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The Danish Ombudsman - Citizens, Parliament and EU

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1. Two Research Themes

When ombudsmen institutions investigate and assess whether public authorities comply with principles of good administration, the institutions do not act isolated from their administrative, legal and political context. Indeed, it is one of the fundamental characteristics of ombudsman institutions that they interact and must interact with other agents in order to make a difference. With a view to this, the first part of this paper focuses on the interaction between the ombudsman and the parliament. The perspective is mainly empirical and the article emphasizes that parliamentary support is crucial to the impact of ombudsman. Generally, there is often a fragmentary focus on this topic and the complexity of the topic. Nonetheless, in the mind of the citizen the pivotal question as to ombudsman control is whether his/her complaint translates into action. On this backdrop, the paper seeks to clarify the role of the ombudsman as an intermediary between citizen and parliament.

In addition I wish in this paper to focus on the contribution by ombudsmen institutions to the development and enforcement of European Union Law. Formally, there is no doubt that European Law such as regulations, directives and ECJ practice is part of national law. According to the principles of supremacy and direct effect there is a – at least at the theoretical level - presumption that European Law forms part of the legal assessments of national ombudsmen. However there is limited comparative and comprehensive exploration of the usage by national ombudsman institution of European Law principles.

The primary object of the my analysis is the Danish Parliamentary Ombudsman – one of the oldest ombudsman institutions in the world and a well-established ombudsman institution within its national context – but the study can hopefully be of general interest to the understanding of ombudsmen. There are no administrative courts in Denmark. This is no doubt one of the basic reasons why the Danish ombudsman enjoys a very strong position in Danish law. The well-developed range of parliamentary actions is another reason to the strength of the Danish ombudsman. It goes without saying that parliamentary backing and assistance can be political as well as legislative. As a result of the overall parliamentary - and state perspective - my analysis does not focus in detail on ombudsman review of local authorities even though this theme is interesting in itself. As to supervision of state administration, however, my conclusion is that *parliamentary* actions are effective and that legislative actions play a minor role as an outcome of ombudsman cases in Denmark.

As the contributions of the ombudsman to the enforcement and development of European Union Law within the national context, this is an important research topic. It is still in the making, however, In a Danish context, the absence of exploration and discussion of this

aspect of ombudsman control is increasingly surprising due to the fact that the Denmark has been a member of the European Community since 1973 and that the ombudsman was established in 955. This paper offers preliminary considerations on ombudsman and EU-law.

2. Scandinavian Ombudsman Models

Today, all Scandinavian countries have ombudsmen institution according to constitutional provisions. Although there are similarities between the Scandinavian ombudsmen, the role of the ombudsman in the national context varies. The Swedish ombudsman is the oldest in the world dating back to 1809. The general framework is that the holder of the office is appointed by the legislator. He is independent of both executive and judiciary and is empowered to inquire into administrative and executive acts. His normative function is to safeguard the interests of citizens by ensuring administration according to law, discovering instances of maladministration and eliminating defects in administration. Subsequent ombudsman institutions were created in Finland in 1920, in Denmark in 1955 and in Norway in 1962.¹ In all countries the ombudsman has little formal power towards public authorities other than the rights to investigate, inspect and to demand adequate information. Compensating for the lack of binding and formal powers, the interaction between the ombudsman and the national Parliament has proved a dynamic tool in Denmark in the transformation of ombudsman opinions into action and compliance.

In practice, the interaction and interdependence is highly complex, however. Generally, the complexity is reflected in the pluralities of roles of the Parliament. At least three basic roles can be identified. Firstly, the Parliament *appoints* the ombudsman, secondly, the Parliament *supports* the appointed ombudsman in a number of ways in his supervision of the executive and thirdly, the Parliament is itself – as far as the Ministers of Government acting as administrative heads of the executive are concerned - *subject to the scrutiny* of the ombudsman. The second role is elaborated in the following. With a view to this it is not surprising that the ombudsman model can hardly be described in the terms of a traditional doctrine of separation of powers. Although the ombudsman institution has its basis in the Parliament, the institution acts in practice in a mix of crossing roads between the Parliament, the complainants, the public administration, the courts of law and the media.

Prosecutor or Quasi-Administrative Court

Scandinavian ombudsmen can be divided into two models: the disciplinary authority model (Swedish-Finnish model) the quasi administrative court model (Danish-Norwegian model).

