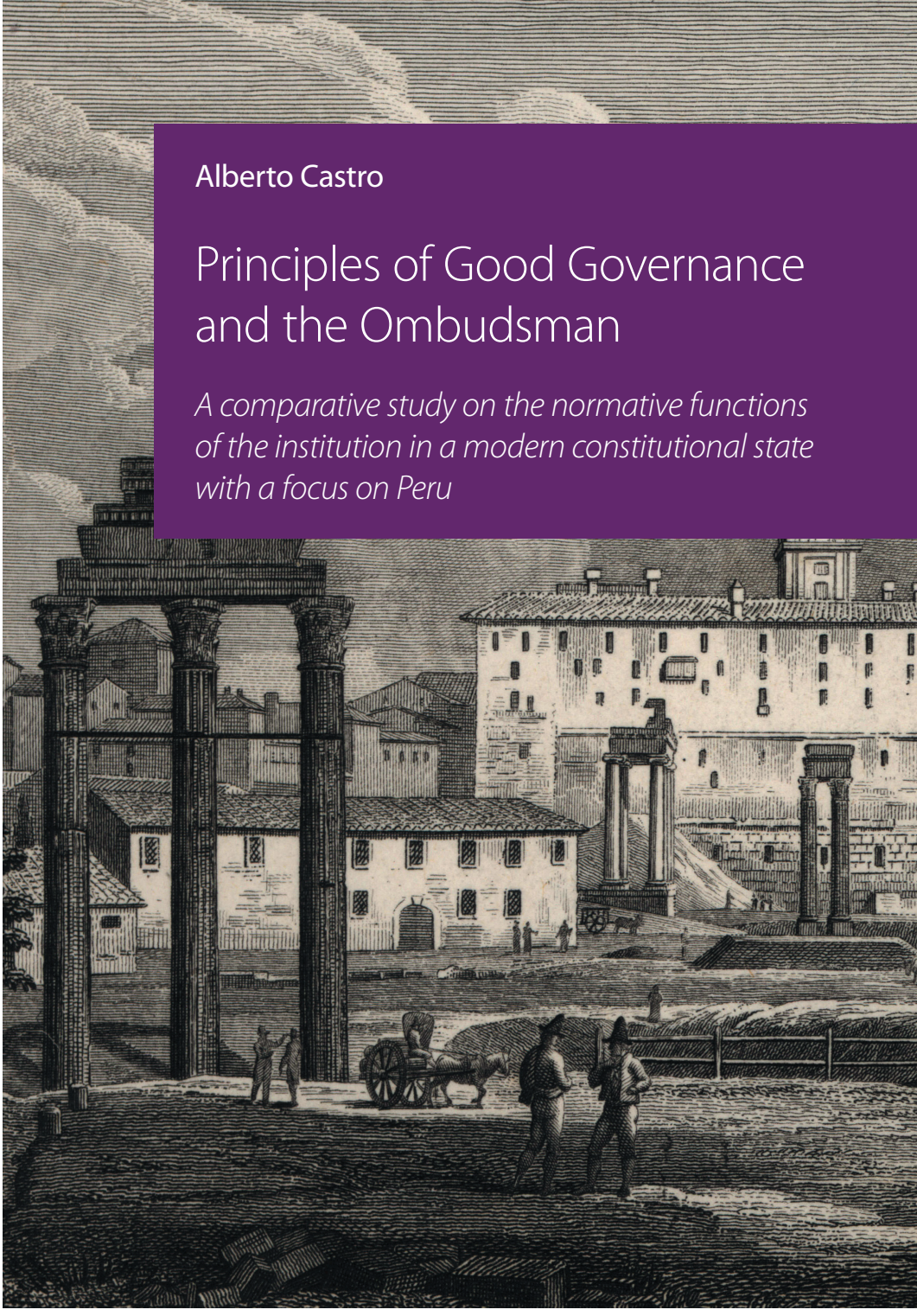

Alberto Castro

Principles of Good Governance and the Ombudsman

A comparative study on the normative functions of the institution in a modern constitutional state with a focus on Peru

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PREFACE

Doing a PhD entails not only an academic journey but also a personal one. In many cases it means a commitment to the future that tests one's resolve, resilience and persistence, and its accomplishment in many ways becomes an act of faith, even an obsession, that inevitably affects one's family, close friends, and nearest and dearest. Many accompanied me on this adventure in one way or another. Thanks to all of them.

In particular, I would like to thank the following people, without whose support this thesis would not have been possible.

First of all, I thank my supervisor, Prof. Henk Addink for his advice, support and encouragement.

Next, I would like to thank the Peruvian Ombudsman Office, the *Defensoría del Pueblo*, particularly former ombudsman Walter Albán and former ombudswoman Beatriz Merino. Thanks also to Samuel Abad, Eugenia Fernán, Alicia Abanto, and, especially, Malena Pineda and Carlos Álvarez Osorio.

I also would like to thank the Dutch Embassy in Lima; particularly, I would like to mention Ellen Roof. Thanks also to Nuffic for the financial support.

My profound thanks go to everyone else at each of the ombudsman institutions who shared their experiences, perspectives and information for this study; and Guillermo Escobar for his expert opinion. Special thanks to Juli Ponce Solé for the many insights that went into my work. My thanks also go to Rocío Villanueva, Johnny Zas Friz Burga and Cecilia Bernuy for their advice, as well as Mayte Chumberiza, Esteban Poole and Kenneth Hermse.

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Finally, I dedicate this thesis to two people: first, Aurora (Mamá Yoya), for being the warm and loving light that still illuminates my path. I know that you would be proud. And second, Grecia, for the various ways that I draw inspiration and motivation in life from my love for you.

CONTENTS

PART I
INTRODUCTION

The objective in this part of the book is to establish the context and scope of this study, introducing the main concepts and ideas supporting the research while explaining the deep motivations underlying it: to determine the extent to which, through the performance of normative functions and the application of principles of good governance as assessment standards, the ombudsman institution can contribute to improving the quality of government while enhancing the legitimacy of the administration and the democratic system as a whole. Chapter 1 establishes the relationship between the ombudsman, the principles of good governance, and quality as a factor of legitimacy. Chapter 2 describes the research design. Chapter 3 analyses the role of the ombudsman institution as a developer of legal norms, and its ability to codify standards with which to assess the behaviour of administrative bodies. To this end, the institution is examined from a substantive point of view, analysing its functions in terms of redress and control and proposing a classification of three general models of ombudsman. Finally, the legal nature of the institution's standards of assessment is determined.

CHAPTER 1

THE OMBUDSMAN, THE PRINCIPLES OF GOOD GOVERNANCE AND THE QUESTION OF LEGITIMACY

This chapter presents the relationship between the ombudsman institution, the principles of good governance, and the notion of quality as a factor of legitimacy. A brief explanation is provided about how the ombudsman contributes to the development of legal norms in modern constitutional states. As a mechanism of accountability, the institution of the ombudsman, in assessing the role of the government against normative standards, can effectively promote good governance and strengthen the democratic rule of law particularly in new democracies, such as Peru, but also in longer-established ones, where the ombudsman can provide new inputs for legitimacy.

1.1. THE ROLE OF THE OMBUDSMAN IN THE DEVELOPMENT OF THE PRINCIPLES OF GOOD GOVERNANCE

1.1.1. THE NORMATIVE FUNCTION OF THE OMBUDSMAN AND THE PRINCIPLES OF GOOD GOVERNANCE

The ombudsman is a public-sector institution, preferably established by the legislative branch of the government to assess, as a rule, the administrative activities of the executive branch.[1] It is a "phenomenon of constitutional law"[2] that was first introduced in the beginning of the 19th century and then spread throughout the world in the second half of the 20th century.[3]

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1 Linda C. Reif, *The ombudsman, good governance and the international human rights system*, Leiden-Boston: Martinus Nijhoff Publishers, 2004, p. 1.

2 Katja Heede, *European Ombudsman: Redress and control at Union level*, The Hague: Kluwer Law International, 2000, p. 8.

3 However, this expantion is not exempted from criticism. In this regard, some authors consider that the accelerated spread of the ombudsman has contributed to the distortion of the institution. See Najmul Abedin, "Conceptual and functional diversity of the ombudsman institution: A classification", in Administration & Society, Vol. 43, Issue 8, 2011, pp. 903–905.

Since its establishment, the institution has undergone a process of gradual evolution, an "organic historical process"[4] giving rise to "development waves of ombudsmen" and consequent variations in their powers and tasks that have ultimately led to the hybridisation of the institution.[5] The ombudsman emerged in Latin America in 1990. This late appearance might be explained, among other factors, by the disparity between the original Scandinavian version of the institution and the legal tradition of the Latin American region, together with limited awareness and the complexity of the term ombudsman itself.[6] In Latin America, the institution of the ombudsman adopted the Spanish model, and in many cases that country's title of *Defensor del Pueblo* was retained.[7] The role of ombudsman has been adapted in these countries, making inroads into protecting human rights and consolidating and further developing democracy. Since then, the institution in the region has come to represent not only a constitutional and legal phenomenon but also a political one[8], as well as an important instrument with which to strengthen and further develop the democratic rule of law.

The modern constitutional state has three cornerstones: rule of law, democracy and good governance.[9] At present, the institution of the ombudsman – as a constitutional concept characterised by independent, easily accessible and soft control of public administration by means of highly reputable persons – is connected to the principles of the rule of law and democracy.[10] It is considered

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See also, Sabine Carl, "The history and evolution of the ombudsman model", in M. Hertogh & K. Kirkham (eds), *Research Handbook on the Ombudsman*, Cheltenham-Northampton: Edward Elgar Publishing, 2018, pp. 26–28.

4 Sabine Carl, loc.cit., p. 18.

5 Milan Remac, "Standards of ombudsman assessment: A new normative concept?", in *Utrecht Law Review*, Volume 9, Issue 3 (July) 2013, p. 63.

6 Héctor Fix Zamudio, "Posibilidad del ombudsman en el derecho latinoamericano", in *La Defensoría de los Derechos Universitarios de la UNAM y la institución del Ombudsman en Suecia*. México: UNAM, 1986, pp. 34–35.

7 This is especially true of the Andean region. However, in Central American countries, other names have been adopted, including *Procurador de los Derechos Humanos* (Guatemala and El Salvador), *Comisionado Nacional de Protección a los Derechos Humanos* (Honduras) and *Comisión Nacional de Derechos Humanos* (México). See, Comisión Andina de Juristas, *Defensorías del Pueblo en la Región Andina. Experiencias comparadas*, Lima: CAJ, 2001, pp. 17–20.

8 Álvaro Gil Robles, "El Defensor del Pueblo y su impacto en España y América Latina", in Instituto Interamericano de Derechos Humanos. *Estudios Básicos de Derechos Humanos II*, San José: IIDH, 1995, pp. 441–458. For the political role of human rights ombudsman see, Sonia Cárdenas, *Chains of justice: The global rise of state institutions for human rights*, Philadelphia: University of Pennsylvania Press, 2014.

9 G.H. Addink, "Three legal dimensions of good governance. Some recent developments", in Alberto Castro (ed), *Buen Gobierno y Derechos Humanos*, Lima: Facultad de Derecho PUCP – Idehpucp, 2014, p. 33.

10 Gabriele Kucsko-Stadlmayer, "The legal structures of ombudsman-institutions in Europe – A legal comparative analysis", in Gabriele Kucsko-Stadlmayer (ed), *European Ombudsman-Institutions. A comparative legal analysis regarding the multifaceted realisation of an idea*, Wien: Springer, 2008, p. 1.

an essential contribution to the effectiveness of these principles, the protection of human rights, the promotion of good governance, and the enhancement of legitimacy.[11] Starting from the first decade of the 21st century, the concept of the ombudsman has become a global phenomenon.

In the comparative legal doctrine, it is recognised that the ombudsman institution performs a normative function.[12] This normative function reflects the task of the ombudsman in developing legal norms in a very strong but indirect way, and rests on the ability to conduct investigations as well as to issue recommendations and reports from which normative statements can be extracted.

The normative function is also exercised through the substantive review of government actions by assessing them against either legally binding or non-legally binding standards. When the ombudsman applies legally binding standards for the assessment of government actions, it is fundamentally interpreting law. In so doing, the institution contributes to the development of legal principles. In this case, it can be said that the ombudsman applies a similar criteria as the judiciary. On the other hand, when non-legally binding standards are applied, the ombudsman usually develops and codifies its own normative standards through which the institution conducts a kind of review oriented mainly to the protection of principles and values, which are not judicially enforceable. These non-legally binding standards, or soft law norms, can also be the basis for the development of fundamental legal principles. In this study, the former is called hard-law review, and the latter soft-law review.[13] In either case, the ombudsman makes recommendations to the administration, the contents of which are normative in essence, although given their non-binding character, their legal effect is not always recognised. In this regard, the institution contributes to the development (and modification) of legal norms.[14] For some

11 Linda C. Reif, "The role of human rights institutions protection and promotion, good governance and strengthening the democratic rule of law", in Alberto Castro (ed), *Buen Gobierno y Derechos Humanos*, Lima: Facultad de Derecho PUCP – Idehpucp, 2014, p. 65.

12 On the lawmaking function of the ombudsman, see M.E. de Leeuw, "The European Ombudsman's role as a developer of norms of good administration", in *European Public Law*, Vol. 17, No 2, 2011, pp. 349–368; N. Niessen, "Lawmaking by the National Ombudsman?", in F. Stroink and E. van der Linden (eds), *Judicial lawmaking and administrative law*, Antwerpen-Oxford: Intersentia, 2005, pp. 285–310; P. Bonnor, "Ombudsmen and the development of public law", in *European Public Law*, Volume 9, Issue 2, 2003, pp. 237–267.

13 This twofold classification of the ombudsman's substantive review is based on the legally-binding force of the norms applied as standards of assessment, and not on the legal character of the decision resulting from the assessment. It is important to keep in mind that the ombudsman conducts a soft law review (in the non-legally enforceable sense) from the perspective of the legal nature of the decision, insofar as its decisions and recommendations are not legally binding – unlike the judiciary, whose decisions are.

14 For the normative function of the ombudsman institution, see Section 3.6.

authors, this is an institutional characteristic, which in turn constitutes a guarantee for the continually evolving process of "*sociale rechtsstaat*" or modern constitutional states.[15]

Good governance is part of the concept of the modern state.[16] As an element of its accountability role, the ombudsman promotes the development of the legal framework inspired by fundamental constitutional values (the principles of good governance) to guarantee the proper exercise of governmental powers and to strengthen democracy, the rule of law, and good governance. It may be said that the ombudsman, as one of the fourth power institutions[17] or new powers, protects the "integrity branch"[18] of modern constitutional states by contributing to the development of principles of good governance as a means of improving the quality of government.[19]

Discussions about the legal dimension of good governance and its core principles are still ongoing in several countries with varying legal traditions. This reflects a contemporary concern for the quality of administrative performance, even though such debates are not always recognised as referring overtly to good governance (or good administration). Ultimately, these discussions arise out of changes in society and government, which have enlarged the tasks of the administration – especially where socio-economic policies are concerned – prompting calls for more flexibility to enable more effective action.[20] Nonetheless, public authorities and citizens are not yet capable of even clearly identifying the legal norms and obligations that have arisen from good governance and good administration, let alone when these norms are violated and how they are affected by their infringement. The distinction between the notions of good governance and good administration is not clear either.

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15 Manuel García Álvarez & Rubén García López, "El papel de los defensores del pueblo como impulsores de la modificación del ordenamiento jurídico: Una garantía adicional de desarrollo del Estado social", in *Teoría y Realidad Constitucional*, No 26, 2010, pp. 137–141.

16 G.H. Addink, loc.cit., p. 23.

17 G.H. Addink, "The ombudsman as the fourth power. On the foundations of ombudsman law from a comparative perspective", in Frits Stroink and Eveline van der Linden, *Judicial lawmaking and administrative law*, Antwerpen-Oxford: Intersentia, 2005, p. 273.

18 B. Ackerman, "The new separation of powers", in *Harvard Law Review*, Vol. 113, No 3, January 2000, pp. 691–693.

19 For an explanation on the ombudsman as a fourth-power institution and the integrity branch, see Section 1.1.2.

20 In this regard, see Javier Barnes, "Reform and innovation of administrative procedure", in Javier Barnes (ed), *Transforming administrative procedure*, Sevilla: Global Law Press 2008; Matthias Ruffert, "The transformation of administrative law as a transnational methodological project", in Matthias Ruffert (ed), *The transformation of administrative law in Europe,* Munich: European Law Publishing, 2007; Oriol Mir Puigpelat, *Globalización, Estado y Derecho. Las transformaciones recientes del derecho administrativo*, Madrid: Civitas, 2004; Eberhard Schmidt-Assmann, *La teoría general del derecho administrativo como sistema*, Madrid: Marcial Pons, 2003.

Modern society and administration is undergoing tremendous changes due to the fusion of administrative modernisation with regulatory reform movements, as well as trends such as globalisation and the knowledge-based society. These changes are invoking new perspectives in administrative law, and academic legal discussions on new dimensions of administrative law are being debated internationally. In any cases, different administrative legal systems have been subject to similar modifications, mainly following on from administrative modernisation, the constitutionalisation of administrative law, and the internationalisation of administrative relations at global and regional level. Thus, there is a need for administrative law to provide more instruments for effective government action.

In this regard, the development of the public (administrative) law instruments from a good governance perspective can be considered as a suitable mechanism for enhancing legitimacy. This study analyses the normative function of the ombudsman institution and its capacity to contribute to the development of more flexible and effective legal frameworks through the application of principles of good governance as assessment standards. In doing so, the institution contributes to improving governmental quality as well as strengthening the democratic rule of law and the political system as a whole.[21] Hence, through the performance of normative functions the ombudsman can actively influence government.[22] Because of its flexibility and ability to adapt to different contexts, the institution can play a prominent role in achieving these goals, particularly in new democracies, such as Peru, but also in longer-established democracies, where the ombudsman can provide new inputs for legitimacy.

1.1.2. THE OMBUDSMAN, DEMOCRATIC ACCOUNTABILITY, AND LEGITIMACY

In analysing the legal-administrative aspects of good governance, public accountability is identified as one of the indicators of legitimacy. An effective democratic state relies on legislative, administrative, and judicial institutions, which are empowered to exercise a degree of direct control over how the other institutions exercise their functions.[23] The notion of control is a constitutional

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21 For the purposes of this study, the words "government" and "administration" include public authorities, administrative authorities and civil servants. Therefore, when this study refers to the need to improve the quality of the government or the administration, it also refers to improving the quality of the performance of these authorities and civil servants.

22 On the discussion of the potential for the ombudsman to play a more dynamic role in influencing government see Chris Gill, "What can government learn from the ombudsman?", in M. Hertogh & K. Kirkham (eds), *Research Handbook on the Ombudsman*, Cheltenham-Northampton: Edward Elgar Publishing, 2018, pp. 298–318.

23 M.J.C. Vile, *Constitutionalism and the separation of powers*, Indianapolis: Liberty Fund, 1998, pp. 19–20.

concept, which spans the whole structure and functions of the state.[24] The modern state has undergone a reconfiguration of its structure and functions and new institutions have arisen to which controlling functions for complementing traditional forms of accountability have also been assigned to varying degrees.[25] In this context, the ombudsman can be considered as a modern mechanism of democratic accountability.[26] It serves as an important element of good governance, enhancing the accountability of the government, and in so doing helps to improve the functioning of public administration.[27]

The ombudsman is an institution that has the capacity to check the abuses by other public agencies and branches of government. This form of oversight or control exercised by one public institution over others is qualified as "horizontal accountability". This can take different forms, such as administrative accountability (by reviewing proper conduct including the procedural fairness of bureaucratic acts), legal accountability (by supervising the observance of legal rules), and constitutional accountability (by evaluating whether legislatives acts are in accordance with constitutional provisions).

As Linda Reif has stated, the ombudsman improves legal, constitutional, and administrative (horizontal) accountability of government through impartial investigation of the conduct of administrative authorities, recommending changes to law, policy, or practice whenever illegal or improper administration is detected.[28] In addition, the ombudsman institution can serve as a vertical accountability mechanism between the public and the government, serving as a channel through which citizens can lodge complaints about the government.[29] Moreover, by assessing the performance of administrative authorities, the ombudsman provides feedback on governmental action, helping the government learn from citizens' complaints.[30]

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24 Luciano Parejo Alfonso, *Derecho Administrativo*, Madrid: Ariel, 2003, pp. 1076–1080.

25 Roberto Dromi, *Modernización del control público*, Buenos Aires: Hispania, 2005, pp. 9–10.

26 S. Owen, "The ombudsman: Essential elements and common challenges", in Linda C. Reif, Mary A. Marshall and Charles Ferris (eds), *The ombudsman: Diversity and development*, Edmonton: International Ombudsman Institute, 1993, p. 1.

27 Linda C. Reif, *The ombudsman, good governance and the international human rights system*, p. 59.

28 Ibid., p. 60.

29 Public institutions such as the judiciary, electoral commissions, anti-corruption agencies, human rights commissions, the ombudsman, etc., conduct horizontal accountability; this is as opposed to vertical accountability, which is the kind of control carried out by citizens, for instance, during election periods and through the complaints lodged by individuals with the ombudsman. For a detailed explanation of accountability as a good governance principle, see Section 6.3.1.

30 M. Oosting, "Roles for the ombudsmen: past, present and future", Speech at the International Symposium on the occasion of the 80th anniversary of the Parliamentary Ombudsman of Finland, Helsinki, 7 February 2000.

As a control mechanism, parliamentary and quasi-judicial ombudsmen (both of which focus mainly on the administrative conduct of the government) are primarily oriented towards issues of administrative accountability, whereas other ombudsmen, such as the mixed ombudsman model, work intensively in areas of constitutional and legal accountability.[31] It is important to mention that according to Linda Reif when an ombudsman has an anti-corruption mandate, it can provide financial (concerning the misuse of public funds, conflict of interest, etc) as well as constitutional and administrative accountability.[32]

Given the ombudsman's role in public (horizontal and vertical) accountability as well as in the protection of human rights, the institution plays an important function in applying principles of good governance with a view to improving the government quality, including the prevention of corruption. In this way, the functions conferred on the institution are significant from a rule of law perspective.[33]

The accountability function of the ombudsman and its influence on both the public decision-making process and the behaviour of public authorities have meant that the ombudsman is acknowledged by part of the doctrine as a "fourth power" institution.[34] As a fourth power, the ombudsman focuses on institutional integrity.[35]As such, some authors contend that it should be recognised as a separate and distinctive constitutional branch of government known as the "integrity branch."[36] From this perspective, institutional integrity goes beyond a narrow concept of legality to concern itself with ensuring that government institutions exercise the powers conferred on them in the manner in which, and for the purposes for which, they are expected or required to do so.[37] Thus, institutional integrity encompasses two considerations in addition to legality. First, fidelity to the public purposes for which the institution was created; and second, application of the public values that the institution is expected (or required) to obey.[38] From this broader perspective of legality, it can be argued that integrity means compliance with the endorsed legal principles and values

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31 For a detailed description of models of ombudsmen see Section 3.5.

32 Linda C. Reif, *The ombudsman, good governance and the international human rights system*, p. 60.

33 J. McMillan, "The Ombudsman and the rule of law", Speech addressed by John McMillan, Commonwealth Ombudsman, to the Public Law Weekend, Canberra, 5–6 November 2004, p. 7. Available at www.ombudsman.gov.au/speeches-and-presentations/.

34 G.H. Addink, "The ombudsman as the fourth power", p. 273.

35 J. Spigelman, "The integrity branch of government", in *Australian Law Journal*, Vol. 78, No 11, 2004, p. 724. Available at SSRN: http://ssrn.com/abstract=1809582, p. 5.

36 B. Ackerman. "The new separation of powers", in *Harvard Law Review*, Vol. 113, No 3, January 2000, pp. 691–693.

37 J. Spigelman, loc.cit., pp. 6–7.

38 Ibid., p. 6.

intrinsic to the democratic rule of law, including certain principles of good governance.[39] This is reflected in the behaviour of civil servants (as well as public and elected authorities).

It is in this context that the ombudsman should be seen as one of a range of institutions that comprise the fourth power, which in turn interact with the other three powers.[40] As a fourth power, the ombudsman protects the integrity branch of the constitution, which is characterised as comprising those values and principles inherent to the rule of law that are not legally enforceable and not protected by the traditional mechanisms of control.[41] The recognition of the ombudsman as a fourth power institution is reinforced by its typical constitutional standing, whereby it occupies by its own, independent place.[42]

Therefore, in performing its constitutional duties, the ombudsman exercises a power that can be distinguished from (and equated to)[43] the other three powers – the legislature, the executive, and the judiciary – and forms part of the system of checks and balances in which all four play a role. Thus, the traditional doctrine of separation of powers as a triad is challenged by the emergence of new branch institutions.

The purpose of separation or distribution of powers is to prevent the state from exceeding the limits of its powers and infringing on the rights and freedoms of citizens. In modern democracies (whether new or old), the three traditional powers operate as part of a system of checks and balances. According, to Viber, the range of unelected institutions that today exercise official authority should be seen as forming a new branch of government in a new separation of powers that gains its legitimacy by developing the principles and procedures for the performance of its tasks.[44]

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39 G.H. Addink, *Good governance in EU Member States*, Utrecht: Utrecht University, 2015, pp. 30–32. On the legal concept of integrity and its relationship with good governance see also, G.H Addink, "Integriteit, rechtmatigheid en goed bestuur", in J.HJ. van den Heuvel, L.W.J.C Huberts, E.R. Mullller (eds), *Integriteit: integriteit en integriteitsbeleid in Nederland*, Deventer: Wolters Kluwer, 2012; Dadan Anwar, *The applicability of good governance norms in situations of integrity violations*, Utrecht, 2015.

40 Other fourth power institutions would include, for instance, the Court of Audit, the Council of State, and the Electoral Council, among others. On the Court of Audit and good governance see for example, Luis García Westphalen, "Evaluating the prosecutorial mandate of the Supreme Audit institution of Peru", *in International Journal of Public Administration*, No 37, 2014, pp. 1–9.

41 R. Kirkham, B. Thomson and T. Buck, "Putting the ombudsman into constitutional context", in *Parliamentary Affairs*, Vol. 2, No 4, 2009, p. 605.

42 G.H. Addink, "The ombudsman as the fourth power", p. 274.

43 J. Spigelman, loc.cit., p. 5.

44 Frank Vibert, *The rise of the unelected: Democracy and the new separation of powers*, Cambridge-New York: Cambridge University Press, 2007, pp. 121–128. For the discussion on separation or balance of powers in modern states and the emerging of new institutions, see

In this regard, according to Addink the ombudsman legitimises its constitutional position as a fourth-power institution by contributing to integrity in holding public authorities to high standards of good administration and human rights. In this manner, it is partly responsible for the balance between the legislature, the executive and the judiciary. It performs this function by examining the conduct of the administration, issuing reports, and making recommendations.[45] As a result, it contributes to promoting quality in public administration and enhances legitimacy of government.

Accordingly, the aim of this study is to determine the extent to which the ombudsman institution applies (and develops) good governance-based standards with a view to improving the quality of government and enhancing legitimacy. Legitimacy is a fundamental notion not only for the political system but also for the administration. However, this relation is not always clear described. A substantial and dynamic perspective of legitimacy may provide links between legitimacy, democracy and a broader concept of legality. As an institution of horizontal accountability, the ombudsman's contribution to improving the functioning of administration and thus strengthening the rule of law is an important undertaking, especially in new democracies.[46]

In these terms, the Peruvian ombudsman institution makes for a compelling subject of analysis.[47] This study argues that the Peruvian *Defensoría del Pueblo*[48] has undergone a process of hybridisation in recent years in terms of its powers, tasks, functions, and the orientation of its assessment. This process is expressed in the fruitful normative function resulting from its powers of investigation.[49] The dual function of the Peruvian *Defensoría del Pueblo,* looking at broader fairness, ethical conduct, transparency and prevention of corruption[50], allows for the development of new normative standards. According to some authors, this function goes beyond a conventional regulative function characterised by

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also G.H. Addink, *Good governance. Concept and context*, Oxford: Oxford University Press, 2019, pp. 20–23.

45 G.H. Addink, "The ombudsman as the fourth power", pp. 274–275.

46 Guillermo O'Donnell, "Horizontal accountability in new democracies", in *Journal of Democracy*, Volume 9, 1998, pp. 112–126.

47 Thomas Pegram, "Weak institutions, rights claims and pathways to compliance: The transformative role of the Peruvian human rights ombudsman", in *Oxford Development Studies*, Vol. 39, No 2, 2011, p. 230.

48 In keeping with other countries in the region, the ombudsman institution in Peru is known as the *Defensoría del Pueblo*.

49 Alberto Castro, "Legalidad, buenas prácticas administrativas y eficacia en el sector público: Un análisis desde la perspectiva jurídica del buen gobierno", in Alberto Castro (ed), *Buen Gobierno y Derechos Humanos*, Lima: Facultad de Derecho PUCP – Idehpucp, 2014, p. 267.

50 Linda C. Reif, "The role of national human rights institutions in human rights protection and promotion, good governance and strengthening the democratic rule of law", pp. 72–73.

the creation of innovative "social accountability" mechanisms.[51] Hence, the institution has positioned itself as a valued institutional resource for legitimacy in the absence of a responsive judicial and political institutional framework.[52] On this basis, it is argued that the *Defensoría del Pueblo* plays an important role in improving the quality of government in Peru.

1.2. THE ROLE OF THE OMBUDSMAN IN THE PROMOTION OF QUALITY IN THE PUBLIC ADMINISTRATION

1.2.1. THE OMBUDSMAN, GOOD GOVERNANCE, AND QUALITY IN THE PUBLIC ADMINISTRATION

The ombudsman is regarded not only as a mechanism for providing individual remedy, but also as one of bureaucratic quality control.[53] As a legal concept, quality is connected with the notion of good governance. Different authors have stressed that modern administrative law is experiencing a shift from government to governance.[54] This trend reflects new perspectives in administrative law, arising out of changes in society and administration. However, quality as a legal concept of a procedural character, and its relationship with a broader perspective of legality, is underexplored.

In this line, governance from an administrative law perspective is oriented towards the development of new and more flexible regulatory frameworks for steering the activities of the administration. These frameworks determine how the administration fulfils its functions, and particularly, the manner in which public powers exercise discretion.[55] In this regard, they regulate the administrative decision-making process, in which a greater number of nongovernmental actors are now involved than ever before. Hence, decision-making is encouraged to be more transparent, participatory, and effective.

The idea of proper exercise of powers and adequate decision-making by the administration is linked to recognition of public law as a tool for achieving

51 Thomas Pegram, loc.cit., p. 230.

52 Ibid.

53 Gavin Drewry, "Ombudsmen and administrative law. Shining stars in a parallel universe?", EGPA Conference, Rotterdam, September 2008: Study Group on Law and Public Administration, p. 2.

54 Martin Shapiro, "Administrative law unbounded: Reflections on government and governance", in *Indiana Journal of Global Legal Studies*, Volume 8, Issue 2, 2001, p. 369.

55 Alberto Castro, loc.cit., p. 246.

quality in public administration and in the way it is organised.[56] The concept of good governance, and particularly the notion of good administration, emerged in connection with demands for quality in governmental activities.

Modern administrative law is concerned with quality[57] as a new and complementary mechanism to enhance legitimacy of administrative action[58], expressed through the legal duty of good administration.[59] Good administration, which is the expression of good governance in the field of public administration[60], acts not only as a limit to discretion against arbitrariness, but also serves as a source of guidance for the behaviour of civil servants and administrative decision-making. As such, good governance can be considered as an ombudsman's instrument for assessing administration and the protection of citizens' rights.[61] Through the performance of its normative functions, the ombudsman applies and develops normative standards to steer the behaviour of public officials and administrative action while contributing in the development of new and more flexible regulatory frameworks or governance instruments, inspired by good governance principles and human rights.

The ombudsman has a prominent role in promoting good administration and defending fundamental rights. Specifically, the ombudsman's interventions help to protect against maladministration by providing individual relief and steering administrative action. The institution performs these functions by assessing the conduct of the administration against normative standards.

In the cases in which human rights is the ombudsman's standard of control, legally binding norms constitute its (main) input for the substantive review of the actions of government. Thus, the normative function performed by the ombudsman arises out of a hard law review based not only on statutes but

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56 Juli Ponce Solé, "El derecho a la buena administración, la discrecionalidad administrativa y la mejora de la gestión pública", in *R. Proc.-Geral Mun. Juiz de Fora – RPGMJF*, Belo Horizonte, Year 2, No 2, Jan./Dec. 2012, p. 305.

57 For a detailed description of quality as a legal concept, see Section 2.1.2.

58 Alberto Castro, "Buen gobierno, derechos humanos y tendencias innovadoras en el derecho público", in Alberto Castro (ed), *Buen Gobierno y Derechos Humanos*, Lima: Facultad de Derecho PUCP – Idhepucp, 2014, p. 18.

59 Juli Ponce Solé, "Good administration and European Public Law. The fight for quality in the field of administrative decisions", in *European Review of Public Law*, Vol. 14, No 4, 2002, pp. 1505–1506. Also see from the same author, Juli Poce Solé, "Quality of Decision-Making in Public Law – Right to Good Administration and Duty of Due Care in European Law and in US Law", in *European Review of Public Law*, Vol. 21, No 3(73), 2009.

60 Alberto Castro, "Legalidad, buenas prácticas administrativas y eficacia en el sector público", p. 250.

61 Juli Ponce Solé, "El derecho a la buena administración y la calidad de las decisiones administrativas", in: Alberto Castro (ed) *Buen Gobierno y Derechos Humanos,* Lima: Facultad de Derecho PUCP – Idehpcup, 2014, p. 118.

also constitutional parameters as assessment standards.[62] In this regard, the ombudsman adopts not only a static approach, which is limited to verifying the correct application of legal norms, but also a dynamic one oriented to recommending changes in legislation as a suitable mechanism for human rights protection.[63]

On the other hand, for those ombudsmen that apply good administration (or its counterpart, maladministration) as their standard of control, the assessment standards are mainly based on non-legally binding norms or soft law norms. The application of soft law norms by the ombudsman for the assessment of the administration is linked to the institution's recognised ability to develop its own normative standards.[64] It is important to mention that for some authors, only non-legal standards constitute good administration. From this perspective, good administration norms developed by the ombudsman as assessment standards resemble ethical norms.[65] Nevertheless, this study proposes that these norms cannot be considered so much purely ethical as soft law norms, to the extent that they are rules stemming from legal principles that create duties for the administration.[66] As will be explained, it is not bindingness but legal effect that defines law.[67]

In either case, the results of the ombudsman's assessment of administrative conduct are reflected in the investigations, reports, and recommendations issued by the institution as a manifestation of its indirect task in developing legal norms (which can include broadening the scope of legally enforceable principles or developing soft-law standards). These ombudsman norms serve as parameters for good decisions and quality administrative action. Through its recommendations, the ombudsman might promote quality as a factor for legitimacy. For this reason, one of the aims of this study is to determine the extent to which the standards applied (and developed) by the ombudsman as a product of its normative functions can be considered legal norms, and to assess their relationship with principles of good governance from a legal perspective.

62 Alberto Castro, "Legalidad, buenas prácticas administrativas y eficacia en el sector público", p. 266.

63 Manuel García Álvarez & Rubén García López, loc.cit., p. 128.

64 Alberto Castro, "Legalidad, buenas prácticas administrativas y eficacia en el sector público", p. 261.

65 M. Remac & P.M. Langbroek, "Ombudsman's assessments of public administration conduct: Between legal and good administration norms", in *The NISPAcee Journal of Public Administration and Policy*, Volume 4, Number 2, Winter 2011/2012, p. 158.

66 See Section 3.6.4.

67 For the concepts of soft law and legal effect, see Section 2.1.2.

1.2.2. THE PROBLEM OF QUALITY IN PUBLIC ADMINISTRATION IN PERU'S DEMOCRATIC CONSOLIDATION PROCESS

Peru – to return to this country case – is currently going through a process of democratic consolidation and socio-economic growth.[68] Nonetheless, one of the paradoxes of Peruvian democracy is the popular disaffection with the government.[69] This disaffection is also reflected in low public trust in the democratic rule of law institutions in general, which extends to the democratic system as a whole.[70] One factor that helps to explain this situation is the weakness of the Peruvian state apparatus. As pointed out by Levitsky, where state institutions (including national and local public bureaucracies, the police and the judiciary, regulatory agencies, and so on) do not function adequately, governments will perform poorly. The failure to effectively deliver basic services (security, justice, health, education, and others) results in the widespread perception of government corruption, unfairness, ineffectiveness, and neglect. Thus, "state weakness brings ineffective governance, and ineffective governance generates discontent, which, if persistent, may erode citizens' trust in democratic institutions".[71]

Thus, It is possible to affirm that one of the main problems facing the Peruvian process of democratic consolidation is the precariousness of the state apparatus, the weakness of its institutions. Widely identified flaws of Peruvian administration include bureaucratic indolence, inadequate treatment of citizens, administrative burdens, and undue delays. This lack of effectiveness on the part of the administration can be observed at the central, regional, and local levels. Moreover, the perception of high levels of corruption should be singled out for special attention, as this is considered to be one of the endemic problems in Peruvian society.[72] The prevailing maladministration, reflected in poor quality

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68 This process follows ten years of autocratic government in the 1990s. Although most of the country's liberal economic reforms took place during this decade, the period was also characterised by corruption at the top levels of the executive, centralisation of the state apparatus, and a lack of transparency and citizen participation. Democratic institutional reforms for consolidating the development process were likewise missing.

69 Steven Levitsky, "Paradoxes of Peruvian Democracy. Political bust amid economic boom?", in *ReVista. Harvard Review of Latin America*, Fall 2014, p. 2. <http://revista.drclas.harvard.edu/book/first-take-paradoxes-peruvian-democracy> (Last visited: May 2014).

70 Peruvian presidents since 2005 have the lowest average approval rating in Latin America, despite the economic boom. See the annual Latinobarometro survey.

71 Steven Levitsky, loc.cit., p. 2. <http://revista.drclas.harvard.edu/book/first-take-paradoxes-peruvian-democracy> (Last visited: May 2014).

72 On the situation of corruption in Peru, see the national surveys on perception of corruption conducted by ProÉtica, Peruvian chapter of Transparency International. According to the 10th National Survey on Perception of Corruption 2017, corruption is one of the two main concerns among the Peruvian population. Available at: www.proetica.org.pe.

administrative performance, affects the legitimacy of the political system as a whole.

Maladministration in Peru has been reported by a range of entities, from international organisations[73] to the country's own *Defensoría del Pueblo*.[74] A broad consensus exists about the urgent need for reform of public administration and institutions in order to consolidate the country's ongoing development. In this regard, scholars have already pointed out that reform must be aimed at developing an effective and efficient administration, a service-minded bureaucracy, and institutional mechanisms for preventing corruption in order to strengthen good governance and democracy.[75] Thus, there is a link between good governance and the effectiveness of the state apparatus, democracy, and legitimacy.[76]

In the Peruvian institutional framework, the ombudsman can contribute to the implementation of institutional mechanisms with the aim of both protecting citizens' fundamental rights and improving the quality of the administration in order to ensure governmental legitimacy and consolidate the Peruvian democratic system by developing the principles of good governance.[77] Encouraging the administrative authorities to act in accordance with the principles of good governance and promoting good governance practices is one mechanism for improving the legitimacy of the entire state apparatus.

All nations, in terms of how they perform good governance, are unique in their pre-existing domestic political environment, the form of democracy they have adopted, the domestic democratic culture, the organisational form of the state

73 The World Bank's *Worldwide Governance Indicators 1996–2013* show that in the case of Peru five of the six governance indicators remains the same as at the end of the 1990. See: Worldwide Governance Indicators 1996–2013. Available at: http://info.worldbank.org/governance/wgi/index.aspx#home. See also: World Bank. *Good governance: The World Bank experience*. Washington D.C.: World Bank, 1994. Daniel Kaufmann, Aart Kraay and Massimo Mastruzzi. *Governance Matters V: Aggregate and individual governance indictors for 1992 – 2005*. Washington D.C.: World Bank, September 2006. More recently, in the World Economic Forum Global Competitiveness Index 2017–2018, Peru is ranked 72nd out of 137 economies, having fallen five positions from 2016. This index shows that the pillar institutions are those in which Peru is facing major problems.

74 See the annual reports of the Peruvian Ombudsman (*Defensoría del Pueblo*).

75 See for example the OECD Public Governance Review on Peru: Integrated Governance for Inclusive Growth (OECD, 2016), the OECD Integrity Review on Peru: Enhancing Public Sector Integrity for Inclusive Growth (2017), and, the OECD Regulatory Review on Peru: Assembling the Framework for Regulatory Quality (2016).

76 F. Sagasti, P. Patrón, N. Lynch, M. Hernández, *Democracia y Buen Gobierno*, Lima: Agenda Perú, 1996, pp. 91–115.

77 Linda C. Reif, "The role of national human rights institutions in human rights protection and promotion, good governance and strengthening the democratic rule of law", p. 82.

apparatus, and the measures adopted for strengthening it.[78] In the process of democracy building there are various factors that may account for the relative success or failure to achieve a well-developed democratic state. One of the issues for analysis in this respect is the qualitative aspect of democracy.[79]

In a state governed by the democratic rule of law, there are important elements that define a well-developed democratic state: i) separation of powers, which involves a government composed of separate legislative, executive, and judicial branches with balanced powers; ii) an independent judiciary; iii) the comprehensive application of the rule of law; iv) the protection of human rights; v) free elections; and vi) the existence of other state institutions that provide accountability.

In a legal reform for development, strong emphasis is placed on the overall legal infrastructure and the promotion of a legal framework supportive of effective and efficient administration.[80] In the framework of Peru's public policies, the need to implement reforms oriented to the development of an efficient, service-minded and democratic public administration is expressed in the "National Agreement" (*Acuerdo Nacional*).[81] The National Agreement is a forum for promoting and monitoring the fulfilment of state policies agreed through the participation and consensus of leading Peruvian political and social actors. The main goal of the agreement is to create conditions for the consolidation of democracy and economic and social development in the country. In this context, a set of 31 state policies has been approved.

The state policies that comprise the National Agreement are aimed at achieving four main objectives: democracy and rule of law; equity and social justice; country competitiveness; and an efficient, transparent, and decentralised state. Hence, the 24th public policy laid out in the National Agreement sets an efficient and transparent administration as state policy. In turn, the 26th policy is oriented to the implementation of measures for promoting ethical standards in the administration, as well as eradicating corruption.

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78 Linda C. Reif, "The Ombudsman, good governance and the international human rights system", p. 57.

79 On quality of democracy see Larry Diamond & Leonard Morlino, *Assessing the quality of democracy*, Baltimore: The Johns Hopkins University Press, 2005.

80 Karin Buhmann, "Administrative reform and increased human rights observance in public administration and beyond: The People's Republic of China", in Hans Otto Sano and G. Alfredsson, *Human Rights and Good Governance: Building Bridges*, The Hague: Kluwer Law International, 2000, p. 236.

81 For further information about the "National Agreement" see www.acuerdonacional.gob.pe. The National Agreement Forum was established by Supreme Decree 105–2002-PCM.

The functioning of the administration (referring, for our purposes, primarily to the executive and its branches, but also to the local governments) is fundamental for determining the quality of the democratic system as a whole. In general terms, it can be said that the quality of administrative functioning is determined by the performance of good administrative practices (which includes respect of fundamental rights) or, conversely, the existence of maladministration. Administrative functioning and its relationship with the quality of the democratic system is also linked to the fourth power institutions of the state, such as the ombudsman, which are characterised for adding new institutional forms of accountability.

In Peru, neither the doctrine nor practitioners are familiar with good governance as a legal concept; nor the term as such is found in written legislation. Likewise, the good governance approach to assessing administrative authorities has not been clearly established for the daily practice of the ombudsman either. Therefore, there are no explicit references to a legal duty of good governance. However, this does not preclude recognition of its existence, or of its constitutive elements, on the basis of constitutional principles and provisions that govern the conduct of the administration, as well as other regulations with force of law.

According to some Peruvian scholars, various principles – rights and obligations – that are considered by comparative legal doctrine as core elements of good governance or good administration are found to be enshrined in the Peruvian legal framework.[82] In this regard, three different groups of legislation can be discerned: Law 27444, General Administrative Procedure Act (*Ley del Procedimiento Administrativo General*)[83]; legislation governing the functioning and organisation of the administration at the three levels (national, regional and local) such as Law 29158, Organic Act of the Executive Branch (*Ley Orgánica del Poder Ejecutivo*)[84], Law 27972, Organic Act of Municipalities (*Ley Orgánica de Municipalidades*)[85] and Law 27867, Organic Act of Regional Governments (*Ley*

82 Jorge Danós Ordóñez, "Principios de buen gobierno en el derecho administrativo peruano y legitimidad de la actividad administrativa", in Alberto Castro (ed), *Buen Gobierno y Derechos Humanos*, Lima: Facultad de Derecho PUCP – Idehpcup, 2014, pp. 122–123.

83 General Administrative Procedure Act is in force since 11 October 2001. Last amended by Legislative Decree 1452. Nineteen are the principles of proper administration codified by this law. Among them we can find the principle of legality, due procedure, impartiality, reasonableness, effectiveness and legal certainty or legitimate expectations. These principles impose standards on the administration and are an important feature of administrative law regarding supervision of administrative performance and protection of the citizen.

84 Published in the official gazette *El Peruano* on 20 December 2007. It was promulgated containing a new set of principles regarding the activity of the administration. Principles such as service towards the citizen, transparency and accountability are now legal standards for the executive's bodies and agencies.

85 Published in the official gazette *El Peruano* on 27 May 2003.

Orgánica de Gobiernos Regionales)[86]; and legislation regulating the behaviour of public officials and civil servants, such as Law 27815, Public Function Code of Ethics Act (*Código de Ética de la Función Pública*).[87] In addition, there is Law 27806, Transparency and Access to Public Information Act (*Ley de Transparencia y Acceso a la Información Pública*)[88] and other legislation regarding environmental law. But despite this legislation, the system has several deficiencies, and remains subject to instances of maladministration.

The Peruvian *Defensoría del Pueblo* has the potential to lead new initiatives with the aim of improving administration in Peru. One of these could be to promote good governance. Thus, the Peruvian ombudsman institution can contribute to making explicit the principles of good governance and the duty of good administration in the Peruvian legal system, and to operationalising this legal obligation by applying and developing principles of good governance.

1.2.3. THE ROLE OF THE PERUVIAN *DEFENSORÍA DEL PUEBLO* IN ENHANCING DEMOCRATIC GOVERNANCE AND QUALITY IN PUBLIC ADMINISTRATION

The *Defensoría del Pueblo* of Peru was created by the 1993 Constitution, and is governed by provisions laid down in the Constitution and in an organic act.[89] The Constitution makes a distinction between the *Defensoría del Pueblo* (the ombudsman as an institution) and the *Defensor del Pueblo* (the ombudsman as an incumbent).[90] According to Article 162 of the Constitution, the *Defensoría del Pueblo* is competent "to defend the constitutional and fundamental rights of the person and the community, to supervise fulfilment of the state administration's duties and the delivery of public services". The institution is vested with autonomy for the performance of its functions.[91] For a person to be elected as the *Defensor del Pueblo,* the Constitution requires that at least two-thirds of the Congress must vote in favour.[92]

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86 Published in the official gazette *El Peruano* on 18 November 2002. Amended by Law 27902.

87 Published in the official gazette *El Peruano* on 13 August 2002.

88 Published in the official gazette *El Peruano* on 3 August 2002. In force since January 2003.

89 Law 26520, Ombudsman Organic Act. In force since 9 August 1995 and last amended by Law 29882 published in the official gazette *El Peruano* on 7 June 2012. Hereafter, the Organic Act.

90 Hereafter, Peru's ombudsman's institution, the *Defensoría del Pueblo*, will be referred to as the *Defensoría* – the abbreviated form by which it is popularly known in the country. In like manner, the term *Defensor* is used to refer to the incumbent.

91 Peruvian Constitution, Article 161.

92 Idem.

The primary task of the *Defensoría* is to protect the fundamental rights of citizens by supervising the administrative authorities. Hence, the *Defensoría* exercises oversight to ensure that public authorities and civil servants observe the Constitution and the law, and that they duly fulfil their functions. Therefore, as pointed out by Reif, the *Defensoría* was given a dual mandate of protecting human rights as well as the function of overseeing public administration.[93] Under this mandate the duties of the *Defensoría* cover all administrative actions, both in response to complaints and of its own accord. Indeed, the institution is empowered to initiate and to discharge, on request or ex-officio, the investigation of any acts and resolutions of the public administration or its agents that may imply the breach of a constitutional or fundamental right.[94]

The political context of a country is always decisive in setting the agenda of the ombudsman institution, and the *Defensoría* is no exception. In this regard, three different stages might be discerned in the *Defensoría*'s work since it was instituted. The first is the role of the institution under the authoritarian regime of Alberto Fujimori (April 1996-December 2000), with Jorge Santistevan as the first *Defensor del Pueblo*. During this period, the *Defensoría* performed an important democratic role as practically the only democratic agent of accountability within the state.[95] In this context, the focus of the *Defensoría* was on the protecting civil and political rights. The institution prioritised measures such as reforming the military justice system, abolishing compulsory military service, combating torture, and protecting freedom of press and expression. The *Defensoría* also played an important and influential supervisory role in the presidential elections of 2000 at the end of Fujimori's rule.

The second stage (December 2000 – April 2005) might correspond to the period known as democratic transition, spanning the interim government of President Paniagua and the presidency of Alejandro Toledo. In this period, Walter Albán served as *Defensor del Pueblo,* with interim status.[96] During this second stage the institution performed an advisory function on matters of "re-institutionalisation of the country".[97] It focused on assorted topics such as decentralisation, electoral reform, judicial reform, and transparency and access to information. The *Defensoría* also supported the creation of the Truth and Reconciliation Commission (*Comisión de la Verdad y la Reconciliación*). In addition, it started

93 Linda C. Reif, "The role of human rights institutions protection and promotion, good governance and strengthening the democratic rule of law", p. 71.

94 Organic Act, Article 9(1).

95 Thomas Pegram, loc.cit., p. 231.

96 Walter Albán was appointed by Santistevan as his first deputy (*primer adjunto*). The second in the institution's line of command, Albán went on to replace Santistevan after the latter's resignation in order to run in the presidential elections of 2001.

97 Thomas Pegram, loc.cit., p. 236.

broadening and shifting its focus from civil and political rights to economic and social rights, which involved intervention on issues of public policy. The *Defensoría* also published special reports on pensions, health, and right to water, among other matters.

The third stage, framed by a democratic context, started with the appointment by Congress of Beatriz Merino as *Defensora del Pueblo* (ombudswoman).[98] Under Merino's leadership, the shift in the orientation of the institution was noticeable. During the period there was an emphasis on influencing and intervening in public policy. In these terms, the *Defensoría* established three thematic or strategic lines of action: i) the surveillance of public policy implementation; ii) the supervision of governmental management; and iii) the promotion of a culture of peace and dialogue.[99] As a result, the institution began to focus on issues such as public policy assessment based on human rights standards, monitoring social conflicts, and supporting the fight against corruption and the "need to strength good governance".[100] Thus, Merino's priorities were structurally or, in the words of Katja Heede, more control oriented. And, following the election of a new ombudsman in 2016, it could be that the institution is set to undergo yet another stage in its development marked by an emphasis on strengthening the oversight of essential public services.[101]

As pointed out by Pegram, this shift in the *Defensoría*'s orientation meant a transition away from the legal role of constitutional guardian towards a rights-based discourse in public policy debates, emphasizing mobilisation through institutional (but also social) channels outside the courts. It meant focusing less on compliance with human rights (binding) norms, and more on "managerial compliance engineered through changes in public policy" with the aim of modifying the behaviour of the administration and its underlying values.[102] From a normative perspective, it presented an opportunity to broaden the institution's standards of assessment. Hence, when assessing the administration, the *Defensoría* has applied in a unique way not only legally binding norms but also more flexible (albeit not necessarily explicit nor codified) standards of assessment.

It is important to mention that despite its advances since transition, Peruvian democracy remains unstable, due, in part, to the weaknesses of the state

98 Merino was appointed by the Peruvian Congress in September 2005. Her predecessor Walter Albán served as acting ombudsman for four years.

99 Defesoría del Pueblo, *Twelfth Annual Report. January – December 2008*, Lima, p. 23. Also see Defensoría del Pueblo's Strategic Institutional Plan 2007–2011.

100 Samuel Abad Yupanqui, "La Defensoría del Pueblo. La experiencia peruana", in *Teoría y Realidad Constitucional*, No 26, 2010, p. 493.

101 See Section 11.1.2.

102 Thomas Pegram, loc.cit., p. 239.

apparatus. In this institutional context the *Defensoría* has maintained a high level of public confidence as a human rights protector in Peruvian society. Arguably, the ombudsman mandate to assess government maladministration is becoming increasingly important as Peruvian democracy matures.[103]

Broad powers of investigation are one of the essential faculties assigned to the *Defensoría*. By means of its investigations, the *Defensoría* monitors the administration to guard against any illegitimate, irregular, unlawful, neglectful, abusive, or improper use of its powers in the exercise of its functions.[104] Thus, it can be concluded that the task of the *Defensoría* is to investigate acts not only concerning decisions made by the administration, but also those concerning the exercise of practical administration as well as individual acts (personal behaviour).[105] Based on its investigations the *Defensoría* has the ability to make recommendations and proposals for adopting new measures or changing administrative action or policy. Moreover, it is empowered to issue warnings and remind the administrative authorities and civil servants of their legal obligations.[106]

The receipt of a complaint from the public can be the launchpad for an investigation, but they can be also started at the *Defensoría*'s own initiative. Own-initiative investigations are conducted based on the same criteria as an ordinary complaint. However, they are flexible enough to enable the *Defensoría* to function as a mechanism of control. Thus, the *Defensoría* can issue recommendations for both correction and prevention.

Own-initiative investigations enable the *Defensoría* to start an inquiry with the sole purpose of protecting the rights of vulnerable groups in society (i.e. indigenous people, persons with disabilities, children, inmates in prisons and mental hospitals) or improving administrative quality in different ways, but always from the perspective of protecting citizens' fundamental rights. The recommendations of the *Defensoría* can be oriented to implementing a public policy, proposing new legislation, and adopting certain administrative action or regulation.

Following on from its own-initiative investigations, the *Defensoría* issues special reports *(Informes Defensoriales)*[107], which are the instruments most commonly used by the *Defensoría* to address structural problems and influence

103 Linda C. Reif, "The role of human rights institutions protection and promotion, good governance and strengthening the democratic rule of law", p. 83.
104 Organic Act, Article 9(1).
105 Organic Act, Article 22.
106 Organic Act, Article 26.
107 Organic Act, Article 27.

public policy. Each of these reports is the result of a specific investigation in the framework of the *Defensoría's* surveillance role on strategic topics, or to address a particular group of related complaints.[108] Likewise, the *Defensoría* is required to present an annual report (*Informe Anual*) to Congress. The annual report of the *Defensoría* describes the situation with respect to the administration and the fulfilment of its duties regarding human rights obligations. The annual report must also include the number of complaints lodged with the institution, and the measures adopted by the administration to implement the recommendations of the *Defensoría*.

The *Defensoría*'s reports should not be perceived as a mere overview of activities, but rather as an information tool for the analysis of Peruvian social reality, with a specific focus on the state's performance, the defence of rights, and the strengthening of democracy. And it is so because the *Defensoría* "not only describes actions, shows results, or issues recommendations, but also seeks to contribute with evidence on issues concerning citizens, and possible solution or principles to guide institutional reforms aimed at the effective realisation of rights".[109] (translation by the author)

Summarising, this study deals with the problem of the legal quality of the administration from a public law and a good governance legal perspective. It aims to identify if, and to what extent, the ombudsman is effectively applying good governance-based standards to contribute to improving governmental quality. These standards, resulting from the exercise of the ombudsman's normative functions as an expression of the institution's hybridisation process, can foster a more effective legal framework to ensure the proper functioning of the entire state apparatus and strengthen the rule of law and legitimacy. To this end, the normative function of the ombudsman institution is analysed from a comparative perspective, focusing primarily on Peru as well as other countries such as The Netherlands, The United Kingdom and Spain. The next chapter outlines the research design and define the main concepts guiding this research.

108 Defensoría del Pueblo, *Twelfth Annual Report. January – December 2008*, p. 12.
109 Ibid.

CHAPTER 2
THE RESEARCH DESIGN

This chapter sets forth the research design. First, the objectives of the study are presented and its relevance is described both from an academic point of view and as a contribution to enhancing citizen trust in government by calling for the development of a more flexible legal framework to improve administrative quality. In this line, the legal perspective of good governance is introduced in relation to the normative function of the ombudsman institution. The aim in so doing is to determine to what extent the ombudsman applies principles of good governance in the form of normative standards to contribute to improving the quality – and thus the legitimacy – of government. The analysis takes a comparative perspective, focusing on Peru as well as The Netherlands, the United Kingdom and Spain. Hence, this section also points to the main ideas that define the study's line of thinking and thus constructs its conceptual framework. This is followed by a delimitation of the research questions, as well as the methodology proposed to answer these questions and achieve the stated objectives, while also explaining the reasons for the selected countries. Finally, an outline of the research is presented.

2.1. OBJECT OF THE RESEARCH AND DEFINITION OF CONCEPTS

2.1.1. OBJECT OF THE RESEARCH

The object of this research is to determine the extent to which the institution of the ombudsman applies (and develops) good governance-based standards to contribute to improving the quality of government and, in so doing, to enhancing legitimacy and strengthening the democratic rule of law. As mentioned, the primary focus is on the Peruvian *Defensoría del Pueblo* and on maladministration in that country. In the context of the domestic process of democratisation and rule of law reform, the *Defensoría* has broadened the scope of its tasks and functions. As part of this process, an overhaul of the provisions and underlying conceptions of Peru's administrative legal system is required to ensure effective steering of the administration's discretionary powers and achieve

the highest standard of services for citizens while promoting development. The legal approach to good governance can be a powerful tool to this end. The same can also be applied to developed democracies with different legal traditions.

As noted, modern society is undergoing changes that require new forms of government intervention to meet citizen demands for service quality. This concern for quality creates a need for regulatory reform oriented to ensuring effective governmental interventions so as to achieve public goals. From an administrative law perspective, this implies the development of flexible legal instruments to positively orientate administrative activities and decision-making, and avoid maladministration.

The ombudsman develops and applies normative standards to steer the behaviour of public officials as an expression of its normative function. At the same time, the institution contributes to the development of new regulatory frameworks. For this reason, the focus here is not on analysing the ombudsman's contribution to developing the legal content of good governance principles, but on the application of these principles as normative standards.[110] Hence, this study concerns how the ombudsman creates and/or applies (both binding and non-binding) normative standards based on principles of good governance.

This study centres on the role of the ombudsman in relation to the activities of the administration. The primary focus is on the steering function of the ombudsman regarding the promotion of good administration instead of the institution's protective (human rights oriented) function. Good administration concretises the principle of good governance at the level of the administration. Therefore, by applying good governance-based standards to ensure good administration the ombudsman is also, in a broad sense, enhancing good governance. In a strict sense, the ombudsman would only be involved in good governance when the institution broadens its scope of control and functions. Otherwise, it is concerned with good administration insofar as the administrative branch of government is the ombudsman's main object of assessment. The aim of this study is to demonstrate that the results of the ombudsman's activities are an improvement in the legal quality and legitimacy of public administration in

110 An analysis of the ombudsman's contribution to the content of legal principles would require, to a certain extent, a comparison between the ombudsman and the judiciary in relation to the development of normative standards. See for example, Milan Remac, *Coordinating ombudsmen and the judiciary. A comparative view on the relations between ombudsmen and the judiciary in the Netherlands, England and the European Union*, Antwerp-Oxford-Portland: Intersentia, 2014. From the same author also see Milan Remac, "The European Ombudsman and the Court of Justice of the European Union: competition or symbiosis in promoting transparency?", in M. Hertogh & K. Kirkham (eds), *Research Handbook on the Ombudsman*, Cheltenham-Northampton: Edward Elgar Publishing, 2018, pp. 133–150.

modern constitutional state (results that are often underappreciated in the legal literature[111]).

Therefore, this study sets two main objectives: one related to the ombudsman institution on a comparative level, and the other focusing on the Peruvian case.[112] The first objective is:

– To determine, based on an analysis of its normative functions, the extent to which the ombudsman, despite the different legal context in which the institution evolves, protects the same values and applies similar standards of assessment, which can be claimed as based on principles of good governance.

The second is:

– To analyse the extent to which principles of good governance might be considered to be embraced through the standards applied by the *Defensoría del Pueblo*, and how these principles can be further developed to effectively promote good governance and improve legal quality in the administration as a means of enhancing legitimacy in Peru.

In turn, the two main objectives can be broken down into the following secondary objectives:

In relation to the first main objective:

– To establish the impact of the institution's gradual hybridisation on its normative standards, assessment orientation, powers, and functions.
– To determine whether the standards applied (and developed) by the ombudsman based on its normative functions can be regarded as legal norms.
– To analyse the relationship between good governance as a legal concept and constitutional principles.
– To contribute to identifying the legal content and scope of good governance principles.
– To analyse the relationship between principles of good governance and the normative standards developed and applied by different models of ombudsman in different legal contexts.

111 On this regard see M. Hertogh & R. Kirkham, "The ombudsman and administrative justice: from promise to performance", in M. Hertogh & K. Kirkham (eds), *Research Handbook on the Ombudsman*, Cheltenham-Northampton: Edward Elgar Publishing, 2018, pp. 1–2.

112 For the research questions see Section 2.2.1.

In relation to the second main objective:

- To determine whether the legality review performed by the *Defensoría* includes the application of legal principles of good governance as assessment standards.
- To identify whether, as a result of the shift in its assessment orientation, the *Defensoría* (implicitly) creates standards of assessment that can be regarded as standards based on principles of good governance.
- To evaluate what legal and institutional mechanisms are needed within the *Defensoría* to foster good governance.

This study is concerned with legal principles of good governance in the context of the ombudsman. Hence, a substantial part of it is devoted to developing a legal theory of good governance to analyse the normative function performed by the ombudsman in modern constitutional states. At the same time the legal meaning of good governance, and how good governance can be achieved (and guaranteed) by means of law, is also proposed.

2.1.2. DEFINITION OF CONCEPTS

As mentioned, the main object here is to determine to what extent the institution of the ombudsman applies principles of good governance as standards of assessment to enhance legitimacy. To this end, it is important to explain the concepts that underlie this investigation. As such, the starting point is to present this study's understanding of governance and good governance, insofar as it is good governance from a legal perspective that defines the line of thinking in this study.

Governance and good governance

The concepts of "governance" and "good governance" have not yet been deeply developed.[113] Academics have not yet succeeded in formulating widely accepted definitions. The problem is exacerbated by the fact that there are many ways to define governance and good governance, which, as commonly understood, are somewhat vague terms. However, this lack of a univocal definition may also provide advantages given the flexibility it offers.

