

EXCERPT FROM:**OMBUDSPRECEDENTS**

On the standard of proper conduct and its application

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1 Introduction and methods**1.1 INTRODUCTION**

This report contains the results of an inquiry commissioned by the National Ombudsman of the Netherlands with an eye to the introduction of legislation on external complaints procedures (the forthcoming Right of Complaint (External Authority) Act or *Wet extern klachtrecht*). As a result of the new legislation, there will soon be a host of independent complaints bodies not only applying the new provisions on the processing of complaints contained in the General Administrative Law Act (*Algemene wet bestuursrecht - AWB*), but also assessing the acts of administrative authorities on the basis of standards of proper conduct. The National Ombudsman also felt a need for an analysis and evaluation of the way in which the proper conduct criteria are currently being applied. The criteria developed by the National Ombudsman provide guidelines for the processing of complaints as referred to in chapter 9 of the AWB, and more generally for the conduct of administrative authorities and the individuals who work for them. In a sense, therefore, they constitute a code of conduct for government authorities in the Netherlands.

The National Ombudsman uses the term 'proper conduct criteria' (*'vereisten van behoorlijkheid'*). The term '*behoorlijkheid*' is derived from statute. The term 'principles of proper conduct' (*'beginselen van behoorlijkheid'*) could also be used but might provoke the misapprehension that the proper conduct criteria are identical to the 'principles of proper administration' referred to in Dutch administrative law. Another term that is occasionally used by commentators is 'the ombudsman's standards' (*'ombudsnormen'*) but this suggests the existence of a discrete code of conduct devised by the ombudsman, whereas the

institution of the ombudsman is not in fact the basis for the concept of proper conduct. It is as well to keep constantly in mind that the task of the ombudsman is to *interpret* and construe the universal concept of proper conduct, just as the courts construe the rules of law. The aim of the ombudsman's reports is to provide an acceptable and well-reasoned interpretation of the vague standard of proper conduct. This makes them the main source of information so far available on the meaning of the term 'proper conduct' in the context of relations between government and individual citizens. That is why this study uses the collective term 'ombudsprecedents', by analogy with the term 'legal precedents', to refer to the ombudsman's reports. The study focuses mainly on the ombudsprecedents of the National Ombudsman of the Netherlands. It has three aims:

- to consider the place, nature and function of standards of proper conduct in a democratic state governed by the rule of law;
- to catalogue, define and classify the most frequently cited standards of proper conduct;
- to produce guidance on standards of proper conduct for the use of the National Ombudsman and local ombudsmen in the Netherlands.

Cataloguing, defining and classifying standards of proper conduct

The initial purpose of the study was to provide insight into the methods of the National Ombudsman and existing local ombudsmen in the Netherlands. A secondary aim was to catalogue the standards of proper conduct employed by the National Ombudsman and local ombudsmen. These aims were established, as already mentioned, against the background of the forthcoming enactment of the Right of Complaint (External Authority) Act, which will encourage the appointment of large numbers of local ombudsmen. The underlying idea was to provide guidance for new and existing local ombudsmen and for the National Ombudsman of the Netherlands and to help ensure that in future they would all apply the same standards of proper conduct. A further aim was to classify the ombudsprecedents in terms both of *operational contexts* and standards of proper conduct in such a way as to produce a ready reference tool for the future use of ombudsmen in the Netherlands. In this respect, we sought initially to focus exclusively on local contexts.

In the course of the research and following consultation with the client, the emphasis came to lie increasingly on cataloguing the standards employed by the National Ombudsman and on the importance of *developing standards*.

There were three reasons for this. First of all, the National Ombudsman's reports tend to offer no clear definition of the standard used to assess the actions that are the subject of the complaint. Secondly, the annual reports published by local ombudsmen frequently offer a poor basis on which to reconstruct the standards of proper conduct applied by them in particular cases. This is not to suggest that local ombudsmen do not seek to apply such standards, but the way those standards are applied is generally difficult to ascertain and this fact has made the local ombudsmen's reports of limited use in the definition of standards and cases. Thirdly, the majority of local ombudsmen place less emphasis than the National Ombudsman on the development of standards of proper conduct. They place greater emphasis on mediation between the administrative authority and the citizen and in that respect their position resembles that of the French *Médiateur de la République* more closely than that of the National Ombudsman of the Netherlands [...].

The main reason for our eventual decision to abandon the aim of defining standards on the basis of a classification of operational contexts was lack of time. It would have taken too long to produce both a

classification of standards of proper conduct and a usable and defensible classification of the ombudsprecedents in operational contexts.

1.2 METHODS

Institutional conditions and organisational structure

For the section of the study on the institutional position, organisational structure and powers of the ombudsman in relation to the achievement of proper conduct requirements, we drew on the literature, internet and primary sources. The latter included not only parliamentary documents and the annual reports of the National Ombudsman and of the municipal ombudsmen for the four main Dutch cities (Amsterdam, The Hague, Rotterdam and Utrecht), but also reports by the complaints committees of the provincial authorities and water boards, and the database of reports maintained by the National Ombudsman. As regards the institutional position of the ombudsman and our understanding of the concept of proper conduct, we also spoke to eight members of the National Ombudsman's staff and to the municipal ombudsmen for the four main cities.

Cataloguing and defining standards of proper conduct

In the light of the original aims of the study, we started by constructing hypothetical classifications both of standards of proper conduct and of operational contexts. We related the standards of proper conduct to the general principles of proper administration; we sought to classify the latter in the simplest possible way – leaving aside the question of the precise relationship between the principles as interpretations of the standard of proper conduct and as legal norms (however vague).

The Office of the National Ombudsman bases its own classification of reports on the 'Oosting list' 3 (a list of assessment criteria used by the National Ombudsman). We took the reports issued in 2001 and 2002 and started by surveying the cases classified by the Office under each criterion. Depending on the number of cases, we sometimes made a preliminary selection of cases and sometimes surveyed all the cases found. The number of reports analysed for each criterion was between 10 and 25, or less than that if fewer relevant reports were identified. In selecting reports for analysis we had two aims: to include the greatest possible diversity of criteria and to include the greatest possible number of local contexts. As a result, the majority of the reports we selected for analysis were by the National Ombudsman and those concerning complaints dealt with locally were in the minority. It should also be noted that supplementary search instructions occasionally resulted in the identification of useful cases in National Ombudsman reports issued in years other than 2001 and 2002 and these were also included in the analysis. In addition, we received a small number of reports from the municipal ombudsmen of The Hague, Rotterdam and Utrecht, and most of these were also included in our analysis. Finally, we also derived a few usable cases from recent annual reports by the Amsterdam ombudsman.

The next step was to make a summary of the case dealt with in each report and to attempt to reconstruct the standard applied. To ensure that we understood the case and the standard of proper conduct applied, we lavished considerable attention on this process. The exercise revealed that the majority of the reports by the National Ombudsman and some of the reports by local ombudsmen contained no explicit statement of the standard of proper conduct applied. As a result, the study became to a large extent a matter of reconstructing the standards implicitly applied. In doing this, we strove to formulate the normative significance of the general standard of proper conduct, in the context of the particular case, in such a way that it could be applied to a whole class of cases. In procedural terms this meant that we started by

describing the case, then reconstructed the specific standard in context and finally considered how this standard could be made more general applicable as part of the relevant principle. The result of the entire exercise was a proposal to modify the Oosting list. Our recommendations relate to the standards of proper conduct to be applied in future by the National Ombudsman and local ombudsmen in the Netherlands and to the way in which they should apply them. These recommendations (*contained in section 9, part II of this report and not included in this translation*) are based on our survey of cases and on the idea that the citing of specific formulations of standards to justify the findings of the ombudsmen can lead to a more open debate about what the standard of proper conduct means in relation to administrative authorities in specific real-life situations. This should in theory increase their capacity to learn from experience and improve their performance.

Our starting point was therefore an empirical study of the standards used by the National Ombudsman. This was based on virtually the whole of the National Ombudsman's database of cases in 2001 and 2002. The standards reconstructed in this report are based on the information we found there but the classification of standards and operational contexts at which we eventually arrived is our own theoretical construction. In view of the limited selection of ombudsprecedents used in the study and the fact that we have formulated these standards on the basis of it, it is not impossible that earlier or later decisions by the National Ombudsman may involve standards other than those we have formulated. Nor is it impossible that other researchers might arrive at different classifications or formulations of standards on the basis of other decisions by the National Ombudsman and local ombudsmen. In so far as our definitions of standards are based on cases dealt with by local ombudsmen, the only significance of this – in the light of what has been said about our methods in relation to reports by the National Ombudsman – is to demonstrate that the standards that we reconstructed on the basis of those cases fit within the framework of the specific standard of proper conduct under which we have classified them. Local ombudsmen may not agree with us. If so, this will help to stimulate discussion of the standards to be applied in future: it will assist the development of standards if that debate is conducted at least partly in public. By specifying the locations and sources of our information, we have striven to make our methods reproducible and verifiable.

Guidance for the National Ombudsman and local ombudsmen

In view of the need for legal certainty and the right of citizens to equal treatment in terms of care and respect, it would not be a good thing if every ombudsman were to develop his own assessment criteria. In the guidance notes that we have produced, we present the standards of proper conduct and the associated cases as they emerged from our reconstructions. This provides access to the information from the point of view of proper conduct. The notes are issued as a separate publication accompanying this research report.

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2 Proper conduct and accountability

2.1 INTRODUCTION

As society has become increasingly complex and relations between government and the public have become more intensive and far-reaching, the need for scrutiny of government actions has become greater and the need for diversity in forms of scrutiny has increased. In this section, we describe in general terms

the institutional context in which the standard of proper conduct has to be interpreted. We discuss the rule of law and the growing use of standards to govern the work of public authorities, as well as various means of accountability. We focus in particular on independent complaints bodies such as ombudsmen and their function in increasing the legitimacy of government. Finally, we describe the tension that exists in the handling of complaints between settling disputes and developing standards.

2.2 FROM A DEMOCRATIC STATE GOVERNED BY THE RULE OF LAW TO A STATE GOVERNED BY STANDARDS AND ACCOUNTABILITY MECHANISMS

In the concept of the democratic state governed by the rule of law, the legitimacy of government depends primarily on the process of decision-making and more particularly legislation. Formally speaking, every single government decision should have its ultimate basis in a decision that every citizen has had the opportunity to influence, directly or indirectly. In practice, this means that every decision must have an identifiable basis in laws passed by a democratic assembly. This is known in Dutch as the principle of legality (*legaliteitsbeginsel*).

