described and categorized. It should also involve the way in which the National Ombudsman and local Ombudsmen handle complaints.
The reason for this request was the planned change to the chapter on complaint procedures in the General Administrative Law Act (GALA), concerning complaints against government. The innovation consists of the introduction, by means of a statutory Act, of external complaints procedures for all decentralised public bodies. Because of that, all municipalities and provinces and other decentralized agencies (*gemeenschappelijke regelingen* = agencies based on a public law contract between public bodies) are obliged to either institute an external complaints committee (called Ombudsman or Ombuds committee) or to adhere to the National Ombudsman. According to the new legislation, the National Ombudsman and local Ombudsmen or Ombuds committees should judge the behaviour subject to a complaint as 'proper' or 'improper'. Local Ombudsmen and the National Ombudsman use the same rules of complaints procedure, but the National Ombudsman is not the appeal instance of judgements by local Ombudsmen. They have separate jurisdictions, and there is no hierarchy between the National Ombudsman and local Ombudsmen. So, the legislator has not planned a central ombuds institution that could lead to the development of norms of good governance or, as we say it in Dutch: 'demands of proper governance'. The National Ombudsman wanted us to develop a guide for the work of the (newly established) local Ombudsmen & commissions.
This article describes the design, evolution and outcomes of the research project on the demands of proper governance as operated by the Dutch National Ombudsman and by some local Ombudsmen. After describing the function and legal competences of the National Ombudsman, we will sketch the policy context of the research project and explain its design and development.

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We will mix the description of these subjects with our findings on the norms used by the National Ombudsman.[1]

2. The Dutch National Ombudsman

The National Ombudsman is a complaints instance, but can also conduct an inquiry upon his own initiative.[2] The figure of the National Ombudsman is embedded in the Dutch Constitution: he is a High Office of State, just as the Parliament, the King, the Supreme Court and the Council of State. He is appointed by the Lower House of Parliament.
Everybody with a complaint against an office, officeholder or public servant within his jurisdiction, can contact the Ombudsman office in The Hague. The complaint will only be admissible when the complainant has first filed the complaint with the administrative body that caused the distress. A complaint to the National Ombudsman will only be useful after the administrative body has been given the opportunity to deal with the complaint itself. The National Ombudsman is competent in the case of national public bodies, and decentralized public bodies, as far as they have indicated the National Ombudsman as their local Ombudsman.
The legal definition of a complaint refers to a written document; however, oral complaints may be delivered at the office and will be written down by Ombudsman staff. The Ombudsman may not conduct an inquiry into complaints that are suitable for legal action against decisions of administrative authorities, or for civil law suits against the public body concerned.
Furthermore, the result of an inquiry by the Ombudsman is of a restricted nature: the Ombudsman delivers a report in which the judgement 'proper' or 'improper' is given. Normally, a report will contain a detailed description of the events that led to the complaints, a description of the internal complaints procedure, an extensive description of the applicable law, and an elaborate check on the lawfulness or unlawfulness of the behaviour subject to the complaint. He may also deliver some recommendations for the public authority concerned.
However, the Ombudsman is not able to conduct any legal act as a response to complaints.
The work of the National Ombudsman is closely related to the terms and concepts of the General Administrative Law Act. This act defines legal concepts like: 'administrative body'; 'decision' and 'complaint', and also operates and legally defines most principles of good governance. The competence of the Ombudsman is linked to the definition of these concepts, and, by his reports, he also contributes to the development of administrative law in the Netherlands.
Nonetheless, it is a point of departure of the research project described below that there is a fundamental difference between principles of proper governance used in a legal framework and demands of proper governance as operated by Ombudsmen.

3. Original research design

The original research design was attuned to the condition that local Ombudsmen should be convinced of the usefulness of the outcomes of this project.

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1 The research project was conducted by a team consisting of: J.B.J.M. ten Berge, N..C, Bouwman-de Zoeten, A.M. Hol, Ph.M. Langbroek, R. Ortlep, P. Rijpkema, R. W. Veldhuis and R.J.G.M. Widdershoven. It was coordinated by Langbroek. As an outcome of the research project, in November 2004 a book was published in Dutch: Ph. M. Langbroek & P. Rijpkema (eds.), *Ombudsprudentie, over de behoorlijkheidsnorm en zijn toepassing*, BJU, The Hague.

2 We describe the situation as it was, before the new chapter on complaints procedures entered into force on July 1, 2005.

Before the new legislation entered into force, several municipalities already had instituted local Ombudsman institutions autonomously several years ago. Especially the cities of Amsterdam, The Hague, Rotterdam and Utrecht, but also the municipalities of the province of Zeeland, the city of Groningen, and so on, have had their own Ombudsman institutions for many years. These institutions do differ from the National Ombudsman institution. They are originally based on municipal or provincial regulations. They do not have a very large staff, and they are much closer to complaining citizens *and* to the local offices, agencies and departments over which they have jurisdiction.
We expected that it would be quite difficult to meet the aim of convincing local Ombudsmen of the usefulness of the outcome of this project. The reason is that they very often perceive themselves as problem solvers and not primarily as officials that only judge a situation when there is a complaint. So a complaint that there are several holes in a cycle lane, resulting in a danger to cyclists, and that the municipal traffic department does not act on the complaint, is – in their view – best solved by going to the place in question, having a look at the holes, and if they are serious, phoning the responsible public servant in order to have the dangerous holes in the road filled in. Carrying out a formal investigation on the complaint and writing a report would not be as effective.
To date, the National Ombudsman deals with 10,000-11,000 complaints annually.

