The Danish Ombudsman as protector of human rights

By Danish Parliamentary Ombudsman Niels Fenger

The Ombudsman institution was not created with a view to promoting and protecting human rights. However, concurrently with the rules on human rights gaining in importance for the public administration's activities, the number of cases where it is relevant to include human rights has increased in the Ombudsman institution. In addition, the Ombudsman has over recent decades been given more and more tasks in relation to, among others, the UN Convention on the Rights of the Child, the UN Convention on the Rights of Persons with Disabilities and the Optional Protocol to the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT). This development has collectively helped to support the Ombudsman's work of highlighting the rights of citizens and promoting an administrative culture built on a general rule of law and the respect for human rights.

1. The Ombudsman deals with human rights issues

It is practically the nature of the case that protection of human rights is an important part of the Ombudsman's task.[1]

Firstly, many of the decisions made by the administration involve human rights protected by the European Convention on Human Rights (ECHR).

Secondly, a large part of the recurring themes of Ombudsman investigations concerns human rights in a broad sense. For example, this could be the conditions of people in prisons, in psychiatric institutions and in institutions for children and young people. Or it could be the administration's application of the principles of presumption of innocence, freedom of speech of public employees and equal treatment regardless of disability or age. Also cases on socio-economic rights such as the right to education, financial assistance and healthcare often land on the Ombudsman's desk.

Lastly, there is a considerable value-related affinity between human rights on the one hand and national public law on the other: Human rights as well as state and administrative law are about setting boundaries for public exercise

[1] On the significance of human rights on administrative law in general, read Fenger, 'Menneskerettighedskonventionen og dens betydning for dansk forvaltningsret', U 2018 B, p. 233.

of power and ensuring compliance with these boundaries. There is also a considerable topical overlap between the ECHR and a number of fundamental public rules and principles such as the Danish Constitutional Act's rights of freedom, the authority requirement and the principle of proportionality. In addition, a number of Danish legislative acts safeguard the same considerations as the ECHR. Examples include the Danish Act on Legal Protection on the Administration's Use of Coercive Measures and Duty of Disclosure (the Legal Protection Act) and parts of the Danish Data Protection Act and the EU General Data Protection Regulation. In addition there are the procedural law rights concerning, among other things, investigation, consultation of parties, right of own access and statement of reasons, which the European Court of Human Rights (Eur. Court H.R.) has in recent years derived from the Convention; all rights that overlap with the Public Administration Act's party rights and that contribute to the washing out of the distinction between administrative law and fundamental rights.

2. The Ombudsman's legal foundation for dealing with human rights issues

2.1. The Parliamentary Ombudsman Act

The Parliamentary Ombudsman institution was founded by the 1953 Constitutional Act a few years after the establishment of the Council of Europe and the UN as well as the adoption of the European Convention on Human Rights and the UN Declaration of Human Rights. Perhaps therefore, the fundamental views on the relationship between the individual and the power of the state that was behind the establishment of the Parliamentary Ombudsman are to a considerable extent convergent with the considerations that formed the basis of these international initiatives.[2] However, based on the explanatory notes to the Constitutional Act and the first Ombudsman Act from 1954, it is at the same time clear that the institution was not meant to play a particular part in relation to observance of human rights. The purpose of the Ombudsman institution was to ensure that the (state) administration complied with Danish legislation when interacting with the citizens, not to review whether both the administration's and the legislative power's activities complied with an international standard.

The legislative history of the current Ombudsman Act from 1996 also did not deal much with the Ombudsman's activities within human rights. As such – with special reference to EU law – the explanatory notes were limited to maintaining that the Ombudsman was to apply the part of international law that had been made part of internal Danish law on equal footing with (other) Danish law. And then the European Committee for the Prevention of Torture

[2] Eilschou Holm, Case FOB 1985.12.

and the European prison rules were briefly mentioned in relation to the Ombudsman's monitoring activities.

Thus, the starting point is that the Danish Ombudsman's task of protecting human rights is carried out based on the same authority and in the same way as the other monitoring and control activities performed by the Ombudsman.

This means that the institution is in a partial clash with, among others, several Eastern European ombudsman institutions, which were established after the fall of the Berlin Wall and which possibly therefore got a special task of promoting and protecting human rights. And similarly with a number of Southern European, African and South and Central American states, where ombudsman institutions were established in connection with the countries' transition to democracy and where the wish to avoid more human rights violations was one of the main reasons for establishing ombudsman institutions.[3] There is also the tendentious difference between the Danish Ombudsman and a number of other countries' ombudsman institutions that the Danish Ombudsman first of all monitors legality while the ombudsmen of many other countries are meant to perform a more politico-legal role, including as human rights advocates, and in that connection have been given access to intervene amicus curiae for the courts. Such ombudsman institutions thereby combine the Danish ombudsman role with that taken by the Institute for Human Rights in Denmark.[4]

In recent decades, however, the Ombudsman has on several occasions been given special tasks in relation to international human rights instruments.

In 1993, Parliament made a decision on equal treatment of people with disabilities and other citizens, and as part of the decision, the Ombudsman was asked to follow the development and possibly reprimand where possible within the Ombudsman's jurisdiction. It goes without saying that the UN Convention on the Rights of Persons with Disabilities is a significant part of the assessment basis for this part of the Ombudsman's activities.

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[3] Giddings, et al., The Ombudsman and Human Rights, in Gregory et al., (ed.), Righting Wrongs – the Ombudsman in Six Continents, p. 441, and Reif, Ombuds Institutions, Good Governance and the International Human Rights System, 2nd ed., p. 11 ff., 59 ff. and 442 ff.