In addition to this, there is the substantive aspect of the democratic legitimacy of government. The basis of democracy and the rule of law is that government owes all its citizens a duty of equal care and respect. This means that citizens must so far as possible be given equal opportunities to live autonomous lives. In other words, they must be as free as possible to live their lives in accordance with the norms and values that they themselves endorse and hence to live lives that are fulfilling in their own eyes. So far as reasonably possible, government should support and respect the autonomy of its citizens. The duty of equal care and respect is the substantive basis of democracy and the rule of law. To enjoy democratic legitimacy, the acts of government must meet this standard. In the Dutch legal system, the duty of equal care and respect is translated into a number of classic fundamental rights. These fundamental rights limit the power of government to take decisions reducing the freedom of citizens to lead autonomous lives. They set standards like the principle of equality, freedom of religion and belief, and the protection of privacy.

These classic rights indicate primarily what government should refrain from doing in order to avoid frustrating the ability of citizens to lead autonomous lives. For this reason, they are sometimes known as negative rights or freedoms. In the course of the twentieth century, there was a growing realisation that such negative rights are not in themselves sufficient to enable citizens to lead lives that are fulfilling in their own eyes. Increasingly, government was expected to provide the basic conditions to enable every citizen to lead an autonomous life. The welfare state evolved and, as part of the 1983 revision of the Dutch Constitution, the existing negative rights were supplemented by a number of positive ones making it the responsibility of government to ensure the provision of basic services in fields like education, health, social security, housing, and social and cultural development.

The development of the welfare state increased the influence of government on the lives of citizens. These days, government plays a regulatory role in virtually every area of public life. By no means all of the requisite legal arrangements can be made by parliament. A major proportion is therefore regarded as 'implementation' and left to administrative authorities. The result of these developments has been greatly to increase the tasks, and therefore the power, of government, while reducing the democratic controls on the exercise of that power.

Alongside the traditional mechanisms of scrutiny and accountability that are a feature of democracies and states governed by the rule of law, recent decades have seen a growing interest in alternative, supplementary means. There has been an increasing desire to introduce further standards to govern the interactions between government and citizens. Clearly, the relationship between citizens and government has become increasingly problematic. Various causes can be identified:

- The increasing dependence of citizens on government for their individual life opportunities within society.
- The development of large bureaucratic organisations, which can cause friction with citizens, either at the collective level (administrative body) or at the individual level (government official).
- The increasing anonymity of government, blurring the responsibility of individual officials and smaller organisational units.

In response, there has been an increase in the number and scope of rules governing the conduct of government. The fundamental notions on which these rules are based are that:

- Government is a kind of trustee: the nation and its citizens have entrusted the protection of their common interests to government and allocated to it the necessary powers and financial resources to perform that task. In addition, citizens have accepted an obligation of civil obedience.
- The acts of government should be based on statutory powers. Government should also operate efficiently and effectively from the financial point of view and should be *accountable* in this respect. This imposes demands on the organisation and management of administrative authorities and the conduct of their personnel. Elementary notions in this respect are the *transparency* and *accessibility* of administrative authorities from the citizen's point of view, for example in the form of protection of rights and complaints procedures.
- Individual citizens occupy a key position in terms of the standards to be observed by government. One implication of this is that government must be polite to citizens, must respect their privacy and must deal carefully with their interests.

These days, standards are set for the conduct of government not only in legislation and the courts, but also in the decisions of complaints bodies and in codes of conduct. In addition to the content of standards imposed by statute, the general standard of proper conduct plays a major role in establishing specific rules for the way administrative authorities operate.

2.3 ACCOUNTABILITY

Government organisations often face a dilemma: on the one hand, they are expected to work quickly and effectively; on the other, they are expected to operate to a high standard and to take account of the needs of individual citizens. In a democratic society governed by the rule of law, administrative authorities operate in interaction with legal norms and the interests of individual citizens. These norms impose constraints which government organisations are constantly obliged to identify and interpret, while at the same time constantly striking a balance between the changing and divergent interests of citizens.

It is hardly surprising if, in the everyday exercise of their responsibilities, they sometimes make mistakes or take steps which prove to be politically unacceptable. This is why, in any society governed by the rule of law, there are mechanisms for challenging and if necessary correcting the decisions and actions of government organisations. In the Netherlands, there are various mechanisms for this. Since these range

from public opinion or political authority through to enforceable judicial decisions, their effectiveness in terms of setting general standards varies, as does the degree to which they are enforceable, but the common feature of all of them is that they ensure that authorities can be held to account for their actions in one way or another.

The forms of accountability for which Dutch law provides can be divided into traditional and new mechanisms.

Traditional mechanisms

The first of these is political and democratic accountability: in other words, the accountability to parliament and to the electorate of the politicians who head the bureaucratic hierarchies of government organisations. Secondly, there is the possible legal liability of a government organisation, either as a legal entity under civil law or as an administrative authority under administrative law. Finally, there is the potential criminal liability of political leaders and government officials, although this plays only a minor role in the Netherlands.

New mechanisms

In addition to the traditional mechanisms of accountability, the last 25 years have seen the emergence of various new mechanisms. The most important of these are complaints procedures, which have increased the opportunities for individual citizens to call government organisations to account. The development of new mechanisms of accountability is connected with a growing interest in procedures for decision-making in individual cases, alongside the traditional interest in procedures for collective decision-making.

The various mechanisms of accountability are of great importance for two reasons:

- Individual citizens deserve to be treated fairly and to be able to obtain some form of satisfaction if government has made a mistake.
- Government needs to win and retain the confidence of citizens and organisations; an important aim of these mechanisms of accountability is to ensure and demonstrate the legitimacy of government action.

Ideally, the combination of mechanisms of accountability shown in the matrix below should produce public confidence in government organisations.

Mechanisms for calling government organisations to account	Collective decision-making processes	Decision-making in individual cases
Traditional	Political and official hierarchy Petitions Pressure groups	Civil proceedings Petition to the House of Representatives
New	Class actions in the civil or administrative courts	Proceedings in the administrative courts Internal and external complaints procedures

In the course of the last century, general principles of proper administration (a.b.b.b.) have been developed in the field of administrative law. Initially intended to serve as criteria for the retrospective assessment of administrative decision-making processes, they have gradually come to be used as a code of conduct for the day-to-day business of government in the Netherlands. Most of these standards are codified in the General Administrative Law Act. A distinctive feature of them is the attempt to strike a balance between the protection of collective interests by the administrative bodies responsible for them and the protection of the interests of individual citizens/organisations. The principles form, as it were, a framework for use by government organisations when preparing and taking decisions concerning legal relationships. But transactions between citizens and government organisations do not only concern legal relationships. Government also provides information, conducts interviews, and prepares, carries out or enforces decisions. Much of this work is directed at the achievement of political aims but administrative authorities also have a duty to strive to maintain standards such as equal treatment in equal circumstances and the provision of legal certainty. It is with an eye to the maintenance of these standards that separate mechanisms are required, such as internal and external complaints procedures. These are not directed at the establishment of legal relationships but at assessing and, if necessary, correcting the way in which administrative authorities behave towards individual citizens. Examples of them include both the complaints procedure operated by the National Ombudsman and the complaints procedures set out in chapter 9 of the General Administrative Law Act.

To ensure the effective operation of these relatively new mechanisms of accountability for use in individual decision-making situations, attention needs to be paid not only to the distinction between standards of proper conduct and legal norms, but also to the relationship between the two.

2.4 QUALITY MANAGEMENT

Complaints procedures bear a direct relationship to the issue of quality management within government. These days, quality management is an accepted part of life in both the private and the public sector. But 'quality' is in itself an empty term; it only acquires meaning in a specific context. In the contexts of both the private and the public sector, it relates to the quality of products and services.

The quality management practices that come to our notice in our everyday lives exist mainly for public relations purposes. These days, for example, a vehicle sales and repair company that operates no quality management procedures will be at a disadvantage, while an equivalent company that can claim ISO or other certification will be at a competitive advantage. In the private sector, therefore, quality management is linked to *competition*. Credibility in the eyes of consumers of a product or service is a means to acquire a competitive edge. Public authorities also have clients, but not in the same way as companies operating in a competitive marketplace. The essential difference is that public authorities deal with members of the public who are dependent on government for many aspects of their daily lives. In a traditional bureaucracy, accountability for the performance of government is organised hierarchically. Departments are staffed by officials but led by politicians. Democratic representatives are periodically elected by the public and oversee the work of ministers. In a complex society, centralised direction is increasingly ineffective. The political responsibility of those in government office is an essential constitutional mechanism within our democracy, but insofar as political responsibility leads to centralised scrutiny and direction it is incompatible with the flexibility that professional government organisations require in order to

respond rapidly and effectively to public pressures and social change.

One aspect of the political responsibility of those in political office is that they can be held accountable for mistakes made within their area of responsibility and can resign if they lose the confidence of parliament and the electorate. In Western societies, the acceptance of responsibility through ministerial resignation is a traditional purification ritual. As the increasing complexity of government operations makes it less effective to exercise political responsibility through centralised direction, there is a need for forms of legitimacy other than those for which systems of representative democracy provide. That is why public authorities and public service organisations are interested in quality management. Effective quality management can be seen as an alternative way for government organisations to acquire legitimacy. Viewed in that light, investments in quality management are investments in public credibility.

Quality management in government organisations is also an attempt to respond to the increased transparency of government. Moreover, it is a means to increase the autonomy of government organisations within society, by encouraging them to learn through interaction with politicians and the public how to maintain and improve the standard of their operations. In theory, the achievement of both these aims can help to increase the legitimacy and moral authority of individual government organisations.

Complaints procedures can help in this respect by providing public authorities with important information on their own performance. However, they can only do this if procedures for reporting complaints and responding to them meet certain requirements. Effective complaints procedures can enable government organisations to improve the way they operate. Viewed in this light, quality management in the public sector relates to the way in which government organisations deal with the tension between the retrospective evaluation of past conduct and the establishment of standards for future action. The aim can be a dynamic process of evaluation and standard-setting producing a constant adjustment and refinement of standards for the future. Local and national ombudsmen have a key role to play in this process.

2.5 SUMMARY

In this section we have identified a trend towards an increasing range of standards being applied to government action, closely accompanied by a growing range of accountability mechanisms. Complaints procedures are part of this trend, whether or not they form part of the internal quality management procedures of government bodies. Both the standards applied to government actions via codes of conduct, and decisions by the courts or complaints bodies on specific past actions of government can help to firm up the general requirement of proper conduct.

3 Functions and distinctive character of proper conduct assessment by the ombudsman

3.1 INTRODUCTION

The ombudsman acts either in response to complaints or of his own accord to investigate the propriety of actions by administrative authorities. The general requirement that their conduct should be 'proper' is laid down in section 9:36 of the AWB.⁵ The legislature has given the ombudsman the task of translating the general requirement of proper conduct into a set of specific criteria and provides that, if the ombudsman feels that an action has not been proper, he should specify the proper conduct criterion that has been breached (section 9:36, subsection 2 of the AWB). In other words, the Act gives the ombudsman

independent authority to set specific standards of propriety for the actions of administrative authorities. For him to exercise this authority effectively, it is important first of all to be clear about the precise nature of the general requirement of proper conduct. What are its bases and limitations and how does the requirement relate to legal norms and in particular to the general principles of proper administration?