A concept is an idea that determines the application of a term or shapes our understanding of it.[114] As will be explained in the following chapters, the term

113 For the development of the concept of good governance, see Section 4.1.1 & Section 4.1.2.

114 Definition taken from Oxford English Dictionary (www.oed.com) and Diccionario de la Lengua Española (www.rae.es).

"governance" refers to a process.[115] According to Hyden, this process refers to the formation of the formal and informal rules that regulate the public realm.[116] According to Cerrillo, governance is characterised by the interaction of a variety of actors (state, civil society, and economic actors), horizontal relations, and the pursuit of balance between the government and those citizens who participate in public affairs.[117] On the other hand, Rhodes defines governance as a method of regulation of the relationship between state actors and non-state actors or networks.[118]

On this, it can be affirmed that there is some consensus in the literature on how the concept of governance relates to the process by which new and flexible regulatory frameworks are developed to steer and regulate the public realm, the arena in which state actors, citizens, and economic agents interact. Therefore, governance as method of regulation has different dimensions and spheres of application. It can be applied to private actors, but it can be also used to steer the actions of state (or private actors that perform public functions). This study focuses on governance as it concerns the performance of public functions.

In this regard, from a legal perspective and regarding the performance of public functions, governance refers to the process of developing regulatory frameworks whereby the government fulfils its tasks – or in other words, that determine the way in which the government exercises its powers.[119] In this context, governance may be understood as referring to govern from a dynamic perspective – that is, as governing.[120] As pointed out by Addink, governance is an act of governing. It relates to decisions that define expectations, grant power, or verify performance that has legal consequences, and factual acts. Thus, governance concerns all acts with legal and non-legal effects.[121] The legal perspective of governance can function as a focal point that can be very useful for developing a normative framework for all public powers, especially for the executive and the administration.

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115 See Section 4.2.2.

116 G. Hyden et al., *Making sense of governance. Empirical evidence from 16 developing countries*, London-Boulder: Lynne Rienner Publishers, 2004, p. 16.

117 Agustí Cerrillo i Martínez, "La gobernanza hoy: Introducción", in Agustí Cerrillo i Martínez (coord), *La gobernanza hoy: 10 textos de referencia*, Madrid: INAP, 2005, pp. 13–14.

118 R.A.W. Rhodes, "The new governance: Governing without governance", in *Political Studies* (1996) Vol. XLIV, pp. 652–653; R.A.W Rhodes, "Understanding governance: Ten years on", in *Organization Studies* (2007) 28(08), pp. 1244–1247.

119 Alberto Castro, "Legalidad, buenas prácticas administrativas y eficacia en el sector público: Un análisis desde la perspectiva jurídica del buen gobierno", p. 246.

120 Jan Kooiman, "Gobernar en gobernanza", in Agustí Cerrillo i Martínez (coord), *La gobernanza hoy: 10 textos de referencia*, Madrid: INAP, 2005, pp. 57–81.

121 G.H. Addink, "Three legal dimensions of good governance. Some recent developments", p. 29.

From this perspective, good governance as a legal concept must be understood in terms of processes related to legal norms that are oriented to steering governmental action in the desired direction. Hence, good governance is linked to the development of regulatory frameworks that guide a "manner" for government actions, showing a specific way in which powers are exercised by the government. It is important to mention that by "government", this study does not mean the executive (or the administration) but the state, the public powers represented by the *trias politica* (the executive, the judiciary and the legislature) but also regional and local governments and other autonomous bodies such as the ombudsman.

A state governed by the democratic rule of law requires specific procedures, regulations, and standards for legitimising the organisation of the administration, the decision-making process, and the contents of decisions. The combination of the classic rule of law and the norm of democracy, the democratic rule of law, can be seen as the main source of good governance from a legal perspective that leads to the implementation of legal norms as methods of steering and regulation.[122]

Principles of good governance

In this study the focus is on good governance as a legal norm. Legal norms can be of two kinds: principles and rules.[123] Principles are optimisation requirements[124], immediate finalistic norms that describe an ideal state of affairs to be promoted.[125] As legal norms, principles can take the form of constitutional rights or constitutional duties.[126] On the other hand, rules are immediate descriptive norms that describe behaviours.[127]

At higher levels, good governance can be established as a legal norm in terms of constitutional principles. In this regard, it is important to keep in mind the difference between good governance and principles of good governance. As Addink has pointed out, "the principles of good governance have a strong

122 G.H Addink, "Principles of good governance: Lessons from administrative law", in Deirdre M. Curtin & Ramses A. Wessel (eds), *Good governance and the European Union. Reflections on concepts, institutions and substance*, Antwerp-Oxford-New York: Intersentia, 2005, p. 36.

123 For the distinction between rules and principles as legal norms see Section 5.3.1. For a detailed description of the definition of principles see Section 5.3.2.

124 Robert Alexy, *A theory of constitutional rights*, New York: Oxford University Press, 2010, pp. 47–48.

125 Humberto Avila, *Theory of legal principles*, Dordrecht: Springer, 2007, pp. 35–36.

126 On principles as constitutional rights see *supra* note 124. For principles as constitutional duties, see, R. de Asis Roig, *Deberes y obligaciones en la constitución*. Madrid: Centro de Estudios Constitucionales, 1991.

127 Humberto Ávila, op.cit., p. 36.

normative connotation and may function mainly instrumentally, whereas good governance is the underlying concept and the consequence of the observance of the principles".[128] This implies that good governance also aims towards a goal and thus represents an end in itself. Therefore, good governance has an axiological dimension and constitutes a fundamental value.

In legal terms, a fundamental value is a secondary source that informs the entire legal order and provides meaning to it. However, it lacks direct effects, as principles (and rules) do, since a fundamental value is not a legal norm.[129] Nonetheless, a fundamental value can be expressed or embraced by principles. Principles may express the highest values of a legal order enshrined in a constitution.[130]

In a legal sense, principles require more specific rules and procedures to operate. Thus, principles may function to assemble or intermediate conflicting ideas. Likewise, principles generate and provide validity to the norms that operationalise them. Therefore, principles need rules to operate, and in turn provide the rationale for these rules.[131]

Good governance may be defined in terms of constitutional principles given its enduring feature as well as its general and all-embracing connotation. Good governance from a legal perspective should concern principles, which can be used for developing a normative framework for questions of governance as well as in the "process of developing networks" for the organisation of the entire state apparatus from a constitutional law perspective.[132]

From a constitutional perspective, good governance can be conceptualised as a fundamental value or a meta-concept[133], which means that it is built on other concepts.[134] As a meta-concept it can be concretised as a general constitutional principle. Thus, a distinction can be made between a general principle of good governance and the specific principles of good governance.[135] As a general

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128 G.H. Addink, "Three legal dimensions of good governance. Some recent developments", p. 31.

129 Ángel Garrorena Morales, "Valores superiores y principios constitucionales", in *Estudios de Derecho Público. Homenaje a Juan José Ruíz-Rico*, Madrid: Tecnos, 1997, Volume I, pp. 38–39.

130 Manuel Atienza & Juan Ruíz Manero, *A theory of legal sentences*, Dordrecht: Kluwer Academic Publisher, 1998, pp. 3–4. For the relation between principles as legal norms and values see Section 5.3.2.

131 Francis Botchway, "Good governance: The old, the new, the principle and the elements", in *Florida Journal of International Law*, Vol. 13 (2), 2001, p. 182.

132 G.H Addink, "Principles of good governance: Lessons from administrative law", p. 29.

133 G.H. Addink, *Good governance. Concept and context*, p. 19.

134 Ibid.

135 When this study refers to "the principle of good governance" in the singular, it refers to a general principle with constitutional status. When "principles of good governance" is used

constitutional principle, good governance stems from, or is at least related to, other specific constitutional principles. Therefore, the general principle of good governance is an umbrella principle composed of other elements: the principles of good governance.

The principles of good governance are the legal parameters for different kind of government activities associated with the fulfilment of public tasks oriented to the citizen well-being and the efficiency of the government. These principles are oriented to the good functioning of the entire state apparatus from the perspective of the democratic rule of law. In this regard, as a constitutional principle, good governance (and the principles of good governance) is not a constitutional right but a constitutional duty[136] from which derive obligations addressed to the public powers (and citizens) regardless of subjective rights.[137] Therefore, attention will be mainly focused on how good governance acts as a norm for the government instead of as a citizen right.[138]

In the doctrine, five principles of good governance have been laid down: properness, transparency, participation, accountability, and effectiveness.[139] However, these principles do not all aim in the same direction; there are issues concerning their mutual relationship, and they do not yet have a univocal meaning.[140]

Although some authors consider human rights as a good governance principle[141], for this study, as pointed out above, good governance and human rights are two different – but interconnected and mutually reinforcing – kinds

in the plural, it refers to the specific five principles of properness, transparency, participation, accountability, and effectiveness.

136 R. De Asis Roig, op.cit., pp. 269ff, *supra* note 126. See also, Juli Ponce Solé, *Deber de buena administración y procedimiento administrative debido*, Valladolid: Lex Nova, 2001, pp. 127–197.

137 Francisco Javier Díaz Revorio, "Derechos humanos y deberes constitucionales. Sobre el concepto de deber constitucional y los deberes en la Constitución Española de 1978", in *Revista IUS*, Year V, No 28, July-December 2011, pp. 284–286.

138 G.H. Addink, "Good governance: A norm for the administration or a citizen's right?", p. 6. This article is the unpublished translation of "Goed bestuur: een norm voor het bestuur of een recht van de burger?", in G.H. Addink, G.T.J.M. Jurgens, P. Langbroek & R.J.G.M. Widdershoven (eds), *Grensverleggend Bestuursrecht,* Alphen aan de Rijn: Kluwer, 2008. For the Spanish version, see G.H. Addink, *Buen Gobierno: ¿Un deber de la administración o un derecho ciudadano?*, Décimo Cuaderno de Trabajo del Departamento de Derecho, Lima: Pontificia Universidad Católica del Perú, July 2009. Available at: http://departamento.pucp.edu.pe/derecho/images/documentos/Buen%20Gobierno%20FINAL.pdf.

139 This study partially adopts the set of principles of good governance proposed by G.H. Addink. However, Addink includes human rights as a sixth principle of good governance. See, G.H Addink, "Principles of good governance: Lessons from administrative law", pp. 36–39; G.H. Addink, *Good governance. Concept and context*, pp. 99ff.

140 G.H. Addink, "Good Governance: A norm for the administration or a citizen's right?", p. 7.

141 See G.H. Addink, *Good governance. Concept and context*, pp. 171–182.

of principles. The implications of the relationship between good governance and human rights for the formulation of the ombudsman's standard of control and the development of legally and non-legally binding assessment standards are analysed later in this research.[142]

As mentioned in Chapter 1, rule of law, democracy, and good governance are the three pillars of the modern state. As Addink has noted, the development of these fundamental principles started at different moments in history, and each has been linked to the development of the state. The first development was the rule of law, the second was the principle of democracy, and good governance developed into the third dimension of the state. The three have developed as part of a process of mutual influence and interconnection. Good governance has been specified by other principles (and rules). These norms are sometimes connected to rule of law and democracy, but they have their own content.[143]

Principles of good governance have the function of forming the internal fundamentals for the administration.[144] They have been developed as norms for administrative action. They are found in their most coherent and abundant form at the European level, in the framework of the European Union and the Council of Europe. Under this structure, the standard to be achieved by the administrative authorities is set by the general principles of EU law as recognised by the EU courts. The application of the principles may be applied to ensure good administration or enforced to protect the rights of individuals.[145]

Good governance and good administration

The European Commission has defined governance in terms of public-service standards as the rules, processes, and behaviour that affect the way in which powers are exercised.[146] This definition outlines the norms and duties that the administration is expected to comply with, as well as approaches to good administration, incorporating adherence to norms of conducts and procedural rules. At the regional level, the underlying principle of the European Union is devotion to the rule of law, which implies adherence to procedural rules.[147] In this context, EU courts have introduced principles of good administration aimed at legitimising decision-making of EU bodies and agencies.[148]

142 See Section 3.4.2.
143 G.H. Addink, *Good governance. Concept and context*, pp. 3–4.
144 G.H. Addink, "Principles of good governance: Lessons from administrative law", p. 36.
145 Jill Wakefield, op.cit., p. 24.
146 Commission of the European Communities, *European Governance: A white paper*, Brussels, 25.07.2001, COM (2001) 428 final, OJ 2001 C 287/.
147 Jill Wakefield, op.cit., p. 21.
148 On the principles of good administration in the framework of the EU, see Beatriz Tomás Mallén, *El derecho fundamental a una buena administración*, Madrid: INAP, 2004; K. Pfeffer,

The perspective of good governance is considered to operate in a legal framework using instruments provided by the law (principles, rules, procedures, and practices) that seek to accomplish the normatively desired effects and avoid non-desired effects.[149] As a regulatory or steering model, good governance requires new procedural mechanisms and rules that are much more flexible and informal. In this context emerges the concept of good administration which, like good governance, is a generic term. As a result of Europeanisation, the principles of good administration have progressed from regional level to national legal orders, resulting in the development of administrative law from principles of proper administration into principles of good administration.[150] These principles concretise good governance at the level of the administration. It should be kept in mind that good administration has been enunciated as a principle, as a duty and as a right.[151] However, neither its features nor the obligations comprising the concept have been fixed.

It is important to mention that the legal standards comprising principles of good administration are variable in status. While some assumed more as rules of conduct or good administrative practices, others have legally binding effects[152], whereby there can be a distinction between general binding effects and (in)direct effects in concrete situations, mostly in relation to the (un)written principles of proper administration.

Therefore, in general, good administration is determined for the performance of good administrative activities, practices, and legal acts in order to make good decisions. Conversely, the absence thereof can be classed as maladministration.[153]

Das Recht auf eine gute Verwaltung, Baden-Baden: Nomos, 2006; R. Bousta, *Essai sur la notion de bonne administration en droit public*, Paris: L 'Harmattan, 2010; B.C. Mihaescu Evans, *The right to good administration at the crossroads of the various sources of fundamental rights in the EU integrative administrative system*, Baden-Baden: Nomos, 2015.

149 Wolfgang Hoffmann-Riem, "The potential impact of social science on administrative law", in Matthias Ruffert (ed), *The transformation of administrative law in Europe,* Munich: European Law Publishing, 2007, p. 213.

150 For the development of principles of good administration at national level see Swedish Agency for Public Management (*Statskontoret*), *Principles of good administration in the Member States of the European Union*, 2005. Available at: www. Statskontoret.se/upload/publikationer/2005/200504.pdf.

151 The European Charter of Fundamental Rights has included the right to good administration alongside the classical fundamental rights. It was the European Ombudsman who called for the Charter to include the rights of citizens to an open, accountable and service-minded administration. See Jacob Soderman, Speech at the Public Hearing on the Draft Charter of Fundamentals Rights of the European Union, Brussels, 2 February 2000. Available at: http://ombudsman.europa.eu/speeches/en/default.htm.

152 Jill Wakefield, op., cit., p. 23.

153 Maladministration, as well as its counterpoint of "good administration", is a vague concept. The European Ombudsman has defined maladministration as that which "occurs when a public body fails to act in accordance with a rule or principle which is binding upon it". See,

The application of legal principles can contribute to good administration by means of both legally binding standards and norms of conduct (soft law) in order to protect citizens' rights and ensure an efficient administration. In this sense, principles of good governance may be considered a steering mechanism of public (administrative) law by which the administration addresses the more instrumental needs for legal flexibility and efficiency. In a broader sense, principles of good administration can also be considered as principles of good governance. However, a more specific definition and distinction between both concepts is still needed.[154] The ombudsman as an institution can contribute to developing the legal content and scope of principles of good governance (and good administration) by applying them as standards of assessment.

Soft law and legal effect

This study applies the principles of good governance to the context of administrative law and the performance of the ombudsman institution. As such, it is important to define the legal nature of the ombudsman's instruments such as decisions, reports, recommendations, and, in particular, standards of assessment like ombudsman norms.

For this study, the instruments applied by the ombudsman in general, particularly standards of assessment, have a legal nature as soft law norms. As pointed out by Linda Senden, the element of legal effect, in particular the attribution of legally binding force or not, is what distinguishes soft law from hard law.[155] Thus, having legal effect and the attribution of legally binding force are not synonymous. One can only speak of a soft law act if it establishes rules of a normative nature, prescribing or inviting its addressees to adopt certain behaviours or measures. Mere political statements confined to expressing a certain view, or instruments that aim only at providing information, do not constitute such rules of conduct. However, the dividing lines may not always be clear in this respect.

Senden establishes three core elements of soft law. The first is that they concern "rules of conduct" or "commitments". Second, there is agreement on the fact that they are laid down in instruments that have no legally binding force per se, but which are nonetheless not devoid of all legal effect. Third, it is clear that they aim at or lead to a practical effect or influence on behaviour of some kind.[156] On this

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European Ombudsman, *Annual Report 1997*, p. 23. Available at: www.ombudsman.europa.eu/report97/pdf/en/rap97_en.pdf.

154 For more detail regarding the distinction between good governance and good administration see Section 6.1.3.

155 Linda Senden, *Soft law in European Community Law. Its relationship to legislation*, Nijmegen: Wolf Legal Publishers, 2003, pp. 103–104.

156 Ibid., p. 104.

basis, this study adopts the definition of soft law proposed by Senden, as "rules of conduct that are laid down in instruments which have not been attributed legally binding force as such, but nevertheless may have certain (indirect) legal effects, and that are aimed at and may produce practical effects".[157] From this definition it is possible to affirm that soft law may consist in legal norms (principles and rules) with non-legally binding effects.[158]

As explained by Senden, the case of soft law implies that there is in fact a tension between intention and result. That is, soft law acts by establishing rules of conduct that aim to have at least some (practical) effect, but this effect depends on factors other than legally binding force. Clearly, this will have an influence on the effect that soft law actually has in terms of its application and compliance therewith. Whether these will be legal or de facto (or practical) effect depends on whether there is a legal obligation to give effect to or comply with the rights and obligations contained in a soft law act. In both cases, this refers to indirect legal effects. In the case of purely voluntary compliance with a soft law act, not imposed by the law itself, it is possible to speak of a de facto effect.

From an administrative law perspective, soft law instruments may have *ad intra* effects (with the purpose of organising the internal activities of the administration) or *ad extra* effects (oriented to regulating the relations between the administration and citizens). They can have either a specific character (recommendations, reports) or a general-regulatory character (guidelines, codes of conduct, plans, and programs).[159] In the case of the ombudsman, recommendations and case-reports can be considered soft law instruments with a specific character. On the other hand, the Principles of Good Administration of the UK Ombudsman and the Guide of Proper Conduct *(Behoorlijkheidswijzer)* of the Dutch Ombudsman are good examples of soft law instruments with a general-regulatory character. It is important to note that the ombudsman's recommendations, despite their specific character, usually have normative content to the extent that they address rules of conduct. This study focuses on rules of conduct as good governance-based standards that are applied (and developed) by the ombudsman as soft law norms.

Administrative legitimacy

As mentioned, the ombudsman, as a public accountability institution, plays an important role in the application of the principles of good governance as a mechanism to improve the functioning of the government. The ombudsman

157 Ibid.
158 Daniel Sarmiento, *El soft law administrativo*, Navarra: Thomson-Civitas, 2008, p. 98.
159 Ibid., pp. 107–132.

performs this accountability function by assessing the administration against certain normative standards. The result of this assessment is reflected in its investigations, reports, and recommendations as an expression of its role as a developer of legal norms. Likewise, and again as noted, the application of these soft law norms by the ombudsman, in the form of standards based on the principle of good governance, can help to improve the quality of government and enhance legitimacy.

Good governance as a process also entails a continual rethinking of legitimacy.[160] Generally speaking, legitimacy is related to the sense of belonging to a political community, as well as acceptance of the authority and decisions adopted by that community. In this regard, legitimisation is the process by which citizens identify with a system of government, with a state, to the extent that they recognise themselves as part of the same political community. This identification with the state, coupled with citizens' political representation, is the basis for acceptance of authority and decision-making within a political system. Therefore, recognition and acceptance are foundations for legitimacy and basic conditions for the viability of a government.[161] This means that in principle, legitimacy is a political-sociological concept rather than a legal one.

Nevertheless, in modern constitutional states the concept of legitimacy provides a bridge between basic foundations of the political system and law, particularly in the context of public (constitutional and administrative) law. In fact, it is the political connotation of legitimacy that establishes its constitutional relevance. From a legal perspective, the concept of legitimacy is built around the notions of democracy and rule of law.[162] But ultimately, government legitimacy is a function of the democratic principle. Legitimacy means democratic legitimacy to the extent that in a democracy, state authority stems from the people.[163] This idea is enshrined in most modern constitutions. Hence, legitimacy is not only a political idea but can also be a binding constitutional legal concept.[164]

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160 G.H. Addink, "Three legal dimensions of good governance. Some recent developments", p. 23.

161 F. Sagasti, P. Patrón, N. Lynch, M. Hernández, op.cit., pp. 91–92.

162 Matthias Ruffert, "Comparative perspectives of administrative legitimacy", in Matthias Ruffert (ed). *Legitimacy in European administrative law: Reform and reconstruction*, Groningen: Europa Law Publishing, 2011, p. 353.

163 Eberhard Schmidt-Assmann, "Legitimacy and accountability as a basis for administrative organization and activity in Germany", in Matthias Ruffert (ed), *Legitimacy in European administrative law: Reform and reconstruction*, Groningen: Europa Law Publishing, 2011, p. 51.

164 See José López Hernández, "El concepto de legitimidad en perspectiva histórica", in *CEFD*, No 18, 2009, p. 162; Richard H. Fallon, "Legitimacy and the constitution", in *Harvard Law Review*, Vol. 118, No 6, April, 2005, pp. 1803–1813; Randy E. Barnett, "Constitutional Legitimacy", in *Columbia Law Review*, Vol. 103, 2003, pp. 111–148.

In a democracy, the sources of government legitimacy are twofold: the form in which a government is elected (free elections) and the fact that acts are subject to the constitution, from which the legitimacy of the entire legal order flows. Therefore, at the constitutional level, democratic legitimacy means rationalizing state government through legal structures and legal norms. As stated by Schmidt-Assmann, the legislators, the representatives elected by the people, are in charge of creating the "structures and norms of legitimation" by enacting legislation that is appropriate to the interests involved.[165] The actions as well as the principles, rules, and procedures designed for the organisation, functioning, and control of the administrative function of the state gains legitimacy from its constitutional basis.[166]

Thus, there is a linkage between administrative legitimacy, democracy, and legality. At this point, legitimacy, and rule of law converge. Administrative legitimacy is based on its connection with parliamentary law (rational legitimacy) as an essential expression of democracy, and is composed primarily of two connected ideas[167]: that legitimacy is derived from a legal order produced by the democratically elected; and consequently, that the administration is subject to the principle of (strict or formal) legality. This is the essence of the Weberian model of administrative legitimacy.[168] For this study, it is a formal or static perspective of administrative legitimacy that is usually connected to the rule of law principle. Nonetheless, a substantial and dynamic perspective of administrative legitimacy can be claimed, and found in the principles of good administration. Here the connection is between legitimacy, democracy and a broader concept of (substantive) legality and the rule of law, which is closer to good governance.[169]

Nowadays, because of the changes in modern society and in public administration, a renewal of the sources of legitimisation has come to accompany legitimacy based on formal legality. This implies an understanding of administrative legitimacy from a broader perspective that should be understood, as pointed out by Velasco, in the context of its time.[170] In the words of Matthias

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165 Eberhard Schmidt-Assmann, "Legitimacy and accountability as a basis for administrative organization and activity in Germany", p. 53.

166 Jacques Caillosse, "Legitimacy in administrative law? A French perspective", in Matthias Ruffert (ed), *Legitimacy in European administrative law: Reform and reconstruction*, Groningen: Europa Law Publishing, 2011, p. 20.

167 Pierre Rosanvallon, *La legitimidad democrática. Imparcialidad, reflexividad, proximidad*, Buenos Aires: Manantial, 2009, p. 26.

168 Max Weber, *Economía y sociedad*, México: Fondo de Cultura Económica, 2002, pp. 173–180.

169 On the rule of law and the principle of legality see Section 5.2.1.

170 Francisco Velasco Caballero, "The legitimacy of the administration in Spain", in Matthias Ruffert (ed), *Legitimacy in European administrative law: Reform and reconstruction*, Groningen: Europa Law Publishing, 2011, p. 89.

Ruffert "the constitutionalisation of administrative law is to some extent a discovery of constitutional legitimacy in administrative law".[171] In this context, a new form of legitimisation of state activity by administrative law has arisen with the notion of good administration. Enshrined in Article 41 of the European Charter of Fundamental Rights, it is based on procedural considerations.[172]

Good administration involves a redirection of power towards the citizen. It represents the pursuit of a balance between protecting citizens' rights and guaranteeing the general interest. It also entails the proper exercise of discretionary powers in order to make good decisions. As mentioned, good administration is the concretisation of good governance at the administrative level. The underlying notion of good administration is the concept of "steering" linked to administrative law.[173] As such, administrative law should be an instrument used to promote the effectiveness of administrative activities.

This amounts to a dynamic perspective of legitimacy related to the way in which decisions are made and functions performed. It represents a concern for quality in the administration. Therefore, a broader concept of legitimacy will include legal quality, and will be connected to good governance as a cornerstone of the modern constitutional state, rather than concerning only legality as the ultimate expression of democratic rule of law.

Legal quality

There is a procedural dimension to the notions of good governance and good administration as far as they concern legal quality. In this regard, the quality of administrative activity is connected to the idea of good decisions adopted by appropriate administrative procedures.[174] One central point for discussion on what constitutes good administrative decisions is related to the tension between

171 Matthias Ruffert, "Comparative perspectives of administrative legitimacy", p. 353.

172 Pascale Gonod, "Legitimacy in administrative law: reform and reconstruction", in Matthias Ruffert (ed), *Legitimacy in European administrative law: Reform and reconstruction*, Groningen: Europa Law Publishing, 2011, pp. 3–7.

173 On the steering approach in administrative law see, Matthias Ruffert, "The transformation of administrative law as a transnational methodological project", in Matthias Ruffert (ed), *The transformation of administrative law in Europe,* Munich: European Law Publishing, 2007; Eberhard Schmidt-Assmann, *La teoría general del derecho administrativo como sistema*, *supra* note 20. See also Section 4.2.4.

174 See, Juli Ponce Solé, "El derecho a la buena administración y la calidad de las decisiones administrativas", pp. 99–108. And by the same autor, Juli Ponce Solé, "The history of legitimate administration in Europe", in Matthias Ruffert (ed), *Legitimacy in European administrative law: Reform and reconstruction*, Groningen: Europa Law Publishing, 2011, pp. 162–168.

the rule of law or the principle of legality and the discretion necessary in order to make tailor-made solutions.[175]

Certainly, legal quality as a factor in good decisions implies, in the first instance, that decision-making is based on the law – that is, legal quality of (administrative) decision-making is determined within the legal framework. However, legal quality is beyond lawfulness (from a narrow perspective) and therefore depends not only on the appraisal of judges, but also on the influence of other legal factors.

According to Bröring and Tollenaar, a first category of legal factors that influence legal quality consists of the procedural rules and concepts that regulate decision-making in the relationship between citizens and the government, and the current interpretation of these rules and concepts. A second category is determined by the development of legal concepts and legal standards.[176] These two factors point towards the breadth of the principles and rules that guide governmental action. Along these lines, the observance of normative standards such as lawfulness, efficiency, effectiveness, and compliance are essential for good decision-making.[177] It underlines the importance of regulating administrative relationships based not only on binding legal norms but also on soft law norms to ensure lawful and proper action.

As a concept, quality has to do with the extent to which the concrete manifestation of a certain phenomenon corresponds to the ideal version of that phenomenon. The more characteristics of the ideal a concrete phenomenon has, the higher its quality will be. In this sense, the definitive mark of legal quality in administrative decision-making is conformity with the legal provisions (parameters) that apply to the process or concrete situation in question.[178] This implies conformity with substantial law, procedural norms, and norms of conduct. That said, from this study's perspective, the process of making decisions and performing activities should be conducted in line with the principles, rules, and standards derived from the constitutional principles that form the composite characteristics of good governance. Accordingly, legal quality is about

175 J. de Ridder, "Factors for legal quality of administrative decision making", in K.J. de Graaf et al (ed), *Quality of decision making in public law*, Groningen: Europa Law Publishing, 2007, p. 31.

176 H.G. Bröring & A. Tollenaar, "Legal factor of legal quality", in K.J. de Graaf et al (ed), *Quality of decision making in public law*, Groningen: Europa Law Publishing, 2007, pp. 53–65.

177 M. Herweijer, "Inquiries into the quality of administrative decision making", in K.J. de Graaf et al (ed), *Quality of decision making in public law*, Groningen: Europa Law Publishing, 2007, pp. 11–27.

178 K.J. de Graaf et al, "Administrative decision-making and legal quality: An introduction", in K.J. de Graaf et al (ed), *Quality of decision making in public law*, Groningen: Europa Law Publishing, 2007, pp. 4–5.

how decisions are made. It is determined by the observance of principles of good governance in administrative decision-making as a means of ensuring good decisions.

Finally, it is important to mention that the way in which compliance with legal standards is monitored by supervisory or controlling bodies is also considered as another factor that influences legal quality.[179] In this regard, the assessment function of the ombudsman institution plays an important role in enhancing the quality of the administration and therefore in enhancing legitimacy. From this perspective "a minimal concept of legal quality is administrative compliance with the law. A maximum concept of legal quality is administrative justice".[180]

2.2. RESEARCH QUESTIONS AND METHODOLOGY

2.2.1. RESEARCH QUESTIONS

As mentioned, this study analyses the normative function of the ombudsman institution from the perspective of the application (and development) of the principles of good governance as assessment standards. This is how the institution contributes to improving the quality of government and to strengthening the democratic rule of law and the political system as a whole.

For this study, the existence of instances of maladministration is a consequence, among other factors, of an inadequate regulatory and legal framework regarding the performance of the administration, which restricts the effectiveness of government action and undermines legitimacy. This represents an obstacle for good governance in both new and developed democracies. In the case of new democracies like Peru, such situations threaten the consolidation of the democratic system as well as institutional development.

On this basis, two research questions have been formulated: as with the main objectives, one focusing on the institution on a global level, and the other on the Peruvian case.

The first question is:

Does the ombudsman institution, despite the different legal contexts in which it operates, apply similar standards of assessment that can be regarded as standards based on principles of good governance?

179 H.G. Bröring & A. Tollenaar, loc.cit., p. 54.
180 J. de Ridder, loc.cit., p. 48.

This question focuses on the normative functions of the ombudsman institution to determine the extent to which it applies normative standards based on the principles of good governance. To answer this question, the following sub-questions are addressed:

What effect does the hybridisation of the ombudsman have on the normative standards, assessment orientation, powers, and functions of the institution?

Can the normative standards applied by the ombudsman be classed as legal norms?

What is the relationship between the legal dimension of good governance and constitutional principles?

What is the legal content and scope of the principles of good governance?

What is the relationship between the normative standards developed and applied by different models of ombudsman and principles of good governance?

The second question is:

Does the Peruvian Defensoría del Pueblo apply the principles of good governance as standards of assessment, and if so, how can these be further developed?

This question concerns the principles of good governance in the context of the role of the Defensoría as a developer of legal norms, and how these principles can be further developed to effectively promote good governance and improve administrative legal quality and legitimacy in Peru. To address this question, the following sub-questions are formulated:

Does the hard-law review performed by the Defensoría del Pueblo include as assessment standards the application of legal principles of good governance?

Does the Defensoría develop assessment standards that can be regarded as standards based on principles of good governance?

What legal and institutional mechanisms would be needed within the Defensoría to foster good governance?

In answering these questions, the study will analyse the performance of the *Defensoría* and examine how this institution, by protecting fundamental rights and promoting good administration, applies and develops legal principles of good governance.

This study's hypothesis is that regardless of the specific legal contexts in which the different ombudsmen work, the ombudsman is an evolving institution, which contributes to improving government quality. The mutual cohesion and hybridisation of the assessment standards and the subsequent hybridisation of ombudsman institutions per se, is what characterises this development.

The hybridisation of the ombudsman institution is led by the development of good governance norms as assessment standards. In this regard, the standards applied – by the institution of the ombudsman in general and Peru's *Defensoría del Pueblo* in particular – regarding administrative performance can be considered as standards based on principles of good governance. In this way, the ombudsman is contributing to the development of a legal content for the principles of good governance, founded in turn on the principles of democracy and the rule of law. Thus, the ombudsman is providing new tools to enhance the legitimacy of public administration and strengthen the democratic system.

2.2.2. METHODOLOGY

This study is centred on good governance from a legal perspective. This will provide the conceptual framework for evaluating the performance of the ombudsman institution and analysing the standards and principles it applies. Therefore, in order to identify the values protected and the standards applied by the ombudsman, which are considered as central elements for good governance, the five principles of good governance (properness, transparency, participation, accountability, and effectiveness) are used to frame the analysis.

Accordingly, the "ombudsnorms" are categorised into a set of five groups corresponding to each of the principles of good governance to determine the extent to which these principles are actually supported by concrete standards developed by the ombudsman. However, the analysis is focused on the identification of standards linked to three of these principles: properness, transparency, and participation. In this framework, the study proceeds to identify the principles and describe the manner of their application (and content) in ombudsman practice. In doing so, the intention is not only to establish good governance as an operative legal concept, but also to identify the rights and obligations regarded as essential for the legal meaning of good governance.

To determine to what extent the ombudsman institution applies good governance-based standards, this study takes a qualitative approach to analysing the performance of the ombudsman in discharging its functions. As part of this qualitative analysis, some basic questions are answered as elements for comparison: *who* can access to the institution; *what* can be investigated; *how*

is the investigation conducted and finalised; and – since the fundamental concern is with the role of the ombudsman in relation to the application (and development) of the principles of good governance – *how* the assessment standards relate to good governance, from a comparative perspective.

The ombudsman is an institution that emerged and was first developed in the European context. Later, the institution underwent a process of wider diffusion, expanding and adapting its role to different legal contexts and traditions. This process has led to the hybridisation of the institution, encompassing not only the functions and standards of assessment[181] but also the assessment orientation. Therefore, this study takes the perspective of the "redress and control" concepts as the operational instruments that define the assessment orientation of the respective ombudsman institutions under comparison.[182]

First, three national ombudsman institutions operating in the European context: are analysed the National Ombudsman of the Netherlands (*Nationale Ombudsman*)[183], the UK Parliamentary Ombudsman (Parliamentary Commissioner for Administration)[184], and the Ombudsman of Spain (*Defensor del Pueblo*). The purpose is to determine how far these ombudsmen, although of different types and belonging to different legal traditions, share the same values and apply similar normative standards that can be traced back to principles of good governance.

In both the Netherlands and the United Kingdom, the institution of the ombudsman was originally created to enhance the administrative justice system by providing citizens with a new mechanism for redress. The Dutch Ombudsman and the UK Parliamentary Ombudsman have explicitly accepted the distinction between lawful administrative behaviour and administrative behaviour as referring to good administration norms.[185] They both perform a soft law or correctness review of government action, and have developed their own normative standards: The Guide of Proper Conduct *(Behoorlijkheidswijzer)* for the Dutch case, and the Principles of Good Administration for the UK case.

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181 Milan Remac, "Standards of Ombudsman assessment: A new normative concept?", p. 69.

182 For an explanation of the concepts of redress and control to define the assessment orientation of the ombudsman see Section 3.4.1.

183 Hereafter, the "Dutch Ombudsman"

184 Here the focus is only on the UK-wide office of Parliamentary Commissioner for Administration (which is referred to in this study as the "UK Parliamentary Ombudsman" or simply "the UK Ombudsman") and not that of Health Service Commissioner for England, both of which are under the auspices of the Parliamentary and Health Service Ombudsman. See Chapter 8.

185 M. Remac & P.M. Langbroek, loc.cit., p. 158.

On the other hand, the Ombudsman of Spain was established as part of the process to restore democracy in the country, and charged with the protection of human rights as its main task. In so doing, the Spanish Ombudsman assesses the actions of the administration against legally binding norms (legal principles and rules). This institution applies law (constitutional principles and legislation) as the standard of assessment of governmental action. Hence, the Spanish Ombudsman conducts legality (hard law) reviews. Most Latin American countries, including Peru, have embraced this model.

The Peruvian *Defensoría del Pueblo* then is analysed on the same basis, as a case study of the ombudsman's evolving role in new democracies in Latin America. This will reflect the wider process of the institution's hybridisation worldwide, and how its functions and assessment standards have been adapted to the evolution of the constitutional state, not least through application of the principles of good governance as a new source of legitimacy.

As stated in Chapter 1, the ombudsman institution has a dual mandate: the protection of human rights and the promotion of good administration, which are two sides of the same coin. As such, it is important to specify that the institution is analysed not in terms of its human rights role but rather as a promoter of good administration from a good governance perspective.

Taking this into account, this study conducts a quality assessment of these ombudsman cases and the reports they produce with a view to showing how these institutions, although of different types, share the same values and take a similar approach to assessing the actions of government. This is done by focusing on the good governance principles of properness, transparency, and participation. These three principles have a longer development than the other two, and are considered key aspects of good governance.[186] In order to facilitate the comparison, the same elements of each principle are described.

The study is based on documentary analysis, encompassing academic literature, analysis of legislation, and individual interviews. The legal standards applied by the different ombudsmen are analysed based on the reports and the cases (ombudsprudence) handled by each of them. In so doing, the aim is to establish whether principles can be taken from the different ombudsman's reports and from ombudsprudence, and held up as being related to good governance. In this way, the intention is to gain a clear perspective of the relationship between

186 Properness, transparency, and participation are principles of good governance that have been developed in close connection with the rule of law and democracy. On the other hand, the principles of effectiveness and accountability are somewhat new for lawyers due to their relationship not only with law, but also economics and social sciences. See, G.H. Addink, *Good governance. Concept and context*, pp. 99–170.

the standards of assessment applied by the ombudsman, the principles of good governance, and the fundamental values and dimensions of the modern constitutional state. It is important to mention that because some of the reports analysed do not refer to the standard in question, and most importantly, considering that good governance is not an explicit assessment criterion, (especially for the Peruvian *Defensoría*) this study applies the "norm in context" method developed by Langbroek[187] in order to identify good governance-based standards. After identifying a standard, it is related to the list of norms of good governance developed in this thesis.[188]

For this purpose, several internet search engines were used. For the national case studies of the Dutch Ombudsman, the UK Parliamentary Ombudsman, the Ombudsman of Spain, and the Peruvian *Defensoría*, reports were obtained from the official websites of the respective institutions.[189] For the Dutch Ombudsman, the UK Parliamentary Ombudsman, and the Ombudsman of Spain, only reports (and other decisions) published between 1 January 2005 and 31 July 2013 were taken into consideration. In the case of the ombudsprudence of the Dutch Ombudsman, the analysis is based on the online published investigation (case) reports. In turn, the ombudsprudence of the UK Parliamentary Ombudsman and the Ombudsman of Spain are analysed based on the individual complaints cited in the annual reports or included in special reports (also available on the official websites) since these ombudsmen do not publish all their investigation (case) reports.[190] As to the analysis of legislation, again only consider developments in the law as at 31 July 2013 are considered.

For the Peruvian *Defensoría*, the central focus, reports and cases (based on the resolved complaints) from between 1 January 2005 and 31 December 2013 are again utilised. During this period, the *Defensoría del Pueblo* produced 77 special reports (*Informes Defensoriales*)[191] on wide variety of issues[192] and has addressed

187 Philip M. Langbroek & Peter Rijpkema, "Demands of proper administrative conduct A research project into the ombudsprudence of the Dutch National Ombudsman", in *Utrecht Law Review*, Volume 2, Issue 2 (December) 2006, pp. 81–98.

188 See Chapter 6.

189 The Dutch Ombudsman: www.nationaleombudsman.nl/rapporten. The UK Parliamentary Ombudsman: www.ombudsman.org.uk/improving-public-service/reports-and-consultations. The Ombudsman of Spain: www.defensordelpueblo.es/es/Documentacion/Publicaciones/anual/index.html. The Peruvian *Defensoría*: www.defensoria.gob.pe/informes-publicaciones.php.

190 In the case of the UK Parliamentary Ombudsman, as at July 2013, only 85 reports (special and others) were published on the official website.

191 As mentioned, ombudsman office reports are the result of specific investigations within the framework of supervision, campaigns, or in response to a group of complaints or own initiative inquiries.

192 From the beginning of its functions in 1996 until 2014, the *Defensoría* had produced more than 200 reports, including special reports (*Informes Defensoriales*) deputy ombudsman's reports (*Informes de Adjuntía*) and working papers (*Documentos de Trabajo*).

more than 150,000 complaints.[193] During this period, the *Defensoría,* as a part of its 2007–2011 Strategic Institutional Plan, determined three thematic lines of action for the coming years: i) surveillance of public policy implementation; ii) supervision of government management; and, iii) promotion of a culture of peace and dialogue aimed at ensuring governance in the country.[194] These thematic lines were maintained in the 2011–2015 Strategic Institutional Plan.

The interviews, for their part, involved ombudsman employees to gain information on their perceptions and opinions on the institution's role in the development of legal norms, especially regarding the normative function of the ombudsman and the relationship between standards of assessment and law. They were also used to identify perceptions of the interaction between human rights and good administration norms, and the changes in the performance of each of the ombudsman institutions. In total, ten persons were interviewed: one incumbent (the Deputy Ombudsman of the Netherlands), one former ombudsman (from the Peruvian *Defensoría*), eight staff members (from the Dutch Ombudsman, the UK Parliamentary Ombudsman, the Ombudsman of Spain, and the Peruvian *Defensoría*) and one scholar specialised in ombudsman law (Spain).

The interviews were based on semi-structured questions and included a combination of open-ended and closed questions. They were recorded and subsequently transcribed and corrected. All the persons interviewed agreed to the publication of the interviews or parts thereof in the thesis. The interviews were mostly oral. Most of them were conducted between March and December 2014. In the case of the UK Parliamentary Ombudsman, the interview was conducted through a questionnaire distributed by email in November 2016 and returned in January 2017. In the case of the Peruvian *Defensoría*, subsequent interviews were conducted in April 2019 in order to update the information available. Each of the interviews followed general research (i.e. literature

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193 The *Defensoría's* cases are grouped into three categories: petitions (*petitorio*), query (*consulta*) and complaint (*queja*). According to the *Defensoría*'s protocol, a petition is a request calling for the intervention of the *Defensoría* to hear and/or settle a situation of defenselessness or threat to a fundamental right – not resulting from any acts or omissions by public administration or any utility company, but regarding something that could be served by these entities in compliance with their role. On the other hand, an inquiry is a request for information and advice filed with the *Defensoría* regarding juridical matters, institutional matters and social or psychological support issues, not involving the violation of any fundamental or other rights. Finally, a complaint is a request that need the intervention of the *Defensoría* through the reporting of a violation or risk of violation of a constitutional or fundamental right resulting from an act or omission by a public agency, by the administration of justice, or by a public utilities company.

194 Defensoría del Pueblo, *Twelfth Annual Report. January – December 2008*, p. 23. Also see Defensoría del Pueblo's Strategic Institutional Plan 2007–2011, p. 18.

research, law and casework research) on the output of each ombudsman. They were conducted in English and Spanish, as applicable.

Some changes have occurred in the functions of the *Defensoría* as a result of these new thematic lines and the changes in Peruvian society following the democratic consolidation process. This can be most readily observed in the *Defensoría*'s reports when they are describing instances of maladministration, in which certain remarks can be interpreted as the statement of good governance norms. Thus, the *Defensoría* could complement its current practice by assessing government action not only against human right principles, but also good governance-based standards. For this reason, analysis of the office's performance over a longer period is useful as a means of identifying these changes over time.

2.2.3. OUTLINE OF THE RESEARCH

This research is divided into five parts. In this first part, in addition to briefly introducing the research topic, the definition of the main concepts underpinning the investigation, the research questions, and the methodology, the institution of the ombudsman is examined from a substantive point of view. To this end, its functions are analysed in terms of redress and control; propose a classification of three general models of ombudsman; study its role as developer of legal norms; and determine the legal nature of its assessment standards.

Part II analyses the concept of good governance as a legal concept with constitutional foundations, whereby good governance is viewed as a fundamental value linked to the rule of law and democracy. As a fundamental value, it might be concretised as an overarching constitutional principle composed of other principles that also have constitutional status, the so-called principles of good governance: properness, transparency, participation, accountability, and effectiveness. These principles provide new elements to bolster administrative legitimacy. The analysis is focused on the three best developed of these principles of good governance: properness, transparency and participation.

Part III evaluates the role of the institution in developing good governance, particularly in its application of good governance-based standards in relation to its indirect normative function as a developer of legal norms and its ability to codify standards for assessing the behaviour of administrative bodies. In this part, the Dutch Ombudsman, the UK Parliamentary Ombudsman, and the Ombudsman of Spain are compared. Some good governance standards applied by these institutions are identified, and established as analytical tools to be applied in Part IV.

Part IV focuses on the Peruvian *Defensoría del Pueblo*. Here, the theoretical framework developed in Part II and Part III is applied to analyse the role of the *Defensoría* in enhancing good governance. Its powers and functions are scrutinised to assess the administration, and determine that although the *Defensoría* does not explicitly develop or codify good governance standards, it does protect the same values and applies the same criteria as its European peers. Therefore, the *Defensoría* also performs a role in developing good governance norms. As an institution of accountability, it is well placed to enhance legitimacy.

Finally, Part V presents the study's conclusions, which are that regardless of the specific legal contexts in which the different ombudsmen operate, the institution is a continually evolving one that contributes to improving the quality of government. The development of the institution is characterised by the mutual cohesion and hybridisation of the assessment standards and the subsequent hybridisation of ombudsman institutions per se. Hence, the contemporary ombudsman performs a dual function: the protection of human rights and the promotion of good administration. The hybridisation of the institution is driven by the development of good governance norms as assessment standards. In this way, the ombudsman is helping to develop the legal content in which the values associated with the principles of good governance operate. The ombudsman is thus providing new elements to enhance the legitimacy of public administration and strengthen the democratic system. Finally, in the Peruvian case, it is suggested that the *Defensoría* make explicit its role in good governance and codify good governance-based standards with a twofold objective: 1) to supplement its human rights protective function (redress-oriented); 2) increase the effectiveness of its preventive (control-oriented) function as an overseer of the behaviour of the administration.

CHAPTER 3

THE OMBUDSMAN AS A DEVELOPER OF LEGAL NORMS

This chapter analyses the role of the ombudsman institution as a developer of legal norms and its ability to codify standards for assessing the behaviour of administrative bodies. The institution is examined from a substantive point of view, describing the main characteristics of the ombudsman as regards its evolution, legal mandate, organisation and powers, while focusing on its normative function. The chapter also studies how the process of hybridisation determines the features of the contemporary ombudsman. Then, the second part of the chapter examines the institution's assessment orientation and standard of control. In the third part, based on the control and redress approach, the institution is categorised into three general models. The chapter concludes that given the constitutional position of the ombudsman in the check and balance system, it plays a significant role in contributing to improving the quality of the administration and enhancing legitimacy. In this regard, it might be argued that the different ombudsman models have implications for the practice of the institution in relation to the development of normative standards from a (soft law) legal nature.

3.1. AN EVOLVING INSTITUTION

As a public-sector institution, the ombudsman has demonstrated its ability to adapt to changing circumstances, to evolve and to survive in diverse political and legal habitats.[195] As pointed out by Heede, in all countries where the institution exists, it was created because "something extra" was needed.[196] In welfare states, an ombudsman was needed to protect citizens' interests against the increasing influence of the administration. In new democracies, the institution was required to ensure citizens' trust in the government. In any case,

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195 Ann Abraham, "The future in international perspective: The ombudsman as agent of rights, justice and democracy", in *Parliamentary Affairs*, Vol. 61, No 4, 2008, p. 682. However, according to some authors the flexibility and adaptability of the instiution, which explain the diversification of models of ombudsman as part of its evolution, would be leading to a dilution of the concept. See, Sabine Carl, loc.cit., pp. 18, 28–30.

196 Katja Heede, op.cit., p. 79.

the ombudsman serves as a kind of reflexive and dynamic institution[197] that helps to enhance good governance in a state.

As already mentioned, since its inception, the institution of the ombudsman has been subject to a process of evolution that has led to its hybridisation.[198] As a global constitutional phenomenon linked to the three cornerstones of the modern state (rule of law, democracy, and good governance), the ombudsman is recognised as a prominent player in the protection of human rights and the promotion of good administration.[199] In new and developed democracies alike the ombudsman helps to ensure that governments are held accountable for their actions, and thus contributes to strengthening democracy and safeguarding quality standards regardless of the environment in which it operates.[200]

Based on the hybridisation of the ombudsman, three main development waves are discerned. The first wave relates to the origins of the institution and the formulation of the so-called "classical" ombudsman. The second wave is related to the process of hybridisation of the functions (and powers) of the institution and the emergence of the "human rights" ombudsman. The third wave is related to the hybridisation of the institution's standard of control and assessment orientation. This comprehensive process of hybridisation is what characterises the contemporary ombudsman.[201]

3.1.1. THE FIRST WAVE

Although the institution was first established by Sweden in 1809, its precursor – the *Justitiekanslern* (Chancellor of Justice) – had been in existence since 1719 as an internal authority within the executive, appointed by the king to supervise the conduct of the administration and the judiciary. As the king's representative, the *Justitiekanslern* was set up to strengthen the authority of the executive over the other powers.[202] As Sweden's form of government became

197 Ann Abraham, loc.cit., p. 682.

198 See Section 1.1.1.

199 As stated in Section 2.1.2, this study considers good governance and human rights as two different but mutually reinforcing kinds of principles. Good governance is a principle-duty while human rights is a principle-right. For the impact of the relationship between good governance and human rights on the institution's standard of control and the development of standards of assessment, see Section 3.4.2.

200 M. Oosting, "The ombudsman and his environment: A global view", in Linda C. Reif (ed), *The International Ombudsman Anthology*, The Hague-London-Boston: Kluwer Law International, 1999, pp. 1–2.

201 Later, three models of ombudsmen that better represent the contemporary ombudsman within this third wave are presented.

202 Paul Magnette, "Between parliamentary control and the rule of law: the political role of the Ombudsman in the European Union", in *Journal of European Public Policy*, 10:5, 2003, p. 678.

more parliamentary, the institution was retained but progressively shifted from the domain of the executive to the sphere of the *Riksdag* (parliament).[203] In 1809, the new Constitution added the institution of the *Justitieombudsman*, appointed by parliament with the powers to supervise the public administration and the judiciary and to prosecute those public officials who failed to fulfil their duties. Thus, the institution became an instrument of parliamentary control over the executive (and the judiciary).

The *Justitieombudsman* was created with the purpose of controlling public officials on behalf of the parliament. In the beginning, the Swedish ombudsman was mainly a prosecuting institution that acted on its own initiative. However, several important changes were gradually introduced. The ombudsman was stripped of its powers to prosecute civil servants and it became a recipient of complaints about instances of maladministration, which were unsuitable for proceedings in the Swedish administrative courts. As the institution evolved, it gained a measure of autonomy from parliament and went from being an exclusively legislative supervisor to a mechanism for citizens to control public authorities.

This formed the basis of the model that was later adopted by other European countries, identified as the classical (or parliamentary) ombudsman model. The other Scandinavian states were first to embrace it: Finland in 1919, Denmark in 1955, and Norway in 1962. According to some authors, the Swedish and Finish ombudsmen, which relate to legality and assess the compliance of public authorities with the law, can be identified as the first generation of ombudsmen.[204]

The Danish and Norwegian ombudsmen, unlike their Swedish counterpart, do not have the power to investigate the judiciary or to prosecute public officials; they can only control the administration through soft mechanisms such as recommendations and reports. The classical ombudsman model that spread worldwide is based on the offices established in these two Scandinavian countries.

In fact it was the Danish Ombudsman that became a benchmark for the further development of the institution. The Danish ombudsman was established in 1953 out of a need for improved protection of citizens against public authorities. Given the lack of specialised administrative courts in Denmark, the ombudsman institution is traditionally considered to be unrivalled as the primary specialist

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203 The institution of the Chancellor of Justice still exists as the "Government's Ombudsman".

204 Milan Remac, "Standards of ombudsman assessment: A new normative concept?", p. 64. Swedish and Finish ombudsmen are also described as "traditional" ombudsmen. See, B. von Trigerstrom, "Implementing economic, social and cultural rights: The role of national ombudsman institutions", in I. Merali and V. Oosterveld (ed), *Giving meaning to economic, social and cultural rights*, Philadelphia: University of Pennsylvania Press, 2001, p. 140.

legal protector of good administration in terms of assessing the compliance of public authorities with national law and, in particular, with a range of general procedural requirements.[205]

Commonwealth countries adopted the model in the early 1960s.[206] The United Kingdom established the institution (the British Parliamentary Commissioner) in 1967. The concept spread rapidly across Europe, and countries throughout the continent appointed an ombudsman. The Netherlands instituted a national ombudsman institution in 1981. This second generation is characterised for its role in assessing the compliance of administrative behaviour with a general normative concept, which in a narrow sense includes only extra-legal requirements of the administration.[207] They are intended not only to control the administration, but also to promote good practices.

The most widely accepted definition of the ombudsman is that it is an "office which receives complaints from aggrieved persons against government agencies, officials and employees or who acts on his own motion, and who has the power to investigate, recommend corrective action and issue reports."[208]

In its classical form, the ombudsman is conceived as a mechanism for supervising the legality, fairness and efficiency of the administrative activities of government. As such, the general objectives of the ombudsman are the improvement of the performance of the administration and the enhancement of government accountability to the public. From a traditional perspective, the first and second generation of ombudsmen can be defined as "classical" ombudsmen.

3.1.2. THE SECOND WAVE

As part of the process of wider diffusion, the ombudsman institution was also established and adapted in other countries, where the role was expanded beyond the assessment of the administrative actions of government. Thus, the institution, as assigned with additional authorisations, gave rise to what has been defined by Reif as the hybrid ombudsman, the most notable variant of which is the human rights ombudsman model.[209]

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205 Michael Gøtze, "The Danish ombudsman. A national watchdog with selected preferences", in Utrecht Law Review, Volume 6 Issue 1, 2010, pp. 33–34. Regarding the Danish ombudsman, see also Gammeltoft-Hansen & J. Olsen (eds), *The Danish ombudsman 2005*, Kopenhagen: Folketingets Ombudsman, 2005.

206 The first Commonwealth country to adopt the institution was New Zealand in 1962.

207 Milan Remac, "Standards of ombudsman assessment: A new normative concept?", p. 64.

208 Ombudsman Committee, *International Bar Association Resolution*, 1974.

209 Linda C. Reif, *The ombudsman, good governance and the international human rights system*, p. 8.

The institution made incursions into the field of human rights largely hand in hand with the process of democratisation, first in Southern Europe and later in Central and Eastern Europe and Latin America. Therefore, it can be said that the development of new liberal democracies in the context of an extension of the state's sphere of action provided new incentives for the concept of the ombudsman. Hence, by combining the basic concepts of rule of law and human rights, the ombudsman institution was brought to a new level.[210]

The restoration of democracy in Portugal and Spain saw the creation of human rights ombudsman institutions in the 1970s. The Portuguese ombudsman, established in 1975, was given the power to protect and promote rights and freedoms in addition to observing public administration. In turn, the Spanish Constitution of 1978 provided for a national ombudsman (the *Defensor del Pueblo*) to supervise the protection of human rights and the government administration.

The human rights ombudsman model was subsequently adopted by most countries in Latin America, including Guatemala, Costa Rica, El Salvador, Honduras, Nicaragua, Peru, Panama, Colombia, Bolivia, Ecuador, Venezuela, Argentina, Paraguay and Mexico.[211] In Peru, the institution of the *Defensoría del Pueblo* was established by the Constitution of 1993.

The implementation of a human rights ombudsman can be seen as a concrete manifestation of a country's attempts to develop democratic accountability and build good governance.[212] It represents an evolution of the institution, in that it combines the classical role of the ombudsman with a significant dimension of human rights protection.[213] Envisioned as such, the ombudsman's task to ensure that citizens' rights are protected in relation to the administration aims – in certain sense – to restore equality between citizens and the state's authorities. Thus, the human rights ombudsman combines both the roles of ombudsman and human

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210 Gabriele Kucsko-Stadlmayer, loc.cit., p. 2.

211 For a comparative study between the ombudsman institution in Latin America, with focus on Central America, and in Europe see G.H. Addink, "Las defensorías del pueblo: Un enfoque comparado desde Centroamérica y Europa incluyendo a los Países Bajos, in Instituto Interamericano de Derechos Humanos (ed), *Análisis comparativo de las instituciones del ombudsman en América Central y Holanda*, San José: IIDH, 2002, pp. 11–24.

212 Linda C. Reif, *The ombudsman, good governance and the international human rights system*, p. 8. It is important to mention that to the extent that the human rights ombudsman model includes an additional human rights protection and promotion mandate, some states have changed their classical ombudsman model to a human rights ombudsman. Hence, besides Portugal and Spain, other European countries with human rights ombudsmen are: Greece, Cyprus, Finland, Sweden and most countries in Central and Eastern Europe.

213 E. Saygin, "Improving human rights through Non-Judicial National Institutions: The effectiveness of the Ombudsman Institution in Turkey", in *European Public Law*, Vol. 15, No 3, 2009, p. 407.

rights institution.[214] Many human rights ombudsman institutions have dual human rights and administrative justice functions.[215] While some human rights ombudsman institutions are closer to the classical ombudsman model, others are much more akin to pure human rights institutions. In fact, the ombudsman institutions with assigned powers to protect human rights can be also considered as national human rights institutions in line with the Paris Principles.[216]

Other variations of (hybrid) ombudsman may be given mandates that include anticorruption and leadership code enforcement functions. While there are several types of horizontal accountability bodies that are established to combat corruption, including the courts and anticorruption commissions, some countries have not created a specific institution for that purpose, having instead endowed their ombudsman with an additional anti-corruption mandate.[217] It is also considered that all ombudsman offices have a (non-explicit) complementary role in anti-corruption efforts.[218] Nevertheless, a small number of ombudsmen have been expressly assigned anti-corruption functions, primarily in African countries like Rwanda, Namibia and Uganda. In some cases, specific new tasks like the protection of children or minorities are also assigned.

3.1.3. THE THIRD WAVE: THE CONTEMPORARY OMBUDSMAN

In its contemporary form, the institution of the ombudsman, as it has developed from its early modern roots in Scandinavian countries, relies on a mixture of both law and concepts such as fairness, justice or integrity in relation to the notion of rule of law from a broader perspective.[219] Although legal principles taken from public law are part of the standards applied by the ombudsman to assess the behaviour of public officials, also of concern is the compliance with

214 Thomas Pegram, "Diffusion across political systems: The global spread of national human rights institutions", in *Human Rights Quarterly*, Vol.32, 2010. pp. 735–737.

215 Linda C. Reif, "Transplantation and adaptation: The evolution of the human rights ombudsman", in *Boston College Third World Law Journal 31*, Issue 2, 2011, p. 277.

216 The Paris Principles were defined at the first International Workshop on National Institutions for the Promotion and Protection of Human Rights, held in Paris on 7–9 October 1991 (E/CN 4/1992/43 of 16 December 1991). They were adopted by the United Nations Human Rights Commission by Resolution 1992/54 of 1992, and by United Nations General Assembly Resolution 48/134 of 20 December 1993. The Paris Principles relate to the status and functioning of national institutions for the protection and promotion of human rights.

217 Linda C. Reif, *The ombudsman, good governance and the international human rights system*, p. 9.

218 This is the case, for example, of the Peruvian Ombudsman, which despite not having an explicit anticorruption mandate has assumed it as a part of its human rights-protecting function. See Section 11.1.2.

219 John McMillan, loc.cit., p. 17–18.

principles of good administration as non-legally binding requirements and a quality factor for the administration. On the other hand, since the behaviour of public officials is monitored, issues of human rights are also raised.[220] Hence, the contemporary ombudsman is the result of the hybridisation of the institution's powers and functions[221], but also its standards of control.[222]

This hybridisation also has consequences for the controlling function, understood in terms of redress and control.[223] That is, human rights ombudsmen have undergone changes in their assessment orientation, and protecting and preventing functions are part of their role. The same might also be said regarding classic ombudsmen.[224] Both functions are mixed and can be found in almost all ombudsman institutions. Thus, although from a theoretical perspective there is a separation between human rights and the good administration approach in the performance of the ombudsman's functions, here they are regarded as integrated components of the whole.

Therefore, nowadays it can be affirmed that the ombudsman has, in general terms, a double mandate: to oversee the conduct of public officials and administrative authorities in order to guarantee good administration, and to protect and promote human rights. According to traditional approaches, both classical and human rights ombudsman institutions perform both functions, and the institution's competence covers a wide range of acts and areas. In this regard, the developing role of the ombudsman institution as a non-judicial remedy is often to address the connection between breaches of law, human rights violations, or other forms of defective administrative behaviour. Consequently, there is a mixture in the standard of control, which at the same time is reflected in the mixture of assessment standards and the assessment orientation of the institution. This comprehensive process of hybridisation is what characterises the contemporary ombudsman.

It is said that the ombudsman is established when the traditional institutions for protecting the interests and rights of the citizens (such as the judiciary, the parliament, or the internal administrative mechanism of control) are not sufficient to control the conduct of public authorities. By exercising its mandate

220 Linda C. Reif, "The promotion of international human rights law by the office of the ombudsman", in Linda C. Reif, Mary A. Marshall and Charles Ferris (eds), *The Ombudsman: Diversity and development*, Edmonton: International Ombudsman Institute, 1993, p. 87.

221 Linda C. Reif. *The ombudsman, good governance and the international human rights system*, pp. 60ff.

222 Milan Remac, "Standards of ombudsman assessment: A new normative concept?", pp. 66–70.

223 See Section 3.4.1.

224 In the Netherlands, a deputy ombudsman for children (*de Kinderombudsman)* was incorporated into the National Ombudsman Office in 2011. To a certain extent, it can be considered as an example of the wider process of hybridisation of the institution since, from a traditional perspective, it is placed within the classical ombudsman model. See Section 7.1.1.

the ombudsman operates as another check on the power of the executive, in addition to the controls exercised by the legislature, the courts, and other public institutions. It acts as a complementary mechanism of accountability, promoting democratic development in a state.[225]

3.2. LEGAL MANDATE AND POWERS

3.2.1. LEGAL MANDATE

The ombudsman is an independent public official with the power to investigate instances of maladministration, issue public reports, and recommend changes to prevent the repetition of misconduct by administrative authorities. Through the performance of its functions, the institution of the ombudsman contributes to protecting the rights of the citizens, improving the performance of the administration, and enhancing good governance.

The ombudsman can be qualified as an extra check on the public administration. From this perspective, it is a kind of auxiliary component to the checks and balances between state powers. It is also possible to regard an ombudsman as a guardian of performance quality in public administration.[226] In these terms, the ombudsman uses and sometimes develops standards to assess the conduct of public bodies, administrative authorities, and civil servants, and is therefore said to also have (indirect) normative functions.