A characteristic of the former is the power of the ombudsman to act as a *prosecutor* and to bring criminal charges or disciplinary procedures against individual public officials for malfeasance or other irregularities. The focus of the disciplinary ombudsman is the correct behaviour of the public employees, not the decisions of public authorities. In practice, the Swedish and Finnish ombudsmen have an inclination to expressing criticism or putting forward recommendation and *not* exercising their criminal law and disciplinary powers. Even though the prosecuting powers rest as means of enforcement, the knowledge of their existence – as a sword of Damocles - among public officials no doubt enhance compliance.

¹ General information on a number of Scandinavian ombudsmen is available on the following addresses: Sweden: www.jo.se (*Justitieombudsmannen*), Finland: www.ombudsman.fi (*Eduskunnan oikeusasiamies*), Denmark: www.ombudsmanden (*Folketingets Ombudsmand*) and Norway: www.sivilombudsmannen.no (*Stortingets sivilombudsman*).

As to areas of normative focus, the modern Finnish ombudsman has a statutory duty to take an interest in human rights and fundamental rights. This is a result of a constitutional elaboration in 1995 of the fundamental rights provisions. The intention is to bring these rights closer to the level of practical application and to enhance their influence on daily administration in Finland. In other words, the development of (the visibility) of human rights is part of the ombudsman's statutory responsibilities. As opposed to the defined role of the Finnish Ombudsman, the Danish Ombudsman formally enjoys a much more autonomous role in supervising the executive and in developing legal principles of good administration.

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. Their powers also apply to the private sector.

The Danish-Norwegian ombudsman model functions to a wide extent as an administrative quasi-court reviewing public authorities as such and assessing general administrative law principles. The ombudsman is primarily concerned with the rule of law. At the outset, the Danish ombudsman was designed an equivalent to the Swedish Ombudsman but the Danish institution has evolved independently. The Danish ombudsman has never exercised his original possibilities of initiating criminal or disciplinary proceedings and the general focus of both the Danish and Norwegian ombudsmen has been administrative decisions and activities of public institutions rather than the behaviour of individual civil servants. The perspective has been institutional, not personal. At the revision of the Danish Ombudsman Act in the 1990s the disciplinary powers of the Ombudsman were completely omitted due to this long-standing practice. One of the motivations of the Danish ombudsman to subscribe to the institutional perspective is the endeavour to avoid the level of conflict that a personal investigation and criticism by the ombudsman might evoke. Not surprisingly, the Danish ombudsman has strived for a climate of negotiation and dialogue with public authorities in order to improve the chances of convincing them of the justification of his opinions and recommendations. In all Scandinavian ombudsman models, however, there has likewise been a development towards minimizing the confrontational and disciplinary role.

Profile of the Danish Ombudsman - the Rule of Law

The ombudsman institution was established as part of the (amended) Danish Constitution of 1953 reflecting a need for improved protection of the individual citizen against public authorities.² The ordinary courts did not suffice as a control mechanisms in this respect. The economic reconstruction of Danish society after World War II had necessitated a powerful state and administrative apparatus with extensive powers. The public administration grew immensely in size and the Parliament enacted an increasingly number of regulations providing administrative agencies with both numerous and discretionary open-ended powers. As a counter-measure to the growing interference by the executive into the spheres of individual citizens, the ombudsman institution was established in 1955.

As to areas of *normative* focus, the anticipation in the beginning was that the ombudsman should review especially the compliance with substantive principles of law, such as legality, equality, proportionality and the rule of law. To some degree, the Danish ombudsman has

² Basic material in English on the Danish Ombudsman can be found in *The Danish Ombudsman, 1995*, and the subsequent publication, *The Danish Ombudsman, 2005, I-III*, all produced by the Danish Ombudsman. An introduction can also be found in Hans Gammeltoft-Hansen and Jon Andersen, *The Ombudsman's Role from a Nordic Perspective*, 1996 *The European Yearbook of Comparative Government and Public Administration* 3, pp. 309-319. Most material in English – and Danish – on the ombudsman is produced by the ombudsman..

realised this intention and has additionally in some cases expanded his review of legality etc. towards appraising also the appropriateness of administrative decisions. Over the years, however, the most distinct feature of the focus of the Danish ombudsman has been his development of procedural requirements relating to the processing of an administrative case such as the obligations to make a hearing and to give reasons. It is a recurrent part of the ombudsman's investigation and assessment to check procedural errors. The preference of procedure over substance is partly due to the fact that the Danish Public Administration Act only deals with procedural matters.³ At a practical level, moreover, the non-compliance by the executive of procedural requirements can be relatively easily scrutinized by the ombudsman on the basis of the documents of the case. Unlike the courts, the ombudsman does not have the powers to hear witnesses and his review is based on written material.

