

# THE DANISH OMBUDSMAN – A NATIONAL WATCHDOG WITH EUROPEAN RESERVATIONS

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## Abstract

The Danish Parliamentary Ombudsman occupies a central position as a watchdog over public authorities within the national context. The statutory and functional powers of the institution are wide and the ombudsman enjoys an a priori sympathy from e.g. Parliament and the media. In addition, there are no specialised administrative courts in Denmark and the ombudsman is thus unrivalled on the legal scene as the primary specialist protector of good administration. Nevertheless, the ombudsman subscribes to a narrow scope of focus in the protection of citizens' rights. In practice the ombudsman often limits his review to the compliance by authorities of national law and in particular of general procedural requirements. The rights of citizens are only actively protected by the ombudsman as far as certain parts of general administrative law is concerned. The current strategy of selected preferences of the Danish ombudsman leaves European Union rights of citizens largely unidentified and unprotected. The Danish ombudsman is a watchdog with teeth but with discerning taste buds. As to EU Law, the ombudsman is reserved and has no appetite at all.

## 1. Introduction

The Danish Parliamentary Ombudsman is one of the oldest ombudsman institutions in the world and occupies a central position as a watchdog over public authorities within the national context. The statutory and functional powers of the institution are wide and multilevel and the ombudsman institution in practice often enjoys an *a priori* sympathy from e.g. the national Parliament and the Danish media. In addition, there are no specialised administrative courts in Denmark and the ombudsman institution is thus traditionally unrivalled on the legal scene as the primary specialist protector of good administration.

Nevertheless, the Danish ombudsman institution subscribes to a narrow scope of focus in the protection of citizens' rights *vis-à-vis* public administration. In practice the ombudsman often limits his review to the national authorities' compliance of purely national law and in particular to the compliance of a range of general procedural requirements. Thus the rights of citizens are only actively protected by the ombudsman as far as certain parts of general administrative law is concerned. The limited horizon in the control and thinking of the ombudsman leaves the European Union rights of citizens largely unidentified and unprotected. The Danish ombudsman is a watchdog with teeth but with discerning taste buds in practice. As to Community law the Danish ombudsman is a watchdog with reservations.

The primary object of the following article is the Danish context but it also embraces a number of aspects which are of interest to the understanding of ombudsmen in general. The article sets out with an analysis of the Danish ombudsman model. This section describes the normative competences, the functional flexibility and the *de facto* alliances of the influential Danish ombudsman (Section 2). This point of departure is contrasted with an analysis of the strategy of selected preferences in the ombudsman's practice on citizens' rights (Section 3). The sparse and cautious inclusion of Community law is addressed as a specific manifestation of the ombudsman's general tendency to a narrow legal gauge (Section 4). A range of explanations for this strategy are discussed in the final parts of the article (Section 5 and 6).

## 2. The Danish ombudsman context – a variety of powers and alliances

Historically, the Danish Parliamentary Ombudsman (*Folketingets Ombudsmand*) was incorporated into the amended Danish Constitution of 1953 reflecting a need for an improved protection of the individual citizen against public authorities (The Danish Ombudsman, 1995, The Danish Ombudsman, I-III, 2005, Gammeltoft-Hansen, 1996). The Danish courts did not suffice as a control body in this respect. The economic reconstruction of Danish society after World War II necessitated a powerful state and an administrative apparatus with extensive powers. The public administration grew immensely in size and Parliament enacted an increasingly number of regulations providing administrative authorities and agencies with both numerous and discretionary powers. As a legal counter-measure to this development, the Danish ombudsman institution was established. The Act creating the office of the Parliamentary Ombudsman

was passed in 1954<sup>1</sup> and the first ombudsman – a distinguished professor of criminal law - took office in 1955. The act has been amended most recently in 1996 and 2009.

### **2.1. The Danish ombudsman as a *primus/prima inter pares***

The Danish ombudsman belongs to the tradition of Scandinavian ombudsman institutions. Although there are a number of similarities between the various institutions, they also show considerable individuality. The Swedish ombudsman is the oldest in the world dating back to 1809 (Wieslander, 1994). The general framework is that the holder of the office is appointed by the legislator and enjoys independence of both the executive and the judiciary. The task of the institution is to inquire into administrative decisions and to safeguard the interests of citizens by ensuring administration according to the law, discovering instances of maladministration and eliminating defects in administration. Subsequent ombudsman institutions were created in Finland in 1920, in Denmark in 1955 as mentioned above and in Norway in 1962 (Kucsko-Stadlmayer, 2008).<sup>2</sup>

Scandinavian ombudsmen are generally divided into two basic models: the disciplinary authority model (Swedish-Finnish model) and the quasi-administrative court model (Danish-Norwegian model). A characteristic of the classical Swedish-Finnish model is the power of the ombudsman to act as a *prosecutor* and to bring criminal charges or disciplinary proceedings against individual public officials. The focus of the disciplinary ombudsman is the correct behaviour of the public employees, not the decisions of public authorities. In practice, however, the Swedish and Finnish ombudsmen are inclined to express criticism or to put forward recommendation and *not* to exercise their formal powers. As for areas of normative focus, both the Swedish and the Finnish ombudsman today have a statutory duty to supervise the enforcement of the fundamental rights and freedoms of citizens. In Sweden this explicit scope of control was established in 1974 whereas the emphasis in the Finnish ombudsman system on fundamental rights was a result of a constitutional elaboration of the fundamental rights provisions in 1995. The intention is to bring these rights closer to the level of practical application and to enhance their influence on daily administration in Finland. Characteristic of both Sweden and Finland is, moreover, that they have established a number of specialised ombudsmen institutions with specific legal competences, e.g. the Data Protection Ombudsman, the Equality Ombudsman, the Ombudsman for Minorities and the Children's Ombudsman.

Arguably, the Danish-Norwegian ombudsman model functions to some extent as an administrative quasi-court reviewing public authorities as such and assessing general principles on good administration. At the outset, however, the Danish ombudsman

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1 The Ombudsman Act no. 203 of 11 June 1954 with subsequent amendments.