[4] According to Section 1 of the Act on the Danish Institute for Human Rights (DIHR), it is the Institute's task to promote and protect human rights in accordance with the UN Paris Principles. In Denmark, it is thus only the DIHR, not the Parliamentary Ombudsman, that is appointed a national human rights institute according to the Paris Principles as established in Resolution A/RES/48/134. Also in that respect, the Danish Ombudsman is different from a number of ombudsmen in other states.

In 2007, the Ombudsman was appointed Danish National Preventive Mechanism (NPM) under the Optional Protocol to the UN Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment (OPCAT). And as part of that role, the Ombudsman, in cooperation with the Danish Institute for Human Rights and DIGNITY – Danish Institute Against Torture, regularly visits places where people are deprived of their liberty; cf. Section 7(1), second sentence, of the Ombudsman Act. In that context, the explanatory notes state that the Convention against Torture as well as the international practice relating to the Convention and other ratified conventions about protection against torture, inhuman, cruel and degrading treatment must be part of the Ombudsman's assessment basis.[5]

In 2011, the Ombudsman – as part of the implementation of the EU Return Directive 2008/155 – was tasked with assessing the police's conduct during forced return of foreign nationals who are staying in Denmark illegally; cf. now Section 19 of the Return Act. In that connection, according to the explanatory notes, the Ombudsman must include, among others, the ECHR, the UN Convention against Torture, the UN Refugee Convention, the UN Covenant on Civil and Political Rights and the UN Convention on the Rights of the Child.

Furthermore – based on a recommendation from the UN Committee on the Rights of the Child – the Ombudsman was tasked in 2012 with helping to ensure and monitor the implementation of children's rights under the UN Convention on the Rights of the Child; cf. Section 7(1), third sentence, and Section 12(2) of the Ombudsman Act.

Lastly, with an amendment to the Sentence Enforcement Act in 2022, the Ombudsman has been tasked with making sure that Danish authorities meet their obligations to ensure that inmates who are transferred to Kosovan authorities as part of serving their sentence in Kosovo are treated in accordance with Denmark's international obligations, including the ECHR.

2.2. International law

The ombudsman institutions' connection to human rights is more visible on the international scene. Thus, the Council of Europe has long viewed the national ombudsmen as a significant part of the Member States' national human rights structures, which also consist of the national human rights institutes. Already in 1975, the Parliamentary Assembly of the Council of Europe recommended that the Member States establish ombudsman institutions.[6] In 1985, the Council of Ministers adopted a recommendation

[5] LFF 213 of 7 May 2009 item 6.2.

[6] Recommendation 757/1975 and see also Case FOB 1974.8.

that indicated that ombudsmen were suited to protect and advance human rights.[7] In 2004, the Parliamentary Assembly of the Council of Europe followed up with a recommendation that again confirmed the significance of the ombudsmen institutions. The recommendation stated, among other things, that 'the development of methods of human rights protection has influenced the role of the ombudsman in that respect for human rights is now included in the standards to be respected by a good administration, on the basis that administrative actions which do not respect human rights cannot be lawful'.[8] Lastly, the Venice Commission of the Council of Europe adopted the so-called Venice Principles in 2019. The principles particularly aim to ensure the establishment of ombudsman institutions and their ability to function, and in that connection they underline the ombudsman institutions' role as protectors of human rights.[9]

In addition, it appears from the mandate for the Council of Europe Commissioner for Human Rights that he must facilitate the activities of national ombudsmen in the field of human rights.[10] In accordance with this, the Commissioner for Human Rights stated in his 2003 Annual Report that the structural similarities between his office and the national ombudsmen made the latter obvious partners at a national level.[11]

Similarly, the UN High Commissioner for Human Rights has long seen ombudsman institutions as pillars of the institutional structure for protection of human rights at a national level.[12] Most recently, on 15 December 2022, the General Assembly of the UN adopted Resolution 77/224 on 'The role of Ombudsman and mediator institutions in the promotion and protection of human rights, good governance and the rule of law'. Like the Venice Principles, the Resolution aims to ensure, among other things, ombudsmen's irremovability and independence of the executive power in particular. At the same time, the Resolution recognises the important role that ombudsman institutions can play in the protection of human rights.

Lastly, you can find recognition of the national ombudsmen's work in the judgments from the Eur. Court H.R., where the Court in its assessment of

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[7] Recommendation No. R (85) 13.

[8] Recommendation 1615 (2003), item 3. See also the Assembly's Resolution 1959 (2013) 'Strengthening the institution of ombudsman in Europe'.

[9] Principles on the Protection and Promotion of the Ombudsman Institution, adopted by the Venice Commission at its 118th Plenary Session (Venice, 15-16 March 2019).

[10] Resolution (99) 50, Article 3(d).

[11] CommDH (2003)7, p. 14 f.

[12] E.g. Human Rights, Handbook for Parliamentarians N° 26.

whether the national process has been fair and sufficiently thorough refers to the fact that the case has been processed by the national ombudsman.[13] The same applies to judgments where the Eur. Court H.R. refers to the national ombudsman's assessment in order to determine the correct understanding of facts and national law.[14]

3. What human rights take up space in the Ombudsman's cases?

The Ombudsman has long dealt with questions about the significance of international rules in specific cases. In fact, the Ombudsman was among the first review bodies in Denmark to incorporate international human rights law in the assessment of the administration's actions.

The ECHR is without a doubt the human rights text that the Ombudsman includes most often. In the published Ombudsman statements, the two dominant provisions are Article 8 on the right to private and family life and Article 10 on freedom of expression followed by Article 3 on prohibition of torture and other degrading treatment.