In principle, the Danish ombudsman's supervision of public agencies comprises a broader spectrum of legal sources than national legislation such as the European Convention on Human Rights and EU-regulations. The Convention was formally incorporated into Danish law in 1991 and the ombudsman institution has in a number of cases - especially regarding freedom of speech - made reference to the Convention (article 10).⁴ Generally, the ombudsman prefers to apply the provisions on human rights in the Danish Constitution or to fall back on the Danish Public Administration Act. As to EU-law the ombudsman has generally exercised a cautious review. Currently, there is a debate in Danish law as to the ombudsman's contribution to the European challenge that I will get back to later on in this paper.⁵ The Danish ombudsman is part of the co-operation between the European Ombudsmen and national ombudsmen (European Network of Ombudsmen - ENO)⁶ and this may in the long run give impetus to the enforcement of EU-law in a Danish context.

3. The Impact of the Ombudsman

As to question of impact and influence, it is by definition difficult to measure and compare different ombudsman institutions. The nature of impact and influence is not subject to simple quantification and, in any case, there is a plurality of determining factors.

- *No administrative courts*

Basically, the Danish ombudsman institution enjoys a fundamentally strong position due to the fact that there are no administrative courts in Denmark as opposed to Sweden and Finland. Denmark has a system of ordinary courts of law that review all kind of cases in private law, public law and criminal law. Thus, the overall structure of the Danish control system provides the ombudsman with a central position. Moreover, the ordinary Danish courts until recently mostly reviewed private law cases and conversely only few public law cases leaving normative space to the Danish ombudsman institution and its development of general legal principles. For the time being, however, this relationship between courts and

³ Act No 571 of 19 June 1995 with subsequent amendments (*Forvaltningsloven*).

⁴ So far, neither complainants nor the Danish ombudsman have made reference to Article 41 of the EU Charter of Fundamental Rights, Chapter V, stating that every citizen has a fundamental right to good administration.

⁵ Michael Gøtze, *The Enforcement of European Union Law by the Ombudsman*, "Juristen" (a Danish Law Review – not yet translated into English), 2009, p. 91-102.

⁶ See on the network e.g. Alexandros Tsadiras, "Rules of institutional "flat-sharing" – the European ombudsman and his national peers", 2008 *European Law Review* 33 (1), pp. 101-115.

ombudsman is in a period of transition due to the fact that the courts receive a rapidly growing amount of administrative cases.⁷

- *Broad Ombudsman Competence*

A supplementary basic reason is that the Danish ombudsman is normatively omnipotent within the public law field in the sense that the institution can deal with almost all aspects of administrative law. The legal framework of the ombudsman in the Danish Ombudsman Act is mostly open-ended and programmatic containing only few limitations of the ombudsman's normative review of public authorities.⁸

- *Compliance by public authorities*

If construed as the specific adherence by public authorities with ombudsman opinions and recommendations, the influence of the current Danish ombudsman is probably considerable, at least as far as *state* and government authorities are concerned. Basically, the Danish ombudsman opinions are in most cases likely to be accepted due to the mere facts that Danish public administration operates in a small society and that the Danish public officials are well-educated and have high moral standards. No empirical and official figure of actual compliance exists, however, and the question as to the precise compliance by state and local authorities remains somewhat open. As opposed to this, it can be noted that the European Ombudsman explicitly reports the follow-up actions by EU-institutions.⁹

- *Ombudsman and Media - brothers in arms*

A supplementary impact factor is no doubt the support of the ombudsman by national media. In this respect it has been an immense advantage to the Danish ombudsman that there is only *one* ombudsman and that the reference in the press to the ombudsman as an institution is thus unambiguous.¹⁰ The Swedish model is different in this respect due to the existence of special ombudsmen and due to the fact that the Swedish Parliamentary Ombudsman itself is not one person, but four persons with specific supervisory areas. As a result of the recurrent focus of the Danish media on cases between citizens and public authorities, the Danish ombudsman is also a recurrent agent on the media stage. Frequently, the sympathy of the media lies with the citizen who is allegedly wronged by public administration and this phenomenon in itself nourishes and confirms the perception of the ombudsman as a protector of the individual.

The power of the joint forces of the Danish ombudsman and the press can be illustrated by a highly political ombudsman case from 2007 in which the Danish ombudsman confronted the Danish Prime Minister in an extraordinary way.¹¹ The ombudsman put forward 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 completely ignored the recommendation of the ombudsman. After having written an open letter to the Prime

⁷ According to statistical information from the Danish courts, the present amount of administrative law cases within the court system is 70 % of the total amount of civil law cases.