2 See [Online] on Sweden at [www.jo.se](http://www.jo.se) (*Justitieombudsmannen*), Finland: [www.ombudsman.fi](http://www.ombudsman.fi) (*Eduskunnan oikeusasiamies*), Denmark: [www.ombudsmanden](http://www.ombudsmanden.dk) (*Folketingets Ombudsmand*) and Norway: [www.sivilombudsmannen.no](http://www.sivilombudsmannen.no) (*Stortingets sivilombudsman*).

was designed as an equivalent to the Swedish prosecutor model but the Danish institution has evolved independently. The Danish ombudsman has never exercised his original possibilities of initiating criminal or disciplinary proceedings and the focus of both the Danish and Norwegian ombudsmen has been decisions of public institutions rather than the behaviour of individual civil servants. Upon the revision of the Danish Ombudsman Act in 1996 the disciplinary powers of the ombudsman were omitted due to this long-standing practice. As opposed to the defined role of the Swedish and Finnish ombudsman, the Danish ombudsman enjoys a more autonomous role in developing legal principles of good administration. There is no statutory duty in the Danish Ombudsman Act to include *e.g.* the fundamental rights of citizens.

In Sweden and Finland decisions of public administration can be appealed to regional administrative courts and a supreme administrative court. No such possibilities exist in Denmark. Denmark has no administrative court but only a system of ordinary courts of law (Gøtze and Rytter, 2000). The ordinary Danish courts review all kind of cases concerning private law, public law and criminal law. Thus, the overall institutional structure of the Danish control system *per se* provides the ombudsman institution with a primary position as a specialist in administrative law. Moreover, the ordinary Danish courts until recently mostly reviewed private law cases and conversely only a few public law cases leaving normative space for the Danish ombudsman's assessment and development of legal principles. For the time being, however, the court system as a whole receives an increasing number of administrative cases and this may, in the long term, change - and perhaps limit - the position of the Danish ombudsman. According to the Danish court system, the present amount of public law and private law cases is some 70 % and 30 % respectively of the total amount of civil law cases.

Despite the Danish ombudsman institution's historical affinity to the other Scandinavian ombudsmen, the institution today stands out as far as its conceptual and intellectual impact on general administrative law is concerned. Apart from his practice on general administrative law the Danish ombudsman produces extensive academic literature on administrative law matters. In addition, almost all literature in English on the Danish ombudsman stems from the ombudsman institution itself. Coupled with the fact that all Danish standard textbooks massively draws on the practice and theoretical concepts of the Danish ombudsman, this paves the way for an influential national ombudsman. The current Danish ombudsman holds the position of the *primus inter pares* among Scandinavian ombudsman institutions.

## **2.2. Normative omnipotence and functional flexibility**

The Danish ombudsman institution is normatively omnipotent within public law and the institution is empowered to examine and to deal with *all* aspects of public law. The Danish Ombudsman Act is open-ended and largely discretionary containing only few normative and clear-cut limitations of the scope of the ombudsman's review of public authorities (General Administrative Procedures Act no. 473 of 12 June 1996 with subsequent amendments). If the ombudsman institution has the ambition to

harbour an expansive normative role, the Ombudsman Act is rarely a hindrance. As to the fundamental formal boundaries of the ombudsman's current competence it follows from the Act that the ombudsman cannot review the acts or the behaviour of the Danish Parliament, the courts of law and private institutions.

Another basic characteristic of the Danish ombudsman is his functional flexibility. Compared with courts of law the ombudsman operates in a much more informal framework and is given vast freedom in his selection of cases. Generally, the existence of only minimum legal barriers to the ombudsman is an inherent element of the ombudsman model. The *actio popularis* principle gives anybody the right to lodge a complaint and there is no requirement of material interest in the case (Gammeltoft-Hansen, 1998). There are only a few formal requirements that must be adhered to, such as a requirement that attempts should have been made to resolve conflicts within the system of administrative recourse before the ombudsman is involved in the case. The majority of the Danish ombudsman's cases are complaint cases. Some 3700 of an annual total of 4000 cases are complaints from citizens. It is free of charge to lodge a complaint which in itself makes the ombudsman more accessible to citizens than the court system. The open track system combined with the ombudsman's functional flexibility give the ombudsman a good prognosis for receiving cases concerning *all* aspects of citizens' rights.

However, this open access does not mean that all complaints are dealt with. In practice, the Danish ombudsman relies on a selection of complaints and it is up to him whether a complaint affords adequate grounds for investigation. About 75 % of all complaints are rejected by the ombudsman primarily due to the fact that the citizens have not exhausted administrative redress. With this reduction, this annual amount of complaints that are treated on their merits is some 1000 cases. The ombudsman's selection policy revolves around complaints that deal with general principles in administrative law and with issues of general interest. The majority of the admitted complaints deal with administrative decisions (*l'actes administratifs* or *Verwaltungsakten*) which represent a distinct area of focus of the Danish ombudsman. As for the substantive areas of public authorities the complaints tend to fall within e.g. social law, employment law, education law, health law, environmental law, taxation law, local government law and criminal law. A specific field of interest for the ombudsman is the right to access to documents.

The opinions of the ombudsman are *per se* soft law opinions in the sense that the public authorities are not legally obliged to comply with them. This is a well-known characteristic of most ombudsman institutions. As to the statutory catalogue of ombudsman actions the Danish Ombudsman Act states that the ombudsman "may express criticism, make recommendations and otherwise state his view of a case" (Article 22 of the Ombudsman Act). Although the ombudsman is deprived of formal sanctions, he is given wide freedom in the wording of critical opinions. The opinion of the ombudsman is phrased in the first person singular ("I state as follows ...") stressing the fact that the opinion is given by the ombudsman personally. The ombudsman

expresses his opinion on behalf of Parliament and this has a ceremonious impact. The written opinion of the ombudsman is often attached to thorough summaries of the facts of the case and with relatively thorough legal arguments in order to convince the recipient authority of the justification of the ombudsman's opinion. If an authority refuses to comply with a recommendation by the ombudsman, the ombudsman may recommend that the complainant be granted free legal aid as to bringing the case before a court of law (Article 23 of the Ombudsman Act). The percentage of cases that ends up with a critical ombudsman opinion is typically some 20 %. The percentage is considerably higher with regard to ombudsman cases concerning local authorities.