In this section, we attempt to clarify the nature of the general requirement of proper conduct by examining the significance of the assessment of proper conduct in a democratic society governed by the rule of law. To do this, we distinguish two functions of the ombudsman's work in assessing the conduct of administrative authorities. The first function is that of *compensation*. Compared with their forebears, citizens of modern welfare states are far more affected by the actions of government. There is a risk that this increased influence of government on the lives of citizens may upset the balance that ought to exist between government and citizen in a democratic society governed by the rule of law. By overseeing the propriety of government actions, the work of the ombudsman to some extent compensates for the increased influence of government and by doing so contributes to its legitimacy (see also section 2).

The second function of the ombudsman's assessment of the propriety of government actions can be described as that of *bridge-building*. Because government now has a far greater influence on the lives of citizens, the public has far greater expectations of government. Where government fails to satisfy those expectations, the result may be discontent, a decline in public confidence and a consequent feeling of alienation from government. The ombudsman's work in assessing the actions of government can help to bridge that gap. On the one hand, he can make it clear to citizens what they can reasonably expect of government; on the other, he can indicate to government how it can better satisfy the reasonable expectations of the public. So whereas the compensation function is directed primarily at legitimation and rectification, the bridge-building function is directed mainly at education and prevention. The remainder of this section examines these two functions in greater depth.

3.2 COMPENSATION

The Netherlands is a democratic state governed by the rule of law. As already stated, in any such society there needs to be a proper balance between government and citizens. Citizens are subject to the authority of government, but government is subject to democratic supervision and control by the citizens of the country and their elected representatives. Government derives its authority from its citizens and the exercise of that authority is subject to their approval. The way in which citizens influence the exercise of government authority determines the democratic legitimacy of government in a formal sense.

Besides this, however, the democratic legitimacy of government has a substantive aspect. The basis of democracy and the rule of law is that government owes all its citizens a duty of equal care and respect. This means that citizens must, so far as possible, be given equal opportunities to live autonomous lives. In other words, they must be as free as possible to live their lives in accordance with the norms and values that they themselves endorse and hence to live lives that are fulfilling in their own eyes. So far as reasonably possible, government must support and respect the autonomy of its citizens. The duty of equal care and respect is the substantive basis of democracy and the rule of law. To enjoy democratic legitimacy, the actions of government must meet this standard.

In a state governed by the rule of law, the actions of government are subject to rules. Since the purpose of these is to ensure that government action enjoys democratic legitimacy in both the formal and the

substantive sense, the rules themselves are both formal and substantive. The formal rules relate to powers and procedures. Taken together, they are designed to ensure that every action of government has its ultimate source in a consent or approval given by citizens.

To decide whether the actions of government are legitimate in the substantive sense, the first step is to establish what more specific criteria can be derived from the basic democratic duty of equal care and respect. In the course of the twentieth century, thinking about these substantive criteria has undergone major changes. First of all the courts began to use the principles of proper administration as a general criterion for assessing administrative action. Later, the ombudsman began to use the principles of proper government conduct as a general criterion for assessing virtually all actions of government.

General principles of proper administration

To compensate for the decline in the formal democratic legitimacy of administrative lawmaking, the courts formulated additional substantive criteria to be met by administrative orders in a democratic state governed by the rule of law. Over time, these criteria evolved into a dense network of general principles of proper administration, initially as 'unwritten' rules of judicial legislation and later to some extent codified in the AWB as statutory provisions.

The general principles of proper administration formulate the requirements set in a democratic state governed by the rule of law for standards of administrative conduct by government, just as fundamental rights do for legislation. Like those fundamental rights, they can be seen as concrete interpretations of the duty of equal care and respect, albeit focused on a specific area of government action (administrative orders). Principles like those of due care, equal treatment, protection of legitimate expectations and proportionality are today just some of criteria which it is taken for granted that administrative orders in a democratic society ought to meet.

General principles of proper government conduct

The increasing influence of government on the lives of individual citizens extends not only to the decision-making process, but also to all other areas of government activity. Citizens interact with administrative authorities in many different areas of life and in a host of ways. Moreover, in these government-citizen interactions, the increasing power of government is accompanied by declining opportunities for adequate democratic scrutiny of the way in which administrative power is exercised. It is even more difficult than in the case of administrative orders to make arrangements for all these other actions of government bodies to be overseen by representative bodies. Yet, of course, it is quite possible that government bodies may fall short in fulfilling the duty of equal care and respect that they owe to every citizen when they are acting under private law or in other areas of activity. Existing Dutch law offers the citizen only limited protection against any actions of government in areas other than decision-making that are incompatible with the duty of equal care and respect. The ombudsman fills this gap in the democratic controls on government by assessing these actions on the basis of the general requirement of proper conduct.

By assessing government conduct in this way, the ombudsman helps to guarantee the democratic legitimacy of government action. Accordingly, his assessments of all types of government action on the basis of proper conduct criteria has a compensatory function, just as review by the courts on the basis of the general principles of proper administration has in relation to administrative orders. In this respect, the proper conduct criteria form a basis for assessment derived from the basic norm of the democratic state governed by the rule of law, the duty of equal care and respect.

It is clear, therefore, that the duty of equal care and respect relates to all kinds of government action: legislation, administrative orders and physical acts by government authorities. In every area and in all its capacities, government has an obligation so far as reasonably possible to support and respect its citizens as autonomous people striving to live lives that are fulfilling in their own eyes. Fundamental rights, general principles of proper administration and the proper conduct criteria applied by the ombudsman are all part of a single system with common roots. Insofar as they are all safeguards on the democratic legitimacy of government action, they can be classed together as general principles of proper government conduct.

3.3 STANDARDS OF PROPER CONDUCT AND LEGAL NORMS

The proper conduct criteria developed by the ombudsman as a touchstone for the democratic legitimacy of government action are closely akin to the fundamental rights and general principles of proper administration. This close kinship results in a certain overlap between these various sets of standards. The question is what this means for the relationship between the proper conduct criteria developed by the ombudsman and the legal norms developed by the legislature and the courts.

One example of the overlap between legal norms and proper conduct criteria can be found in the General Administrative Law Act. Under section 3:1, subsection 2, the general principles of proper administration contained in section 3.2 of the Act also apply to 'acts of administrative authorities other than orders'. These legal principles therefore apply to acts other than orders that the ombudsman must assess by application of the proper conduct criteria. Suppose that an investigation by the ombudsman reveals that an administrative authority has acted without first gathering sufficient information concerning the relevant facts and interests to be weighed against each other. This may be judged to be in conflict with the proper conduct criterion of careful preparation. However, under section 3:1, subsection 2 of AWB, the duty of care contained in section 3:2 of the Act also applies to this act. The question, therefore, is whether the ombudsman should apply the proper conduct criterion of section 9:27 in conjunction with section 9:36, subsection 2 of the AWB or the general principle of proper administration, the duty of care, contained in section 3:2 of the Act?

Parallel norms

The key to this question lies in a recognition of the shared basis of the two norms. Each of them is, in its own way, a formulation of the fundamental democratic duty of equal care and respect resting on government. Article 3:14 of the Civil Code and the expansion of the scope of section 3:2 AWB via the linking provision of section 3:1, subsection 2 bring other acts of government within the purview of the courts, which may find that failures to fulfil the duty of equal care and respect are breaches of a legal norm, while the ombudsman may find that the same failures are breaches of a proper conduct criterion.

The fact that the actions of government are to some extent subject to legal norms does not mean that the ombudsman has no power to assess them, either as regards their exact description in terms of law or as regards the standards applying to them. The proper conduct criteria applied by the ombudsman continue to apply in full across the whole range of actions over which he has jurisdiction, albeit to some extent in parallel with existing legal norms. This interpretation of the relationship between proper conduct criteria and legal norms corresponds to the interpretation of the rules incorporated in the United Nations Charter by the International Court of Justice (ICJ). In the view of the ICJ, general principles of law have been translated both into customary law and into the rules incorporated in the Charter, and have subsequently

developed further in international law as a result of interaction between the two. The ICJ observes, for example, in relation to the prohibition on the use of armed force, that 'the Charter gave expression (...) to principles already present in customary international law, and that law has in the subsequent four decades developed under the influence of the Charter, to such an extent that a number of rules contained in the Charter have acquired a status independent of it. The essential consideration is that both the Charter and the customary law flow from a common fundamental principle outlawing the use of force in international relations.'⁶ For that reason, according to the ICJ, general principles of law can be applied in their customary law form even if the application of the substantively identical rules incorporated in the Charter would be outside its competence: 'Principles such as those of the non-use of force, non-intervention, respect for the independence and territorial integrity of States, and the freedom of navigation, continue to be binding as part of customary international law, despite the operation of provisions of conventional law in which they have been incorporated.'

Likewise, the proper conduct criteria continue to be a concrete interpretation of the duty of equal care and respect and therefore applicable to the actions of government, despite the parallel applicability of legal rules incorporating the basic democratic duty in a similar way. The task of the ombudsman is to assess government conduct and to establish whether it was proper. To do this, he must translate the general requirement of proper conduct into a set of proper conduct criteria. If the ombudsman formulates and applies a proper conduct criterion which is also incorporated in the law, he is not applying the legal norm but a concrete interpretation of the general requirement of proper conduct which is substantively identical to the legal norm.

The ombudsman and lawmaking

The ombudsman has no lawmaking powers. His task is to help translate the general duty of equal care and respect into concrete criteria of proper government conduct. However, because some legal principles can be applied to the actions of government more or less parallel to the standards of proper conduct, the development of proper conduct criteria can have an influence on the further development of these legal norms by the legislature and the courts. Accordingly, it is not unusual for proper conduct criteria developed by the ombudsman eventually to find their way into law via legislation or case law. In this way, the ombudsman makes an indirect contribution to the development of the law. Nevertheless, the development of concrete criteria of proper conduct by the ombudsman remains an independent sphere of activity and should continue to be kept separate from the respective spheres of activity of the legislature and the courts. The ombudsman has his own area of responsibility alongside theirs.

On the other hand, the shared basis of standards of proper conduct and legal norms like the general principles of proper administration means that the various bodies engaged in translating the duty of equal care and respect into concrete norms and standards should strive to harmonise their activities. Within the Dutch legal system, there is naturally a certain hierarchy of authority in this respect. The decisions of the legislature normally have precedence over those of the courts and those of the courts over those of the ombudsman. This point is clearly expressed in section 9:27 of the AWB, which provides that, where an investigation by the ombudsman relates to acts on which a court has pronounced judgement, the ombudsman must take account of the grounds on which that judgement is based. This means that the ombudsman must, wherever possible, be guided by established legal norms when interpreting the concept of proper conduct.