Another perspective is to see an ombudsman as an addition to legal protection against the government by acting as a channel through which to lodge complaints. In this conception, solving citizens' problems is the main aim of the ombudsman's functions. And finally, the ombudsman can give an assessment of the lawfulness and the ethical character of the administration's behaviour. The outcomes of these such ombudsman's inquiries can be used as evidence in court proceedings, as well as in the development of organisation.[227]

In any case, independence, impartiality, and broad powers of investigation are fundamental conditions for the effective functioning of the institution.[228] The ombudsman's duty is to safeguard the "individual's right to proper

225 Linda C. Reif, The ombudsman, good governance and the international human rights system, p. 79.

226 M. Oosting, "The ombudsman and his environment: A global view", p. 1.

227 M. Remac & P.M. Langbroek, loc.cit., pp. 154–155.

228 Mary A. Marshall & Linda C. Reif, "The Ombudsman: Maladministration and alternative dispute resolution", in *Alberta Law Review 34*, 1995, p. 218.

governance".[229] This section is devoted to describing the essential legal features of the institution and its contribution to good governance. For the purpose of this research, the normative function of the institution is emphasised.

The most basic idea regarding the ombudsman institution is its independence from the executive, as well as from the other branches of the state. The principle of independence is the core concept for ensuring the effectiveness of the institution. This independence is usually granted by the constitution (although sometimes it is provided by legislation). Thus, it is the constitutional position of the ombudsman that ensures its independence from other public authorities.

Another way to guarantee the independence of the ombudsman, particularly from the executive branch, is by the way in which the incumbent is appointed and removed. Generally appointed by the parliament, this procedure in many cases requires a qualified majority. Several countries provide for a right to proposal.[230] In the Netherlands, an independent committee composed of the Vice President of the State Council, the Chief Justice, and the President of the Court of Audit, is entitled to nominate three candidates for election. In the United Kingdom, the Queen, as the head of state, appoints the ombudsman on the recommendation of the Prime Minister. However, the British ombudsman is considered completely independent from the executive. In general terms, where the parliament is tasked with the appointment of the ombudsman, it is also the parliament that is responsible for an incumbent's removal from office. A qualified majority may be also required.

An ombudsman institution is a highly personalised state office. Accordingly, most legal orders provide for the appointment of only one incumbent. However, cooperative solutions are also possible, and sometimes more than one incumbent is appointed.[231] In these cases, like in Sweden where four incumbents are appointed, each incumbent has a particular field of competence, which is regulated by law. In many institutions where only one incumbent is appointed, deputies are also provided for. In Peru, for instance, the institution has seven deputies. However, there are some ombudsman institutions in which deputies are not appointed at all.[232] It is important to mention that the incumbent usually has immunity against criminal prosecution during his tenure in office.[233]

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229 Marten Oosting, "The ombudsman and his environment: A global view", p. 1.

230 Gabriele Kucsko-Stadlmayer, loc.cit., p. 12.

231 Ibid., p. 11.

232 Gabriele Kucsko-Stadlmayer, loc.cit., p. 12.

233 Because the focus here is on the ombudsman as an institution rather than the incumbent of the office, all references to "the ombudsman" in this study are to be understood as such. For the same reason, the pronoun "it" rather than "h/she" is used in reference to the institution throughout.

In certain cases, the national ombudsman establishes regional or local branch offices also known as "regional representatives" or "local representatives". These offices are deconcentrated organs of the national ombudsman institution intended to enable direct contact and communication with the citizens, provide information on submitting complaints to the ombudsman, and facilitating the accessibility of the institution. The branch offices also aim to provide quick and unbureaucratic problem solving in the locality.

Some legal orders provide for the establishment of independent ombudsmen at the regional level. These regional ombudsmen may exist in addition or instead of a centralised national ombudsman institution. Sometimes, like in The Netherlands, special ombudsman institutions may even exist at municipal or provincial level as independent institutions. The scope of responsibility of these regional, provincial and municipal ombudsmen covers administration agencies at the corresponding level, as well as administrative tasks within the field or responsibility of the region or municipality in question.[234]

Finally, it is worth noting that some advantages of the ombudsman relative to other public-sector institutions are its informality, speed, and accessibility. One characteristic that makes it accessible is that the use of the institution is free of charge to complainants.

3.2.2. POWERS

The ombudsman is an independent institution that contributes to improving the performance of the administration, as well as to protecting the rights of the citizens in their unequal relationship with the state. To this end, the ombudsman is vested with three characteristic types of powers: investigation, recommendation and reporting. It is due to these powers and their interrelation with one another that the ombudsman differs most distinctively from all other state institutions.

Investigation

The ombudsman is assigned with broad powers of investigation.[235] The institution can initiate an investigation on the basis of a complaint lodged

234 Gabriele Kucsko-Stadlmayer, loc.cit., p. 17.

235 As an example of the extent of the investigation powers assigned to the ombudsman institution, some studies refer to horizontal and (direct and indirect) vertical investigative powers in relation to the European Ombudsman. In this regard, see Alexandros Tsadiras, "Unravelling Airadne's thread: The European Ombudsman's investigative powers", in *Common Market Law Review* 45, 2008, pp. 760–762.

by a citizen or on its own initiative. When the ombudsman operates based on complaints, the possibility of lodging a complaint can be laid down in strict terms, rather similar to the *locus standi* requirements in administrative court proceedings. They can also be left completely open, implying that anyone can complain irrespective of the (legal) interest in the case and without any time limit.[236] In some special situations, a member of parliament can request the ombudsman to start inquiries. In addition, the ombudsman can be also given the power to conduct own-initiative investigations. With such a power, it can both start investigations into matters where no complaints have been received and broaden the inquiry of a complaint where necessary.[237]

The administrative authorities subject to the ombudsman´s investigation are bound to the duty of cooperation. This implies that the administration must facilitate the supervisory activities of the ombudsman by providing information and access to government buildings. Providing information allows the administration to comment on an issue, expounding their point of view and thereby enabling the ombudsman to behave impartially.[238] In order to facilitate its investigations, the ombudsman is granted access to official buildings. Sometimes, no advance notice is required. In many cases, there are explicit regulations concerning access to prisons and other institutions where the personal freedom of citizens is restricted, such as mental health facilities, orphanages, and asylums. Such visits are intended to monitor the observance of human rights by such institutions *ex officio*, and they are not necessarily connected to a complaint. As part of its power of investigation, the ombudsman is also empowered to interview public servants.

An issue related to the initiation of investigations is the possibility to control the ombudsman's compliance with the rules governing its duties. On this point, the question is that where a right exists to lodge a complaint, this right should also be judicially enforceable. At one extreme, the complainant has no right and is considered a mere informant. At the other, complainants have procedural rights but the complainant must meet certain admissibility criteria. In the latter case, the ombudsman must give a detailed response on the merits of the complainant or justify its decisions when a complaint has been declared inadmissible, which, theoretically, the complainant could then challenge in court. Moreover, the ombudsman can be controlled politically like other state authorities. This allows the parliament to perform a kind of political *ex post* control of individual ombudsman decisions.[239]

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236 Katja Heede, op.cit., p. 86.

237 The term "inquiry" will be used to refer specifically to those investigations conducted by the ombudsman to address the complaints lodged by the citizens.

238 Gabriele Kucsko-Stadlmayer, loc.cit., p. 40.

239 Katja Heede, op.cit., p. 87.

Recommendation

The ombudsman is vested with the authority to give recommendations. A recommendation means a specific proposal by the ombudsman that legislation or administrative regulations or practices be changed.[240] The ombudsman focuses on the procedural aspects of the administrative structure, but it is not precluded from examining the substance of the law regulations that may have led to maladministration in a particular case. Thus, after an objective investigation, the recommendation of the ombudsman may include suggested amendments to government policy or practice, and even legislation.

A recommendation does not give rise to an enforceable duty of observance. The ombudsman is not vested with the power to make legally binding decisions. Hence, recommendations are considered as legal acts with soft-law character. Because the institution has no power of enforcement, it must rely on persuasion and publicity as a means to the realisation of its recommendations. Therefore, the ombudsman has to exercise the "magistracy of conviction" in order to influence other institutions. It is precisely in this capacity of convincing others that its powers rest. And it is this very characteristic from which the institution derives its identity, features, and opportunities.

Although the administrative agencies to which the recommendations are addressed are not obliged to implement them, a reaction of some kind is required. Thus, for example, in some cases the administration has to announce the measures to be taken in response to a recommendation. This "duty of reaction" is usually deduced from the general instructions of cooperation.[241]

It is important to note that a recommendation is not always the outcome of an investigation. Sometimes the problems under consideration – those that gave rise to the investigation – can be resolved by informal means (such as legal advice, explanation of a specific administrative conduct, or advice about optional forms of action) or by the establishment of good understanding with the administrative agency under examination (mediation or friendly solution).

Reporting

With regard to the authority of reporting assigned to the ombudsman, three types of reports can be discerned: the annual report, the special or general investigation report, and the case report.

240 P. Bonnor, loc.cit., p. 246.
241 Gabriele Kucsko-Stadlmayer, loc.cit., p. 46.

The ombudsman is required to submit an annual report on its activities to the parliament. This reporting fulfils several functions. First of all, the ombudsman accounts for its activities. Second, the annual report can render grievances transparent to the parliament and enable it to employ its own competences within the democratic control of the administration. In this respect, the ombudsman functions as an auxiliary body of the parliament. A third important function of reporting is the imposition of a form of soft sanction in case of non-compliance with recommendations. Finally, the reporting activity of the ombudsman can draw the attention of parliament to the necessity for amendments to legislation.

In addition to the obligation to submit an annual report, the ombudsman may also be empowered to submit special reports. Such reports enable the ombudsman to point out exceptionally serious cases of misconduct in the administration and thus to awaken public attention. Special reports contain general recommendations aimed at improving the quality of the government by proposing changes in institutional practices, procedures or regulations. Special reports and case reports are the outcome of an investigation conducted by the ombudsman.

Unlike a special report, a case report closes an investigation initiated on the basis of an individual complaint lodged before the ombudsman.[242] It may include recommendations, which are usually of a specific character intended to provide individual remedies. General recommendations may also be included as well. In some cases, an inquiry on an individual complaint does not finalise with a report but with a specific concluding decision.[243] In turn, this decision may also include further recommendations.

Additional powers

In addition to the three typical powers of the ombudsman described above, sometimes the institution is assigned additional powers in order to strengthen the effect of its functions. These powers include, for example, the right to appeal to the constitutional courts due to violations of fundamental rights, the contestation of laws and regulations before the constitutional court about general accordance with the constitution and laws, participation in pending proceedings, and the task of education and information specific to the field of human rights.

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242 Investigation reports in the case of the Dutch Ombudsman. Invariably, investigations conducted by the UK Ombudsman conclude with a report.

243 Spanish Ombudsman and Peruvian Ombudsman.

3.3. SCOPE OF CONTROL AND FUNCTIONS

3.3.1. SCOPE OF CONTROL

Generally, the administrative branch of government is the ombudsman's main object of assessment, although the extent and form of assessment can vary. In this regard, the approach to the administration can be organisational or functional to the extent that the definition of "administration" differs from one legal order to another. From an organisational perspective, the ombudsman may assess the conduct of all administrative agencies, bodies and offices, as well all public, administrative, or state servants, officials, and authorities. The mandate of the ombudsman can include the central and local levels of the administration, autonomous administrative bodies, the police force, and state institutions such as prisons, hospital and mental health facilities. Another form of control is based upon a kind of schedule-system, whereby the only entities that can be subject to the ombudsman's control are those administrative bodies that are listed explicitly in the applicable ombudsman act.[244]

In those states that have regional ombudsmen established, the scope of control is even further – substantially – differentiated, but depending of the degree of independence assigned to regional ombudsmen by legal orders. Regional ombudsmen are only entitled to observe administrative institutions at a regional level. Usually, when a national ombudsman exists in addition to regional-level institutions, the former is restricted to the control of those administrative institutions that are not already checked by its regional counterparts. Likewise, when regional ombudsmen exist, they are sometimes assigned the authority to control the local administration at the municipal level within the corresponding region. National ombudsmen are often explicitly empowered to control offices of municipal administration.

From a functional perspective, the competence of the ombudsman can also include private institutions that fulfil a public role or perform certain administrative tasks by virtue of a concession or an administrative authorization. When the functional understanding of the concept of administration includes acts of state authority, irrespective of the responsible legal entity, the control of the ombudsman can encompass not only administrative acts, but also the provision of public services (water supply, energy supply, telecommunications, railways, highways, and infrastructure in general) by private entities. This competence is sometimes stated expressly in the law.

244 Gabriele Kucsko-Stadlmayer, loc.cit., p. 22.

In some cases, only those private legal entities that operate to any extent under the auspices of the state (on account of shareholding or explicit organisational regulations) are subject of the ombudsman's control. However, in a few cases those ombudsmen that are assigned specifically to protecting human rights are authorised to control private entities, which are not closely related to the state in any way. Thus, for example, the Portuguese Ombudsman is entitled to investigate relations of exceptional subordination between private persons, taking into consideration human rights and fundamental freedoms. On the other hand, the Greek Ombudsman can control private legal entities with respect to infringements of children's rights. Likewise, following the implementation of European Union equal treatment legislation in countries like Estonia, Latvia and Cyprus, the respective ombudsman institutions were assigned additional of antidiscrimination functions regarding work and access to services.[245]

Another aspect of the ombudsman's legal mandate is related to the kind of acts of the administration that can be subject the ombudsman control. For instance, the ombudsman can be tasked with reviewing factual acts, individual decisions and general measures. Thus, the institution's mandate may include the supervision of all acts of the administration, may be restricted to factual acts of civil servants, or may comprise all public authorities but only with respect to individual decisions. Another alternative is to restrict the ombudsman's mandate to general acts, such as internal guidelines or legislative measures, and leave the supervision of both administrative decisions and the conduct of civil servants to the courts. In addition, another possible matter for consideration is the question of whether the activity subject to supervision will only have external effects, or whether acts with internal effects (such as staff affaires) are also to be included. Also of relevance is whether the supervision of the ombudsman is restricted to instances of maladministration *ex post*, or whether the institution can investigate in a preventive way, supervising *ex ante*.[246]

The ombudsman's mandate may include the judiciary and even the parliament. Although many ombudsman institutions are not authorised to control the judiciary (neither in terms of intervening in pending court proceedings nor in terms of checking judicial decisions), some legal orders (specifically, Sweden, Finland and Poland) provide for an extensive ombudsman control of the judiciary, including the substance of judicial decisions, to the same degree as the administrative branch.

In other cases, the ombudsman has partial power to control the judiciary. This applies to those states where the ombudsman does not focus on controlling

245 Gabriele Kucsko-Stadlmayer, loc.cit., pp. 24–25.
246 Katja Heede, op.cit., pp. 88–89.

maladministration but on protecting human rights. In general, such legal orders aim to neutralise human rights violations through the courts, while taking judicial independence into consideration. Thus, the ombudsman can be expressly empowered to intervene in court proceedings in cases, for instance, of undue delay and abuse of authority (like in Slovenia). In addition, the ombudsman can also be empowered to intervene in pending court proceedings if it considers the action necessary for the performance of its functions.[247]

In several legal orders the administration of justice, understood as a matter of administrative domain, is submitted to the ombudsman's control. This refers to the administrative conduct of court proceedings (delays, setting down a hearing date, obtaining expert opinions, executed copies and service of judgments), defaults in executing judgments, deficiencies in court equipment, impolite conduct by officials, and the initiation of disciplinary measures against judges.

In relation to the parliament, even though the legislature is excluded from the ombudsman's jurisdiction, the institution can exercise some indirect control, particularly regarding legislation. In practice, many complaints against the administration result from legal regulations. Thus, as part of its functions, the ombudsman is entitled to recommend amendments to legislation. These recommendations can be issued in response to individual complaints, or be incorporated in ombudsman's special reports. Many ombudsman institutions are expressly authorised to submit legislative proposals to parliament. In some states with constitutional jurisdiction, the ombudsman is empowered to appeal against laws before the constitutional courts.

3.3.2. FUNCTIONS

As part of its role in assessing government action, the ombudsman is assigned three main functions: a protective function, a preventive function, and a normative function. By exercising these three functions, the ombudsman is able to supplement the traditional means of control exercised by parliament and courts.

The protective function relates to safeguarding citizens' rights and interests. This function is exercised through handling complaints with a view to securing redress of grievances. As such, the ombudsman offers additional protection to that provided by the courts. While the courts assess administrative action on the basis of the law, the ombudsman usually applies broader standards than the law in a strict sense. Indeed, the ombudsman's grounds include legal norms and

247 Gabriele Kucsko-Stadlmayer, loc.cit., pp. 25–27.

principles, but also "extra-legal" norms or soft-law norms of proper conduct.[248] In some systems, there is no need to first address a court or otherwise to have exhausted legal remedies. In some others, it is a requisite for the admissibility of a complaint.[249] Thus, the institution can be considered a (complementary) part of the administrative system of justice. For some authors, the resolution of disputes is an integral part of the protective function of the ombudsman.[250] Not only does the institution provide protection to citizens against the administration, but it also solves disputes between citizens. It seeks to do so in an informal way. In some cases, the ombudsman can also act as a mediator between citizens and the administration.[251] In this sense, the ombudsman's intervention as a mediator in cases of conflict can reduce costs for both the individual and the administration.[252] But the scope of this mediation role depends on the political and social context in which it is performed.[253] As Marshall and Reif point out, the ombudsman may play an important role in the consensual resolution of public interest disputes by "identifying parties with legitimate and significant interest, developing a common set of facts, and setting out the major issues requiring resolution".[254] In solving conflicts, the ombudsman must always retain its independence and impartiality.[255]

The protective function is also performed whenever the ombudsman is entitled to lodge individual appeals for relief against rights infringements, such as *habeas corpus* and *recurso de amparo*.[256] These are both considered important instruments at the disposal of the ombudsman for the fulfilment of its protective function.

In turn, the preventive function is oriented to influencing policy level in order to improve the quality of government and public service delivery. The function is performed through own-initiative investigations[257] or the preparation of

248 Leonard Besselink, "Types of national institutions for the protection of human rights and ombudsman institutions: An overview of legal and institutional issues", in K. Hossain et al (eds), *Human Rights Commissions and Ombudsman Offices. National experiences throughout the world*, The Hague: Kluwer Law International, 2000, p. 158.

249 Dutch Ombudsman and Peruvian Ombudsman.

250 Milan Remac, *Coordinating ombudsmen and the judiciary*, p. 5.

251 As part of its protective function, the Peruvian *Defensoría del Pueblo* performs an important role as a mediator in social conflicts. See Section 11.1.2.

252 G. Carballo Martínez, *La mediación administrativa y el Defensor del Pueblo*, Navarra: Thomson-Aranzadi, 2008, p. 206.

253 Jorge Santistevan de Noriega, "El Defensor del Pueblo en Iberoamérica", in Antonio Rovira Viñas, *Comentarios a la Ley Orgánica del Defensor del Pueblo*, Pamplona: Arazandi, 2002, p. 975.

254 Mary A. Marshall & Linda C. Reif, loc.cit., p. 217.

255 Milan Remac, *Coordinating ombudsmen and the judiciary*, p. 6.

256 Spanish Ombudsman and Peruvian Ombudsman.

257 Dutch Ombudsman and Peruvian Ombudsman.

special reports[258], which allow the ombudsman to focus on general problems and to recommend changes in the administration. It is performed when the ombudsman recommends legislative or regulatory reforms, or changes to institutional practices. In these cases, the institution plays the "role of reformer".[259] It is also performed when the ombudsman is entitled to lodge appeals in which legislation is alleged to be unconstitutional.[260]

It is worth noting that since the recommendations arising from the ombudsman's investigations are aimed at ensuring that the administration does not make similar mistakes in the future, these investigations might be considered not only preventive but also educational in nature.[261] Thus, it is possible to argue that the ombudsman is also assigned an (intrinsic) educational function.[262]

There is a link between the preventive function and the need to develop structured criteria and apply objective standards for the exercise of discretion by public officials, in order to prevent maladministration.[263] Accordingly, the third main function attributed to the ombudsman institution, and which deserves special attention, is its authoritative function in the development of legal norms. This function stems from the ombudsman's power to conduct investigations in connection to the ability to submit special reports. In order to assess the conduct of public authorities the ombudsman not only applies but also develops standards of review.

In some cases, the ombudsman develops and codifies its own normative standards. In so doing for the assessment of the administration, it performs a soft-law review. Indeed, for those ombudsman institutions for which good administration (or maladministration) is a standard of control, soft-law review is that which they mostly conduct. In other cases, the ombudsman applies legal principles as a standard of assessment. By applying and interpreting legal standards, the ombudsman contributes to developing the content of law. This is usually true of ombudsman with human rights as the standard of control. In either case, ombudsman's reports show how normative standards are applied

258 UK Ombudsman and Peruvian Ombudsman.

259 Daniel Jacoby, "The future of the ombudsman", in Linda C. Reif (ed), *The International Ombudsman Anthology*, The Hague-London-Boston: Kluwer Law International, 1999, p. 34.

260 Spanish Ombudsman and Peruvian Ombudsman.

261 Daniel Jacoby, loc.cit., p. 37.

262 The educational function might be performed, in addition, when the institution educates citizens or interest groups about the ombudsman's role, and about their rights as citizens. The ombudsman may also train civil servants to identify shortcomings in government organisation and contribute to improving service quality. This study will pay attention to the protective, preventive and the normative functions, focusing especially on the latter.

263 S. Owen, "The expanding role of the ombudsman in the administrative state", in *40 University of Toronto Law Journal*, 1990, pp. 675–676.

in practice as standards of assessment.[264] In this regard, the standards and the reports are expressions of the normative function of the ombudsman. Arguably, in this way the ombudsman contributes to developing a more flexible and effective legal framework aimed at positively steering government action. This normative function will be further discussed in Section 3.6.

3.4. ASSESSMENT ORIENTATION AND STANDARD OF CONTROL

3.4.1. ASSESSMENT ORIENTATION: REDRESS AND CONTROL

The ombudsman institution is assigned different functions and powers. However, the main role of a given ombudsman, and the way in which discharges its responsibilities, will be determined by the assessment orientation of that institution. This assessment orientation may be defined in terms of what Heede refers to as the "control and redress" functions. Hence, the division between control and redress (and the emphasis on the orientation) is the crucial difference between one ombudsman institution and another. Therefore, both concepts will be briefly explained.

To the extent that an ombudsman cannot give a legally binding decision on the issues brought to it (but a legally relevant one to the extent that it has legal effect)[265], the notions of control and redress must be understood in terms of their "powerless" meaning. Thus, in the context of the institution's assessment orientation, the concept of "control" is defined in terms of a certain process. Thus, control is "the process through which administrative behaviour is investigated and hopefully influenced with the purpose of improvement".[266] Although from this perspective the concept of control does not include the power to take binding decisions, it still embraces the notions of steering and influencing. Thus, control does not depend on a relationship of power between the supervisor and the supervised, but on a certain activity, which has the objective of increasing the quality of decision-making and its outcome, in turn enhancing the acceptability thereof for citizens. Hence, the definition of control has a citizen-oriented accountability approach.

In turn, the term "redress" is understood as "a process which can have a certain effect but which does not guarantee this effect since the authority providing

264 Milan Remac, *Coordinating ombudsmen and the judiciary*, p. 7.
265 For the concept of legal effect see Section 2.1.2.
266 Katja Heede, op.cit., p. 94.

redress does not have the power to overrule the original decision."[267] As far as the ombudsman institution is concerned, redress is exercised as a mechanism that does not ensure that a decision is changed or that other forms of remedies are achieved, but which might have the effect of remedying the position of an individual. If remedy does occur, it will be based on the motion of the authority that took the original decision.

In short, although both control and redress as assessment mechanisms are oriented to supplying (or ensuring) additional legitimacy to the government, it is practiced in different ways. Control is when a supervisor tries to influence policy for the benefit of the citizens as a whole, while redress is when the supervisor attempts to remedy an individual's grievance. Control mechanisms regulate the rules that govern all the activities of public authorities. Redress mechanisms are mainly oriented to assessing the application of the law and principles in individual cases with a view to restoring the relationship between the administration and the citizen affected. As can be observed, redress as a mechanism of assessment is connected with the protecting function of the ombudsman, while control is connected with the preventive function.

Thus, redress-oriented ombudsman institutions are created when the traditional means of redress (the judiciary) prove to be insufficient to regulate the relationship between the public administration and a citizen. On the other hand, control-oriented ombudsman institutions primarily regulate the means by which standards are created and understood by the public administration. The controlling function involves a concern on the part of the citizens about the acceptability of government conduct, and is thus related to legitimacy in a more general manner. Therefore, the control function stresses the importance of developing standards and rules for the proper behaviour of the administration. Consequently, a control ombudsman is empowered to conduct investigations on its own initiative as regards general measures, such as policy decisions and legislative acts.

From this perspective, the choice of model will depend on the consideration of whether there is a need to provide additional redress mechanisms, or to enhance the legitimacy of public authorities. Moreover, the distinction between the different models has to be made based on the ombudsman's position in relation to other existing mechanisms of control and redress. This relationship can be one of overlapping mandates or not. Thus, an ombudsman can operate as a mechanism of control or redress in areas that fall outside the traditional supervising mechanisms; or it can be created to assist an existing supervisor; or its mandate can even extend to the activities of all public authorities, including

267 Ibid., p. 95.

all other supervising authorities.[268] Usually, both assessment mechanisms coexist in the same ombudsman institution. Regardless of the legislative option, the emphasis of the orientation will be given by the practice of the institution and the particular context in which the ombudsman operates.

This study proposes that Heede's control and redress approach provides substantive elements for assessing the tasks, powers and evolution of the ombudsman institution from a comparative perspective. It also allows for better classifications for the institution than those focusing solely on the standard of control without taking into account the current hybridisation of both the standard of control and the assessment standards. Thus, the approach will be particularly useful to the analysis of the role that the ombudsman institution performs in enhancing the principles of good governance and strengthening legitimacy.

3.4.2. STANDARD OF CONTROL

The standard of control of the ombudsman institution is formulated in various ways. In some cases it is defined positively (verifying the observation of the principle of legality, good administration, or human rights) while in others it is articulated negatively (identifying unlawful conducts, instances of maladministration, or rights violations). Some authors have broken down these formulations into three categories: legality, principles of good administration, and human rights.[269] As far as this study is concerned, this categorisation tends to assimilate the standard of control into the assessment standards, based on a static and rigid perspective of the ombudsman's role.

As Remac has pointed out, and as has already been noted here, the contemporary ombudsman is the result of a process of hybridisation, which has led to a phase of special development. This "special development phase" itself represents a combination of different standards of ombudsman control with the assessment standards within all existing ombudsman models.[270] In this regard, it is unusual to find a pure standard of control for the ombudsman, as well as an institution that only deals with the law, good administration, or human rights.

From this study's perspective, to emphasise the principle of legality as the ombudsman's standard of control would imply that the institution only employs legally binding rules (constitutional provisions, legislation, regulations, general – written and unwritten – principles of law, and ratified international treaties)

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268 Katja Heede, op.cit., p. 100.
269 Gabriele Kucsko-Stadlmayer, loc.cit., pp. 31–39.
270 Milan Remac, "Standards of ombudsman assessment: A new normative concept?, p. 66.

for the control of the administration. This approach restricts the performance of the institution to conducting a (strict) hard-law review regarding the exercise of both regulated and discretionary powers. However, the ombudsman also conducts soft-law review. This forms part of the remit of most ombudsmen, as it is generally considered to be one of the main advantages that the ombudsman institution has over other existing review mechanisms.[271]

It is beyond dispute that the ombudsman is responsible for supervising the compliance of public authorities with their legal duties. This means that the institution observes the legality of the government's conduct, irrespective of the legal formulation of the standard of control.[272] An example of this is the ombudsman institution of UK, which despite in principle having no remit to decide on the lawfulness of administrative actions, may include legal considerations when assessing maladministration. The same can be said regarding the Dutch Ombudsman.[273]

As to good administration as a standard of control, it is true that, as mentioned above, for part of the doctrine this is related to evaluating the conduct of public authorities only against non-legally binding rules by way of a soft-law review. Nevertheless – and again, as noted – the principle of good administration embraces both legally binding and non-legally binding principles. Hence, the ombudsman may apply both legally binding norms and soft law as part of the standard of good administration. This is also true in relation to the application of human rights as a standard of control.

Human rights are particularly important when the ombudsman is charged specifically with the protection of human rights. These are enshrined in most modern constitutions and in a range of international instruments. Thus, human rights are part of the legal system. Their application as a standard of control by the ombudsman implies assessing compliance with (although not exclusively) legally binding principles. On the other hand, even "classical" ombudsmen have recognised that they play a role in human rights protection.[274] To paraphrase the European Ombudsman, both good administration and the protection of human rights demand public officials to act in accordance with a rule or principle which is binding upon it.

As mentioned, the institution of the ombudsman is connected to the principles of the rule of law, democracy, and good governance. Enhancing and safeguarding

271 Ibid., p. 91.
272 Gabriele Kucsko-Stadlmayer, loc.cit., p. 31.
273 See Chapter 7 & Chapter 8.
274 Ann Abraham, loc.cit., pp. 688–690,

these values is an intrinsic part of its role, which it discharges by assessing the behaviour of the administration against certain assessment standards. As result of the hybridisation process, the ombudsman uses both legally and non-legally binding) assessment standards, as opposed to one or the other. Because of this, the institution's standards of control are being reformulated for the better.

This being so, this study considers it is more pertinent to formulate the ombudsman's standard of control based not on the instruments (or assessment standards) applied to the institution (legal principles/non-binding rules), but on the institutional approach implemented to assess the actions of the government. Therefore, the ombudsman's standards of control can be formulated into just two general categories: good administration and human rights. Both are comprised of legal principles and non-legally binding rules of good administrative conduct associated with a broader notion of the rule of law. Frequently, these formulations are applied in an accumulative way.[275]

The hybridisation of the standard of control, together with the hybridisation of the assessment standards, reflects the fact that most existing ombudsman share (and protect) similar values. Therefore, good administration and human rights as standards of control may be described as two sides of the same coin.[276] They both are needed to enhancing the legitimacy of the government. Their application produces similar outcomes. Thus, the distinction between these two standard of control corresponds mainly to methodological purpose. The next section will provide an explanation of both.

3.4.2.1. Good administration

The concept of good administration refers to the sound functioning of the state apparatus. Through the supervision of good administration, the ombudsman applies non-judicial standards in addition to legally binding rules. This competence is considered as correlative to their authorisation to create new standards that are not intended to be legally binding.

The criterion of good administration emanates – at least partly – from British law. It concerns a set of standards for enhancing the quality of the administration. Good administration is formulated either positively (as good administration, fair administration, sound administration or proper administration) or negatively (as maladministration). Thus, the criterion of proper conduct applied by the

275 Gabriele Kucsko-Stadlmayer, loc.cit., p. 31.

276 Good administration (good governance) and human rights are mutually reinforcing and share the same foundations.

Dutch Ombudsman, and that of maladministration of the UK Ombudsman, are both derivatives of the broader category of good administration.[277]

In some cases, the aspects of relevance for good administration are expressly set down in the legislation. In others, they derive from constitutional provisions or general principles of law. According to some authors, good administration is only composed of non-legal standards. Thus, principles of good administration and ethical norms or rules of good administrative conduct are alike.[278] In any case, the substance of the criterion remains rather vague.

In defining the substance of good administration, the European Ombudsman has played a significant role by describing its counterpart, maladministration. The European Ombudsman was created by the Treaty of Maastricht as a new EU body with the aim of benefiting the Union through the identification of instances of maladministration. According to Article 228 of the Treaty on the Functioning of the European Union – TFEU (ex article 195 of the Treaty of Maastricht), the European Ombudsman is empowered to "receive complaints from any citizen of the Union or any natural or legal person residing or having its registered office in a Member State concerning instances of maladministration in the activities of the Union institutions, bodies, offices or agencies, with the exception of the Court of Justice of the European Union acting in its judicial role".

The European Ombudsman conducts inquiries either on its own initiative or on the basis of complaints submitted to it directly or through a member of the European Parliament.[279] The review that the ombudsman must perform of the activities it submits to an inquiry has been described as a review against the standard of "maladministration" as established in Article 228 of the TFEU.[280] The European Ombudsman has defined maladministration as "[that which] occurs when a public body fails to act in accordance with a rule or principle which is binding upon it".[281]

In determining instances of maladministration, the European Ombudsman reviews an activity against rules and principles that are binding, but also includes non-legally binding norms, extending its activity beyond the compliance with strict legality.[282] Hence, non-legally binding standards are part of the concept

277 M. Remac & P.M. Langbroek, loc.cit., p. 160.
278 Ibid., p. 158.
279 Facts which are or have been subject to legal proceedings are excepted.
280 Katja Heede, op.cit., p. 145.
281 European Ombudsman, *Annual Report 1997*, p. 23.
282 Alex Brenninkmeijer & Emma van Gelder, "The rule of law in the European Union: Standards of the ombudsman, judge, and auditor", in M. Hertogh & K. Kirkham (eds), *Research Handbook on the Ombudsman*, Cheltenham-Northampton: Edward Elgar Publishing, 2018, p. 155.

of maladministration but they are secondary, coming after a hard-law review. Moreover, the Ombudsman must consider these non-legally binding standards binding. It means that the Ombudsman considers only pre-established non-binding standards.[283] Non-binding standards are made based on considerations such as due care, service-minded behaviour, and other organisational matters. Consequently, while illegality necessarily implies maladministration for the European Ombudsman, maladministration does not automatically entail illegality.[284]

However, given the outcome of its reports and recommendations, both legally and non-legally binding standards can have a (indirect) legal effect. Non-binding standards have legal effect when the administration complies with them and even achieve legally binding force when they are incorporated into its internal regulations. In developing standards for determining instances of maladministration, the European Ombudsman has developed a code of good administrative behaviour.[285]

The European Code of Good Administrative Behaviour was the result of a detailed analysis of the principles of good administration in EU law, in the case law of the EU courts, and in various administrative laws of the member states. As pointed out by Katja Heede, the Code did not create a new administrative law, but merely put the existing principles together into a single code.

But not even the Code of Good Administrative Behaviour has direct legal general binding effect; the European Ombudsman and the European Parliament has the expectation that the EU institutions and bodies will adopt it. Nonetheless, the Code is applied by the European Ombudsman to determine the existence of instances of maladministration.[286] The Code contains the classical substantial and procedural principles of administrative law, as well as some rules of good administrative conduct.

The classical principles of administrative law include the following: lawfulness (Article 4), non-discrimination (Article 5), non-abuse of power (Article 7), impartiality and independence (Article 8), objectivity (Article 9), legitimate

283 Katja Heede, op.cit., pp. 147–148.

284 European Ombudsman, Annual Report 2006, p. 35.

285 In July 1999, the Ombudsman recommended a draft Code of Good Administrative Behaviour to the Community institutions and bodies. For further information about the draft of the Code of Good Administrative Behaviour see: www.ombudsman.europa.eu/recommen/en/oi980001.htm.

286 On 6 September 2001, the European Parliament adopted a Code of Good Administrative Behaviour. When approving it, the European Parliament asked that the Code be applied to determine any instances of maladministration "so as to give effect to the citizen's right to good administration in Article 41 of the Charter of Fundamentals Rights of the European Union".

expectations (Article 10), rights of defence (Article 16), reasonable time limit for taking decisions (Article 17), duty to the state's grounds of decisions (Article 18), access to documents (Article 23), among others. With regard to principles of good administrative functioning, the Code has established: courtesy (Article 12), reply to letters in the citizens' language (Article 13), acknowledgement of receipt (Article 14), data protection (Article 21), keeping adequate records (article 24), among others.

The European Code of Good Administrative Behaviour contains the principles of good administration that European Union institutions must respect in dealing with the public. The Ombudsman considers that the Code is the most complete and developed instrument available for avoiding instances of maladministration. It gives a very complete view of the way in which the principles must be complied with to perform good administration. In this way, as Diamandouros pointed out, the goal of combating maladministration was gradually replaced by the pursuit of good administration.[287] As such, maladministration could be defined as the result of a breach in the duty of good administration.[288]

Good administration entails legally binding and non-legally binding standards of substantial and procedural character. Ombudsman's decisions based on (legally binding and non-legally binding) good administration-based standards have legal effect.[289] Thus, through the monitoring of good administration, the ombudsman institution also protects fundamental rights[290], which might be considered as a complementary activity resulting from ensuring good administration.[291]

3.4.2.2. Human rights

In many cases, ombudsman institutions are expressly assigned the protection of human rights as one of their main tasks. Sometimes, this competence is charged

287 P. Nikiforos Diamandouros, "From maladministration to good administration: retrospective reflections on a ten-year journey" in, H.C.H Hofmann & J. Ziller (eds), *Accountability in the EU. The role of the European Ombudsman*, Cheltenham-Northampton: Edward Elgar Publishing, 2017, p. 226.

288 G. Carballo Martínez, op.cit., p. 231.

289 See Section 3.6.4.

290 Alex Brenninkmeijer & Emma van Gelder, loc.cit., p. 156. It is interesting to note that in Finland, the concept of good administration was included in the constitutional reform of 1995, dealing with fundamental rights. On this see Terhi Arjola-Sarja, "The ombudsman as an advocate for good administration", in *Parliamentary Ombudsman of Finland. 90 Years*, Sastamala: Vammalan Kirjapaino Oy, 2010, p. 93.

291 Pasi Pölönen, "Monitoring fundamental and human rights as the Parliamentary Ombudsman's duty", in *Parliamentary Ombudsman of Finland. 90 Years*, Sastamala: Vammalan Kirjapaino Oy, 2010, pp. 51–52. In these terms, and as a reflection of the process of hybridisation, the impact of the entering into force of the European Convention of Human Rights in Finland in May 1990 may be of relevance.

to them jointly alongside other authorities. However, even in those cases where human rights protection is not a specific task assigned to the institution, this does not immediately imply that it cannot also be applied as standard of control.[292] Human rights can be part of the ombudsman's standard of assessment in a variety of ways and, like good administration, can be considered as a broad category.

In those legal systems in which the protection of human rights has been declared an explicit task of the ombudsman, human rights are to be considered as a standard for assessing the conduct of the government. The assignment to the ombudsman of the function of human rights protection occurred primarily in those states where the institution was created with the aim of supporting democratisation after a period of totalitarianism. Nevertheless, more recently, the protection of human rights has been also incorporated into the legal basis of older ombudsman institutions traditionally categorised as classical or parliamentary, as well as by new western European ombudsmen.[293]

Sometimes, the field of human rights to be protected by the ombudsman may differ from one institution to another. The role of human rights protection assigned to the ombudsman may embrace civil and political rights, but also economic, social, and collective rights. The first references are those human rights (and fundamental freedoms) enshrined in the given national constitution, although depending on each legal order, the field of human rights can be defined in a broader sense to include those recognised in international treaties. In this regard, ratified but not yet transformed treaties can also serve as standards of assessment.[294] Thus, human rights-based standards or indicators derived not only from domestic legislation but also from international treaties can be developed by the ombudsman to assess the conduct of the administration.

Human rights can also be applied by the ombudsman for soft-law review in the form of non-binding standards. Through the creation of non-legally binding standards, the institution can contribute to developing the legal parameters for the conduct of the administration as provided by treaties that are ratified but not yet sufficiently transformed on the national level. In these cases, the ombudsman's main purpose is to evaluate the degree of compliance by national states with the obligation to ensure the realisation of the rights enshrined in the treaties.

Sometimes, the development of human right-based standards can be inspired not only by ratified treaties, but also by other international instruments (for

292 Gabriele Kucsko-Stadlmayer, loc.cit., p. 36.

293 This is the case of the Finnish, Norwegian, and Swedish ombudsmen; and the newer ombudsman institutions of Andorra, Cyprus and Luxembourg.

294 Gabriele Kucsko-Stadlmayer, loc.cit., p. 38.

instance, international declarations, international principles approved by the UN General Assembly, and general UN comments, on the articles of the ICCPR and ICESCR). In this respect, of interest is the experience of the Peruvian *Defensoría* in developing non-binding standards for the protection and promotion of the right to mental health, the right to education, and the right of persons with disabilities; and for the evaluation of public-policy implementation from a human-rights perspective.[295] It is important to note that in the field of human rights protection, this function is usually interpreted as including the promotion of human rights as a preventative measure with respect to human rights breaches in the daily practice of the administration.

Human rights are relevant as a standard of assessment even though their protection may not be an explicit task of the ombudsman. In general, the formulation of the ombudsman's functions leaves room for interpretation, which allows the institution to extend its sphere of control to the observance of the entire legal order, including human rights, to identify instances of maladministration.[296]

Therefore, on one hand, human rights can be a criterion for the examination of the administration's conduct as part of the entire legal order, together with other general (administrative) legal principles and rules. This is especially the case of those human rights that are codified in the particular state constitution, and in human rights international treaties adopted by a particular state. From this perspective, human rights are considered as part of the broader criterion of legality. Therefore, the interpretation of law has to be in accordance with human rights, especially when exercising discretionary powers. Thus, human rights are legally binding for all governmental institutions, bodies and agencies. Consequently, human rights are of significant relevance for the actions of government.

On the other hand, as mentioned above, human rights can also be incorporated as non-binding standards for international instruments that have not been transformed into national law. Consequently, even for those ombudsman institutions that are not assigned the explicit task of protecting human rights, their work sometimes raises human rights issues and (legally binding and non-legally binding) human rights-based standards of control are applied to promoting (and defining) good administration (or maladministration).[297]

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295 For more detailed information, see Chapter 11.

296 Gabriele Kucsko-Stadlmayer, loc.cit., p. 37.

297 Linda C. Reif, "Ombuds institutions: Strengthening gender equality, women's access to justice and protection and promotion of women's rights", in M. Hertogh & K. Kirkham (eds), *Research Handbook on the Ombudsman*, Cheltenham-Northampton: Edward Elgar Publishing, 2018, p. 238.

Thus, the role of those ombudsman institutions that are explicitly entrusted with the protection of human rights, and which have applied human rights as a standard of control, does not differ from those ombudsmen that are not assigned with an explicit human rights-oriented function and which have applied good administration as their assessment criterion.

3.5. MODELS OF OMBUDSMAN

3.5.1. TRADITIONAL CLASSIFICATIONS OF THE INSTITUTION

The ombudsman institution is created with different purposes in different places. Therefore, even though a general common definition of the institution and its tasks can be drawn, the literature has distinguished between different models of ombudsmen, all of them conceived as ideals. No one ombudsman institution can be entirely ascribed to any single model, as they all present different elements in their institutional design. It is for this reason that different classifications of the institution have been proposed trying to explain the development of the role and functions of the ombudsman, as part of a historical process.[298]

A first classification is the one proposed by Linda C. Reif described above, which distinguishes between classical ombudsmen and (hybrid) human rights ombudsmen. The classical ombudsman is intended to supervise the administrative conduct of the government[299], whereas the hybrid ombudsman is vested with additional authority. The latter points to the distinctive feature of those ombudsman institutions that have been created specifically to protect human rights and to advance the process of democratisation. Nevertheless, as stated above, classical ombudsman also has certain competences in the field of human rights. Therefore, this functional approach to classification seems too reductive to clarify the different types of ombudsmen that can be created.

In turn, based on the particular powers assigned to the ombudsman, Kucsko-Stadlmayer has classified the institution into three different models: the basic or classical model; the rule of law model; and the human rights model. The classical model is characterised by its soft legal powers vested to investigate instances of

298 Sabine Carl, loc.cit., p. 18. In this regard, Carl distinguishes, for example, four models: rule of law ombudsman, classic ombudsman, executive ombudsman and human rights ombudsman. For a detailed categorisation of the ombudsman models see Chris Gill & Carolyn Hirst, *Defining consumer ombudsman. A report for ombudsman services*, Queen Margaret University, Edinburgh, March 2016.

299 In this study, the supervisory function assigned to the ombudsman institution is understood in terms of redress and control, as defined in Section 3.4.1.

maladministration; namely, the power of examination, the power to formulate recommendations, and the power to submit annual reports. A particular characteristic of this conceptualisation is that the ombudsman does not have powers of coercion. The protection of the rule of law and human rights may also be part of the task of the classical model, although this does not imply any specific powers.

The rule of law model described by Kucsko-Stadlmayer is provided with additional measures of control addressed at protecting the legality of behaviour of the administration in general, including compliance with human rights principles. Thus, the rule of law ombudsman is vested with the powers to contest law and regulations with legal force before constitutional courts, in the interests of general conformity with the constitution. Sometimes, also included as powers of the ombudsman are those that apply to courts in connection to participation in proceedings, and the criminal and disciplinary prosecution of public officers.

Finally, the human rights model is assigned with specific measures of control, which exceed the soft power of the basic model, aiming specifically at protecting human rights and fundamental freedoms. The powers assigned to the human rights ombudsman are constitutional appeals regarding human rights violations, contestation of laws before constitutional courts in cases of human rights violations, and the task of education and information in the field of human rights. In some cases, the power to appeal before a constitutional court is restricted to the field of human rights, thus excluding the possibility to contest the constitutionality of law and regulations, which is a characteristic of the rule of law ombudsman model.[300]

Taking into consideration the modern development of the ombudsman institution and its hybridisation process (including the hybridisation of the standards of control and the assessment criteria), Remac identifies three groups of ombudsman institutions that partially replace and develop the original, historical generation of ombudsman institutions. Hence, the first group of ombudsmen are those that mainly assess compliance with law, the second group is composed of ombudsman institutions that mainly assess compliance with a general (extra-legal) normative concept often described as good administration, and the third group denotes those ombudsmen that mainly assess compliance with human rights.[301]

On the other hand, other classifications have been made based on the assessment orientation performed by the institution, understood in terms of

300 Gabriele Kucsko-Stadlmayer, loc.cit., pp. 61–66.

301 Milan Remac, "Standards of ombudsman assessment: A new normative concept?, pp. 69–70.

redress and control. Indeed, Heede has devised a more detailed classification of ombudsmen in which she identifies five theoretical ombudsman models: i) the extra-judicial ombudsman; ii) the discount alternative ombudsman; iii) the quango ombudsman; iv) the citizens' ombudsman; and, v) the parliamentary ombudsman.[302] There is no a sharp division between control and redress ombudsmen, only that some ombudsmen are more oriented towards control, and others are more redress providers. They are also assigned secondary tasks, and in that regard they combine elements of both functions. Every system that creates an ombudsman has to decide which assessment orientation (control or redress) should be predominant, and accordingly, what powers will be assigned.

3.5.2. OMBUDSMAN MODELS

Based on Heede's control and redress approach, this study attempts to (re)classify the ombudsman institution into three general types in order to facilitate the assessment of its role in promoting good governance through its contribution to developing legal standards. Thus, the three models proposed are as follows: the parliamentary ombudsman model; the quasi-judicial ombudsman model; and the mixed or dual ombudsman model. In common with other classifications, it is important to note that these are theoretical constructions, which in practice are unlikely to be found in their pure states.

3.5.2.1. The parliamentary ombudsman model

The purpose of the parliamentary ombudsman model is to assist parliament. It has a restricted functional autonomy and forms part of parliamentary control. The ombudsman starts an inquiry only at the request of parliament, which precludes both own-initiative inquiries and direct access for citizens. It does not have a redress purpose, and nor does it represent an autonomous source of legitimacy. It is control oriented. The parliamentary ombudsman has the obligation to start an inquiry when is required to do so. It does not have the discretion to decide whether an inquiry is justified. The ombudsman's mandate is restricted to the supervision of the executive and is focused on general measures. However, it may also include administrative decisions that cannot be challenged in court and for which derogation of the law is the only possible solution.[303]

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302 For a detailed description of these models see: Katja Heede, op.cit., pp. 100–112.

303 The consideration of deviation from the standard practice for the benefit of a particular individual is called *équité* (equity).

The parliamentary ombudsman mainly conducts non-legality review following the criteria of good administration. It seeks to supervise the functioning of the administration, allowing it to hold the executive to account for its behaviour with respect to the citizens. Under this model, the ombudsman does not need explicit investigate powers as far as being part of the parliament; the parliaments' prerogatives are enough to allow it to perform its investigative functions. In assessing the administration, compliance with law can be also taken into consideration.

The parliamentary ombudsman only has the power to present specific reports to the parliament, mainly oriented to achieving good administration. It is worth mentioning that all European ombudsmen relate to parliament in one way or another. This model is linked to the classical Scandinavian ombudsman from which all modern institutions have evolved. The UK Parliamentary Ombudsman is one example of this model.

3.5.2.2. The quasi-judicial ombudsman model

The quasi-judicial ombudsman model is redress oriented. The complainant has to be individually and directly concerned by the activity which is the subject of the complaint. It is intended to provide relief to citizens affected by administrative actions, with the aim that public officials fulfil with their duties. In doing so, the quasi-judicial ombudsman can seek that non-legally enforceable rules are fulfilled by the administrative authorities. Thus, as part of its role it can create and enforce non-legally binding principles of good administrative conduct to correct instances of maladministration. As such, it performs a soft-law review by operating in areas outside the competence of the judiciary. However, when addressing complaints lodged by citizens, it can also evaluate the way in which public authorities interpret and apply legal norms in individual cases.

In this sense, it might be said that the quasi-judicial ombudsman performs a legality review similar to the courts. In the case that the ombudsman is also entrusted with the supervision of administrative decisions, it can be said that it contributes to the judiciary by acting as a pre-administrative court[304], making recommendations which are not legally binding but with the ability to persuade the authority to change its decision. Generally speaking, only those citizens who are directed affected by an administrative activity has the right to lodge a complaint with the ombudsman. Although created exclusively to conduct a non-legality review, the Dutch Ombudsman can be excited as an example of the quasi-judicial ombudsman model.

304 Katja Heede, op.cit., p. 105.

3.5.2.3. The mixed or dual ombudsman model

The mixed or dual ombudsman model is created to address general distrust of the state on the part of the citizens, thereby enhancing the legitimacy of government. Consequently, the mixed ombudsman is control oriented. It is deeply connected to the concepts of democracy, citizenship, and the protection of fundamental rights. Indeed, the protection of the fundamental rights of citizens is the ombudsman's chief task and its main standard of control. In this regard, the citizen's ombudsman mainly performs a legality review. Under this model, citizens can complain about any matter they consider relevant. No direct interest is required. The institution is also able to launch own-initiative investigations.

As a mechanism of control, the mandate of the mixed ombudsman may include monitoring the (administrative) activities of traditional supervisory authorities (the judiciary and the parliament). In a functional sense, its mandate will focus on general acts, although it may also include individual acts. An investigation may result in the prosecution of a civil servant, a specific recommendation oriented to rectifying the misconduct of a public official, or a general recommendation for the modification or adoption of certain policy or legislation. The availability of enforcing powers will depend on the type of recommendation. In the case of recommendations for prevention, political support should be available through the parliament. For the breach of fundamental rights and legal principles, judicial review should be possible. Both the Spanish and Peruvian ombudsmen (like most ombudsmen in Latin America) have been set up based on this model.

Table 1. Models of Ombudsman

	Parliamentary Ombudsman	**Quasi-Judicial Ombudsman**	**Mixed or Dual Ombudsman**
Assessment orientation	Control	Redress	Control
Access	Inquiries only at the request of parliament	Citizens directly affected and own initiative	Citizens and own initiative
Assessment standard	Good administration (Legal and non-legal standards)	Good administration (Legal and non-legal standards)	Human rights (Legal and non-legal standards)
Object of supervision	Executive	Public administration	All public authorities / entities
Mandate (functional sense)	Policy decisions (Individual and general)	Individual decisions and factual acts	Administrative (individual and general) decisions and factual acts
Enforcing powers	Political backup	Court ruling / Political backup	Constitutional court ruling / Political backup

3.6. THE OMBUDSMAN AS A DEVELOPER OF LEGAL NORMS

As already noted, the ombudsman institution has been attributed with a normative function. According to the literature, it has an indirect task in the development of legal norms.[305] Some authors have defined this as the ombudsman's creative "legal source-function".[306] As pointed out by Addink, the ombudsman as a fourth-power institution develops and applies legal norms. These norms are an important feature of administrative functioning regarding protection of citizens as well as supervision of administrative behaviour.[307] They are intended to steer government action in order to reach better outcomes. The institution's contribution to the production of legal norms hinges on the authoritative character of the ombudsman's opinion. Thus, even though the opinion of the ombudsman is not binding, it does not go unnoticed by public authorities. Another factor that makes it possible to ascribe a normative function to the ombudsman is its independent position in relation to the *trias politica* (executive, judiciary, and legislature), which is usually constitutional guaranteed.[308]

The main bases of the norm-developing activity of the ombudsman institution can be considered to be threefold. The first basis is the power to issue recommendations. The second and the third bases concern substantive review, based either on hard-law review through the interpretation of the law, or in the performance of soft-law review.

3.6.1. RECOMMENDATIONS AS A NORMATIVE SOURCE

As stated above, a recommendation is addressed to changes to either practice or the law. Recommendations are usually aimed at getting law provisions clarified, practices codified, or procedures amended to ensure better observance of fundamental principles and rights. Thus, the power to recommend is understood not simply as compensating for the lack of mandatory powers (i.e. binding decisions or direct enforcement), but constitutes a real tool for reform. The power to recommend general changes is therefore an important aspect of the ombudsman's normative task.[309]

305 See Section 1.1.1.
306 P. Bonnor, loc.cit., p. 238.
307 G.H. Addink, "Good governance: A norm for the administration or a citizen's right?", p. 6.
308 N. Niessen, loc.cit., p. 296.
309 P. Bonnor, loc.cit., pp. 246–247.

3.6.2. THE HARD-LAW REVIEW

As with any other law-operator, the ombudsman has a function in the interpretation of legal norms. When the ombudsman interprets and applies legally binding norms as the standard for assessing the government's action, it is conducting a hard-law review. The term "legally binding norms" refers either to constitutional provisions, legislation, regulations and general principles of law (written and unwritten), including human rights principles and norms.[310] Thus, through a hard law review the ombudsman protects the legality of the administration regarding the exercise of both regulated and discretionary powers.[311] Consequently, to the extent that the institution protects the principle of legality, the criteria established by the judiciary in its case law will usually be followed by the ombudsman.

In the application of general principles of law, the ombudsman contributes to the development and clarification of the scope and nature of such principles. It also plays a role in the codification of unwritten principles. In some cases, the ombudsman also has the power to address constitutional issues. This involves the power to contest laws and regulation with legal force before constitutional tribunals in terms of their compliance with the constitution.

Usually, those ombudsman institutions assigned with the power to protect human rights apply constitutional and legal parameters as assessment standards. They are also often allowed to contest the law before constitutional tribunals and appeal regarding breaches of human rights by governmental authorities. The ombudsman may also participate in such *procesos constitucionales* by submitting its specialised opinion to the courts as *amicus curiae*. The ombudsman's reports on specific matters may also be considered of relevance by the courts and the legislator as direct legal-norm developers. Through its role as law-interpreter, the ombudsman influences the rationale of legal rules and principles and seeks to give these legal norms a wide scope and to enable their correct application. In any case, it can be considered as a doctrinaire source for the development of public law.

3.6.3. THE SOFT-LAW REVIEW

The ombudsman also contributes to developing not only the legal content of general principles already recognised by the courts, but also new standards for

310 The application of policy-rules (voluntary) approved by supervised public bodies and agencies as part of the legality review of the ombudsman could also be considered.

311 As regards the supervision of discretionary powers, the ombudsman does not seek to substitute the administration's decisions on its own but to ensure that such decisions have been reached in accordance with a sound decision-making process in which all relevant factors have been taken into consideration and/or without conflicting with a law or other regulations.

the assessment of the administration as part of its (preventative) task of creating models of good administrative behaviour.[312] When the ombudsman assesses the conduct of public authorities against non-legally binding norms, the institution is conducting soft-law review.

The soft-law review is a characteristic of almost all European ombudsman systems, although the nature and use of this kind of review often differs.[313] It has also been described as a non-legality review, efficiency review, or policy review.[314] The soft law review has a potential rulemaking quality insofar as it may lead to the creation of soft law norms. These soft law norms are applied in a similar way to legal rules or principles but without being recognised as judicially enforceable rules. However, in some cases, they give rise to the creation of judicially enforceable rules.[315] This soft law review might also be termed a correctness review, complementing (or even broadening) the hard law or legality review.

From a comparative perspective, soft law norms or "rules of good administrative conduct" have been developed particularly by those ombudsman institutions that apply good administration – or its counterpart, maladministration – as their assessment standard. In such cases, these rules of conduct are part of the standard of good administration together with legal rules and general principles of law.[316] Frequently, non-binding principles have been developed and codified by the ombudsman as guidelines for good administrative conduct.[317] In this context, an example is the European Code of Good Administrative Behaviour prepared by the European Ombudsman. Other examples are the Principles of Good Administration of the UK Parliamentary Ombudsman; and the Guidelines on Proper Conduct (*Behoorlijkheidswijzer*) of the Dutch Ombudsman.

The European Ombudsman's code of good administrative behaviour contains a set of rules of good administrative conduct such as the duty of courtesy, the duty of acknowledgment of receipt, acknowledgement of the competent official, the duty to transfer to the competent service of the institution, and the duty to keep adequate records.[318] On the other hand, in the Principles of Good

312 R. Widdershoven & M. Remac, "General principles of law in administrative law under European influence", in *European Review of Private Law*, Volume 20, Issue 2, 2012, p. 405.
313 P. Bonnor, loc.cit., p. 247.
314 Katja Heede, op.cit., p. 90.
315 P. Bonnor, loc.cit., p. 247.
316 R. Widdershoven & M. Remac, loc.cit., p. 405.
317 Ibid.
318 The European Ombudsman's Code of Good Administrative Behavior also contains a set of general principles of European administrative law and some procedural and substantive rights, some of them corresponding to the rights enshrined in Article 41 of the EU Charter of Fundamental Rights. On this, see Section 6.1.3.

Administration of the UK Parliamentary Ombudsman it is possible to find principles such as that of being customer-focused or of seeking continuous improvement. Meanwhile, the *Behoorlijkheidswijzer* of the Dutch Ombudsman lists principles such as leniency[319], de-escalation[320], and courtesy.[321]

In other cases, rules of good administrative conduct might be disseminated (even implicitly) through different guidelines of conduct that orientate the performance of staff members in the assessment of individual cases. This the case of the Peruvian *Defensoría*, whose guidelines of conduct (the so-called *guías de acutaciones defensoriales*) are largely internal and guide how to solve complaints or how to conduct *ex officio* interventions in the framework of national supervision campaigns. As such, they do not function as codes of behaviour for governmental institutions and their agencies.

In any case, rules of good administrative conduct, as applied by the ombudsman, imply a higher standard of behaviour for the administration, insofar as administrative institutions should act in the way that citizens may reasonably expect them to.[322] They are aimed at ensuring the proper functioning of administrative services in terms of efficiency and quality.[323] Thus, soft-law review based on rules of good administrative conduct contributes to enhancing administrative legitimacy.

Even though rules of good administrative conduct do not have binding legal effect, they cannot be considered as purely ethical norms given that they derive from legal principles that create actual duties for the administration. They define behaviours based on legally binding principles. In this regard, Langbroek has stated that the rules of good administrative conduct developed by the ombudsman overlap with fundamental rights and general (administrative)

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319 The principle of leniency implies that authorities should be prepared to admit their mistakes and to offer appropriate apologies. They should not deny reasonable claims for compensation and should not burden citizens with unnecessary procedures for proof. According to Ten Berge and Langbroek, leniency (*coulance*) refers to "the moral need (not a legal obligation) of a public body to reach out to a complainant and offer some compensation in money or goods for things having gone wrong where no one can be held responsible explicitly". In G. Ten Berge & P.M. Langbroek, "Superplus value of the Ombudsman", in H. Gammeltoft-Hansen & J. Olsen (eds), *The Danish Ombudsman 2005*, Part III, Kopenhagen: Folketingets Ombudsman, 2005, pp. 113–140.

320 The principle of de-escalation implies that administrative authorities should, in their contact with individual citizens, seek to prevent or limit further escalation of the situation.

321 For a comparative analysis of the development of principles of good governance, including rules of good administrative conduct by the Dutch Ombudsman and the UK Ombudsman, see Chapter 7 & Chapter 8.

322 M.E. de Leeuw, loc.cit., p. 362.

323 J. Mendes, *Good administration in EU law and the European Code of Good Administrative Behaviour,* European University Institute, EUI Working Papers, Law 2009/09, 2009, pp. 4–5.

principles of law.[324] This overlap can be explained by the fact that these different norms derive from the same constitutional principles.[325] Moreover, as will be explained in coming chapters, bindingness is not a core feature of law but a consequence of the coercive character of the modern state.[326] Thus, rules of good administrative conduct developed by the ombudsman might be considered as (soft) law. As pointed out by Linda Senden, soft law is considered law not because it is binding in character (it is not), but due to its indirect legal effect.[327]

Soft-law review can coexist with hard-law review, even within the same decision.[328] Soft-law review through rules of good administrative conduct can be applied for the improvement of good administrative practices and procedures; and for a better application of existing legal rules. It can also be seen as the basis for review through which fundamental principles of law can be developed. As such, the soft law-review can be considered as a gap-filling function, especially in countries that do not have a tradition of an administrative court system.[329]

3.6.4. THE OMBUDSMAN STANDARDS OF ASSESSMENT AS SOFT LAW NORMS

Although the normative task of the ombudsman has been analysed in relation to the performance of the hard-law review and soft-law review, the legal nature of the ombudsman's decisions, recommendations, and, especially, standards of assessment is still not always self-evident, even for staff members of the institution. This situation is (mainly) a consequence of the non-binding character of these ombudsman instruments.

As mentioned above, bindingness does not define the character of the law. A legal norm can be non-enforceable by coercive means even though it may have legal effect. The concept of legal effect can be characterised as an umbrella concept. It covers not only legally binding force *stricto sensu*, but also other possible legal effects of soft law. Thus, legal effect may come about not only through a legal instrument or act itself (legally binding force), but also by way of the operation of other legal mechanisms, particularly general principles of law and interpretation

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324 Philip M. Langbroek & Peter Rijpkema, *Ombudsprudentie. Over de behoorlijkheidsnormen en zijn toepassing*, Den Haag: Boom Jurisdiche Uitgevers, 2004, p. 20.

325 M.E. de Leeuw, loc.cit., p. 361.

326 See Section 5.1.1.

327 Linda Senden, op.cit., p. 104, *supra* note 155.

328 M.E. de Leeuw, *An empirical study into the norms of good administration as operated by the European ombudsman in the field of tenders*, European University Institute, EUI Working Papers 2009/20, 2009, p. 4.

329 This is the case, for instance, of Denmark. See, P. Bonnor, loc.cit., p. 249.

(indirect legal effects).[330] For instance, an ombudsman's recommendation, which lacks legally binding force, may gain indirect legal effect in a particular case through the operation of legal principles enshrined in the recommendation. This concept of legal effect is to be distinguished from a merely de facto effect.

Along the same lines, the recommendations of the ombudsman cannot create rights to be relied upon before a national court, but at the same time it does not necessarily follow that they cannot be regarded as "having no legal effect". Thus, it is established that the recommendations could gain legal effect if the national court takes them into account in its interpretation of national law.[331] As pointed out by Senden, legal effect does not result directly from the nature of the act itself (for instance, its legally binding force) but indirectly from the operation of other legal methods and principles. Therefore, an indirect legal effect can occur as a result of interpretation, but also as a result of general principles of law, in their application as standards of assessment by the ombudsman.