A significant embodiment of the ombudsman's functional flexibility is his investigation powers. The ombudsman can choose to act as a "nosy detective" by exercising his powers to instigate a specific or general investigation on his own initiative. These powers are not incumbent on the courts of law. Although the proactive cases of the ombudsman constitute a smaller part of the total bulk of cases, they form a potent part of the normative work of the institution. The general experience is that even the prospect of being involved in an ombudsman investigation means a loss of prestige for the public authority in question. In conjunction with the negative press coverage that an investigation may generate, an ombudsman investigation on his own initiative often lead to improvements by the public authority even if the ombudsman has not reached any conclusions. In addition, the ombudsman can perform inquisitorial activities during an investigation and authorities are obliged to furnish the ombudsman with the relevant information. Also the obligation to contribute to an ongoing ombudsman investigation can in itself produce positive changes at a preliminary stage.

The wide powers - and the following alliances - of the ombudsman have in large measure compensated for the ombudsman lack of formal sanctions. Most of the ombudsman's critical or advisory opinions are adhered to by the responsible public authority (Passemiers, Reynaert and Steyvers, 2009). The exact percentage of adherence is not known but it is traditionally stated in the ombudsman's academic writings that the figure is high.

### **2.3. Alliance with Parliament**

The interplay between the Danish ombudsman and the national Parliament (*Folketinget*) is an important prerequisite for the traditional stronghold of the ombudsman institution. The interplay is complex and is only partly regulated in the Danish Ombudsman Act. The most interesting parts of the interplay result from an informal scheme of cooperation.

The Danish Ombudsman Act contains explicit provisions on the election and dismissal of the ombudsman. The general notion is that Parliament acts as an employer *vis-à-vis* the ombudsman personally concerning the initial and the final stages in the ombudsman's term of service. Thus, the ombudsman is elected by Parliament after each general election in a majority vote and can be dismissed by Parliament if the ombudsman ceases to have the confidence of Parliament. There are only a few written

requirements as to the qualifications of the ombudsman but in practice it is considered of particular importance that the candidate can be regarded as party political neutral. There is no fixed ombudsman term in Danish law as opposed to e.g. Swedish and Finnish law. As to the dismissal procedure, there are no specific grounds for dismissal in the Danish Ombudsman Act and it is left to Parliament to define the concept of a lack of confidence. So far the dismissal procedure has never been activated and the vast majority of the political parties have consistently supported the ombudsman. The present Danish ombudsman was re-elected in 1987, 1988, 1991, 1994, 1998, 2001, 2005 and 2007. He has held the ombudsman office both under mainly Conservative-Liberal led and Social Democrat governments.

The backing of Parliament reflects itself not only in the formal election of the ombudsman but also in the fact that the Parliament presumably supports and shares the general legal values of the ombudsman such as the right to good administration. The fact that the ombudsman acts according to a political and parliamentary mandate is a fundamental feature of the ombudsman model. The ombudsman performs his task of overseeing public administration as the official and trusted *representative* of Parliament. However elusive the presumptive support by the Parliament might be, it contributes to the strength of the Danish ombudsman.

The concrete parliamentary actions in the wake of an ombudsman investigation or a final ombudsman opinion revolve around the system of standing committees in Parliament. When the ombudsman deals with state authorities, he ultimately deals with a Minister of Government acting as the head of the administrative authority. A well-established practice in Denmark is parliamentary intervention with regard to the responsible Minister by means of a *consultation* in the relevant parliamentary committee. The committees are the workshops of the Parliament and all major decisions are prepared in the relevant committees.

For the time being the Danish Parliament has 25 standing committees and the working sphere of a committee roughly corresponds to that of a ministry. Important standing committees are the Labour Market Committee, the European Affairs Committee, the Defence Committee, the Municipal Affairs Committee, the Economic and Political Affairs Committee and the Foreign Affairs Committee. At the opening of each parliamentary year and after general elections, Parliament appoints MPs to sit on the committees. The individual political parties are represented according to the number of seats which the parties have obtained in the Parliament. Thus, the committees politically mirror Parliament itself. The task of the committees is primarily linked to the reading of Bills. In addition, the committees follow the general development within their spheres of competence and this is where the political support for the ombudsman comes into play. The committee may ask a Minister to appear before the committee in order to answer questions according to the consultation procedure. Such consultation frequently takes place in an open meeting.

A releasing factor of a consultation with a Minister is the ombudsman's investigations. If the ombudsman has expressed criticism as a response to a citizen's complaint, the

committee subsequently asks questions as to the remedies and proposed actions of the Minister acting as head of the executive. The result of the consultation is almost invariably that the Minister decides to follow the recommendations of the ombudsman in order to avoid additional political pressure. The tendency towards appeasement is enhanced if there is press coverage of the case. Functioning as a sword of Damocles, the mere prospect of a consultation procedure is sometimes in itself a sufficient means to ensure compliance. Today, there is an increasing usage of the consultation procedure and the annual amount of questions asked is some 700. There is no official tracking of the amount of questions initiated by the ombudsman.

In a highly media exposed ombudsman case from 2008 concerning the right to family reunification under the EU law on the free movement of persons, the Danish Integration Authorities made substantial alterations, during the ombudsman's actual preliminary investigation, to the Danish guidelines on the scope of the right to family reunification. The Minister of Integration was consulted by the Parliamentary Legal Affairs Committee with a view to the ombudsman investigation and the minister decided "voluntarily" to change the practices. The investigation by the ombudsman is a result of *inter alia* the judgement of 25 July 2008 of the European Court in Case C-127/08, *Metock*, and of European Parliament and Council Directive 2004/38/EC of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States (Annual Parliamentary Ombudsman Report, 2008, p. 238).

It can be noted that the Danish Parliament only rarely acts on a general legislative level as a result of ombudsman complaints. The legislative process is not perceived as the most effective response to an acute problem involving a citizen and a public authority. At a specific level, however, the Parliament quite frequently decides to pass legislation that extends *financial* subsidies and grants to the public authority that has been the object of an ombudsman investigation. Together with the financial intervention by the Parliament, a critical opinion by the ombudsman turns into a positive change for the responsible authority in the shape of extended resources. No matter how ominous an ombudsman investigation might be perceived by an authority at a first glance, the ombudsman's activities – especially his inspections of prisons and mental hospitals – have relatively often drawn the attention of the Parliament to the problems of the authorities. A parliamentary metamorphosis sets in and the outcome of the ombudsman's case is to the benefit of the public authority.