Nevertheless, the ombudsman has a personal responsibility to develop proper conduct criteria and his

decisions will in turn provide guidance (albeit of a less peremptory nature) for the legislature and the courts. It is hard to imagine, for example, that any court would ignore a previous decision by the ombudsman relating to an act brought before it. It seems likely that the court would take such a decision at least as seriously as an opinion of the Equal Treatment Commission (CGB), and the Supreme Court has indicated that such an opinion cannot be set aside by the courts without good reason. Thus, although the ombudsman has no lawmaking powers, he does contribute to the development of fundamental standards for government and can make an indirect contribution to the development of the law.

Not enforceable but still compelling

An important difference between a court decision as to whether government action was lawful and a decision by the ombudsman on whether it was proper is that the first is enforceable and the second is not. The ombudsman's decision is contained in a conclusion concerning the government action under investigation. That decision is not binding on the government body concerned. The ombudsman has no means to compel the body in question to observe the criteria.

This does not mean, however, that the body concerned can simply ignore the ombudsman's decision. Even if the decision is not enforceable, it can still be so compelling that it is virtually so. In this respect, the position of the ombudsman is comparable to that of other institutions within the Dutch state system which can issue directions that are not enforceable, but still have a compelling influence on the actions of government bodies. Examples include the Netherlands Court of Audit and the Equal Treatment Commission. Parliamentary commissions of inquiry and the media also have a similar influence. While the latter have not been established by the legislature, their influence on the actions of government should not be underestimated. Like these institutions, the ombudsman plays a role alongside that of the legislature, the executive and the judiciary in the overall system of checks and balances that guarantees the legitimate exercise of power by government authorities.

A recommendation by the ombudsman is only as compelling as the authority commanded by his decision. That authority rests on several different bases. The first of these is the strength of the arguments advanced. An important element in any recommendation by the ombudsman is that the government body concerned is made aware of the principle on which the decision is based and of how the decision follows in all reasonableness from that principle. The self-evidence of the underlying principle and the inevitability of the argumentation do much to contribute to the authority of the decision.

That authority is further reinforced by the public nature of the decision and in particular by the publication and circulation of the ombudsman's annual report. This adds to the strength of the argument the potential pressure of public opinion and of the representative bodies.

Furthermore, the authority of a recommendation by the ombudsman can be enhanced by being linked to current legal norms. As already indicated, there is a degree of parallelism and overlap between the standards of proper conduct applied by the ombudsman and legal norms (in particular fundamental rights and general principles of proper administration). The authority of these norms is undisputed and a parallel standard of proper conduct is likely to command similar authority. This is a reason for all Dutch ombudsmen, local and national, to state the standards of proper conduct on which their decisions are based.

Finally, the authority of the decision will be determined in part by the extent to which the ombudsman

shows that he understands the real world in which government and citizens operate. Government bodies are likely to find the decision more comprehensible and authoritative if it shows that the ombudsman is aware of the real day-to-day world in which the relevant actions occurred and avoids making recommendations which may look fine in theory but are unworkable in practice. On the other hand, it is equally important that the ombudsman should strive to make his decisions comprehensible to citizens, even if – indeed, more particularly when – he finds their complaints unfounded. This will depend to a considerable extent on there being exchanges of information both between the ombudsman and the government body concerned and between the ombudsman and the citizen, so that the ombudsman has a better understanding of the position of the relevant government bodies and citizens, and they are better able to comprehend and accept his eventual decision.

The authority commanded by the ombudsman's decisions depends, of course, not only on their individual quality taken in isolation, but also on the quality of all such decisions over time. By constantly seeking to make wise and well-founded decisions, the ombudsman can eventually endow his recommendations with such authority that there is little practical difference between an enforceable decision and one that is morally compelling. Over recent decades, the National Ombudsman has set such an excellent example in this respect that Timmer and Niemeijer report that at least 90 per cent of his recommendations are now ultimately being adopted.

Legal norms as a source of guidance

The ombudsman has two reasons to base his decisions on the propriety of government actions on legal norms developed by the legislature and the courts. Firstly, many legal norms are designed at least in part to ensure that government will treat its citizens with sufficient care and respect, and the ombudsman is unlikely to assume that parliament and the courts are mistaken. Secondly, reference to existing legal norms enhances the authority of the ombudsman's decisions.

However, this should not mean that the ombudsman confines himself to a test of lawfulness. Rules of law frequently set only a minimum standard of propriety for government action, while the ombudsman's job is to assess the level of proper conduct that we are reasonably entitled to expect from government. For this reason, a review of lawfulness in the courts will frequently rely on lower standards than are appropriate to an assessment by the ombudsman.

Part of the ombudsman's job is to investigate the particular circumstances of each case to see whether there is good cause to apply a higher (or indeed lower) standard of proper conduct than is laid down in law. A breach of a legal norm does not automatically mean that the interests of citizens have been improperly infringed, just as the fact that an act was lawful does not inevitably mean that their interests have been properly protected.

In principle, it would be possible to integrate the ombudsman's own standards of proper conduct into a test of lawfulness by employing a broad or narrow interpretation of the law. However, this would be undesirable as regards both legal certainty and the authority of the ombudsman's decisions. It would reduce legal certainty if citizens were confronted with conflicting interpretations of the law by the courts and by the ombudsman. This should be avoided. It would also be a threat to the authority of the ombudsman, since a sound decision on proper conduct might be regarded as a poor legal judgment. We can illustrate this by an example.

Example: representing the interests of a deceased person (zaakwaarneming)

Report 1997/38 by the National Ombudsman discusses a case in which the police assumed responsibility for a deceased person's property. Acting on information, the police had entered the home of an elderly lady living alone and found her dead. Since there was nobody else in the dwelling, the police traced the names of next of kin via the Population Affairs Department of the municipality. They then gave the keys to the house and a purse which they had found in the dwelling but not opened to one of the relatives (the complainant's half-brother). The complainant had had no contact with his half-brother for the last twenty years and only learned of the death of his aunt two days later, when the notary involved informed him that he had been appointed executor of her estate. The complainant alleged that money and bank cards had been appropriated by his half-brother. The National Ombudsman considered that 'In the case of a death like this, when the police are the first to enter the home of a deceased person living alone, they assume by doing so responsibility for managing his/her property. This includes not only the responsibility to secure the dwelling and safeguard any money and valuables, but also not to transfer this responsibility to anyone other than the lawful recipient. That is, the heir or heirs. If the deceased person has left a will appointing an executor and awarding possession of the estate to that person, then he or she is the appropriate person to take responsibility. The implication of all this is that the police may be expected in a case of this kind to seek to establish whether the deceased person has designated an heir or heirs, and in particular whether the deceased has appointed an executor. An obvious way of doing this is for the police to consult a notary, who will have rapid telephone access to the Central Register of Wills.'

This report has been criticised by G.J. Knijp.⁹ He writes that:

'The ombudsman's judgement that in this case, in the course of executing their statutory duty of lending public assistance, the police assumed responsibility for the deceased person's property seems to me entirely correct (cf. Asser-Hartkamp III no. 297, end). Accordingly, it was the duty of the police while acting in that capacity – in the words of Hartkamp op. cit. no. 307 – to protect the interests of the interested party or parties with the care that can normally be expected of a conscientious representative, taking account of the circumstances of the case. But does this mean that the police can be expected to conduct in-depth inquiries into the rights of claimants to the estate (including the involvement of an expert in civil law), in order to avert – as the ombudsman says – the not inconceivable risk that the police may transfer possession of the estate to persons not lawfully entitled to it (report p. 27)?'

Following a discussion of the legal literature on the responsibility under private and public law in such cases, Knijp concludes: 'It seems to me that the ombudsman is imposing too high a standard for the duty of the police to act properly as the custodian of the deceased person's property. This conclusion is also prompted by the judgements cited in Asser-Hartkamp III no. 307 in which the civil courts judged the propriety of actions taken in such cases and indicated that action is only improper if it is manifestly so when it is taken. This is only reasonable; the propriety of actions must be judged in the context of the time when they were taken, and any retrospective knowledge that a different course of action by the representative would have been better for the interested party has no influence on the assessment of their propriety.'

In the light of the above, I believe that the police did all that they could reasonably have been expected to do in the circumstances of the case while acting as custodian of the deceased person's property.'

Assuming that Knijp's interpretation of the law is correct, the question is whether this means that the ombudsman was wrong to find that the police acted improperly. This certainly need not be the case. A

representative (*zaakwaarnemer*) is normally an individual who of his own free will protects the interests of another person. In doing so, he assumes – possibly in conflict with his own interests – the responsibility to act conscientiously in that capacity. He must see that responsibility through to the end and is in principle liable for any losses that may occur as a result of inadequate representation. In the case of a private individual acting in this capacity, it seems reasonable that he should not be too easily held liable and that his conduct should have to have been manifestly improper before that is the case.

In the case of representation by an administrative authority, however, there is no potential for any sacrifice of self-interest since government has no self-interest. Indeed, it is one of the tasks of government to provide adequate services (*in casu* consequent on section 2 of the Police Act 1993) and in doing so it may be expected to act professionally. For these reasons, higher standards of propriety may be set for an administrative authority representing a person's interests than for individual citizens who do so. This is at odds with the legal norms of Book 6 of the Civil Code, but perfectly consonant with the standard of proper conduct laid down in section 9:27 of the AWB. In this case, therefore, a test of lawfulness does not do sufficient justice to the ombudsman's task of assessing whether conduct has been proper. The standard for proper representation of interests by the authorities to a large extent parallels the standard set in private law: it is based on that standard and builds on it, but is not identical to it. Knijp seeks an equivalent standard in public law in the provisions of articles 116 and 353 of the Code of Criminal Procedure, according to which the Public Prosecution Service can transfer any object in its custody as 'representative' to the person who is 'probably' the rightful owner without in-depth investigation. According to Knijp, therefore, the test of proper conduct in such a case is one of reasonableness and no far-reaching proper conduct criteria can be derived from these provisions either. If he is right, this accords with the impression that statutory provisions tend to establish only minimum standards of proper conduct. A government body that acts in accordance with the statutory provisions has not, therefore, necessarily satisfied a parallel standard of proper conduct deriving from section 9:27 in conjunction with section 9:36 of the AWB. To do that, it must act as properly as we are reasonably entitled to expect.

By giving the impression that he is judging the lawfulness of the police's actions, the ombudsman has exposed himself to the criticism that he has applied the law wrongly. He could have averted that criticism by instead making it clear that the standard of proper conduct he was applying in this case imposed greater demands on government than the law did and explaining why. For this reason too, it is important that the ombudsman should continue to emphasise his duty to set independent criteria for the propriety of government action as well as judging its lawfulness.