⁸ Act No 473 of 12 June 1996 (*Ombudsmandsloven*).

⁹ See e.g. "Study of follow-up given by institutions to critical remarks and further remarks made by the ombudsman in 2006", published 22 May 2008 by the European Ombudsman.

¹⁰ The term "ombudsman" is legally protected by the Danish Ombudsman Act in order to avoid a watering down. In recent year, the introduction of local control bodies within certain Danish municipalities has give rise to discussions of the usage of the term. In spite of their ombudsman-like functions these local control bodies are not allowed to do make use of the term "ombudsman". The only other ombudsman in Denmark - apart from the Parliamentary Ombudsman - is the Consumer Ombudsman Office who has explicit legal basis for its name.

¹¹ The case is found in the Annual Report 2007 of the Danish Ombudsman p. 347 et seq.

Minister, published in the Danish press, the ombudsman persuaded the Prime Minister to comply with the ombudsman's recommendation and to give the controversial interview.

- *Compliance by Courts*

The question of the courts' compliance with ombudsman opinions is also highly relevant to a qualitative analysis of the impact of ombudsman institutions. The courts can review the same *case* as the ombudsman if a citizen or an authority brings the case before the courts. Typically, however, the overlap consists in a situation where the courts review the same *legal principle* or legal problem e.g. the right to a hearing that has been dealt with by the ombudsman in another case. There is no tracking in Danish law of the coherence between the courts' and the ombudsman's application of law. According to the Danish ombudsman, the courts in most cases confirm the positions of the ombudsman whereas other studies show that there are a number of normative differences between Danish courts and the ombudsman.

- *Conceptual impact on legal thinking*

As to conceptual and intellectual impact, the Danish ombudsman is arguably the most influential ombudsman institution in Scandinavia. This is *inter alia* reflected by the facts that ombudsman's practice is massively quoted in Danish legal literature - as a source of law - and that the ombudsman is generally perceived by politicians, citizens and the press as a guardian of good administration. An important explanation for this stronghold of the Danish ombudsman is multilevel parliamentary support as we will discuss in detail later.

In this respect, an interesting characteristic of the Danish Ombudsman is his ties to *academia*. This is primarily reflected in the recruitment of ombudsmen. 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 criminal procedure law. 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 institution as a whole. The ombudsman himself and his executive staff produce extensive legal writings within the field of public law especially administrative law – e.g. textbooks, articles, annotation of legislation - and are involved in teaching in numerous contexts. It is difficult to overestimate the importance of the academic and educational activities of the Danish ombudsman as to ensuring and consolidating the authority of the institution.

4. Citizen Complaints as a Source of Ombudsman Action

The most fundamental access of citizens to the Parliament is of course the right to vote at general elections and thus influence the decisions and actions of the elected Parliament. As a specific channel into the Danish parliamentary sphere during the election term, both organisations and citizens have a right of obtaining an interview with the standing parliamentary committees and citizens can within this framework present problems and opinions to the relevant politicians on the committee. The members of the committee can ask questions to the citizens but do not embark on discussions. Another means of obtaining contact with the Danish Parliament is the right to lodge complaints with the ombudsman. The establishment of the ombudsman relieves the Parliament of the task of relating to individual queries from citizens concerning administrative authorities and the intermediary role of the ombudsman is - in abstract terms - to qualify the citizen's complaints.

Inherent in the Danish ombudsman model is the existence of only a minimum of legal barriers to access to the ombudsman as an intermediary. According to the *actio popularis*

principle anybody may lodge a complaint with the ombudsman and there is no requirement of material interest in the case.¹² There are only few formal requirements that must be met, 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. However, the open access does not mean that all complaints are handled. In practice, the Danish ombudsman enjoys a large measure of independence in selecting complaints and it left to his discretion whether a complaint affords adequate grounds for investigation. Generally, the ombudsman's policy of selection is to admit complaints that deal with general principles in administrative law and with issues of general interest.