Most of the cases about Article 10 used to concern public employees and right of access. In more recent practice, the themes have more often been freedom of expression and information for people in prison, psychiatric institutions and education institutions. The Article 8 cases are more of a mixed bag. The more recent cases concerned, among other things, the obligation to reside within a departure centre and the duty to report regularly to the police for foreign nationals with tolerated residence status, underage children in social care, postal control in institutions, the rights to family life in asylum centres and the like as well as the right of own access.

[13] E.g. the Eur. Court H.R. of 12 January 2023 in Case 27700/15, Kilic.

[14] The Eur. Court H.R. of 13 December 2022 in Cases 11811/20 and 13550/20, Elmazova, Eur. Court H.R. of 8 December 2022 in Case 42010/18, Yakovlyev, Eur. Court H.R. of 8 September 2022 in Case 1434/14, Jansons, Eur. Court H.R. of 22 February 2022 in Case 54547/16 Shirkhanyan, and Eur. Court H.R. of 12 June 2018 in Cases 7549/09 and 33330/11, Alpeyeva and Dzhalagoniya. The access to complaining to the Ombudsman is not a legal remedy, which under Article 35 of the ECHR must be used before a complaint can be taken under active consideration by the Eur. Court H.R.; cf. the Eur. Court H.R. of 7 December 2021 in Case 64387/14, Tabakov, Eur. Court H.R. of 20 May 2021 in Case 52415/18, Asanovic, and Eur. Court H.R. of 17 October 2019 in Case 58812/15, Polyakh. Similarly, the starting point is that a complaint to an ombudsman does not constitute an effective legal remedy under Article 13 of the ECHR; cf. the Eur. Court H.R. of 3 April 2018 in Case 21318/12, Danilczuk, and Eur. Court H.R. of 15 October 2015 in Case 37991/12, Memlika.

The Article 3 cases mostly concern institution conditions, for instance in prisons, psychiatric institutions, return centres or institutions for children and young people. The provision has also been used in a few cases concerning return of seriously ill foreign nationals. In addition, there are a large number of unpublished cases concerning suicide and suicide attempts in prisons etc., where both Articles 2 and 3 are routinely part of the assessment basis.

As already implied in item 2.1, the Ombudsman also, where relevant, includes other international human rights instruments, including conventions that are not incorporated by law. For instance in cases about accessibility for disabled people, the UN Convention on the Rights of Persons with Disabilities is an important part of the basis for review.[15]

Also the Convention on the Rights of the Child is included in a considerable number of cases. The majority of these concern monitoring visits to institutions for children and young people, but the Convention has also formed part of the basis for review in cases where the question is whether a child has been heard sufficiently – and in a way the child understands – before decisions affecting the child are made.[16]

In Case FOB 2009 18-1, the Ombudsman carried out an investigation of the Convention on the Rights of the Child and of the Convention on the Rights of Persons with Disabilities to assess whether the parents of a 13-year-old boy with infantile autism had the right to say no to a municipal special school option.

For instance in his monitoring activities with prisons and psychiatric institutions etc., the Ombudsman has since the 1970s included international rules and non-binding guidelines. For example, in Case FOB 1975.571, he criticised that the conditions at a housing institution considerably deviated from the standard set out in the UN Declaration on the Rights of Mentally Retarded Persons.[17]

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[15] Case FOB 2016-40, FOB 2016-16, FOB 2014-39, FOB 2014-38, FOB 2014-31 and FOB 2009 18-1. See also Case FOB 2008.137 where the Convention on the Rights of Persons with Disabilities should have been included in a dismissal case.

[16] Case FOB 2022-13, FOB 2018-39, FOB 2016-16, FOB 2015-53, FOB 2014-19, FOB 2014-9, FOB 2013-2 and FOB 2009 18-1. As illustrated by Case FOB 2019-29, the Ombudsman includes not only the text of the Convention on the Rights of the Child, but also the UN Committee on the Rights of the Child's general comments to the Convention in its basis for review. There is no practice for the Ombudsman to refer to non-binding statements from the UN's various committees concerning the interpretation of UN conventions and non-binding instruments. For the source of law significance of such non-binding statements, see Report No. 1546 on Danish courts' use of other conventions on human rights, p. 288 ff. (in Danish).

[17] For the significance of international soft law, see also item 4.1.1 below.

The international rules and guidelines used most often in the monitoring cases are the Convention against Torture,[18] the European Prison Rules (Recommendation (2006) 2)[19] and the so-called Nelson Mandela Rules (United Nations Standard Minimum Rules for the Treatment of Prisoners).[20] Also guidelines issued by the European Committee for the Prevention of Torture (CPT) are included in the assessment.

In addition, the Council of Europe's 'Twenty Guidelines on Forced Return' and the CPT's standard 'Deportation of foreign nationals by air' are integral parts of the Ombudsman's assessment basis in cases on forced return of foreign nationals.[21]

Case FO 20/03042 concerned the conditions in the Prison and Probation Service's institutions during the COVID-19 period. As part of his assessment basis, the Ombudsman used the CPT's 'Statement of principles relating to the treatment of persons deprived of their liberty in the context of the coronavirus (COVID-19) pandemic'.

Until now, there have been no cases where it was relevant to include the EU Charter of Fundamental Rights.

4. The basis for review

4.1. The usual review situation

4.1.1. The impact of human rights law

Like the courts, the Ombudsman basically uses international human rights instruments in three ways. Sometimes they are used directly, for instance in combination with the Danish incorporation rule. Other times, they are used more indirectly as an interpretation element when determining the content of Danish legal rules. And yet other times, the international rule is used to cut off

[18] Case FOB 2018-39, FOB 2018-18 and FOB 2014.32.