Following Senden's line of thinking, the question of legal-effect of soft-law instruments does not relate per se to whether the rights and obligations laid down in them actually exist, but rather to whether these can be made effective in some way. This is the case if there is a legal obligation to give effect to or comply with the rights and obligations contained in the soft-law instrument. As noted, this legal obligation may result not only from the legally binding force of an act, but also in a more indirect way from the operation of other legal methods and principles.[332] This is the case not only for ombudsmen that perform a hard-law review based on legal parameters, but also for those that develop their own normative standards. As pointed out above, the rules of good administrative conduct created by the ombudsman as standards of assessment define obligations based on legal binding principles. The legal effect of such obligations through the operation of rules of good administrative conduct is evident. As pointed out by Escobar Roca, it is precisely the ombudsman institution that has the ability to contribute to make soft-law legally effective[333], and even to become it in hard–law.

Based on her definition of soft law, Linda Senden has developed a functional classification of soft-law instruments. In order to demonstrate the soft-law legal nature of the ombudsman's instruments, this study attempts to fit them into Senden's categories. According to the author, three different soft law instruments

330 Linda Senden, op.cit., p. 263.
331 Ibid., p. 267.
332 Ibid., p. 268.
333 Guillermo Escobar Roca, "Del derecho débil a la fuerza de los derechos", in Guillermo Escobar Roca, *El Ombudsman en el Sistema Internacional de los Derechos Humanos: Contribuciones al debate*, Madrid: Dykinson, 2008, p. 26.

can be discerned: preparatory and informative instruments, interpretative and decisional instruments, and steering instruments.

Preparatory and informative instruments are adopted with a view to the preparation of further legislation and policy or providing information on a particular situation. The ombudsman's special reports and annual reports, for example, would fall within this category. Meanwhile, interpretative and decisional instruments aim at providing guidance on the interpretation and application of existing standards. More specifically, decisional instruments indicate the way in which an institution will apply the norms in individual cases, but also when it is assessing the exercise of discretionary powers. As such, they constitute the rules on the basis of which an institution will decide in a particular case. This would be the case of ombudsman codes, guidelines, and in general its normative standards of assessment. Finally, steering instruments aim at establishing or giving further effect to objectives and policy or related policy areas, but often also with a view to establishing closer cooperation or even harmonisation between other institutions in a non-binding way. As such, it would be possible to consider as steering instruments the ombudsman's recommendations.[334]

As has been demonstrated, the instruments developed by the ombudsman for the performance of its functions are of a soft-law nature. The standards of assessment, as soft-law norms, derive this character from the (indirect) legal effect of the obligations enshrined by them, either as a result of the application of legal parameters or of rules of administrative conduct.

3.7. FINDINGS

This chapter has described the ombudsman as a good governance institution. The hybridisation of the institution has led to the contemporary ombudsman with its mixture of functions, standards of control, and assessment orientation, whereby no rigid or one-way classification is possible based on the standard of control. The institution has a unique character in modern constitutional states. The combination of the standard of assessment in terms of redress and control has implications for the normative function of the ombudsman and its contribution to good governance, but also for the rule of law, democracy, and human rights.

Because of the ombudsman's role in public (horizontal and vertical) accountability as well as in the protection of human rights, the ombudsman

334 Linda Senden, op.cit., pp. 108–110.

plays an important function in the application of principles of good governance for improving the quality of the government, including the prevention of corruption. In this way, the functions conferred on the institution are significant from a rule of law perspective.[335] The ombudsman legitimises its constitutional position as a fourth power institution by overseeing public authorities' adherence to good administration and human rights standards, and thus contributing to integrity.

In supervising the conduct of government, the ombudsman is dedicated to aspects of lawfulness, effectiveness, properness, transparency, accountability and other aspects related to good governance. Hence, the ombudsman function serves to promote good administration. As regards the role of the ombudsman in relation to the promotion of good governance, it is important to mention that the European Charter of Fundamental Rights has recognised, alongside the right to good administration, (Article 41), the right of citizens to complain to the (European) ombudsman (Article 43). This recognition allows us to conclude that the ombudsman institution is in itself a factor of good governance from a citizen protection approach, which is in compliance with a broader concept of good administration, from which derived the obligation for public administration to proactively seek ways to improve quality of service, linked to the accountability function of the ombudsman.[336]

Therefore, the ombudsman helps to build good governance by working to improve the principles of good governance. By making recommendations to public officials in relation to instances of misconduct or maladministration, the ombudsman contributes directly to improving the quality of government. Likewise, by controlling the behaviour of public officials by improving due care procedures and proper conduct, the ombudsman contributes to preventing corruption and improving the effectiveness of the public administration.

The ombudsman provides in its recommendations an opportunity for debate and deliberation and reasoned conclusion about the quality of the democratic performance of the public powers. In so doing, the ombudsman promotes the principles of properness, transparency, participation, accountability, and effectiveness in strengthening legitimacy and good governance. It is precisely the hybrid nature and status of the ombudsman and the way in which it performs its functions, underpinned by a philosophy of "deliberative administrative action"

335 Alex Brenninkmeijer & Emma van Gelder, loc.cit., p. 152; Diamandouros, loc.cit., p. 219. See also J. McMillan, loc.cit., p. 7.

336 Diamandouros, loc.cit., p. 231. Alse see T. Fortsakis, "Principles governing good administration", in *European Public Law Journal*, Volume 11, Issue 2, 2005, pp. 208 – 209.

that enables the institution to combine the instruments of parliamentary scrutiny and judicial control in an original way, contributing to good governance.[337]

The promotion of good governance for improving the legal quality of the administration is also reflected in its role in law-making. Although this role is of an advisory nature, the outcomes of its reports and recommendations have an effect on the law-making process conducted by the other public bodies.[338] The law-making nature of the ombudsman's functions is also reflected in the development of legal and non–legally binding standards for determining good administration.[339] In both cases the normative standards of the ombudsman can be considered as soft-law norms.

The ombudsman is an evolving institution that contributes to improving the legal quality of the government. It promotes the development of a more flexible and effective legal framework aimed at positively steering government action, providing a new source of legitimacy resulting from the good functioning of the administration and, consequently, strengthening the democratic system as a whole.

Arguably, it can be sustained that depending on the specific model of ombudsman, particular connotations derive from the practice of the institution regarding the development of principles of good governance. Generally speaking, the parliamentary ombudsman is closer to effectiveness and accountability, while the quasi-judicial ombudsman is more concerned with properness and effectiveness. On the other hand, the mixed ombudsman focuses on properness and participation. In all cases, most of the developments are connected with the steering dimension of the modern constitutional state. Hence, the role of the ombudsman as a fourth power is to facilitate the realisation of good governance.[340]

337 D. Curtin, "Holding (quasi-) autonomous EU administrative actors to public account", in *European Law Journal*, Vol. 13, No 4, July 2007, p. 538.
338 G.H. Addink, "The ombudsman as the fourth power", p. 276.
339 N. Niessen, loc.cit., pp. 316–320.
340 J. Spigelman, loc.cit., p. 5.

PROVISIONAL CONCLUSIONS PART I

This study analyses the role of the ombudsman institution in relation to the (activities of the) administration. It aims to identify whether, and to what extent, the ombudsman effectively applies good governance-based standards to contribute to improving the legal quality of government. In this regard, the focus is on the steering (controlling) function of the institution in relation to the administration. Hence, it is possible to affirm that the ombudsman is regarded not only as a mechanism to provide individual remedy, but also as a mechanism of bureaucratic quality control.

Quality as a legal concept is connected with the notions of good governance and good administration. It has a procedural dimension. The quality of administrative activity is connected with the idea of good decisions adopted by appropriate administrative procedures. This implies that decision-making is based on the law. However, legal quality goes beyond lawfulness (from a narrow perspective), involving conformity with substantial law but also procedural norms and norms of conduct. Therefore, the process of making decisions and performing activities should be conducted based on the principles, rules and standards derived from the constitutional principles that comprise the characteristics of good governance. Accordingly, legal quality is achieved by the observance of principles of good governance in administrative decision-making as a means of ensuring good decisions.

The ombudsman, as a public accountability institution, plays an important role in the application of the principles of good governance as a mechanism to improve the functioning of the government. The ombudsman performs this accountability function by assessing the administration against some normative standards with a soft-law character. The application of these soft law norms by the ombudsman, in the form of standards based on the principles of good governances, can contribute to improving the quality of government and to enhance legitimacy.

From a legal perspective, the concept of legitimacy is built around the notions of democracy and rule of law. Administrative legitimacy is composed of two main connected ideas: legitimacy as derived from a legal order produced by those democratically elected; and the administration as subject to the principle of (strict) legality. This is a formal or a static perspective of administrative

legitimacy based on the Weberian model of administrative legitimacy. But on the contrary, a substantial and dynamic perspective of administrative law legitimacy can be found in the principles of good administration. Here the connection is between legitimacy, democracy and a broader concept of legality, which is closer to good governance. This dynamic perspective of legitimacy related to the way in which decisions are made and functions performed. Therefore, a broader concept of legitimacy includes legal quality.

The development and application of good governance-based standards by the ombudsman reflects the indirect task of the institution in the development of legal norms. This is the case when the ombudsman performs both hard-law review based on interpretation of legal parameters and soft-law review based on non-legally binding rules of good administrative conduct. These standards, resulting from the exercise of the ombudsman's normative functions as an expression of the institution's hybridisation process, can foster a more effective legal framework to ensure the proper functioning of the entire state apparatus and strengthen the legitimacy of the government.

The contemporary ombudsman is the result of the process of hybridisation characterised by a combination of different ombudsman's standards of control, in addition to the combination of assessment standards within all existing ombudsman models. The hybridisation of the standard of control, together with the hybridisation of assessment standards, reflects that in most cases, the existing models of ombudsman share (and protect) similar values. Therefore, good administration and human rights as standards of control can be viewed as two sides of the same coin. They both are needed to enhancing the legitimacy of the government. Their application produces similar outcomes. In addition, it is possible to argue that the hybridisation of the ombudsman is leading to an emphasis on the control-oriented performance of functions (at least one that beyond the functions of citizen redress and protection) insofar as there is a major concern about the acceptability of government conduct on the part of the citizens which stresses the importance of developing standards and rules for the proper behaviour of the administration.

The ombudsman assesses the behaviour of the government against either legally binding or non-legally binding standards. When the ombudsman applies legally binding standards to this end, it is fundamentally interpreting law. In this way, the institution contributes to the development of legal principles. In this case, it can be said that the ombudsman applies similar criteria as the judiciary. On the other hand, when non-legally binding standards are applied, the ombudsman usually develops and codifies its own normative standards through which it can conduct a kind of review oriented mainly to the protection of principles and values, which are not judicially enforceable. These non-legally binding standards

can also be the basis for the development of fundamental legal principles. The standards of assessment developed by the ombudsman have a soft-law nature derived from the (indirect) legal effect of the obligations they enshrine, as a result of the application of either legal parameters or rules of administrative conduct. They may become hard law (with direct legal effect) when they are adopted by the judiciary, the legislature or even the administration in its regulations. In this regard, the ombudsman contributes to developing the legal character of principles of good governance.

The rule of law, democracy, and good governance are the three pillars of the modern state. The development of each of these fundamental principles started at different moments in history, all linked to the development of the state. The next sections will analyse good governance as a legal concept with constitutional foundations. As mentioned, good governance might be conceptualised as a general constitutional principle concretised through five specific principles of good governance: properness, transparency, participation, accountability, and effectiveness. These principles will also be examined in the light of the steering character of good governance.

PART II

DEMOCRATIC RULE OF LAW AND PRINCIPLES OF GOOD GOVERNANCE

Part II analyses the meaning of good governance as a legal concept with constitutional foundations. From this perspective, good governance is a fundamental value linked to the rule of law and democracy but with its own core substance and character. As a fundamental legal value or meta-concept, it might be concretised as a general constitutional principle composed of other principles that also have constitutional character. These are the so-called principles of good governance: properness, transparency, participation, accountability and effectiveness, all of which provide new elements to administrative law legitimacy. These principles have been developed at the international, regional and national levels. The analysis is focused on three of these principles: properness, transparency and participation. They have been developed in closed connection to the rule of law and democracy and therefore are considered key aspects of good governance.[341]

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341 See G.H. Addink, *Good governance. Concept and context*, pp. 99–140. See also Section 6.2.

CHAPTER 4

THE CONCEPT OF GOOD GOVERNANCE FROM A LEGAL PERSPECTIVE

This chapter analyses the meaning of good governance from a legal perspective. The aim here is to develop good governance as a legal concept that is part of the theoretical framework. Section 4.1 presents the origin of the term in the framework of the international cooperation for development agenda. Section 4.2 shows how the notion of good governance has shifted from development studies towards law and social sciences. Based on the continually evolving process of the concept, it can be argued that from a legal perspective, good governance relates to the process of formation of regulatory frameworks for steering public actions. Section 4.3 defines the legal meaning of good governance based on three levels of abstraction. The main purpose is to determine the application of the term in the realm of law, first describing its essential features as a legal notion, then analysing its normative dimension at the most abstract level as a legal value or meta concept, and finally its effects and scope at a more concrete level as a legal norm. Thus, from a legal point of view, good governance can be considered a method for the analysis of regulatory frameworks, as a fundamental value informing legal norms, and as a general principle connected with other principles and rules. From this perspective, good governance is related to the rule of law and democracy, but it has evolved as an independent principle of constitutional law.

4.1. THE EMERGENCE OF GOOD GOVERNANCE

4.1.1. THE ORIGIN OF GOVERNANCE

The origin of the term "governance" has its roots in the international development debate of the late 1980s.[342] Since then, governance has been

[342] See the pioneering World Bank publication on the "crisis on governance" in Sub-Saharan Africa: World Bank, *Sub-Saharan Africa: From Crisis to Sustainable Growth. A long-term perspective study*, Washington D.C.: World Bank, 1989.

increasing in importance and is now a key concept not only in the development agenda, but also in other academic disciplines and fields. In this regard, it represents an interdisciplinary approach to good governance that connects the social sciences, economics and law. According to Addink, good governance as it has evolved has a dual dimension that comprises both a factual dimension and an ideal one. The factual dimension is represented by how governance actually is, and the ideal dimension by how governance ought to be. Addink points out that the ideal or "ought to be" dimension is a matter of weighing up between the development and the application of law.[343] Hence, governance has brought new perspectives in relating socio-economic outcomes to macro interventions, as well as in the discussion of new forms of regulation and trends in legal theory. However, the term has not yet been fully defined[344], and academics have not yet succeeded in formulating generally shared definitions of the concept. Thus, the need to clarify what governance and good governance is remains, especially in the realm of law, in which a coherent and comprehensive understanding of governance requires an interdisciplinary approach.[345]

To understand the present importance of governance, one should be aware – at least in broad terms – of how it reflects the shifts that have taken place in thinking about development in recent decades. It was after the 1980s, once economic structural reforms came to be regarded as essential for development, that the limited success of liberal economic policies led to consideration of the capacity of governments as an important factor for development. In these terms, international organisations concluded that structural adjustment programmes failed because of institutional weakness. The main idea was that economic policy could not be separated from the political environment in which it takes place.[346]

Thus, from the 1990s onwards, development theories incorporated into their discourse the social and political dimensions of development, addressing issues of equity, redistribution, social participation and institutional capacities and focusing debate on the importance of creating a politically enabling

343 G.H. Addink, *Good governance in EU member states*, pp. 12–13.

344 For some definitions of governance and good governance see Section 4.1.2. For the concept of governance and good governance, also see G.H. Addink, *Good governance. Concept and context*, pp. 16ff; Joan Prats i Catalá, *De la burocracia al management, del management a la gobernanza*, Madrid: INAP, 2005, pp. 33–39.

345 For an interdisciplinary approach to governance and good governance, see G.H. Addink, "Governance and norms. An interdisciplinary approach of good governance", in A.L.B. Colombo Ciacchi, M.A. Heldeweg, B.M.J. van der Meulen, A.R. Neerhof (eds), *Law & Governance. Beyond the public-private law divide?*, The Hague: Eleven International Publishing, 2013, pp. 241–272.

346 Jan Wouters & Cedric Ryngaert, *Good governance: Lessons from international organizations*, Working Paper 54, Institute for International Law, K.U. Leuven, May, 2004, pp. 6–7.

environment for development. Therefore, as Otto, Stoter and Arnscheidt have pointed out, the development agenda became not only a question of promoting economic growth but also one of "getting politics right". Thus, development came to imply the improvement in human conditions, in terms of both the fulfilment of the population's basic needs as well as improvements in the "polity" of any given state, one of the objectives of the latter being to ensure good governance.[347]

Consequently, governance came onto the development agenda along with the need for international development agencies to promote institutional reforms to enhance economic growth without interfering in the exercise of political power by governments. Thus, the usage of governance has been pioneered and dominated by international organisations and aid agencies. According to Hyden, this situation has led to the concept of governance being translated into practice in a way that reflects the programme-oriented nature of each institution, resulting in the current unsatisfactory state of thinking about governance.[348]

4.1.2. GOOD GOVERNANCE AS AN OPERATIONAL CONCEPT FOR INTERNATIONAL ORGANISATIONS

In this context, institutions such as the World Bank, the United Nations Development Program (UNDP), and the International Monetary Fund (IMF) have been taken a leading role in conceptualising governance and good governance.[349] Thus, for example, the World Bank has defined governance as "the manner in which power is exercised in the management of a country's economic and social resources for development".[350] Hence, good governance is optimised by predictable, open and enlightened policymaking. Good governance "fosters strong (…) states capable of sustained economic and social development and institutional growth".[351] Having defined governance as an operational framework, the World Bank goes on to identify three aspects of governance: i) the form of political regimen; ii) the processes by which authority

347 J.M. Otto, W.S.R. Stoter & J. Arnscheidt, "Using legislative theory to improve law and development projects", in J. Arnscheidt, B. van Rooij & J.M. Otto, *Lawmaking for development,* Leiden: Leiden University Press, 2008, p. 54.

348 G. Hyden et al, op.cit., p. 15.

349 Other institutions that have developed definitions of (good) governance are the UNCHR, The Organization for Economic Cooperation and Development (OECD), the European Council, among others.

350 World Bank, *Good Governance: The World Bank Experience*, p. 66, *supra* note 73.

351 Idem.

is exercised in the management of a country's economic and social resources; and, iii) the capacity of government to formulate and implement policies and discharge functions.[352] In line with its Articles of Agreement, the World Bank has limited itself to just the second and third aspects of governance.[353] From the organisation's perspective, good governance has been promoted as a major variable in economic development.[354]

On the other hand, the UNDP defines governance as "the exercise of political, economic and administrative authority to manage a nation's affairs at all levels. It is the complex mechanisms, processes, relationships, and institutions through which citizens and groups articulate their interests, exercise their legal rights and obligations, and mediate their differences."[355] Along these lines, governance "embraces all the methods – good and bad – that societies use to distribute power and manage public resources and problems." Therefore, good governance is "a subset of governance wherein public resources and problems are managed effectively, efficiently and in response to the critical needs of society. Effective democratic forms of governance rely on public participation, accountability and transparency."[356]

According to the UNDP, the challenge facing all societies is to create a system of governance that promotes, supports, and sustains human development. As such, three different dimensions of governance can be identified: i) economic; ii) political; and iii) administrative.[357] Economic governance includes decision-making processes that affect a country's economic activities and its relationships with other economies; political governance is the process of decision-making involved in formulating public policy; and administrative governance is the system of public policy implementation carried out through an efficient, independent, accountable and open public sector.[358] These four

352 World Bank, *Governance and Development*, Washington D.C.: World Bank, 1992, pp. 1–6.

353 On this point, it is important to keep in mind that, for example, the World Bank's Articles of Agreement do not provide a definition of development and also prohibit the Bank from interfering in the political affairs of the recipient country. Thus, Shihata's "Governance Doctrine" is considered the legal basis enabling the World Bank to expand its activities in accordance with its mandate. The promotion of good governance and the development of the concept has became a convenient way to justify the Bank's commitment to new fields. See: M. Yamada, *Evolution in the concept of development: How has the World Bank 's legal assistance extended its reach*, Institute of Developing Economies (IDE), IDE Discussion Paper 133, March 2008.

354 Francis Botchway, loc.cit., p. 163.

355 United Nations Development Program, *Governance for sustainable human development*, New York: UNDP, January 1997, p. 9.

356 Ibid.

357 Ibid.

358 For this study, it is more appropriate to refer to political governance in relation to the political regimen and the organisation of the state apparatus from a constitutional law perspective. In

dimensions interact with and affect one other, defining the processes and structures that guide political and socioeconomic relationships.[359] Hence, the definition provided by UNDP focuses on three main actors: the state, civil society and the private sector. It is said that the essence of governance is to foster interaction among these three actors so as to promote social development.[360]

From the IMF's perspective, its involvement in governance should be limited to the economic aspects, including the avoidance of corrupt practices, to the extent that paying greater attention to governance could promote macroeconomic stability and sustainable growth in its member countries.[361] Hence, the IMF has stressed the importance of "promoting good governance in all its aspects, including ensuring the rule of law, improving the efficiency and accountability of the public sector and tackling corruption as essential elements of a framework within which economies can prosper".[362] Thus, from the IMF's rendering, the connection between good governance, rule of law, and the fight against corruption can be observed. As an example of this, the IMF has encouraged greater transparency and accountability in the management of public funds to reduce poverty.[363]

As the literature points out, the definitions of governance provided by international organisations are characterised for being programme-oriented. Thus, it is possible to concur with Hyden by saying that the use of governance by international development agencies is characterised as being open-ended in its scope of coverage, making no real distinction between this concept and others such as policy-making and policy implementation. Thus, the concept of governance was developed in the first instance as a tool for programme design, and to that extent it was a descriptive and operational definition rather than a substantial and analytical one that emerged.[364]

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addition, in relation to the definition of administrative governance, we have to consider that the administration not only implements policy but also formulates it.

359 United Nations Development Program, op.cit., p. 10.

360 G. Shabir Cheema, "Linking governments and citizens through democratic governance", in Dennis A. Rondinelli, *Public administration and democratic governance: Governments serving citizens*, New York: United Nations, 2007, p. 31.

361 International Monetary Fund, *Good governance. The IMF's Role*, IMF: Washington D.C., 1997, *with* attached *The Role of the IMF in Governance Issues: Guidance Note*, approved by the IMF Board of Governors on 25 July 1997, p. 3.

362 International Monetary Fund, *Declaration on Partnership For Sustainable Global Growth*, adopted by the IMF's Interim Committee on 29 September 1996.

363 See George T. Abed & Sanjeev Gupta, *Governance, Corruption & Economic Performance*, IMF, 2002.

364 Goran Hyden et al, op.cit., pp. 15–16.

4.2. THE MEANING OF GOOD GOVERNANCE FROM A LEGAL PERSPECTIVE

4.2.1. THE DIFFERENT MEANINGS OF GOVERNANCE

Many attempts have been made to define the concept of governance in recent years. Rhodes, for instance, has identified at least six different definitions.[365] From a political sciences approach, there are three commonly accepted usages of the term, which refer to: a new process of governing; a changed condition of ordered rule, or the new method by which society is governed.[366]

According to Rhodes, the new process of governing implies governing with and through networks.[367] It is argued that governance is partly a consequence of the public-sector reforms of the 1980s, which in turn gave a more active role to private actors. Thus, governance is a result of the hollowing out of the state, related not only to reforms for modernising administration but also to the process of globalisation and the increasingly transnational dimension of regulation and policymaking.[368]

Even though there is no widely agreed definition of governance, it is possible to identify some common elements that are shaping its features: i) a more active role for non-state actors, changing the boundaries between public and private; ii) continuing interactions between a plurality of governmental and private actors for decision-making and public policy; and iii) flexible regulation for interaction. Thus, there would seem to be a degree of consensus that the term governance refers to a process of setting new and flexible regulatory tools for public-private interaction.

Most of the theoretical efforts for defining and understanding governance, such as that one stated above, come from the political science approach. It is a fact that the application of new and more flexible governance mechanisms of regulation has increased in place of more traditional legal techniques, especially at the European and international levels. However, the legal dimension of (good) governance remains under-explored. For traditional law, used to detailed

365 Rhodes has identified six separate uses of the term governance: as the minimal state, as corporate governance, as the new public management, as good governance, as a socio-cybernetic system, and as self-organizing networks. See: R.A.W. Rhodes, "The new governance: Governing without governance", pp. 653–660.

366 R.A.W. Rhodes, "Understanding governance: Ten years on", p. 1246.

367 R.A.W. Rhodes, "The new governance: Governing without governance", pp. 652–653.

368 Ibid., pp. 661–633. Also see Grainne De Búrca & Joanne Scott, "Narrowing the gap? Law and new approaches to governance in the European Union. Introduction", in *Columbia Journal of European Law*, Vol. 13, No 3, Summer 2007, p. 513.

regulation to command administrative action and control it by means of coercion, determining the normative connotation of the steering perspective of governance is not an easy task. From a social (sociological or political) science approach, governance (and good governance) relates to how regulatory processes are made; while from a legal approach, it relates to how regulatory processes ought to be. As mentioned above, the former is connected to the factual dimension of the concept and the latter to the ideal one, which in turn relates to the development and application of legal norms and their legal effect. The need for new regulatory frameworks to legitimise government action in response to changes in public administration and modern society led legal doctrine to explore and develop the legal dimension of governance.[369]

This section aims to provide inputs for the preparation of an analytical-operational concept of governance from a legal perspective. But before doing so, the concept of governance as proposed by Hyden will be described. By defining governance in reference to "how the rules of the political game are managed" this scholar adopts the so-called "steering approach to governance". He also offers insights into the relationships between politics and development.

It is important to note that in this study, the term steering is used in the sense of conducting or guiding and not in the sense of controlling (understood as commanding, restricting or limiting).[370] From this perspective, governance can be understood as referring to regulatory frameworks for steering political processes. Thus, governance is related with processes and rules, highlighting its political dimension and its impact in the public sphere.

This approach is considered important because it provides a productive analytical concept of governance. Therefore, it will serve as the starting point for developing a legal theoretical framework of governance, as will be described in Section 4.3.

4.2.2. GOVERNANCE AS A STEERING MECHANISM OF SOCIAL-POLITICAL PROCESSES

Although the concept of governance remains unclear, Hyden points out that its application in different academic disciplines and fields suggest two separate lines of understanding: one regarding the substantive content of governance, the other regarding its character in practice. Hyden argues for the first line of thinking

369 For a detailed description of the legal dimension of governance, see Section 4.2.4.

370 It may be said that governance has a steering and controlling dimension, where the steering element is more comprehensive than the controlling one. And although governance can apply steering and controlling mechanisms, it stresses the steering dimension by focusing on new and more flexible forms of regulation.

on governance that there is a difference between, on the one hand, those who consider governance as concerned with rules of conducting (or steering) public affairs; and on the other, those who see it as controlling public affairs. The "rules approach" tends to stress the institutional determinants of choice, while the "controlling approach" concentrates on how choices get implemented.[371]

As far as the character of governance in practice is concerned, there is divergence on whether governance is best seen as activity or process. Those who regard governance as an activity tend to treat it as reflected in human intention and action, and thus it is possible to observe the results of governance interventions. On the other hand, others view governance as a process that guides how results are achieved.[372]

Bearing in mind the different uses of the concept of governance, Hyden defines it by focusing on the importance of rules and how political process operates, rather than on results and performance. In this interpretation, although governance is viewed as reflective of human intervention (activity), it is considered a process that sets parameters for how public policy is developed and implemented.[373] Consequently, governance becomes a "meta" activity at the "polity level" that guides the process by which results are reached and, as such, influences outcomes such as human rights protection and the quality of decision-making.[374] Hence, Hyden has defined governance as "the process of formation and stewardship of the formal and informal rules that regulate the public realm, the arena in which state as well as economic and societal actors interact to make decisions".[375] In so doing, he provides an analytical definition of governance that stresses its political dimension.

Therefore, good governance refers to the quality of a regimen, dealing with the constitutive side of how a political system operates rather than its distributive or allocative aspects, which are more directly a function of policy.[376] From this

371 Goran Hyden et al, op.cit., p. 12.

372 Ibid.

373 Ibid., p. 16.

374 Politics refers to the exercise of authority or the science of governing. Policy refers to the set of rules and principles that guide decisions or government intervention for solving public problems. Following Hyden, it might be said that politics influences policy.

375 Goran Hyden et al, op.cit., p. 16.

376 Hyden defines the constitutive side of politics in terms of answering these questions: who sets what rules, when and how?. This perspective differs from typical policy-derived concerns of how resources are allocated. Although governance does not influence such outcomes directly, it does so indirectly by changing the rules for how policies are made. Thus, even though the constitutive and distributive side of politics can be distinguished from each other, they remain related. Hyden illustrated his approach through the analogy: "governance is to policy and administration what a house is to its occupants". Goran Hyden et al, op.cit., p. 17. As noted, this is the factual dimension of governance. For the legal approach to governance, see Section 4.3.

perspective, good governance is constituted by a series of basic fundamental principles that regulate and steer the political process in order to ensure development, which in turn should include a broad range of freedoms or rights understood as basic capabilities. In this regard, according to Hyden good governance should be considered a public good that citizens should be entitled to.[377]

Likewise, by focusing on the political dimension of governance, Hyden's concept is also linked to the process by which public institutions conduct public affairs and manage public resources, where the government is one of the main governance actors. To that extent, governance relates to the regulatory framework through which powers are exercised for the achievement of public goals. In the case of formal rules, it is important to note the importance of constitutional and other legal norms in providing the context in which the political system functions and public polices and administration are carried out. In fact, rules are set and applied at different levels. Therefore, Hyden recognize that, as a regulatory tool, governance can also be considered in terms of establishing and applying constitutional principles.[378] Hence, there is no doubt from this perspective that law has a place in the process of steering the political regimen and the performance of the state apparatus.

4.2.3. THE RELATIONSHIP BETWEEN THE STEERING APPROACH OF GOVERNANCE AND LAW

Despite of the vagueness of the concept of governance from a legal perspective and the lack of limitation of its scope, the legal literature tends to use the term to refer to a wide range of processes and practices that have a regulatory dimension but do not operate primarily through the conventional mechanisms of command-and-control type legal institutions.[379]

Hence, the literature shows that governance from a legal perspective embraces (and has been stimulated by) the mainstream meaning of governance given by the social sciences, in which it is defined as referring to regulatory structures for steering processes. Understood as such, governance is about the "how" of governing and administering.[380] In these terms and regarding the performance

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377 Goran Hyden et al, op.cit., p. 24.

378 Ibid., p. 17. For the general principle of good governance and the principles of good governance as constitutional principles, see Chapter 6.

379 Grainne De Búrca & Joanne Scott, "Introduction: New governance, law and constitutionalism", in Grainne De Búrca & Joanne Scott, *Law and New Governance in the UE and the US*, Portland: Hart Publishing, 2006, p. 2.

380 Wolfgang Hoffmann-Riem, loc.cit., p. 216, *supra* note 149.

of public functions, the legal dimension of governance refers to the process of developing the regulatory frameworks through which the government fulfils its tasks – in other words, those which determine how the government exercises its powers.[381] Thus, the legal dimension of governance emphasises new regulatory mechanisms for steering decision-making process and policy implementation. So the debate is focused on the extent to which governance mechanisms (understood as new regulatory tools) are affecting our understanding of law, as well as the role of traditional legal institutions and legal doctrine.[382]

In an attempt to explain the shifts from traditional legal regulatory tools towards new (governance) regulatory techniques, van den Broek describes the different rationales that underlie this phenomenon. Based on Karkkainen's theory, she presents three rationales: i) The Teuberian rationale; ii) The instrumental rationales; and iii) the philosophical pragmatic rationale. To these she adds a fourth: the administrative law rationale.[383] The author notes that these rationales mark a shift away from the traditional legal institutions approach. In relation to Teuberian's rationale, she notes his proposal that in the presence of a crisis of substantive regulatory law, the solution is to adopt "reflexive legal strategies" that influence the internal dynamics of the affected subsystems by the use of dynamic self-regulation within the regulated spheres. Hence, the crisis of regulatory law emerges from the mismatches that arise when law attempts to exercise control over similarly self-referential social subsystems. The reflexive legal strategies aim to correct and redefine the existing self-regulatory mechanisms in law.[384]

On the other hand, the institutional rationale points to the empirical observation that traditional legal regulation is not working properly, a situation that can be overcome by using new governance techniques. According to this rationale, changes in society demonstrate the limits of traditional regulatory approaches and call for new type of policy-making.[385]

In turn, the philosophical pragmatic rationale emphasizes the inherent constraints in formulating comprehensive solutions for complex social issues. This rationale prefers a regulatory architecture that embraces the provisionality,

381 Alberto Castro, "Legalidad, buenas prácticas administrativas y eficacia en el sector público", p. 246, *supra* note 49.

382 Grainne De Búrca & Joanne Scott, "Narrowing the gap: Law and new approaches to governance in the European Union", p. 513.

383 M. van de Broek, *New Governance. The exchange of information in the Dutch Financial Expertise Centre from good governance perspective*, Utrecht: Utrecht University, 2010, p. 18. For a more detailed explanation see B.C. Karkkainen, "New governance in legal thought and in the world: Some splitting as antidote to overzealous lumping", in *Minnesota Law Review* 89 (2), 2004, pp. 471–497.

384 M. van de Broek, op.cit., p. 19.

385 Ibid.

revisability and experimental character of all policy determinations.[386] Finally, the administrative law rationale provides a more internal perspective and is linked with discussions about innovations in administrative law. Here, the point of attention is to increase the quality of the administration through sound decision-making processes.[387] This study proposes that the institutional rationale and the administrative law rationale are those that best explain the governance trends in law.

In this regard, it is important to mention that academic legal discussion on governance trends in law is the subject of debate in several countries where similar legal modifications have occurred, mainly due to the impact of public sector modernisation, the constitutionalisation of legal systems (legal order) and the internationalisation of regulatory and administrative relations at global and regional levels.[388]

The modernisation of public administration (following the concept of New Public Management[389] was aimed at the economization and efficiency of administrative action, and led to the creation of independent agencies, privatization processes[390], and new forms of regulation and deregulation. The reorientation of administrative action and organisation towards the citizen, alongside the implementation of mechanisms for ensuring transparency and accountability with a view to improving the quality of public policies and services, is another element driving administrative modernisation. It implies different kinds of central government programmes oriented to ensuring the recognition of citizens' rights.

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386 Ibid., p. 20.

387 Ibid., pp. 20–21.

388 Matthias Ruffert, "The transformation of administrative law as a transnational methodological project", p. 4. Also see, Eberhard Schmidt-Assmann, *La teoría general del derecho administrativo como sistema*, *supra* note 20.

389 The concept of New Public Management (NPM) has been leading to the reform of public administration in many countries over the world since the 1980s. Economic efficiency is the value driving the reform. Later, a second generation of reforms known as Whole-of-Government (WOG) was launched. In contrast to the NPM reforms, which were dominated by the logic of economics, this approach sought to apply a more holistic strategy using insights from other social sciences as well. These new trends are in accordance with those experienced in Latin America such as the Latin American New Public Management. See, Tom Christensen & Per Laegreid (eds), *Transcending new public management. The transformation of public sector reforms,* Hampshire: Ashgate, 2007. For Latin American trends in public administration reforms, see CLAD, *La responsabilización en la nueva gestión pública latinoamericana,* Buenos Aires: CLAD/BID, 2000.

390 Privatization is understood in a broader sense as moving any public or governmental competences or activity from public sector to private sector. This is the case not only when transferring industrial branches or public services from government or public ownership or control to the private sector, but also when citizen participation is included in the decision-making process. This is also expressed in a shift away from public law towards private law. See Javier Barnes, "Reform and innovation of administrative procedure", p. 28, *supra* note 20.

Administrative law has shown itself to be sensitive in dealing with modernising administrative trends. In many cases, practice resists the adoption of innovations and administrative jurisprudence appears to be immune to transfers from politics and the economy. The idea of efficiency, which lies at the base of these innovations, is not considered as an opportunity for administrative legal development, but as a threat to its traditional guarantees. Those reforms that are inspired by economic ideals operate in some cases through non-legal instruments using non-legally binding rules, and traditional mechanisms of control (judicial review) are limited in their scope. The citizen approach, although based on the concept of citizen-consumer, led not only to the formulation of new rights in relation to the administration, but also to the promotion of more active citizenry participation.[391]

On the other hand, the internationalisation of regulatory techniques is a phenomenon characterised by two types of trends. The first is internationalisation as a result of international (administrative) cooperation; and the second is internationalisation through formation of complex international regulatory structures (WTO, UN, etc.).[392] While the scope and the legal provisions of the latter are still unclear; the former, exemplified by so-called Europeanisation, has been well developed over the last two decades.[393]

Europeanisation entails transfer of legal concepts from one national legal system via European Union Law to another national legal system, and vice versa from national legal orders to EU Law. The process is also related to adaptations of national legal orders through either the reinterpretation of constitutional principles based on EU jurisprudence or the harmonisation of administrative law to the needs to implement EU Law and procedural guarantees observed by EU administrative authorities and by national administrations alike. With regard to EU procedural law, one source thereof is represented by codes of good practice such as the European Ombudsman Code of Good Administrative Behaviour. These codes contain recognized legal standards along with norms of conduct

391 Matthias Ruffert, "The transformation of administrative law as a transnational methodological project", p. 38.

392 See, Eberhard Schmidt-Assmann, "La ciencia del derecho administrativo ante el reto de la internacionalización de las relaciones administrativas", in *Revista de Administración Pública*, No 171, Sept-Dic., 2006, pp. 7–34. See also, Eberhard Schmidt-Assmann, "Structures and functions of administrative procedures in German, European and International Law", in Javier Barnes (ed), *Transforming administrative procedure*, Sevilla: Global Law Press, 2008, pp. 43–74. For the specific case of WTO see, G.H. Addink, "The transparency principle in the framework of the WTO from administrative law perspective", in *Merkurios,* Vol. 25, No 67, 2008, pp. 21–30.

393 Eberhard Schmidt-Assmann, "Structures and functions of administrative procedures in German, European and International Law", p. 67.

and rules on citizen-friendly administration, which represent a combination of case-law and soft law.[394]

The emergence of new legal concepts via EU law and their integration into national orders is taking place gradually. However, this is a process that is not without its obstacles, either because of the constitutional bases of the individual countries or due to fears of loss of autonomy. In any case, Europeanisation ultimately leads to a diversification of sources of law.[395]

The constitutionalisation of legal orders entails, among others, three main elements: i) the existence of a fixed constitution which enshrines a set of fundamental rights; ii) constitutional provisions prevailing over other legal norms; and, iii) interpretation of the law in accordance with constitutional provision (rules and principles).[396] Constitutionalisation is also expressed in the emergence of the legal postpositivism or neoconstitutionalism paradigm, which advocates the application of legal principles as well as rules.[397] However, Constitutionalisation and the broader use of legal principles have not been immune from criticism.

An example of the effects of constitutionalisation can be seen in the impact of administrative law under the influence of constitutional law.[398] This implies the replacement or accordance of strict administrative rules with constitutional principles such as democracy, rule of law and human rights, which must be weighted when controlling administrative action. Therefore, while constitutional law has increased in legal density and juridification, from some perspectives, the autonomy of administrative law is considered under risk.[399] At present, the orientation towards general principles is about to replace detailed administrative regulation and the strict application thereof.[400]

These new trends are the result of the changes in society and government. Modern administration has expanded its tasks, especially those concerning socio-economic policies, and this demands more flexibility for more effective

394 Ibid., p. 64.

395 Matthias Ruffert, "The transformation of administrative law as a transnational methodological project", p. 46.

396 Josep Aguiló Regla, "Positivismo y postpositivismo. Dos paradigmas jurídicos en pocas palabras", in Isabel Lifante Vidal, *Interpretación jurídica y teoría del derecho*, Lima: Palestra, 2010, pp. 15–16.

397 Ibid., pp. 13–21.

398 See, Eberhard Schmidt-Assmann, "Cuestiones fundamentales sobre la reforma de la teoría general del derecho administrativo. Necesidad de la innovación y presupuestos metodológicos", in Javier Barnes (ed), *Innovación y reforma del derecho administrativo*, Sevilla: Global Law Press 2006, pp. 46–73.

399 Matthias Ruffert, "The transformation of administrative law as a transnational methodological project", pp. 30–40.

400 Ibid., p. 42.

action. Thus, to achieve its public duties, more flexibility has been conferred to the administration through delegation of regulatory powers and granting more discretionary powers at all levels.

Modern society and the state are undergoing tremendous changes because of the fusion of public-sector modernisation with regulatory reform movements, as well as trends such as globalisation and the knowledge-based society.[401] These changes are invoking new legal perspectives to provide more instruments for effective government action. Traditional structures may be replaced by new regulatory models to steer different decision-making processes with a focus upon citizen needs and efficiency.

For this study, the trends described above constitute a call for the incorporation of governance trends in law. And it is necessary to harmonise these regulatory governance techniques with constitutional values such as democracy and rule of law.

4.2.4. GOVERNANCE AS A STEERING MECHANISM OF PUBLIC LAW

The impact of governance trends can be sharply appreciated in different fields of law, especially in administrative law where a vivid discussion on the reform of some of its basic institutions is currently going on.[402] It is unquestionable that governance trends offer a framework for new approaches to law. They reflect the swift changes undergone by society and modern states in recent years, leading to a need for a more comprehensive understanding of the role of law and more flexible and comprehensive methods of regulation.

To illustrate this point, the basic concepts that constitute the foundations of administrative law will now be described, in order to explain the need for innovation and finally outline the characteristics of what this study calls the "good governance" approach to public law. From this study's perspective, the good governance approach can be considered as a steering mechanism for regulating government action, focusing on decision-making and results.

In the classic liberal tradition, the task of administrative law is to prevent arbitrary behaviour on the part of the administration to protect citizens and

401 Javier Barnes, loc.cit., p. 28.

402 On this, see Luciano Parejo Alfonso, *Crisis y renovación en el derecho público*, Lima: Palestra, 2008; Javier Barnes (ed), *Innovación y reforma en el derecho administrativo*, Sevilla: Editorial Derecho Global, 2006. See also *supra* note 20.

secure fundamental rights. From this perspective, the administration's actions and behaviour must be defined by general rules and by strictly defined legal competence (principle of legality). The simplest interpretation of this model is that the administration is limited to issuing concrete decisions.[403] The compliance of administrative action with general rules is controlled by the judiciary, which reviews the legality of administrative behaviour for the benefit of the individual. In sum, this perspective is one of control.

Arbitrary administration is prevented via a kind of hierarchical restricted concept. It is assumed that abstract legal rules suffice to command administrative behaviour. Thus, legal rules attribute absolute certainty and predictability to the administration's action.[404] Under this perspective, rules and laws are based on positive legal commands and prohibitions, while the administration implements, enforces, and controls the application of these by means of coercive sanctions. Thus, the objective control of the administration is realised by means of legal standards, of which the principle of legality is the most important.[405]

The characteristic legal institutions and techniques of administrative law are the products of this framework, consisting of binding laws that take everything into account, programming all administrative action. The administrative hierarchy is pyramidal, and its procedures are merely tools to apply the law.[406] Thus, while the classical control perspective aimed at preventing arbitrariness and protecting individual interest has been consolidated over the years, the legal perspective based on the objective control of administrative activity for achieving good administration has been somewhat overlooked.[407]

The validity of this model is undeniable, but its monopoly, less so.[408] Classic administrative law is not capable of facing rapid succession and interrelation of phenomena of wide scope and impact[409], such as the modernisation of administration, the internationalisation of administrative activity, or the collaboration between the public and private sectors. Thus, alongside more traditional methods, a new regulatory framework for decision-making is needed. To this end, modernisation efforts in administrative law are aimed at a shift away from the control perspective (without disregarding the protection of rights) towards a "steering" or governance perspective.

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403 Bart Hessel, "Political practice confronted with the concept of the rule of law in the Netherlands", in Bart Hessel & Piotr Hofmanski (eds), *Government Policy and Rule of Law*, Utrecht-Bialystok: Utrecht University, Bialymstoku University, 1997, p. 33.

404 Ibid., p. 34.

405 Ibid., p. 25.

406 Javier Barnes, loc.cit., p. 25.

407 Ibid.

408 Ibid.

409 Ibid., p. 23.

In line with this perspective, administrative law should provide the means, tools and scales to allow for the effective implementation of legal principles and rules, using resources economically and taking sound decisions that are accepted by those affected (effectiveness, efficiency and acceptance).[410] Thus understood, the legal perspective of governance can function as a central point of focus and can be very useful for a developing a normative framework for the administration.

As explained earlier, the term governance is related, from a broader perspective, to the way in which powers and duties are exercised for the achievement of public goals. From a narrow perspective, governance involves how decisions are made to promote the general interest through the fulfilment of a public task.[411]

The formal process of decision-making is conducted by means of administrative procedures. Decisions adopted by the administration can be of a formal or informal character. Examples of formal decisions are individual resolutions or administrative acts (adjudication)[412] rules[413] (regulations, environmental planning); and the contract award process. Informal decisions are those described as soft law, such us guidelines, recommendations, manuals, policy rules, among others.[414] Thus, administrative procedure is not related solely to adjudication[415]; it also extends to other areas and serves to establish criteria for guiding the public activities of the administration, standards of care and conduct regarding provision of services, etc.[416]

As Ponce Solé pointed out, for many decades, administrative procedure was not been interested in good decisions; rather, it was aimed at protecting citizens by emphasizing control of discretionary powers of the administration mainly through judicial review. This stands as a negative approach of administrative

410 Matthias Ruffert, "The transformation of administrative law as a transnational methodological project", p. 11. The legal theory of steering (*steurung*) has been particularly developed in the discussion for administrative law reform in Germany. See Eberhard Schmidt-Assmann, *La teoría general del derecho administrativo como sistema*, *supra* note 20.

411 G.H. Addink, "Principles of good governance: Lessons from administrative law", p. 29.

412 The term "decision-making process" is associated with the procedure conducted to issue an individual decision or Adjudication. However, for methodological reasons in this research the term decision-making process is used in a broader sense as well as administrative procedure. In the same way, the word "decisions" is used as a general category. When referring to decisions not of a general nature, the term "individual decision" will be used.

413 Rulemaking, understood as the decision-making process for making rules, embraces a broad range of possibilities, which ranges from the creation to binding general norms to non-binding statements of policy or guidelines. By rules is understood the product of each of these activities. For methodological reasons in this research the term rulemaking will be only used when making "legislative rules". In other cases, the term decision-making will be used.

414 Javier Barnes, loc.cit., p. 17.

415 Although this is one of its more traditional and transcendental aspects.

416 Javier Barnes, loc.cit., p. 27.

procedure in the sense that it is not so much in favour of "good" administration as against arbitrariness.[417] Lately, however, administrative procedure, as well as administrative law in general, has also taken on affirmative tasks.[418] Under this approach, discretionary power is to be exercised not only according to procedural legal standards, if and when they exist, but will take into account the complex economic and social circumstances involved in order to reach a good decision.[419]

Therefore, if governance deals indirectly with good decisions, a legal perspective of governance also refers to quality. In the main, this concerns how the administration (considering not only the executive, but also the judiciary, the legislature, local and regional governments, and other autonomous bodies) performs with the aim of reaching sound decisions. The administration will have performed to high quality if the decision-making process is conducted through proper regulatory frameworks, weighing up all the relevant factors while also explaining the reasons for making them.[420] But a good decision depends not only on the process through which it was made, but also on the results of the decision. Thus, the administration will have made a good decision if it achieves the desired effects. Therefore, governance, as a steering legal mechanism, presents a "conduct- and effect-oriented dimension".[421]

In this regard, the legal steering approach of governance functions as an analysis tool, making governance an important legal analytical concept. As argued by Kahl, this can be instrumentalised for the disciplining function of law, particularly for attaining rightful law enforcement. According to this author, this rightfulness consists of the standards of legality, optimality, effectiveness, acceptability, implementability and future viability.[422] Thus, the governance perspective is also a means of legitimising the administration by guaranteeing high-quality state performance.

As mentioned earlier, governance provides a dynamic perspective of administrative law legitimacy based on the notion of good administration as the concretisation of good governance at the administrative level.[423] Therefore, the principles of good governance (participation, properness, transparency,

417 Juli Ponce Solé, "Good Administration and European Public Law. The fight for quality in the field of administrative decisions", p. 1505.
418 Javier Barnes, loc.cit., p. 32.
419 Ibid.
420 Juli Ponce Solé, "Good Administration and European Public Law. The fight for quality in the field of administrative decisions", p. 1504.
421 Wolfgang Kahl, "What is `New´ about the `New Administrative Law Science´ in Germany?", in *European Public Law,* Vol. 16, No 1, 2010, p. 111.
422 Ibid., p. 112.
423 See Section 2.1.2.

accountability and effectiveness) can be considered as fundamental part of regulatory frameworks steering administrative action. Thus, good governance will be reached in the degree that the administration complies with the aforementioned principles when performing its activities. It is for this reason that in this study the term "good governance" is preferred when referring to the legal perspective of governance. It expresses the "ought to be" dimension of governance by referring to processes related to norms that are oriented towards steering government action in the desired direction.

To sum up, the legal approach of good governance can be considered to be acting in a legal framework by using regulatory instruments provided by the law (principles, rules, procedures and practices), with the aim of accomplishing normatively desired effects and avoiding non-desired effects.[424] It is also aimed at steering the administration to achieve the highest possible standard of efficiency (positive approach).

In relation to the scope of good governance rules, Addink has made a distinction between two different approaches: i) the functional approach; and, ii) the institutional approach. As regards the functional approach, he points out that good governance norms are embraced by the realm of public law.[425] He also suggests the desirability of using a broader rather than a narrower definition of the concept of governance.

As pointed out, a state governed by the democratic rule of law requires specific procedures, regulations and standards for legitimising the organisation of the state apparatus, the decision-making process and the contents of the decisions. According to some authors, the combination of the classic rule of law and the democratic principle, the democratic rule of law, is the main source of the good governance legal perspective.[426] From a legal perspective, good governance leads to the implementation of legal principles and rules as methods of steering and regulation. They (rules and principles) will constitute the legal parameters for the realisation of different kind of activities by the administration for the fulfilment of public tasks oriented to ensuring the well-being of citizens and the efficiency of the administration.

Therefore, the legal perspective of good governance can be conceptualised as a steering mechanism implemented in order to improve the legitimacy of the government, and the political system as a whole. As a regulatory tool of

424 Wolfgang Hoffmann-Riem, loc.cit., p. 213.
425 G.H Addink et al (eds), *Human rights and good governance*, Utrecht: Utrecht University, 2010, p. 19.
426 G.H Addink, "Principles of good governance: Lessons from administrative law", p. 36.

government action, the principles governing good governance can be established at the constitutional level, spreading their effects across the entire administration and to all regulatory levels.

4.3. THE LEGAL MEANING OF GOOD GOVERNANCE

Starting from the analysis of a perspective of governance related to the social sciences approach and based on a multidisciplinary method, this study has attempted to define the legal meaning of good governance. In so doing, three different definitions are proposed: i) a substantive definition; ii) a prescriptive definition; and, iii) an operational definition. These three definitions are interconnected and refer to the different aspects of good governance as a legal concept at different levels of abstraction. Together, they constitute the theoretical legal framework aimed at providing elements to further the discussion on the legal dimension of governance.

The substantial definition provides an analytical concept of good governance, considering it as a process involving rules aimed at steering government action in the desired direction. Hence, good governance provides a method for the analysis of legal regulatory frameworks. The prescriptive definition considers good governance as a meta-concept, and characterises it as a fundamental legal value. On the other hand, the operational concept responds to a descriptive definition of good governance, seeing it as a general umbrella principle composed of a set of other principles operating at the constitutional level. For the purposes of this study, this third definition has been adopted.

4.3.1. SUBSTANTIVE DEFINITION

From the point of view of the substantial definition, good governance is considered as a process related to rules. It is a steering mechanism acting within a legal framework and using regulatory instruments provided by the law. As a steering mechanism, it is focused on the process by which decisions are made as well as on the results of the decisions. It presents a shift from a perspective of pure legal protection and the sole application of rules to a more action-oriented perspective of law and the application of more flexible regulatory instruments.[427] As such, good governance provides a methodological perspective for the analysis of regulatory frameworks that focus on a steering approach to law.

[427] G.H. Addink, "Good governance: A norm for the administration or a citizen's right?", p. 6.

The steering approach to good governance has its major impact in the realm of administrative law. Thus, good governance may be identified as the means to strike a balance between the protection of citizens´ rights while securing public interest on one hand, and effective administration and the rule of law on the other. The application of legal principles may be applied to ensure good administration by means not only of legally-binding standards, but also (leading to) non-legally binding standards or norms of conduct (soft law) in order to protect rights of the citizens and ensure an efficient administration. This definition of good governance emphasizes the institutional legal framework within which public decisions and policies are made and implemented.

Therefore, good governance can also be seen as connected with principles, rules, procedures, and practices that structure the organisation and performances of the state apparatus around a common fundamental value: the idea of good governance.[428] As a fundamental (legal) value, good governance can also be defined also as goal in itself. This fundamental value or meta-concept encompasses other values.[429] At a high level, these values can be concretised by a set of constitutional principles.

4.3.2. PRESCRIPTIVE DEFINITION

The character of good governance as a fundamental value makes it possible to prepare prescriptive definitions of the term. According to Addink, good governance means "the proper use of the government's powers in a transparent and participative way." In essence, it implies the "fulfilment of the three elementary tasks of government: to guarantee the security of persons and society, to manage an effective and accountable framework for the public sector, and to promote the economic and social aims of the country in accordance with the wishes of the population."[430]

At the regional level, the European Commission has defined good governance in terms of public-service standards as rules, processes, and behaviours that affect the way in which powers are exercised especially around five principles: openness, participation, accountability, effectiveness, and coherence. These principles underpin democracy and the rule of law in the member states.[431]

428 G.H Addink, "Principles of good governance: Lessons from administrative law", p. 29.
429 See Section 2.1.2.
430 G.H Addink et al, *Human rights and good governance*, p. 19.
431 Commission of the European Communities, *European Governance: A white paper.* Brussels, 25.07.2001, COM (2001) 428 final, OJ 2001 C 287/, pp. 10–11.

At the international level, the concept of good governance has been defined by the UN Commission on Human Rights by describing its attributes. According to UN Commission on Human Rights: "transparent, responsible, accountable and participatory government, responsive to the needs and aspirations of the people, is the foundation on which good governance rests".[432] For the Office of the United Nations High Commissioner for Human Rights, good governance is the exercise of authority through political and institutional processes that are transparent and accountable, and encourage public participation.[433] Although not normative in character, the definitions of both the European Commission and the UN Commission on Human Rights have led to the identification of other values embraced by the concept of good governance.

Thus, in the conceptualisation adopted here, good governance can be defined as: the proper exercise of the government's powers and the accountable fulfilment of its duties to guarantee the realization of human rights and the protection of the public interest while providing transparent and participatory institutional frameworks for the effective functioning of the entire state apparatus from a democratic rule of law perspective, to ensure the equitable and dignified development of all members of the society.[434]

4.3.3. OPERATIONAL DEFINITION

As noted above, from the democratic rule of law perspective, good governance as a fundamental value can be concretised by constitutional principles. Thus, the realisation of good governance is led by the application of constitutional principles whose specification and scope vary depending on the arena in which they are applied. Based on the prescriptive definition and in the literature, five principles can be identified as the components of good governance: properness, transparency, participation, accountability and effectiveness.[435] This study argues that good governance can be defined as a general constitutional

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432 Commission on Human Rights, *Resolution 2000/64*, approved on 26 April 2000 at 66th Meeting.

433 Office of the United Nations High Commissioner for Human Rights, Good governance practices for the protection of human rights, New York: United Nations, 2007, p. 2.

434 Definition translated from the original Spanish. According to the author, good governance (*buen gobierno*) is defined as: "*el adecuado y responsable ejercicio del poder y del cumplimiento de los deberes de función estatal, garantizando la realización de los derechos humanos y la protección del interés general, proveyendo marcos institucionales transparentes y participativos para el eficaz funcionamiento del aparato estatal en el marco de un Estado Social y Democrático de Derecho, como medio para asegurar el desarrollo de todos los miembros de la sociedad en condiciones dignas y de igualdad*". Alberto Castro, "Legalidad, buenas prácticas administrativas y eficacia en el sector público: Un análisis desde la perspectiva jurídica del buen gobierno", p. 248.

435 See Section 2.1.2.

principle embracing the other principles. As a general constitutional principle, good governance would have an enduring feature as well as a general and all – embracing connotation.[436]

In a legal sense, principles are juridical generalities that require more specific normative rules and procedures to operate. Thus, principles may function to assemble or intermediate conflicting ideas. Likewise, principles generate and provide validity to norms, which operationalize them. Therefore, principles need rules to operate and at the same time provide the rationale for the rules.

In conclusion, good governance must be based on principles that can be used for developing a normative framework for the organisation of the entire state apparatus from a constitutional law perspective. Principles of good governance need norms and ideas to concretise and enrich.

4.4. FINDINGS

The concept of good governance is rooted in the international development agenda of the late 1980s. Since then, its relevance has spread to other academic disciplines, including law. There are three main elements that shape its meaning: the reference to a more active role for private actors in the public arena, the interactions between private and public actors in decision-making, and the creation of flexible regulatory frameworks. Hence, the term governance refers to a process of setting new and flexible regulatory tools for public-private interaction.

From a legal perspective, the meaning of governance embraces the mainstream definition provided by the social sciences, where it refers to regulatory structures for steering processes. In turn, the legal dimension of governance concerns regulatory mechanisms for steering the decision-making process and policy implementation. Thus, governance mechanisms are understood as new regulatory tools. The impact of governance trends can be appreciated in different fields of law, especially administrative law where a discussion on the reform of some of its basic institutions is currently ongoing. This is a consequence of the impact of public sector modernisation, the constitutionalisation of the legal system, and the internationalisation of administrative relations at the global and regional level. Good governance better reflects the normative dimension of governance from a legal perspective.

Starting from the analysis of a perspective of governance related to the social sciences approach and based on a multidisciplinary method, this study

436 G.H. Addink, "Principles of good governance: Lessons from administrative law", pp. 30–36.

proposes a legal meaning of good governance based on three different but interconnected definitions. The substantial definition provides an analytical concept of good governance, considering it as a process related to rules aimed at steering government action in a desired direction. The prescriptive definition considers good governance as a meta-concept or fundamental value. Finally, the operational concept sees good governance as a general principle, which embraces a set of other principles operating at the constitutional level.

This chapter develops a theoretical framework of good governance from a legal perspective. Alongside De Búrca and Scott, this study considers the legal approach to good governance to present significant practical and conceptual challenges for law, as well as for notions of democracy and constitutionalism.[437] The next chapter will analyse the role of constitutional principles and the democratic rule of law from a good governance perspective.

[437] Grainne De Búrca & Joanne Scott, "Introduction: New governance, law and constitutionalism", p. 4, *supra* note 379.

CHAPTER 5

GOOD GOVERNANCE, DEMOCRATIC RULE OF LAW AND CONSTITUTIONAL PRINCIPLES

This chapter analyses the relationship between the legal dimension of good governance, the democratic rule of law, and constitutional principles. As stated, the legal dimension of governance relates to regulatory mechanisms for steering governmental action. Thus, governance and good governance mechanisms can be understood as referring to new regulatory technics. Section 5.1 presents the relationship between governance in connection with new forms of regulation and traditional law. It is important here to distinguish between, on the one hand, the substantive definition of good governance whereby it is referred to as an analytical concept, which provides for a new approach for the analysis of regulatory frameworks; and on the other hand the prescriptive and operational definition, which considers good governance as a fundamental legal value that is concretised as a general principle. In this regard, Section 5.2 focuses on the relationship between good governance, the rule of law, and democracy as the three pillars of a modern constitutional state. It is argued that as a fundamental value or meta-concept, good governance can be concretised as an independent general constitutional principle whose operationalisation is connected with other constitutional principles. Finally, Section 5.3 analyses the role of the constitutional principles in the realisation of good governance.

5.1. THE RELATIONSHIP BETWEEN GOOD GOVERNANCE AND LAW

5.1.1. THESES ON THE RELATIONSHIP BETWEEN GOOD GOVERNANCE AND LAW

As previously stated, the concept of governance as referred to here is related to processes and practices that have a regulatory, normative (formal or informal) dimension. De Búrca and Scott have noted that the language of governance signals a shift away from the monopoly of traditional command and control

type legal institutions and implies either the involvement of actors other than classically governmental actors or the absence of a traditional framework of government. In sum, it represents a "shift in emphasis away from command and control in favour of regulatory approaches less rigid, less prescriptive, less committed to uniform outcomes and less hierarchical in nature".[438]

Although these new forms of regulation differ from pre-existing regulatory and legal paradigms, the true relationship between governance and law remains unclear. This is an important point because only by understanding governance and good governance from a legal perspective will it be possible to formulate systemic answers to the challenge that good governance poses for law, constitutionalism, and democracy. In this approach, as pointed out earlier, the traditional forms of regulation that are challenged by the new forms of regulation of governance – or "new governance" as De Búrca and Scott call it[439] – correspond to a restricted conception of legality, which in turn is consistent with the classic positivist paradigm that prevailed (and remains dominant) in our understanding of law, but in any case it conclusively defines what law is (from a legal theory point of view). A legal approach to good governance needs to shift away from this classic positivistic understanding of law.

At this point, the analysis turns to the perspective of legal theory. Accordingly, this study adopts the definition of law proposed by Neil MacCormick who understands it as "institutional normative order".[440] That is, as a normative order it is composed by norms.[441] From this perspective, norms are related to the constitution of practices. Hence, following a norm means acting in a manner endowed with meaning that results from behaviours corresponding to that particular norm.[442] Therefore, norms define behaviour patterns with "meaning content" based on our understanding of what ought to be done (or what constitutes right or wrong conduct) in a certain situation. Thus, according to

438 Grainne De Búrca & Joanne Scott, "Introduction: New governance, law and constitutionalism", p. 2.

439 As will be explained, according to the authors, the term "new governance" refers to new as opposed to traditional forms of regulation.

440 Neil MacCormick, *Institutions of law. An essay in legal theory*, New York: Oxford University Press, 2007, p. 11. It is important to mention that this study follows the institutional theory of law proposed by MacCormick. From this perspective, institutions are not understood as public bodies or entities but as rules (informal and formal). Indeed, public bodies are institutions because they represent a normative framework with meaning for society. For this study, the institutional theory of law has implications for our understanding of the relationship between effectiveness and the coercive force of law, as well as the way in which compliance with law is addressed. This allows for an understanding of the legal character of the new forms of regulation of (good) governance and its relationship with law.

441 In relation to the distinction between rules and principles as different kind of norms, and their relevance for good governance, see Section 5.3.1.