Numbers of complaints entered and how they are dealt with by the National Ombudsman[3]

	2000	***2001***	***2002***	***2003***	***2004***
Complaints received	8,242	9,528	9,643	10,518	11,156
Complaints dealt with	8,172	9,060	10,363	10,214	11,347
Beyond Jurisdiction	5,078	6,333	7,465	7,464	8,285
Inquiry	3,094	2,727	2,005	1,897	2,137
*Sent to public body for re-examination**			893	853	925
Reports	379	406	413	507	506
Satisfied without report	2,715 (87%)	2,321 (85 %)	1,592 (79%)	2,404 (79%)	1,631 (76%)
Satisfied because of intervention	1,681	2,034	1,385	1,183	1,388

* This was introduced in 2002, based on the argument that public bodies should be enhanced to deal with complaints themselves.

When an investigation is opened, Ombudsman staff first try to reach a friendly solution. This method, called the 'intervention method', is quite successful as most of the inquiries started (between 55% and 88%) are closed in this way. The intervention method is the informal approach; Ombudsman staff function as mediators, by arranging some contact between the complainant and the office complained of. Often, a meeting, an explanation and/or an excuse by

3 Sources: Annual reports 2000-2003.

a public servant suffices. In these cases, no report is written. In principle, a report follows when an attempt at intervention is not successful and when a re-examination of the case is not possible. This means that the development of the demands of proper governance is based on complaints where public authority and the complainant were unable to reach an agreement.
Evidently, local Ombudsmen and the National Ombudsman spend most of their efforts on interventions and not on writing reports. Although reports were expected to be most interesting from a normative perspective, problem-solving methods are of interest from the perspective of having mistakes rectified, and hence for the realisation of the principles of proper governance. For these reasons we thought it best not only to pay attention to the norms to be used by Ombudsmen in general, but also to the problem-solving methods of the National Ombudsman and the local Ombudsmen. In this way, newly established local Ombudsmen would be able to know how to use the different principles of good governance and to see the different approaches of other Ombuds institutions to problem solving.
The point of view of the original research design was the vision of governmental organisations as 'learning organisations'. As part of the institutional infrastructure of the state, they inevitably relate to citizens. In representative democracies feedback from citizens to government is formally organized via elections; quality management of governmental organisations presupposes also other feedback from citizens to the government. In our view, an Ombudsman organizes such auxiliary feedback, by hearing and judging complaints by citizens against alleged improper behaviour of offices, civil servants, or office holders.
That is why the communication of applied norms of proper governance between Ombudsman offices and the administration is essential, at least in theory: without it the administration would not be able to learn from its mistakes. The same holds true for the problem-solving methods.
We intended to carry out in part, qualitative and exploratory research on the intervention method of the National Ombudsman and of the then existing local Ombudsman institutions. Next, we intended to carry out empirical normative research on the reports of the National Ombudsman and of local Ombudsman institutions of several years standing, in order to make an inventory of which demands of proper administrative conduct were used and how these norms are used by Dutch public Ombudsman institutions. We decided to choose the reports from 2001 and 2002, with auxiliary reports accessible via the Ombudsman website.[4] The Ombudsman office supplied us with a list of 800 reports organised by date of publication, file code and a code for the field of governance, and a code of the ombudsnorms violated.
Typical fields of governance are *e.g.* Aliens, the Police, Finances, Municipalities, Justice, Home Affairs etc. We asked researchers to pick every fifth report on the list and to check if it would be worthwhile making a description according to the following standards:

– the case;
– what is the subject of the complaint;
– what behaviour is at stake;
– is the administrative organisation concerned a municipality or a province;
– how is the behaviour judged, and according to what norm;
– can you make a summary within a reasonable time?

4 www.nationaleombudsman.nl

Oosting's list

In accordance with general legal rules
Human rights
Rules of competence
Rules of procedure
Rules of content
Abuse of power (*détournement de pouvoir*)
Balancing of interests/reasonableness
Balancing of interests
Proportionality
Legal certainty/ legitimate expectations
Promises
Legitimate expectations
Legal certainty otherwise
Following up judicial decisions
Equality (other than the prohibition of discrimination)
Reasons
Carefulness
Timeliness of proceedings
Administrative accuracy
Adequate provision of information
Active approach
Provisions for registration
Provisions for coordination
Provisions for the protection of privacy
Provisions to enhance impartiality
Provisions to enhance service to citizens
Accessibility of services
Adequate conditions for a stay
Comportment
Respect for human dignity
Decency
Politeness
Professional conduct
Respect of privacy
Non-arbitrariness
Empathic abilities/ service attitude towards citizens
Taking care of the interests falling within the domain of the office's tasks
Other demands of proper administration

This approach was directed at assembling cases under the heading of the standards of proper governance applied by the National Ombudsman. With regard to the standards applied, the National Ombudsman has developed a list of norms that, after the name of the National Ombudsman at the time of its introduction in 1987, has been labelled 'Oosting's list'. Oosting's list consists of, on the one hand, legal norms for administrative conduct that are developed by the legislator and the judiciary and, on the other, norms developed by the National Ombudsman in the course of the first couple of years of the functioning of the institution. The list is regarded as the National Ombudsman's normative backbone for judging administrative behaviour.
If a report would be considered uninteresting, *e.g.* because it very much resembled a case already summarized, or seemed too complicated, we asked them to take the next case. In most single reports different aspects of administrative behaviour are scrutinized, for which different norms may apply. For example, the complaint may be that the arrest of the complainant by the police was based on racial prejudice, or that the complainant was handcuffed while being held to the ground for no reason and was not given any medical attention while being detained at the police station, although he suffered from diabetes. So one report may contain different situations and norms.
Together with this more random approach we planned to contact the ombudspersons of the indicated city areas in the Netherlands, and to ask them to describe the practical and normative sides of their work. We also planned to ask them to provide us with some reports for our normative analysis.