Currently, the majority of Danish ombudsman cases are complaint cases. Some 3700 of an annual total of 4000 cases are complaints from citizens. Citizens see the ombudsman as an easily and freely accessible court of appeal against administrative decisions in particular in relation to areas where the inequality between the administration and those concerned by its decisions is greatest such as the areas of e.g. social benefits, immigration, taxation and employment matters. The citizens that lodge complaints are private individuals and it is not customary that enterprises and businesses turn to the ombudsman for assistance with conflicts with public authorities. Generally, this is no doubt that the ombudsman is perceived as a watchdog institution that serves individual persons rather than companies. So far, however, there has been no scrutiny in Danish law as to what types of people who complain to the ombudsman. The majority of complaints deal with decisions – *l'actes administrative*. Some 70 % of the complaints pertain to administrative decisions whereas the residual complaints deal with e.g. lengthy processing time of the administration. As to the substantive areas of public authorities the complaints fall within criminal matters, social law, immigration law, environmental law, taxation law, local government law and employment law. About 75 % of the total number of complaints is immediately rejected by the ombudsman primarily due to the fact that the citizens have not exhausted administrative redress. With this reduction, this annual input from citizens is less than a 1000 cases. The percentage of cases that ends up with a critical opinion from the ombudsman is generally 20 %. In addition, the Danish ombudsman institution gives informal advice to citizens.

The Danish ombudsman epitomizes the idea of ombudsman to Danes and the international ombudsman perspective has a peripheral status in Danish law. The right of Danish citizens to lodge complaints with the *European Ombudsman* is rarely exercised. According to the European Ombudsman office, a total of only 95 Danish complaints have lodged complaints with the European Ombudsman from April 2003 until 2007 representing a considerably lower percentage of complaints than the one would expect taking the relative size of the Danish population of the EU population into consideration.¹³

5. Ombudsman Actions *per se*

From a formal point of view, the ombudsman has very limited powers. The opinions and recommendations *per se* of the ombudsman are soft law in the sense that the public authorities are not legally obliged to comply with them. This is a well-known basic feature.

¹² During the revision of the Danish Ombudsman Act in the 1990s it was discussed whether the “*actio popularis*” should be narrowed. The proposal was not adopted. See Hans Gammeltoft-Hansen, *The Ombudsman as a non-traditional tool for citizen participation*, 1998, *The International Ombudsman Yearbook*, p. 189 et seq.

¹³ See general statistics concerning the work of the European Ombudsman in e.g. the publication “*What can the European Ombudsman do for you*”, 2008. The European Ombudsman is described comprehensively in e.g. Katja Heede, *European Ombudsman, redress and control at Union level*, 2000.

As to the current catalogue of ombudsman actions as such, the Danish Ombudsman Act states that the ombudsman “may express criticism, make recommendations and otherwise state his view of a case”. The ombudsman has a wide choice of wording when stating his opinion of a case. If he states that the authority’s decision cannot give him cause for comment or ground for criticism, this may imply actual agreement with the authority but it may also reflect the fact that the ombudsman has limited his examination of the case. The opinion of the ombudsman is phrased in the first person singular underlying the fact that the opinion is given by the ombudsman personally. The ombudsman expresses his opinion on behalf of the Parliament and this has *eo ipso* an impact in most cases. A recommendation is put forward if the ombudsman considers that an administrative decision should be rescinded or changed. The written recommendation of the ombudsman is attached with thorough summaries of the facts of the case and with thorough arguments in order to convince the recipient authority of the justification of his 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 the court. Such recommendations by the ombudsman are invariably complied with by the directorate dealing with free aid legal matters.

Although the impact of ombudsman sanctions and actions *per se* is limited, it must not be forgotten that the ombudsman has a number of investigate powers. Firstly, the ombudsman can launch an investigation on his own initiative. To most public authorities even the prospect of being involved in an ombudsman investigation means a loss of prestige. In conjunction with the negative press coverage that an investigation on a controversial issue typically arises, an ombudsman investigation on his own initiative often leads to improvements by the public authority even if the ombudsman has not made any conclusions. Secondly, the ombudsman can perform extensive inquisitorial activities during an investigation and Danish authorities are obliged to furnish the ombudsman with information and documents if the information and documents must be assumed to be of importance to the ombudsman’s investigation. Also this obligation to contribute to an ongoing investigation can in itself produce changes and remedies within the administrative authorities at a preliminary stage. Finally, it is common ground among public authorities that the percentage of criticism in investigation cases that are initiated *ex officio* by the ombudsman is considerably higher than in investigation cases that are products of complaint from citizens. About 40 % of the ombudsman’s own initiative investigations conclude in legal terms that there is something rotten in the state of Denmark. Thus, an investigation is perceived by the public administration as if not anticipated criticism then at least a bad omen. Even in some *complaints* cases, the ombudsman may simply inform the public authority about the complaint in order to make the authority resolve the problem.

6. Support by the Parliament

I now turn to the interplay between the ombudsman and Parliament in more specific terms. The Ombudsman Act and, in particular, the practices of the ombudsman and the Folketing set the stage for the interaction between the ombudsman and the Parliament. Not only the general support by the Folketing but also political and legislative actions have been of importance to the carrying out of Danish ombudsman control of state administration.