442 Massimo La Torre, *Law as Institution*, Dordrecht: Springer, 2010, pp. 115–116.

MacCormick, the idea of the normative concerns the conceptions of what one ought to do in recurring situations.[443] Based upon what has been argued up to this point, it is possible to affirm that a norm concerns a practice or a pattern of behaviour based on a common idea of what ought to be done. Thus, as a behaviour pattern, "norm" has a meaning content.[444]

It can be inferred that norms define a kind of order, not in the sense of commands but in the sense of orderliness.[445] Nevertheless, a normative order is not just "an actual and predictable pattern" but also a set of patterns for human conduct based on shared opinion among community members concerning what everyone ought to do.[446] When these behaviour patterns constitute a structured practice they then become an "institution". Hence, institutions can be defined as "ordered practices imputable to the same or generically similar norms"[447] or "systems of norms."[448]

Therefore, an institutionalised normative order is based on structured practices endowed with meaning by reference to shared norms of conduct or, in other terms, a "logically coordinated complex of normative statements" or institutions.[449] Thus, in MacCormick's conceptualisation, the world of human beings includes not only pure physical acts but also those that rely on the existence of institutions, the so-called "institutional facts". For MacCormick, institutional facts are "facts that depend on the interpretation of things, events, and pieces of behaviours by reference to some normative framework".[450] They are "humanly meaningful because imputable to shared human norms of conduct".[451]

Based on MacCormick's line of thinking an institutional normative order can be either informal or formal. This is to say that it can be composed of (informal) institutions dependent on mere conventions (implicit norms of conduct) or, on

443 Neil MacCormick, op.cit., p. 20.

444 Institutional theories have been developed in other academic fields. From an economic perspective Douglas North defines institutions as "the rules of the game in a society". See, Douglas North, *Institutions, institutional change, and economic performance,* New York: Cambridge University Press, 1990.

445 Neil MacCormick, op.cit., p. 11.

446 Ibid., pp. 16–18.

447 Ibid., p. 32. Thus, from MacCormick's perspective, queuing is an example of institution, as too are contracts, marriage, etc.

448 Massimo La Torre, op.cit., p. 116.

449 Ibid., p. 120.

450 Neil MacCormick, op.cit., p. 11.

451 Ibid., p. 32. Thus, the perception of a piece of plastic as a credit card and metal pieces as currency, for instance, depends on legal rules. The interpretation of these things and their use in the light of the relevant norms is what gives them their meaning. Neil MacCormick, op.cit., pp. 11–12.

the other hand, of (formal) institutions supported by articulated norms. Thus, an institutional normative order becomes formalised by reference to the explicit articulation of a norm that is made by a person conferred with authority, "either authority to decide how to apply first-tier norms, both implicit and explicit, or authority to lay down explicit norms that clarify or vary what was previously implicit".[452]

Therefore, following MacCormick's perspective, law is a formalised institutional normative order. It belongs to the genus normative order, and within that genus, to the particular species of institutional normative order.[453] State law, law as it manifests itself in a modern constitutional state, is just one form of law.[454] MacCormick holds that recognition of the bindingness of law lies in what H.L.A. Hart called the "internal aspect of conduct,"[455] which is based on a conscious assumption by participants in practices that they ought to conduct themselves in compliance with the norm. This finds expression in informal conventions rooted in the customs and usages of the citizens.[456]

Along these lines, Massimo La Torre stresses that any custom, even the habit of obedience, requires some form, however minimal, of consent.[457] Thus, he distinguishes between an objective and subjective binding force of norms. The former is related to the space of action created by the norms. Hence, norms are binding to the extent that compliance therewith is a condition for the existence of the possibilities of action opened by those norms. Hence, "anyone who chooses a certain course of action is bound by the rules that make possible the action itself".[458] On the other hand, the subjective binding force coincides with the motivation to act in a particular way. Here, the main reason for observing norms is that of "wanting to enter the sphere of reality that those norms constitute."[459] From there, it follows that law is always to a certain extent subject to the will or conscious intention of the actors. In this regard, it can be affirmed that the effectiveness of law depends not only on its enforceability but also on its acceptability. Thus, legal norms are accomplished not solely because of their coercive force but also because citizens see them as legitimate.[460]

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452 Neil MacCormick, op.cit., pp. 24–25.

453 Ibid., p. 13.

454 According to MacCormick, there are other forms of law, such as international law, or the law of emerging politic-legal forms such as the European Union, among others.

455 H.L.A. Hart, *The concept of Law*, Oxford: Clarendon Press, 1994, p. 56.

456 Neil MacCormick, op.cit., p. 13.

457 Massimo La Torre, op.cit., pp. 38–39.

458 Ibid., p. 127.

459 Ibid., p. 128.

460 For more detailed information about acceptability as an element of effectiveness as a good governance principle see Section 6.3.2.

In reference to the above line of argument, MacCormick concluded that the essence of law is not to be a coercive system, but it is a defining character of states to be territorial and coercive associations. As a consequence, state law is typically manifested as a coercive as well as an institutional form of normative order.[461] However, the validity of law, the recognition of what law is within a legal system, is based on the constitution as the highest and ultimate expression of articulated normative order, which implies that it has to be respected as a whole, and that legal norms are to be enacted in accordance with its principles and rules.[462] According to MacCormick, this brings us back to a new variant on Kelsen's *Grundnorm* or Basic Norm (or *Norma Fundamental*).

In recent years, many scholars have explored the specific relationship between the new forms of regulation that characterise governance and law (as manifested in modern constitutional states). In this regard, one interesting theory is that developed by De Búrca and Scott. They have sketched out three tentative theses, assigning a descriptive and a normative dimension to each. These theses are: a) the gap thesis; b) the hybridity thesis; and, c) the transformation thesis. According to the authors, they offer a framework for thinking not only about the actual nature and the role of law in new governance, but also about its potential nature and role.[463]

The gap thesis stresses the idea of the existence of a gap between formal law and the practice of governance. The authors point out that formal law, including constitutional law, is blind to the new forms of governance. Thus, "the law either has not caught up with developments in governance, or it ignores developments which not are in conformity with its presuppositions, structures and requirements".[464] De Búrca and Scott hold that from a normative dimension of the gap thesis, two strands can be identified: the resistance capacity perspective and the reduced capacity perspective. The former considers law as an obstacle to new forms of governance, and that its premises are not aligned with the premises of new governance. Conversely, the latter argument is concerned about

461 Neil MacCormick, op.cit., p. 54.

462 Ibid., pp. 55–57. In this regard, it is of interest to note what MacCormick has to say in relation to the character of state-law as enforced law and the role of courts and tribunals in determining what law is. Thus, "if it is a defining feature of state law that it is a coercively enforced institutional normative order, then the possession of an institutionalised system of courts and other tribunals is a part of that defining feature." Enforcement of law in individual cases has to be mediated by the judgments of courts and tribunals. They determine law meaning by interpreting it in accordance with constitutional provisions. However, in determining what law is as a question of legal theory, "judges have no particular standing as legal theorist, despite their necessary authority as practical jurists" regarding concrete cases.

463 Grainne De Búrca & Joanne Scott, "Introduction: New governance, law and constitutionalism", p. 4.

464 Ibid.

what the law cannot any longer do in the face of governance. According to this perspective, the capacity of law to both steer the normative direction of policy and secure accountability in governance is at risk. Thus, there is concern that the new forms of governance may evade traditional legal mechanisms for securing accountability, and even constitutional limits.

The hybridity thesis acknowledges the co-existence of law and new governance and searches for different ways of securing their interaction. From this perspective, law and governance are mutually interdependent and mutually sustaining. According to De Búrca and Scott, this hybrid relationship can be understood as an interim phenomenon, a transition from a formal legal order to a completely new regulatory regime embracing good governance techniques. At the same time, hybridity can be considered a long-term phenomenon and not simply a passing phase. In addition, the authors discern three versions of the hybridity thesis: the baseline or fundamental normative hybridity; the functional or developmental hybridity; and, the default hybridity, or governance in the shadow of law. These three varieties of the hybridity thesis can be understood as closely related and overlapping.

According to fundamental hybridity analysis, new governance is conceived as complementary to traditional forms of law and regulation. This thesis insists on a continuing role for constitutional commitments and established rights. In turn, the instrumental hybridity thesis pays attention to new governance techniques as tools for developing or applying existing and traditional legal norms. New governance provides the institutional framework for the development of the traditional forms of regulation. Meanwhile, the default hybridity argues that the law represents a default penalty, which applies only in case of failure to conform to new governance demands.

In the last thesis, the so-called transformation thesis, the new forms of governance demand a re-conceptualisation of the traditional understanding of law and the role of lawyers. This thesis seeks to avoid an excessively formalistic and positivistic account of law. It views governance and law as independent but interacting. Therefore, its focus is on the mutual interaction, since law is shaped by the characteristics of governance and vice versa, as well as by good governance, to the extent that this is an expression of the new forms of governance, and concerns the application and development of legal standards (principles, rules, procedures and practices) oriented to steering government action. Thus, reconceptualising law requires thinking on how good governance is generating and operating within the context of a normative legal order.

5.1.2. THE THREE ASPECTS OF THE RELATIONSHIP BETWEEN GOOD GOVERNANCE AND LAW

This section clarifies what the relationship is between new (good) governance regulatory techniques and law. It does so mainly by reflecting on what law is and how it is manifested in the modern constitutional state, from a legal theory perspective.

The definition of law utilised here is based on the institutional theory of law perspective proposed by MacCormick, conceptualising law as (formalised) institutional normative order. From this perspective, "state-law," understood as the law as it manifests itself in the modern constitutional state, is just one among several forms of law. In this regard, it can be said that state-law is a sub-species within the species of law as institutional normative order (which in turn corresponds to the genus normative order). So, how can the new good governance regulatory techniques be placed in relation to law?

As stated from the beginning of this chapter, governance has a legal dimension characterised by the development of new and more flexible regulatory instruments in contrast to more traditional command and control forms. Therefore, the new forms of governance also belong to the genus normative order. However, for this study, these new forms of regulation also fall within that genus (as does law) of the species institutional normative order. Consequently, the new forms of regulation of governance are law. But it is law of a different kind to that which is traditionally manifested in the modern state. Thus, "state-law" (in the sense of law as traditionally expressed in the modern state) and new governance are not "different species of normative ordering" as Walker and De Búrca contend[465], but they are sub-species within the same (general) species of law as institutional normative order.

In this regard, Walker and De Búrca stress some common traits between the new forms of governance and traditional law (or state law, as they refer to), which, this study contends, are core-defining features of law as institutional normative order. Hence, after classifying new governance and law as members of the genus normative order, the scholars recognise that they both have in common two "supplementary" characteristics (that they place under the umbrella of "accessibility" but which are crucial for the understanding of law as institutionalised normative order and which are related to its formalisation). Thus, Walker and De Búrca state that "the norms referred to under the rubric of

[465] Neil Walker & Grainne De Búrca, "Reconceiving law and new governance", in *Columbia Journal of European Law*, Vol. 13, No 3, Summer 2007, p. 533.

both law and new governance must be expressly articulated".[466] As stated before, an institutional normative order becomes formalised by reference to the explicit articulation of norms, either regarding the application of first-tier (explicit and implicit) norms or laying down explicit norms in order to clarify what was previously implicit.[467]

In addition, the scholars point out that law and the new forms of governance are the subject of an "internal aspect of conduct" on which the bindingness or "ought-to-be" character of law relies.[468] Thus, the internal aspect of conduct is "the focus of and cue for a conscious attitude of acknowledgement by affected social actors of the putative force of the norm's claim to bindingness or authoritative guidance".[469]

Likewise, law and new governance norms "must be publicly promulgated in timely fashion". Hence, according to the common traits described, Walker and De Búrca conclude that law and new governance are normative orders operating within a framework of "publicly reflexive universalizability".[470] Hence, according to these authors, while the universalisability (understood as regularity and continuity) of both orders is an intrinsic consequence of their normative dimension, their reflexive character corresponds to the possibility of adjusting norms to new contexts of application in order to effectively respond to social changes.[471]

Hence, for this study and based on Walker and De Búrca, new governance is an institutional order as well as a normative one. It is its formal character – through the explicit articulation of norms and its calls to operate within a framework of universalisability – that lead us to conclude that the new forms of governance are indeed law, but law of a different kind from that traditionally manifested in the modern state. Thus, the difference between state law and new governance is none other than the difference between two different kinds of laws, as can be inferred from Walker and De Búrca's thesis. In sum, it might be said that this is the difference between traditional forms of regulation (or traditional law) and new forms of regulation (or new law).

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466 Ibid., p. 534.

467 See Section 5.1.1.

468 The "internal aspect of conduct" is an important element of the institutional theory of law. See Neil MacCormick, op.cit., pp. 42-46.

469 Neil Walker & Grainne De Búrca, loc.cit., p. 534. According to the authors, the conscious attitude of acknowledgement resulting from the "internal point of view" may in turn result in compliance by the affected actors with the norm, their violation of these requirements, or in their strategy of reinterpretation or reform of its acknowledged terms.

470 Neil Walker & Grainne De Búrca, loc.cit., p. 534.

471 Reflexivity is another characteristic of the neo-institutional theory of law. From this perspective, norms, in order to be applied, have to be reinterpreted in light of the concrete situation. See Massimo La Torre op.cit., p. 239.

In this regard, following the Walker and De Búrca's line of thinking, it is possible to argue that the difference between traditional law and the new forms of governance (new law) is their differing commitment to universalisability and reflexivity. So, while traditional law tends to be closer to the aim of ensuring normative continuity over both time and space (universalisability), new governance is more closely aligned to the need for normative adjustment in relation to the purpose to respond to new social demands (reflexivity).[472] However, Walker and De Búrca conclude that law and new governance have more in common than is usually appreciated, in that the relationship between them is one of mutual influence and penetration.[473]

Thus, the institutional theory of law (given its concern for the normative value of social contexts in the application of law and its claim for shifting away from rigid formalism) is that best describes the normative character of the new forms of regulation of governance and their relationship with law. On this basis, this study argues that new (good) governance forms of regulation are expressing a new form of law. Thus, as Sabel and Simon point out, new governance can be conceived as "transformative law on the innovative and practice of courts and administrative bodies".[474] Therefore traditional law and new (good) governance are subsets within the (general) species of law as institutional normative order. Or perhaps it is more accurate to say that in the modern state, law (or in other words, modern state law) manifests itself through two different set of norms: one set oriented to ensuring social regularity (which this study calls traditional or classic law) and another one geared towards social responsiveness.

As stated before, the legal dimension of governance relates to regulatory frameworks, and hence to legal norms; this equates to rules and principles. As explained by De Búrca and Scott, the idea of governance as a new form of regulation has certain key characteristics, such as an emphasis upon the promotion of diversity, the importance of provisionality and revisability, and the goal of policy learning, as well as involving citizen participation (affected actors or stakeholders) and openness as a means of information-sharing and learning. It can also involve the new forms of governance establishing operational systems that promote coordination instead of rigid hierarchical structures of government

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472 The idea of social responsiveness refers us to the responsive theories of law (from a sociological-legal perspective). On this, see Philippe Nonet & Philip Selznick, *Law & society in transition. Toward responsive law*, New Brunswick: Transaction Publishers, 2001.

473 Neil Walker & Grainne De Búrca, loc.cit., pp. 535–536.

474 Charles F. Sabel & William H. Simon, "Epilogue: Accountability without sovereignty", in Grainne De Búrca and Joanne Scott, *Law and New Governance in the UE and the US*, Portland: Hart Publishing, 2006, p. 409.

authority and the use of non-binding rules or soft law.[475] From the perspective of this study, this idea reinforces the legal dimension of governance by reference to a normative framework that acts as the legal parameters for steering the activities of the government, from which it can be said that good governance is a form of governance that embodies processes that are proper, transparent, participatory, accountable and effective.[476]

What the above shows is that all these new forms of regulation or forms of governance regulation, to a greater or lesser extent, seek to concretise the principles of good governance in an innovative way, either by protecting social and economic rights, implementing more comprehensive forms of accountability, promoting participation, or pursuing effectiveness through the implementation of end-oriented forms of regulation. They reflect a concern for processes, flexibility, and quality as new forms of legitimising state interventions. Thus, in the perspective taken here, the principles of good governance underlie or guide these new regulatory techniques. As such, it can be argued that these new forms of regulation address the realisation of good governance. It is for this reason that this study refers to these new forms of regulation – which call for normative adjustment to steer government action as an effective response to the demands of modern society – as good governance. Thus, understood in this way, good governance has constitutional foundations.[477]

With these ideas in mind, three different kinds of relationships between good governance and law can be established. These three relationships are not mutually exclusive but different (and complementary) ways to understand the same phenomenon. First of all there is an "inclusion relationship" between good governance and law, whereby good governance is a "subset" contained in the set "law", and law is the set in the species of "institutional normative order". So, good governance and traditional state-law are (strict) subsets of the set law to the extent that each one is a partial order of the set law as an institutional normative order. Correspondingly, law is a superset of the subset good governance and the subset traditional-state law. Thus, the relationship between good governance and traditional state-law is the relationship between two (sub)sets that share some elements, the others remaining outside and exclusive to each one. Given that they mutually influence one another, this study defines their relationship as "relative complementary."

475 Grainne De Búrca & Joanne Scott, "Introduction: New governance, law and constitutionalism", p. 3.

476 Samantha Velluti, *New governance and the European employment strategy*, London-New York: Routledge, 2010, p. 18.

477 Neil Walker, "EU constitutionalism and new governance", in Grainne De Búrca and Joanne Scott, *Law and New Governance in the UE and the US*, Portland: Hart Publishing, 2006, pp. 33–34.

Second, good governance can also be understood as a "mode" of looking at law, not as method but as "approach". Thus, the relationship between good governance and law is the same as the relationship between "study approach" and "subject of study". As a new approach to law, the subject of study of good governance is the distinction between new regulatory techniques and traditional forms of regulation. Good governance is based on an interdisciplinary method and a steering approach to law.[478] Thus, considering law as steering mechanism, good governance is more focused on the process by which government powers are exercised and legal duties fulfilled. So, good governance pays attention to decision-making processes and results, looking to quality as the legitimising criteria for the performance of government.[479] Here, good governance relates to the notion of governance as method of regulation.

At this point, it is worth mentioning that the institution of the ombudsman, by issuing (non-binding) recommendations and exercising the so-called "magistrature of persuasion", is in many cases filling the gaps between the traditional and new forms of regulation. Thus, the ombudsman not only provides a new mechanism of control and accountability, but also fosters the implementation of new regulatory techniques inspired by the principles of good governance. In this regard, as well as contributing to the realisation of good governance, the ombudsman can be defined as a good-governance institution insofar as it steers the administration by applying standards based on principles of good governance, while also developing standards based on principles of good governance as steering norms for the administration.[480]

Third, as stated before, the new and more flexible regulatory instruments, which correspond to the good governance approach, have in turn as underlying principles the so-called legal principles of good governance. These specific principles embody good governance as a general umbrella principle located at the constitutional level, legitimising the possibilities of action opened by the new governance forms of regulation but also orienting the actions of the entire state apparatus so as to align these actions with the specific principles of good governance that also have constitutional status.[481] As a general principle, good

478 See Section 4.3.1 regarding the substantive defection of good governance.

479 The new governance approach to public law is in the line with the steering approach proposed by the new administrative law science developed by German scholars, who have in Prof. Schmidt-Assmann one of its most prominent representatives. The good governance approach proposed here follows the same line of thinking.

480 The good governance legal approach allows a better understanding of the role of the ombudsman as a new controlling institution and the assessment of the conduct of the administration through good governance-based standards. Regarding the application of principles of good governance by the ombudsman from a comparative perspective, see Part III & Part IV.

481 On the realisation of good governance through constitutional principles, see Section 5.3.4.

governance and the principles of good governance concretised the idea of good governance as a fundamental value.

As Addink has pointed out, principles and values are connected to each other, especially when it comes to the balance of competing principles and values. Values are often regarded as the grounds for principles.[482] In this conceptualisation, the difference between principles and values is reduced to just one point. Norms are distinguished between axiological norms and deontological norms. The former refers to an evaluative criterion or value. The latter concerns the existence of a rule or principle. What, under a system of values, is prima facie the best, is under a system of principles what prima facie ought to be; and what under a system of values is definitively the best, is under a system of principles what definitively ought to be. Thus, principles and values are distinguished by their respective deontological and axiological characteristics only.[483]

Therefore, as a value, good governance has an axiological character and is considered prima facie as the best. Understood as such, good governance can be considered as a goal in itself. It functions as a mediate normative source as it operates by informing legal norms within the entire legal order.[484] In the realm of legal norms, good governance as a value can be concretised as a general constitutional principle. As a general principle, good governance, but also the specific legal principles of good governance, has an ought-to-be character. That is, they define a purpose to be fulfilled. They have a guiding, directive function to determine behaviour.[485] Therefore, the general principle of good governance and the principles of good governance are legal norms that operate within the normative system, represented by the modern constitutional state as the institutional normative order.

In the context of this study, good governance *stricto sensu* refers to the legal principles governing, both explicitly or implicitly, all these new forms of processes and regulations, which in turn leads us to the constitution as the exclusive source of ultimate authority for the legal system, and thus to the validity and legitimation of good governance techniques. This, in turn, serves to explain the relationship between good governance and the democratic rule of law and constitutionalism.

482 G.H. Addink, *Good governance. Concept and context*, pp. 71–72.
483 Robert Alexy, op.cit., pp. 91–92.
484 Ángel Garrorena Morales, loc.cit., p. 36.
485 Humberto Ávila, op.cit., pp. 40–41. For a more detailed description of the definition and function of principles as legal norms, see Section 5.3.2.

5.2. GOOD GOVERNANCE AND DEMOCRATIC RULE OF LAW

5.2.1. THE RULE OF LAW

Good governance can be seen as one of the cornerstones of the modern constitutional state.[486] The modern state is one organised and limited by law, whose development is linked to the fundamental notions of rule of law and democracy, the democratic rule of law. However, from a theoretical perspective, the interpretation of their conceptual meaning and how they are related is subject to discussion.

The notion of the rule of law has analogous expressions such as *estado de derecho* (or *rechtsstaat*, or *état de droit*, or *stato di diritto*), each of them with a different interpretation due to the diversity of cultural contexts and the relative independence of the theories advanced, which make developing a univocal definition a no easy matter. From a narrow approach, the notion of rule of law embraces only principles of procedural fairness. From a broader approach, it also encompasses more substantive specifications of the elements that comprise the rule of law. Generally speaking, the difference between a narrow and a broader approach to the concept of rule of law corresponds to the rough division between the common law and civil law traditions.[487] Nevertheless, these perspectives have gradually converged.[488] Therefore, whatever differences remain, there are common core elements that enable a generally accepted category of "rule of law".

The origins of the rule of law are grounded in the need to restrain public power in benefit of individuals. This alludes to "how to intervene (through law) on power so as to strengthen individual´s positions".[489] The rule of law emerged as the particular solution to the problem of the relationship between power, law, and individuals. It is the control of power through law, the legalisation of power. Hence, the first (and most) important characteristic of rule of law is that it is assigned two specific functions: the checking of arbitrary power and the institutional protection of human rights.[490] Ultimately, the rule of law advocates the protection of individual rights as the primary aim of political institutions and legal bodies.[491]

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486 G.H. Addink et al, *Human rights and good governance*, 2010, p. 11.
487 G.H. Addink, *Good govenance. Concept and context*, pp. 75ff.
488 Ibid., p. 87.
489 Pietro Costa, "Rule of Law: A Historical Introduction", in Pietro Costa & Danilo Zolo, *The Rule of Law. Theory, History and Criticism*, Dordrecht: Springer, 2007, p. 74.
490 Danilo Zolo, "Rule of Law: A critical reappraisal", in Pietro Costa & Danilo Zolo, *The Rule of Law. Theory, History and Criticism*, Dordrecht: Springer, 2007, p. 57.
491 Ibid., p. 4.

From this perspective, Danilo Zolo defines the rule of law as a normative and institutional structure of the modern state within which the legal system is entrusted with the task of guaranteeing individual rights, by constraining the natural tendency of political power to expand and act arbitrarily.[492] According to the scholar, the rule of law leads to the establishment of two fundamental principles: the principle of "distribution of power" and the principle of "differentiation of power".[493]

The principle of distribution of power is oriented to limiting the powers of the state by means of explicit restraints, with the aim of enlarging the scope of individual freedoms. This principle has been historically expressed by the following normative or institutional modalities: a) the unicity and individuality of the legal subject (according to which all individuals are subjects of the legal system under the rule of law, and consequently are granted, in principle, equal status as holders of rights); b) the legal equality of individual subjects (all individuals are equal before the law); c) the certainty of law; and, d) the constitutional acknowledgement of fundamental rights.[494]

On the other hand, the principle of differentiation of power stands for the functional differentiation of the political-legal system from other social subsystems (confirming its high functional autonomy with respect to ethical-religious paradigms), as well as for the delimitation, coordination, and legal regulation of the state´s functions. The principle of differentiation is expressed by: a) the delimitation of the scope of political power and law enforcement (excluding the functional interference of religion and explicitly defining the functional scope of the legal-political system by limiting the state´s internal sovereignty and establishing a clear-cut boundary line between the public and the private); b) the separation between legislative and administrative institutions (interpreted as a strategy for the separation of powers, or separation of functions, aimed at guaranteeing balance between the state´s organs); c) the autonomy of the judiciary; and d) the principle of legality (under which the acts and decisions of public powers are subject to law).[495]

492 Ibid., p. 19.
493 Idem.
494 Ibid., pp. 22–26.
495 Along with the principle of legality, Zolo refers to the principle of "statutory reservation" according to which only the legislative power is entitled, in principle, to enact norms, excluding the executive and judiciary from this function. In the same logic, he states that under the rule of law the legislative, as the organ entitled to enact general norms, is granted functional primacy over the other branches of the state. In addition, he also cites the obligation of the legislative power to respect individual rights as another normative modality of the principle of differentiation. Danilo Zolo, loc.cit., pp. 26–29.

Therefore, it can be stated that the rule of law (the idea of *Rechtsstaat* as incorporated in the modern constitutional state)[496] is characterised by: legal certainty, separation and balance of powers, independent judicial control (accountability), protection of fundamental rights, and the principle of legality. These are core elements of the rule of law. For the purposes of this study, a brief focus will be placed on the principle of legality. Depending on the theoretical perspective from which the principle of legality is conceptualised, it can have different implications for other elements that define the rule of law as well as for our understanding of concepts such as discretion, effectiveness, and human rights protection.[497] It will also have implications on our understanding of the role of the ombudsman as a controlling institution.[498]

The principle of legality as a strategy to control power through law has had, and continues to have, a capital importance in the development of the rule of law, affecting both its meaning and purpose.[499] In this regard, Luigi Ferrojoli has pointed out that "rule of law" as a term is usually given two different meanings. In the broadest or formal sense, it means any legal system in which public powers are conferred by law and exercised in the forms and by means of the procedures that the law prescribes. On the other hand, in the substantive sense, rule of law refers only to those legal systems in which public powers are also subject to law not only in their form, but also in the content of their decisions. Hence, in accordance with this meaning, rule of law denotes legal and political systems in which all powers are constrained by substantive principles normally provided for by the constitution, such as the separation of powers and fundamental rights.[500]

Thus, the first effect of the substantive concept of the rule of law concerns the theory of validity of law. In the constitutional state, the principle of legality is not only a formal one. Legislation is subject not only to formal norms regarding their production, but also to substantive ones regarding their meaning. Therefore, although a norm may be formally valid and thus in force, it may be substantively invalid because its meaning clashes with a substantive constitutional norm. Hence, the rule for recognising validity of law is subject to what Ferrajoli calls the principle of substantive legality (while the rule for recognising a norm as in force lies on the principle of formal legality, which concerns the form of law making exclusively – its formal source of production). Thus, according to the

496 G.H. Addink, *Good govenance. Concept and context*, p. 80.

497 See Rafael de Asis Roig, "Sobre el concepto de Estado de derecho", in *Ius et Veritas*, No 33, 2006, pp. 324–331. From the same author see also, Rafael de Asis Roig, *Una aproximación a los modelos de Estado de derecho*, Madrid: Dykinson, 1999.

498 For a theoretical perspective of the ombudsman as a controlling institution, see Chapter 3.

499 Pietro Costa, loc.cit., p. 134.

500 Luigi Ferrajoli, "The past and the future of the rule of law", in Pietro Costa & Danilo Zolo, *The Rule of Law. Theory, History and Criticism*, Dordrecht: Springer, 2007, p. 323.

principle of substantive legality (or legality in a broader sense), the contents or meanings of the norms produced must be consistent with the principles and rights laid down in the constitution.[501] In other words, legal norms have to be in accordance with constitutional principles.

From Ferrajoli's perspective, the substantive conditions of the validity of laws (that the pre-modern paradigm found in the principles of natural law and the earlier positivist paradigm replaced with the merely formal principle that valid law is enacted law) enter the legal system as positive principles of justice enshrined in norms of a higher order than a legislation: the constitution. Hence, if the rule of law is based on the principle of substantive legality, the laws are themselves regulated by norms on their production, with their own validity conditioned by norms of a higher order that regulate both their meanings and their form. It is on these substantive norms on meaning that the foundations of the constitutional state lie.[502]

At this point it is worth making two remarks regarding the substantive definition of rule of law and the principle of legality as it concerns the legal perspective of good governance. First, if the validity of the law is based on "substantive norms on meaning" and if the constitution is the exclusive source of ultimate authority for the legal system, then good governance should derive its legitimacy from the constitutional framework within which it operates.

Therefore, the general principle of good governance and the specific principles of good governance should manifest themselves as constitutional norms. If principles of good governance are available as constitutional resources, then it is the constitution itself that provides a legitimating framework for the development and achievement of good governance. From this perspective, the constitutional principles that constitute the core of good governance should be isolated so that their notion and scope can be clearly identified and define.[503] Only then does it become possible to develop new forms of regulation sheltered by the constitution, leading to a systemic rethinking of legal and constitutional categories.

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501 Ibid., p. 328.

502 Ibid. Ferrajoli also specifies that constitutional state and the rule of law are not synonyms *strictu sensu*. He says that the rule of law in the strong sense implies that the law is subjected to normative principles such us fundamental liberties and separation of powers. "The bi-univocal tie (…) between rule of law in the strong sense and constitutionalism stems from the fact that written and rigid constitutions have made these principles positive in nature. In doing so, they have been given legal guarantee to the subordination of public powers to these principles, not only in terms of spontaneous alignment by judges and legislators but also in their formulation in positive constitutional norms and the control by a constitutional court on their possible violation." Luigi Ferrajoli, loc.cit., p. 350 cf.2.

503 On the nature and scope of the general principle of good governance and the principles of good governance as constitutional principles, see Chapter 6.

The second remark is in relation to the principle of substantive legality and the theory of validity of law. To paraphrase Ferrajoli once again, it should be noted that shifts in legal paradigms are the result not only of political revolutions and institutional innovations, but also of theoretical revolutions that changed the conception of law in order to respond to the social needs legitimising it. In this regard, substantive conditions of validity of laws (substantive legality) should be understood as referring not only to the content of the norm produced in a "material" sense, but also to qualitative aspects of how the norm is made.[504] If good governance is related to (political, managerial and administrative) processes of formation of regulatory frameworks for the proper exercise of public powers, then a logical step in the validity of norms is a concern for the quality of the process of formation of the law, a dimension that should not be mistaken with the "procedural" one related to "norms on the formal source of production" (formal legality).

Summing up here, the rule of law (the *Rechtsstaat*) is a meta-concept or fundamental value, which is concretised as a general constitutional principle (like democracy and good governance). As such, good governance can give more adequate answers to the normative side of the functioning of the public sector, which is subject to the rule of law.[505]

5.2.2. THE PRINCIPLE OF DEMOCRACY

Democracy is about government and governance.[506] In general terms, it can be said that it is a political form of government in a state, exercised by the people either directly (direct democracy) or indirectly by means of elected representatives (representative democracy). From a narrow approach, democracy basically has a procedural dimension associated with political equality and participation. From a broader approach, democracy also has a substantive dimension that encompasses respect for civil and political rights as well as social and economic rights. Both the narrow and the broader approaches to democracy concern the development of the concept in connection to the evolution of the modern state from the classic liberal state to the democratic and social *rechtsstaat* or democratic welfare state.[507] The development of democracy shows that it has qualitative elements, which becomes clearer when referring to

504 This idea is also based on the thesis of July Ponce Sole in relation to the duty of good administration and its achievement through the administrative procedure. See Juli Ponce Solé, *Deber de buena administración y derecho al procedimiento administrativo debido*, *supra* note 136.

505 G.H. Addink, *Good governance. Concept and context*, p. 90.

506 Ibid., p. 91.

507 See Section 5.2.3.

democracy as either a liberal democracy or a social (welfare state) democracy.[508] Although a social democracy also pertains to the concept of liberal democracy, the distinction lies in the extent to which the elements of democracy are applied.

On this, the literature identifies that as a minimum, democracy requires: universal suffrage; free, competitive and fair elections; more than one political party; and alternative sources of information. These four basic elements refer to political equality and public participation as the foundations of democracy as a political system. It is sustained that once these elements are met, a democratic system then has to achieve three main goals: political and civil freedom, popular sovereignty (in terms of direct or indirect control over public policies and the officials who make them), and political (and underlying economic and social) equality through the legitimate and lawful functioning of stable institutions. The compliance with standards of good governance is also considered part of the equation.[509] Thus, it is in relation to the achievement of its goals that democracy can be assessed in terms of quality.

Diamond and Morlino have identified eight elements that define the qualitative aspects of democracy. These dimensions can be grouped into three different sets. The first one corresponds to the procedural dimension: rule of law, participation, competition (in free, regular, and fair elections) and accountability, both horizontal and vertical. The second relates to the substantive dimension: respect for civil and political freedoms, as well as economic and social equality. And the third concerns responsiveness, which is related to a broader concept of participation and accountability through the connection between public policies and the demands and preference of citizens.

The different elements of democracy vary in their specific forms of institutional expression and in their degrees of development. But they are all present, to varying degrees, in different models of democracy. In addition, these elements have evolved to add new content to the core values of democracy. Hence, for example the principle of equality has evolved from political (and formal) equality to include substantial aspects of social and economic equality. A tension exists between both approaches to equality.[510] It is said the while the former is connected to the idea of self-government, the latter is connected to good government.[511]

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508 G.H. Addink, *Good governance. Concept and context*, p. 91.

509 Larry Diamond & Leonard Morlino, "Assessing the quality of democracy: Introduction", in Larry Diamond & Leonard Morlino (eds), *Assessing the quality of democracy*, Baltimore: The Johns Hopkins University Press, 2005, p. xi.

510 Dietrich Rueschemeyer, "Addressing inequality", in Larry Diamond & Leonard Morlino (eds), *Assessing the quality of democracy*, Baltimore: The Johns Hopkins University Press, 2005, pp. 47–61.

511 Richard Barron Parker, "Two visions of democracy", in Ann E. Cudd & Sally J. Scholz (eds), *Philosophical perspectives on democracy in the 21st century*, New York: Springer, 2014, pp. 76–77ff.

Similarly, there is a conflict between the values of freedom and equality, it being the role of a democratic government to promote both.[512] In this respect, arguably, it seems that the realisation and protection of political freedoms is part of the basis (and a pre-condition) of democracy. There is an integral connection between both concepts.[513]

It is important to mention that the procedural dimensions of democracy mainly concern rules and practices.[514] They show the connection between democracy and the concept of the rule of law. With regard to this connection, a first point to make is that democracy is not only a kind of political system but also (as good governance) a goal in itself. As a form of government, "democracy found its most suitable instrument in the formal mechanisms of the rule of law."[515] Therefore, as with the rule of law, democracy is a meta-concept or fundamental value of the modern constitutional state.

As pointed out by Koopmans, historical evidence indicates that democracy goes hand in hand with the rule of law. Then, where one of the two disappears, the other too is in danger of being discarded.[516] However, there is also a contradiction between rule of law and democracy. While democracy is based on the majority rule, the rule of law lies in the protection of individual rights. According to the majority rule, every opinion must have an opportunity to become more generally accepted so that, "the minority of today can be the majority of tomorrow".[517] Dahl states that freedom of expression and protection of the minority are part of the prerequisites of a democratic government.[518] The position of minorities in relation to majorities may also be considered a qualitative aspect of democracy.[519]

When discussed with regard to the theory of democracy, the rule of law should be conceived not only as a generic characteristic of the legal system but also, and mostly, as the legally based rule of a democratic state.[520] According to O´Donnell, it entails the existence of a legal system that is itself democratic in

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512 Emily R. Gill, "Democracy: A paradox of rights?", in Ann E. Cudd & Sally J. Scholz (eds), *Philosophical perspectives on democracy in the 21st century*, New York: Springer, 2014, pp. 15–20.

513 David Beetham, "Freedom as the foundation", in Larry Diamond & Leonard Morlino (eds), *Assessing the quality of democracy*, Baltimore: The Johns Hopkins University Press, 2005, pp. 33–34.

514 Larry Diamond & Leonard Morlino, loc.cit., p. xii.

515 Pietro Costa, loc.cit., p. 116.

516 Tim Koopmans, *Courts and Political Institutions. A comparative view*, Cambridge: Cambridge University Press, 2003, p. 123.

517 Ibid.

518 Robert Dahl, *On democracy*, Chapter 5, New Heaven: London, 1998.

519 G.H. Addink, *Good governance. Concept and context*, p. 94.

520 Guillermo O´Donnell, "Why the rule of law matters", in L. Diamond & L. Morlino (eds), *Assessing the quality of democracy*, Baltimore: The Johns Hopkins University Press, 2005, p. 7.

three senses. First, as already mentioned, it upholds the political rights, freedoms and guarantees of a democratic system. Second, it upholds the civil rights of the whole population. And third, it establishes networks of responsibility and accountability which mean that all public and private agents, including the highest state officials, are subject to appropriate, legally established controls on the lawfulness of their acts.[521] Thus, there is a link between democracy, rule of law, and the development of institutions for accountability, of which the ombudsman is one.

Scholars have discerned several varieties of democracy. From them, the distinction between direct democracy and representative democracy is important. In a direct democracy, citizens directly participate in decision-making about the acts of the administration rather than relying on representatives. Direct democracy refers to any form of government based on a theory of civics in which all citizens can directly participate in the decision-making process.[522]

In modern democracies, citizens ought to have opportunities to participate in decision-making in a wider sense; that is, not only regarding adjudicative procedures in individual decisions, but also in the process and creation of the legal and policy frameworks that govern administration. Thus, initiatives for enhancing participation in the policy-making and policy-implementation processes take place, for example, at the local level by giving new powers to local authorities and increasing opportunities for communities and neighbours. Opportunities for public participation also take shape through government consultation mechanisms as part of the policy-making process, as well as through various forms of self-organisation that emerge from the bottom up.

This broader participation denotes that government has to take into consideration the preference of the citizens. It implies, to a certain extent, that "the democratic process induces the government to form and implement the public policies that the citizens want."[523] The public policies that are adopted and the consequences of their implementation affect the future preferences of citizens, which will be reflected in their voting behaviour during the elections. From this perspective, institutional arrangements are important to reliably connect citizens to those who make and implement public-policy, thereby making them accountable.[524]

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521 Ibid.

522 G.H. Addink, *Good governance. Concept and context*, p. 93.

523 G. Bingham Powell, "The chain of responsiveness", in Larry Diamond & Leonard Morlino (eds), *Assessing the quality of democracy*, Baltimore: The Johns Hopkins University Press, 2005, p. 62.

524 Ibid., pp. 63ff.

On the other hand, representative democracy concerns the selection of government officials by the citizens and by those represented. When the head of state is also democratically elected, the state is called a democratic republic. In a representative democracy the most common characteristic is the election of the candidate with a majority of the votes. Some representative democracies also include elements of direct democracy, such as referendums, legislative initiative, among others. Parliamentary democracy is a form of representative democracy where parliamentary representatives, as opposed to a "presidential rule", appoint government. In presidential systems, the president is both head of state and the head of government and is elected by the voters. In parliamentary democracies, the government is exercised by delegation to an executive ministry and subject to checks and balances by the parliament, which is elected by the people.[525]

As already mentioned, a liberal democracy is a representative democracy in which the elected representatives exercise decision-making power subject to the rule of law. It is usually curbed by a constitution that emphasises the protection of the rights and freedoms of individuals and which places constraints on the leaders and on the extent to which the will of the majority can be exercised against the rights of minorities.[526] Liberal democracy (or constitutional democracy) is a common form of representative democracy and can take various constitutional forms. It may be a federal republic or a constitutional monarchy. It may have a presidential system, a parliamentary, or a hybrid, semi-presidential system. It is worth mentioning that in a representative democracy with a parliament, different opinions exist for the role of the parliament. As Addink points out, the traditional form is the unitary, self-correcting democracy. In this type, there is sovereignty in the sense of the "omnicompetence and legislative monopoly" of the parliament. The author adds that more modern types of pluralist democracy have also been developed. For him, this pluralist approach to democracy is more focused on rights and certain standards of legality and is designed to prevent misuse of power by public authorities. In this regard, the controlling bodies, including the judiciary but also other controlling institutions like the ombudsman, do not just apply to the legislature will but articulate principles intended to guide the exercise of administrative action and to interpret legislation in the light of these principles.[527]

Technological changes and the evolution of modern society are giving rise to changes in our understanding of democracy. It is said that the concept

525 G.H. Addink, *Good governance. Concept and context*, p. 93.
526 Ibid.
527 Ibid., pp. 93–94.

of democracy is "inextricably context specific."[528] Indeed, recent global movements offer an opportunity to analyse the implications of these changes for democracy.[529] In this context, new forms of democracy (from a theoretical point of view) also arise. Thus, there have been some suggestions for e-democracy in which the internet performs an important role by offering various mechanisms for implementing direct democracy. Globalised communications networks enhance citizen participation in the public arena, facilitating demands for quality and better information to enable a more deliberative democracy and forms of consensus in decision-making.[530]

Along these lines, some authors refer to the emergence of so-called experimental democracy.[531] From this perspective, a democratic government should produce well-informed decisions that provide practical solutions to problems of collective action while fostering participation and giving a voice to those affected by such decisions.[532] This approach allows for new and flexible forms of regulation and has implications from a constitutional perspective.

In conclusion, democracy and the rule of law are intrinsically connected. The elements of democracy and the evolution of the concept also reflect a link with the principles of good governance. The degree of mutual reinforcement will depend on the degree of the development of their inter-related elements. In this sense, good governance can better connect the procedural and substantive dimensions of democracy. Therefore, in any of its forms, democracy will be influenced by the concept of good governance.

5.2.3. GOOD GOVERNANCE AS A PILLAR OF A MODERN CONSTITUTIONAL STATE

The concepts of rule of law, democracy, and good governance are interconnected. As Addink has pointed out, they "make up the structure of the state and its institutions, the position of the governmental institutions and the citizens, and the norms for the relation between the government and the citizens".[533] Thus,

528 Ann E. Cudd & Sally J. Scholz, "Philosophical perspectives on democracy in the Twenty-First Century: Intrduction", in Ann E. Cudd & Sally J. Scholz (eds), *Philosophical perspectives on democracy in the 21st century*, New York: Springer, 2014, pp. 2–6.

529 Ibid., p. 6.

530 Joseph M. Bessette, "Deliberative democracy: The majority principle in republican government" in Robert. A. Goldwin, *How democratic is the constitution?*, Washington: American Enterprise Institute for Public Policy Research, 1980, pp. 102–116.

531 M. Dorf & C. Sabel, "A constitution of democratic experimentalism", in *Columbia Law Review*, 98, 1998, pp. 265–479.

532 Neil Walker, loc.cit., p. 31.

533 G.H. Addink, *Good governance. Concept and context*, p. 3.

rule of law, democracy, and good governance are the pillars of the modern constitutional state. It may be said that there is a relationship of "reciprocal justification"[534] between these concepts.

There is an intrinsic connection between these three fundamental pillars insofar that their emergence is linked to the development of the modern state. Indeed, even though they arose at different moments in history, their development has been mutually influential.[535] Thus, the relationship between these pillars can justify the assertion that the principles of good governance (properness, transparency, participation, accountability, and effectiveness) are evolving principles built upon existing legal values. Therefore, it might be affirmed that the emergence of these principles is part of an ongoing "historical process" confirming the dual nature of law: the commitment to stability and certainty on one hand; and the vocation to adjustment to meet the demands of societal change on the other.[536]

Accordingly, the principles of good governance are sometimes linked to the norms of rule of law or democracy.[537] There is an interdependent relationship between the rule of law, democracy, and good governance. In many cases their elements overlap. Hence, for example, as explained above, the good governance principle of properness is primarily linked to legal norms derived from the rule of law. The rule of law principle is the result of an historical process, which took place in the 18th and 19th centuries in connection with the formation of the classic liberal state. In this context, the rule of law developed with the aim of curbing state power and preventing arbitrariness in order to create confidence and trust.

Later, the process of industrialisation and the configuration of new social groups claiming their political participation led to the emergence of a new political legal order: the democratic *rechtsstaat*. Thus, the principle of democracy developed by redefining the foundations of the liberal state while preserving the core content of the rule of law principle. Hence, the modern state developed hand in hand with the rule of law and the democratic principle, from the classic *rechtsstaat* to the 20th democratic and social *rechtsstaat* or democratic welfare state (*soziale und demokratische Rechtsstaat*). In this democratic welfare state, in which the state is characterised as the provider of public services, the principle of democracy relates to the values of political pluralism, consent, and equality.[538] In

534 Humberto Ávila, op.cit., p. 91.
535 G.H. Addink et al, *Human Rights and Good Governance*, pp. 11–12.
536 See Section 5.1.2.
537 G.H. Addink et al, *Human Rights and Good Governance*, pp. 12–14.
538 Luciano Parejo Alfonso, *Estado Social y Administración Pública*, Madrid: Editorial Civitas, 1983, pp. 64–65.

this regard, good governance principles such as participation and transparency are closely related to democracy.[539]

According to Schmidt-Assmann, the increasing participation of civil society in areas that were the exclusive responsibility of the state until not long ago is shaping a new model of state cooperation with civil society.[540] As such, the state can be considered to be going through a new stage in its evolution. This process is fostered by the revolution of communications and better-informed social actors. As Ponce Solé stated, nowadays, citizens not only want legal decisions but also want to know why and how public functions are carried out.[541] This reflects a new concern for quality in the performance of public powers as an additional source of government legitimacy.

In this context, legal rules and standards emerge to guide the positive action of the state in accordance with principles such as properness, transparency, participation, accountability, and effectiveness. In the new modern state, where the state might not be the main provider of public services but the guarantor of the efficient delivery of services by private actors[542], the law would be concerned not only about controlling discretionary powers but also steering them via more flexible mechanisms in order to achieve high-quality public interventions. It is in this context that the principles of good governance emerge. And notwithstanding their connection with existing constitutional values, they are gradually developing to provide new perspectives, content, and dynamics.[543]

To the extent that good governance is related to the way in which public powers are exercised, it is fundamentally intertwined with administrative legitimacy. This is achieved through the application of the principles of good governance as constitutional principles for conducting of administrative functions. As pointed out above, it is in the realm of the administration that the principles of good governance have been further developed. Administrative legitimacy based on the good governance approach is founded not only on respect of the principles of rule of law and democracy, but also on demands for quality in the performance of administrative actions. Thus, good governance is aimed at improving the institutional framework through commitment to the principles of properness, transparency, participation, accountability, and effectiveness for the

539 See Section 5.2.2.

540 Eberhard Schmidt-Assmann, "Structures and functions of administrative procedures in German, European and International Law", p. 59, *supra* note 392.

541 Juli Ponce Solé, "Good administration and European Public Law. The fight for quality in the field of administrative decisions", p. 1505.

542 Eberhard Schmidt-Assmann, "Structures and functions of administrative procedures in German, European and International Law", p. 59.

543 See Chapter 6.

suitable operation of the state apparatus. Thus, the principle of good governance contributes to providing institutional responses to the legitimacy deficit in order to strengthen the political system as a whole. As pointed out by Smith "it is heavily reliant on the legal system to provide legitimacy, when the political system is considered deficient in certain respects."[544]

If we accept that good governance is a fundamental value and a pillar of a modern state governed by the democratic rule of law, then it remains to be established what its function is within a modern legal system and how the principles of good governance can be interpreted and applied in order to ensure their full realisation. The next section aims to address these questions.

5.3. THE ROLE OF CONSTITUTIONAL PRINCIPLES AND ITS RELEVANCE FOR GOOD GOVERNANCE

5.3.1. THE DISTINCTION BETWEEN RULES AND PRINCIPLES

Every modern legal system consists of two basic kinds of norms: rules and principles. Norms are patterns of behaviours. As behaviour patterns, they have a meaning content.[545] By extension, norms can also be defined as meaning contents, which form a normative system.[546] Rules and principles are both norms. Thus, the distinction between rules and principles is the distinction between two types of norms[547] that have different and complementary functions. There is no a supremacy of one norm above the other.[548]

According to Alexy, "principles are norms which require that something be realized to the greatest extent possible given the legal and factual possibilities".[549] Thus, principles are "*optimization requirements* characterised by the fact that they can be satisfied to varying degrees, and that the appropriate degree of

544 M. Smith, "Developing administrative principles in the EU: A foundational model of legitimacy?", in *European Law Journal*, Vol. 18, No 2, March 2012, p. 272.

545 Neil MacCormick, op.cit., p. 12.

546 Robert Alexy, "The nature of legal philosophy", in *Ratio Juris*, Vol. 17, No 2, June 2004, p. 156. According to Alexy, defining norms as meaning contents leads to the conception of norms as elements of an inferential system and, thereby, as starting point of arguments. If this is so, legal reasoning towards "correctness" is possible which in turn lead to the establishment of the relationship between law and morality.

547 Robert Alexy, *A theory of constitutional rights*, p. 45.

548 Humberto Ávila, "Neoconstitucionalismo: Entre la ciencia del derecho y el derecho de la ciencia", in *Gaceta Constitucional*, No 66, junio 2013, p. 205.

549 Robert Alexy, *A theory of constitutional rights*, p. 47.

satisfaction depends not only on what is factually possible but also on what is legally possible".[550] The scope of the normatively possible in relation to the application of principles is determined by other principles and rules opposed to them, whereas the scope of the factually possible depends on the content of principles as norms of conduct only being determined when faced with facts.[551]

By contrast, "rules are norms which are always either fulfilled or not. If a rule validly applies, then the requirement is to do exactly what it says, no more and no less. In this way, rules contain fixed points in the field of the factually and legally possible."[552] In formulating this definition, Alexy followed a similar line of thinking to Dworkin's "all or nothing" characterisation of rules. According to the latter, "rules are applicable in an all-or-nothing fashion. If the facts a rule stipulates are given, then either the rule is valid, in which case the answer it supplies must be accepted, or it is not, in which case it contributes nothing to the decision."[553] Hence, rules define a decision. They set out legal consequences that follow automatically when the conditions provided are met.

Conversely, principles do not define decisions. They only contain foundations that must be combined with other foundations that stem from other principles.[554] Principles state reasons that argue in one direction, but they do not necessitate a particular decision. There may be other principles arguing in other directions. So, a particular principle may not prevail, but this does not mean that it is not a principle of the legal system, because in other cases when the contravening considerations are absent, the same principle may prove decisive.[555] Thus, Dworkin points out that another distinction between rules and principles is that principles have a "dimension of weight or importance."[556] Consequently, when principles collide, the relative weight of each has to be taken into consideration, whereby the principle with the greater relative weight for the

550 Ibid., pp. 47–48. The concept of requirement embraces commands, permissions and prohibitions.

551 Humberto Ávila, *Theory of legal principles*, p. 10.

552 Robert Alexy, *A theory of constitutional rights*, p. 48. On the legal graduation of principles, G.H. Addink distinguishes between the meta-conceptual dimension, the macro regulation dimension, and the micro review dimension. According to the author, the meta-conceptual dimension is the most abstract, which can be seen as a basic and fundamental normative framework. From this perspective, principles reflect fundamental values concretised as general fundamental principles informing the entire legal order. The macro regulation dimension concerns the codification of principles (either explicit or implicitly) in the constitution or a framework law of the central legislator. The micro review dimension results from the application of principles by the judiciary (but also other controlling institutions such as the ombudsman) in specific cases. See G.H. Addink, "Three legal dimensions of good governance. Some recent developments", pp. 24ff, *supra* note 9.

553 Ronald Dworkin, *Taking rights seriously*, Cambridge: Harvard University Press, 1978, p. 24.

554 Humberto Ávila, *Theory of legal principles*, p. 9.

555 Ronald Dworkin, op.cit., p. 26.

556 Idem.

particular case prevails without the others losing their validity. But the situation is different in the case of rules. They can either be valid or invalid. When two rules collide, one of them cannot be considered a valid rule.

Hence, although rules and principles refer to particular decisions about legal obligations in particular cases, they differ in the character of the direction they give. While rules set forth absolute obligations, principles set forth prima facie obligations. Thus, the "distinction between rules and principles is a qualitative one and not one of degree."[557] It is one concerning logical structure based on classification, not on comparative criteria.[558]

Therefore, according to Alexy, the distinction between principles and rules cannot be based on the "all-or-nothing" application standard that Dworkin proposes; rather, it must be restricted to two factors: the difference concerning collision and the difference concerning the obligation set forth.[559] In relation to the former, a conflict between two rules can only be resolved by declaring one of the rules invalid or by creating an exception, whereas if two principles compete, one of the principles must be outweighed.[560] The normative realisation of principles is limited on a reciprocal basis only, and none of them need be declared invalid. Thus, "conflicts of rules are played out at the level of validity; since only valid principles can compete, competitions between principles are played out in the dimension of weight instead."[561] On the other hand, in relation to difference concerning the obligation set forth, while rules have a definitive character insofar as they set forth absolute obligations, principles set forth prima facie requirements that can be displaced by other competing principles. Hence, "principles represent reasons which can be displaced by other reasons."[562]

Although the distinction between rules and principles as different kinds of norms has been broadly accepted by the doctrine and, consequently, so too has their different legal character, some criticism has arisen in relation to the criteria applied for distinguishing these two legal norms. In this regard, it is interesting to refer to Atienza and Ruiz Manero's discussion on Alexy's theory on principles as optimisation requirements, and their classification of principles.[563]

According to these authors, the characterisation of principles as optimisation requirements (applicable in several degrees), as opposed to rules (which have

557 Robert Alexy, *A theory of constitutional rights*, p. 48.
558 Humberto Ávila, *Theory of legal principles*, p. 9.
559 Ibid., p. 10.
560 Robert Alexy, *A theory of constitutional rights*, pp. 49–50.
561 Ibid., p. 50.
562 Ibid., p. 57.
563 Manuel Atienza & Juan Ruíz Manero, op.cit., pp. 3–6.

to be fully applied) leads to the distinction between two kinds of principles: principles in the strict sense and policies or programme norms. Thus, to say that principles are applicable in different degrees would be only true in relation to policies or programme norms but not regarding principles in the strict sense.[564]

Atienza and Ruiz Manero make a fourfold classification of principles. They distinguish between: 1) principles in the strict sense and policies or programme norms; 2) principles in the context of the primary system and principles in the context of the secondary system; 3) explicit principles and implicit principles; and, 4) substantive principles and institutional principles. These classifications correspond with the different meanings, which usually overlap, in which the expression "legal principles" have been used.[565]

In this regard, principles in the strict sense are those that express the highest values of a legal order (or part thereof, or of an institution) while polices or programme norms stipulate the obligation to pursue certain ends or state of affairs.[566] On the other hand, principles in the context of the primary system refer to principles (standards of conduct that can be formulated as principles in the strict sense or as programme norms) intended to guide the conduct of the general public, whereas principles in the context of the secondary system seek to guide the exercise of public normative powers (the creation and application of norms) by legal organs. In turn, explicit principles are those explicitly formulated within the legal order, and implicit principles are principles derived from other provisions existing in a particular legal order. Finally, substantive principles (which can be principles in the strict sense or programme norms) are requirements that express the highest values of a legal order or the collective goals to be reached. Institutional principles are requirements derived from the "internal values of law" aimed at securing the effectiveness of law and the legal system.[567]

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564 Manuel Atienza & Juan Ruíz Manero, *Para una teoría postpositivista del derecho*, Lima: Palestra, 2009, pp. 87–94.

565 Manuel Atienza & Juan Ruíz Manero, *A theory of legal sentences*, pp. 3–6. The distinction between substantive principles and institutional principles has been included in the fourth edition of the Spanish version of Manuel Atienza & Juan Ruíz Manero, *Las piezas del derecho. Teoría de los enunciados jurídicos*, Barcelona: Ariel, 2007, pp. 27–28.

566 According to Atienza and Ruiz Manero, this distinction implies that although both kinds of principles can be understood as principles in the strict sense in some contexts and as policies in others, they cannot be used in both senses at the same time in the same context of reasoning.

567 Atienza and Ruiz Manero point out that many institutional principles are oriented to the internal functioning of the legal system, assuring the realisation of substantive principles. Thus, for example, in the Spanish legal system the principle of "deference to the legislator" (*deferencia al legislador*) is an "institutional translation" of the democratic principles. Manuel Atienza & Juan Ruíz Manero, *Las piezas del derecho*, pp. 27–28.

According to the authors, the distinction between principles and rules concerning the obligation set forth would be, as regards their classification of principles, only relevant in reference to principles in the strict sense and to programme norms, and only applicable in relation to the latter but not the former. Thus, principles in the strict sense, like rules, allow for a certain behaviour. They determine a specific conduct. Therefore, if a principle in the strict sense is not overcome after being weighed against other competing principles in a concrete case, then it requires full compliance. "It is either obeyed or not obeyed, and there is no way of compliance by degree."[568]

On the other hand, policies or programme norms do not prescribe any particular behaviour. Instead, they "command that a purpose, a state of affairs with certain characteristics be attained" but do not specify beforehand the actions to be chosen. Therefore, a programme norm will be applied to its maximum possible degree because it is weighed against other competing principles in a concrete case. In this sense, Atienza and Ruiz Manero state that "Robert Alexy's theory of principles as mandates of optimization distorts the matter with respect to legal principles, in strict sense but it seems perfectly adequate to account for policies."[569]

In a similar line of thinking, Humberto Ávila states that principles (like rules) can be analysed from the behavioural as well as from the finalistic point of view. This analysis would correspond to the distinction between those principles that command actions and those principles that command the maximisation of sates of affairs (between principles in the strict sense and policies or programme norms according to Atienza and Ruiz Manero's category of principles). This distinction, however, would not eliminate the definition of principles as goal norms, since the actions commanded by principles would be instrumental actions for promoting certain states of affairs. Thus, principles create the duty not only of adopting the behaviour required to realise a state of affairs, but also establish the duty of accomplishing a state of affairs by adopting the necessary behaviour.[570] Therefore, principles can be defined as immediate finalistic and

568 Manuel Atienza & Juan Ruíz Manero, *A theory of legal sentences*, p. 11. This would be the case, for example, with the principle of prohibition of discrimination. The principle leaves its condition of application open (it is not bound to a specific situation) but not the prescribed pattern of behaviour in order to reach the end set. After weighing, the behaviour prescribed is either fulfilled or not (that is, the discriminatory action ought to be realised or not).

569 Ibid., pp. 11–12.

570 Humberto Ávila, *Theory of legal principles*, pp. 35–36. The fact that rules can also be analysed from the behavioural as well as from the finalistic point of view corresponds to the distinction made by Atienza and Ruíz Manero between rules of action and rules of end.

mediate behaviour norms, as opposed to rules, which are immediate descriptive and mediate finalistic norms.[571]

Consequently, the distinction between rules and principles cannot focus on the final mode of application (whether all or nothing or in different degrees) but on the mode of justification. Therefore, because rules are immediate descriptive and mediate finalistic norms, their interpretation and application in a concrete case will be justified by assessing the accordance between the conceptual construction of the facts and the conceptual construction of the norm (subsumption method). As regards principles, because they are immediate finalistic and mediate behaviour norms, their application will be justified by assessing the correlation between the effects of the conduct or action to be adopted, seen as the means necessary to promote the state of affairs set by the norm, and the gradual realisation of the state of affairs seen as the goal to be reached (balancing method).[572]

According to Ávila, another important aspect of the distinction between rules and principles concerns the way they contribute to the decision in a particular case. Thus, rules are preliminary decisive and including norms as they aspire to provide a specific solution for the case, despite their expectation of covering all aspects of relevance to the decision-making. On the other hand, principles are primarily complementary and preliminary partial norms, as they cover only part of the aspects relevant to deciding. They are expected not so much to provide a specific solution regarding a concrete case as to contribute to the decision-making.[573]

To sum up, the distinction between rules and principles, as formulated by Ávila, is based on a three-model criterion consisting of: their normative descriptive nature; the kind of justification that they require in order to be applied; and, the kind of contribution of the problem. Thus, in relation to their normative descriptive nature, while rules describe definite objects, principles describe an ideal state of affairs to be promoted. As to their kind of justification, while rules require an examination of the correspondence to the normative description and the acts performed, principles require an assessment of the positive correlation between the effects of the adopted behaviour and the state of affairs that should

571 Rules are immediate descriptive norms to the extent that they provide for obligations, permissions and prohibitions by describing the conduct to be followed. And they are immediate finalistic norms insofar as they set forth purposes whose realisation is aimed at more exact due behaviour. Hence, rules create the duty of adopting descriptively provided-for behaviour as well as describing a behaviour to reach a certain end. In the latter case, rules state their conditions of application in a closed way and their end must be attained fully. In the case of principles, the conditions of application are always open.

572 Humberto Ávila, *Theory of legal principles*, pp. 37–38.

573 Ibid., p. 38.

be promoted. And in the case of the contribution to the solution of the problem, while rules intend to be decisive principles intend to be complementary, as they serve as reasons to be coupled with other reasons towards the solution of a problem.[574]

5.3.2. DEFINITION AND MEANING OF PRINCIPLES

Principles can be defined, in general terms, as "goal norms." In this sense, based on the discussion on the distinction between rules and principles laid out in the previous subchapter, we will adopt the definition of principles proposed by Ávila. Thus, principles are "immediately finalistic, primarily future regarding norms which intend to be complementary and partial, whose application requires assessing the correlation between the state of affairs to be promoted and the effects of the conduct seen as necessary to its advancement."[575] The first part of this subsection will define the meaning of principles. Then, it goes on to explain the function of principles.

Definition of principles

As goal norms, principles are immediate finalistic norms. As such, principles set for an ideal state of affairs that ought to be promoted, which in turn defines a purpose to be met. Ávila defines state of affairs as "a situation defined by certain qualities." The state of affairs becomes a purpose "when one aspires to obtain, enjoy or have the qualities in that given situation."[576]

Thus, a purpose is an idea that expresses a practical orientation. It represents a guide to determine behaviour intended to accomplish an ideal state of affairs, understood as the purpose's desired content. The object of the purpose is a desired content, which can be either the fulfilment of an end-situation, the realisation of a situation or state, the pursuit of a continuing situation, among others. Therefore, a state of affairs is "a general form to frame the several contents of a purpose."[577] The creation of the purpose is the starting point in the search for means, defined as conditions (objects, situations) that enable the gradual realisation of the purpose's content.

Principles are future-regarding norms as they establish a state of affairs that needs to be built. The realisation of the ideal state of affairs requires the adoption

574 Humberto Ávila, *Theory of legal principles*, p. 44.
575 Ibid., p. 45.
576 Ibid., p. 35.
577 Ibid., p. 40.

of certain behaviours. These behaviours or conducts represent the means required in order to reach the state of affairs. On the other hand, the absence of these conducts hinders the realisation of the state of affairs set by the norm as ideal, and consequently prevents the purpose from being reached. Thus, such conducts "become practical needs whose effects are needed to progressively advance to the purpose."[578] Therefore, principles impose the duty of adopting the behaviours required, even if indirectly or regressively, to realise a state of affairs.