4. The normative situation found

Complaint procedures primarily have the function of redressing wrongs in the relation between the administration and individual citizens. Here the focus is retrospective: the Ombudsman judges an administrative act that has taken place in the past. Parallel to legal procedures, judgments of the Ombudsman can also be a reservoir of experience from which general rules can be deduced which administrative bodies have to live up to in their dealings with citizens. As such, the function of the judgments is more prospective: the rules can function as a guideline for future actions of administrative bodies and as a future standard for judging administrative acts by Ombudsmen.
In order to fulfil this prospective function, the judgments of Ombudsmen will have to meet several criteria. The most important ones are that the judgments must contain sufficiently clear standards and that they are easily accessible for both the administrative agencies and Ombudsman authorities. We found that existing Ombudsman judgments were lacking on both accounts.
The National Ombudsman used the list mainly as an administrative tool for classifying rendered judgments for the purpose of the annual report and not as the normative basis for deciding a case. And even as an administrative tool the list had only limited meaning, since it turned out that there was no clear understanding of how cases should be administered. Through interviews with staff members of the National Ombudsman we learned that some believed a single case should only be administered under a single norm, while others rubricated a case under as many norms as might seem relevant. Also staff members disagreed about whether or not particular cases fell under a specific heading.
The basic reason for this was that the list contained the norms for proper administrative conduct only at the most abstract level. As such, the norms are hardly ever directly applicable to concrete administrative conduct. The missing link between abstract norms and concrete judgments are norms in context. The formulation of norms in context is the typical responsibility of judging

institutions. In deciding cases, they identify the general aspects of the case that are relevant for their judgment and identify the rules in the light of which these aspects are relevant. Thus the institution explicates the meaning of the abstract rules by identifying the contexts in which they are applicable and the consequences they imply in those contexts. Without this explication abstract rules remain largely without sense or meaning. This is true also for legal adjudication. It explains the importance that is given in every legal system to the study of case law.
However, Oosting's list does not contain a systematic rendering of norms in context. These will have to be found in the individual judgments. In the last couple of decades there have been periods in which the National Ombudsman has been active in formulating norms in context, several of which have been incorporated in the law. In other periods the Ombudsman has been less active. Our analysis of the judgments of the National Ombudsman in the period 2001-2002 revealed that during that period the Ombudsman hardly formulated norms in context. Typically, reports contain a very detailed description of the facts of the case and the judgment that, given these facts, the conduct of the administrative body was either proper or improper.
The absence of norms in context has several disadvantages. First, for the parties involved the judgment may be more difficult to accept, because the finding that the conduct was proper or not appears more or less out of the blue. Second, the judgment does not offer guidance to administrative bodies as to how they should act in the future in order to meet the standards of proper administrative conduct. Finally, the judgment offers no guidance to citizens with respect to what they can reasonably expect from administrative bodies.
The Ombudsman office, as the principal in this project, was itself divided on how to proceed from these findings. This, together with the circumstance that reports of local Ombudsmen are rare and were not very well disclosed, made us decide to refrain from an inquiry into problem-solving methods and to focus on reports of the National Ombudsman. Nonetheless, we insisted on involving experiences and reports of local Ombudsmen into our analysis, as an auxiliary to our analyses of National Ombudsman reports.

5. Developing a solution for our research method: reconstruction of ombudsnorms

In order to proceed properly from this experience, we had to solve a different problem. We had discovered that most of the reports analysed so far did not contain any form of reasoning considering which standard of proper administration would be at stake. Now that most of the reports did not contain this reasoning and now that markings of standards of proper administration in a concrete case were often wild guesses, how could we ever make a convincing inventory of the norms used by the National Ombudsman and have them function as guidance for the local Ombudsmen?

Shift to the (re)construction of ombudsnorms

Given the importance of the development of norms in context and the stagnation in the development of these norms by the National Ombudsman, the focus of our research gradually shifted to the reconstruction and even the construction of norms in context from the factual materials in the reports of the Ombudsman. We have tried to relate the context of a given case to the general rules of proper conduct given in Oosting's list in such a way that we described a norm in context that is applicable to a general category of situations. In general, the process started with identifying the facts of the case that appeared to us to be decisive for the final judgment in a short case description, called the context. In this context we tried to distill it further into a single sentence with a rule-like structure. Next, we tried to generalize the particulars of this rule as far as seemed

justified by the context of the case. Finally, we tried to link the rule to the general principles of Oosting's list.
One of the consequences of this exercise was that it became clear that the organization of Oosting's list was less than perfect. Thus, it became a further extension of our research project to review the structure and content of Oosting's list and to suggest an improved version thereof. In the evaluation of Oosting's list two perspectives were employed:

– the relation between the requirements of proper conduct and the context of the administrative conduct, and
– the relation between norms of proper administrative conduct and legal norms.