#### **2.4. Alliance with the media**

A further – and no doubt – crucial reason for the *de facto* power of the Danish ombudsman is the tendency to "ombudsmania" that characterizes Danish media. Although it is rarely stated in legal discussions, the alliance between the ombudsman and the press has been a *conditio sine qua non* to the success of the Danish ombudsman. Frequently, the sympathy of the media lies with the citizen who is allegedly wronged by public administration and this phenomenon in itself nourishes the perception of



the ombudsman as a guardian of good administration. In fact, the ombudsman and the press are mutually dependant in the sense that the ombudsman acts as the press ombudsman when handling complaints from journalists regarding the right to obtain access to documents from public authorities. It is interesting that the ombudsman in practice gives cases on access to documents a high priority and that a considerable part of the published ombudsman opinions deal with this particular legal topic.

As to his general role as a media hero it is an advantage to the Danish ombudsman that there is only *one* ombudsman and that the reference in the press to the ombudsman is thus unambiguous. The term “ombudsman” is legally protected by the Danish Ombudsman Act in order to avoid a watering down. The Swedish model is different in this respect due to the existence of special ombudsmen as mentioned above and due to the fact that the tasks of the Swedish ombudsman is carried out by four ombudsmen/ombudswomen in specific supervisory areas.

The power of the joint forces of the Danish ombudsman and the press is illustrated by a highly political ombudsman case from 2007 in which the Danish ombudsman confronted the Danish Prime Minister (Annual Parliamentary Ombudsman Report 2007, p. 347). The ombudsman uttered harsh criticism of the Prime Minister for refusing to give an interview to a journalist from a tabloid newspaper. The intended topic of the interview was the Danish Government’s decision to participate in the Iraq war in 2003. Initially, the Prime Minister ignored the recommendation of the ombudsman. After having written a so-called open letter to the Prime Minister, published in the Danish press, the ombudsman persuaded the Prime Minister to comply with his recommendation and to accept the controversial interview with the journalist.

The Danish ombudsman’s habitual heroic status in Danish press by far overshadows the coverage of e.g. the European ombudsman. To Danes the Danish ombudsman simply epitomizes the idea of ombudsman and the international ombudsman perspective has generally a peripheral status in Denmark. The right of Danish citizens to lodge complaints with the *European Ombudsman* is very rarely exercised. According to the European Ombudsman office, a total of only 95 Danish complaints were lodged with the European Ombudsman from 2003 until 2007 representing a considerably lower percentage of complaints than the one would expect taking the relative size of the Danish population into consideration (European Ombudsman, 2008, and e.g. Heede, 2000).

### ***2.5. Traditional alliance with academia***

A final alliance that I want to touch upon in this panorama is the ombudsman institution’s ties to *academia*. The ties are clearly reflected in the recruitment of ombudsmen and in the fact that among the four Danish ombudsmen so far, three candidates have had academic career profiles as professors or doctors of law in criminal law, administrative law or the law of criminal procedure. The current Danish ombudsman – appointed in 1987 - is no exception.

The distinct academic profile of the institution is further enhanced by the multilevel academic activities of the ombudsman as an institution and as a person. In addition to legal writings the ombudsman and his executive staff are involved in teaching in numerous contexts. It is difficult to overestimate the importance of the academic and educational activities of the Danish ombudsman when consolidating the authority of the institution. The writings of the ombudsman have extensively been incorporated into other standard textbooks on administrative law resulting in a unique academic environment surrounding the Danish ombudsman. Since Danish law textbooks on general administrative law are in large measure inspired by ombudsman writings, it is hardly surprising that the concepts of the ombudsman play a pivotal role. An interesting aspect is that the ombudsman's approach to European Union Law is echoed in almost all Danish textbooks resulting in a general administrative law culture that is still predominantly and overtly national.

### **3. Danish ombudsman in practice – a strategy of selected preferences**

An outline has been provided above of the general ombudsman's context in Denmark and what the Danish ombudsman is in principle capable of achieving as far as protecting citizens' rights is concerned. We now turn to the practice of the institution. So far, the ombudsman has primarily operated within a rather narrow framework and has adhered to a strategy of selected preferences with a predominant focus on national procedural requirements.

#### ***3.1. National and general administrative law***

Judging from the published opinions of the Danish ombudsman institution it is a fundamental characteristic that the institution consistently concentrates on national legislation and on national legal principles and concepts. The range of legislation examined by the ombudsman comprises a number of specific acts within the competences of the ombudsman such as immigration law legislation, social law legislation, environmental law legislation, employment law legislation and criminal law legislation. In practice, however, the dominant focus of the ombudsman is *general* administrative law legislation and principles, i.e. legislation and principle that apply to most public authorities and in most public law sectors. In action, the ombudsman is first and foremost a specialist in general administrative law.

#### ***3.2. Consistent procedural preference***

As to areas of specific focus within general administrative law, the original anticipation in the preparatory works to the Danish Ombudsman Act was that the ombudsman institution should review especially compliance with *substantive* principles of law such as legality, equality and proportionality. Only to some degree, however, has the Danish ombudsman realised this original intention. Over the years, a distinct priority of the Danish ombudsman has been his enforcement and development of

*procedural* requirements relating to the processing of an administrative case such as the obligations to make a prior hearing, to give reasons and to investigate the facts of case. Thus, this tendency in the actual review of authorities is a *further* narrowing of the national and general focus of the ombudsman.

The preference for formalities and technicalities over substance and content is basically due to the fact that the Danish General Administrative Procedures Act from 1985 deals *only* with procedural matters (Act no. 571 of 19 June 1985 with subsequent amendments). The Act is a codification of existing procedural requirements and the codification conversely excludes substantive principles. The scope of the Danish General Administrative Procedures Act is much narrower than *e.g.* the European Code of Good Administrative Behaviour of the European Ombudsman comprising both substantive and formal requirements. The European Code of Good Administrative Behaviour was approved in September by the 2001 by the European Parliament (Nassis, 2009; Craig, 2006). In addition, the Danish General Administrative Procedures Act is a minimum protection act and on that backdrop the ombudsman has taken a *dynamic* and teleological approach to the interpretation of some of its specific provisions. On a number of occasions, the ombudsman institution has widened and expanded the scope of the rights in the Act in order to protect citizens. The result is that, today, the Act can only be interpreted in close combination with the case law of the ombudsman.