In this regard, it is said that principles have a deontic-teleological character. They can be considered deontic because they set forth reasons for the existence of obligations, permissions, or prohibitions. And they are teleological because obligations, permissions, and prohibitions stem from the effects of a given behaviour that preserves or advances a certain state of affairs.[579] This characteristic also underlines the fact that principles have normative consequences, because on the one hand the reason to which the principle refers ought to be considered relevant in a real case; and on the other hand, the behaviour required to accomplish or preserve a certain ideal state of affairs ought to be adopted. Thus, although principles may be indeterminate in relation to the content of the behaviour to be adopted, they are not absolutely indeterminate in that while providing the duty of adopting the behaviour required to realise the state of affairs, they do determine its kind.

At this point, it is important to stress that although principles and values are related to each other, they cannot be mistaken. Constitutional norms, like principles, incorporate values. There exists a connection between them. Thus, "principles relate to values as far as defining purposes implies a positive definition of a state of affairs to be promoted."[580] However, while principles have a deontological character, values have an axiological one. Thus, principles are concerned with what ought to be done (in the case of principles, to pursue an ideal state of affairs) while values assign positive attributes to a given element.[581] In addition, the condition of validity of principles lies in the fact that they are enshrined, either explicitly or implicitly, in a constitution as the exclusive source of authority for the legal system and not in the values they may imply.[582]

A characterisation of principles such as that described above allows for emphasising some traits with respect to the role they play on different levels within a legal

578 Ibid., p. 41.

579 Ibid., p. 35. See also Jaap Hage, *Reasoning with rules. An essay on legal reasoning and its understanding*, Dordrecht: Springer, 1997, p. 67.

580 Ávila. Humberto, *Theory of legal principles*, p. 41.

581 Robert Alexy, *A theory of constitutional rights*, pp. 87–93.

582 Luigi Ferrajoli, *Garantismo. Debate sobre el derecho y la democracia*, Madrid: Editorial Trotta 2006, pp. 26–38.

system, thereby contributing to the understanding of the meaning of other norms. Because principles are immediate finalistic norms intended to be complementary and partial, they only point to goals: an ideal to state of affairs to be pursued. The stress is on the interdependence between principles and, in general, the influence of principles upon other norms of the same system, to the extent that the state of affairs set forth by principles is to be sought in relation with other (sub) principles and rules. This allows for a coherent interpretation of the legal system.

Thus, principles perform an "integrative function." They validate by adding elements not provided in subprinciples or rules, even though these elements may be essential for the realisation of the purpose established by them. Hence, principles assure the presence of the elements needed to guarantee the promotion of an ideal state of affairs by direct reference to them. This is the so-called direct internal efficacy of principles.[583]

Function of principles

Principles also play a "defining function." That is, they contribute to limiting and specifying the scope of ampler or embracing principles in more concrete situations. Thus, sub-principles contribute to defining the normative content of embracing principles. Nevertheless, it is important to bear in mind that the normative content of principles is also delimited by rules, insofar as they contribute to specifying the behaviour to be adopted in order to achieve the goals set forth by principles.[584] In this sense, principles also need rules for their specification and realisation.

Along with the defining function, principles have an "interpretative function", as they are used to interpret legal or constitutional provisions. In this respect, a principle allows for each one of its sub-principles to be interpreted according to it, thus broadening their scope. The defining and interpretative functions are a result of the indirect internal efficacy of principles.[585] Constitutional provisions are properly understood if interpreted according to their overlying principles.

Principles of ampler or embracing character, such as the rule of law and due process (or good governance) are characterised by the "reordering function." Given the relations that a principle generates regarding its sub-principles, each of them is given a new meaning, different from what it would have if it were built in isolation or solely in relation with other principles. Likewise, embracing principles play a "blocking function", as they remove elements that

583 Humberto Ávila, *Theory of legal principles*, p. 55.
584 Ibid., p. 59.
585 Ibid., pp. 55–56.

are incompatible with the state of affairs to be promoted.[586] These two functions also reflect the indirect internal efficacy of principles.

But principles are not only important for the understanding of other norms. They are also necessary for the interpretation of the relevant facts of the case. To the extent that principles make explicit values regarding an ideal state of affairs to be achieved, they "indirectly supply a parameter for the examination of pertinence and valuation" of facts based on legal objectives. In this respect, they also project an external efficacy capacity.

Thus, in order to determine which facts are relevant, interpreters employ the parameters provided by constitutional principles to select all the events related to a legally protected interest. In this way, principles "determine which facts are pertinent through an axiological revisitation of factual material", by means of a "retro operative procedure" (objective external selective efficacy).[587]

As explained above, principles are immediate finalistic norms that establish the duty of promoting a certain state of affairs without establishing the means to be adopted. By establishing an ideal state of affairs, principles protect certain legal interests. Hence, when adopting measures that restrict some principles (and consequently affecting legal interests) in order to satisfy other ones, the state has to present grounds to an extent that justifies the restriction.[588] This is what Alexy calls the "Law of Balancing."[589]

From the above, it follows that defining the application of a principle in a concrete case requires balancing it with other competing principles. The need for balancing arises from the lack of specification of the means to be adopted for the accomplishment of a state of affairs. For this reason, principles require the complementation of other principles for solving cases. Thus, because of the complementary character of principles in reaching specific solutions in concrete cases that interpreters have to determine, by balancing the competing principles, what the suitable, necessary, and proportional means are for the realisation of the state of affairs set forth by a principle. As such, by providing reasons as a consequence of complementing and balancing, principles demonstrate their (objective external) argumentative efficacy.[590]

In conclusion, principles are defined by their finalistic character and the indeterminacy of their conditions of application. They describe a state of affairs

586 Ibid., p. 56.
587 Humberto Ávila, *Theory of legal principles*, p. 57.
588 Ibid.
589 Robert Alexy, *A theory of constitutional rights*, p. 102.
590 Humberto Ávila, *Theory of legal principles*, pp. 58–59.

being pursued without a previous definition of the means. It is for this very reason that colliding principles in a concrete case ought to be balanced. The relevance of this fact for the argumentative efficacy of principles leads us to briefly analyse the form by which constitutional principles are interpreted and applied.

5.3.3. DEVELOPMENT AND APPLICATION OF CONSTITUTIONAL PRINCIPLES

The application of principles is subject to an interpretative exercise. Interpreters build norms from provisions, the starting point of the interpretation process. Meanings are construed from their systematic interpretation. Thus, the transformation of constitutional provisions into legal norms (principles and rules) depends on the interpreter's construing the meaning of their contents. In this regard, "interpretation is a decision that creates the signification and meanings."[591] It serves not simply to describe previously existing meanings but also to create such meanings.

Thus, interpreters (judges, scholars and any other entity which as part of its functions has to interpret and apply the law, such as the ombudsman)[592] not only build but also rebuild meanings, using constitutional provisions (or normative texts) under interpretation as limits to the construction of meanings and the manipulation of language, adding meaning cores that are created by use. The "act of reconstruction", to use Ávila's expression, is carried out by building syntactic and semantic connections, or by adding facts to those connections (as judges do when adjudicating, and the ombudsman when solving complaints).[593]

Interpretation is important not only for the classification of legal norms into principles or rules, but also in order to determine their normative content and application. In the case of principles, because their conditions of application are not set forth (or in other terms, the description of the behaviour content is not established), the interpretation of their normative content depends to a greater extend on the examination of the case. Consequently, their application will be justified, as explained before, by assessing the effects of conduct seen as the means necessary to promote a state of affairs in relation with other colliding principles. This assessment is carried out by means of balancing.[594]

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591 Ibid., p. 6.

592 Isabel Lifante Vidal, "Un mapa de problemas sobre la interpretación jurídica", in Isabel Lifante Vidal (ed), Interpretación jurídica y teoría del derecho, Lima: Palestra, 2010, pp. 54–57.

593 Humberto Ávila, *Theory of legal principles*, pp. 7–8.

594 Robert Alexy, *A theory of constitutional rights*, pp. 50–54.

Balancing is the procedure through which principles are applied. Therefore, it has become an essential methodological criterion for adjudication and solving conflicts between principles.[595] According to Alexy, "the nature of principles implies the principle of proportionality and vice versa."[596] Thus, it is said that the requirement of balancing is intrinsically connected with the principle of proportionality and the nature of principles.[597]

As stated earlier, Alexy points out that the application of principles is related to what is legally and factually possible, or in other words, to the effects of a particular conduct in order to accomplish a state of affairs in a concrete case. To that extent, the connection between the nature of principles and the principle of proportionality is a connection with proportionality and its three sub-principles: suitability, necessity (use of the least intrusive means), and proportionality in its narrow sense (balancing *stricto sensu*).[598] Thus, while the principles of suitability and necessity are related to what is factually possible, the principle of proportionality in its narrow sense (the requirement of balancing) is related to what is legally possible, which in turn depends on the result of the collision between principles.[599]

It is because of the lack of definition of the means to be adopted to promote a certain state of affairs that the application of a principle has to be decided by balancing it with other competing principles in a concrete case. Hence, balancing determines the legal possibilities for realizing principles. The result thereof will be to set a "conditional relation of precedence" between principles in the context of a particular case. This relation of precedence is conditional because "in the context of the case conditions are laid down under which one of the principles takes precedence. Given other conditions, the issue of precedence might be the reverse."[600]

The application of legal principles in general and constitutional principles in particular has a practical effect. Constitutional principles have an interpretative function, as they function as guiding criteria for judges and any operator in the application of law. In this regard, particularly important is the function of constitutional principles as review norms for the control of the constitutionality

595 Carlos Bernal Pulido, "La racionaliad de la ponderación", in Miguel Carbonell & Pedro Grández Castro, *El principio de proporcionalidad en el derecho contemporáneo*, Lima: Palestra Editores, 2010, p. 37.
596 Robert Alexy, *A theory of constitutional rights*, p. 66.
597 It is important to mention that balancing has been subject to a lot of criticism.
598 Robert Alexy, *A theory of constitutional rights*, p. 66.
599 Ibid., p. 67.
600 Ibid., p. 52.

of legal norms.[601] In this context, constitutional principles are framed as interpretative parameters, which are applied to assess the performance of public powers and as standards of control.

Accordingly, César Landa points out that when assessing the constitutionality of legal norms, the constitutional jurisdiction performs the following: a) an assessing function (reviewing the conformity of a legal provision with the values enshrined in constitutional norms); b) a pacifying function (expelling from the legal system the legal norms that are found to be unconstitutional); c) an ordering or normative function (establishing legally binding standards by developing the legal content and scope of constitutional norms); and d) an integrating function (addressing the omissions of the legal system in the development of constitutional provisions).[602]

Constitutional principles become relevant insofar as they provide the grounds for legal reasoning. Thus, constitutional principles become standards of assessment for defining the legal content of legal norms. They also have an informative function as they inspire all public authorities and civil servants who must act in line with the obligations and legal standards set forth by the principles.[603]

5.3.4. THE REALISATION OF GOOD GOVERNANCE THROUGH CONSTITUTIONAL PRINCIPLES

Good governance is considered to refer to political, managerial, and administrative (regulatory) processes for ensuring the proper exercise of government powers and the wellbeing of all members of society. The call for

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601 Constitutional control can be of two kinds: concrete or diffuse control of constitutionality by any given court; and abstract or concentrated control of unconstitutionality exclusively by the constitutional court. The former implies that every judge is competent to assess the conformity of legal norms with the constitution. The constitutionality of a norm can only be assessed within a concrete case. In this regard, the judge has the duty to assess the consistency of the applicable norms with the constitution. The effects are restricted to the concrete case. The concrete or diffuse control follows the US model of judicial review established by the Marbury vs. Madison Case. On the other hand, abstract concentrated control implies that only the constitutional court has competence to declare that a legal provision is unconstitutional with general binding force. In this regard, the constitutional court occupies the highest position of the constitutional jurisdictional order. The abstract control is also known as the Kelsenian Model. It is important to mention that in the Peruvian legal system, both the concrete control and the abstract control are established. Concrete control is enshrined in Article 138 of the Peruvian Constitution, while abstract control is established in Articles 200 and 202.

602 César Landa Arroyo, *Tribunal Constitucional y Estado Democrático*, Lima: Palestra, 2007, pp. 174–176.

603 Federico Castillo Blanco, *La protección de la confianza en el Derecho Administrativo*. Madrid: Marcial Pons, 1998, p. 38.

good governance is a response to a modern society that demands for more participation, transparency, and quality in the performance of public powers. From this perspective, good governance strengthens the rule of law and democracy, providing new sources of legitimacy to the political system.[604]

Thus, good governance represents a fundamental value that implies the proper and accountable exercise of the government's powers and duties, guaranteeing the realisation of human rights while providing transparent and participatory institutional frameworks for the effective functioning of the entire state apparatus in order to ensure the equal development of the citizens.[605] Therefore, good governance points to a goal and also represents a goal in itself.

Nevertheless, good governance does not only have an axiological dimension. It is incorporated into the legal system as a constitutional principle, which stems from other constitutional norms. As pointed out by Alexy, principles are characterised as 'evolved' rather than 'created' since they do not need to be expressly enacted, but can derived from the interpretation of normative texts and judicial decision-making as the widespread expression of what the law ought to be.[606]

As a constitutional principle, good governance clearly states certain values to the extent that pointing to a goal implies a positive definition of a state of affairs to be reached. Thus, the principle of good governance demands the realisation of a state of affairs that manifests properness, transparency, participation, accountability and effectiveness, which requires the adoption of certain behaviours to be defined in each case.

Therefore, the general principle of good governance is an umbrella principle composed of other elements: the principles of good governance. These specific principles (properness, transparency, participation, accountability, and effectiveness) contribute to specifying the scope of the ampler principle of good governance in more concrete situations, thus performing a defining function.

In turn, good governance leads to the interrelation of its specific principles in such a way that each element, given the relationship it creates with others, is given a new dimension and scope. Thus, even when certain principles of good governance may already be incorporated into the legal order, its presence is not

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604 According to Smith, the principles of good governance are appropriate mechanisms for delivering greater legitimacy. Thus, properness and effectiveness correlate to the need for identifiable rules; transparency and accountability correspond to the need to provide clear justifications, and the principle of participation relates directly to the acceptance of the citizens. (trust, stability/satisfaction/acceptance or consent). See M. Smith, loc.cit., p. 276.

605 See Section 4.3.2.

606 Robert Alexy, *A theory of constitutional rights*, p. 61.

redundant.[607] So, the principle of good governance plays a reordering function within the legal system. Moreover, good governance allows other (overlapping) constitutional norms (principles and rules) to be interpreted coherently due to their relationship of reciprocal justification, as is the case of good governance in relation to the principles of rule of law and democracy.[608]

Likewise, the general principle and (specific) principles of good governance also contribute to the due protection and promotion of human rights. Good governance and human rights are mutually reinforcing. While human rights provide a set of values with which to guide government action and inform the content of good governance, good governance provides a conducive and enabling environment without which human rights could not be respected and protected in a suitable manner.[609]

Along these lines, the Peruvian *Defensoría* has stressed that both good governance and human rights share the same foundations, such as the principles of participation, accountability, and transparency.[610] Hence, good governance provides elements for the realisation of human rights; not only civil and political rights (classic defensive rights) but also social and economic rights, and insofar as all human rights are related, the actions and measures adopted in order to guarantee some have a positive impact on the others and vice versa. Thus, the principle(s) of good governance contribute to the subjective external efficacy of human rights principles by not only restraining but also fostering state action.[611] Thus, good governance is a condition for the realisation of human rights just as the realisation of human rights is a condition for the existence of good governance. Here again, the relationship of reciprocal justification between good governance and human rights is in evidence.

Therefore, the general principle and principles of good governance provide the legal parameters through which powers are exercised; they set the context in which the political system functions, and public polices and administration are carried out for the achievement of public goals. Since they are located at the constitutional level, they spread their effects to all public powers and at all regulatory levels. Therefore, good governance also leads to more flexible and comprehensive methods of regulation, interpreting them as a steering

607 Humberto Ávila, *Theory of legal principles*, p. 56.

608 On the postulate of coherence and reciprocal justification, see Humberto Ávila, *Theory of legal principles*, pp. 85–91.

609 Office of the High Commissioner for Human Rights, op.cit., p. 1, *supra* note 433.

610 Defensoría del Pueblo, *Special Report 147. Aportes de la Defensoría del Pueblo para una educación sin corrupción*, Lima: Defensoría del Pueblo, 2009, p. 25.

611 Humberto Ávila, *Theory of legal principles*, p. 59.

mechanism of government action aimed at accomplishing normatively desired effects and avoiding non-desired effects.

As stated earlier, the application of rules depends on the interpretation of the principles that refer to them, while principles also require the complementation of rules in order to be applied.[612] Thus, good governance acts using regulatory instruments provided by the law such us principles, rules, procedures, and practices. Therefore, the principle(s) of good governance will support rules and other kinds of regulatory instruments described as soft law, such as policy-rules, guidelines, and recommendations, among others. In turn, they contribute to shaping their normative content and scope.

The general principle and (specific) principles of good governance impose the duty to achieve a state of affairs for which some behaviours are necessary. These behaviours, seen as the necessary means for the realisation of good governance, define its normative content in each particular case. It is the role of the interpreters to select relevant facts and create signification and meanings for the principle(s) of good governance.

In this regard, institutions like the ombudsman, through its quasi-jurisdictional and indirect normative functions[613], can contribute to developing the normative content of the principle(s) of good governance and fostering their achievement. By selecting facts, either when resolving complaints, supervising ex-officio public institutions or the provision of public services, or determining instances of "maladministration", the ombudsman should use the parameters provided by the principles of good governance in order to select those facts that are relevant for ensuring the realisation of the principles themselves.[614] These parameters will be reflected in the rules, standards, supervision criteria, or indicators applied (and developed) by the ombudsman, which in turn can contribute to defining the normative content of the principle(s) of good governance. The ombudsman can also facilitate the realisation of good governance by recommending new and more flexible regulatory techniques inspired by its specific principles.

5.4. FINDINGS

It can be argued that any theory of good governance as a constitutional principle will be flawed. Moreover, the vagueness of the term "good governance" has been contested given the direct relationship with moral values and the arbitrariness of

612 Ibid., p. 18.
613 In relation to the functions of the ombudsman, see Section 3.3.2.
614 This is the so-called objective external selective efficacy of principles.

defining what is "good" in governance. In this regard, it is said that "reasoning about the question of what ought to be done or is good defines ethics."[615] Thus, reference to what is "good" in governance leads us to the claim of "correctness" and through this to the discussion on including morality in law. According to Alexy, the claim of correctness "is the source of the necessary relation between law and morality."[616] As stated earlier, good governance can be considered as an axiological concept (a value), or it can be considered as a deontological concept (a legal principle). Alexy reminds us that axiological concepts are used whenever something is described as beautiful, reliable, democratic, socially justice or consistent with the rule of law.[617] Therefore, it is inconsistent to seek to restrict good governance to an axiological dimension by arguing its connection with moral values.

Good governance also has a deontological dimension derived from the concept of "what ought to be"[618]; that is, a state of affairs that ought to be pursued. The general principle of good governance sets forth a state of affairs that respects the principles of properness, transparency, participation, accountability, and effectiveness. Hence, the deontological dimension of the general principle of good governance is determined by the specific principles that embrace it. Good governance is defined by the interaction of all the principles of good governance, which have to be balanced with one other. It will be realised to the extent that each of its specific principles can be accomplished to the highest possible degree. The validity and legitimacy of the general principle of good governance and the specific principles thereof hinge on the constitutional framework in which they operate (and from whose provisions they are derived), and not on their (unquestionable) connection with moral values.

Nevertheless, it is true that the meaning and normative content of good governance as a general principle, as well as its constitutional traits, still need to be shaped. And even then, it can be accepted that the five principles adopted here as the constitutive elements of good governance do not constitute a definitive or strict list. As indicated in the introductory chapter, this study is aimed at determining the extent to which the institution of the ombudsman can contribute to the realisation of good governance from a legal perspective.

At this point, what remains to be clarified are the uncontested general aspects that comprise the features and meaning of good governance as a general principle and of each one of the principles of good governance and their constitutional

615 Robert Alexy, "The nature of legal philosophy", p. 157.
616 Robert Alexy, "The dual nature of law", in *Ratio Juris*, Vol. 23, No 2, June 2010, p. 168.
617 Robert Alexy, *A theory of constitutional rights*, p. 87.
618 Ibid.

roots. The intention in the next chapter is to sketch out what their meaning is. In doing so, legal doctrine and court decisions will be examined, especially the case law of the European Court of Justice. This will provide the starting point for the further analysis of the role of the ombudsman in developing good governance, to which the remainder of this study will be devoted.

CHAPTER 6
THE PRINCIPLES OF GOOD GOVERNANCE

This chapter analyses the legal content of the principles of good governance as developed by doctrine and in case law, but also in legislation and policy rules. Section 6.1 describes the nature of good governance as a general constitutional principle. The following sections present the specific principles that make up good governance. These are legal principles (that also have constitutional status) under the umbrella of the general principle of good governance. Thus, properness, transparency, participation, accountability, and effectiveness are described in order to identify their legal content, scope, and elements. Section 6.2 focuses on the principles of properness, transparency, and participation. These principles have been subject to longer development than the others and are considered to be the key aspects of good governance. Section 6.3 examines the principles of accountability and effectiveness as newer principles of good governance. Finally, Section 6.4 presents the principles of good governance as evolving principles in connection with the general values or cornerstones of the modern constitutional state.

6.1. THE GENERAL PRINCIPLE OF GOOD GOVERNANCE

6.1.1. LEGAL NATURE

As Addink argues, although "good governance is rooted in both the rule of law and democracy, it has developed into a full-fledged cornerstone, which has its own core dimension." This means that aspects of the general principle of good governance are still recognisable in the rule of law and democracy, but that good governance also possesses its own new aspects. The development processes of all three pillars of the modern state are strongly interconnected.[619]

The general principle of good governance relates to the way in which power is exercised. The exercise of power materialises through the performance of

[619] G.H. Addink, *Good governance. Concept and context*, p. 75. See also Section 5.2.3.

public functions. Thus, the general principle of good governance approaches power from a dynamic perspective. Its concern is not primarily with the ultimate decision (or policy) to be adopted but with how decisions are made.[620] Yet although the principle of good governance is process-oriented, it is also concerned with the final decision as an outcome.

Being a general constitutional principle, good governance applies to all public bodies but also to private bodies when they perform public tasks. Insofar as it concerns how power is exercised and public functions performed, the principle of good governance could be understood as "good government" or even "good governing". Thus, as mentioned earlier, government must be understood as including not only the executive (or the administration) but also the judiciary and the parliament, as well as central, regional and local governments and public institutions such as the ombudsman.[621]

The general principle of good governance emphasises the steering approach of law in terms of how it guides the conduct of public powers in a positive direction. As we have seen, according to this perspective law is a mechanism that steers government action and focuses on decision-making as well as results.[622] Since what primarily matters to good governance is how public functions are performed and decisions made, it allows the application of more flexible and comprehensive methods of regulation such as soft-law instruments (policy-rules, guidelines, and recommendations, among others) to achieve desired effects. It involves a concern for quality in the performance of government.

The general principle of good governance can be broken down into a set of sub-principles whose constitutional status has been recognised (either implicitly or explicitly) in most modern states governed by the democratic rule of law. They stand as the constitutive elements of good governance and define its core content. The emergence of good governance is the result of the development of this set of more specific constitutional principles, which in turn are linked to the norms of rule of law and democracy.[623] Accordingly, good governance is a fundamental principle linked to the democratic rule of law and is also located at the constitutional level.

As a general constitutional principle, good governance takes the form of a constitutional duty[624], acting as a norm for the government rather than

620 M. Smith, loc.cit., p. 276.

621 For the definition of governance and good governance and the meaning of "government" in the context of this research, see Section 2.1.2.

622 See Sections 4.2.4, 5.1.2 & 5.2.3.

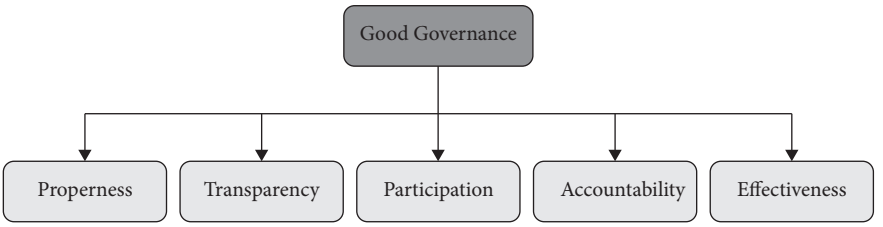
623 See Section 5.2.3.

624 In this regard, De Asis Roig states that the constitutional "duty of good governance" (*deber de buen gobierno*) imposes upon the government the fulfilment of the individual, political,

as a right for citizens.[625] It imposes the constitutional duty of proper and accountable exercise of the government's powers, while providing transparent and participatory institutional frameworks for the effective functioning of the entire state apparatus in order to ensure the equal development of citizens and the realisation of the general interest.[626] As a fundamental principle, the effects of good governance extend across all public powers and all regulatory levels.

The materialisation of the principle of good governance imposes the fulfilment of correlative duties, stemming from various constitutional provisions, upon the branches of state (and the respective agents thereof). These duties are expressed in the obligation to perform the state's activities in accordance with the set of specific constitutional principles comprising good governance: properness, transparency, participation, accountability, and effectiveness.[627]

Chart I



6.1.2. LEGAL CONTENT AND SCOPE

The general constitutional principle of good governance applies to all the powers of state, and imposing the duty to achieve a state of affairs (good governance) for which certain behaviours are necessary. In turn, these behaviours stem from the specific constitutional principles of good governance. Depending on the arena in which these principles are applied, they might result in one of three different (general) principles: the principle of good administration[628], the

economic, social and cultural needs of members of society, based on respect of human dignity, equality and freedom. See R. De Asis Roig, *Deberes y obligaciones en la constitución*, p. 276. Regarding the distinction between human rights and constitutional duties as constitutional principles, see Francisco Javier Díaz Revorio, "Derechos humanos y deberes constitucionales. Sobre el concepto de deber constitucional y los deberes en la Constitución Española de 1978", *supra* note 137. See also Section 2.1.2.

625 G.H. Addink, "Good governance: A norm for the administration or a citizen's right?", p. 6.

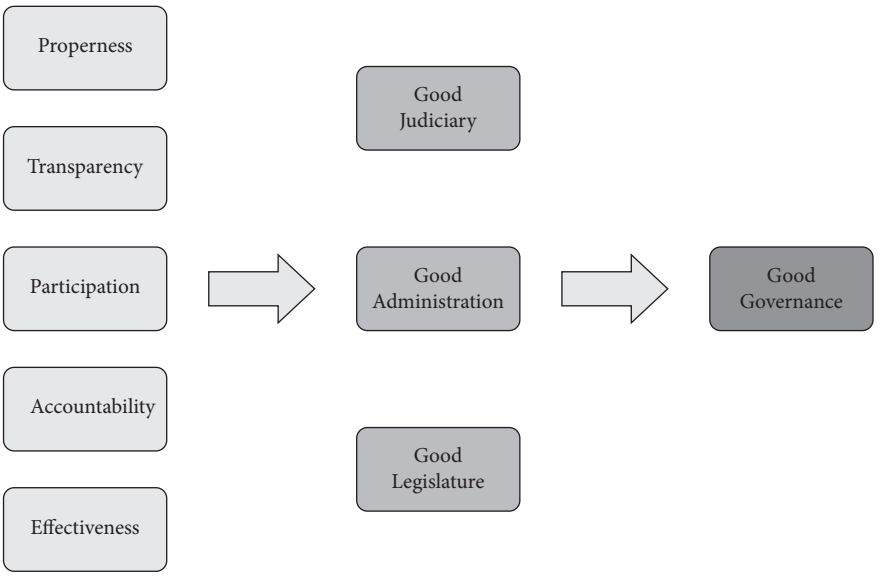
626 See Section 4.3.2. See also, Alberto Castro, "Legalidad, buenas prácticas administrativas y eficacia en el sector público", p. 248.

627 See Section 5.3.4.

628 It is important to mention that good administration is recognised as a general principle (and a fundamental right) in the legal system of the European Union. At the national level,

principle of good judiciary, and the principle of good legislature. These three principles concretise the general principle of good governance in the different branches of state; in other words, they specify the "broad conception" of good governance through the application of the specific principles of good governance in each of the three branches of state.[629] Chart II shows how the application of the specific principles of good governance by the branches of state contributes to the realisation of the general principle of good governance.

Chart II



The specific principles of good governance can be translated into specific norms based on their application in each of the three branches of state. Moreover, because the principles can be subdivided into three sets corresponding to each of the three powers[630], whether in the context of the executive, the legislature, or the judiciary, we can speak of "principles" of properness, transparency, participation, accountability, and effectiveness.[631] Charts III and IV show how the principles of good governance are broken down in each of the three powers of the state.

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the Peruvian Constitutional Court has recognised good administration as a constitutional principle. As far as this study is concerned, good administration is a manifestation of the existence of the broader principle of good governance. For the principle of good administration, see Section 6.1.3. For the principles of good governance and good administration within the Peruvian legal framework, see Section 11.1.1.

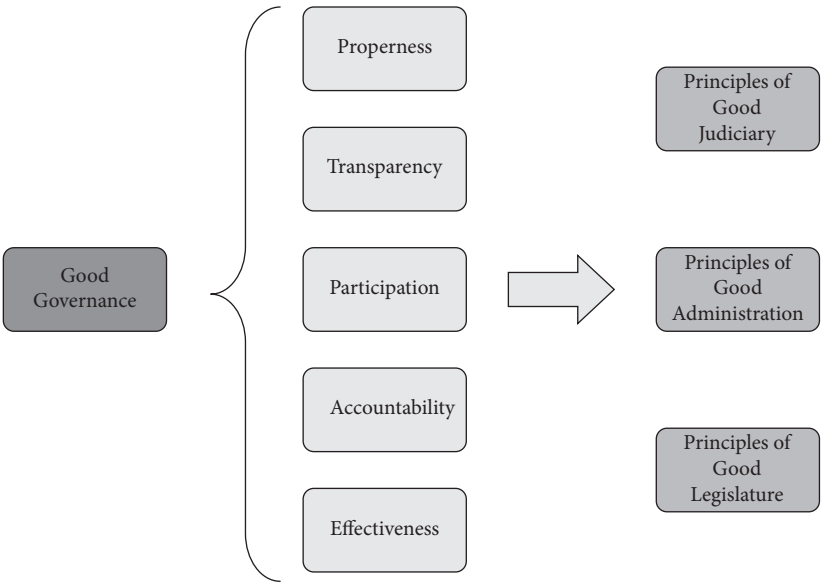
629 G.H. Addink, *Good governance. Concept and context*, p. 5.

630 Ibid.

631 G.H Addink et al, *Human rights and good governance*, p. 10.

As explained earlier, properness, transparency, participation, accountability, and effectiveness, as the specific principles of good governance, are evolving principles whose elements are sometimes linked to the general principles of the rule of law and democracy. It is the added value of the principles of good governance – resulting from their evolution – that led to the emergence of the general principle of good governance. In many cases the elements of the three pillars overlap.[632] The specific principles of good governance are concretised by legal rules and standards that together guide the positive actions of the state. They are not only oriented to curbing the exercise of (discretionary) powers but also to steering the state through more flexible legal mechanisms so as to achieve quality in the conduct of public functions.

Chart III



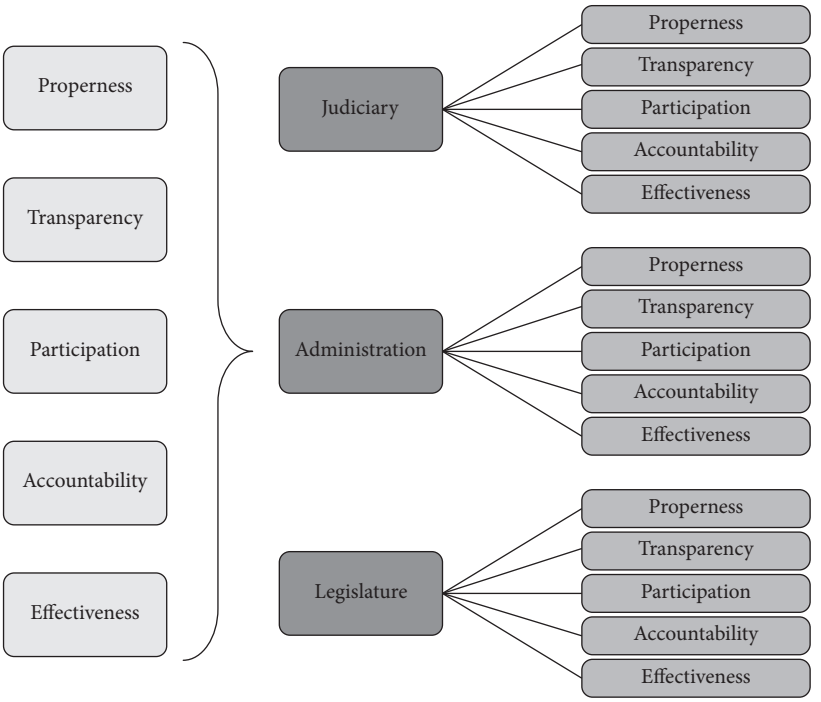
As a steering mechanism for the performance of public functions by institutions that fulfil a public task, the principles of properness, transparency, participation, accountability, and effectiveness have broader implications than those derived from their relationship with the principles of the rule of law and democracy. Hence, as principles of good administration, they entail an expansion of the scope of the general principles of administrative law – or the principles of proper administration, as some authors call them.[633] These principles regulate

632 See Section 5.2.3.

633 The term "principles of proper administration" (*beginselen van behoorlijk bestuur*) is used particularly in Dutch legal doctrine and in case law. In this regard, see R. Widdershoven & M. Remac, loc.cit., p. 403, *supra* note 312; P. Langbroek, "General principles of proper

not only the decision-making process (in terms of either individual or general decisions) but all administrative legal and factual acts, and even institutional (organisational) matters.

Chart IV



As principles of good legislature, they have a broader scope than simply establishing standards of sound legislation, and are addressed at enhancing an effective parliament at large.[634] As principles of good judiciary, they go beyond guaranteeing access to justice, the due process of law and the rights of defence; they also concern the jurisdictional functions as well as the internal operational aspects of the judiciary.[635] Thus, although their specific scope and character can vary depending on the arena in which they are applied, this study refers

administration in Dutch administrative law", in B. Hessel and P. Hofmanski (eds), *Government Policy and Rule of Law*, Utrecht-Bialystok: Utrecht University – Bialymstoku University, 1997, pp. 84–85.

634 K. Kabba, "Legislatures in modern states: The role of the legislature in ensuring good governance is inadequate", in *European Journal of Law Reform*, Vol. 12, 2010, pp. 426 – 435.

635 See for example, A. Herrero & G. López, *Access to information and transparency in the judiciary*, World Bank Institute, Governance Working Paper Series, 2010. See also, Gar Yein Ng, "A discipline of judicial governance?" in *Utrecht Law Review*, Volume 7, Issue 1, January 2011, pp. 102–116; and from the same author, Gar Yein Ng, *Quality of judicial organisation and checks and balances*, Antwerp: Intersentia, 2007.

to properness, transparency, participation, accountability, and effectiveness as principles of good governance.[636] They provide the regulatory framework through which the three branches of state exercise their functions. They also inform the role of other institutions, such as the ombudsman.

From a comparative perspective, the discussion on the emergence of the principles of good governance has been particularly relevant to the framework of the development of European public law.[637] As a concept, good governance came as a response to the claims of lack of legitimacy levelled at the institutions of the European Union.

The term "governance" became prominent in the European Union following the allegations of fraud and financial mismanagement made by the Santer Commission to the European Parliament.[638] In this context, the attempts to respond to the EU's legitimacy deficit culminated in the White Paper on European Governance.[639] The White Paper established two dimensions on the agenda of governance. First, governance aims at setting norms that justify and guide EU decision-making. Second, governance describes how the EU is to go about its decision-making.[640] The White Paper set out five principles of good governance: coherence, openness, participation, accountability, and effectiveness.[641] Although the White Paper did not list the principles of properness and transparency as such, this study believes that coherence and openness as further developed in the European legal order would nowadays be

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636 According to some authors, good governance is formulated in a more restricted way, in which the norms derived from it only apply to the administration. From this perspective, they are not principles of good governance but merely principles of good administration.

637 According to Addink, the focus on principles of good governance "is derived from an area of legal research designated by the new concept of "International and Comparative Administrative Law". This field of legal study examines the way in which administrative law functions in the context of the global (international, European and national) legal order." See G.H. Addink, "Principles of good governance. Lessons from administrative law", *supra* note 122; Luc Verhey, "Good Governance. Lessons from constitutional law", in Deirdre M. Curtin & Ramses A. Wessel (eds), *Good governance and the European Union. Reflections on concepts, institutions and substance*, Antwerp-Oxford-New York: Intersentia, 2005. On the general principles of EU law see, U. Bernitz & J. Nergelius (eds), *General Principles of European Community Law*, The Hague: Kluwer International, 2000; U. Bernitz, J. Nergelius & C. Cardner (eds), *General principles of EC Law in a process of development*, Alphen aan den Rijn: Kluwer Law International, 2008. On international administrative law, see B. Kingsbury, N. Krisch & R.B. Stewart, "The Emergence of Global Administrative Law", in 68 *Law and Contemporary Problems* 15 (2005); Anthony Gordon (ed), *Values in Global Administrative Law*, Oxford: Hart Publishing, 2011.

638 Committee of Independent Experts, *First report on allegations regarding fraud, mismanagement and nepotism in the European Commission* (15 March 1999).

639 See *supra* note 146.

640 D. Chalmers, G. Davies & G. Monti (eds), *European Union. Cases and Materials*, Cambridge: Cambridge University Press, 2010, pp. 352–353.

641 European Commission, *European Governance: A White Paper*, p. 8.

re-labelled as the principles of properness and transparency.[642] The principles of good governance set out in the White Paper were not proposed as legally binding norms but rather as general principles to be realised in different ways.[643]

Therefore, good governance is a fundamental value of the European Union. It has percolated through the European policy field to the realm of law and can thus be found in policy documents and legal texts. The principles of good governance (or some of aspects thereof) can be identified in the foundational treaties of the European Union, or developed as general principles of law by the European Courts.[644] So, for example, as Addink points out, certain aspects of good governance have been developed in important European legal documents. For instance, good governance is referred to indirectly in the Treaty of Lisbon where it explicitly refers to the Charter of Fundamental Rights of the European Union.[645] Good governance is also covered in Article 41 in relation to the general right to good administration, where some specific principles of good governance such as participation, transparency and accountability can be found.[646] Principles of good governance such as transparency also appear in Article 1[647] of the Treaty of Lisbon, while the principle of participation is enshrined in Article 11.

In case law, evolution of the principles of good governance has been perceived as an expression of the rule of law in terms of the emergence of the principle of good administration.[648] In this regard, the European Court of Justice has stated that good administration "is one of the general principles that are observed in a State governed by the rule of law and are common to the constitutional traditions

642 According to some legal doctrine and case law openness can be considered as an element of transparency; in the same way coherence may be considered as an element of properness. For a detailed description of the principles of properness and transparency as principles of good governance, see Section 6.2.

643 D. Chalmers, G. Davies & G. Monti, op.cit., p. 354. It is important to mention that although not legally binding the principles of good governance of the white paper could have an indirect legal effect by general principles of law.

644 In the context of this study, "European Courts" refers to the European Court of Justice and the General Court (before the Court of First Instance). On the development of the principles of good governance in the case law of the European Courts, see Section 6.2.

645 G.H. Addink, "Three legal dimensions of good governance. Some recent developments", p. 35. The Treaty of Lisbon establishes in Article 6(1) that the Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights, which have the same legal value as the Treaties.

646 Ibid.

647 Article 1 of the Treaty of Lisbon states that: "(…) This Treaty marks a new stage in the process of creating an ever closer union among the peoples of Europe, in which *decisions are taken as openly* as possible and as closely as possible to the citizen" (emphasis added).

648 T. von Danwitz, "Good governance in the hands of the judiciary. Lessons from the European Example", in PER/PELJ 2010, Volume 13, No 1, p. 8.

of the Member States."[649] It is also important to mention that the European Court of Human Rights has explicitly stated the fundamental character of the principle of good governance, especially as far as it affects human rights.[650] Therefore, good governance has a constitutional character in the legal order of the European Union.[651]

Summing up, the principle of good governance approaches power from a dynamic perspective, based on the steering perspective of law. It is concerned with how public functions are exercised and decisions made. It is a positive approach in the sense that it promotes the correct exercise of discretion and the quality of public interventions rather than being actively against arbitrariness. To the extent that the administration can be defined as "power in action", the principles of good governance have been more developed (and applied) in this realm.

Good governance means "to revisit the relationship between the governors and the governed, and the way in which the institutions interact with citizens".[652] In this regard, it can be said that the principle of good governance is a means of finding a balance between protecting citizens' rights and pursuing the general interest. In addition, it can address changes in institutional and bureaucratic culture. Therefore, the principles of good governance can be considered a suitable mechanism for enhancing administrative legitimacy in particular, and for delivering greater legitimacy to the political system in general.[653] Hence, the principles of good governance have an instrumental character.[654]

As mentioned, the principles of good governance have a specific relevance to the administration to the extent that some may use the terminology of the principles of good administration in the specific context of the administration.[655] Many of the core aspects of good governance have been further developed in the realm of the administration. In this regard, in a narrow sense good governance represents the situation in which public powers apply the its specific principles in relation to the activities of the administration. In a broader sense, good governance principles are applied across the different contexts of legislation, administration, judiciary, and fourth-power institutions such as the ombudsman.[656] As mentioned, it is this broader perspective of good governance adopted here.

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649 Case T-54/99 *max.mobil Telekommunikation Service GmbH v. Commission* [2002] ECR II-313, para. 48.

650 Case of Czaja v. Poland, Application 5744/05, October 2, 2012, para. 70.

651 G.H. Addink, "Three legal dimensions of good governance. Some recent developments", p. 37.

652 M. Smith, loc.cit., p. 276.

653 For the relationship between good governance, good administration and administrative legitimacy, see Section 2.1.2.

654 G.H. Addink, *Good governance. Concept and context*, p. 207.

655 G.H. Addink, "Three legal dimensions of good governance. Some recent developments", p. 31.

656 G.H. Addink, *Good governance in EU Member States,* pp. 142–143.

Given its increasing relevance in academic debate, the next section pays particular attention to good administration and its relationship with the principle of good governance.

6.1.3. THE GENERAL PRINCIPLE OF GOOD GOVERNANCE AND GOOD ADMINISTRATION

As Tridimas has pointed out, in seeking to set down standards of good governance, procedural rules falling under the umbrella term of good administration have been developed by the case law of the European Courts.[657] These were a response to the need to provide individual protection against the increasing diversity of EU administrative action, as well as the paucity of guidance in that respect, in the original treaties and in secondary European legislation.[658] From this perspective, good administration comprises procedural guarantees aimed at protecting the rights of the citizens.[659]

However, the emergence at the European level of the concept of good administration involves not only the provision of procedural safeguards to citizens, but also a development in the scope of general administrative principles. Accordingly, as pointed out by Addink, the notion of good administration appears to be "an intrinsic extension of the standard regarding administrative behaviour".[660]

From a broad perspective, good administration can be described as a principle embracing democratic ideals "in the form of a just and efficient administration,

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657 Although the courts have also used the alternative terms of "proper administration" and "sound administration". T. Tridimas, *The general principles of EU Law*, Oxford: Oxford University Press, 2006, p. 410. On the emergence of good administration as a general procedural principle of EU law, see, for instance, H.P. Nehl, *Principles of administrative procedure in EC law*, Oxford: Hart Publishing, 1999.

658 The competences of European authorities were expanded following the Amsterdam and Nice treaties. The lack of adequate procedural safeguards for protecting individuals in community legal order has gradually been remedied by treaty amendments and provisions in secondary legislation. It is said that the European Union has no comprehensive legislation on the procedural rights of private parties to be respected throughout the administrative process. Thus, the little attention paid to the development of administrative law-type mechanisms within the EU, including administrative principles, represents a detriment to EU legitimacy. One of the attempts to revert this situation has come in the form of improvements to administrative procedures through recognition of the right to good administration, as enshrined in Article 41 of the European Charter of Fundamental Rights. See K. Lenaerts & J. Vanhamme, "Procedural rights of private parties in the Community administrative process", in *Common Market Law Review*, Vol. 34, 1997, pp. 531–569; K. Kanska, "Towards administrative human rights in the EU. Impact of the Charter of Fundamental Rights", in *European Law Journal*, Vol. 10, No 3, 2004, pp. 296–326; M. Smith, loc.cit., pp. 269–288.

659 J. Mendes, op.cit., p. 4, *supra* note 323.

660 G.H. Addink. *Good Governance: a norm for the administration or a citizen's right?,* p. 7.

implementing rules of democratic polity for the good of society".[661] From a narrow perspective, it can be regarded as "encompassing administrative procedural rules governing the relationship between the individual and the public authorities in individual matters".[662] Some of these rules are procedural rights and principles already lay down in the treaties and secondary legislation (such as the right to a reasoned decision and the rules on the use of language), but most were developed by the European Court of Justice. As Kanska has stated, "through the gradual acknowledgment of various separate procedural rights, the notion of good administration developed as an umbrella principle, comprising an open-ended source of rights and obligations".[663]

The notion of good administration in the legal system of the EU is recognised as both a general principle and a fundamental right. It is the narrower conception of this principle as developed by the European Courts that formed the basis for its current recognition as a fundamental right. Nevertheless, as a rule, good administration has been treated in case law at the level of principle rather than as a subjective right. It was not applied as a self-standing criterion for claiming the review of administrative decisions. On the other hand, it was often used in association with other principles, rights, and duties in order to reach specific legal consequences through their combined use.[664] According to Hofmann, the core content of the principle of good administration is linked to the "duty of care", the main characteristic of which is "the duty of the administration to impartially and carefully establish and review the relevant factual and legal elements of a case prior to making decisions or other measures".[665] For some authors the duty of care or due diligence is the core and distinctive element of good administration.[666] It imposes the administration's positive obligation to steer decision-making, especially when exercising discretionary powers, in order to ensure quality decisions.[667]

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661 J. Reichel, "Between supremacy and autonomy. Applying the principle of good administration in the Member States", in U. Bernitz, J. Nergelius & C. Cardner (eds), *General principles of EC Law in a process of development*, Alphen aan den Rijn: Kluwer Law International, 2008, p. 244.

662 Ibid.

663 K. Kanska, loc.cit., p. 305.

664 J. Mendes, op.cit., p. 3.

665 H.C.H. Hofmann, "Good administration in EU law – a fundamental right?", in *Buletin des Droits de l'Homme*, No 13, 2007, p. 48. According to the author, in the earlier case law of the European courts the duty of care was used as a principle alongside the notion of good administration without a clear distinction between the two. In more recent case law, the duty of care has become an element of the principle of good administration. It is also reflected in Article 41 of the Charter of Fundamental Rights.

666 Juli Ponce Solé, "El derecho a la buena administración y la calidad de las decisiones administrativas", pp. 93–95.

667 Ibid., p. 96.

The recognition of good administration as a subjective fundamental public right came with the proclamation of the European Charter of Fundamental Rights.[668] As mentioned, the right to good administration is enshrined in Article 41 of the Charter and is procedural in character. Procedural rights serve to vindicate the rule of law in administrative proceedings. As a subjective public right, good administration can be considered as a tool through which citizens can enforce their rights against the administration providing the grounds for claims.[669]

Following the same trend as within the member states, the European Court of Justice has regarded certain principles of administrative procedure as fundamental rights in its case law. This is explained by the fact that European administrative procedure is decisively influenced by the constitutional law of its member states. Thus, European administrative law has been dominated by control theory, which is centred on the protection of citizens. This is a tendency that prevails in proceedings brought forward by individuals against the specific member states. In proceedings against EU institutions, it is instrumentalist theory that prevails. According to instrumentalist theory, procedural rules (and public law in general) are designed to ensure efficiency and serve as an instrument for the achievement of sound decisions. On the other hand, according to dignity theory, which is in line with the control theory of public law, the main aim of procedural rules is to protect citizens' rights and to ensure fair proceedings. According to Kanska, good administration as a subjective right is in the line with dignity theory and therefore is not focused on the pursuit of the public interest. On the contrary, Ponce Solé sees good administration as a response to the instrumental rationale to the extent that it is not only useful for the protection of the rights and interests of citizens but also as a mechanism for reaching good decisions and, consequently, guaranteeing the general interest.[670] This study subscribes to Ponce Solé's perspective, as shown in this section.

According to Article 41 of the European Charter, the right to good administration is defined as the right of every person to have his or her affairs handled impartially, fairly, and within a reasonable time by the institutions and bodies of the EU. In turn, it is composed of three other specific rights, namely: i) the right to be heard before any individual adverse measure is taken; ii) the right

668 Proclaimed at the European Council meeting in Nice on 7 December 2000. The European Charter of Fundamental Rights obtained the status of primary treaty law under the Treaty of Lisbon.

669 K. Kanska, loc.cit., p. 300. However, according to some authors Article 41 of the Charter does not establishes a subjetive fundamental right to good administration but rather a duty. See, R. Bousta, "Who said there is a 'right to good administration'? A critical analysis of Article 41 of the Charter of Fundamental Rights of the European Union", in *European Public Law*, Vol. 19, No 3, 2013, pp. 486–488.

670 Ibid., p. 326. See also Juli Ponce Solé, "Good administration and administrative procedures", in *Indiana Journal of Global Legal Studies*, Volume 12, Issue 2, Summer 2005, pp. 552–553.

to have access to one's own file; and, iii) the obligation of the administration to account for its decisions.[671] Thus, the right to good administration is an umbrella right under which may be a set of other subjective procedural rights developed by the court's case law (or defined in the treaties), intended to limit arbitrary administrative conducts.[672] In this regard, "Article 41 of the charter could be seen as a compilation of separate rights developed by the court and, in addition, a formulation of a general overarching right to good administration".[673]

The right to good administration is a recent development. No explicit self-standing right to good administration or general and enforceable principle exists in the legal orders of the member states. Nonetheless, good administration is found to be implicit in their legal traditions, stemming from constitutional provisions regarding the performance of public functions.[674]

As can be observed, the notion of good administration has been developed at the European level in close connection with the principle of rule of law and the precept of procedural justice in public administration.[675] This notwithstanding, the procedural character of good administration reflects a concern that goes beyond limiting discretion. According to Ponce Solé, the administration has the legal duty to use discretionary powers in order to make the best possible decisions in favour of the general interest. Thus, discretionary powers entail the administration's obligation to place itself in the best situation possible before it makes a decision, in order to ascertain what the general interest requires.[676] In

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671 The right to good administration also includes the right to the liability of damages caused by the institutions of the EU and the right to address the institutions of the EU in one's own language.

672 J. Mendes, op.cit., p. 3.

673 K. Kanska, loc.cit., p. 305.

674 As mentioned, the European Court of Justice (Court of First Instance) has recognised in the Max Mobil case that the right to good administration is one of the general principles that are common to the constitutional traditions of the member states, as confirmed in Article 41 of the Charter of Fundamental Rights (Case T-54/99 *Max.Mobil Telekommunikation Service GmbH v. Commission*). On the other hand, as the Venice Commission has stressed, only Finland has explicitly enshrined good administration, in Article 21 of its Constitution. Nevertheless, the requirements of good administration stem from fundamental principles recognised in nearly all member states by legislation, the judiciary, and legal doctrine. See *Stocktaking on the notions of good governance and good administration*. Council of Europe, *European Commission for Democracy through Law* (Venice Commission), Strasbourg, 2011, p. 16.

675 H.C.H. Hofmann, G.C. Rowe & A.H. Turk, *Administrative Law and Policy of the European Union*, Oxford: Oxford University Press, 2011, p. 190. The connection is confirmed by the explanations for the text of the Charter, where it is stated that "Article 41 is based on the existence of a Community subject to the rule of law whose characteristics were developed in the case-law which enshrined inter alia the principle of good administration". *Charter of Fundamental Rights of the European Union. Explanations relating to the complete text of the Charter.* Council of the European Union, Luxembourg, December 2000, p. 58.

676 Juli Ponce Solé, *Deber de buena administración y procedimiento administrativo debido*, p. 129.

this sense, the proper exercise of discretionary powers involves making not only legal decisions but also good decisions as a factor of quality.[677]

From this perspective, good decisions are those made by weighing up all the relevant factors, and whose underlying reasons are explained.[678] Hence, good administration entails good decisions as much as legal decisions, and good decisions can be reached only by good administrative procedures. Thus, administrative procedure stands as one of the legal instruments that allow public authorities to comply with good administration.[679] In this line, as pointed out by Lord Millet, "by good administration is meant good administrative procedures".[680] Hence, "the idea of procedure is linked to the idea of good use of powers, especially in the case of discretionary powers".[681] Accordingly, good administration is not only "a factor in user protection" but also represents "a shift in the emphasis from the outcome of administrative action (result) to administrative behaviour (functioning)".[682] Therefore, good administration is related to the way in which administrative functions are performed, and to that extent it approaches power from a dynamic perspective.[683]

Thus, as a legal concept, good administration is not limited to preventing public authorities from improper behaviour for the protection of citizens' rights, but also imposes on them the positive obligation to properly exercise their functions in order to make good decisions that guarantee the general interest.[684] The concern of good administration for the general interest makes it seem a multifaceted concept. It defines a model of administration that aims to properly and efficiently pursue the general interest while being respectful of the rights and interests of the citizens, as well as fostering trust and acceptance of administrative actions.[685]

From this broader perspective, good administration implies a way of conducting administrative activities regarding the decision-making process

677 Juli Ponce Solé, "Good Administration and European Public Law. The fight for quality in the field of administrative decisions", pp. 1505–1506.

678 Ibid., p. 1504.

679 Juli Ponce Solé, *Deber de buena administración y procedimiento administrativo debido*, p. 127.

680 Lord Millet, "The right to good administration in European Law", in *Public Law*, Summer 2002, p. 310.

681 Juli Ponce Solé, "Good Administration and European Public Law. The fight for quality in the field of administrative decisions", p. 1507.

682 T. Fortsakis, loc.cit., p. 217, *supra* note 336.

683 Juli Ponce Solé, *Deber de buena administración y procedimiento administrativo debido*, pp. 132 – 133.

684 Ibid. In relation to good administration and general decisions regarding rule-making, see Juli Ponce Solé, "¿Adecuada protección judicial del derecho a una buena administración o invasión indebida de ámbitos constitucionalmente reservados al gobierno?", in *Revista de Administración Pública*, No 173, 2007, pp. 239–263.

685 J. Mendes, op.cit., p. 4.

as well as dealings with citizens in general. In this sense, good administration makes an impact on the functioning of the administration with respect to legal acts (individual and general decisions) as well as factual acts. Here, good administration stresses the importance of flexibility and the development of other administrative law mechanisms, such as soft law principles, for the quality of the performance of administrative functions.

According to the former British Advocate General, Gordon Slynn, "legal rules and good administration may overlap […]; the requirements of the latter may be a factor in the elucidation of the former. The two are not necessarily synonymous".[686] Thus, the principle of good administration is composed of binding legal principles and soft law principles. This opinion has been endorsed by the case law of the European Courts, confirming the multifaceted nature of good administration.[687] Thus, in the *ABB* case the Courts have judged that regrettable conduct by an official does not in itself vitiate the legality of a decision, even though it infringes the principle of good administration.[688] In *Aseprofar and Edisa* the Courts upheld that internal rules adopted in the interest of good administration (such as the duty to contact persons and inform them in writing of the steps taken in response to their complaints) do not necessarily constitute procedural guarantees for individuals.[689] Likewise, in *Dynamiki* the courts considered that responding quickly to an applicant's requests demonstrates a level of diligence characteristic of good administration, and all the more so when this obligation has no place in the legislation. The courts recalled that the need to act within a reasonable time in conducting administrative proceedings is a component of the general EU law principle of good administration. In this regard, they held that unjustified delays, in the circumstances of each particular case, constitute an infringement of the duty of diligence and good administration. Nevertheless, the courts also stated that, regrettable as it may be, this infringement does "not restrict the applicant's ability to assert its rights before the Court" although "not such as to entail annulment of the contested decision".[690]

Based on the opinions of the advocate generals and the case law of the European Courts, some authors have characterised good administration as composed of three different but interconnected layers. First, the procedural guarantees layer, which is connected to Article 41 of the European Charter of Fundamental Rights and the recognition of good administration as a subjective right. Second, the legal principles

686 Opinion of Advocate General Sir Gordon Slynn of October 27 1983 in Case 64/82 *Tradax Graanhandel BV v. Commission* [1984], ECR 1386.
687 J. Mendes, op.cit., p. 5.
688 Case T-31/99, *ABB Asea Brown Boveri Ltd v. Commission* [2002] ECR II-1881, para. 104.
689 Case T-247/04, *Aseprofar and Edifa v. Commission* [2005] ECR II-3449, para. 55–56.
690 Case T-59/05, *Evropaiki Dynamiki v. Commission* [2008] ECR II-00157, para. 150, 152, 156 and 159.

layer, which structures the exercise of administrative functions for the realisation of the general interest. And third, the non-legally binding rules of conduct (or soft law norms) layer, mostly developed by the institution of the ombudsman.[691] Therefore, the distinctiveness of good administration lies in its "combination and practical overlap between legality and aspects that stand beyond legality".[692]

Therefore, it can be asserted that the concept of good administration can be divided into a stricter legal meaning and a broader meaning of the term. For the stricter legal meaning, good administration is a procedural safeguard. Its procedural character entails its recognition as a subjective public right.[693] The right to good administration is comprised of other procedural rights – specifically, those envisaged in Article 41 of the Charter.[694] For the broader meaning, good administration is considered a general principle that embraces legally binding and non-legally binding rules structuring the exercise of administrative functions. Their main purpose is to steer the exercise of discretionary powers in line with due pursuance of the public interest.

Accordingly, good administration is a legal principle from which specific obligations are derived. One such obligation is the duty to make appropriate decisions through the implementation of adequate procedures. Thus, from a narrow perspective, the principle of good administration is solely related to decisional processes regarding either individual or general decisions.[695] In this way, good administration is connected to the concept of natural justice, procedural fairness, or due process of law, and consequently it might explain the existence of a self-standing right to due process in administrative matters.

Thus, there is a connection between the procedural dimension of good administration and the right to due (good) administrative procedure. In this regard, Ponce Solé states that good administration "is not complied with by

691 J. Mendes, op.cit., pp. 4–6.

692 J. Mendes, op. cit., p. 6.

693 Juli Ponce Solé, "Good administration and administrative procedures", pp. 559–561.

694 In this regard, the Court of First Instance has upheld that the principles of good administration do not confer rights upon individuals, except where "it constitutes the expression of specific rights" such as the ones enshrined in Article 41. See Case T-193/04, *Hans-Martin Tillack v. Commission* [2006] ECR II-3995, para. 127; and Case T-128/05, *Societé de Plantations de Mbanga SA (SPM) v. Council and Commission* [2008] nyr, para. 127. Likewise, the Court of First Instance, and advocate generals, tends to identify the right to good administration with the procedural rights contained in Article 41 of the Charter. See Case T-378/02 R, *Technische Glaswerke Ilmenau v. Commission* [2003] ECR I-2921 para. 65; Opinion of AG Kokott delivered on 22 January 2009, Case C-75/08 *Christopher Mellor v. Secretary of State for Communities and Local Government* nyr, para. 24; Opinion of AG Mengozzi delivered on 16 November 2006, Case C-523/04, *Commission v. Netherlands* [2007] ECR I-3267, para 59, note 36.

695 Although Article 41 of the Charter refers to good administration regarding individual decisions, there is nothing to prevent it from having implications in relation to general decisions, such as regulations.

means of any procedure, but only thanks to the pursuit of due or fair procedure, which consists of following all the precise procedural activity in order to comply with the constitutional and procedural principles."[696]

From a broader perspective, as far as good administration relates to the way in which administrative functions are performed, the principle of good administration is to be considered as a norm of conduct from which other principles and rules for the positive guidance of administrative action are derived.[697] As a general principle, good administration might serve as an instrument that orientates the interpretation of other constitutional principles, as well as the development of other administrative law mechanisms for enhancing the proper behaviour of public officials.[698] Thus, the principle of good administration guides the way in which all administrative activities are conducted, even those related to organisational matters and dealings with the citizens.

In this context, soft-law instruments such as rules of good administrative conduct may emerge for guiding and assessing the performance of the administration. These rules of conduct, or principles of good administration as some authors call them[699], are mostly developed by the ombudsman institution as part of its role of controlling the administration. From a comparative perspective, rules of conduct have been developed particularly by those ombudsman institutions that apply maladministration as their assessment criteria.[700]

Summing up, good administration is the result of the step-by-step development of procedural principles. It has been developed in relation to the concepts of procedural justice and the rule of law. In that regard, it is directly connected to

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696 Juli Ponce Solé, "Good Administration and European Public Law. The fight for quality in the field of administrative decisions", pp. 1517–1518.

697 Good administration is configured as a steering instrument for the administration. Regarding the good governance legal approach as a steering mechanism of public law, see Section 4.2.4.

698 G. Ruiz-Rico Ruiz, "El derecho a una buena administración. Dimensión legal y estatutaria", in Carmen María Ávila Rodríguez & Francisco Gutiérrez Rodriguez, *El derecho a una buena administración y la ética pública*, Valencia: Tirant Lo Blanch, 2011, p. 56.

699 See for example, R. Widdershoven & M. Remac, loc.cit., pp. 403–406. According to some authors, the denomination "principles of good administration" is reserved to those principles that, although based on legal norms, could be better defined as moral or ethical norms. They are also defined variously as non-binding rules of proper conduct or good behaviour, or principles of good administrative practice. Thus, the terms "rules of conduct" and "principles of good administration" can be considered synonyms by default. In the framework of this research, the expression "rules of good administrative conduct" will be used when referring to those principles of good administration that do not have a binding character.

700 Examples of ombudsman institutions that have actively developed and codified rules of good administrative conduct are the European Ombudsman, the National Ombudsman of the Netherlands, and the UK Parliamentary Ombudsman. On the role of the ombudsman as a developer of norms from a comparative perspective, see Section 3.6.

the concept of properness. Good administration also represents an expansion of the scope of general administrative principles to the extent that its primary concern is not controlling arbitrariness but ensuring good decisions as a factor of quality. Therefore, good administration provides new perspectives in the way we understand how administrative functions and discretion are exercised.

Resulting from how it has evolved, good administration can be defined in a narrow sense or in a broader one. Regarding the narrow definition, good administration is a principle related to decision-making processes, which encompasses procedural rules. From this perspective, good administration is primarily concretised through (proper) administrative procedures.[701] Then good administration is defined in terms of good administrative procedure. The recognition of good administration as a fundamental right is related to the narrow perspective of good administration.