Regarding the context of the conduct to be judged, it seemed that a natural way for organizing the norms of proper administrative conduct is by starting from its actual context. One advantage of organizing the norms of proper conduct in this way is that it makes the norms more easily accessible for both administrative bodies and citizens. For the question of which abstract principle might be relevant for judging some specific administrative action may be quite difficult to answer when one is not already familiar with the normative framework of judgments of the Ombudsman. On the other hand, it seems quite natural to ask what type of conduct is involved. For example: is the conduct complained about part of a formal decision process, a complaint procedure, or the execution of a formal decision? Or does the complaint concern factual conduct like acting impolitely or not sufficiently informing citizens? From this perspective we examined whether a specific norm establishes a sufficiently discernible standard for the evaluation of administrative conduct.
The perspective of the relation between norms of proper administrative conduct and legal norms was relevant for a different reason. One of the findings of our analysis of the reports of the National Ombudsman was that, insofar as the Ombudsman applied more detailed norms, these norms were almost exclusively legal norms. It appeared that in the course of time the National Ombudsman increasingly regarded itself as an institution for the assessment of the legality of administrative conduct.
It is not fully clear whether this development has been the result of the fact that more detailed norms for assessing whether the conduct of administrative bodies was proper or not were lacking, whereas legal norms for administrative conduct were developed in detail by both the legislator and the judiciary. Conversely, it might be the case that the Ombudsman did not develop more detailed norms in context because it regarded itself primarily as an institution judging the legality of administrative conduct. Another part of the explanation may be that several staff members are not trained in administrative law, but in criminal and civil law; hence they were not familiar with the scope of the legal principles of proper administration.
From our interviews with staff members of the National Ombudsman it emerged that many of them regarded the National Ombudsman as the tailpiece of the legal protection of citizens against administrative actions and that they are inclined to look primarily at whether some legal norm is being violated. If it is, the conduct is marked as not proper, and if it is not, it is regarded as proper. Some of them explicitly stated that the Ombudsman office was a small claims *court*. On the other hand, there are also staff members who believe that the Ombudsman should steer a more autonomous normative course.
Be that as it may, the fact of the matter was that the National Ombudsman increasingly equated proper administrative conduct with lawful conduct. We believe that this equation is inconsistent

with the proper function of the institution of the Ombudsman and is also an inaccurate interpretation of its standard of evaluation: the norm of proper administrative conduct.

6. A normative perspective on the Ombudsman as a developer of ombudsprudence

Regarding the function of the Ombudsman, we can distinguish between an aspect of compensation and of reconciliation.

Compensation

Within a democratic society, citizens are subjected to the power of the government, but the government, in turn, is subjected to democratic supervision by (representatives of) the citizens. The reason for this is that a democratic state rests on the principle that the government should equally support and respect its citizens as autonomous people. In the modern welfare state, citizens are confronted more often and more intensely with administrative institutions. The impact of administrative actions on the lives of citizens has increased accordingly and, as a result, the balance of power that should exist in a democratic state between government and citizens tends to become lost. By assessing whether administrative conduct was proper, the Ombudsman can compensate for the growing power of the state by adding an extra check on the government to ensure that it treats each citizen with sufficient concern and respect. This compensating aspect is structurally secured by the status of the National Ombudsman as a High Office of State and by the fact that the Ombudsman is directly accountable to Parliament.

Reconciliation

In addition, there is the aspect of reconciliation. Because of the increasing involvement of the state in the lives of its citizens, citizens also have much higher expectations of what the state can and should do for them. If the government does not succeed in meeting the expectations of its citizens, this may lead to dissatisfaction and declining trust in the government, which, in turn, can lead to the erosion of the legitimacy of the government. The Ombudsman can contribute to reconciling this gap by, on the one hand, making clear what citizens may reasonably expect from their government and, on the other, indicating how the government can better meet the reasonable expectations of its citizens.

Legal norms differ from ombudsnorms

The idea of equating the standard for proper administrative conduct with the legal norms developed by the legislator and the judiciary is at odds with both aspects of the function of the National Ombudsman. In order to offer compensation for the growing impact of administrative conduct on the lives of citizens the Ombudsman cannot restrict itself to examining the legality of administrative conduct, precisely because democratic control through legal standards is insufficient. For one thing, legal protection of citizens is largely restricted to formal decisions of administrative institutions and does not extend to factual actions (administrative real acts) that show insufficient concern or respect for citizens. The norm of proper administrative conduct extends to all types of government action.

Even more importantly, however, legal norms normally offer only limited protection to citizens because they usually aim at guaranteeing a minimum level of proper action. Legal norms often only require administrative institutions not to act improperly by clearly disregarding the principle of equal concern and respect. The principles of proper administration developed by the judiciary also tend to formulate only the lower limit of proper administrative conduct, since administrative

courts are careful to leave a sufficiently wide margin of appreciation to administrative institutions. The standard of proper governance employed by the Ombudsman, on the other hand, implies a higher standard: administrative institutions should act as we may reasonably expect them to behave. This standard is of an ethical nature. Therefore the conduct of an administrative institution may not be proper even if the law allows it. To give a simple example: legal rules lay down general terms for administrative decisions. These terms are generally set wide enough to cover all normal problems that may arise in taking the decision. If, without good reason, an institution postpones taking a decision requested by a citizen although it could easily have done so immediately, this may not be proper conduct even if the institution decides before the legal term expires.

We have tried to emphasize the individual character of the normative framework of the Ombudsman by referring to its decisions as 'ombudsprudence' as an ethical counterpart to the legal jurisprudence. We regard it as the most rewarding aspect of our research project that we believe to have succeeded in convincing the staff members of the National Ombudsman of their responsibility in autonomously developing the moral standard of proper administrative conduct.

Legal norms should not be ignored

However, the individual character of ombudsprudence does not mean that the Ombudsman should develop the standards of proper administrative conduct irrespective of the legal norms laid down by the legislator and the judiciary. There are several reasons why the Ombudsman should take legal norms into account.