[19] Case FO 19/02834, 19/03364 and 18/05446.

[20] Case FOB 2016-52, Thematic Report 2019 of 5 May 2020 on disciplinary cells and Thematic Report 2018 of 23 August 2019 on exclusion from association in the institutions of the Danish Prison and Probation Service. The latter is mentioned in item 4.2 below.

[21] Case FOB 2020-32.

or restrict the authority's discretionary powers according to a Danish rule or non-statutory principles of law.[22]

In principle, you might think that international human rights instruments would also be used as a stepping stone for establishing principles on good administrative practice and best practices within the framework of applicable law. In that respect, however, the Danish Ombudsman has so far been more cautious than many of his colleagues abroad.

The impact of the international human rights instrument depends in part on whether it has been implemented in Danish law and in part on whether it is binding or is solely a recommendation. The Ombudsman here uses the overall principles for the relationship between international law and Danish law, which the courts have developed.

Case FOB 2021-3 concerned the question of whether the Department of Prisons and Probation could use rooms of less than 8 square metres for double occupancy for inmates. The Ombudsman found that the European prison rules should be understood thus that specific minimum requirements must be set out in national law for the floor area that each inmate must have at their disposal. However, the Danish Circular on the size of inmate's rooms in Prison and Probation Service institutions did not set out such minimum requirements, but only regulated the minimum size of single and double cells. The effect was that the applicable Danish rules in this area did not ensure compliance with the European prison rules. However, as the European prison rules are not legally binding for the Member States, the Ombudsman could not criticise the Department's practice, but only make the relevant actors aware of the lack of compliance with the prison rules.

As stated above, there is considerable overlap between the ECHR and the national regulation. Therefore, it often happens that the result of the case already follows from Danish law, but that the case also includes human rights aspects. A classic example of this are cases about the prohibition against self-incrimination according to Section 10 of the Legal Protection Act.[23] Another example are cases about the right of access and the right of own access, where the practice of the Eur. Court H.R. supplements the relevant

[22] See also item 5 below. The Ombudsman has also emphasised the importance of the authorities including, on their own initiative, the ECHR, among other things, in their decisions and actual administrative activities; cf. Case FOB 2005.425 and FOB 1999.350.

[23] Case FOB 2023-8, FOB 2019-33 and FOB 2018-30.

Danish and EU law rules, but does not (with only reasonable certainty) ensure more extensive right of access.[24]

In such cases, the Ombudsman naturally ensures that the conception of law that his statement expresses is in accordance with the human rights. However, he normally confines himself to referencing the relevant Danish rule, even if human rights obligations are 'hiding' in the collective set of cases.[25] This approach has been met with criticism from some places.[26] But it has been a fixed practice by the Ombudsman with good reason. The approach is in my opinion especially well-founded in the not so few cases where it may be considered more difficult to establish the legal position under the ECHR's vague and elastic provisions than under Danish public legislation. And it is even more evident in the many cases where Danish law ensures more extensive rights than the international human rights instruments and where the inclusion of international law would thus not affect the outcome of the case. For the same reason, today you see no references to Article 10 of the ECHR in cases about public employees' freedom of expression, as the Danish rules ensure the employee a more extensive access to expressing yourself than required by the Convention.[27]

Furthermore, in my opinion, it is rather a sign of health than a problem when the Ombudsman has been able to solve so many cases in conformity with human rights without including an international human rights convention. Because this is an indication that Danish law fundamentally lives up to the human rights. It would be much more concerning if the Ombudsman would often need to resort directly to the international human rights instruments to ensure their compliance.

4.1.2. Review intensity

In the same way as in relation to Danish law, the Ombudsman includes human rights rules ex officio and as such not only if either the complainant or the defendant authority does so.

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[24] See Fenger, 'Menneskerettighedskonventionen og dens betydning for dansk forvaltningsret', U 2018 B, p. 233 (242).

[25] Sørensen, 'Ombudsmanden anno 2012', p. 169 (175).

[26] Næsborg-Andersen: Human Rights in National Administrative Law, p. 293 f. and 306, and see similarly in relation to the EU law's unwritten principles Taheri Abkenar, 'Ombudsmandens kontrol med EU-rettens grundlæggende forvaltningsprocessuelle rettigheder', in Blume et al. (ed.), 'Forvaltning og retssikkerhed', p. 393.

[27] Fenger, 'Menneskerettighedskonventionen og dens betydning for dansk forvaltningsret', U 2018 B, p. 233 (246 f.).

In Case FOB 2021-21, the social authorities had, with future effect, reduced the rate of disability pension from a fraction of 38/40 of full disability pension to 14/40. The disability pensioner believed that she was entitled to full disability pension, but the Ombudsman agreed with the authorities that the correct rate was 14/40. He subsequently noted – as a new element which had until then not been subject to considerations in the case – that disability pension was a benefit that could be protected according to Article 1 of the ECHR in the first Additional Protocol. On that basis, he made a thorough review of the Eur. Court H.R.'s practice concerning the Member States' access to withdraw a non-statutory recurring social benefit. Not until then did he conclude that the reduction was justified.

It also happens regularly that the Ombudsman on his own initiative opens cases about the authorities' compliance with human rights.

In Case FOB 2019-15, the Ombudsman investigated on his own initiative the Ministry of Immigration and Integration's work with rectifying the errors that were the result of the Ministry being too late in changing its practice due to a judgment by the Eur. Court H.R., which affected Danish practice in cases on humanitarian residence permits.