Lawfulness and proper conduct

Assessing whether action is proper is not the same thing as judging whether it is lawful. In many cases, the test of propriety will be wider in scope than that of lawfulness. This is particularly the case where the law requires government action to achieve only a minimum level of propriety, while the standard of proper conduct applied by the ombudsman reflects higher aspirations. On the other hand, the test of whether action has been proper will not depend on whether it was lawful. A breach by government of a legal norm will not necessarily conflict with the duty of care and respect that government owes to its citizens and thus will not necessarily be improper. For example, an official who breaks a rule of procedure in order to offer quicker and more satisfactory service to a member of the public will be acting unlawfully but not necessarily improperly; indeed, he may actually be acting properly precisely because of the breach he is committing. The ombudsman will be guided by legal norms but will always have to consider, in the circumstances of the particular case, whether the proper conduct criterion sets a higher or lower standard

for government conduct than the legal norms concerned.

However, the test of lawfulness is important not only because of the standards of proper conduct laid down in the law. The lawfulness of government action is also important in terms of its predictability. Citizens have a right to assume that government will obey the law, and for that reason legal rules also express the legitimate expectations of the public. Breaches of those expectations may constitute an improper erosion of legal certainty.

Unlawful government action can therefore be improper for two reasons. It may conflict with a standard of proper conduct laid down in the law, or it may conflict with the expectations aroused in citizens by the relevant legal provision and therefore with the proper conduct criterion of legal certainty.

3.4 BRIDGE-BUILDING

Public expectations of government have increased enormously. Citizens now expect not only that government will create the necessary conditions to enable them to lead lives which are fulfilling in their own eyes, but also that government will do so in such a way as to demonstrate care and respect for its citizens.

If government fails to show sufficient care and respect in its treatment of citizens, the result is likely to be declining public confidence in government. This may give rise to a sense of alienation from government, even if government offers its citizens a high level of provision. Because the development of the welfare state has increased contact between government and citizens, there is scope for more errors to be committed in the individual treatment given to citizens. This can produce the paradoxical situation that the increased efforts of government to enable citizens to lead autonomous lives actually increase feelings of dissatisfaction amongst them. Erosion of public confidence in government leads eventually to erosion of its authority and hence to an erosion of its legitimacy. One function of the ombudsman's assessment of proper conduct is to allay the threat of alienation and bridge the gap between citizens and government. The ombudsman can help to do so by identifying what citizens are reasonably entitled to expect of government (education) and what government can do in order to avoid disappointing the legitimate expectations of citizens (prevention).

Education

Government owes all its citizens a duty of equal care and respect. One of the key tasks of the ombudsman is to clarify what citizens are entitled to expect of government in practical terms in this respect. A major aim of the ombudsman's reports, his annual report and other publications written or initiated by him is to make it clear what practical demands the general requirement of proper conduct places on government in specific operational contexts. In addition, the direct contact between the ombudsman and government bodies plays a major role. After all, the vast majority of the complaints addressed to the ombudsman are settled via the intervention method.

Improper or insufficiently proper

One problem in clarifying the general requirement of proper conduct is that the ombudsman's decision is binary in character: he finds the relevant action proper or improper. In fact, however, there is a sliding scale: any action is more or less proper or improper. Any proper government action could be said to be situated somewhere between 'just about at the lower end of what can be regarded as proper' to 'right at

the top end of what we can reasonably expect of a government body'. Accordingly, if a government action is judged not to satisfy the standard of proper conduct, this can mean two things. It can mean that the action fails to satisfy even minimum expectations and is therefore manifestly improper or it can mean that it fails to satisfy our maximum reasonable expectations. In the latter case, it is insufficiently proper.

As we have already seen, there is a sometimes an overlap between legal norms and the standards of proper conduct applied by the ombudsman when assessing government action. Where this is the case, the legal norms tend to focus primarily on the minimum standard of propriety while the standards applied by the ombudsman tend to relate to the maximum limit of what citizens can reasonably expect of government. In comparison with legal norms, therefore the standard of proper conduct specifically addresses government action which is not manifestly improper but still leaves something to be desired.

The ombudsman judges whether government action is or is not proper. The binary nature of his decision makes it difficult to do justice to the variation in the extent to which a particular government action may be improper. Is it patently so, or does it merely leave something to be desired? A finding of 'improper' for an action which only just fails to satisfy our reasonable expectations of government may meet with incomprehension and resentment on the part of the government body concerned, which may (rightly) feel that its action was not patently improper. On the other hand, a finding of 'proper' for an action which may not have been patently improper, but was nevertheless less proper than we are reasonably entitled to expect from government, is likely to rouse incomprehension and resentment in the citizen. This will diminish the educational effect of the ombudsman's decision and possibly ultimately even the authority of the institution. For that reason, it is important for the ombudsman to give a clear indication in his decision of how and to what extent the relevant action of government was proper or improper. Was the action manifestly improper or only insufficiently proper, and why?

Proper or more than proper

A further complication is that, even if government has acted properly, its performance could in theory always have been better, indeed even better than we are reasonably entitled to expect. For example, if a government body refuses to pay compensation for damage caused by an error it has clearly committed, its action is manifestly improper. If the body pays compensation into the bank account of the citizen concerned but fails to offer any form of apology or acknowledgement that it was at fault, its actions may not be patently improper, but they certainly fall short of the standard of proper conduct that we are reasonably entitled to expect of government. It might be even nicer if the official responsible also called round personally to present his apologies and offer a bunch of flowers, but – however admirable such a course of action might be – this is not something that the citizen can reasonably expect to happen. If it did, government would be acting in accordance with a standard exceeding that of proper conduct. The technical term for such excessively proper conduct is 'supererogatory'.

An action is supererogatory if it would be admirable to perform it but not reprehensible to refrain from doing so. For example, we admire Mother Teresa for her self-sacrifice in dedicating her life to assisting destitute people in India, but we do not accuse people who are less self-sacrificing in that regard of acting immorally. There are excessively proper or supererogatory acts that government might ideally perform but which we cannot demand of it.

We cannot demand of government that it acts in an excessively proper way, but we are entitled to expect it to strive to perform as well as possible. For this reason, the educational responsibilities of the

ombudsman can be taken to include the formulation of ideal standards for administrative authorities. If the ombudsman formulates such ideal standards, this may give rise to a problem of distinguishing between proper and excessively proper conduct comparable to that of distinguishing between improper and insufficient proper conduct. A citizen may well be bewildered if the ombudsman decides that a complaint is unjustified but at the same time recommends the relevant authority to improve the way it does things. On the other hand, an administrative authority that sincerely and rightly believes that it is acting as properly as can reasonably be expected is likely to have difficulty in accepting a recommendation to do still better. Once again, therefore, it is extremely important that the ombudsman should clearly indicate the status of the standard he is formulating. Is it a normal standard of proper conduct or an ideal standard of service to the public, and why?

The question of whether an authority's conduct was proper is sometimes difficult to answer with a simple positive or negative. Its conduct will lie somewhere on a sliding scale between the ideal and the utterly unacceptable and will meet the requirement of proper conduct to a greater or lesser extent. It follows therefore that the ombudsman can in principle decide that it falls into one of three categories of conduct:

1. manifestly improper;
2. insufficiently proper;
3. proper, but with room for improvement.

Public confidence is hard to win, but easy to lose

Part of the ombudsman's core business is to make it as clear as possible to government what the public is reasonably entitled to expect of it. By enabling the authorities to meet the justifiable expectations of citizens, this can help to prevent or reduce a possible sense of alienation and loss of confidence in government. However, the educational role of the ombudsman relates not only to government, but also to the public.

Citizens may also have exaggerated expectations of government. The gap between government and citizens can therefore be reduced by making it clear to the public what they are reasonably entitled to expect from government and where they are asking too much of it. It is just as important, therefore, to indicate when a complaint is unjustified because the authority concerned has acted perfectly properly.

Another aspect of the ombudsman's educational role is that he can explain, when finding a complaint to be unjustified, why the administrative authority concerned has acted correctly in this case or why it could not have acted in any other way in the relevant circumstances. Many complaints are the result of a breakdown in communication and the complainant's inability or refusal to understand that the attitude of the authority concerned is reasonable. In such cases, the image of an uncaring government bureaucracy is easily established and difficult subsequently to eradicate. By providing an insight into the situation that has arisen and restoring communication, the ombudsman can do much to prevent unnecessary damage of this kind.

It is also important that the ombudsman should point out where shortcomings in government action are (at least partly) due to the behaviour of the citizen involved. For instance, if a procedure has been disrupted by the complainant's own culpable failure to play his proper part in it (perhaps by providing the necessary information at the right time), it is important that this should be pointed out to the citizen. Government has a responsibility to support and respect the individual autonomy of citizens so far as it reasonably can. But this also means that it can expect citizens to shoulder their own responsibilities as autonomous

individuals. In a democracy, the formal locus of power is ultimately in the hands of individual citizens and government exists to serve the public. Government is there to serve the public, not vice versa. In that sense, the wishes of the citizen are paramount. However, this does not mean that government is obliged to satisfy the citizen's every whim. The citizen is not a customer in a five-star hotel and government is not a lackey. It is part of the ombudsman's educational responsibilities to indicate how the rights of citizens relate to their responsibilities as autonomous members of society.

Prevention

A recommendation by the ombudsman can be either retrospective or prospective: in other words, its primary purpose can be either to put right what has gone wrong in the past or to ensure that the authority will satisfy the proper conduct criteria in the future. The ombudsman's work is not directed only at restoring the position of the citizen and the relationship between the citizen and the authority, but also at preventing future problems in this respect. Because it is hard to win the confidence of the public but all too easy to forfeit it, prevention of improper government action is an important aspect of the ombudsman's bridge-building function.

In a sense, every recommendation has a preventive function. As Michiel Scheltema stresses,¹⁰ every complaint by a citizen can be seen as a recommendation to improve the performance of government. It follows, therefore, that every recommendation by the ombudsman can be seen as one for improvement. This would be the case even if the ombudsman were to confine himself to identifying how and why an administrative authority has breached a standard of proper conduct.

Target standards

The contribution that the ombudsman can make to improving the performance of government is not, however, limited to identifying what has gone wrong in the past and what standard of proper conduct has been breached. In addition to identifying a breach of standards, but also in isolation from this, the ombudsman can make recommendations aimed at improving the organisation, systems and procedures of the authority concerned in such a way as to prevent similar breaches occurring in the future. In many cases, therefore, both the National Ombudsman and local ombudsmen translate their decisions on individual complaints into concrete recommendations on how the performance of the authority can be improved with an eye to preventing future complaints.

The specific requirements that the ombudsman formulates for the organisation, systems and procedures of the authority are targets rather than in themselves criteria for proper conduct. Whereas criteria for proper conduct indicate the quality standards that need to be met by the actions of government in relation to citizens, these target standards tell authorities how they can reduce the risk of future breaches of standards. For example, if an administrative authority keeps poor records, this will increase the chances of inadequate service to the public and hence of improper conduct on its part. By pulling out all the stops and with luck on its side, the authority may so far have managed to prevent any actual breaches of proper conduct criteria but, by allowing the situation to continue, it is running a considerable risk of treating citizens improperly in future. This in itself betrays a lack of care and respect towards the citizens concerned. If the authority's organisation, systems or procedures are such as to create a substantial risk of improper conduct, the very fact that it allows the situation to continue can be regarded as improper. For this reason, these target standards can, despite what has been said above, be seen as proper conduct criteria relating to the duty of care.