First, many legal rules do lay down elaborations of the standard of proper government action. Although from a different perspective, both types of norms aim at guaranteeing that every citizen is treated with equal concern and respect. In most cases if administrative conduct is contrary to the law, it will also be contrary to the norm of proper conduct employed by the Ombudsman. The Ombudsman therefore has reason to consider the applicable legal rules, but the fact that some administrative conduct falls under a legal norm is not a reason for the Ombudsman to withdraw from an autonomous judgment of the applicable standard.

Second, legal rules raise expectations regarding the future conduct of administrative institutions, since citizens may expect them to obey the law. In general it will not be proper for administrative institutions to infringe upon the reasonable expectations of citizens.

A third reason for the Ombudsman to take legal rules into account is that some of these rules contain extra high standards for administrative institutions in order to safeguard against breaches of fundamental values. This is the case, for example, with regard to the use of police powers. The formal requirements for the employment of these powers are meant to limit the risk of abuse of powers. Similarly with security precautions. The Ombudsman has reason to qualify breaches of these rules as improper conduct even if in the case at hand the breach has had no harmful consequences for individual citizens. The ground for regarding the conduct as not proper is in this case that by violating the legal rules, the administrative institution took the risk of harming the interests of citizens. By taking that risk the institution shows insufficient concern and respect for citizens in general.

Thus, legal rules and the norm of proper administrative conduct on the part of the Ombudsman are related in several ways. Nevertheless, the norm of proper administrative conduct clearly adds an additional dimension to the evaluation of administrative conduct. It is the responsibility of the Ombudsman to further develop the standards for the evaluation of administrative conduct independent of, although not in isolation of the applicable legal standards.

7. How we continued: interaction

Because of the change of perspective in the research project, we decided not to focus on cases with regard to municipalities and provinces. We decided that we should focus on assembling enough reports in order to scrutinize Oosting's list, and to demonstrate that it would be possible to construct norms in context with a wide variety under the heading of an ombudsnorm. When we did not find enough variety in the list of reports from 2001 and 2002, we looked elsewhere in the public database of the National Ombudsman. For that reason, you will find in our book references to Ombudsman reports from 1988-2000 and from 2003-2004 as well. This occurred in the fields of human rights, courtesy, proportionality (*egalité devant les charges publiques*), and also in the many fields under the heading of the norm of carefulness. So, we have been looking for reports outside our sample in order to prove the relevance of a certain ombudsnorm. Where this was unsuccessful, *e.g.* for the norm of 'legality', we concluded that it should be eradicated from the list of ombudsnorms. All in all, we effectively described about 240 reports.
As a consequence, we also faced another problem: how to convince the office holder and his staff that our approach could work? The office holder, Mr Fernhout did not have objections to our approach but wanted a practicable solution. This left us to convince his staff.
We had to find and show them some cases where legal conduct could be classified as improper, or where proper administrative conduct could be classified as illegal, in order to show the difference between legal rules and standards of proper administration. After several discussions during meetings at the office of the National Ombudsman, it was accepted that it might be useful to distinguish between legal norms and ombudsnorms of proper governance.
For our normative analysis we proceeded as follows. We summarized situations as described in an Ombudsman report, including the judgment of the Ombudsman. Next we tried to formulate the concrete norm in the context of the case , and subsequently we analyzed which general norm from Oosting's list was at stake. For example:

Description of context:
A complaint has been filed against the Central Fine Collecting Agency in Leeuwarden for refusing to refund traffic fines and garage charges which were paid to have a motor vehicle returned, as it later transpired that the vehicle had been wrongfully seized. The National Ombudsman judges that in general before seizing a vehicle, investigating agencies should verify whether the vehicle in which a person is found actually belongs to that person. This did not occur. The complainant was wrongfully fined and the vehicle was wrongfully seized. It is therefore unreasonable that the Collecting Agency refuses to refund the fines and charges paid.[5]

From this description we distil the norm in context:
'The Central Fine Collecting Agency should refund the fines and garage charges if they were wrongfully imposed.'

This rule can be generalized into:
'If an administrative body wrongfully imposes fines or other charges, these sums should be refunded.'

5 2001/142 Report.

This norm in context is an elaboration of the general norm of reasonableness, which we defined as follows:
'The norm of reasonableness requires that administrative bodies always balance the interest of achieving an objective against the interests of citizens concerned.'

8. Outcomes: human rights, legality of administrative conduct, and a reorganisation of Oosting's list

Based on the analysis of all these reports we came to a reconstruction of Oosting's list.
Of course, in the context of this paper we are not able to give a full description of all our findings. We want to focus on two issues: the relevance of human rights in the reports of the Dutch Ombudsman and the evaluation of legality as a separate Ombudsnorm. The discussion with Ombudsman staff especially revolved around these two issues, and they are interrelated.
After that, we will summarize the changes we made to Oosting's list.
One of the outcomes of our analysis of the Ombudsman reports is that references to human rights, either as described in the European Convention on human rights or in chapter one of the Dutch Constitution, are quite scarce. They do occur (we found about 20 reports), especially in the field of discrimination, the inviolability of one's home, and privacy. The reluctance to refer to human rights is also connected to the preference of Ombudsman staff members to refer to legal rules in judging a case over referring to ombudsnorms. Sometimes they do refer to ombudsnorms, but refrain from mentioning the human right concerned. So, their apparent preference was:

1. legal rules;
2. if need be, refer to the principle of proper administration;
3. only if there is absolutely no other possibility, refer to a human right.

Some of the Ombudsman staff said that reproaching public bodies (the police) for violating human rights would hinder their working relationship with the police, *e.g.* during inquiries, and would probably also lead to neglecting reports by the Ombudsman on their behaviour.