In Case FOB 2015-18, a 10-year-old boy and his grandmother, who was the boy's guardian, had been refused asylum in Denmark. A couple of months later, the municipality of residence decided to place the boy in an institution in order to investigate if the grandmother was capable of caring for the boy and if there was a risk of serious harm to the boy's health and development. The municipality also submitted an application for a residence permit on behalf of the boy and the grandmother. However, the Danish Immigration Service denied that the boy and the grandmother could submit an application for residence in Denmark, and the Service then arranged for the boy and the grandmother to be returned to Serbia together. The Ombudsman became aware of the case when it was mentioned during a monitoring visit to the asylum centre where the boy and his grandmother had stayed. He subsequently opened an own-initiative case where he noted that the, then, Ministry of Integration a few months before the Danish Immigration Service's decision had recognised that children placed involuntarily in institutions needed the protection of the Danish state according to the Convention on the Rights of the Child and Articles 3 and 8 of the ECHR, and that the children could thus generally not be told to take residence in another country, let alone leave Denmark with the parents. The Ombudsman found it extremely criticisable – and an expression of fundamental neglect of the boy – that the Danish Immigration Service denied that the two persons could submit an application for residence in Denmark and that the Service in continuation thereof told the Danish National Police that there was nothing to prevent deporting the two from Denmark.

The Ombudsman's application of international law has on several occasions gone through a development in the direction of a more independent and in-depth review.

One of the changes is that, originally, the Ombudsman did not normally conclude what the Convention entailed, but only asked the authorities to include it in the assessment. This applied in particular, but not exclusively, if the authority in question had not considered the question before the Ombudsman's statement.[28] Occasionally, the Ombudsman would also briefly mention the ECHR in his statements without taking a position on whether the Convention demanded that the case had a specific outcome.[29] Lastly, the ECHR was sometimes included as a supplementary – and often not very developed – argument for a result that was built on purely Danish rules and could in fact be reached solely on the basis of these rules.[30] Today, the Ombudsman more often concludes unambiguously whether the Convention is hindering a given decision or behaviour.[31]

The other development is that, for a number of years, the Ombudsman only referred directly to judgments by the Eur. Court H.R. to a limited extent and relied more on Danish legal literature about Convention practice.[32] In recent years, the law practice of the Eur. Court H.R. has more often been used directly with a sometimes quite comprehensive judgment analysis.[33]

As already mentioned, older Ombudsman practice includes examples where the Ombudsman has referred to the ECHR without also making it clear whether the ECHR actually demanded a specific result in the concrete case. There would sometimes be references to the ECHR in situations that did not immediately seem to be supported by the legal practice of the Eur. Court

[28] Case FOB 2006.346, FOB 2005.336, FOB 2004.525, FOB 1999.350, FOB 1983.205 and FOB 1982.156.

[29] Case FOB 2011 20-3, FOB 2007.375, FOB 2006.524 and FOB 2004.190.

[30] Case FOB 2003.699 and FOB 1990.232. See also item 5 below and Andersen, 'Ombudsmandens anvendelse af internationale regler', in Baumbach og Blume (ed.), 'Retskildernes kamp', p. 15 (35).

[31] Case FOB 2017-27 and FOB 2017-10 (ECHR was violated) and FOB 2021-28, FOB 2021-11, FOB 2021-16, FOB 2018-39, FOB 2018-18, FOB 2017-33, FOB 2017-12, FOB 2014-12 and FOB 2014-8 (ECHR was complied with). See also item 5 below.

[32] E.g. Case FOB 2011 20-3, FOB 2010 20-7, FOB 2004.452, FOB 2003.115 and FOB 1995.170.

[33] Case FOB 2021-21, FOB 2021-16, FOB 2021-11 and FOB 2013-18.

H.R. concerning the provision relied on.[34] These older statements could possibly leave the impression that the Ombudsman stands (or stood) for an expansive, activist and free interpretation of the ECHR and other international rules.

However, such an impression would not be justified. The reality is that the Ombudsman has always receded from stating that violations of international human rights instruments had taken place, unless he had solid support for it in either the relevant provision's wording or its explanatory notes and possibly legal practice. For instance, this applies to the ECHR where the final interpretation and legal development are in the hands of the Eur. Court H.R. and where the Ombudsman is not in the same way as in relation to Danish administrative law intended to play a special part in the establishment and development of applicable law. But it also applies in relation to international human rights instruments if compliance is not ensured by a special international body that has been granted jurisdiction to establish the content of the rules in question bindingly. In addition, the reluctance is particularly pronounced if either the legislative power or Parliament has considered the issue.[35] Thus, the Ombudsman does not see himself as a front-runner in the development of practice after the ECHR and other international human rights instruments. For the Ombudsman, the guidepost in all cases is a prognosis over what the Supreme Court (and the Eur. Court H.R.) would conclude.[36]

Besides, the review is marked by the same variables for a more or less reticent review that the Ombudsman uses in cases concerning Danish law. Thus, the starting point is full review without reticence. However, the Ombudsman will show reticence when assessing issues that presuppose special professional knowledge and expertise, typically of a non-legal nature.[37] If the case calls for discretionary assessments, the Ombudsman will – again in the same way as in cases without human rights contents – solely review the framework of the discretion but not the administration's balancing of legal criteria in a decision that is otherwise correct.[38]

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[34] For examples, see item 5 below.

[35] See item 4.2.1 below.

[36] Sørensen, aforementioned, p. 175. In other words, the Ombudsman has not taken the role that Rytter has suggested the courts to take; cf. Rytter, 'Dansk-europæisk menneskerettighedsbeskyttelse – en fredelig forfatningsretlig revolution', J 2010, p. 187.