Limits to recommendations

Since there is no upper limit to the quality of government service and treatment of citizens, the question is how far the ombudsman should go in recommending improvements to the performance of authorities. There are a number of general rules in this respect.

Firstly, there is a limit to what is humanly possible. While the highest possible standards can in principle be demanded of the machinery of government, its operation is and will remain subject to human fallibility. Individual officials may be expected to display a reasonable degree of professionalism, both in their formal actions and in their behaviour towards citizens. The public is entitled to expect that officials will in all circumstances show care and respect in their dealings with citizens. A good rule of thumb for the standard of care and respect that officials may be expected to display was suggested to us by the municipal ombudsman for Rotterdam, Migiel van Kinderen. He proposes that officials should deal with citizens as they would like other officials to deal with their own mothers. However, officials do not always find themselves dealing with dear old ladies; they also have to cope with the constantly dissatisfied and with rude or even aggressive members of the public. Although many problems can be averted by establishing good procedures, officials cannot be expected to show exemplary courtesy whatever the circumstances. Ombudsmen must not lose sight of the human factor when making their recommendations.

There is also a limit to what is technically possible. The public has a right to expect authorities to have their houses sufficiently in order that the interests of citizens are not unnecessarily damaged. Authorities should avoid unnecessary delays, mislaying files and failing to communicate with their clients. What can be achieved in this respect will depend in part on the current state of technology. This means that, over time, the evolution of technology will set a higher standard for the service that the public has a right to expect. It does not mean, however, that authorities can invariably be expected to have state-of-the-art facilities in place, for example as regards information and communications technology. There will be technical and budgetary constraints in this respect.

This final remark brings us to a more general and less easily defined limit to the recommendations that may be made for the improvement of government action. Where an administrative authority has acted in a patently improper manner, a recommendation to improve its performance is clearly appropriate. But where the upper rather than the lower limit of the standard of proper conduct is at stake, there will always be a question mark concerning the best use of available resources. This is partly a matter of weighing up and prioritising policy options and should in principle be at the discretion of the administrative authorities with whom responsibility lies.

It is equally difficult to identify the exact limit of what can reasonably be expected of an authority. Under these circumstances, a recommendation that unilaterally states the appropriate level of proper conduct will quickly run the risk of being regarded as an example of over-ambitious interference.

Agreement

All this does not mean that the ombudsman should be over-cautious in his demands. It simply means that he should try to ensure that the targets he formulates reflect standards to which government is prepared to commit itself. He can do this, for example, by basing his recommendations on policy rules establishing performance standards in similar areas or adopted by similar authorities. In that way he can also contribute to the gradual refinement and expansion of standards of proper conduct.

The main means of improving the quality of government action is direct consultation with the administrative authorities concerned. This can have two purposes. Firstly, it can help the ombudsman understand what an authority itself regards as a feasible level of proper conduct. Secondly, it can lead to agreement on what further improvement can reasonably be expected of the authority in a particular area of its operations. Agreement on the yardsticks to be applied will help to increase the commitment of the authority to improving its performance and give the ombudsman a concrete standard against which he can assess its future performance. Regular consultations can help maintain the commitment of the authority and provide the opportunity to modify performance yardsticks if necessary. In this way, the ombudsman can not only prevent the erosion of public confidence in government, but actually help to increase it. Consultation on the level of proper conduct that can reasonably be expected of administrative authorities is therefore extremely important in relation to the bridge-building function of the ombudsman.

GUIDANCE NOTES ON STANDARDS OF PROPER CONDUCT

Guidance on standards of proper conduct for the use of National and local ombudsmen

INTRODUCTION

The National Ombudsman and the municipal ombudsmen for the four main cities in the Netherlands already have wide experience of assessing the propriety of actions taken by administrative bodies and individual officials. It is clearly sensible, therefore, that the external complaints bodies to be established under the forthcoming Right of Complaint (External Authority) Act (*Wet extern klachtrecht*) should draw on that experience.

Over recent years, the National Ombudsman of the Netherlands and the municipal ombudsmen for the four main cities have made outstanding efforts to improve the way in which administrative authorities, government services and individual officials deal with citizens. They have done so by applying standards of proper conduct. Like legal norms, standards of proper conduct are a means of influencing human behaviour. They cannot be effective unless their content and meaning is clear. Based on this essential precondition, existing standards of proper conduct can be developed and refined to produce what we have called ‘ombudsprecedents’, just as legal norms are the basis for legal precedents. This naturally requires that ombudsmen should not only record in their reports what criteria they have applied, but also that they should define these criteria and continue to apply them to different cases (and so to re-interpret them).

In this part of our report, we summarise two years of casework reported by the National Ombudsman, supplemented by a small number of cases dealt with by the municipal ombudsmen for Amsterdam, Rotterdam, The Hague and Utrecht. This material is classified in accordance with the list of proper conduct criteria proposed in section 9 of this report [*not included in this translated excerpt of the report*]. For each of these criteria, we include descriptions of between three and fifteen selected cases [*not included in this translation.*]

For each criterion, we supply a general **Formulation** followed by a **General discussion**.

Fundamental rights

1. FREEDOM FROM DISCRIMINATION

Formulation

Administrative authorities must not discriminate on grounds of political opinion, religion, belief, race or sex or any other grounds whatsoever.

General discussion

Government has a duty to treat all citizens with equal care and respect. This means that equal cases should be treated equally and unequal cases given unequal treatment in proportion to the extent of inequality. If an administrative authority fails to do this, it is in breach of the principle of equality. Some

forms of unequal treatment distinguish between citizens on the basis of criteria, such as religion, race or sex, which are now regarded as particularly sensitive because of the severe forms of social exclusion that resulted from them in the past. Such forms of unequal treatment are described as 'discrimination'. Where such a sensitive criterion is the immediate basis of unequal treatment, this is described as 'direct discrimination' and is self-evidently improper. However, unequal treatment based on grounds other than these sensitive criteria can still result in inequality in terms of sensitive criteria. This is known as 'indirect discrimination' and is always improper unless it can be justified by its aims. These will therefore have to be established.

2 PRIVACY OF CORRESPONDENCE AND TELEPHONE

Formulation

The privacy of correspondence must not be violated except, in the cases laid down by Act of Parliament, by order of the courts.

The privacy of the telephone and telegraph must not be violated except, in the cases laid down by Act of Parliament, by or with the authorisation of those designated for the purpose by Act of Parliament.

General discussion

The privacy of correspondence and telephone is a fundamental right enshrined in the Dutch Constitution. It means not only that the right of administrative authorities and individual officials to inquire into the contents of a citizen's correspondence and telephone calls is confined to specific cases laid down by Act of Parliament, but also that the contents of letters and calls may not be passed on by administrative authorities to third parties unless they are requested to do so.

3 PRIVACY OF THE HOME

Formulation

Entry into a home against the will of the occupant is permitted only in the cases laid down by or pursuant to Act of Parliament. Entry into a home without legal authorisation or the permission of the occupant is permitted only in the case of serious danger to persons or goods.

General discussion

This right protects the privacy of people in their own homes. To that extent, it is directly related to the right to personal privacy (see below). The right to the privacy of the home means that, in principle, nobody is entitled to enter a person's home without his or her permission. The Act on Entry into Dwellings (*Algemene wet op het binnentreden*) lays down the specific conditions under which government employees may enter a home without such permission. As a general rule, authorisation is required and persons given authority by or pursuant to Act of Parliament to enter a home without the permission of the occupant have a duty to furnish the occupant with proof of that authority. These statutory provisions help to establish criteria for proper conduct in this respect. The Act on Entry into Dwellings is so clearly drafted that ombudsmen can generally refer to its provisions when assessing complaints relating to the privacy of the home. They must, however, always consider whether the particular circumstances of the case give reason to apply more stringent criteria or, indeed, to find that action in breach of the law was in fact proper.

To supplement the statutory provisions, the National Ombudsman has drafted standards of proper conduct in this respect. For example, he has formulated criteria for deciding when it is proper for police officers to enter a home without written authorisation in order to avert or allay a serious and immediate danger.

4 PRIVACY – RESPECT FOR PERSONAL PRIVACY

Formulation

Everyone has the right to respect for his privacy, without prejudice to restrictions laid down by or pursuant to Act of Parliament.

General discussion

Government has a duty to respect the personal privacy of citizens. The ombudsman calls this 'the right to privacy'. The right to privacy is designed to protect citizens against the gathering and communication of personal information. In terms of relations between government and citizens, this means that authorities are not automatically entitled to communicate information they are holding about citizens (for example, in a municipal personal records database) to third parties. The term 'third parties' includes not only other citizens or companies, but also other administrative authorities or officials. The right to privacy relates to the protection of individuals' private lives insofar as this is not covered by more specific rights, such as the right to physical integrity, the right to the privacy of the home and the right to the privacy of correspondence, telephone and telegraph.

5 PROTECTION AGAINST UNLAWFUL DEPRIVATION OF LIBERTY

Formulation

Article 15 of the Constitution

1. Other than in the cases laid down by or pursuant to Act of Parliament, no one may be deprived of his liberty.
2. Anyone who has been deprived of his liberty other than by order of a court may request a court to order his release. In such a case he shall be heard by the court within a period to be laid down by Act of Parliament. The court shall order his immediate release if it considers the deprivation of liberty to be unlawful.
3. The trial of a person who has been deprived of his liberty pending trial shall take place within a reasonable period.
4. A person who has been lawfully deprived of his liberty may be restricted in the exercise of fundamental rights insofar as the exercise of such rights is not compatible with the deprivation of liberty.

General discussion

Article 15 of the Dutch Constitution relates to one of the most essential and long-standing of the 'classic' fundamental rights, observance of which is a key feature of any state governed by the rule of law. Subject to limitations laid down by law, the fundamental rights of those lawfully deprived of their liberty must be respected unless this is incompatible with the deprivation of liberty. One of the rights that may be at issue in this respect is the right to protection of private and family life as laid down, for example in article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

6 OTHER FUNDAMENTAL RIGHTS

It is not impossible that other fundamental rights may also play a role in complaints investigated by ombudsmen, although we have not come across any case in which they do. For this reason, a miscellaneous category of 'Other fundamental rights' must be included.

Substantive propriety

7 PROHIBITION ON THE MISUSE OF POWER (*DÉTOURNEMENT DE POUVOIR*)

Formulation

An administrative authority must not use any power for a purpose other than that for which it was conferred.

General discussion

The prohibition on the misuse of power is a classic principle of proper administration. Since the effect of this prohibition relates closely to the aim and scope of any statutory provision on which the power of an administrative authority is based, a case of misuse of power will almost always involve a breach of statute.²

8 REASONABLENESS

Formulation

The principle of reasonableness requires that an administrative authority should, prior to any juristic act or physical action, balance its interest in achieving its aims against the interests of citizens. The result of its deliberations in this respect must not be unreasonable in the light of the aim to be achieved.