Human rights

Typically, many Ombudsman cases related to human rights concern police behaviour. Many of these cases concern the exercise of criminal investigating competences or competences involved in maintaining order, including the use of violence. They concern the prohibition of discrimination, the confidentiality of personal correspondence and telephone conversations, the inviolability of one's home, privacy, and the right not to be detained without due cause. These are some examples:

A person arrested in the evening is immediately locked up, whereas according to a ministerial guideline, the arrested person should be given a choice of spending the night in a police cell or in a holding area at the police station. The question is, how to judge this situation from an ombudsnorm perspective. The Ombudsman judged that the violation of the guideline was improper, but we missed the explanation of the grounds for this judgement in terms of standards of proper administration. First of all, the competence to place this person behind bars in the police station is not questioned. Therefore the right not to be detained without due cause was not at stake. So, at stake is the way this competence was exercised. A ministerial guideline has the character of a formal promise, and therefore the principle of legitimate expectations was violated. [6]

6 2003/031 Report.

Police officers arrested a suspect caught red-handed for theft when they concluded that he was taking a stolen scooter apart. However, it had already been 16 hours since the scooter was stolen, so there could be no question of someone being arrested because they were 'caught in the act'(this is a certain category of offences according to art. 54 Code of criminal procedure-CCP). Therefore this person was arrested without the necessary arrest warrant by the public prosecutor. So this article has been violated, and the police were therefore judged to have acted improperly. But the reason for the impropriety from the perspective of ombudsnorms was not so much the illegality, but the fact that the violation of article 54 CCP also constitutes a violation of the right not to be detained without due cause.[7]

Peace activists had caused damage at the air force base at Volkel. They were stopped by patrolling soldiers. Art. 53 CCP prescribes that a suspect, stopped by someone other than an criminal investigations officer, should be transferred immediately to the criminal investigations officer. For detainees of the military it may make a difference if they have to wait or if they are transferred to the police at once. The Ombudsman judged in this case that they had to wait for 3 hours before being transferred to the police in Eindhoven, and this was way beyond the legal norm of art. 53 CCP, and therefore improper.[8]

A police officer carried out a bodily search of an arrested person who had been caught 'in the act' of using a false ID-card while carrying out a financial transaction at a bank.[9] The norm used by the Ombudsman was proportionality; it is up to the searching police officer to differentiate between a bodily search and searching one's clothing in relation to the seriousness of the crime and the behaviour of the suspect. The Ombudsman judged in this case that a bodily search was disproportionate. But he could also have referred to the human right to integrity of the human body as described in article 11 Constitution.

In these cases the impropriety of the behaviour is such that the Ombudsman regarded it as inappropriate to label the behaviour as a breach of a human right. If, however, the Ombudsman does not confine himself to mentioning the very abstract human right, but also indicates which norm in context is implied by that abstract principle, this problem does not arise. At the same time, mentioning the norm in context makes it clear why a breach of the legal rule constitutes a breach of proper governance. Similarly, the Ombudsman can indicate how a legal norm can be regarded as a specification of a human right intended to protect the fundamental interests of citizens.

Thus, we showed the possibility of referring to legal norms and to human rights in relation to the applicable ombudsnorms. And we advised that reference should be made to human rights as ombudsnorms if the legal norm legitimising and conditioning a breach of the right is violated. Sometimes, like in the Volkel Airbase case, it is debatable whether reference should be made to the relevant ombudsnorm under the heading of *carefulness* only, rather than to the human right. We think it best to refer to an aspect of carefulness if a legal norm protecting a human right concerns not the right itself, but the risk that the human right can be violated and the risk has not been realised. The said legal norm of article 53 prescribes the immediate delivery of persons stopped by non-police officers to the police. The rationale of this article is to prevent non-police officers from taking the law into their own hands and from maltreating persons who have been detained. Apart from having to wait for several hours, the persons arrested were not maltreated. So, in the Volkel case, reference to the principle of *timeliness* would have sufficed.

Legality

At the beginning of our research project we tried to analyse and describe all the reports referring to situations where legal rules were judged to have been violated as they were contrary to the principle of legality. There were many such reports.

7 2003/287 Report.
8 2003/362 Report.
9 2003/314 Report.

Our analysis revealed that the reconstruction of 'legality' as an ombudsnorm has no power to discriminate between different contexts. The norm can only be operated as: has any legal provision been violated by the administrative body concerned or not? The concrete norm description always referred to a specific content. Therefore, these reports were connected to all kinds of fields of administrative activities and all kinds of contexts. In each case it could be argued that another, more specific, ombudsnorm was violated. For example:

The complaint is that an initial complaint about the way an objection procedure under GALA was managed, was declared inadmissible by the Mayor & Aldermen of the municipality of Enschede, because for objections, a term of 14 weeks is the general policy. According to art. 7:10 and 7:13 GALA the term for decisions on objections is either 6 or 10 weeks. Enschede uses the possibility to postpone a decision on an objection in special cases as a standard solution. This is a breach of the provisions of GALA. This is especially grave, because the government imposes many time-limits on citizens, which are generally legally adhered to.[10]

The complaint is that the Economic Control Service has sent a letter to the complainant, stating that for the time being no investigations would be opened against the firm TDE, by which the complainant had allegedly been treated unfairly. The reason given was that the case was too old. However, such a decision may only be taken after consultations with the public prosecutions service (PPS), and such consultations had not been taken place. Furthermore, the complainant should have been informed of the complaint procedure of art. 12 CCP. This is a breach of the law, according to which the PPS is responsible for the investigations policy.[11]