[37] It is presumed that the Ombudsman's activities as National Preventive Mechanism (NPM) under the Optional Protocol to the UN Convention against Torture take place on an interdisciplinary basis and that at least medical expertise is included. In practice this part of the obligation is met by doctors from DIGNITY participating in the investigations conducted in this context.

[38] Case FOB 2013.25 and FOB 2012-17.

Lastly, doubt about the facts of a case may under the circumstances entail that the Ombudsman leaves the authority a margin.[39]

In Case FOB 2020-19, the Ministry of Immigration and Integration refused to extend the residence permit of a man from Afghanistan who had been ordered to leave Denmark. The central issue of the case was whether the man, who suffered from a serious illness, had access to the necessary treatment in Afghanistan. The Ombudsman found that the Ministry had included the matters that, according to the practice of the Eur. Court H.R. concerning Article 3 of the ECHR, had to be included in the overall assessment of whether the man would have access to the necessary treatment. The specific assessment of these matters related to assumptions and predictions about the actual situation in Afghanistan, and, in other words, it was an evidential assessment that was in the nature of partly a balancing of contradictory evidence, partly a prognosis. The Ombudsman could generally not make this assessment in a different and better way than the Ministry. He could therefore only criticise the Ministry's decision if there were special circumstances in the case, such as if the Ministry had not investigated it properly or had used rules on burden of proof incorrectly. This was not the case.

4.2. Modifications to the ordinary review framework

4.2.1. Review limitations

Above, I have shown that the increased significance of international human rights entails that the Ombudsman's review has gone from originally only ensuring that the administration complied with Danish legislation in the meeting with the citizens to now also measuring the administration's activities against international standards. However, the Ombudsman still does not have full review access in relation to the administration's compliance with international human rights instruments.

Because, contrary to the courts, the Ombudsman is subject to the limitation in his basis for review that he cannot review legislative acts' compatibility with the ECHR or other international rules; cf. Section 7(1) of the Ombudsman Act. In the same way as in cases without human rights aspects, the Ombudsman's lack of jurisdiction to reviewing Parliament's activities also entails that he shows considerable reticence in dismissing an administrative practice on which Parliament has already taken a position.

In Case FOB 2013-25, the Ombudsman noticed that the investigated practice for notification of a humanitarian residence permit was adopted by

[39] Case FOB 2020-19, FOB 2019-6 and FOB 2010 20-7.

Parliament. On that basis, it would require very secure grounds to dispute the Ministry's practice for notifying a humanitarian residence permit, including for when the treatment options in the home country would be examined. Based on this standard, the Ombudsman did not find he had the necessary basis for assuming that it was in contravention of Articles 2 or 3 of the ECHR that the Ministry had refused humanitarian residence without having started further investigation of the treatment options for a woman in her home country.

On the other hand, the Ombudsman can, according to Section 12 of the Ombudsman Act, call Parliament's attention to the fact that a legislative act can raise a human rights problem.

In Case FOB 1995.46, the Ombudsman called on the Ministry of Employment to consider if there were grounds for changing the legislation in order to bring it in accordance with the international law obligations that Denmark had assumed in the ratification of ILO Convention No. 111 and the UN Convention on the Elimination of Racial Discrimination. The Ministry subsequently presented the legislative bill that led to the Act on the Prohibition of Differences of Treatment in the Labour Market.

The Ombudsman can also recommend that a complainant is granted free legal aid to conduct a case before the courts. In the same way, in own-initiative investigations, he can state in advance that he will give such a recommendation if he receives a complaint. This option has been used in individual cases that raise sensitive human rights issues.

In Case FOB 2016-17, the Ombudsman found that it had to be considered doubtful whether the proportionality requirement in relation to the residence obligation at Center Sandholm was still met in the case. However, he found it most proper, if necessary, to leave the final assessment of the issue to the courts, and he therefore stated that he would be prepared to recommend, according to Section 23 of the Ombudsman Act, that free legal aid be granted for review of the issue.[40]

4.2.2. Extended basis for review

In certain respects, the Ombudsman's monitoring of the administration's compliance with human rights goes further.

4.2.2.1. Monitoring activities

The first extension concerns the Ombudsman's monitoring activities. According to Section 18; cf. Section 21, second sentence, of the Ombudsman Act, he can include universal human and humanitarian views. The aim of the underlying legislative bill was that the Ombudsman's

[40] For another example, see Case FOB 2019-15.

assessment should be affected by a requirement of legal protection, consideration and dignified treatment of the citizens. For instance, he can give suggestions for building changes, better maintenance and better leisure and occupation options.

Both the facts and the issues can vary a lot from case to case, but they have in common that the Ombudsman, according to Section 18, tries to articulate a more general societal understanding of what is decent and fair in relation to citizens who have been deprived of their liberty.

In Case FOB 1988.201, the Ombudsman stated that patients at psychiatric departments were locked into a defined area and forced to be with other mentally ill people. They should therefore be ensured a minimum of privacy, and, on that basis, he criticised that patients in middle beds did not have a wall to turn towards.

In Case FO 22/03260 and FO 22/03529, the Ombudsman stated that inmates in local prisons should be able to expect that they can go to the toilet, also during the night, so they did not have to use for instance urine bottles in their cells. He therefore recommended that the managements of three local prisons ensure that cell calls are answered as quickly as possible and within reasonable time. He also recommended that urine bottles are not handed out to inmates unless requested.