General discussion

Reasonableness and proportionality have traditionally been related. In the context of public administration in the Netherlands, the principles of reasonableness and proportionality reflect different gradations of the freedom of administrative authorities to opt for different forms of action. Reasonableness refers to the prohibition on arbitrariness, which is generally formulated negatively in law and therefore allows administrative authorities greater freedom than the principle of proportionality.

Before acting, an administrative authority must gather information on the relevant facts and circumstances. The aim of this is to give it sufficient information on which to base its decisions. It must then translate the information it has gathered into differing interests, which must subsequently be weighed against each other. Unless there is evidence that particular interests should not play a role in decision-making, the assumption should always be that all the interests directly involved in the decision should be taken into account. Whether a particular interest should be disregarded is a question of interpretation of the legislation or of the nature and purpose of the power. The prohibition on arbitrariness means that the balance of interests finally struck by the administrative authority must not be unreasonable. The requirement that the balance struck between the aim envisaged by the administrative authority and the interests of individual citizens must not be unreasonable means that administrative authorities may be allowed a degree of discretion in matters relating to policy and assessment. The principle of reasonableness relates primarily to administrative decision-making outside the context of control, enforcement and sanctions. It often relates to government action under private law, for example in relation

to the collection of debts or recovery of undue payments.

In assessing cases concerning the refusal of authorities to pay compensation, the principle is applied with a degree of caution. Because of the demarcation of his powers in relation to those of the civil courts, the ombudsman only returns a finding that compensation should be paid in cases where claims are patently well-founded. This is known as the 'DELA criterion' (after the first case in which it was applied)³. It is expressed in the following standard consideration used by the National Ombudsman: 'In the case of complaints about decisions by administrative authorities to reject claims for compensation, the National Ombudsman adopts a cautious position. This is in recognition of the fact that the civil courts have exclusive powers to issue binding judgments on whether administrative authorities must offer compensation under the provisions of civil law. The National Ombudsman's practice is to find a decision to reject a claim for compensation improper only when he is of the opinion that the claim is, in view of its grounds, so patently sound that the administrative authority could not reasonably have decided to refuse it.'⁴

9 PROPORTIONALITY

Formulation

The principle of proportionality requires that an administrative authority should, prior to any juristic act or physical action, balance its interest in achieving its aims against the interests of citizens. In striking that balance, the authority must, in the light of the aim to be achieved, anticipate the consequences of its actions for individual citizens and opt for the course of action that will be least burdensome to them.

General discussion

Reasonableness and proportionality have traditionally been related. In the context of public administration in the Netherlands, the principles of reasonableness and proportionality reflect different gradations of the freedom of administrative authorities to opt for different forms of action. The principle of proportionality is explicitly aimed at ensuring that government achieves its ends via the means that are least burdensome to individual citizens. Action can therefore be said to be situated somewhere on a sliding scale between arbitrariness and proportionality.

Before acting, an administrative authority must gather information on the relevant facts and circumstances. The aim of this is to give it sufficient information on which to base its decisions. It must then translate the information it has gathered into differing interests, which must subsequently be weighed against each other. Unless there is evidence that particular interests should not play a role in decision-making, the assumption should always be that all the interests directly involved in the decision should be taken into account. Whether a particular interest should be disregarded is a question of interpretation of the legislation or of the nature and purpose of the power.

The principle of proportionality means that the consequences of a decision to act and those of the actual act itself must not be disproportionate to the aim served by the decision. An administrative authority should opt for the approach that has the least serious consequences (subsidiarity),⁵ and the end should justify the means (proportionality).⁶ Thus, the balance of interests should take account of the potential consequences of the action envisaged. In this form, the principle of proportionality applies mainly to operational contexts involving control, detection and enforcement.

In addition, the principle of proportionality requires that authorities should ensure that individual citizens are not disproportionately affected by their decisions or actions, as compared with other citizens in a comparable position. If it is impossible to prevent this happening, the citizens who are disproportionately affected should be offered financial or other compensation.

Compensation

The grounds on which the ombudsman decides whether compensation should be paid are complex. On the one hand, there is the rule under private law that loss or damage should be compensated. An unlawful act by an administrative authority constitutes a tort and any consequent loss or damage should be compensated. On the other hand, even lawful government action can sometimes cause disproportionate damage to the interests of an individual citizen. This should also be compensated, on the basis of the principle in Dutch law of 'equality of public burdens' (known in French as '*égalité devant les charges publiques*'), which means that nobody should be disproportionately (i.e. in comparison with other citizens) disadvantaged by lawful government action. However, the practice of the ombudsman is to find conduct improper only when he feels that the claim for compensation is so patently well-founded that the administrative authority could not reasonably have decided to refuse it (the DELA criterion).

10 GENEROSITY

Formulation

It may sometimes be appropriate for administrative authorities to adopt a generous attitude in situations where probable but unproven errors by them have cost citizens time or money, even though no patently or even probably unlawful act has been committed.

General discussion

This standard is the basis for recommendations by the ombudsman that authorities should pay compensation. It is clear that there is a place for generosity (in the form of ex-gratia payments) within the system of standards of proper conduct, but not always clear where it should be adopted. It is not appropriate in situations where compensation has been awarded – or could be awarded – according to the law. In general, ex-gratia payments should be made in situations where the administrative authority appears to have made mistakes which, while not resulting in patently unlawful action, have nevertheless cost citizens time or money. Ex-gratia payments are recommended by the ombudsman where it is reasonable to assume that it would be fair to pay compensation for the time or money lost. By making them, the administrative authorities concerned will be playing safe and confirming the propriety of their intentions towards the citizen. The formulation 'It may sometimes be appropriate...' is intended to suggest that such situations will be the exception rather than the rule.

11 LEGAL CERTAINTY

The principle of legal certainty gives rise to two different proper conduct criteria: firstly that administrative authorities should comply with court judgments, and secondly that they should fulfil the legitimate expectations of citizens and organisations.

I COMPLIANCE WITH COURT JUDGMENTS

Formulation

Administrative authorities should comply with court judgments.

General discussion

This is an elementary standard of conduct by administrative authorities in any state governed by the rule of law. It flows directly from the principle of legal certainty and is also the basis of **enforcement law**. In most cases, complying with court judgments proves to be a question of taking prompt action in a particular context. The standard also implies that judgments should be obeyed with a degree of precision.

II LEGITIMATE EXPECTATIONS

Formulation

Authorities should fulfil the legitimate expectations of citizens and organisations.

General discussion

The principle that legitimate expectations should be fulfilled begs a number of questions. First of all, who can raise legitimate expectations? The basic rule in this respect is that it must have been reasonable for the citizen to believe that the authority or official was competent to do so.

Secondly, when are expectations legitimate? Not every act or communication of an administrative authority or official can be said to raise legitimate expectations. The circumstances will be an important factor. Something said in the local pub will carry less weight than an official letter on behalf of the municipal executive or a signed contract. Oral commitments will carry less weight than written ones, because it may be more difficult to prove what was said. So there may be variation in the extent to which expectations can be said to be legitimate.⁷ Physical actions can also raise legitimate expectations. Expectations raised by physical actions have the same effect as promises made by an administrative authority or an official in a position of responsibility.

Past cases show that expectations can be raised by administrative authorities and officials in various ways. The most important of these are:

- by providing specific information;
- by making promises;
- by making arrangements;
- by entering into agreements.

A long-standing situation can also raise expectations that the existing situation will continue. This does not mean that an administrative authority cannot change its policies, but it does mean that, before doing so, it must consult those concerned and give them reasonable notice of the changes it intends to make.

Finally, how should authorities and officials respond to the legitimate expectations of citizens? Such expectations should normally be met and, if this is clearly impossible, citizens should generally be offered compensation.

The proper conduct criterion applied by the National Ombudsman in this respect is closely related to the principle of legitimate expectations applied in administrative law.

Formulation

The principle of equality demands that equal cases should be treated equally and unequal cases given unequal treatment in proportion to the extent of inequality.

General discussion

Reliance on the principle of equality will always be based on a comparison of two or more cases. The principle of equality demands that equal cases be treated equally. It is related to the prohibition on discrimination contained in Article 1 of the Dutch Constitution but differs from that provision in that it focuses specifically on the administrative relationship between citizens and government authorities. The prohibition on discrimination as a general norm is translated into detailed provisions in the Equal Treatment Act (*Algemene wet gelijke behandeling*), article 429 quater of the Dutch Criminal Code and, even more specifically, the Employment of Minorities (Promotion) Act (*Wet stimulering arbeidsdeelname minderheden*). We confine ourselves here to discussing the principle of equality. Since complaints based on the principle of equality are seldom found to be justified, many of the norms given below are formulated negatively. Distinctions are drawn between 'enforcement and tolerance' and between 'application of rules and application of policies'.

Procedural propriety

13 IMPARTIALITY/ABSENCE OF BIAS

Formulation

Administrative authorities should actively seek to avoid forming any kind of preconceived idea or opinion. Indeed, they should avoid even the appearance of partiality. They should focus on the objective public interest or on general policies.

General discussion

The term 'impartiality' relates to the attitude of administrative authorities towards both the parties and the issue under consideration: their attitude should be free of any bias or preconceived opinion. A distinction can be drawn between the subjective and objective assessment of impartiality. The subjective assessment focuses on whether an administrative authority has actually shown partiality or bias in a particular case. The subjective impartiality of administrative authorities can be assumed unless there is evidence to the contrary. The objective assessment concerns the question of whether it is reasonable to fear that an administrative authority may be partial; are there any facts and circumstances that might justify such a fear? Even the appearance of partiality is to be avoided. However, not every appearance will justify a claim of reasonable fear of partiality: there must be objective justification for such a complaint.

14 RIGHT OF BOTH SIDES TO A HEARING

Formulation

The principle of the right of both sides to a hearing prescribes that, when preparing to take actions or decisions, administrative authorities must give citizens the opportunity to present their interests in the matter under consideration.

General discussion

This is related to the rule that administrative authorities should gather information prior to taking action but is different in scope. Adequate information-gathering refers to investigation by the authority itself, whereas the right to a hearing gives interested parties a voice in the preparation of decisions. As a criterion of proper conduct, the requirement to give both sides a hearing means that an administrative authority has an obligation to give citizens an opportunity to defend their own interests in various situations. These include not only the kind of primary decision-making referred to in sections 4:7 and 4:8 of the General Administrative Law Act (*Algemene wet bestuursrecht – AWB*), but also secondary decision-making, such as that involved in objection procedures and applications for administrative review. The principle is also relevant to complaints procedures. According to the National Ombudsman, such procedures need to satisfy a number of conditions: 'These conditions are important, among other things, to foster confidence in the impartiality of the body dealing with the complaint. For example, the principle of giving both sides a hearing should be applied. In accordance with this principle, the administrative authority is obliged under section 9:10 of the AWB to hear both the complainant and the person whose conduct is the subject of the complaint. The authority may only refrain from offering the complainant a hearing if the complaint is manifestly ill-founded or if the complainant has stated that s/he does not wish to avail him or herself of the right to be heard.'