At a practical and operational level, moreover, the executive's non-compliance with procedural requirements can arguably be more easily scrutinized by the ombudsman on the basis of the documents of the case than the non-compliance with substantive requirements such as *e.g.* anti-discrimination requirements. As in many other countries the review by Danish ombudsman is normally based on written material and correspondence between the ombudsman and the authorities and this fact has promoted a normative proceduralisation. Unlike the courts the ombudsman does not have the powers to hear witnesses and directly evaluate the credibility of the persons involved. Another practical and strategic reason for the ombudsman's preference for a procedural review is arguably the fact that the ombudsman can more easily voice his criticism of technicalities and formalities than substantive matters. By formulating a technical criticism the ombudsman avoids the more stigmatising and confrontational criticism that is inherent in a substantive overruling of a public authority. Finally, there is no doubt that the current ombudsman institution has an intellectual preference for procedural requirements.

The normative activism by the ombudsman with regard to the Danish General Administrative Procedures Act has not been unchallenged by the courts, however. In particular in the field of employment law, the ombudsman's approach has given rise to debate. In a number of cases, the ombudsman has put forward a specifically dynamic interpretation of the Act preventing the usage of bilateral agreements on resignation concerning public employers and employees. According to the ombudsman such agreements cannot be made and the employer must comply with the administrative law requirements of *e.g.* the right of the employee to a prior hearing. The interpretation

of the ombudsman implies a more rigid labour market in the *public* sector than in the *private* sector which is contrary to a number of general labour market regulations. With a view to this, in 2004 the Danish Supreme Court explicitly overruled the ombudsman and allowed agreements on resignation also within the public sector. Subsequently, the Danish ombudsman has suggested that Parliament might take legislative action in order to clarify the matter. This still remains to be done (Decision of 16 November 2004 of the Danish Supreme Court, in the Danish Weekly Law Journal (Ugeskrift for Retsvæsen, 2005, p. 616).

### **3.3. Predominant state perspective**

In most cases the ombudsman deals with public authorities within the central administration. Historically, the primary competence of the ombudsman was until 1997 the state branch of the Danish public administration and this tradition is fundamentally still upheld in large parts of ombudsman practice. The strategic advantage of focusing on state authorities is closely linked to the parliamentary support mentioned above. By activating the parliamentary committees the ombudsman has traditionally been very efficient in enforcing his opinions and recommendations vis-à-vis state authorities. From 1997 onwards the ombudsman has full competence in general to review and control *local* government. This shift in the focus of the Ombudsman Act has led to an increase in the amount of local cases lodged with the ombudsman but the institution frequently still prefers to direct its attention to authorities within Danish central administration. The local perspective is no doubt a challenge to the Danish ombudsman institution. A general structural reform of the entire system of Danish local government from 2007 giving the 98 municipalities and five regions more powers calls for more focus - and more intensive - ombudsman focus on local and regional cases.

### **4. The ombudsman's European reservations**

As a consequence of the predominant national and procedural strategy, the Danish ombudsman rarely embarks upon a review of the compliance by public authorities with Community law such as the Treaties, regulations, directives and the case law of the European Court of Justice (ECJ). From a normative point of view, however, it can be stressed that the ombudsman has an obligation to assess and enforce all existing legislation. This is explicitly stipulated in the Danish Ombudsman Act which proclaims that the ombudsman shall assess whether any authorities or persons falling within his jurisdiction have acted or act in contravention of "existing legislation" or commit other errors or derelictions in the discharge of their function (Article 21 of the Ombudsman Act). There is no doubt that the principle of the supremacy of Community law and the doctrine of direct effect apply in Danish law and that Community law forms part of existing legislation (Craig, 1999, pp. 177-214, Steiner, 2006, pp. 69-114, and Kaczorowska, 2009, pp. 290-345). As to the total quantitative importance of secondary EU-law in current Danish law it is estimated by the Danish Justice Department that about 20 % of the acts that are enacted in the Danish Parliament today are based on European sources of law.

In the specific ombudsman context, moreover, it is worth noting that the Danish Ombudsman Act presupposes an equally close scrutiny of EU rights as national rights. This is unambiguously emphasized in the preparatory works to the Ombudsman Act (Committee Report No 1272 from 1994 on the Ombudsman Act, p.113).

“So far, the Ombudsman has been quite reluctant to include rules of EC law, now EU law, in the basis for his decisions. This reluctance cannot, in the opinion of the committee, be maintained. An ever increasing proportion of current law in Denmark – and in other EU countries – is regulated by rules originating from the bodies of the EU. These can be rules that apply directly in Denmark and therefore have to be used by Danish authorities. But they can also be acts passed by the Folketing or departmental orders issued by a minister for implementations of decisions made by the bodies of the EU. In the opinion of the committee, the use of EU law by the institution of Ombudsman should be planned as follows: If a question relating to EU law is decisive for the Ombudsman’s decision in a case he is considering and which is also being considered by one of the Community courts at the same time, the Ombudsman should stop considering the case or at least postpone any decision on the case until the court in question has spoken ... In *all other* cases, EU law should simply be included in the basis for the Ombudsman’s decisions when rules of EU law – including the judgements of the EU courts – are of importance” (Report No 1272 from 1994 on the Ombudsman Act, p. 295).

Thus, there is no doubt that the range of broad competences given by the Danish Parliament to the ombudsman institution is not only a prerogative but also an obligation

#### ***4.1. Unused functional potential***

Instrumentally, the ombudsman has at his disposal a number of possibilities that can ensure and enhance the enforcement of EU Law. So far, the ombudsman has refrained from using this potential in this field. For instance, the right of the ombudsman to select appropriate cases among the total bulk of complaints provides the institution with a unique possibility to focus on suitable European cases. In addition, the ombudsman enjoys a considerable autonomy in the legal assessments in so far as he can revise and expand the complaint themes of the citizens – for instance as far as relevant EU law is concerned – if he sees a need for this. As opposed to this, a court is to a large degree prevented from interfering with the claims that the parties put forward. Nonetheless, there is no example of the ombudsman making an active intervention concerning Community law. Furthermore, the powers of the ombudsman to initiate cases can potentially contribute to the enforcement of EU law regardless of the number and nature of complaints. They are, however, rarely used by the ombudsman in this field. Finally, the lengthy reasoning in the ombudsman’s opinions can be seen as an argumentative potential. The fact that the ombudsman does not hand down a decision dealing only with the case at hand but can also take a general approach to the legal problem that the case involves has great potential in terms of EU law. If the citizens’ awareness of their Community rights is basic or

non-existent, the mere voicing by the ombudsman of European sources of law can be a contribution.