- *Symbolic Support*

The Danish Ombudsman Act contains provisions on the election and dismissal of the ombudsman. The Danish Parliament acts as employer vis-à-vis the ombudsman personally as

to the initial and the final stages in the ombudsman's term of service. Thus, the ombudsman is elected by the Folketing after each general election in a majority vote and can be dismissed by the Parliament if the ombudsman ceases to have the confidence of Parliament. The election of the ombudsman is made on the recommendation of the Legal Affairs Committee of the Folketing. There are only 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 and that the election is likely to have the support of all or a broad majority of the political parties. There is no fixed ombudsman term in Danish law as opposed to e.g. Swedish and Finnish law. At the outset, the ombudsman is highly dependant on the Parliament. As to the dismissal procedure, there are no specific grounds of dismissal in the Ombudsman Act and it is left to Parliament to define the concept of lack of confidence. So far the dismissal procedure has never been put into play and the vast majority of the political parties in the Folketing have consistently supported the ombudsman.¹⁴

The fact that the ombudsman acts on a political and parliamentary mandate is a significant and fundamental feature of the ombudsman model. The ombudsman works in collaboration with the Folketing and performs his task of overseeing public administration as the official and trusted representative of the Parliament. It is very important that the ombudsman receives the backing of the Parliament and a corresponding backing by public opinion – above all the backing of the press. The backing of the Folketing manifest itself not only in the formal election of the ombudsman but also in the fact that the Parliament presumptively supports and shares the general legal values of the ombudsman such as legality, the rule of law and good administration. However elusive the presumptive and symbolical support by the Folketing might be, it no doubt contributes to the strength of the ombudsman.

- *Political actions by the Parliament*

The most important and effective political actions in the wake of an ombudsman investigation or a final ombudsman opinion revolve around the system of standing committees in the Folketing. When the ombudsman deals with state authorities, he deals ultimately with a Minister of Government acting as head of the administrative authority. A well-established practice in Denmark is parliamentary intervention towards the responsible Minister by means of a *consultation* in the relevant parliamentary committee. The committees are the workshops of the Folketing and all major decisions are prepared in the relevant committees. The Folketing has 25 standing committees and the working sphere of a committee roughly corresponds to that of a ministry. The Ministry of Social Affairs for instance corresponds to a Social Affairs Committee, the Ministry of Taxation to a Fiscal Affairs Committee and so on.¹⁵ At the opening of each parliamentary year and after general elections, the Folketing appoints members from the Folketing to sit on the committees. The individual political parties are represented according to the number of seats which the parties have obtained in the Folketing. Thus, the committees politically reflect the Chamber.

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 to the ombudsman comes into play. The members of the committee may ask a Minister to appear in the committee in order to answer questions

¹⁴ 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.

¹⁵ Other important standing committees are: the Labour Market Committee, the Trade and Industry committee, the European Affairs Committee, the Defence Committee, the Municipal Affairs Committee, the Cultural Affairs Committee, the Economic and Political Affairs Committee, the Social Services Committee, the Educations Committee, the Foreign Affairs Committee and the Immigration and Integration Affairs Committee.

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 adhere with the ombudsman in order to avoid additional political pressure. The tendency to 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 of ensuring compliance by the Minister with ombudsman cases. Generally, there is an increasing usage of the consultation procedure and the annual amount of questions asked is some 700. There is no comprehensive tracking of the amount of questions that is initiated by the ombudsman but it is a significant part.

At the time being, as a result of a pending and highly controversial ombudsman case concerning the right to family reunification under EU-law on the free movement of persons and on union citizenship, the Danish Integration Authorities have already made substantial alterations to Danish guidelines on the scope of the right of the individual to family reunification. The current Danish Minister of Integration has been consulted by the Legal Affairs Committee with a view to the ongoing ombudsman investigation and the minister has decided to change administrative practices beforehand.¹⁶

As to the contact between the committees and the ombudsman about pending and concluded ombudsman cases, it was formerly the practice of the Legal Affairs Committee to review cases passed to them by the ombudsman and to distribute them to the relevant committee. The relevant committee would then ask the Minister in charge to comment on the ombudsman's assessment and any criticism expressed. The Minister's comments were returned to the ombudsman through the Legal Affairs Committee. This procedure was abandoned in the late 1990s in favour of a quicker and more direct contact between the committee and the ombudsman and the interaction may also take place on an informal basis.