In a complaint against Cadans BV, an organisation for the execution of social insurance decisions, the allegation is made that in the management of the complainant's case, the complainant's privacy had been breached, because not only the medical doctor examining her incapacity to work, but all the employees of Cadans could have access to her medical file (containing information about her venereal diseases). The medical doctor is obliged to maintain professional secrecy concerning such information. In addition, an external medical doctor contracted by Cadans to deal with backlogs was given her file without her permission.[12]

Due to an anonymous local tip off, an investigation is started against the complainant. The investigation is of an administrative nature, and concerns the question whether the complainant rightfully receives a social insurance benefit because she is a widow and living alone. The allegation is that she shares her house with a friend, and hence is not entitled to the widow's insurance benefit. Social insurance inspectors from the municipality of Eijsden, who have searched the house to find evidence, have conducted their investigation. The Ombudsman indicated that the searches were illegal after a criminal investigation had been commenced against the complainant, and the CCP is especially designed to protect the interests of persons under criminal investigation. In such cases a warrant is necessary to search a house.[13]

In these cases, apart from the fact that, somehow, some kind of regulation has always been breached, it is always possible to indicate that the administrative conduct could be judged according to a more specific ombudsnorm. In the case in Enschede, the municipality's policy on dealing with objection proceedings was not only contrary to the law, but the act violated legal provisions; it was also contrary to the ombudsnorm that proceedings should be conducted in good time (*timeliness*). In the Cadans case, the applicability of the *privacy* norm – as a basic right – is evident. The ECD, by deciding not to investigate TDE, went beyond their competence, and therefore had committed an *abuse of power*; the house search in Eijsden by social insurance inspectors also involved an *abuse of power*. Moreover, in doing so it is also more accurately

10 2001/085 Report.
11 2001/216 Report.
12 2001/248 Report.
13 2004/051 Report.

stated why the act was improper. For, as we indicated earlier, not every breach of a legal rule constitutes a breach of the ombudsnorm of proper governance.
We therefore recommended that this principle, although recognized as a principle of (administrative) law, should not be used as an ombudsnorm. This does not mean that we intended to say that from an Ombudsman perspective illegality would not be important. When a legal rule has been breached by an administrative authority it should certainly be mentioned, but it should also be indicated why this implies that the ombudsnorm was violated.

The reconstruction of Oosting's list

After having analysed so many reports and having (re)constructed norms in context, we saw that not all parts of Oosting's list were useful. Considering the tendency in law to evolve legal rules in ever more refined rules, we thought it best to reduce the number of ombudsnorms, in order to enable the Ombudsman office to make a new start. If the Ombudsman would adapt our advice, more refined ombudsnorms could be added to the list in due time. Our stand is therefore that the list below is supposed to be neither our nor anybody else's last word on what a complete list of ombudsnorms should look like. Ombudsnorms are under development, and like the law, that is an ongoing process.

This is our list of demands for proper administrative conduct:

Human rights
Prohibition of discrimination
Confidentiality of personal correspondence and telephone conversations
Inviolability of one's home
Privacy
The right not to be detained without due cause
(Other human rights)

Material demands for proper administrative conduct
Prohibition of abuse of power
Reasonableness
Proportionality
Courtesy
Legal certainty
  Duty to follow court judgements
  Legitimate expectations
Equality

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

Carefulness
Timeliness
Administrative accuracy
Active and adequate provision of information
Active and adequate gathering of information
Adequate organisational provisions
Comportment
  Politeness and decency
  Service
Professionality

Other demands of proper administrative conduct

9. Conclusion: towards a follow-up

The Ombudsman office has accepted our advice. We organised two sessions with Ombudsman staff in order to show them how to develop ombudsnorms in context, also in cases where a legal rule had been breached. It appeared that after some exercises, they could work quite well with our list. However, we also evoked a permanent discussion about the applicability of specific norms to specific cases. Especially the relation between norms within the domain of the carefulness-principle and more material and formal demands for proper administration resulted in debate. In most cases when a material or formal demand for proper administrative conduct appears to have been breached, an aspect of the principle of carefulness has also been breached. When information gathered appears to be insufficient, principles of reasonableness (related to the balancing of interests), reasoning and/or proportionality may be at risk. It appeared difficult for most staff to choose what principle would be impaired. However, our advice is to always choose the most material principle of good governance, as it confronts administrative bodies most directly with the consequences of their conduct.
At the moment, we are in the process of organising several courses for local Ombudsmen.
Furthermore, an association for complaints law has recently been established. The idea is that the National Ombudsman and local Ombudsmen will create a platform to exchange reports, and have continuous discussions about ombudsnorms and their application. We will have to wait and see whether this initiative by Ombudsmen will evolve into the necessary permanent discussion on the operation of ombudsnorms.
For further research, it would be interesting to evaluate the way in which changes proposed by us take effect during the next few years. Further, it would be most interesting to study the way in which local Ombudsmen practically deal with complaints, and what solutions to conflicts they have developed. Considering what we have seen so far from their practical perspectives, there is quite a difference between their approaches and the approach of the National Ombudsman. More research is needed in order to investigate how local Ombudsmen operate demands of good governance, and which approaches contribute best to the actual realization of principles of proper conduct by administrative bodies.

Appendix: Judgement form following Oosting's list

mei 2000

BEOORDELINGSFORMULIER

DOSSIERNR.: RAPPORTNR.:

DATUM AFH.: / / ORGAAN:

ONDERZKR.:

Als er sprake is van meer dan één betrokken orgaan, dient per orgaan een beoordelingsformulier te worden ingevuld.

De kolom geeft de beoordeling aan t.w.: + behoorlijk
- niet behoorlijk
o geen oordeel

BIJ INTERVENTIE:

LET OP: Als het onderzoek wordt beëindigd en geen rapport wordt uitgebracht, dient toch per betrokken orgaan een formulier te worden ingevuld.
De criteria dienen dan gemarkeerd te worden met de code van "geen oordeel".