#### **4.2. A minimalistic case law**

The Danish ombudsman's case law on Community law is limited. As far as the official ombudsman registrations are concerned, the Danish ombudsman has until now (December 2009) dealt with only *four* cases on European Union law. The register on the homepage [www.ombudsmanden.dk](http://www.ombudsmanden.dk) has three entries on EU law: "Miscellaneous", "Implementation" and "European Institutions". The four cases are found in the Annual Parliamentary Ombudsman Reports 1989 p.148, 1991 p. 65, 1990 p. 58 and 2000 p. 142. They are described in the following. This is the total of ombudsman opinions with Community law perspectives in the entire pool of published ombudsman cases from the Danish accession to the European Communities in 1973 until now. As mentioned above, the Danish ombudsman nowadays submits some 1000 cases on their merits every year and with a view to this, a total of four opinions in more than 35 years of ombudsman practice – comprising perhaps 30.000 cases - is modest to say the least.

As a contrast, it can be noted that the Danish Supreme Court from January 2009 to December 2009 has embarked upon an assessment of European Union Law in a total of 8 decisions. The amount of European Supreme Court cases is recorded on the homepage of the Supreme Court since 2009. With a view to this, the Danish Supreme Court is considerably more active than the Danish ombudsman in the European field. This significant discrepancy is in itself surprising due to the fact the Danish ombudsman and the courts of law are supposed to assess their (public law) cases on the basis of a similar understanding of the concept of existing law.

The unpublished cases of the Danish ombudsman do not alter the general impression of a limited European case law. Since 2004 the ombudsman has implemented an internal registration of cases with European Union law aspects and the bulk of cases within this registration have been included in my analysis of the ombudsman's case law. As to the right of access to document it can be noted that the Danish ombudsman in three unpublished opinions – all from 2004 - has assessed parts of Regulation 1049/2001 on access to documents.<sup>3</sup> These cases are the sole contributions by the ombudsman to the understanding of the regulation – for instance Article 5 of the regulation on collaboration between national and European authorities - which has direct application and is binding in its entirety.

#### **4.3. No equivalence in argumentative patterns**

It follows from Community law that national authorities - such as the ombudsman, the courts and public authorities – must apply Community law with respect to the

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3 Regulation (EC) no. 1049/2001 of the European Parliament and of the Council regarding public access to European Parliament, Council and Commission documents, [2001] O.J. L 145/43. See on the regulation e.g. Driessen, 2005.

principles of equivalence and effectiveness. Community law is enforced through national authorities but Community law imposes these two main limitations on the national competence concerning judicial protection. It goes without saying that the principles are relevant also to the Danish ombudsman in relation to the protection of citizens' European rights. The principle of equivalence requires that Community law actions cannot be treated less favourably than comparable actions derived from purely domestic law. In *Peterbroeck v Belgian State* the ECJ stated as follows:

“(...) the Court has consistently held that, under the principle of co-operation laid down in ... the Treaty, it is for the Member States to ensure the legal protection which individuals derive from the direct effect of Community law. In the absence of Community rules governing a matter, it is for the domestic legal system of each Member State to designate the courts and tribunals having jurisdiction and to lay down the detailed procedural rules governing actions for safeguarding rights which individual derive from the direct effect of Community Law. However, such rules must not be less favourable than those governing similar domestic actions nor render virtually impossible or excessively difficult the exercise of rights conferred by Community law”.<sup>4</sup>

The principle of effectiveness demands that national remedies and procedural rules cannot render the exercise of Community law rights virtually impossible or excessively difficult (See onHartley, 2007: 226-229, and Wyatt and Dashwood, 2006: 205-234). Inspired by the principle of equivalence, in particular, the ombudsman's protection of purely Danish law and Community law is outlined in the following. In order to have the fullest basis for such an analysis I have included a number of borderline opinions that can be said to involve EU law although they are not officially recorded in that capacity by the ombudsman institution.<sup>5</sup> In general, the criteria for the official recording by the ombudsman of cases on Community law have not been clarified by the ombudsman in *e.g.* his annual reports.

The recurrent patterns are relatively simple: As to purely Danish cases the ombudsman typically enforces the selected elements of Danish law by means of both reactive and *proactive* instruments and the ombudsman quite *often* concludes by voicing criticism of the public authority in question. In Danish cases the ombudsman voices criticism in some 20 % of cases. As the enforcement of Community law, however, the patterns differ. The Danish ombudsman is reactive in his inclusion of European law aspects and he very rarely voices criticism. If the ombudsman considers a critical conclusion as to the application and interpretation of Community law, moreover, he seems more open to forgive errors by administrative authorities if they concern Community law than if they concern Danish law. Especially in the 2008 ombudsman case on the right to family reunification under EU principles of free movement of

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4 Case C-312/92, para. 12.

5 The border line opinions are the Annual Parliamentary Ombudsman Report 2008 p. 238, 2007 p. 239, 2006 p. 578, 2006 p. 529, 2006 p. 379, 2005 p. 507, 2003 p. 309 and 2000 p. 410.

workers the ombudsman explicitly considered the repetitious confessions and *mea culpa* statements of the involved authorities as a mitigating factor (Annual Parliamentary Ombudsman Report 2008, p. 238) A final distinct pattern is that the ombudsman only assesses the compliance of EU law by state authorities.

To elaborate the European side of this comparative analysis, it can be noted that the original initiative to include European law is typically taken by the complaining citizen. The ombudsman limits himself to reacting to complaints from citizens in which an explicit reference to EU law is made. If Community law rights *are* included in the case, however, the ombudsman requests the public authority to make a legal analysis and presentation of the relevant Community law. For his part, the ombudsman is reluctant to embark on a substantial assessment of EU Law. An official explanation for the ombudsman's reluctance and caution is the presupposed role of the ECJ. According to the Danish ombudsman institution, the ECJ enjoys a kind of right of "exclusivity" to assessment of EU Law, precluding the ombudsman from entering the scene. This explanation was first introduced by the ombudsman in the 1980s and has since been incorporated into several opinions.