In this area, the assessment basis is thus broader than the traditional assessment basis of Section 21 of the Ombudsman Act – and also than the one used by the courts. For the same reason, according to Section 18, the Ombudsman's statements usually distinguish clearly between a legal assessment on the one hand and the humanitarian views that he can include in his assessment basis on the other hand.

In Case FOB 2014-42 about Center Sandholm, the Ombudsman stated that he did not have grounds to assume that the conditions for people with tolerated residence status in the centre was in contravention of applicable law, including the UN Convention against Torture and Article 3 of the ECHR, and that he also did not have grounds to assume that this was the case for individuals. However, he did find that there were grounds for considering to what extent it was necessary to maintain such burdensome and restrictive living conditions.

In Case FOB 2018-39 about Return Centre Sjælsmark, the Ombudsman found that the children's conditions were generally not in contravention of the UN Convention on the Rights of the Child, the UN Convention against Torture or Article 3 of the European Convention on Human Rights. He then noted that the children nevertheless lived in difficult conditions. And he pointed to

various conditions concerning, for instance, eating and leisure activities that could be changed in order to improve the children's wellbeing.

In my opinion, the Ombudsman's practice can, according to Section 18, with a certain justification be seen as a sort of 'extended protection of human rights'. Because, on the one hand, the Ombudsman's broader assessment basis in such cases does not constitute an implementation of binding rules within human rights. But on the other hand, the considerations included in the Ombudsman's assessment are to a significant extent convergent with values and ways of thinking that are behind many international human rights instruments. Furthermore, the monitoring activities unfold in areas where the conditions are often not covered by legal precepts or by norms of good administrative practice and where human rights observations in a broad sense also take up a lot of space for that reason.[41]

In Case FO 12/00263, an employee at a secure institution for young people had promised a boy that he could call his mother if he could find a hidden telephone while blindfolded. When the boy found the telephone, he still was not allowed to call home because he had a police ban against calling. The Ombudsman found that the young person had been subjected to unreasonable and degrading treatment. He noted that 'a secure institution is a type of closed prison for young people under 18. The employee therefore possesses a great deal of power, which must be used with consideration and respect for the young people's fundamental rights.'

As mentioned in item 2.1 above, the Ombudsman has been appointed Danish National Preventive Mechanism (NPM) under the Optional Protocol to the UN Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment (OPCAT). In this respect, the Ombudsman's mandate is characterised by the preventive aim being more prominent so that it is an independent focus area to look at matters that reduce the risk of errors and not just, as in the original more retrospective Ombudsman role, to react to errors etc. that have already been made.

In relation to the monitoring activities, it is thus not uncommon that the Ombudsman – also where he finds no violations of applicable law – makes recommendations that may strengthen the legal protection and the actual

[41] Gammeltoft-Hansen, 'Folkerettens betydning for ombudsmandens virksomhed – med særligt henblik på menneskerettighederne og EU-retten', in Christensen et al. (ed.), 'Max Sørensen 100 år', p. 525 (529 f.). In special cases, such considerations of dignity are also included outside Section 18 monitoring visits in the Ombudsman's selection of cases. In Case FOB 2012-10, the Ombudsman thus opened an own-initiative case on care for live-born, inevitably dying children who in some cases had been left to die alone in a utility room. After he entered the case, the Danish Health Authority impressed on the Danish maternity wards that inevitably dying children should be given the necessary care.

conditions for the affected people. For example, the Ombudsman has several times recommended that the central authorities do more to inform the institutions about the rules and guidelines they must use. He has also recommended that children and young people who on arrival to a secure institution have not already undergone a psychiatric evaluation are offered screening in order to uncover a possible need for this.[42] And that institutions for children and young people with disabilities take initiatives to prevent that the children are exposed to violence and sexual abuse.[43]

In a thematic report from 2018 on exclusion from association in Prison and Probation Service Institutions, the Ombudsman stated that more could be done on several points to protect inmates from mental health damage when they are excluded from association. Exclusions generally took place in accordance with the rules, but the documentation in the reports could, in his opinion, be better, and the managements of various institutions should be better at following up on the quality of the reports.[44]

4.2.2.2. The Convention on the Rights of the Child

The second extension concerns the Ombudsman's tasks in relation to the Convention on the Rights of the Child. According to Section 12(2) of the Ombudsman Act, he is obligated to make Parliament and the government as well as municipalities and regions aware of any problems in connection with the legislation's compatibility with international obligations to ensure the rights of children.

In Case FOB 2015-53, the Ombudsman found that Danish legislation did not contain provisions that school pupils at private primary and lower secondary schools were to be heard before they were dismissed or expelled. He therefore asked the Ministry of Education for a statement about the implementation of Article 12 of the Convention on the Rights of the Child, which establishes a child's right to be heard in all matters concerning the child. The Ministry of Education then drafted two guides on the issue and denied that there was a need for further legislative clarification of the issue. This caused the Ombudsman to recommend that the Ministry (re-)consider legislation as an effective means for compliance with children's right to be heard within the private school sector. He later informed Parliament that it could not be ruled out that the Ministry's decision to continue the information efforts rather than establishing new legislation would have the consequence that the Convention problem would be dragged out further. In 2020, new

[42] Thematic Report 2021 on children and young people in secure residential institutions.

[43] Thematic Report 2020 on institutions for children and young people with disabilities.

[44] Thematic Report 2018 on exclusion from association in the institutions of the Danish Prison and Probation Service.

legislation was established according to which also private schools must consult the pupil before the school decides to expel a pupil.