Beoordelingscriteria		+	-	o
1.	Overeenstemming met algemeen verbindende voorschriften (d.w.z. alle algemeen werkende regels niet zijnde beleidsregels of andere interne instructies):			
	a) mensenrechten/grondrechten:			
	aa) in de grondwet vastgelegd	100	101	102
	ab) in internationale verdragen vastgelegd	110	111	112
	b) bevoegdheidsvoorschriften	120	121	122
	c) vorm- en procedurevoorschriften (behoudens de hierna te noemen Awb-voorschriften)	130	131	132
	d) inhoudelijke voorschriften	140	141	142
2.	Geen misbruik van bevoegdheid (het zgn. verbod van détournement de pouvoir; zie 3:3 Awb)	150	151	152
3.	Belangenafweging/redelijkheid			
	3.1. t.a.v. besluiten (d.w.z. alles wat niet feitelijk handelen is):			
	a) belangenafweging (zie 3:4.1 Awb)	160	161	162
	b) evenredigheid (zie 3:4.2 Awb)	170	171	172
	3.2. t.a.v. feitelijk handelen: evenredigheid/proportionaliteit	180	181	182
4.	Rechtszekerheid/vertrouwen:			
	a) honoreren van gedane toezeggingen	190	191	192
	b) honoreren van gewekte gerechtvaardigde verwachtingen/vertrouwen	200	201	202
	c) anderszins (bijv. "begroeien" status quo/rechtsverwerking)	210	211	212
	d) actief gevolg geven aan rechterlijke beslissingen (zie bijv. daartoe strekkende bepalingen in hoofdstuk 8 Awb)	560	561	562
5.	Gelijkheid (voor zover niet vallend onder 1a): in gelijke gevallen gelijke behandeling	220	221	222
6.	Motivering (juistheid, toereikendheid en kenbaarheid; zie onder meer 3:27, 4:16 - 4:20, 7:12, 7:26 Awb)	230	231	232

mei 2000

			+	-	O
7.		Zorgvuldigheid			
A	t.a.v.	procesgang:			
	7.1.	Voortvarendheid			
		a) o.g.v. wettelijk of intern termijnvoorschrift (zie onder meer 4:13, 4:14, 7:10, 7:24 Awb)	260	261	262
		b) anderszins (bijv. redelijke termijn/tijdig herstel gesignaleerde fout)	270	271	272
	7.2.	Administratieve nauwkeurigheid	280		
	7.3.	Actieve informatieverstrekking:			
		a) behandelingsbericht (zie onder meer 3:17.2, 6:14.1 Awb)	290	291	292
		b) tussenbericht (zie onder meer 7:24.6 Awb)	300	301	
		c) tijdige mededeling van besluit tot niet (inhoudelijke) beantwoording	310	311	
		d) informatieverstrekking over rechten/plichten van de burger (zie onder meer 3:41 - 3:45 Awb)	320	321	322
		e) informatieverstrekking anderszins (zie onder meer 7:4, 7:9 Awb)	330	331	332
	7.4.	Actieve opstelling:			
		a) horen (zie onder meer 7:2 Awb)	340	341	342
		b) actieve informatieverwerving anderszins (bijv. toereikend onderzoek; zie onder meer 3:2, 3:9 Awb)	350	351	
		c) vastlegging verkregen informatie (zie onder meer 7:7 Awb)	360	361	
		d) hoor en wederhoor	550		
B.	t.a.v.	aanwezigheid voorzieningen op het vlak van de organisatie			
	7.5.	Voorzieningen ten behoeve van registratie:			
		a) ontvangst-/verblijfsregistratie	370	371	372
		b) voortgangsbewaking	380	381	381
	7.6.	Voorzieningen ten behoeve van coördinatie/afstemming	390	391	392
	7.7.	Voorzieningen ter bescherming van de privacy	400	401	402
	7.8.	Voorzieningen ter bevordering onpartijdigheid	410	411	412
	7.9.	Voorzieningen ter bevordering hulpvaardigheid t.o.v. burgers	420	421	422
	7.10.	Toegankelijkheid:			
		a) fysieke toegankelijkheid	430	431	432
		b) telefonische bereikbaarheid	440	441	
	7.11.	Adequate verblijfs- en bezwaaromstandigheden	450	451	
C.	t.a.v.	houding/gedrag actor(es)			
	7.12.	Correcte bejegening:			
		a) betonen van respect voor de menselijke waardigheid/integriteit van de burger (in het algemeen)	460	461	462
		b) betrachten van wat in het algemeen vanuit overwegingen van fatsoen mag worden verlangd (voor zover niet vallend onder één van de andere subcriteria van 7.)	470	471	472
		c) achterwege laten van onbetamelijke opmerkingen (bijv. discriminerende opmerkingen/"uitschelden")	480	481	482
		d) tonen van de vereiste zelfbeheersing/sociale vaardigheden/professionaliteit	490	491	492
	7.13.	Respecteren privacy (voor zover niet vallend onder 1a): grondrechten; zie onder meer ook 2:5 Awb)	510	511	512
	7.14.	Onbevooroordeeldheid (zie ook 2:4 Awb)	520	521	522
	7.15.	Open oog voor positie/belangen van burgers/inlevingsvermogen/actieve en hulpvaardige opstelling	530	531	532
	7.16.	Goed vervullen van zorgplicht t.a.v. aan b.o. toevertrouwde belangen	570	571	572
	8.	Overige eisen van behoorlijkheid, te weten	800	801	802