In a case from 1989 concerning the Danish tax authorities the ombudsman received a complaint from a Danish citizen employed at the European Commission. The citizen's claim was that he was not subject to – relatively strict - Danish tax legislation and that his legal status in that respect is to be assessed on the basis of Community rules. During the case the citizen was assisted by a lawyer who provided the ombudsman with a statement on the relevant points of law. Although the ombudsman's opinion is somewhat ambiguous, the conclusion is an explicit reservation as to the ombudsman's general suitability to include and assess EC Law. The ombudsman encouraged the citizen to refer the case to the courts of law. According to the ombudsman the courts are more appropriate to deal with EU law due to the fact that the courts – as opposed to ombudsmen – are empowered under Article 234 EC (formerly Article 177) to request the ECJ to give a preliminary ruling on the EC points of law (Annual Parliamentary Ombudsman Report 1989, p. 148). It can be noted that the final statement in the case was formulated very broadly by the ombudsman. The ombudsman seemed to take the opportunity to herald a general position.

This general stance towards the assessment of Community law was in large measure followed by a case from 1991. The ombudsman received a complaint concerning adoption from a German citizen and his Danish wife. Having been rejected by the Danish authorities as adoptive parents to adopt a 4-year old child from Columbia, the German citizen proceeded to adopt the child in Germany under - more liberal - German adoption legislation at the time. The European perspective arose because the German citizen applied for family reunification with the child under Danish law. The application was rejected by the Danish immigration authorities, however, with a view to the fact that the German adoption is not valid in Denmark. In his legal assessment the ombudsman embarked on an initial legal analysis of the relevant Community rules on residence at the time and he disagreed with the Danish authorities as to the



interpretation of the right of residence under EU-law. Nevertheless, the ombudsman repeated his reservation as to his suitability to assess Community law and repeated his lack of competence to ask the ECJ for preliminary rulings. Even though the ombudsman initially uttered some criticism, he seemingly concluded otherwise by repeating his general reservation as to Community law (Annual Parliamentary Ombudsman Report 1991, p. 65).

A final element in the recurrent patterns of the Danish ombudsman is the fact that he very rarely corrects the interpretation of relevant EU law by an authority. This can be illustrated by a case from 1990. A Danish journalist lodged a complaint in relation to a rejection of access to a draft EC directive concerning public procurement. The responsible Danish authorities referred to EC principles of confidentiality as part of the reasons for their decision to deny access. Substantively, the Danish authorities argued that internal Commission rules exempt the draft directive from the right of citizens to access to documents. In his investigation the ombudsman did not pursue the European points of law but displayed an explicitly reserved approach to the matter. The ombudsman simply decided to take it for granted that the interpretation by the Danish authorities of the relevant EC rules on confidentiality was correct. Consequently, no criticism was voiced as to European law (Annual Parliamentary Ombudsman Report 1990, p. 58).

There is one example of a clear-cut ombudsman criticism, however, namely a case from 2000. A British citizen represented by legal counsel lodged an extensive complaint with the ombudsman in 2000 as a result of an administrative rejection of his residence in Denmark. Having lost his job due to illness the citizen applied for residence under EC secondary legislation at the time. The ombudsman undertook a legal analysis of the relevant European rights and he expressed distinct criticism towards the responsible authority. His recommendation was that the case be re-evaluated and that residence be granted. The moment when the ombudsman's opinion was published, the authorities duly complied. The case from 2000 is interesting also because it is one of the very few examples of a legal interplay between the Danish ombudsman and the European Ombudsman. Although the European Ombudsman apparently does not provide the Danish ombudsman with more than a seemingly basic examination of the case, the reference in itself generates a thorough initial assessment by the Danish ombudsman (Annual Parliamentary Ombudsman Report 2000, p. 142).

In general, it is surprising that the proposal by the European Ombudsman to assist national ombudsmen on points of EU law has only been resorted to on very rare occasions by the Danish institution up until 2009. In the future, the Danish Parliamentary Ombudsman membership of the co-operation scheme between the European Ombudsmen and national ombudsmen – the so-called ENO, the European Network of Ombudsmen – has the potential to be a means of ensuring and enhancing the European perspective in Danish ombudsman practice (see on the network e.g. Tsadiras, 2008).

## **5. Explanations for the reservation towards Europe**

There are a number of possible explanations for the Danish ombudsman's reluctance to identify and actively protect citizens' European rights. Due to the fact that the European perspective on the Danish ombudsman is only sporadically taken up in Danish general administrative law literature, the discussions are probably still in an awakening phase.

### ***5.1. Lack of suitable complaint cases***

A practical reason for the minimalistic European case law might be a lack of suitable and precise complaints concerning relevant points of Community law. To some degree the ombudsman is dependant on an influx of "good" cases with relevant legal problems that can attract the ombudsman's assessment and enforcement of EU law. As a comment on this, however, the range of functional flexibility should not be forgotten. The ombudsman is not dependant on complaints but can launch investigations at his own discretion.

A possible lack of complaint cannot in itself justify a sporadic enforcement of EU-law. In addition, the academic writings of the ombudsman provide the institution with an abstract and highly normative platform for the enforcement and development of citizens' European rights. As to the cornerstone in the series of the ombudsman's own literature – "General Danish Administrative Law" (Gammeltoft-Hansen, 2002) - the European sources of law are introduced and mentioned only very briefly comprising some 10 pages of the elaborate work of more than 1100 pages.

A basic practical reason for the relative neglect of EU-law might be a lack of human resources within the ombudsman institution. This is in large measure a matter of discretion for the ombudsman. As a comment it can be stated that even a relatively few proactive investigations into crucial points of Community law might promote a general awareness and compliance by the authorities concerning this part of the existing law without excessively drawing on the resources of the ombudsman. As to the legal staff, it is a well-known fact in Denmark that the current Danish ombudsman institution has more lawyers at its disposal for preparing cases than the Danish Supreme Court.