From a broad perspective good administration is a principle that provides positive guidelines for all administrative actions.[702] As a general principle it applies legally binding norms and rules of good administrative conduct to ensure the realisation of the general interest. From this perspective, the scope of good administration is expanded outside the decision-making process. While the broad concept of good administration embraces the narrow one; the later cannot immediately explain the former. In that regard, from this study's perspective, the principle of good administration has to be from a broad perspective, which includes both, substantial aspects and procedural ones.

In this way, it is possible to affirm that good administration concretises the principle of good governance at the level of the administration. It synthesises the specific principles of good governance that result from their specific application to the administration. Good administration structures administrative legitimacy. Without good administration, good governance and political legitimacy cannot be sustained.[703]

By this point it has clearly seen that good governance provides a new paradigm based on the quality of decisions and the proper exercise of discretion. Good

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701 In relation to good administration as a good administrative procedure, the Peruvian General Administrative Procedure Act (GAPA) enshrines in Article IV.1.2. the *principio del debido procedimiento administrativo* (principle of due administrative procedure). It derives from the constitutional principle of *debido proceso en sede administrativa* (due process in administrative matters). This constitutional principle has also been recognised as an (implicit) fundamental right by the Peruvian Constitutional Court. On that regard see, Christian Guzmán Napurí, *Manual del procedimiento administrative general*, Lima: Pacífico, 2016, pp. 30–37.

702 The Peruvian Constitutional Court has recognised, in Case 2235–2004-AA/TC, the implicit existence of good administration as a general constitutional principle. Although the Constitutional Court does not define its specific legal content, it has adopted the broader perspective of the concept. This aspect will be further discussed in Section 11.1.1.

703 M. Smith, loc.cit., p. 276.

administration is the best expression of good governance. The principles of good governance have been further developed in the field of the administration as principles of good administration.

However, what remains unclear is what the uncontested general aspects are that determine the features and legal meaning of the principles composing good governance; in short, what their substance is. As such, sketching out their legal meaning is the very purpose of this chapter.

6.2. THE SPECIFIC PRINCIPLES OF GOOD GOVERNANCE: PROPERNESS, TRANSPARENCY, AND PARTICIPATION

As stated above, the "discovery" of the legal principles of good governance has taken place primarily in the framework of the development of European public law. European public law witnessed the emergence of new legal concepts, many of them set down in the foundation treaties and other legal texts, as well as others in the case law of the European Court of Justice. In this regard, Tomkins has pointed out that European public law has become both broader and richer since the emergence of new legal concepts as a consequence of "the relatively minor but nonetheless significant shift in the legal gaze" from case law to legislation in its development, especially since the Maastricht Treaty, in which each of these concepts has a place of its own.[704]

In this context, concepts such as properness, transparency, participation, accountability, and effectiveness have percolated through the European public institutions and have moved further away from the traditionally legal sphere than ever before.[705] However, the legal content and scope of these principles is not well established. Although almost all the specific principles of good governance are well known on the national level – insofar as at least some aspects of them have been promoted through the development of legal principles by the judiciary or the parliament in written legislation – the discussion on principles of good governance on the regional (European) and international levels makes the definition of their legal dimension a top-down/bottom up process. This is a consequence of the mutual reinforcement and influence of the national legal orders of EU member states and the European legal order on the development of general principles of law.[706] It is a process of the "mutual-cross-fertilisation"

704 Adam Tomkins, "Transparency and the emergence of a European administrative law", in P. Eeckhout & T. Tridimas (eds), *Yearbook of European Law* 1999–2000 (Vol. 19), Oxford: Oxford University Press, 2000, pp. 218–219.

705 Ibid., p. 219.

706 Luc Verhey, loc.cit., pp. 49–52, *supra* note 637.

or "Europeanisation" of public law, which creates a flux of ideas regarding the development of the principles of good governance.[707]

As a general trait, it can be said that the principles of good governance are built upon existing legal values, and are gradually developing and evolving to provide new legal perspectives. As already mentioned, they provide a concern for quality while stressing the steering approach to law in order to positively guide the conduct of public powers. They regulate the decision-making process (regarding either individual or general decisions) as well all administrative legal and factual acts including organisational matters.[708] Regardless of their substantive character they are relatively open-ended, and as such their specific content has to be honed in the context of their specific area of application (administration, legislature, or judiciary) in order to produce concrete results. This is because the requirements of constitutional principles are related to the context in which they are applied. Endicott calls this the principle of relatively.[709]

Another important feature of the principles of good governance is that they relate to each other in ways that are not always harmonious. Tension often exists between them, and there are even overlaps between their various elements and with other principles. Therefore, the question of which of them prevails in concrete situations has to be reasonably determined by weighing up all factors involved. As constitutional principles, the principles of good governance may be invoked as standards of review of acts by public powers or serve as guidance in the interpretation of other provisions. Thus, constitutional structure, competences, and actions of public bodies and their respective agencies must be accomplished with principles of good governance as constitutional standards.

The following sections will analyse the legal scope and meaning of the principles of good governance. But first, this section will focus on the principles of properness, transparency, and participation. As mentioned, they have been developed in close connection to the rule of law and democracy. As explained, the basic idea of the rule of law is grounded in the need to restrain public power to prevent arbitrariness and protect citizen's rights, being the principle of legality the strategy to control power through law.[710] Properness is connected to a broader

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707 This study borrows the expression "mutual-cross-fertilisation" from K. Lenaerts & J.A. Gutiérrez-Fons, "The constitutional allocation of powers and general principles of EU law", in *Common Market Law Reivew*, Vol. 47, 2010, p. 1630. For the concept of cross-fertilisation see, J. Bell, "Mechanisms for cross-fertilisation of adminiatrative law in Europe", in J. Beatson and T. Tridimas (eds), *New directions in European public law*, Oxford: Hart Publishing, 1998, pp. 147–167. About the so-called process of Europeanisation of public law see, J.H. Jans, R. de Lang, S. Préchal & R.J.G.M. Widdershoven, *Europeanisation of public law*, Groningen: Europa Law Publishing, 2007.

708 See Sections 6.1.1 & 6.1.2 and Table 2 for a better understanding of the elements of the principles of good governance that result from their evolving character.

709 Timothy Endicott, *Administrative Law*, New York: Oxford University Press, 2009, p. 11.

710 See Section 5.2.1.

conception of the rule of law and the principle of substantive legality, which claims for the application of constitutional provisions and principles in accordance with the neoconstitutionalism perspective.[711] In this way properness intends to steer governmental action through the application of principles being the constitution the main normative source. On the other hand, democracy gives the rule of law depth specially regarding transparency and participation.[712] Transparency is needed for the proper function of a democracy. In modern states transparency goes beyond to the law-making process to enhance legal certainty.[713] Transparency is essential for citizens to be informed and to influence in public decisions. It is also required to market efficiency and the realisation of fundamental freedoms.[714] Regarding participation, it has broadened its content being relevant not only for free elections but also in the process of policy-making and implementation.[715]

As can be observed, as good governance principles, properness, transparency and participation have distinctive elements which are the result of the further development of the rule of law and democracy but also adds elements to accountability and effectiveness.[716] They provide new elements to legitimise administrative action through quality decisions. Therefore, they are essential for strengthening democratic rule of law. In this regard, these principles are considered key aspects of good governance, and are also interconnected with the other good governance principles. For that reason, they are the criteria used here for assessing the role of the ombudsman institution in fostering good governance.

To determine the normative-legal effects of these principles, the analysis will centre mainly on the literature and court decisions. Since the discussion is on the development of principles of good governance that first emerged in the EU legal context, this chapter will focus especially on the case law of the European Courts.

6.2.1. PRINCIPLE OF PROPERNESS

6.2.1.1. General aspects

The concept of properness entails a special quality or character that makes something appropriate or suitable for a correct purpose.[717] From a substantive legal perspective, properness might be related to the constitutional duty to ensure

711 See Section 6.2.1.1.
712 G.H. Addink, *Good governance. Concept and context*, p. 3.
713 See Section 6.2.2.1.
714 Anoeska Buijze, *The principle of transparency in EU law*, 's-Hertogenbsoch: Uitgeverij BOXPress, 2013, pp. 45–49.
715 See Section 6.2.3.1.
716 G.H. Addink, *Good governance. Concept and context*, pp. 3–4.
717 See Oxford Dictionary.

the correct exercise of government powers, and it is thus closely connected to the rule of law principle. In this regard, Addink points out that the principle of properness developed because the formal approach to legality was "too narrow for the adequate control of the government".[718] Thus, properness would have the longest history of all the principles of good governance.[719]

On the national level, the liberal tradition identifies procedural rules as the means of protecting the fundamental rights of individuals.[720] As explained earlier, the principle of the rule of law is based on the idea of legal certainty, which is to be attained through the subjection of public authorities to the law. In the original understanding of separation of powers, legal certainty relied on the material content of legal norms.[721] However, from a classical rule of law perspective, legal certainty was broken with through the conferral of discretionary powers upon the administration (through delegated legislation) to cope with the need for flexibility in a developing and changing society.[722]

As the discretionary powers of the administration increased, the courts were confronted with a lack of adequate legal instruments to review the behaviour of the administration. Thus, substantive, and procedural general principles were developed by the courts (and the doctrine) as unwritten norms in order to deal with legal uncertainty and to provide a counterweight to the discretion of the administration. They have also been codified by the legislator to expand their effects into wide-ranging areas of decision-making in public law.

It may be said that general principles of law are the result of the search for a balance between social and government needs for changeable legislation and adjustable competencies on the one hand; and guarantees for adequate decision-making and judicial control on the other.[723] They aim at providing procedural safeguards for the protection of citizens' rights while pursuing the general interest.

The principle of properness gives expression to two of the core values of a democratic state governed by the rule of law: controlling the abuse of discretion through the objective conduct of public authorities in rigorously observing the law and weighing all interests at stake before taking actions; and avoiding acting in an untoward manner by making distinctions between citizens based

718 G.H. Addink, *Good governance. Concept and context*, p. 99.
719 Ibid.
720 J. Wakefield, op.cit., p. 21.
721 See Section 5.2.1.
722 P. Langbroek, "General principles of proper administration in Dutch administrative law", pp. 84–85.
723 Ibid., pp. 87–92.

on grounds other than those provided by law. These constitutional values are operationalised by laying down a set of unwritten and written norms of conduct in order to ensure the proper exercise of discretionary powers.[724] General principles regarding the performance of public functions that can be found in most modern states governed by the rule of law include: legality, proportionality, legal certainty, prohibition of arbitrariness, prohibition of misuse of power, legitimate expectations, and due care. Thus, properness can be described as an overarching notion encompassing various other legal concepts or principles. These principles regard the correct exercise of discretionary powers as having the purpose of protecting citizens' rights and guaranteeing the general interest.

In accordance with a marked trend in public law, the constitutional character of both substantive and procedural principles regarding the functioning of the administration has been recognised in almost all modern states governed by the rule of law. Given their universal character and constitutional status, they permeate the whole legal system and stand as an important trait of modern public law.[725] Although they are particularly relevant for the performance of administrative functions, these principles have to be considered as norms of conduct for the whole government by applying either individual or general decisions, legal or factual acts, to all acts of public legal entities.[726] Hence, general principles function not only as standards for judicial review on the legality of administrative decisions but also as legal standards for the assessment of government action. They apply to, and also are applied by, all powers of the government outside the administrative law process.[727]

This trend is the expression of the constitutionalisation of the national legal orders in relation to a broader conception of the rule of law, according to which public powers are subject primarily to the constitution as the ultimate source of the legal order. As mentioned, this is the so-called legal postpositivism or neoconstitutionalism paradigm.[728] From this perspective, the modern state is a constitutional state.[729] In this modern constitutional state, constitutional provisions (principles and rules) prevail over other legal norms, and the

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724 J.A. Santamaría Pastor, *Principios de Derecho Administrativo General*, Madrid: Iustel, 2004, Vol. 1, pp. 113–115.

725 Much of administrative law is composed of general principles derived from constitutional provisions. Thus, some principles of administrative law are in fact general principles of law that have an application specific to the administrative function as well as to the other functions of government. Other principles of administrative law are specific only to the administrative function.

726 Nevertheless, there are general principles that are specific to certain public function (administrative, legislative or jurisdictional) and not to the others.

727 G.H. Addink. *Good Governance: a norm for the administration or a citizen's right?,* p. 6.

728 See Section 4.2.3.

729 Josep Aguiló Regla, loc.cit., p. 19, *supra* note 396.

interpretation of law must be in accordance with these provisions. Consequently, constitutional principles, and the values enshrined in the constitution, play an important role in guiding the conduct of public powers.[730] As Addink points out, this is a "mark of the *Rechtsstaat* development under the constitution".[731] The principle of properness expresses this paradigm to the extent that it represents the concretisation of the supremacy of the constitution in the modern constitutional state by advocating the application to rules, principles, and values that orientate the activities of the government, especially when discretionary powers are performed.

From a traditional legal perspective, public law has dealt with discretion by imposing constraints in decision-making in order to prevent public officials from making arbitrary decisions and to protect the rights and interests of individuals. Some authors have described this as a negative approach in the sense that it is expressly against arbitrariness.[732] However, as a good governance principle, properness has more specific implications than solely controlling discretion. It also embraces a concern for steering discretion in order to achieve quality in the performance of public functions.[733] The steering dimension of properness is best reflected in the development of good administration as a general principle in the case law of the European Courts.

In a similar way as at the national level, at the regional level the underlying principle of the European Union is devotion to the rule of law, which implies adherence to procedural rules.[734] In this regard, in its early case law the European Court of Justice has already recognised the importance of proper procedural rules for the legality of administrative action.[735] In this context,

730 Ibid., p. 21.

731 G.H. Addink, *Good governance. Concept and context*, p. 88.

732 Juli Ponce Solé, "Good administration and administrative procedures", p. 554.

733 Regarding the concept of quality in public law, see K.J. de Graaf, J.H. Jans, A.T. Marseille & J. de Ridder (eds), *Quality of decision-making in public law*, Groningen: Europa Law Publishing, 2007; Juli Ponce Solé, "Good Administration and European Public Law. The fight for quality in the field of administrative decisions", *supra* note 59; Juli Ponce Solé, "La calidad en el desarrollo de la discrecionalidad reglamentaria", in *Revista de Administración Pública*, No 162, 2003, pp. 89–144. For the relationship, between the concept of quality and good governance see Section 2.1.2.

734 J. Wakefield, op. cit., p. 21. The rule of law is enshrined in Article 2 of the TEU. It is also embodied in Article 19(1) of the TEU, which provides that the Court "shall ensure that in the interpretation and application of the Treaties, the law is observed". Nevertheless, the rule of law principle was developed by the Court of Justice before the adoption of the aforementioned treaties. See Case 294/83 *Les Verts v. Parliament* [1986] ECR 1339, para. 23, in which the Court stated that the European Union "is a community based on the rule of law".

735 H.C.H. Hofmann, G.C. Rowe & A.H, Turk, op.cit., p. 192. In that regard, see Joined Cases 7/56 and 3/57 to 7/57 *Algera v. Common Assembly* [1957] ECR 39, para. 7, 12 and 55. In relation to the obligation to follow procedural requirements, in particular those derived from the rights of defence, see Case 46/87 *Hoechst v. Commission* [1989] ECR 2859, summary point 1 and 3.

the European Court of Justice has developed general principles of law derived from the European Union Treaties and the legal system of the member states, thereby providing a framework for the action of the institutions, organs, and bodies of the Union.[736] Thus, the Court of Justice has developed (substantive and procedural) administrative principles as part of the so-called general principles of EU law.[737]

According to some authors, most of these principles are very similar to those that are recognised in the legal orders of the member states, although EU principles may not have the same substance and scope as the national principles from which they are derived.[738] As general principles some of them apply to all the authorities of the European Union and not just to the administration. Others are principles specific to the administration, including those of a procedural character. Some of the most important general principles of EU law are[739] the principle of protection of fundamental rights, the principle of equality, the principle of legal certainty and legitimate expectations, the principle of proportionality, the principle of observance of the rights of defence, and the principle of good administration.

As mentioned, good administration is related to the proper use of discretionary powers in the sense of not only reaching legal decisions but also good decisions as a factor of quality.[740] Thus, according to Ponce Solé with regard to good administration, classic general principles of law such as legality, prohibition of abuse of power, prohibition of arbitrariness, objectivity, proportionality, equality, and impartiality can be reinterpreted as providing positive guidance to how public functions are conducted in relation to both legal acts (either individual or general decisions) as well as factual acts. From this perspective, Ponce Solé has stated that at the national level, the general principles "referring

736 T.C. Hartley, *The foundations of European Public Law*, Oxford: Oxford University Press, 2010, p. 143. It has to be borne in mind that even when these principles may have their origins at the national level, they are applied by the ECJ as principles of EU law and not national law. See also Tim Koopmans, "General principles of European and national systems of law: A comparative view", in U. Bernitz & J. Nergelius (eds), *General Principles of European Community Law*, The Hague: Kluwer International, 2000, pp. 25–34.

737 M. Smith. loc.cit., p. 279. See also T. Tridimas, op.cit., *supra* note 657.

738 R. Widdershoven & M. Remac, loc.cit., p. 387.

739 Regarding general principles in EU law, see X. Groussot, J. Hettne & G.T. Petursson, "General Principles and the Many Faces of Coherence: Between Law and Ideology in the European Union", in S. Vogenauer & S. Weatherill (eds), *General Principles of Law: European and Comparative Perspective,* Oxford: Hart Publishing, 2017, pp. 77–103; D. Galetta, H.C.H. Hofmann, O.M. Puigpelat, J. Ziller, The General Principles of EU Administrative Procedural Law, In-depth Analysis, Brussels: European Parliament, 2015; P. Craig, *EU Administrative Law*, Oxford: *Oxford University Press* 2012.

740 See Section 6.1.3.

to the development of the activity of service to the general interests" might be grouped under the overarching principle of good administration.[741]

Therefore, the development of good administration implies a renewed involvement of general principles of law in the furtherance of the general interest and effectiveness in the realisation of public goals. It extends the scope of general administrative law principles beyond their intrinsic connection to the rule of law as traditionally linked to the negative approach of the exercise of discretionary powers. Consequently, this approach has contributed to an expansion of the notion of properness to one that is not limited to preventing public authorities from undue behaviour in the protection of citizens' rights but also imposes on them the positive obligation to properly exercise their functions so as to guarantee the general interest.

To recap, as a good governance principle, properness is connected to a broader conception of the rule of law, which implies that the proper functioning of public powers requires that they are subject to the principle of legality which comprises constitutional provisions (rules, principles and values) for orienting the activities of the government.[742] It encompasses a set of principles for conducting public functions in the sense not only of restricting discretionary powers for the protection of fundamental rights, but also of providing positive guidance to discretion for the achievement of the general interest. Thus, it has a direct (albeit not exclusive) application at the level of the administration. Properness can be considered as reflecting the principle of legality under the neoconstitutionalism paradigm.

Properness might embrace negative and positive obligations. Negative obligations that are further consequences of its connection to the rule of law principle would be oriented to restraining public officials from the incorrect exercise of their discretionary powers. Typical examples are the duties derived from principles such as prohibition or arbitrariness, prohibition of abuse of power, or objectivity. On the other hand, positive obligations would involve the steering dimension of good governance in terms of guiding the performance of public officials towards taking measures in favour of the general interest. In this regard, and as explained earlier, the principle of due care or due diligence implies

741 J. Ponce Solé. "Good Administration and European Public Law. The fight for quality in the field of administrative decisions" pp. 1516–1517. It is worthy to mention that as a consequence of Europeanisation principles of good administration have shifted from regional level to national legal orders. In that regard see J. Reichel, loc.cit., pp. 243–271; J.H. Jans, R. de Lange, S. Préchal & R.J.G.M. Widdershoven, *Europeanisation of public law*, *supra* note 707; Swedish Agency for Public Management (Statskontoret), *Principles of good administration in the Member States of the European Union*, 2005.

742 Antonio Pérez Luño, *La Seguridad Jurídica*, Barcelona: Ariel, 1994, pp. 31ff.

a positive obligation for all branches of the government to carefully establish and review the relevant factual and legal elements of a case prior to making decisions in order to pursue quality in the performance of their functions.[743] Thus, properness provides new foundations for legitimacy based on the (formal) principle of legality as well as the quality of the performance of the state apparatus.[744] Viewed as such, properness has been perceived by some authors as the general constitutional value of integrity. Despite the different denominations, both principles refer substantially to the same notion.[745] As Buck has pointed out the pursuit of integrity in the exercise of public authority has a parallel in the prevention of arbitrariness. To the extent that properness embraces principles, rules, and values, it also relates to integrity.

Therefore, from this study's point of view the principle of properness implies the duty for public authorities to exercise their powers in accordance with separation of powers, the rule of law, and the democratic principle. In this regard, authorities act in accordance with the principle of legality as well as constitutional principles and values to serve the public interest in an objective way, guarantee respect for citizens' rights, and promote integrity in the public service.[746] Properness can be defined as the constitutional dimension, or the constitutionalisation of the principle of legality.

It is not the intention of this chapter to detail what has been written elsewhere regarding the elements of properness. However, an overview of some of them will be given in order to clarify the normative framework proposed here. Thus, this chapter will only describe the following elements of properness: the principle of equality, the principle of legal certainty, the principle of prohibition of arbitrariness, the principle of prohibition of misuse of power, the principle of proportionality, and the principle of legitimate expectations. As mentioned, all

743 See Section 6.1.3.

744 See Section 2.1.2.

745 As Buck, Kirkham and Thompson point out, "integrity is being posited as a fundamental and multifaceted constitutional value to be adhered to by government institutions in their relations with the governed. Arguably, the concept of integrity reflects a targeted variant of the more familiar notion of 'accountability'. But the pursuit of integrity in the exercise of public authority has obvious parallels with the underlying purpose of the rule of law: the prevention of arbitrary rule. Indeed, perhaps the better understanding is that the rule of law is a subset of the broader concept of integrity, with a significant feature of the concept of integrity being that it includes the rule of law but goes further than judicially developed principles alone. Acting lawfully is not enough for public authorities; other expectations of 'proper conduct' must also be met". T. Buck, R. Kirkham & B. Thompson, *The ombudsman enterprise and administrative justice*, London: Ashgate, 2011, p. 29.

746 Alberto Castro, *El ombudsman y el control no jurisdiccional de la administración pública como garantía del derecho a la buena administración*. Paper presented at XX Congreso Internacional del Centro Lationamericano de Administración Pública para el Desarrollo – CLAD, Lima, Perú, 10–13 November 2015, p. 4.

of them have constitutional status, either in the legal order of national states or in the European legal order. The constitutional character of properness derives from its connection to the rule of law as well as from the constitutional status of its elements.

6.2.1.2. Specific aspects

Equality and non-discrimination

The principle of equality is a general principle of EU Law recognised by all member states.[747] It has been codified in Article 1 of the Dutch Constitution. On the international level, the principle is also laid down in Article 2(2) of the Peruvian Constitution. The function of the principle of equality is to prevent arbitrary distinctions, and to avoid differences in treatment without reasonable grounds. To this end, it prescribes that comparable situations must not be treated differently and that different situations must not be treated in the same way. This implies that where two categories are treated differently it should first be determined whether the situations concerned are similar.[748]

Three aspects can be discerned regarding the principle of equality: a) equality of the law, which means that the law is applied for all; b) equal treatment of individuals by the administration; and c) the equal spread of costs, which will have been applied in the general interest.[749]

The principle of equality implies the prohibition of discrimination. The application of this principle in the Netherlands has been influenced by the European principle of equality, and more specifically by the several written European prohibitions of discrimination on grounds of nationality, gender, race, and age.[750] In Peru the grounds for the prohibition of discrimination are laid down in the Constitution, but this is not considered as an exhaustive list. The principle of impartiality derives from this general principle.

Legal certainty

The principle of legal certainty has a formal and substantive dimension. The formal dimension implies that norms, rights, and duties must be formulated in such a way that they are recognisable to the addressees. In turn, the substantive dimension means that the rules possess durability and must be complied with. It

747 R. Widdershoven & M. Remac, loc.cit., p. 388.
748 J.H. Jans, R. de Lange, S. Préchal & R.J.G.M. Widdershoven, op.cit., p. 130.
749 G.H. Addink, *Good governance. Concept and context*, p. 106.
750 R. Widdershoven & M. Remac, loc.cit., p. 389.

also means that rights must not be infringed without a legal basis, and in general retroactive effects for restrictive rules are prohibited.[751]

As a general principle, legal certainty (*seguridad juridica*) also has an objective and a subjective dimension. In the case of its objective dimension, legal certainty is a parameter for the activities of the state, from which its obligation to perform in a coherent and predictable way, in accordance with law, is derived. As to its subjective dimension, legal certainty ensures that every measure taken by public bodies is foreseeable by the individuals concerned. At the level of the administration, legal certainty is specified in the principle of predictability *(predictibilidad)*. In general, legal certainty implies that public authorities (both legislative and administrative) should ensure continuity and predictability in their relations with individuals.

In the Netherlands, legal certainty is codified in Articles 4:23 of the *Algemene wet bestuursrecht* (General Administrative Law Act, hereafter GALA) regarding the provision of subsidies. It is also a European principle, partly codified in Article 49(1) of the Charter of Fundamental Rights. In both European and Dutch laws, it prohibits the retroactive withdrawal of legally acquired rights.[752] In addition, it imposes standards on the clarity of decision.

Prohibition of misuse of power

The principle of prohibition of misuse of power means that an administrative authority must use its power to make a decision for no other purpose than the one for which the power has been granted. In the Netherlands, this principle has been codified in Article 3:3 of GALA. In Dutch case law, four aspects of the principle have been developed: a) the use of the power against the aim of the power; b) the use of the power for an incorrect goal; c) the appropriate use of the power; and, d) the use of the power consistently with the aim.[753]

Rather than an abuse of power, the literature sometimes refers to abuse of discretion, although in reality this is a different situation. The former implies a situation in which power has been used for an illegal purpose. The latter involves a case which is found to be unreasonable, irrational, or disproportionate.[754] Thus, the difference is one of illegality versus irrationality. In UK case law the illegality line is formulated in connection with the lines of improper purposes, but less according to the line of relevance, and only incidentally in relation to the

751 G.H. Addink, *Good governance. Concept and context*, p. 104.
752 R. Widdershoven & M. Remac, loc.cit., pp. 389–390.
753 G.H. Addink, *Good governace. Concept and context*, p. 102.
754 Ibid.

concept of bad faith. Atypical situations occur when there is a duality of purpose or overlapping motives. In both situations, the court refers to the dominant purpose.

Prohibition of arbitrariness

The principle of prohibition of arbitrariness requires that administrative decisions result from a weighing up of interests in order to avoid unreasonable outcomes. In the Netherlands, this principle can be found in Article 3:4 of the GALA. In general, the following aspects can be identified in this principle: a) arbitrariness in the context of an evidently unreasonable (that is, completely unsystematic) way of acting by the administration; b) visible unreasonableness, which means that a balancing of interests was performed by the administration, but this did not prove acceptable; c) "cannot be done in reasonableness", a formulation in which there is a situation of a marginal judicial review; d) "in fairness", which means a more substantial interpretation that is both reasonable in strict sense and fair.[755]

In the United Kingdom the principle of prohibition of arbitrariness is known as "Wednesbury unreasonableness". This is a situation "so irrational that no properly directed authority could have come to this conclusion". The Wednesbury test of unreasonableness is an exception to judicial review in that it reviews the substantive merits of the decision. Since the judges do not make a new decision, it is not considered a breach of the separation of powers.

Proportionality

Proportionality implies that there should be a proper balance between the means and the aims that have to be reached. Proportionality has been codified in Article 3:4, under 2, of the GALA, prescribing the duty of the administration not to act disproportionately. The Article is inspired by the EU principle of proportionality.[756]

The principle of proportionality has been developed in the Netherlands especially in the context of administrative sanctions. At the European level, there is broader application of this principle. In this broader application, a proper balance between the means and the aims should exist. According to the European Court of Justice, proportionality is based on three elements: suitability, necessity and proportionality *stricto sensu*. In Peru, the principle of

755 G.H. Addink. *Good governance. Concept and context*, p. 103.
756 R. Widdershoven & M. Remac, loc.cit., pp. 389–390.

proportionality has been recognised as an implicit constitutional principle and has been developed in a similar way by the Constitutional Court.[757]

Legitimate expectations

The principle of legitimate expectations (also known as the principle of confidence or *confianza legítima)* provides protection to citizens against arbitrary actions on the part of the state by requiring public authorities to act, as far as possible, in accordance with the legitimate expectations that they themselves have created.[758] In general it can be said that legitimate expectations may be originated by legislation, individual decisions, policy rules, and specific assurances and promises.[759] According to much of the doctrine, legitimate expectations stem from the principle of legal certainty. According to others, they may also derive from the principle of good faith.[760] The principle of legitimate expectations can be found at both the regional (European) level and the national level in different legal orders.

As an element of European Law, legitimate expectations are a fundamental legal principle, explicitly recognised by the European Court of Justice as a "part of the Community legal order".[761] They apply to legislative acts as much as administrative acts and are connected to the principle of legal certainty.[762] The European principle of legitimate expectations is primarily inspired by German law. In the legal order of that country, legitimate expectations are considered a fundamental right that can be derived from the constitution.[763]

The European Court of Justice does not allow the *contra legem* application of the principle of legitimate expectations. In most cases it refers jointly to the principles of legitimate expectations and legal certainty. The protection provided by the Court of Justice based on the principle of legitimate expectations differs in intensity from that conferred by each of the member states.[764] Thus, the protection provided by the Court based on the principle of legitimate expectations is less extensive than, for example, in Dutch administrative law.

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757 On the constitutional foundations of the principle of proportionality see Carlos Bernal Pulido, *El principio de proporcionalidad y los derechos fundamentales*, Madrid: Centro de Estudios Polítcos y Constitucionales, 2007, pp. 599–615.

758 J.H. Jans, R. de Lange, S. Préchal & R.J.G.M. Widdershoven, op.cit., p. 164.

759 R. Widdershoven & M. Remac, loc.cit., p. 390.

760 Alejandro Arieta Pongo, "El principio de protección de la confianza legítima ¿Intento de inclusión en el ordenamiento peruano?", in *Revista Ita Ius Esto*, No 1, 2008, pp. 95–96.

761 See, Case 112/77 *Topper* [1978] ECR 1019.

762 Joint Cases C-177 and 181/99 *Ampafrance und Sanofi* [2000] ECR I-7013, para. 67.

763 J.H. Jans, R. de Lang, S. Préchal & R.J.G.M. Widdershoven, op.cit., p. 165.

764 R. Widdershoven & M. Remac, loc.cit., p. 390.

Thus, in the Netherlands, the debate concerns the limiting effect of EU law on its national principle of legitimate expectations.

In Dutch administrative law, the principle is regarded as an important legal principle. Having had no more than unwritten status until relatively recently, the principle of legitimate expectations is now codified in the GALA in the area of subsidies, offering strong protection for individuals in case of the withdrawal of unlawfully granted subsidies. In the Dutch legal system, the *contra legem* effect of the principle is accepted. Although the law generally takes precedence, under certain circumstances the legitimate expectations derived from the policy is so strong that the law must be overruled.[765] However, in relation to state subsidies the courts will only rule on the *contra legem* application of legitimate expectations favourably if it benefits the person relying on the principle, and provided that it could not directly or indirectly adversely affect others.[766]

The principle of legitimate expectation is less familiar in other countries, such as Peru. It has been recently codified in Article IV(1.15) in the GAPA as *principio de predictibilidad o confianza legítima*.

6.2.2. PRINCIPLE OF TRANSPARENCY

6.2.2.1. General aspects

"Transparency" is a vague term. It appears to be a flexible notion that emerges in a wide range of different contexts and subject areas.[767] It is also said that transparency is "a term of analogy".[768] In this regard, it is possible to affirm that the government is transparent if its decision-making procedures and the effects of its decisions and actions can be seen through, "just as one can see easily through a clean window". Along the same lines, it is said that "if someone

765 J.B.J.M. Ten Berge & R.J.G.M. Widdershoven, "The principle of legitimate expectation in Dutch constitutional and administrative law", in E.M. Hondius (ed), *Netherlands Report to the Fifteenth International Congress of Comparative Law*, Antwerp/Groningen: Intersentia, 1998, pp. 421–452.

766 J.H. Jans, R. de Lange, S. Préchal & R.J.G.M. Widdershoven, op.cit., p. 170.

767 Although the importance of transparency has been focused upon in relation to the functioning of the administration, its role is also increasing in areas such as financial market regulations, labor regulations, competition law, social law and others. See S. Préchal & M.E. de Leeuw, "Transparency: A general principle of EU Law?", in U. Bernitz, J. Nergelius & C. Cardner (eds), *General principles of EC Law in a process of development*, Alphen aan den Rijn: Kluwer Law International, 2008, p. 202. See also, Anoeska Buijze, *The principle of transparency in EU law*, *supra* note 714.

768 William B.T. Mock, "An Interdisciplinary introduction to legal transparency: A tool for rational development", in *Dickinson Journal of International Law*, Vol. 18:2, 1999–2000, p. 295.

subject to the law can understand what is expected of her, can understand and comply with the commands of the law and can foresee the consequences of compliance or not compliance, then the law is transparent. If not, then the law is opaque".[769]

Thus, the notion of transparency has a core content that is opposed opaqueness, complexity, disorder, and secretiveness, all of which are obstacles that transparency seeks to combat.[770] Transparency also claims to embrace simplicity and comprehensibility, and cannot be achieved if, for example, available information is perceived as incoherent.[771] Taking these factors into account, transparency has been defined as "concerned with the quality of being clear, obvious and understandable without doubt or ambiguity".[772]

Transparency manifests itself on different levels. At the constitutional level, it is related to the principle of democracy. It is a commonplace to say that transparency is required in order for a democracy to function properly. That is, transparency operates in relation to the legislative and general policy decision-making process, and is closely related with both democracy and the principles of legitimacy and accountability.[773] It is said that in a modern state, the need for transparency is based on the need for new forms of government legitimacy, in which different forms of inquiries by the public play an important function. Therefore, the main reason to promote the principle of transparency is to enhance the legitimacy of the government.[774] It facilitates the accountability of government actions and enhances citizen participation insofar as the information held by authorities is available to the public. Hence, transparency is considered to be central to a modern democracy.[775]

From this perspective, transparency also plays an important role at a more concrete administrative level where is linked to "open government".[776] Thus, it is essential for the sound functioning of democratic states and is directly linked to citizens' opportunities to be well-informed and to influence the government.[777]

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769 Ibid.

770 P. Birkinshaw, "Freedom of information and openness: Fundamental human rights?" in *Administrative Law Review*, No 58, Vol. 1, 2006, p. 190.

771 D. Heald, "Varieties of transparency" in C. Hood & D. Heald (eds), *Transparency. The key to better governance?,* Oxford: Oxford University Press, 2006, p. 26.

772 Opinion of Advocate General Ruiz-Jarabo Colomer of December 16, 2004 in Case C-110/03 *Belgium v. Commission*, para. 44.

773 S. Préchal & M.E. de Leeuw, loc.cit., p. 205.

774 G. H. Addink, *Good governance. Concept and context*, p. 111.

775 P. Birkinshaw & M. Varney, *Government and Information. The Law relating to Access, Disclousure and Their Regulation*, Bloomsbury Publishing, 2011.

776 S. Préchal & M.E. de Leeuw, loc.cit., p. 205.

777 G. H. Addink et al, *Human rights and good governance*, p. 53.

In the context of open government, the notion of transparency is related to openness in the work of the administration, particularly in terms of the decision-making process. Openness in decision-making materialises as access to documents and to meetings, as components underlying this process.[778] Along these lines, transparency also includes financial disclosure statements, budgetary review, audits, etc. Hence, openness and transparency result kindred concepts.

However, as pointed out by Birkinshaw, although openness is similar to transparency, the two concepts should not be confused since transparency extends beyond openness insofar as it involves not only "keeping observable records of official decision and activities" but also "making processes of governance and law-making as accessible and as comprehensible as possible to simplify them so that they are more easily understood by the public".[779] As Paul Craig argues, because transparency operates as an important safeguard for democracy and can foster critical evaluation of the decision-making process, it is broadly connected with process.[780] Indeed, transparency improves the quality of decision-making by making it easier to predict the consequences of government actions.[781]

There is also a connection between transparency and accountability. Transparency is required to exercise control and keep public officials accountable. Thus, as pointed out by Addink, the relationship is particularly relevant in the fight against corruption. Nevertheless, the two principles must be distinguished.[782] Transparency is instrumental for accountability[783], which means that transparency is a precondition for accountability.[784]

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778 Along with the Amsterdam Treaty, Article A of the Maastricht Treaty was amended to enshrine the principle of openness: Maastricht Treaty. Article A, second paragraph: "This Treaty marks a new stage in the process of creating an ever closer union among the peoples of Europe, in which decisions are taken as *openly* as possible and as closely as possible to the citizen" (emphasis added). In order to operationalise the principle of openness, the Council of Europe amended its rules of procedures to open up its legislative meetings. Thus, as of June 2006, Council's deliberations on legislative acts to be adopted under the co-decision procedure take place in public, with some exceptions. In addition, the Council's first deliberations on new legislation besides that adopted under the co-decision procedure is likewise open to the public. On this, see the Council's Rules of Procedure of 15 September 2006, 2006/683/EC/EC, OJ 2006, L 285/47. On the other hand, the European Parliament and its committees, following the constitutional traditions of the member states, meet in public.

779 P. Birkinshaw, loc.cit., pp. 189–190. According to this author, openness means concentrating on processes that allow the citizens to see the operations and activities of government at work.

780 P. Craig, op.cit., p. 356, *supra* note 739.

781 Anoeska Buijze, "The six faces of transparency", in *Utrecht Law Review*, Volume 9, Issue 3, July 2013, p. 9.

782 G. H. Addink et al, *Human rights and good governance*, p. 53.

783 Mark Bovens, "Analyzing and assessing accountability. A conceptual framework", in *European Law Journal*, Vol. 13, No 4, July 2007, p. 450.

784 In relation to the principle of accountability, see Section 6.3.1.

Moreover, transparency is linked to the principle of participation. It is necessary in order to allow citizens to participate in the public realm in an informed manner.[785] As such, transparency "requires external receptors capable of processing the information made available".[786] For this purpose, available information needs to be understandable. Hence, it is possible for the government to provide access to its information and meetings and yet not be transparent to the citizens if the information available is not clear.[787] But provided that the information is clear, transparency contributes to democracy by facilitating public debate and the process of will formation.[788]

The relationship between transparency, accountability, and participation reveals the instrumental character of the former insofar as it is needed for the realisation of the latter two principles, as well as others.[789] As an instrumental principle, transparency serves as a tool to inform people about what public powers are actually doing. It is considered as a mechanism that should be "the result of a way of governing, of administering and managing by the state, which allows for control and participation by citizens in public matters".[790] In this way, transparency serves to increase trust in governance and legitimacy.[791]

In practice, transparency includes requests for access to public information, in terms of the state's obligation to generate information and make it widely available to citizens in ways that empower them to demand that the government fulfils its obligations.[792] In so doing, the government performs its intended functions while complying with legal principles, rules, and values enshrined in the constitution. Thus, transparency contributes to the quality of governance because the idea of being watched can improve the behaviour of public officials and prevent corruption.[793]

According to Buijze, transparency can also contribute to the realisation of economic ends to the extent that the availability of information empowers people,

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785 While participation is considered an essential element of the democratic principle, accountability derives from the principle of the rule of law and liberal constitutionalism.

786 D. Heald, loc.cit., p. 26.

787 Ibid.

788 Anoeska Buijze, *The principle of transparency in EU law*, pp. 40–42.

789 In this respect, Heald conceptualises transparency as "a set of contested relationships with other objects that themselves may be valued intrinsically and/or instrumentally (…) These contested relationships are sometimes trade-offs (one must be scarified to gain more of the other) and some times synergies (more can be gained of each)." See D. Heald, "Transparency as an instrumental value", in C. Hood & D. Heald (eds), *Transparency. The key to better governance?,* Oxford: Oxford University Press, 2006, p. 60.

790 A. Herrero & G. López, op.cit., p. 9, *supra* note 635.

791 Anoeska Buijze, *The principle of transparency in EU law*, pp. 42–44.

792 A. Herrero & G. López, op.cit., p. 9.

793 Anoeska Buijze, *The principle of transparency in EU law*, pp. 45–48.

and allows them to pursue the realisation of their rights. It is also a precondition for fundamental freedoms such as freedom of expression.[794] Likewise, transparency increases economic performance and market efficiency. A transparent government is more predictable, allowing economic agents to make better decisions.[795]

The principle of transparency has an active and a passive side. The active side means that the government has the duty to provide information to the public by itself and on its own initiative. On the other hand, the passive side means that every person can ask the government for access to the information it holds.[796] The provision of information on the government's own initiative is a tool for citizens to advocate for their rights before the administration. It also enhances public understanding of the functioning of administrative agencies, procedures, and proceedings. Therefore, transparency contributes to promoting good relations between the citizens and administrative authorities.

The active side of transparency is also related to the openness of government. It means that the government is open about its activities to the public, which implies, as a general rule and subject to exemptions, that every person is able to attend any meeting of the government, and that final decisions made by the government should be published.[797] In a broader sense, it also entails knowledge about who makes the decisions and how they are made, understandability and accessibility of decision-making, openness of administrative conduct, among other factors.

It is important to mention that at the EU level, both the European Courts and the European Ombudsman have played an important role in the development of transparency as a broader principle of law.[798] In this regard, the institution conducted an own-initiative inquiry into public access to documents addressed to fifteen EU institutions besides the Council and the Commission. The European Ombudsman concluded that the failure to adopt rules governing public access to documents and to make those rules easily available to citizens constituted maladministration. The consequence of this investigation was that most major EU bodies and agencies adopted rules governing access to documents. In addition, the institution provided guidance on access to information via its Code of Good Administrative Behaviour.

In this study's view, transparency can be framed as a principle that establishes the state's duty to organise its administrative systems and procedures openly, informing actively on its processes, rules, and decisions while providing timely,

794 Ibid., pp. 48–49.
795 Ibid., pp. 50–52.
796 G. H. Addink et al, *Human rights and good governance*, p. 57.
797 Ibid., pp. 57–58.
798 P. Craig, op.cit., p. 360.

accurate, complete, and up-to-date information when required by citizens.[799] This implies that authorities and state officials carry out their actions in a clear manner, without opacity and secrecy so that citizens can anticipate, learn about, and understand the decision-making process and the actions that state authorities perform. By reducing information asymmetry, transparency promotes predictability, contributes to legal certainty, and balances the relationship between the state and citizens.[800] This definition concretises transparency as a procedural and instrumental principle needed for the realisation of other principles and rights.

As can be observed, transparency covers a variety of elements, which must be determined in the context of the more specific area of application. This means that transparency is considered as an umbrella or overarching principle. Its relatively open-ended nature leads to an overlap between its elements and even between the notion of transparency itself and other principles.[801] Of all the elements of transparency, the most developed concerns open government, and in particular, the right to access documents or information. However, there are other dimensions in which transparency has been developed. Hence, in addition to access to documents, some other elements of transparency include clarity of procedures, clear drafting, publication and notification of legislation and decisions, and the duty to give reasons. In the following paragraphs, a brief explanation is provided of the content of each of these elements of transparency.

6.2.2.2. Specific aspects

Access to documents

With regard to transparency in the field of access to public information at the EU level[802], Article 255 of the Treaty of Maastricht, as amended by the Amsterdam Treaty, introduced citizens' right of access to European Parliament, Council, and Commission documents.[803] The right of access to documents was implemented by way of Regulation 1049/2001.[804]

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799 Alberto Castro, "El ombudsman y el control no jurisdiccional de la administración pública como garantía del derecho a la buena administración", p. 4.

800 Ibid.

801 S. Préchal & M.E. de Leeuw, "Dimensions of transparency: The building blocks for a new legal principle?", in *Review of European Administrative Law*, Vol. 0, No 1, 2007, p. 52.

802 At the national level, legislation on access to information held by the administration can be found in almost every country.

803 Treaty establishing the European Community, Article 255: "1. Any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, shall have a right of access to European Parliament, Council and Commission documents, subject to the principles and the conditions to be defined in accordance with paragraphs 2 and 3".

804 Regulation 1049/2001/EC regarding public access to European Parliament, Council and Commission documents of 30 May 2001, OJ L 145 of 31/05/2001, p. 43.

The purpose of Regulation 1049/2001 is to define the principles, conditions, and limits on grounds of public and private interest governing the right of access to European Parliament, Council, and Commission documents, as well as to promote good administrative practices on access to documents.[805] The Regulation provides a wide definition of the term "document", interpreting it as any content whatever its medium (written on paper or stored in electronic form or as a sound, visual, or audio-visual recording). Exceptions to the right of access to documents has been established on the basis of public interest (public security, defence and military matters, international relations, and the financial, monetary, or economic policy of the EU or a member state) and the privacy and the integrity of individuals.[806]

The Treaty of Lisbon, which came into force on 1 December 2009, replaced Article 255 of the Treaty of Maastricht with Article 15(3) of the TFEU, and extends the public right of access to documents pertaining to all Union institutions, bodies, offices, and agencies.[807] In addition, with the entry into force of the Treaty of Lisbon, the European Charter of Fundamental Rights was given binding legal effect. The Charter explicitly recognises in Article 42 the right of access to documents.[808]

Since Regulation 1049/2001 only governs the public right of access to European Parliament, Council, and Commission documents, attempts were made to extend its institutional scope in accordance with Article 15(3) of the TFEU.[809]

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805 Regulation 1049/2001, Article 1.

806 Regulation 1049/2001, Article 2. According to Article 15(3) second paragraph of the Treaty on the Functioning of the European Union, "general principles and limits on grounds of public or private interest governing this right of access to documents shall be determined by the European Parliament and the Council, by means of regulations, acting in accordance with the ordinary legislative procedure".

807 Treaty on the Functioning of the European Union, Article 15(3): "Any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, shall have a right of access to documents of the Union's institutions, bodies, offices and agencies, whatever their medium, subject to the principles and the conditions to be defined in accordance with this paragraph".

808 European Charter of Fundamental Rights, Article 42: "Any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, has a right of access to European Parliament, Council and Commission documents".

809 As a first step in the review process, in April 2007 the Commission published a Green Paper that formed the basis for a public consultation on the issue. Later, in April 2008, the Commission prepared a proposal for a recasting of the Regulation Following the entry into force of the Treaty of Lisbon, in March 2011 the Commission submitted a new proposal with a view to adapting Regulation 1049/2001 to the requirements of the Treaty of Lisbon. On the Green Paper, see "Public access to documents held by the institutions of the European Community – A review", COM(2007) 185. Regarding the proposal of new regulation submitted by the Commission, see "Proposal for a regulation of the European Parliament and of the Council regarding public access to European Parliament, Council and Commission documents", COM (208) 229 final. In relation to the Commission's new proposal for adapting

This article grants any EU citizen, as well as any natural or legal persons residing or with a registered office in a member state, right of access to documents of EU institutions, bodies, offices, and agencies regardless of their medium, subject to the principles and the conditions (on grounds of public or private interest) defined by the European Parliament and the Council in accordance with that Article. However, in the case of the EU Court of Justice, the European Central Bank, and the European Investment Bank, the right of access to documents only applies when they exercise administrative tasks.

The Courts have played an important role in developing certain principles in relation to application of the right of access to documents. Hence, for example, the European Court of Justice has stated that in so far as the exceptions provided in Article 4 of Regulation 1049/2001 derogate from the principle of widest possible public access to documents, such exceptions "must be interpreted and applied strictly".[810] As such, exceptions to access to documents should be applied restrictively. Moreover, the European Court of Justice, confirming the opinion of the General Court, ruled that granting partial access to documents requires application of the principle of proportionality.[811] Hence, exceptions to document access must be interpreted based on this principle. As the European Court of Justice has stated, "the principle of proportionality requires that derogations remain within the limits of what is appropriate and necessary for achieving the aim in view".[812]

In addition to public access to documents, transparency has been developed in terms of the right of access to one's own file as part of the rights of defence in the field of competition law. In this sense, the right of access to a file may be considered as an individual manifestation of access to documents.[813] In this regard, the General Court stated that the rights of defence might be affected by the non-disclosure of documents that can be used in the applicant's defence.

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the Regulation on access to documents, see "Proposal for a regulation of the European parliament and the Council amending Regulation 1049/2001 regarding public access to European parliament, Council and Commission documents", COM(2011) 137 final. See also, Report from the Commission on the application in 2016 of Regulation (EC) No 1049/2001, regarding public access to European Parliament, Council and Commission documents, COM(2017) 738 final.

810 Case C-266/05 P *Jose Maria Sison v. Council*, [2007] ECR I-01233, para 63. See also Case T-14/98 *Hautala v. Council* [1999] ECR II-2489, para. 84; Case T-105/95 *WWF (UK) v. Commission* [1997] ECR II-0313 para. 56; and, Case T-124/96 *Interporc v. Commission* [1998] ECR II-231, para. 49.

811 See Case C-353/99 *Council v. Hautala* [2001] ECR I-09565, para. 27–31, and Case T-14/98 *Hautala v. Council* [1999] ECR II-2489, para. 87.

812 Case 222/84 *Johnston v. Chief Constable of the Royal Ulster Constabulary* [1986] ECR 1651, para. 38.

813 S. Préchal & M.E. de Leeuw, "Dimensions of transparency: The building blocks for a new legal principle?", p. 52.

Therefore, in order to find that the rights of defence have been contravened, "it is sufficient for it to be established that the non-disclosure of the documents in question might have influenced the course of the procedure and the content of the decision to the applicant's detriment".[814] Thus, the applicants must be given the opportunity to examine documents, which may be relevant to asserting the probative value for the defence.[815]

As the General Court has established in case law, access to one's file is one of the procedural safeguards intended to protect the rights of the defence. Respect for the rights of defence in all proceedings in which sanctions may be imposed is a fundamental principle of Community law, which must be respected in all circumstances, even in administrative procedures. As to competition law cases, the purpose of providing access to one's file is to enable the addressees of statements of objections to examine evidence in the Commission's file, so that they are in a position to effectively express their views in their defence on the basis of that evidence.[816]

Thus, based on the general principle of equality of arms, which presupposes in competition case law undertakings the same knowledge of the file used in the proceeding as the Commission, the General Court has considered that it is not acceptable for the Commission alone to have certain documents available to it, and for it to be able to decide on its own whether or not to use these documents against the applicant, when the applicant had no access to them and is consequently unable to decide whether or not they may be used in the defence. In such situations, the rights of defence are excessively restricted.[817] In addition, it is worthy of mention that the right of access to one's own file has been recognised in Article 41(2) of the European Charter of Fundamental Rights as a part of the right of good administration.[818] In this regard, transparency through the right of access to one's own file is connected not only to the right of defence, but also to the right to good administration.

Clear drafting

Clear drafting is considered as dimensions of transparency. In this sense, transparency coincides, on the one hand, with the requirements for clarity and

814 Case T-30/91 *Solvay SA v. Commission* [1995] ECR II-1775, para. 68.
815 Case T-30/91 *Solvay SA v. Commission* [1995] ECR II-1775, para. 81.
816 Case T-30/91 *Solvay SA v. Commission* [1995] ECR II-1775, para. 59.
817 Case T-30/91 *Solvay SA v. Commission* [1995] ECR II-1775, para. 83.
818 European Charter of Fundamental Rights, Article 41: "Right to good administration: 1. Every person has the right to have his or her affairs handled impartially, fairly and within a reasonable time by the institutions and bodies of the Union. 2. This right includes: (…) the right of every person to have access to his or her file, while respecting the legitimate interests of confidentiality and of professional and business secrecy."

non-ambiguity in legal texts or regulations in a broader sense (legislation, rules decisions, directives, etc). Together with the requirement of publication, this supports the cognoscibility of the law.[819] It is sometimes seen as an element of a more broadly defined openness, which requires that legislation be clear, simple, and understandable. This means that existing legislation must be consolidated and codified.[820] On the other hand, it also contributes to making policy action predictable in the case of broad discretionary powers, and to serving as one of the safeguards against arbitrariness.[821] In both cases, transparency in the form of clear drafting is related to legal certainty.

The principle of legal certainty stems from the constitutional principle of the rule of law. Legal certainty requires that all measures of public bodies (and their agencies) with legal effects be clear and precise and brought to the attention of the person concerned. Meanwhile, regulation must be certain and of foreseeable application for the individuals. As explained above, transparency also concerns the avoidance of complex and confusing regulation which, along with large conferrals of administrative discretion, are barriers to transparency insofar as citizens are not able to foresee the scope of the legislation (the implications of compliance or non-compliance) or the effects (positive of negative) of an administrative decision on their personal interests.[822] Thus, it may be said that "the closer an area of regulation is to providing those subject to regulation with perfect information about the standards of conduct and the consequences of their actions, the more transparent the regulation is".[823]

Legal systems that apply the same rules to every similarly situated party and avoid both confusing regulation and large grants of administrative discretion serve to provide legal certainty, and may therefore be described as embodying the rule of law. As can be seen, the possibility to foresee the scope and effects of regulation and administrative decisions is linked to the principle of legal certainty and the rule of law. Thus, clarity, precision, notification, and publication are treated, as a rule, as elements of legal certainty. However, they also pertain to transparency.[824] Therefore, "a country whose legal system embodies the Rule of Law necessarily is a transparent legal system".[825] Arguably, transparency contributes to (the objective dimension of) legal certainty.[826]

819 S. Préchal & M.E. de Leeuw, "Dimensions of transparency: The building blocks for a new legal principle?", p. 53.
820 Linda Senden, op.cit., p. 90.
821 S. Préchal & M.E. de Leeuw, "Dimensions of transparency: The building blocks for a new legal principle?", p. 54.
822 William B.T. Mock, loc.cit., p. 297.
823 Ibid., p. 300.
824 S. Préchal & M. E. de Leeuw, "Transparency: A general principle of EU Law?", p. 219.
825 William B.T. Mock, loc.cit., p. 304.
826 On the principle of legal certainty see Section 6.2.1.

In this respect, the European Court of Justice, in a substantive analysis of a case regarding the alleged breach of the principle of transparency as a fundamental principle of EU law – by the approval of a Council's decision concerning the conclusion of Memoranda of Understanding between the European Community and Pakistan and between the European Community and India on arrangements for market access for textile products – seems to consider clarity of legislation as an element of transparency to be a self-standing principle.[827] In the aforementioned case the Portuguese government upheld that the principle of transparency had been breached, because the contested decision approved Memoranda of Understanding that were not adequately structured and were drafted in obscure terms that prevent a nonexpert reader from immediately grasping all their implications.[828] The European Court of Justice dismissed this argument in the grounds that it found the decision to be clear in every respect, as regards both the wording of its provisions and as regards the rules contained in the Memoranda of Understanding.[829]

In other cases, the European Court of Justice analyses clarity and precision of regulation as elements of the principle of legal certainty, whereby transparency is considered as another implicit element of this principle without being referred to explicitly. Thus, in a case in which the Belgian government sought the annulment of Commission Regulation 2204/2002 on employment aid due to its lack of clarity and hence its infringement of the principles of transparency and legal certainty, the European Court of Justice stated that "the lack of clarity is in reality concerned with breach of the general principle of legal certainty".[830] The applicant argued that Regulation 2204/2002 failed to comply with the principles of transparency and legal certainty imposed by the fifth recital in the preamble to Council Regulation 994/98. The ECJ did not refer to the principle of transparency in its decision, and instead upheld that the Belgian government relied on the fifth recital only in order to invoke the principle of legal certainty.[831] Hence, according to the European Court of Justice, the principle of legal certainty "is a fundamental principle of Community law which requires, in particular, that rules should be clear and precise, so that individuals may be able to ascertain unequivocally what their rights and obligations are and may take steps accordingly".[832]

However, in his opinion on the aforementioned case, Advocate General Ruiz-Jarobo Colomer explicitly recognised the existence of the principle of

827 C-149/96 *Portugal v. Council* [1999] ECR I-8395.
828 C-149/96 *Portugal v. Council* [1999] ECR I-8395, para. 53.
829 C-149/96 *Portugal v. Council* [1999] ECR I-8395, para. 57.
830 Case C-110/30 *Belgium v. Commission* [2005] ECR I-02801, para. 27.
831 Case C-110/30 *Belgium v. Commission* [2005] ECR I-02801, para. 28.
832 Case C-110/30 *Belgium v. Commission* [2005] ECR I-02801, para. 30.

transparency in its specific sense of clarity and understandability, as a general principle of law in its own right.[833] In this regard he stated that "both the principle of transparency and that of legal certainty must be respected by the legislature as sources of community law".[834] Thus, "the Belgian government's arguments relating to transparency and legal certainty should therefore be seen as falling under the heading of infringement of Community legal principles, despite the fact that they have not been formally presented as such".[835] Thus, Advocate General Ruiz-Jarobo Colomer analysed whether the regulation lacked transparency in the sense of the quality of being clear, obvious and understandable without doubt or ambiguity.[836]

In other cases, transparency features as a separate requirement of legal certainty.[837] Thus, in a case related to measures implementing directives, the European Court of Justice has stated that "a directive must be transposed into national law by provisions capable of creating a situation which is sufficiently precise, clear and transparent to enable individuals to ascertain their rights and obligations".[838] Based on these considerations, the European Court of Justice upheld that the provisions of the contested directive cannot be considered to have been implemented "with precision, clarity and transparency required in order to comply fully with the requirement of legal certainty".[839]

Transparency has also been considered to be of great importance to the predictability of policy action. Thus, in the area of state aid and competition, the efforts made to accomplish transparency and predictability have resulted in the adoption and publication by the Commission of a great number of soft-law instruments such as notices, communications, guidelines and codes.[840] In this respect, the European Court of Justice has explained that such guidelines, by setting out the approach that the Commission proposes to follow, helps to ensure that the Commission acts in a manner that is transparent, foreseeable and consistent with legal certainty and may form a useful point of reference.[841] Therefore, by establishing the way in which the Commission must exercise its

833 S. Préchal & M. E. de Leeuw, "Transparency: A general principle of EU Law?", p. 221.

834 Opinion of Advocate General Ruiz-Jarabo Colomer of December 16, 2004 in Case C-110/03 *Belgium v. Commission*, para. 36.

835 Opinion of Advocate General Ruiz-Jarabo Colomer of December 16, 2004 in Case C-110/03 *Belgium v. Commission*, para. 37.

836 Opinion of Advocate General Ruiz-Jarabo Colomer of December 16, 2004 in case C-110/03 *Belgium v. Commission*, para. 44. The Advocate General rejected the allegation of lack of transparency.

837 S. Préchal & M. E. de Leeuw, "Transparency: A general principle of EU Law?", p. 221.

838 Case C-417/99 *Commission v. Spain* (2001) ECR I-6015, para. 38.

839 Case C-417/99 *Commission v. Spain* (2001) ECR I-6015, para. 40.

840 S. Préchal & M. E. de Leeuw, "Transparency: A general principle of EU Law?", p. 225.

841 Case C-310/99 Italian Republic v. Commission (2002) ECR I-2289, para. 52.

discretionary powers, it makes the exercise visible, clear and understandable: in other words, transparent. In this way, it becomes possible to foresee the behaviour of the institution and to achieve legal certainty, despite these norms of conduct being set down in soft-law instrument.[842]

Along these lines, the European Court of Justice has ruled that the Commission, by adopting and publishing rules of conduct designed to produce external effects, has imposed a limit on the exercise of its discretion and cannot depart from these rules under pain of being fund, where applicable, to be in breach of the general principles of law, such as equal treatment or the protection of legitimate expectation.[843] Therefore, as Préchal and de Leeuw note, transparency in relation to legal certainty also functions as a mechanism to prevent arbitrary behaviour on the part of the administration.[844]

Another particular aspect of clear drafting is the importance of clarity regarding the requirements and steps to be followed by public authorities in the decision-making process. Clarity of procedures implies that the process of decision-making should be easy to follow. In this respect it has also been said that clarity of procedures, both legislative and administrative, constitute a necessary requirement for transparency in a democracy.[845]

The European Court of Justice has also ruled on the importance of having clear procedures, specifically in the area of food safety. It pointed out that, in relation to the legality of a procedure provided under Directive 2002/46[846] – to be followed when a decision has to be taken as to whether certain vitamins and minerals contained in food supplements may be put on the market – it would have been desirable for the directive to have included provisions that in themselves ensured that the consultation stage of the procedure be completed transparently and within a reasonable time.[847] By virtue of the implementing powers conferred on it by Directive 2002/46, the Commission has to adopt, in accordance with the principle of sound (proper) administration, the measures necessary to ensure generally that the consultation stage is carried out transparently and within reasonable time.

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842 S. Préchal & M.E. de Leeuw, "Dimensions of transparency: The building blocks for a new legal principle?", p. 56.

843 See joint cases C-189/02 P, C-202/02 P, C-205/02 P to C-208 P and C-213/02 P Dansk Rorindustri A/S and Others v. Commission (2005) ECR I-5425, para. 211.

844 S. Préchal & M.E. de Leeuw, "Dimensions of transparency: The building blocks for a new legal principle?", p. 57.

845 S. Préchal & M. E. de Leeuw, "Transparency: A general principle of EU Law?", p. 215.

846 Directive 2002/46 regarding approximation of the laws of the Member States relating to food supplements, OJ 2002, L 183/51.

847 Joined Cases C-154/04 and C-155/04 Natural Health Case [2005] ECR I-6451, para. 81.

It is important to mention that, in his opinion on the aforementioned case, Advocate General Geelhoed linked transparency to the principle of proportionality. According to the Advocate General the procedure in question had "the transparency of a black box: no provision is made for parties to be heard; no time-limits apply in respect of decision-making; nor, indeed, is there any certainty that a final decision will be taken."[848] As a result, since the directive lacked appropriate and transparent procedures for its application, it infringed the principle of proportionality and was, therefore, invalid.[849]

As can be observed, clarity of procedures is related to procedural standards in order to guarantee transparency and openness. As Préchal and de Leeuw point out, "the bottom line in relation to all these procedures is that the persons concerned, and also the public in general, must understand what is going on in administrative procedures and how they operate".[850] This makes it possible to hold the authorities accountable. From this perspective, the principle of good administration, as far as it concerns legal certainty and the right to be heard, is taken into account.[851]

Publication of legal norms

Another dimension of transparency is related to publication of legislation or notification of decisions. Like in the case of clear drafting, this is closely linked to the principle of legal certainty. As explained above, both clear drafting and publication of legislation support the cognoscibility of the law as well as the achievement of legal certainty. Thus, regulation must not only be clear and understandable but also brought to the notice of the persons concerned and publicised.

The relationship between publication, transparency, and legal certainty has been established by European Court of Justice case law. The Court has established that rules laid down must enable the persons concerned to know the precise extent of the obligations imposed on them, otherwise the principle of legal certainty and the principle of transparency are breached. Thus, "failure to publish a measure prevents the obligations laid down by that measure from being imposed on an individual".[852] Therefore, non-compliance with the requirement to publish a regulation implies a breach of the principles of legal certainty and transparency.

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848 Opinion of Advocate General Geelhoed of 5 April 2005 in Joint Cases C-154/04 and C-155/04 Natural Health Case, para. 85.

849 The European Court of Justice did not agree with the opinion of Advocate General Geelhoed and found that the procedure was legal.