If the version of events given by the person whose conduct is the subject of the complaint tallies with that given by the complainant, it is unnecessary to obtain any further response from the complainant. However, if the person denies that the conduct ever took place or adduces facts that place the conduct in a different light, this constitutes new factual evidence to which the complainant must be given an opportunity to respond. Whether both sides were given a hearing will then be a criterion of proper conduct.'⁹

15 REASONS

Formulation

Government action should be factually and logically supported by reasons and interested parties should have access to these.

General discussion

This principle encompasses two basic requirements:

- government action should be factually and logically supported by the reasons advanced for it;
- interested parties should have access to the reasons for government action.

Administrative authorities may be expected to provide sound reasons for every decision and action because they are not at liberty to act arbitrarily or capriciously. Three constituents of a sound set of reasons are: the relevant legislation, the relevant facts and interests, and logical argumentation. The reasons must be tailored to the specific circumstances of the individual case: a standard set of reasons is not sufficient. Another important consideration is the doctrine that an administrative authority should not make a major policy change without giving good reasons for it.

The reasons it provides should at any rate show that the authority has taken account of the interests of the affected citizens. It is not possible to scrutinise the reasons for a decision until they are made known. If the urgency of the matter means that reasons cannot be announced at the same time as the decision, they should be provided as soon as possible afterwards. An authority may only abstain from providing reasons if it is reasonable to assume that there is no need for them.

The ombudsprecedents that we came across relating to the provision of reasons included decisions about the meaning of the duty to give reasons, the way in which reasons were communicated, the strength of the reasons provided, the access given to reasons, and the advice taken by an administrative authority.

16 FAIR PLAY

Formulation

The principle of fair play requires that administrative authorities and individual officials should give citizens the opportunity to exhaust all procedural avenues open to them.

General discussion

There are various situations in which citizens must be given the opportunity to exhaust the procedural avenues open to them. For example, police officers must allow citizens to report crimes and officials must identify themselves to citizens wishing to lodge complaints against them. In the Netherlands, the English term 'fair play' is often used to describe this principle.

The founding father of the general principles of proper administration described the principle of fair play as meaning that an administrative authority may be expected to take the attitude that a citizens must be offered the opportunity to amplify on and defend their points of view, and to challenge the possibly opposing views of the administrative authority itself or of third parties. Consequently, the actions of administrative authorities should demonstrate openness, honesty and loyalty.¹¹ In other words, authorities should 'lay all their cards on the table' and must not act in secret against citizens unless it is imperative to do so. ¹² This means that administrative authorities also have an obligation actively to assist citizens to some extent.

Due care: target standards

It is impossible to translate the principle of due care into a general standard of proper conduct. In practice, the National Ombudsman and local ombudsmen apply the principle by way of a range of criteria governing specific situations. We have called these 'target standards'.

The target standards are:

- Promptness
- Administrative accuracy
- Active and adequate information provision
- Active and adequate information gathering
- Adequate organisation of services
- Correct treatment
- Politeness and good manners
- Helpfulness
- Professionalism

17 PROMPTNESS

Formulation

Promptness means that administrative authorities should act decisively and without any unnecessary

delay.

General discussion

Administrative authorities should not drag their feet and should deal with matters within the relevant statutory time-limits, or at any rate within a reasonable time. Promptness has for many years been the most frequently breached criterion, both in cases that were discontinued and in cases that led to a report. The National Ombudsman has expressed his concern about this in several annual reports, pointing out that promptness must be regarded as an important measure of proper conduct. The following standard consideration of the National Ombudsman is highly relevant to this point: 'It is only fair that authorities should feel themselves as much bound by statutory time-limits as are individual members of the public. Bodies which ignore such time-limits undermine their own authority and forfeit their credibility.'¹³

The promptness criterion implies, therefore, that authorities should observe the statutory time-limits wherever possible, despite the fact that breaching them often does not entail a tacit decision. Since statutory time-limits are often minimum speed requirements, a breach of such a time-limit will generally constitute a breach of the promptness criterion. It follows, however, that mere observance of the statutory time-limit will not necessarily guarantee that action has been prompt enough. On the other hand, the circumstances may be so weighty or the case so exceptional that a breach of the statutory time-limit may actually be regarded as proper. Situations where this may be the case include those where extra information needs to be obtained from third parties, where time has been lost in a vain attempt to reach a compromise, or where a decision on an objection must await a relevant decision by the courts.¹⁴

For these reasons, statutory time-limits may provide guidance for a decision by the ombudsman, but they cannot take the place of his independent assessment of whether conduct has been proper.

If no relevant statutory time-limit exists, the authority has a duty to act within a reasonable period. Section 4:13 of the AWB provides in subsection 1 that, in the absence of a statutory time-limit, a decision should be taken within a reasonable period. Subsection 2 provides that the reasonable period referred to in subsection 1 shall in any event expire if the administrative authority has not taken a decision or given notice as referred to in section 4:14, subsection 3 of the Act within eight weeks. The definition of a reasonable period depends on the kind of decision involved and the particular circumstances of the case. A heavy workload as a result of absenteeism or staff shortages may explain a breach of the relevant time-limit, but it will not justify it.

The promptness criterion also applies to correspondence. Two to three weeks is a reasonable period in which to answer a letter. If it is not possible to give a substantive reply within a reasonable period, the administrative authority should send a holding letter, if possible indicating when it will be able to give such a reply and stating the reasons for the delay (adequate information provision).

The standards below relate to situations in which breaches of statutory time-limits are improper (nos. 1-3), and to those exceptional situations in which they are not (no. 4). They also provide a definition of the concept of a 'reasonable period' in those cases where a statutory time-limit cannot be met, and for the execution of judgments by the courts.

18 ADMINISTRATIVE ACCURACY

Formulation

Administrative authorities should be meticulous in the way they do their work.

General discussion

The criterion of administrative accuracy means that administrative authorities should be meticulous in the way they do their work. They should avoid sloppiness and correct errors as quickly as possible.

Documents supplied to them should be kept carefully and information they receive should be adequately processed. In addition, any information they provide should be accurate and clear. This implies that they should keep their files in order and that they should sometimes gather information on their own initiative.

The criterion of administrative accuracy derives from the principle of due care. It is indirectly related to the law, in that inaccuracy can give rise to breaches of general legal norms like the formal duty of care or the principle that authorities should provide reasons for their decisions, or can cause loss or damage requiring compensation to be paid.

19 ACTIVE AND ADEQUATE INFORMATION PROVISION

Formulation

Administrative authorities should, either if requested or on their own initiative, provide sufficient information to enable citizens to defend their own interests. This implies, among other things, a duty to answer every letter from a citizen, dispatch a confirmation of receipt, and send an interim reply if it is taking longer than initially expected to produce a substantive response.

General discussion

Authorities and citizens often find themselves embroiled in situations where the right information can help clear the air between them. Transparency is a necessary precondition both of the credibility of an authority and of public confidence in it. For that reason, it is vital that authorities provide information about their intentions and actions affecting the interests of citizens in order to ensure credibility and public confidence.

This criterion is translated into detailed provisions in sections 3.2 and 3.4 of the AWB, and in the full preparatory procedures laid down in parts 3.4 and 3.5 of that Act. **15** Other aspects of information provision are addressed in the Government Information (Public Access) Act (*Wet openbaarheid van bestuur*). In particular, the grounds for refusal given in section 10 of that Act can be cited as statutory grounds for general limitations on information provision.

The criterion that administrative authorities should ensure active and adequate provision of information to citizens encompasses two requirements: on the one hand, to respond to citizens' requests for information; on the other, to act on their own initiative in providing citizens with information about actions which may affect their interests.

20 ACTIVE AND ADEQUATE INFORMATION GATHERING

Formulation

In preparing to take action, administrative authorities should gather information relevant to the context in which they intend to act.

General discussion

The principle of due care demands, among other things, that administrative authorities should know what interests are likely to be affected by their actions. When preparing to take action, therefore, they have an obligation to find out who will be affected and what effects can reasonably and humanly be expected. Having done this, they should weigh up the interests they have identified against the purpose of the actions they envisage, taking account of the information they have gathered in the course of their preparations.

This norm is related to the right of both sides to a hearing, but is more limited in scope; it relates only to the information-gathering in which an authority engages on its own initiative when preparing to take a decision on future action. By contrast, the principle of the right to a hearing gives interested parties a voice in the preparation of decisions.

21 ADEQUATE ORGANISATION OF SERVICES

Formulation

Administrative authorities should organise their administration and services in such a way as to ensure proper service to the public.

General discussion

An administrative authority should organise its administration and services in such a way as to ensure proper service to the public. The term 'proper service to the public' refers to the principle of due care but also to other requirements: specific systems (i.e. systems that ensure that procedures are effective), public access, promptness, information provision, record-keeping etc. One aspect particularly worth mentioning in this respect is the duty of administrative authorities to organise their internal systems in such a way as to guarantee continuity of service: record-keeping and the archiving of records are among the means to this end.

In this respect, we distinguish between external provision, designed primarily to ensure service to the public, and internal provision, which serves to ensure the smooth operation of authorities' internal processes.

22 CORRECT TREATMENT

The criterion of correct treatment refers to good manners and helpfulness on the part of the authorities. It relates to the behaviour of officials and administrative authorities in their dealings with individual citizens. Helpfulness means simple acts of courtesy, like showing someone the way.

1 POLITENESS AND GOOD MANNERS

Formulation

Administrative authorities should respect citizens as individuals and deal with them politely.

General discussion

The criterion of politeness and good manners is part of the requirement of correct treatment. It means that

government should refrain from any action generally regarded as rude. The term 'action' includes both performing or refraining from performing physical acts, making or refraining from making particular remarks, and adopting or refraining from adopting particular attitudes. In more positive terms, it amounts to a requirement that administrative authorities and their employees should be polite to citizens and should sometimes, as a matter of common courtesy, offer a helping hand to people dependent on their work.

II HELPFULNESS

Formulation

Administrative authorities should adopt a helpful attitude in their individual dealings with citizens.

General discussion

Administrative authorities should be helpful to citizens in simple ways, such as helping them find their way. They and their employees should offer any assistance they can wherever necessary or whenever they are asked to do so.

23 PROFESSIONALISM

Formulation

In their dealings with citizens, officials with specific training or professional qualifications should observe normal professional codes of conduct.

General discussion

Professional conduct means the conduct of specially trained or qualified people in the exercise of their professions, particularly when they are employed by government. Such people include police officers, military personnel, medical practitioners, judges and lawyers.