### ***5.2. EU law as the monopoly of the European Court of Justice***

A formal and legal reason for the European distance of the ombudsman is the relationship between the ombudsman and the ECJ. This is so far the official explanation by the ombudsman institution for the strategy of the limited enforcement of European rights. It has been repeatedly incorporated into ombudsman opinions as mentioned above. To my mind, however, such an explanation is questionable. The logical consequence of the ombudsman's argument is that public authorities – e.g. a ministry or a municipality – can likewise justify a non-compliance with Community law with their lack of a formal competence to ask preliminary questions to the ECJ according to the procedure in Article 234. Such non-compliance by Danish public authorities would constitute a legal problem.

If the ombudsman's reference to the lack of competence to ask preliminary question is to be understood as a justification for a cautious review by the ombudsman as to points of Community law that are not clear and where the position of the ECJ might be difficult to predict, this would be a valid ground for caution in those specific cases. This presupposes, however, that the Danish ombudsman analyses *in concreto* whether the relevant EU law in the cases that he deals with needs to be clarified. If the relevant Community law is clear-cut, the ombudsman is obliged to include and protect European rights with the same intensity and vigour as his inclusion and protection of domestic laws. With a view to that, it is somewhat surprising that the Danish ombudsman only hesitantly enters into a substantive analysis of European law, and that the institution very rarely draws upon the case law of the ECJ. Judging from the opinions of the ombudsman, the institution in general refrains from an investigation of the relevant jurisprudence of the ECJ. Invariably, the recurrent reference by the Danish ombudsman to the lack of formal competence under the procedure of Article 234 EC conveys an image of a somewhat standardized pretext for excluding EU law.

### **5.3. Danish authorities as top of the class**

A third possible explanation for the European reservation might be that the ombudsman in general considers Danish public authorities to be the absolute "top of the class" in the European family of Member States. The perception has officially been voiced by the Danish ombudsman and the presumption is that the implementation of Community law by the responsible state and local authorities has an almost ideal standard and that this justifies a lenient approach by the ombudsman. The underlying rationale is that there is nothing rotten in the state of Denmark. As a comment on this it can be stressed that a – possible - high standard might explain a low percentage of criticism in the ombudsman's opinions on Community law but it does not exempt the ombudsman from checking and assessing EU-compliance altogether. The sparse case law of the Danish ombudsman gives the impression – from a purely optical perspective - of a fundamental reluctance to embark on an assessment of EU law. Finally, the ombudsman's image of Danish authorities as the top of the class in the Union does not seem to be based on concrete facts. According to the annual reports from the Commission on monitoring the application of Community law Denmark in general provokes a fair share of the infringement cases. According to the Commission, Denmark's share of the Commission's own initiative cases on infringements is 2-3 % and 1-2 % of the complaints to the Commission on infringements (Annex to the 24th Annual Report from the Commission on monitoring the application of Community law, 2006)<sup>6</sup>. In other words, the ombudsman's seemingly blind faith in correct implementation is nothing more than wishful thinking.

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6 [COM(2007) 398 Final]

#### **5.4. Alliance with Parliament revisited**

An unofficial and tactical explanation to the patterns in the ombudsman's enforcement of EU-law is coupled with the alliance between the ombudsman and the Danish Parliament. In general, the ombudsman institution's respect for the supremacy of the national Parliament can put a damper on the inclusion of supranational sources of law. Within that line of thought one could argue that Community law in a Euro-sceptic country like Denmark – casting the no vote in general elections on EU in 1992 (Maastricht Treaty) and 2000 (Monetary Union) - constitutes a kind of “politicised” source of law. In particular, this is the case if European rights constitute a clash with domestic rights. Due to the Danish ombudsman's strong political antennas this might perhaps colour the legal focus of the ombudsman. By handling conflicts between citizens and public authorities within the – politically “more neutral” and purely technical – framework of national procedural law requirements, the ombudsman manages to swim in a calm sea without risking negative political feedback such a reduced access to parliamentary support for his opinions. In addition, the ombudsman personally faces a dilemma in the sense that he risks alienating EU-sceptical parties if he insists on enforcing EU-law in controversial cases whereas he may reversely provoke EU-supportive parties by *not* enforcing EU-law. Due to the fact that the Parliament appoints the ombudsman, the ombudsman presumptively endeavours to avoid unnecessary confrontation.

It is difficult to say if such a tactical consideration can explain the general approach by the ombudsman to European matters. It is clear, however, that a purely tactical reluctance cannot justify a general European reservation. From a legal point of view the ombudsman institution must protect European rights on the same legal footing as the citizens' national rights.

#### **5.5. De facto supremacy of the national procedural requirements**

It is my contention that the most important reason for the ombudsman's non-enforcement of EU law so far is the institution's general preference for Danish general administrative procedural law. As mentioned above this preference is an overall and consistent characteristic of the Danish ombudsman and the relative exclusion of EU law is a concrete manifestation of this practical and intellectual bias within the ombudsman institution. This bias is clearly transposed to the theoretical products of the ombudsman institution which – not solely – but in large measure focus on procedural matters. The fundamental explanation for the Danish ombudsman's European reservation is that the institution considers the Community law components of existing law to be the responsibility of the Danish courts. From a legal point of view, however, this is not a valid explanation for European neglect.

### **6. A watchdog with teeth but no appetite**

Within the field of general administrative procedural requirement the Danish ombudsman has had remarkable success in exercising his broad competences and developing a unique environment of alliances with Parliament, the press and Danish

academia. Within this particular field the ombudsman has made important and positive contributions to the enforcement and development of citizens' rights. Outside this field, however, the ombudsman is generally more reserved in his protection of rights. Although the institution is equipped with a variety of flexible instruments to enforce and develop citizens' European rights, the institution has chosen to, if not ignore, then to marginalize the increasing significance of Community law within the public law landscape. There are a very limited number of cases identifying and assessing EU law although Denmark has been a member of the Union since 1973 and although the ombudsman was explicitly requested during the revision of the Danish Ombudsman Act in the mid 1990's to safeguard citizens' European rights.

If the Danish Parliamentary ombudsman institution consistently turns a blind eye to Europe, the citizens might respond by opting for other control systems where European rights are taken into account both actively and seriously. If so, the ombudsman model may find itself in dire straits. This should be avoided. The Danish ombudsman institution is a watchdog with teeth but with discerning taste buds. As far as citizens' European Union rights are concerned, the Danish ombudsman has so far been a sleeping watchdog with no appetite at all.

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