- *Legislative actions by the Parliament*

The Danish Parliament only rarely acts on a general legislative level as a result of ombudsman complaints. The law-making process is a time consuming process and it is not perceived as the most effective response to an acute problem involving a citizen and a public authority. At a specific level, however, Folketing 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 or assessment. With the financial intervention by the Folketing, a critical opinion by the ombudsman turns into a positive change for the responsible authority in the shape of extended resources providing the authority with better possibilities of adhering to the guidelines of the ombudsman. No matter how ominous an ombudsman investigation might be perceived by an authority at a first glance, the ombudsman activity – especially his inspections of prisons and mental hospitals – has often drawn the attention of the Folketing to the problems of the authorities. A parliamentary metamorphosis sets in and the final outcome of the ombudsman's case is to the benefit of the public authority.

¹⁶ 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. The Danish Ombudsman investigates whether the responsible Danish public authorities have given proper advice to citizens as to their rights under the European regulations or whether the Danish authorities have only taken the - restrictive - current Danish immigration legislation into consideration.

- *General legislative actions – Public Administration Act*

As to general legislative actions, the enactment of the Danish Public Administration Act in the 1980s is the primary contribution of the Folketing within the field of administrative law. The Act was developed and enacted following the early ombudsman practice pertaining to the procedural requirement of administrative law and, for the most part, the Act simply codifies general legal principles that were already in effect as unwritten rules. The Act focuses on the administrative procedures and formalities that must be adhered to by public authorities when handling cases. The Danish Administration Act is not particularly elaborate but lays down only the basic rules such as the duty of public authorities to assist citizens, the right of citizens with a material interest in the case to access to documents, the right of the citizen to be heard prior to decisions, the duties of public authorities to give reasons and to inform the citizens of the possibilities of administrative recourse. Thus, the scope of the Act is much narrower than e.g. the European Code of Good Administrative Behaviour of the European Ombudsman.¹⁷

The Danish Public Administration Act of 1985 is still the basic formal framework of Danish administrative procedural law. However, due to the fact that the Act is a minimum protection act and that the ombudsman has taken a dynamic and activist approach to the interpretation of its concrete provisions, the scope of the Act has developed considerably. In a number of aspects, the ombudsman has widened the scope of the Act and the Parliament has not opposed this extensive widening of the Act. The Folketing has left the original text of the Act from the 1980's more or less untouched and has in practice delegated important parts of its normative powers within the administrative law areas to the Parliamentary ombudsman. Today, the Danish Public Administration Act can only be applied and interpreted in close combination with relevant case-law from the Danish ombudsman.

The normative activism of the ombudsman has not been unchallenged, 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 dynamic interpretation of the Danish Public Administration Act preventing the usage of agreements on resignation between public employers and employees on resignation. According to the ombudsman, such bilateral agreements cannot be made and the employer must comply with the administrative law requirements of for instance the right 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, the Danish Supreme Court in 2004 explicitly overruled the ombudsman in a couple of distinct judgements and allowed e.g. agreements on resignation within the public sector. Subsequently, the Danish ombudsman has himself suggested that the Parliament might take legislative actions in order to clarify the matter. This still remains to be done.¹⁸

7. Enforcement of EU-law: Ombudsman Contributions

From an abstract point of view the ombudsman institution is well suited for enforcing and developing citizen rights on the basis of European Union Law. The legal focus of

¹⁷ The European Code of Good Administrative Behaviour was approved in September 2001 by the European Parliament. See www.ombudsman.europa.eu

¹⁸ See Decision of 16 November 2004 of the Danish Supreme Court, reported in Danish Law Journal (*UfR*) 2005 p. 616 et seq.

ombudsman scrutiny and assessment in complaint cases is existing legislation. This is explicitly stipulated in the Danish Ombudsman Act: “The ombudsman shall assess whether any authorities or persons falling within his jurisdiction act in contravention of existing legislation or other commit errors or derelictions in the discharge of their function”. There is no doubt that EU-law is part of existing legislation in Denmark. As the quantitative importance of written secondary EU-law, e.g. regulation and directives, in Danish law it has been estimated by the Danish Justice Department that approx. 20 percent of the acts and bills that are enacted in Parliament are based on European sources of law.

- *Ombudsman as a flexible control mechanism*

Typically, ombudsman institution disposes of a number of instruments that can enhance the enforcement of European Union Law if this is the priority of the institution. The right to select cases among the bulk of complaints lodged with the ombudsman – and conversely to reject cases with no general legal interest – provides the ombudsman with an important autonomy in his case-handling. He can thus regulate the case-flow in general and the character of cases and legal problems in particular. In addition, the right to initiate case ex officio is a possibility which has no equivalent in the Danish court system. By initiating cases on EU-law, this ombudsman can no doubt contribute to the development of this part of existing law. As to the Danish ombudsman in this respect, it can be noted that the institution has so far initiated very few cases with a European profile. So far the predominant legal theme in such pro-active investigations is national administrative law.