In addition, the Ombudsman's statements can lead to legislation relating to human rights, including in relation to the Convention on the Rights of the Child and the ECHR. For example, the committee that submitted Report No. 1551/2015 on use of coercion towards children and young people placed outside the home – and whose work led to the Act on Adult Responsibility – was set up after the Ombudsman had contacted the Ministry of Social Affairs and Integration and pointed out that the then-applicable rules on use of coercion towards children and young people were unclear.

5. Human rights as ideals outside their scope of application

Above in item 4.2.2.1, I argued that you can view the Ombudsman's broader mandate according to Section 18 of the Ombudsman Act and the UN OPCAT rules as an extended implementation of human rights values outside the actual scope of application of the human rights. On that basis, you can ask the related question of whether international human rights instruments should play a similar role in relation to administrative acts so that they are not only significant as a legal framework for the administration, but that the considerations followed by the human rights instruments must be included as criteria in the administrative authorities' exercise of discretionary powers, regardless of whether the international rules actually regulate the situation in question.

A number of older Ombudsman statements seem to be built on such a conception of law.

In Case FOB 2004.452 and FOB 2003.115, the Ombudsman stated that a uniform treatment of all journalists had to be considered to correspond best with the consideration behind Article 10 of the European Convention on Human Rights on freedom of expression. The Ombudsman did not state whether the cited difference of treatment in the specific cases was compatible or incompatible with the Convention. Nor about why the equal treatment consideration would be most compatible with Article 10 if Article 10 did not itself prescribe equal treatment in the specific cases.

In Case FOB 2009 3-1, FOB 2009 17-2, FOB 2005.589, FOB 2005.485 and FOB 2001.504, in relation to the question of right of additional access, the Ombudsman stated that a scheme under which there are no more restrictions for disclosure and communication of information than necessary due to substantial societal considerations is most consistent with the provision in Article 10 of the European Convention on Human Rights. In those cases, the

Ombudsman also did not take a position on whether the Convention demanded a specific result in the individual cases.[45]

In more recent practice, you do not find similar wording concerning the interplay between the ECHR and the exercise of discretion. Because if the ECHR demands (or rules out) a specific result, the administration has no discretion, but must either directly or through the interpretation and instruction rule ensure that the Convention requirements are satisfied. In other words, the discretion is only apparent, and it is therefore not the case that the ECHR is part of a balancing where the weight of opposite discretionary considerations that determine if the relevant Convention provision must be observed. On the other hand, if the Convention does not demand a specific result in the exercise of discretion, there is no international law element to include in the discretion. It cannot be a compulsory criterion to over-comply with international law – according to neither the ECHR nor Danish law. Furthermore, references to the Convention can even be misleading in the cases where the Eur. Court H.R.'s legal practice recognises the considerations that led the authorities to act the way they did.[46]

On that basis, the Ombudsman no longer refers to the ECHR without also making clear what more precise significance the Convention provision has to the decision of the present case. Behind this change of direction is also an observation that the Ombudsman owes it to the authority being reviewed to make it clear when the Ombudsman finds a Convention breach and when the Ombudsman himself uses parallel national principles of law with more extensive content. In the same way as in relation to the Ombudsman's activities according to Section 18 of the Ombudsman Act, the Ombudsman thus no longer in decision cases relies on the human rights conventions' special legitimacy in support of results that the conventions strictly speaking do not require.

This changed approach does not mean that the values that, for instance, the ECHR reflects are today considered to be without significance for the authority requirement, including for the establishment of what the administration can do pursuant to the institution status. There is a good reason why certain types of freedoms are deemed so worthy of protection that they are secured in international human rights instruments – and typically

[45] See also Case FOB 2010 20-7 and Andersen, aforementioned, p. 36, in which the Ombudsman has implied the value basis for the international rule in the Danish legal basis.

[46] Fenger, 'Den forvaltningsretlige teoris udfordringer i starten af det 21. århundrede', Juristen 2010, p. 275 (279), and in the same direction Mørup, 'Legalitetsprincippet og grundsætningen om saglig forvaltning', in Fenger (ed.), Forvaltningsret, p. 340 f.

also in our own Constitutional Act.[47] However, it is not consideration for the international rule as such that is significant, but instead the fact that the underlying values influence the formation of law in the same way as (other) legal protection considerations, the principle of legitimate expectations and the principle of proportionality.[48]

6. Conclusion

The Ombudsman institution was not created with a view to promoting and protecting human rights. But, concurrently with the rules on human rights gaining in importance for the public administration's activities, the number of this type of cases has increased in the Ombudsman institution.

As a rule, the Ombudsman uses human rights in the same way as the courts. However, the Ombudsman's basis for review is more narrow in that he cannot review legislative acts' compatibility with international human rights instruments. In other respects, his assessment basis is broader, and his possibility of actively promoting human rights values is greater.

It is an important part of the Ombudsman's work to increase attention on issues of significance to citizens' rights and to promote an authority culture that supports the general rule of law and the respect for human rights, be it the conventions or the human value in itself. Luckily, the Ombudsman is well placed for identifying situations where administrative practice may raise legal protection problems. Furthermore, the Ombudsman's procedure is particularly suited for the weak in society who do not have the funds or the strength for a court procedure. These advantages are not least important in cases about fundamental rights.

The Danish Weekly Law Reports (Ugeskrift for Retsvæsen) 2023B, p. 105

[47] Fenger, 'Anstaltsforholdet som hjemmelsgrundlag', U 2021 B, p. 243 (244 f.).

[48] In the same direction Garde and Hansen Jensen, 'Menneskerettighedernes betydning for udstedelse af forvaltningsakter', in Toftegaard Nielsen et al., Festskrift om menneskerettigheder til Carl Aage Nørgaard, p. 115.