- *Active ombudsman assistance in compliant cases*

Even in complaint cases, the ombudsman enjoys a considerable degree of autonomy in so far as the ombudsman can revise and expand the complaint themes of the citizens – for instance as far as relevant EU-regulation is concerned – if the ombudsman sees a need for such assistance to the citizen. As opposed to this, a court is to a large degree prevented from intervening in the claims that the parties put forward vis-à-vis the court. In addition, the ombudsman is responsible for the scrutiny of the facts of the case as well as the legal qualification of the legal problems at hand. As to the Danish context, the number of complaint cases involving EU-law is very limited and the ombudsman seems to be quite cautious in exercising his possibilities of assisting the citizen with a view to EU-law.

- *Open ombudsman reasoning*

As a final point, the explicit and lengthy reasoning by the ombudsman in opinions can be seen as an argumentative stronghold as far as the development of European law principles is concerned. The fact that the ombudsman does not hand down a decision dealing only with the case at hand but also has the possibility of taking a more general approach to the legal problem that the case involves is not without relevance. If the citizen's awareness of their European rights is relatively basic, the mere voicing of European sources of law can be a contribution. Within the framework of his style of reasoning, the ombudsman can contribute to the strengthening of European rights both in the concrete case and generally. So far, however, the ombudsman has very rarely made reference to EU-law. The introduction of e.g. the European Charter of Fundamental Rights by Danish ombudsman - and in particular Article 41 on the citizen's right of good administration - by the ombudsman has still to come.

8. Politics or Law?

There are a variety of possible explanations why the Danish ombudsman – and perhaps other national ombudsmen – adheres to a limited investigation and control of EU-law. The Danish

ombudsman has explicitly pointed out the necessity for caution and reservation because the institution – due to its lack of formal sanctions - has no powers under Article 234 of the Treaty to ask preliminary questions to the EU-Court. This is a long discussion that I will not go into in this paper. Another fundamental explanation for the cautious enforcement and development of European Principles that I would like to emphasize as a basic phenomenon is the Danish perception of EU-law a controversial – and “political” - source of law in various contexts. The EU-scepticism among the Danish population has no doubt had a huge impact on the Danish Parliament. The Euro-sceptic sentiment among the Danish population has manifested itself in referendums on the relationship between Denmark and the EC.

In 1972 the Danish population with a clear majority voted in favour of joining what they basically believed to be an economic community with inherent advantages for Danish economy as well as for private businesses such a Danish agriculture. In domestic politics, the EC has traditionally been presented by politicians as a pragmatic cooperation in the general economic interests, and not as for instance a constitution-building project or as a constant integrative legal engine. The “true nature” of the EC project was revealed to the Danes some twenty years later after the accession in 1973 when the EC took the distinctive step to become the European Union (Maastricht 1992), This was a big awakening to the Danish population which responded by voting no at the 1992 referendum to the new treaty initiating a dramatic phase in Danish EU-politics. The year after, however, the Danes cast the yes vote with a narrow margin (Amsterdam 1993) when Denmark had managed to opt out of important legal elements in the treaties, such as common defence policy, cooperation on internal affairs, common currency and Union citizenship. In spite of the fact that a large majority of the Parliament has since then supported a constructive attitude towards further integration, the population is still deeply split over the issue. Most recently, the population rejected Danish acceptance of the common currency (European Monetary Union 2000).

In this volatile political climate it is hardly surprising that the ombudsman institution finds itself trapped in a number of dilemmas as to the enforcement of EU-law and that the institution consequently generally prefers to keep a distance to EU-regulation. By handling conflicts between citizens and public authorities within the – “neutral” and “more legal” – framework of national procedural law requirements, the ombudsman manages to stay within a smooth sea without risking negative political reactions. If the EU and EU-law often give rise to heated political debate, the ombudsman is not likely to obtain easy and effective parliamentary support to his potential enforcement of citizens’ European rights. This perspective can generally put a damper on the ombudsman’s European ambitions. 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 reversely may provoke EU-supportive parties by *not* enforcing EU-law in controversial cases. Due to the basic fact that the Parliament appoints the ombudsman, the ombudsman presumptively endeavours to avoid confrontation with the Parliament. As a result, the ombudsman might prefer a low profile in EU-matters if he strives for re-election. In the mind of ombudsman institutions, law and politics are closely intertwined. EU-law is no exception.