850 S. Préchal & M. E. de Leeuw, "Transparency: A general principle of EU Law?", p. 218.

851 Ibid.

852 Case C-108/01 Parama (2003) ECR I-5121, para. 85.

In addition, the European Court of Justice has stated in the same case that "an obligation imposed by Community law must be easily accessible in the language of the Member State in which it is to be applied".[853] Along the same lined, it has pointed out that any prohibition provided by regulation must be transparent and easily accessible. Therefore, "the principles of transparency and accessibility are complied with only if the restriction may be determined easily based on official publications of the Community".[854]

Along the same lines, in a case regarding the annulment of the Commission's decision to initiate the formal investigation procedure for assessing the compatibility with the EU treaty on state aid, the European Court of Justice stated that a failure to notify the member state of the Commission's decision can in certain circumstances justify the annulment of an act of a Community institution.[855] As Préchal and de Leeuw observe, the Court's position follows from legislation and case law, which establish that decisions in state aid cases must be taken without delay and must be addressed to the member states concerned in the interests of transparency and legal certainty.[856]

Duty to give reasons

In the EU, the duty to state reasons is not recognised as a general principle of law. However, it is established as an important administrative requirement in the EU legal order.[857] According to European Court of Justice case law, the statement of reasons "must show clearly and unequivocally the reasoning of the Community authorities which adopted the contested measure, so as to enable the persons concerned to ascertain the reasons for the measure and to enable the Court to exercise its powers of review".[858] The duty to give reasons is a procedural requirement which "must be appraised by reference to the circumstances of each case, in particular the content of the measure in question, the nature of

853 Case C-108/01 Parama (2003) ECR I-5121, para. 85.

854 Case C-108/01 Parama (2003) ECR I-5121, para. 86.

855 Case C-398/00 *Spain v. Commission* (2002) ECR I-5643, para. 33.

856 See Council Regulation (EC) 659/1999 laying down detailed rules for the application of Article 93 of the EC Treaty, OJ 1999, L83/1. Also see Case C-227/92 P *Hoechst v. Commission* [1999] ECR I-4443, para. 68.

857 The duty to state reasons is laid down in Article 253 of the EC Treaty: "Regulations, directives and decisions adopted jointly by the European Parliament and the Council, and such acts adopted by the Council or the Commission, shall state the reasons on which they are based and shall refer to any proposals or opinions which were required to be obtained pursuant to this Treaty". The second paragraph of Article 296 (Ex Article 253 TEC) of the Treaty on the Functioning of the European Union establishes that: "Legal acts shall state the reasons on which they are based and shall refer to any proposals, initiatives, recommendations, requests or opinions required by the Treaties".

858 Case C-344/04 *IATA* and *ELFAA* (2006) ECR I-0403, para. 66 & Case C-310/99 *Italian Republic v. Commission* (2002) ECR I-2289, para. 48.

the reasons given and the interest which the addressees of the measure, or other parties to whom it is of direct and individual concern, may have in obtaining explanations".[859]

Therefore, the statement of reasons aims to enhance transparency in the decision-making process. As such, stating of reasons and transparency both require an understanding of the reasons behind an institution´s actions and decisions. In this regard, it has been said to constitute one element of the principle of transparency, such as for example, access to documents.[860]

In different cases, it has been pointed out by the European Court of Justice that the statement of reasons has transparency as one of its objectives. In this respect, based on European Court of Justice case law, Préchal and de Leeuw note that although the aim of the statement of reasons is to provide transparency, it is not an end in itself. It represents, in particular, a tool to enable effected parties to defend their rights and for the Court to exercise judicial review.[861]

Hence, in a case referred by the Public Procurement Review Chamber of the Vienna Region to the ECJ, for a preliminary ruling on the interpretation of Article 2(1) (b) of Council Directive 89/665/EEC of 21 December 1989 – on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts – the ECJ established the importance of stating reasons in order to ensure transparency. Thus, in relation to the withdrawal of an invitation to tender for a public service contract, the ECJ stated that "it should be noted that the duty to notify reasons for a decision to withdraw an invitation to tender, laid down by Article 12(2) of Directive 92/50, is dictated precisely by concern to ensure a minimum level of transparency in the contract-awarding procedures to which that directive applies and hence compliance with the principle of equal treatment".[862]

In a similar vein, in his opinion on a case concerning the rights of members of the public to access information on the environment – and more specifically, the procedure for obtaining such access before national authorities – Advocate General Kokott stresses that the right to good administration creates the obligation to state reasons for decisions. In addition, Kokott holds that "the statement of reasons is not merely a general expression of the transparency of the administration's actions, but it is also intended, in particular, to give the

859 See Case C-17/99 *France v. Commission* [2001] ECR I -2481, para. 35–36.
860 S. Préchal & M. E. de Leeuw, "Transparency: A general principle of EU Law?", p. 223.
861 Ibid., p. 224.
862 Case C-92/00 *Hospital Ingenieure Krankenhaustechnik Planungs-Gesellschaft mbH (HI)* (2002) ECR I-05553, para. 46.

individual the possibility of deciding, with full knowledge of the relevant facts, whether there is any point in his applying to courts. There is therefore a close connection between the obligation to give reasons and the fundamental right to effective legal protection".[863] Indeed, Article 41 of the European Charter of Fundamental Rights includes the obligation to give reasons for the decisions as one the elements of the right to good administration.[864] Consequently, through the duty to state reasons, transparency is related (again) to the right to good administration and the right to effective legal protection.

In this respect, Préchal and de Leeuw argue that even though the duty to state reasons and transparency are connected, from the European Court of Justice's point of view they remain, from a procedural perspective, two separate concepts. Thus, while the violation of the duty to state reasons can justify the annulment of a decision, the questions of what consequences flow from violation of the principle of transparency remains unclear.[865]

According to the above explanation, it is possible to identify some recurring elements or dimensions of transparency. For instance, it would appear to encompass publication of legal rules, clear drafting, the duty to state reasons, and access to documents. Therefore, transparency overlaps, partially or completely, with certain elements of other legal principles, such as legal certainty. This leads to a new amalgamation of these elements, providing a new perspective and potentially new dynamics.[866]

The concrete meaning of the various elements of transparency, as well as its scope as a self-standing principle, is still taking shape. The more precise meaning of transparency depends on the context in which it is applied, the function it is expected to fulfil, and the interests it aims to protect. Consequently, the concrete operationalisation of transparency differs. Thus, transparency might also be considered, as a specific good governance principle, to be a general principle built up from other elements.

In any case, and despite its still uncertain meaning, there are some arguments stating why transparency should be defended as a fundamental principle of

863 Opinion of Advocate General Kokott of 27 January 2005 in Case C-184/04 *Pierre Housieaux* (2005) ECR I-3299, para. 32.

864 European Charter of Fundamental Rights, Article 41: "Right to good administration: "1. Every person has the right to have his or her affairs handled impartially, fairly and within a reasonable time by the institutions and bodies of the Union. 2. This right includes: (…) *the obligation of the administration to give reasons for its decisions*." (emphasis added).

865 S. Préchal & M. E. de Leeuw, "Transparency: A general principle of EU Law?", p. 225. Also see joint cases C-64, 71 to 73 and 78/86 *Giovanni Sergio and Others v. Commission* (1988) ECR 1399, para. 30.

866 Ibid., p. 241.

public law. According to the administrative argument, with greater transparency comes greater accuracy and objectivity in record-keeping in general and as regards personal files in particular. On the other hand, the constitutional argument states that greater transparency supports the legal and constitutional roles of national bodies by strengthening their legitimacy. In turn, the legal argument holds that reasons and transparency in decision-making are essential if citizens are to be able to determine whether they might have a right to some form of legal redress against a disproportionate or unfair decision. In addition, there is a so-called policy argument whereby transparency leads to better decision-making if decisions and decision-making processes are opened up to public and media scrutiny. And finally, the political argument establishes that transparency "enhances the ability of informed citizens meaningfully to participate in a democracy".[867] And even though some of these arguments require rather more research before they can properly be relied upon, as Tomkins notes, "the constitutional and the political arguments alone surely provide all the justification which is required to take transparency seriously".[868]

6.2.3. PRINCIPLE OF PARTICIPATION

6.2.3.1. General aspects

Participation has been defined as the active involvement of individuals in a collective process.[869] As developed, participation is closely connected with the principle of democracy. In its basic form, citizen participation in the election of their authorities and representatives is what defines democracy. In fact, as mentioned before, the literature identifies that at minimum, democracy requires universal suffrage, free competitive and fair elections, and more than one political party.[870] These three elements are essential for political participation in a liberal democracy.

Participation as a legal principle first evolved in the realm of political constitutionalism, in the form of political participation connected with the recognition of political rights. As Verba defines it, "political participation affords citizens in a democracy an opportunity to communicate information to government officials about their concerns and preferences and to put pressure on them to respond".[871]

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867 Adam Tomkins, loc.cit., pp. 220–221.
868 Ibid., p. 221.
869 G.H. Addink, *Good governance. Concept and context*, p. 129.
870 See Section 5.2.2.
871 Sidney Verba et al, *Voice and Equality. Civic Voluntarism in American Politics*, Cambridge: Harvard University Press, 2002, p. 37.

Later, the principle of participation extended beyond the political arena to that of public administration. In Addink's words, there was a need of participation to supplement representative democracy in order to increase the legitimacy of the government.[872] In the context of public administration, participation means "the involvement of citizens in actual or intended actions of administrative authorities."[873] Administrative law has mostly limited participation to the right to be heard in adjudicatory procedures for the adoption of individual decisions.[874]

Despite this narrow legal approach, participation has expanded to new situations and procedures, while focusing on deliberation and dialogue at different levels of government. Legal doctrine has paid little attention to these other dimensions of administrative participation aimed at ensuring the procedural protection of the interests of persons affected by the administration. Nonetheless, legal implications arise regarding the constitutional competences and responsibilities assigned to the administration as regards decision-making.[875]

All of these new forms of participation are connected with the evolution of the democratic principle.[876] An advanced democracy requires the implementation of different forms of citizen participation in the political and administrative structures of a society in accordance with the constitutional aims of a state governed by the rule of law.[877] As Addink points out, "the significance of participation is an important part of the development of the principles of good governance under the democratic rule of law".[878]

Participation has a procedural character. In a general and simple form, it can be understood as the possibility of taking part in decision-making processes. In its different forms, participation implies the involvement of persons situated outside the formal, public-decision making structures. All of them have in common the fact that the external input is ultimately filtered through formal structures, although in different ways and to different degrees.[879] And in the realm of the

872 G.H. Addink, Good governance. Concept and context, p. 131.
873 Ibid., p. 129.
874 J. Mendes, "Participation and the role of law after Lisbon: A legal view of on Article 11 TEU", in *Common Market Law Review*, No 48, 2011, p. 1849.
875 Gerardo Ruiz-Rico Ruiz, loc.cit., p. 55.
876 For the principle of democracy in relation to good governance, see Section 5.2.3.
877 Gerardo Ruiz-Rico Ruiz, loc.cit., p. 55.
878 G.H. Addink, *Good governance. Concept and context*, p. 129.
879 J. Mendes, *Participation in EU rule-making: A rights-based approach*, Oxford-New York: Oxford University Press, 2011, p. 27.

administration, participation has been extended from decision-making for adjudication to the public policy cycle.[880]

For this study, the principle of participation entails the duty for public authorities to ensure citizens the right to participate, individually or collectively form, in the political, economic, social, and cultural life of the community. Furthermore, it promotes and guarantees the conditions for citizens to take part in decision-making processes as well as in the cycle of public policies and management, encouraging cooperation with citizens in the delivery of goods and services.[881]

In this sense, two main categories of participation can be identified: political participation and administrative participation. The former can be classified among the classical political rights recognised in most modern constitutions and international treaties and forms of direct democracy mechanisms. In the case of political rights, two main rights are recognised: the right to campaign for elective public office and the right to elect the main political offices through universal and equal suffrage.[882] Meanwhile, direct democracy mechanisms include citizens' initiative and referenda.

On the other hand, administrative participation can be performed in different spheres, in which different forms of participation can be distinguished. According to Danós, there are three main forms or categories of participation in the administration: i) organic participation; ii) functional participation; and, iii) cooperative participation. These three forms of administrative participation are interconnected.[883]

Organic participation implies the incorporation of citizens into a body of public administration through, for instance, membership of advisory committees or boards. As to functional administrative participation, citizens perform administrative roles as participants, without losing their private status nor being incorporated into an administrative body. This form of administrative participation manifests itself in various ways, such as public hearings, requests for information from documents held by the administration, and opinions and consultation on policies before they are approved, among others. This

880 Hugo León, "El derecho a la participación ciudadana como componente de la actuación del Estado", en Alberto Castro (ed), *Buen Gobierno y Derechos Humanos*, Lima: Facultad de Derecho PUCP – Idehpucp, 2014, p. 235.

881 Alberto Castro, "El ombudsman y el control no jurisdiccional de la administración pública como garantía del derecho a la buena administración", p. 4.

882 David Beetham, loc.cit., pp. 40–41, *supra* note 513.

883 Jorge Danós Ordóñez, "La participación ciudadana en el ejercicio de las funciones administrativas en el Perú", in *Revista de Derecho Administrativo*, Año 1, No 1, Marzo, 2006, pp. 124–127. For a detailed description of forms of administrative participation in the Peruvian legal framework see Section 11.1.1.

form of participation allows citizens to involve themselves in the decision-making process by facilitating acceptance of the measure to be adopted by the administration. Some authors refer to this as "procedural participation".[884]

Cooperative participation, for its part, is that in which citizens are not incorporated into the structure of the administration and do not exercise materially public functions, but rather discharge strictly private activities that constitute voluntary collaboration with activities that the administration promotes for the protection of public interests. This form of participation can be seen in the activities of NGOs, often in the form of organic and functional participation such as participation in user boards (organic participation) or consultation or public hearings (functional or procedural participation). Cooperative participation between the public sector and private actors also occurs through so-called public private partnerships (APP).[885] Under these arrangements, the private sector finances and constructs public infrastructure or provides public services that the population requires, at its own expense and risk, for which the state permits it to charge a fee, as well as conferring guarantees. The idea underlying such initiatives is that private firms do not pursue solely commercial ends but also collaborate with state endeavours.[886]

Of these forms of participation, the most prolific in recent times have been the procedural and cooperative forms. As mentioned, the increasing participation of civil society and private actors in public affairs is leading, according to some authors, to the emergence of a cooperative state.[887] It should be noted that some authors see citizen participation as particularly necessary, especially in the form of procedural participation, in cases where the administration acts with broad discretion, such as rule-making procedures.[888]

In this context, the regulatory decision-making structures emphasise the steering rather than the controlling approach to administrative procedure – which characterises decision-making for individual decisions (adjudication) in order to protect the rights of citizens against discretionary powers.[889] In the steering approach, participation aims to direct and rationalise the exercise of discretionary powers by the administration, especially in rule-making, in

884 Luciano Parejo Alfonso, *Perspectivas del derecho administrativo para el próximo milenio*, Bogotá: Ediciones Jurídicas Gustavo Ibañez, 1998, p. 82.

885 Hugo León, loc.cit., p. 237.

886 On Public Private Partnerships see, Yseult Marique, *Public-Private Partnerships and the Law*, Cheltenham-Northampton: Edward Elgar, 2014.

887 Eberhard Schmidt-Assmann, "Structures and functions of administrative procedure in German, European and International Law, p. 50.

888 Luciano Parejo Alfonso, *Perspectivas del derecho administrativo para el próximo milenio*, p. 83.

889 Javier Barnes, loc.cit., pp. 32–33.

order to achieve more effective administration.[890] As such, decision-making, policy-making and policy implementation are increasingly interconnected. This relationship is an expression of the concern for quality in law – an area that has received considerable impetus in the regulatory sphere through movements such as better or smart regulation, and through the development of methodologies such as regulatory impact assessment (RIA), of which consultation to stakeholders is an essential part.[891] In this sense, from a public law perspective, when this study refers to a good administrative procedure for rulemaking, in essence it is also referring to good administration.[892] For this reason, this section will focus on administrative procedural forms of participation.

Some forms or elements of administrative procedural participation are the right to be heard (participation in decision-making for individual decisions); consultation (participation in rule-making or regulatory participation); and community-level participation (participation in policy making and policy implementation).

The next section will give a brief description of each of these elements of administrative participation, as well as the concept of popular initiative, as a form of political participation.

6.2.3.2. Specific aspects

Right to be heard

The right to be heard is the cornerstone of procedural guarantees for citizens in administrative procedures at the national level. Over many years this right has been developed by the EU courts, which recognise it as both a fundamental principle of EU law[893] and a fundamental right.[894] The right to be heard has also been enshrined in Article 41(2)(a) of the European Charter of Fundamental

890 Ibid, p. 31.

891 On this point, see European Commission, Better regulation guidelines, Brussels, 7 July 2017, SWD (2017) 350. See also, Jean Bernard Auby & Thomas Perroud, *Regulatory Impact Assessment*, Sevilla: Global Law Press, 2013.

892 Juli Ponce Solé, "El derecho a la buena administración y la calidad de las decisiones administrativas", p. 98. See also from the same author, Juli Ponce Solé, "La calidad en el desarrollo de la discrecionalidad reglamentaria", pp. 98–104, *supra* note 733. See also Alberto Castro, *Análisis de calidad regulatoria, simplificación administrativa y buena administración*. Paper presented at XIII Congreso Internacional del Centro Latinoamericano de Administración Pública para el Desarrollo – CLAD, Guadalajara, México, 6–9 November 2018, p. 7.

893 Case 85/76, *Hoffmann la Roche v. Commission* [1979] ECR 461, para 9.

894 Case C-49/88, *Al Jubail v. Council* [1991] ECR I-3187, para 15; Case C-349/07, *Sopropé v. Fazenda Pública* [2008] ECR I-10369, para. 33–37.

Rights as part of the right to good administration. Within the EU legal system, Article 41(2)(a) is the benchmark for its interpretation and application.[895]

The right to be heard has been conceptualized as a "participation right". From a rights-based approach to participation, this refers to the "intervention during a decision-making procedure of holders of subjective rights or of legally protected interests potentially affected by the outcome of the procedure".[896] The substantive relationship with the procedure is the basis for granting the right to be heard as a participation right.

As a form of participation right, the right to be heard would have a broader conception than mere application to individual adjudicatory process. In this regard, it may be broadly defined as the means by which holders of advantageous positions can influence the exercise of decisional power. It is the correlative of the duty of the decision-maker to carefully and impartially examine the factual situation.[897]

Popular initiative

A popular initiative involves a citizen entitled to vote taking the lead to make sure that a certain issue is placed on the public agenda. The citizen sponsoring the initiative must often meet certain requirements for the initiative to be binding and placed on the agenda, such as place of residence and age. In some cases, support from a minimum number of citizens, or a direct and personal interest on the part of these citizens, is required. Moreover, it is sometimes specified that popular initiatives are only possible with regard to a pre-determined policy area. The development of initiatives by citizens and policy renewal from outside the administration can offer useful insights into a polity.[898]

In addition, the proposal must usually comply with further conditions, including that it be clear and in writing and that it be implemented through a pre-determined procedure. The standard decision-making protocol then ensues once the initiative is placed on the agenda. In some countries, the popular initiative is also established at the local level. In Peru, in accordance with the constitution, popular initiative (for draft legislation, constitutional reform, as well as for normative initiatives at regional and local government levels) is regulated as a

895 Itai Rabinovici, "The right to be heard in he Charter of Fundamental Rights of the European Union", in *European Public Law*, Volume 18, No 1, 2012, p. 149.
896 J. Mendes, *Participation in EU rule-making: A rights-based approach*, p. 76.
897 Ibid., p. 77.
898 G.H. Addink, *Good governance. Concept and context*, p. 133.

participatory right of direct democracy.[899] Referenda are also enshrined in the constitution as a participatory right regulated by legislation.[900]

Consultation

Consultation can be defined as a regulatory process that involves actively seeking the input of interested and affected groups. It is oriented to improving transparency, efficiency, and effectiveness. Consultation involves a two-way flow of information.[901] It may take place at any stage of regulatory development, from problem identification to evaluation of existing regulation or policy implementation. It may take the form of a one-stage process or an ongoing dialogue, and can be implemented through different methods (advisory bodies, citizens panels, public hearings, solicitation of comments, referenda, etc.).

From a more legal perspective, consultation as a form of participation can be defined as involvement in a decisional process by a natural and legal person who is deprived of formal decisional powers and are outside the formal structure of decision-making.[902] This concerns a discussion forum in which either the general public or interested persons are asked to express their opinions on a regulatory proposal. The procedural intervention is not necessarily grounded in the substantive rights and interests of the participants. In addition, there are no procedural rights granted that require the decision-maker to adopt a specific conduct subject to judicial control.

At the EU level, the structured incorporation of interest groups into the policy-making process is not a far-off prospect. The European Commission has formalised the dialogue with civic groups by adopting general principles and minimum standards governing the process of consultation with interested parties.[903] According to these general principles and standards, interest groups must fulfil certain good governance criteria such as representativeness,

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899 Popular initiative is established in Articles 2(17) and 31 of the Peruvian Constitution and regulated by Law 26300, Citizens Participation and Control Rights Act (*Ley de los Derechos de Participación y Control Ciudadanos*), published in the official gazette *El Peruano* on 3 May 1994. For detailed information on popular initiative and the principle of participation as a principle of good governance in the Peruvian legal framework, see Section 11.1.1

900 Referenda are established in Articles 2(17), 31 and 32 of the Peruvian Constitution and also regulated by Law on Citizens Participation and Control Rights. In that regard, see Section 11.1.1.

901 OECD, *Background document on public consultation*, p. 1. Available at: www.oecd.org/mena/governance/36785341.pdf.

902 Joana Mendes, *Participation in EU rule-making: A rights-based approach*, p. 29.

903 European Commission, *Communication from the Commission. Towards a reinforced culture of consultation and dialogue – General principles and minimum standards for consultation of interested parties by the Commission*, COM(2002)704 final, 11 December 2002.

accountability, and transparency in order to participate in EU consultations of stakeholders and in-depth impact assessment by the Commission.[904]

The formalisation of civil groups' involvement in EU policy-making and implementation can be regarded as part of the new forms of governance introduced by the European Union with the intention of improve its efficiency and legitimacy. The Commission regards the consultation of interested parties to be beneficial for the legislation-drafting process because it helps to ensure that its legislative proposals are sound, but also because it considers itself to be legally bound to engage in this consultation.[905]

At the national level, in the United Kingdom a set of consultation principles has been established as guidance for government departments and other public bodies about engaging stakeholders when developing policy and legislation.[906]

Special attention should be paid to consultation procedures regarding special or vulnerable populations, such as indigenous peoples. In this case, consultation is connected with indigenous peoples' right to free, prior, and informed consent. There is a consensus within international human rights jurisprudence[907] that at minimum the state must engage in good faith consultations with indigenous peoples prior to the exploration or exploitation of resources within their lands, or to actions that would impact their traditionally used resources.[908] The right of indigenous peoples to consultation is embedded in Convention 169 of the International Labour Organisation (ILO). As pointed out by James Anaya, UN former special rapporteur on the rights of indigenous peoples, consultation is one central element for a new model regarding the relationships between the state and indigenous peoples and for a new development model.[909] In Peru, in 2011

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904 D. Obradovic & J.M. Alonso Vizcaino, "Good governance requirements concerning the participation of interest groups in EU consultations", in *Common Market Law Review*, No 43, 2006, p. 1049.

905 According to the Commission itself, this duty derives from Protocol No 7 on the application of the principles of subsidiarity and proportionality annexed to the Amsterdam Treaty. See, D. Obradovic & J.M. Alonso Vizcaino, loc.cit., pp. 1050–1054.

906 The Consultation principles replaces the Code of Practice on Consultation issued in July 2008. See: Consultation principles: Guidance. Cabinet Office, 17 July 2012. Available at: https://www.gov.uk/government/publications/consultation-principles-guidance.

907 See for example: Inter-American Commission on Human Rights. 2010. Indigenous and Tribal People's Rights over their Ancestral Lands and Natural Resources: Norms and Jurisprudence of the Inter-American Human Rights System. Organization of American States, Washington, DC.

908 Tara Ward, "The right to free, prior and informed consent: Indigenous peoples' participation rights within international law", in *Northwestern Journal of International Human Rights*, Volume 10, Issue 2, 2011, pp. 54–55.

909 James Anaya, "El derecho a la consulta previa en el derecho internacional", in Defensoría del Pueblo de Perú, *El derecho a la consulta previa de los pueblos indígenas. El rol de los ombudsman en América Latina*, Encuentro Extraordinario de la Federación Iberoamericana

the legislature adopted a law on the right of indigenous people to consultation.[910] The Peruvian *Defensoría* played an important role in promoting its enactment.[911]

Community-level

According to Addink, community-level participation can be depicted as an informal or structured opportunity for citizens and organisations who are not connected with the public authorities to express their opinions regarding policy-making and policy implementation, as well as to engage in debate about these matters with public representatives.[912] This type of participation can take a variety of forms, involving such elements as public hearings and the right to speak during meetings in order to influence the policy process under the responsibility of the administration. The proximity of local and regional administrations to the citizens makes these levels of government ideal forums for community participation and other forms of direct democracy.[913]

One feature of community participation is that the outcomes are not usually binding to the public authorities. However, public input is considered beneficial at least theoretically, especially in relation to exercising due care in the decision-making process. In the Netherlands, the optional uniform public preparation procedure was established in the GALA. In addition, general regulations for community-level participation at the local and regional levels can be found in the Municipalities Act and the Provinces Act.[914] In Peru, among other forms of community participation established in domestic legislation, an obligatory mechanism has been created for citizen participation in the preparation of the public budget at the local and regional level.[915]

One of the advantages of community participation is that citizens have an opportunity to influence the policy-making process. As a result, the

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del Ombudsman, Lima, April 2013, p. 25. It is important to mention that the right to indigenous people to consultation is not considered by the doctrine as an individual right but as a collective right related to the right to self-determination. See, James Anaya, *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people*, A/HRC/9/9, 11 August 2008. See Also James Anaya, *Indigenous peoples in international law*, Oxford: Oxford University Press, 2000.

910 Law 29785, Law on the right of indigenous people to prior consultation (*Ley del derecho a la consulta previa a los pueblos indígenas u originarios reconocido en el Convenio 169 de la Organización Internacional del Trabajo – OIT*), published in the official gazette *El Peruano* on 7 September 2011.

911 On this, see Section 11.1.2.

912 G.H. Addink, *Good governance. Concept and context*, p. 135.

913 Gerardo Ruiz-Rico Ruiz, loc.cit., pp. 59–62.

914 G.H. Addink, *Good governance. Concept and context*, pp. 135–136.

915 Law 28056, Framework Law on Participatory Budget (*Ley Marco del Presupuesto Participativo*), published in the official gazette *El Peruano* on 8 August 2003.

administration starts paying more attention to the different social interests involved and consequently, at least from a theoretical perspective, the quality of administrative practices improves.[916]

6.3. NEW PRINCIPLES OF GOOD GOVERNANCE: ACCOUNTABILITY AND EFFECTIVENESS

This section will attempt to describe the legal content of accountability and effectiveness. As principles of good governance, they are two of the more recently developed. According to Addink, this is partly because they are related not only to law, but also to social sciences and economics.[917] The principle of accountability has long since gone far beyond financial accounting, and now comes closer to the notions of responsibility and control of public authorities. Meanwhile, effectiveness relates both to the enforceability of law and the operational aspects of the administration in order to fulfil public aims, protect the general interest, and create public value. This section will briefly explain both.

6.3.1. PRINCIPLE OF ACCOUNTABILITY

6.3.1.1. General aspects

Public accountability is a hallmark of modern democratic governance.[918] Moreover, accountability can increase the quality of the administration, as part of the progression towards good governance, by preventing government errors.[919] As Schedler points out, the term *accountability* "expresses the continuing concern for checks and oversight, for surveillance and institutional constraints on the exercise of power".[920]

According to Bovens, accountability can be defined from a broad and a narrow perspective. From the former perspective, it serves as a conceptual umbrella that covers various other concepts such as transparency, equity, democracy, efficiency, responsiveness, responsibility, and integrity.[921] Some of these elements, such as transparency, are instrumental for accountability but not constitutive of it. Others,

916 G.H. Addink, *Good governance. Concept and context*, p. 136.
917 Ibid., p. 141.
918 Ibid., p. 158.
919 Mark Bovens, loc.cit., p. 463, *supra* note 783.
920 Andreas Schelder, "Conceptualizing accountability", in Andreas Schedler, Larry Diamond & Marc F. Platnner, *The self-restraining state. Power and accountability in new democracies*, Boulder-London: Lynne Rienner Publishers, 1999, p. 13.
921 Mark Bovens, loc.cit., p. 449.

such as responsiveness, have dimensions that are more evaluative than analytical. For Bovens, in this broad sense accountability is a fundamentally evaluative concept, used to positively qualify a state of affairs or the performance of an actor.

From a narrow perspective, accountability refers to concrete practices of being accountable. It might be defined as the "obligation to explain and justify conduct", and involves a relationship between an actor (the accountor) and a forum (the accountholder or accountee). As such, this study adopts the definition of Bovens, for whom "accountability is a relationship between an actor and a forum, in which the actor has an obligation to explain and to justify his or her conduct, the forum can pose questions and pass judgment, and the actor may face consequences."[922]

Following Bovens' perspective, the relationship between the actor (which may be either an individual, such as an official or civil servant; or an organisation, such as a public institution) and the forum (which can also be a specific person, such as a superior or a minister; or an agency, such as a parliament, a court, or an ombudsman institution) consists of three elements: i) first, the actor's obligation to inform the forum about their conduct by providing data on the performance of a task, procedures, or the outcomes of a decision. It is important to note that this obligation implies not merely the provision of information, but the actor's duty to explain and justify the conduct in question. This obligation can be formal or informal. For instance, public officials are usually under the formal obligation to render account on a regular basis to supervisory agencies, courts, or auditors (the forum). Meanwhile, examples of informal obligations include press conferences, informal briefings, or even self-imposed actions such as voluntary audits; ii) second, the possibility for the forum to interrogate the actor and to question the adequacy of the information or the legitimacy of the conduct. According to Bovens, this element explains the close connection between accountability and answerability, since the latter is a component of the former; and iii) third, the forum may pass judgement on the conduct of the actor, and the actor may face consequences.[923]

A distinctive element of accountability, as developed by Bovens, lies in the discussion of whether the fact of the actor facing consequences necessarily implies the imposition of a sanction. In Bovens's line of thinking, it is precisely the "possibility" of sanctions of any kind – rather than the actual imposition thereof – that is a constitutive element of accountability. However, the author explains that the expression "sanction" should be understood from a less formal or (classic) legal perspective, otherwise institutions such as the ombudsman, which (as a rule) do not have the authority to sanction formally but nonetheless

922 Ibid., p. 450.
923 Ibid., 451.

can be very effective in securing redress or reparation, would be excluded from consideration as an accountability institution.[924] It is important to keep in mind that the consequences may not necessarily always be negative, but can also be positive.

In this context, the expression "the actor may face consequences" used by Bovens should be understood from a broad perspective, encompassing highly formalised consequences such as fines, disciplinary measures, civil remedies, or penalty sanctions, as well as less coercive ones such as a recommendation for improvement, or even informal consequences such as the fact of having to render account in front of television cameras, or public condemnation. A point to consider is that the binding effect or enforcement of the consequences is not necessarily brought upon the actor by the forum itself. Again, an example is the ombudsman, which can scrutinise the agencies, identify instances of maladministration, and make recommendations, but leaves other institutions such as the parliament or the courts to impose formal sanctions or put pressure on the responsible public official or agency.[925] Hence, Bovens's definition of accountability allows for conceptualisation of the ombudsman (and assesses its role) as a new controlling (accountability) institution in the modern democratic state.[926]

The capacity of the forum to scrutinise the actor, and the fact that the latter may face consequences as a result of such scrutiny, is a factor that marks accountability and transparency apart. As pointed out earlier, transparency is a precondition for accountability. In this respect, Bovens distinguishes them by stating that although transparency is a very important prerequisite for accountability insofar as it may provide accountability forums with the necessary information, "transparency as such is not enough to qualify as a genuine form of accountability, because transparency does not necessarily involve scrutiny by a specific forum." Likewise, the author distinguishes accountability from participation by indicating that new forms of participation, such as consultation and responsiveness to the needs and preferences of a broad range of stakeholders, may be very important to enhancing legitimacy and democracy but do not constitute accountability because they lack the necessary elements of justification, judgment, and consequences.[927]

From a legal perspective, the principle of accountability is connected to the principle of separation of powers. Because of the separation of powers, mechanisms of accountability are established in order to prevent each branch

924 Ibid., pp. 451–452.
925 Ibid., p. 452.
926 For the role of the ombudsman as a controlling institution, see Chapter 3.
927 Mark Bovens, loc.cit., p. 453.

of the state from exceeding the powers conferred, under the rule of law, in the exercise of its functions. Constitutional theory states that separation of powers requires a system of checks and balances, which implies that "each branch of the state will act as a check to the exercise of arbitrary power by the other".[928] This means that each branch is restricted to the exercise of its function and must not unduly interfere in the functions of another branch (negative approach to the checking of the power of the branches of the state), and also that each branch is given the power to exercise a degree of direct control over how the other institutions exercise their functions. In this regard, legislative, administrative and judicial institutions can exercise some authority in the domain of all three functions (positive approach to the checking of powers).[929]

According to Parejo Alfonso, the notion of control is a constitutional concept, which spans the whole structure and functions of the state, beyond the three branches.[930] Control is intended to verify the legitimacy (legal reason) and timeliness (political reason) of the form (procedure) and the end (final cause) of the authority's actions. Control is an instrument imposed to verify the correspondence between means and ends in the exercise of power. As such, accountability is a principle linked to the very structure of state power under the democratic rule of law.[931]

The changes and transformations undergone by the modern state has resulted in a reconfiguration of its structure and functions, as well as the emergence of new institutions which, to varying degrees, have been assigned controlling functions that complement traditional forms of accountability.[932] This new structure covers a series of state agencies with a range of hierarchal and legislative competencies and relationships, such as the courts, court of audits, regulatory agencies, tribunals, ombudsman institutions, among others. But forms of non-state organisation have also arisen to play a role in the task of controlling the *res publica*, comprised of varied private entities such as professional bodies, consumer associations, press outlets, and NGOs.[933]

The rule of law requires that the actions of the public powers be governed by principles that include criteria such as probity, as well as unwavering respect for the legal order. But the modern state also requires that the control mechanisms be effective and assure the quality and effectiveness of the state's actions.[934]

928 M.J.C. Vile, op.cit., p. 19, *supra* note 23.
929 Ibid., p. 20.
930 Luciano Parejo Alfonso, *Derecho Administrativo*, pp. 1076–1080.
931 Roberto Dromi, op.cit., pp. 40–42, *supra* note 25.
932 Ibid., pp. 9–10.
933 Ibid., p. 11. Also see, Mark Bovens, loc.cit., pp. 455–456.
934 Roberto Dromi, op.cit., pp. 42–43.

From this perspective, accountability, as a legal duty structured around the idea of safeguarding the legal order, is of fundamental importance in a constitutional democracy.[935]

The requirement for accountability is based on the idea that the exercise of power must come from legitimate sources in order for it to be considered democratic, and that this legitimacy must be based on the possibility of its justification before the citizens.[936] Thus, mechanisms of accountability are essential to a good working democracy.[937] As Bovens states, accountability contributes to democratic control, to enhancing the checks and balances of institutional countervailing powers, and to strengthening the legitimacy of government. So, "good governance arises from a dynamic equilibrium between the various powers of the state".[938]

Therefore, accountability is important for providing a democratic means of monitoring and controlling government conduct, preventing concentration of power, and enhancing the effectiveness of public administration.[939] In this regard, three different effects or purposes of accountability can be discerned: i) controlling the abuse and misuse of public authority; ii) assuring the adequate use of public resource and adherence to the law and public service values; and, iii) encouraging and promoting learning in pursuit of continuous improvement in public administration.[940]

To sum up, as far as this study is concerned accountability creates the duty for public authorities to justify their actions and decisions to the citizens. It also implies the obligation for the state to organise and structure mechanisms for assessing, monitoring, and controlling the performance of public bodies and policies.[941]

6.3.1.2. Specific aspects

Bovens has specified the concept of accountability in different ways.[942] Based on the forum to which the actor is required to render account, he distinguishes

935 Ibid., pp. 43.
936 Nuria Cunnil Grau, *Responsabilización por el control social*, San José: FLACSO, 2003, p. 9.
937 Gar Yein Ng, *Quality of judicial organization and checks and balances*, p. 9, *supra* note 635.
938 Mark Bovens, loc.cit., p. 463.
939 Ibid., p. 462.
940 Peter Aucoin & Ralph Heintzman, "The dialectics of accountability for performance in public management reform", in *International Review of Administrative Sciences*, Vol. 66, Issue 1, March 2000, p. 45.
941 Alberto Castro, "El ombudsman y el control no jurisdiccional de la administración pública como garantía del derecho a la buena administración", p. 4.
942 Bovens has identified different types of accountability based on four general categories: the nature of the forum, the nature of the actor, the nature of the conduct, and the nature of the obligation.

between political, legal, administrative, professional, and social accountability. Here, the focus is on the institution to which a public official or civil servant is accountable. This perspective allows for recognition of the role of the new institutions (public and private) that have emerged to complement traditional forms of accountability in modern constitutional states.

Political and legal accountability are both particularly important types of accountability in a democracy. They concern the accountability of the government, civil servants, and elected authorities to the public, legislative bodies, and judicial bodies. In this context, accountability is connected with responsibility and liability.[943]

As regards political accountability, some elements can be identified. First, the parliamentary control of ministers and other officials of the executive. The controlling function of the parliament can be carried out through ministerial responsibility (in case of cabinet members) or parliamentary committees. Elections can be also considered an element of political accountability, as a mechanism for appointing representatives as well as for sanctioning representatives by retracting trust and not re-appointing them in office.[944]

In turn, legal accountability is the most unambiguous type of accountability, since it is based on legal standards prescribed by civil, criminal, or administrative statues, or precedents.[945] In relation to the conduct of the administration, legal accountability is performed by judicial review of administrative actions. The legal forums may be ordinary courts, specialised administrative courts, penal courts or even constitutional tribunals. Legal accountability is usually based on specific responsibilities, formally or legally conferred upon administrative authorities. Thus, administrative authorities can be subject to administrative, civil, and criminal liability.

As regards administrative accountability, alongside the courts, an array of quasi-legal forums[946] exercising independent, external administrative and financial control have been established in recent decades at the regional, national, and local levels. The appearance of these new administrative forums relates to the transformation of the modern state and the demands by citizens that the state operates more efficiently. Hence, the traditional forms of control were not sufficient.[947] In this regard, the assessment performed by these institutions has

943 G.H. Addink, *Good governance. Concept and context*, p. 161.
944 For a more detailed description of the types of political accountability see, G.H. Addink, *Good governance. Concept and context*, pp. 160–165.
945 Mark Bovens, loc.cit., p. 456.
946 G.H. Addink, *Good governance. Concept and context*, p. 166.
947 Gar Yein Ng, *Quality of judicial organization and checks and balances*, p. 10.

been broadened to secure quality performance based not only on legally binding and non-binding standards of probity, but also efficiency and effectiveness.[948] The institutions for administrative accountability range from ombudsman and audit offices to independent supervisory authorities, anti-fraud offices, administrative tribunals, and inspector generals. An interesting element is the soft control exercised by institutions such as the ombudsman by means of assessment inquiries.[949] Another element of administrative accountability is the implementation of internal complaint mechanisms, which the ombudsman has an active role in promoting.

Professional accountability implies accountability relationships with professional associations and disciplinary tribunals. Professional organisations lay down codes with standards for good practices that are binding for all members. These standards are monitored and enforced by professional supervisory bodies based on peer-review. This type of accountability is very relevant for public managers who work in professional public organisations such as hospitals, police departments, schools, among others.[950] The state recognises the relevance of professional associations for considering that there is a general interest at stake that must be protected even if the actor does not perform activities in a public (state) organisation, as in the case of legal practitioners. In Peru, per Article 20 of the Constitution, professional associations are recognised as autonomous institutions by public law.

Social accountability regards the explicit and direct relationships of accountability between public agencies on the one hand, and citizens and civil society on the other. In this regard, more attention is being paid to the role of non-government organisations, interest groups and citizens as relevant stakeholders in determining policy and rendering account. Public authorities should feel obliged to account for their performance to the public at large, or at least to interest groups. In different countries, legal instruments are being implemented in order to promote citizen involvement in authoritative forums, to ensure that such authorities are held to account.[951]

In relation to the actor to be held to account, accountability may focus on the organisation per se or on individual officials. Thus, the forum of accountability can adopt corporate accountability strategies in which the organisation itself is held to account for the collective outcome. Accountability can also be hierarchal,

948 Mark Bovens, loc.cit., p. 456.

949 This study uses the term "assessment inquiries" as a general category to refer the kind of investigation (either redress- or control-oriented) addressed at issuing recommendations instead of sanctioning, and whose findings do not have binding effects.

950 Mark Bovens, loc.cit., pp. 456–457.

951 Ibid., p. 457.

whereby the highest official within an organisation assumes responsibility for internal accountability. In such cases, the process of calling to account takes place along the strict lines of the "chain of command" and the middle managers serve, in turn, both as actor and forum. The forum can also adopt collective accountability strategies and pick any member of the organisation and hold it accountable for the conduct of the organisation, by virtue of their being a member of the organisation. Another accountability strategy is the individual form, in which each individual official is held proportionately liable for their personal contribution to the conduct of the organisation rather than on the basis of formal position. On the other hand, depending on the nature of the conduct, it is possible to discern a variety of accountability relationships on the basis of the most dominant aspect. For instance, in legal accountability, the legality of the official's conduct is the most dominant aspect. The aspect in question can be financial, professional, procedural, and so on.[952]

In turn, further distinctions can be made depending on the nature of the obligation, in which accountability can be defined as either vertical or horizontal. O'Donnell defines horizontal accountability as "the existence of state agencies that are legally enabled and empowered, and factually willing and able, to take actions that span from routine oversight to criminal sanctions or impeachment in relation to actions or omissions by other agents or agencies of the state that may be qualified as unlawful."[953] On the other hand, Bovens, from a less formalistic perspective, states that in horizontal accountability "a hierarchical relationship is generally lacking between actor and forum, as are any formal obligations to render account."[954] However, he recognises that another form of horizontal accountability mentioned in the literature is mutual accountability by bodies on an equal footing, with reference to the definition of horizontal accountability developed by O'Donnell.

Bearing in mind the above-mentioned definitions of horizontal accountability, this study regards O'Donnell's as that which best captures its essence by framing it in the context of the relations between government agencies. However, Bovens's definition provides an interesting insight, insofar as he notes that not all horizontal accountability relations imply a hierarchical relation or the presence of sanctions.[955] In this regard, horizontal accountability can be defined as the

952 Mark Bovens, loc.cit., pp. 457–460.

953 Guillermo O'Donnell, "Horizontal accountability: The legal institutionalization of mistrust", in S. Mainwaring & C. Welna (eds), *Democratic accountability in Latin America*, Oxford: Oxford University Press, 2005, p. 34.

954 Mark Bovens, loc.cit., p. 460.

955 Bovens, in addition, proposes the concept of diagonal accountability, which he regards as an intermediate form of accountability relationships between horizontal and vertical accountability, but which actually has a similar meaning to that given by O'Donnell

formal control based on the relationship between government agencies, in which both the possibility of sanctions and a situation of hierarchic dependence may be present or not.

Vertical accountability, on the other hand, is closely related to the democratic dimension of accountability. O'Donnell conceives this chiefly as electoral accountability: that is, the possibility given to citizens to unseat incumbent authorities through periodical electoral processes.[956] Thus, vertical accountability can be defined as the social control-based relationship between the government and the people, in which the latter can sanction the former through political control mechanisms. The paradigmatic expression of this is the removal from office of political authorities through elections. But various forms of social accountability may also be considered as part of this category.

Taking this theoretical framework into account, the ombudsman institution may be regarded, as Linda Reif points out, both as a horizontal and a vertical accountability mechanism, primarily oriented to enhancing, in both cases, administrative accountability, but also legal (and constitutional) accountability, especially in the case of the mixed ombudsman.[957] Thus, when the ombudsman performs *ex officio* interventions, it is acting as a horizontal accountability mechanism; and when it acts in response to citizens' complaints, it is performing vertical accountability.

A further distinction: passive and active dimensions of accountability

Based on the distinction between horizontal and vertical accountability, this study proposes that there is a further distinction to be made between the

to horizontal accountability, insofar as it deals with administrative accountability relationships. With regard to diagonal accountability, Bovens makes the following statement: "Administrative accountability relations are usually an intermediary form. Most ombudsmen, audit offices, inspectorates, supervisory authorities and accountants stand in no direct hierarchical relationship to public organisations and have few powers to enforce their compliance. However, the majority of these administrative forums ultimately report to the minister or to parliament and thus derive the requisite informal power from this. This indirect, two-step relation with a forum could be described as a diagonal accountability – accountability in the shadow of hierarchy." Mark Bovens, loc.cit., p. 460.

956 Guillermo O'Donnell, "Horizontal accountability: The legal institutionalization of mistrust", pp. 47–49. On the contrary, according to Bovens vertical accountability "refers to the situation where the forum formally wields power over the actor, perhaps due to the hierarchical relationship between actor and forum, as is the case of the executive organization that is accountable to the minister or (over the head of the minister) to parliament. The majority of political accountability arrangements, which are based on the delegation from principal to agents, are forms of vertical accountability." Mark Bovens, loc.cit., p. 460.

957 Linda C. Reif, *The ombudsman, good governance and the international human rights system*, pp. 59–60. See also Section 1.1.2 on the ombudsman, democratic accountability, and legitimacy.

passive and active dimensions of accountability. The former relates to horizontal accountability, while the latter concerns vertical accountability relationships.

The passive dimension of accountability is involved when a state agency or official explains and justifies the reasons for its decisions because there is a formal or legal requirement for doing so, either at a citizen's request (such as under the provisions of access-to-information laws) or because they are instructed to do so by a hierarchical superior or a control institution, such as an ombudsman or audit office. In the other hand, the active dimension of accountability goes beyond explicitly prescribed legal requirements. Thus, when active accountability arises, state agencies and officials account for their decisions and their reasons for adopting them, without any legal mandate or requirement for doing so by a hierarchical superior or controlling agency. These actions can be motivated by established social customs, political and social pressure, or reasons of political opportunity.[958]

6.3.2. PRINCIPLE OF EFFECTIVENESS

6.3.2.1. General aspects

From a traditional legal approach, effectiveness is related to the observance and enforcement of law. In this regard, Addink notes that legal effectiveness can be framed as the degree to which a gap exists between what the law states or commands and how the population acts; thus, when the behaviour is not in accordance with the law, the legal system is not considered completely effective.[959] From this perspective, there is a relationship between effectiveness and the coercive force of law, since coercion is conceived as the classical mechanism for the enforcement of law.[960] Hence, it is assumed that the very purpose of public administration is to comply with the law to which it is subject. From this perspective, the means are less important than the ends (which is to comply with the law).[961] In this regard, the principle of effectiveness, understood as compliance with – and the enforcement of – the law means that from a classical perspective, effectiveness is connected to legality and the rule of law.

However, several developments that challenge the traditional notion of effectiveness as merely law enforcement have been taking place. The competences

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958 For a similar perspective see, Mark Bovens, *The quest for responsibility. Accountability and citizenship in complex organisations*, Cambridge: Cambridge University Press, 1998, pp. 22ff.

959 G.H. Addink, *Good governance. Concept and context*, p. 147.

960 Nonetheless, as explained earlier, coercion is not an attribute of law but rather of the modern state as a legal and political entity. See Section 5.1.1.

961 Luciano Parejo Alfonso, *Eficacia y administración pública. Tres estudios*, Madrid: INAP, 1995, p. 134.

and tasks of many administrative institutions have been delegated to separate agencies, and sometimes to private institutions.[962] As already mentioned, the modern state is not the main provider of public services but the guarantor of the effective (and efficient) delivery of goods and services to satisfy the basic needs of society.[963] These changes have undoubtedly had an impact on public law and the traditional legal perspective regarding the principle of effectiveness. In this context, the scope of effectiveness is broadened beyond law enforcement and is concerned with the performance of public administration in terms of procedural and organisational aspects as well as policy implementation in order to obtain a particular result. Addink calls it the "instrumental conception of law".[964]

According to some of the literature, the principle of effectiveness evolves as a consequence of the requirements of the social *rechtsstaat*. In this regard, Descalzo points out that the social dimension of the democratic rule of law enshrines the duty of the public authorities to effectively promote the conditions for the freedom and equality of the individual to be real and effective, as well as the removal of obstacles to its realisation.[965] The emergence of the social *rechtsstaat* implies the recognition of social rights, and the duty for the state to implement actions in order to achieve this end. It implies that state intervention must be effective in order to ensure the availability and quality of the basic goods and services demanded as part of social rights.

In a similar line of thinking, Parejo Alfonso points out that the social rule of law principle imposes upon the state the obligation to promote equality and better living conditions through quality public services. It relates to effectiveness, in the first instance, in the promotion of the general interest through achievement of public goals. Consequently, effectiveness becomes operational at the administrative level.[966] Thus, the principle of effectiveness is the instrumental dimension of the social and democratic rule of law.[967] In this sense, Parejo Alfonso highlights the constitutional dimension of the principle of effectiveness given its connection to the social dimension of the rule of law principle.[968]

Effectiveness mainly relates to the achievement of an objective or a public goal. As a principle of good governance, it also expresses a concern for quality

962 G.H. Addink, *Good governance. Concept and context*, p. 142.
963 See Section 5.2.3.
964 G.H. Addink, *Good governance. Concept and context*, p. 148.
965 Antonio Descalzo González, "Eficacia administrativa", in *Eunomía. Revista en Cultura de la Legalidad*, No 2, 2012, p. 146.
966 Luciano Parejo Alfonso, "La eficacia como principio jurídico de la actuación de la Administración pública", in *Revista Documentación Administrativa*, No 218–219, 1989, pp. 16–18.
967 L. Arroyo Jiménez, *Libre empresa y títulos habilitantes*, Madrid: CEPC, 2004, pp. 186–193.
968 Luciano Parejo Alfonso, *Eficacia y administración pública. Tres estudios,* pp. 32–41.

of public interventions as new source of legitimacy.[969] Hence, the operational or instrumental dimension of effectiveness connects this principle to service delivery, the performance of public functions, the organisation of the administration, and the implementation of public policies as factors of quality. This means that the manner in which a goal is achieved is just as important as the achievement in itself. In this regard, from a legal perspective, effectiveness and efficiency are inextricable in terms of how goals are attained. Efficiency is an economic concept. For the public sector, it is important to provide the services required in the most effective and efficient way possible, which means the highest quality service at the lowest possible cost.[970] Thus, as a legal principle, effectiveness must be understood from two perspectives. On the one hand, the perspective of fulfilling objectives based on optimal use of resources; and on the other, the perspective of means takes into account the procedures employed to achieve results, which must be proportional.[971] Therefore, from a legal perspective, efficiency can be defined as a subspecies of effectiveness.[972]

As already mentioned, in the classical legal approach changes in public administration and law have an impact on effectiveness and the way in which compliance with the law is addressed. In this regard, new techniques and institutions have emerged for effective compliance with the law. Thus, the effectiveness of law does not rely solely on classical legal institutions such as the judiciary, but also includes new controlling institutions like the ombudsman. In this regard, effectiveness of law depends on persuasion as much as it does coercion and sanction.[973] It is important to keep in mind that although legal principles taken from public law are part of the standards applied by the ombudsman to assess the behaviour of public officials, also of concern is compliance with soft-law norms as non-legally binding requirements for achieving good administration.[974] As stated earlier, good administration comprises legally binding and non-legally binding rules with the aim of fostering trust in and acceptance of administrative action.[975] Thus, effectiveness is also concretised in managerial standards regarding the internal relationships of the administration from a policy perspective (either within the same administrative

969 See Section 2.1.2.

970 G.H. Addink, *Good governance. Concept and context*, p. 145.

971 Anoeska Buijze, *On the justification and necessity of legal effectiveness norms*, Utrecht: Utrecht University, 2008, pp. 12–13. See also, Alberto Castro, "Legalidad, buenas prácticas administrativas y eficacia en el sector público", p. 256.

972 Luciano Parejo Alfonso, "La eficacia como principio jurídico de la actuación de la Administración pública", 19.

973 Alberto Castro, "Legalidad, buenas prácticas administrativas y eficacia en el sector público", p. 256.

974 On the ombudsman and the application of binding and non-binding legal norms, see Sections 3.1.3 and 3.6.4. On the legal nature of soft law, see Section 2.1.2.

975 See Section 6.1.3.

agency, or in relationships between different administrative agencies).[976] These norms will be accepted and therefore will have legal effect insofar as they are seen as legitimate.

In this regard, it is also possible to refer to the effectiveness of law in relation to its acceptability in the eyes of the addressee. As already mentioned, the observance of law is always, to a certain extent, subject to the will of the actors.[977] In a similar line of thinking, regarding the effectiveness of legal norms, Addink distinguishes between validity and realisation. In this context, validity means that legal norms that are based on truth or reason are likely to be accepted. Realisation refers to the state in which a situation is understood by the addressee of the norm, or when he or she becomes aware of it.[978] Therefore, conditions for the effectiveness of legal norms are the application of law and the level of legal consciousness. If citizens are participants in the process of formulating legal norms, they will be better informed and aware of the content of these norms, which facilitates acceptance and application. Thus, from the perspective of the acceptability of legal norms, effectiveness is connected to democracy.

As a good governance principle, effectiveness can be seen as a parameter for the behaviour of the administration. At the EU level, the White Paper on European Governance has defined effectiveness by indicating "policies must be effective and timely, delivering what is needed on the basis of clear objectives, an evaluation of future impact and, where available, of past experience. Effectiveness also depends on implementing EU policies in a proportionate manner and on taking decisions at the most appropriate level."[979]

The development of the principle of effectiveness is somewhat different from the other general principles of EU law in that it is not directly based on the laws of the member states. Indeed, its distinct character is derived from EU law in itself, through the concepts of primacy and direct effect. This makes it the development of a real EU law principle.[980] The principle of effectiveness is usually considered as a background principle that plays a role in EU administrative law, especially in the framework of the tools of review and compensation in order to hold the administration to account. As Addink recalls, this principle underlies a series of developments in the sphere of judicial protection and has been recognised as a general principle of EU law by the ECJ and its predecessor. Its origins lie in the interpretative techniques of the ECJ, which favoured a liberal construction of

976 Alberto Castro, "Legalidad, buenas practicas administrativas y eficiencia en el sector público", p. 256.
977 See Section 5.1.1. See also, Massimo La Torre, op.cit., *supra* note 442.
978 G.H. Addink, *Good governance. Concept and context*, p. 143.
979 European Commission, *European Governance: A White Paper*, p. 8.
980 G.H. Addink, *Good governance. Concept and context*, p. 153.

Treaty provisions so as to ensure the direct effect of directives. Progressively, the Court has placed more emphasis on connecting the principle to the fundamental right of judicial protection, as guaranteed by Articles 6 and 13 ECHR and as laid down in Article 47 of the EU Charter regarding the right to effective remedy and the right to a fair trial.[981]

It is important to mention that on the national level, Article 103.1 of the Spanish constitution explicitly enshrines the principles of effectiveness. In so doing, the Spanish constitution establishes that the public administration serves objectively for the general interest and acts in accordance with the principle of effectiveness, among others.[982] According to Tomás Mallén, this constitutional provision is an expression of the right to good administration.[983]

For this study, as a principle of good governance, effectiveness gives rise to the duty for public officials and agencies to direct their actions towards the achievement of public goals, in a proportional, objective, and reasonable manner and base on the responsible and optimal management of public resources, in order to meet the requirements that stem from the social and democratic rule of law. In addition, this implies the obligation to ensure compliance with the provisions and mandates of the law, as well as to steer government actions to guarantee the quality of public service delivery and to organise public procedures and management systems to achieve results that benefit citizens.[984]

As Schmidt-Assmann observes, all law aspires to effectiveness. Thus, law cannot simply involve the construction of legal techniques, categories, and rules, but must also incorporate the conditions for these to prove effective and efficient. For this reason, administrative law has to be approached from a steering perspective.[985]

6.3.2.2. Specific aspects

Administrative law is increasingly concerned with good governance principles, and specifically the principle of effectiveness.[986] This innovation in

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981 Ibid. On the principle of effectiveness in EU law also see M. van den Broek, *Preventing money laundering*, The Hague: Eleven International Publishing, 2015, pp. 31–34.

982 Spanish Constitution, Article 103.1: "Public administration serves objectively for the general interest and acts in accordance with the principles of effectiveness, hierarchy, decentralisation, deconcentration, and coordination, and fully subject to the law".

983 Beatriz Tomás Mallén, *El derecho fundamental a una buena administración*, pp. 102–103, *supra* note, 148.

984 Alberto Castro, "El ombudsman y el control no jurisdiccional de la administración pública como garantía del derecho a la buena administración", p. 4.

985 Eberhard Schmidt-Assmann, *La teoría general del derecho administrativo como sistema*, p. 27.

986 G.H. Addink, *Good governance. Concept and context*, p. 149.

administrative law is important because policymakers have often complained about legal restraints preventing them from taking the policy measures considered necessary to achieve public goals.

In the literature, the balance between policy rationality and administrative law rationality is seen as a tension, not as an optimum. As Addink points out, the good governance perspective on administrative law provides is a more integrated approach that enables a better balance between the policy needs and the legal conditions of administrative law.[987]

According to Addink, effectiveness has a procedural and substantive dimension. The procedural side, which is the more developed, relates to effective protection and effective judicial review. The substantive side refers to the situation in which a particular benefit or commodity is going to be achieved because of the effectiveness of the substantive legal norm. This idea is connected to protection of the public interest.[988] Nevertheless, from this study's perspective, effectiveness is a procedural principle to the extent that it is concerned not only with the achievement of a public goal, but also with the manner in which the goal is obtained.

Hence, enforceability, acceptability, celerity, simplification, coordination, effective organisation, and professionalism, among others, can be identified as elements of effectiveness as a good governance principle.

6.4. FINDINGS

The general principle of good governance is rooted in both the rule of law and democracy. However, it has developed into a full-fledged cornerstone that has its own core dimension. In this sense, good governance relates to the way in which power is exercised, and approaches the power from a dynamic perspective. Its concern is not primarily with the ultimate decision to be adopted but with how decisions are made. This indicates that the principle of good governance is process-oriented in nature, but also concerned with the final decision as an outcome.

As a general constitutional principle, good governance is applied to all public bodies, as well as to private bodies that perform public tasks. This general principle emphasises the steering approach of law as a means of positively guiding the conduct of public powers. In addition, it allows the application

987 Ibid.
988 Ibid.

of more flexible and comprehensive methods of regulation, such as soft-law instruments (policy rules, guidelines, and recommendations, among others) to achieve desired effects. This involves a concern for quality in the performance of the government.

As a general constitutional principle, good governance takes the form of a constitutional duty by acting as a norm for the government rather than a right for the citizens. The general principle of good governance encompasses a set of specific principles whose constitutional status has been recognised (either implicitly or explicitly) in most modern states governed by the democratic rule of law. These principles stand as the constitutive elements of good governance and define its core content. As constitutional principles, they inform the performance of the government. To recap, they are: properness, transparency, participation, accountability, and effectiveness.

The sound functioning of the government is a qualitative aspect of any democratic governance system.[989] Consequently, in order to strengthen good governance, several states have focused on reform of the administration. In particular, new democracies have attempted to reduce administrative inefficiency or unfairness and eliminate government corruption. In this context, the institution of the ombudsman is one of the various public sector mechanisms that can contribute to strengthening good governance.[990]

[989] Linda C. Reif, *The Ombudsman, good governance and the international human rights system*, p. 57. However, it is important to mention that there is a discussion on whether good governance, understood as the effective functioning of the administration, can be considered as an element for assessing the quality of democracy. In this regard, see M. F. Plattner, "A skeptical perspective", in L. Diamond & L. Morlino (eds), *Assessing the quality of democracy*, Baltimore: The johns Hopkings University Press, 2005, pp. 77–81.

[990] Linda C. Reif, *The Ombudsman, good governance and the international human rights system*, p. 58.

PROVISIONAL CONCLUSIONS PART II

This study is aimed at determining whether and to what extent the principles of good governance are being applied by the institution of the ombudsman as a mechanism for strengthening democracy and consolidating the development process in Peru. Accordingly, the study analyses how the legal content of the principles of good governance is being developed by the institution. It also explores whether, by applying these principles as standards for assessing the conduct of the government, the ombudsman is making an effective contribution to improving the institutional framework from a good governance perspective in order to overcome the legitimacy deficit.

With this purpose, the analysis is focused on the good governance principles of properness, transparency, and participation. In particular, attention is paid to their application by the ombudsman in assessing the performance of administrative authorities. As explained before, properness, transparency and participation are considered key aspects of good governance. Properness is connected to a broader conception of the rule of law, which implies that the proper functioning of public powers requires them to be subject to the principle of legality, comprising constitutional provisions (rules, principles and values) for orienting the activities of the government. It also implies a concern for quality in the performance of administrative authorities, going beyond simply limiting discretion. Thus, properness is expending the scope of administrative principles.

On the other hand, transparency and participation are linked to the principle of democracy. Transparency is essential for the sound functioning of a democratic state and its institutions, and is directly related to citizens and their opportunities to be well informed and to influence the government. It covers a variety of elements, the most developed of which is access to information.[991] For its part, participation, though linked to the principle of democracy, has spread from the political arena to different areas and activities of the administration in order to strengthen the legitimacy of the decision-making process. As a good governance principle, participation is related to the concept of deliberative democracy, as it is confirmed by citizens' participation in the policy process.[992] The relationship between participation and deliberative democracy is also confirmed by the procedural

991 See Section 6.2.2.

992 For the concept of deliberative democracy, see Section 5.2.2.

character of good governance.[993] Transparency and participation are closely related: the former is instrumental to the latter since it is a requirement for the well-informed participation of citizens. In turn, both are instrumental to accountability. Transparency differs from accountability because it does not necessarily involve scrutiny by a forum. On the other hand, participation does not constitute accountability since it lacks the element of justification, judgment and consequences.

Table 2. Good Governance Principles and Dimensions of Modern Constitutional State related to Administrative Legitimacy

	Administrative Legitimacy			
Good Governance	**Dimensions** **Principles of Good Governance**	***Rule of Law (Protecting dimension)***	***Democracy (Participatory dimension)***	***Good Governance (Steering dimension)***
	Properness	Legal certainty Prohibition of arbitrariness Prohibition of misuse of power Legitimate expectations	Equality and non-discrimination	Due care or due diligence Proportionality Courtesy
	Transparency	Publication and notification of legislation and decisions Clear drafting Duty to give reasons	Access to documents	Active provision of information
	Participation	Right to be heard	Right to vote Referendum Popular initiative	Consultation Community-level
	Accountability	Ministerial responsibility Parliamentary inquiries Judicial review	Elections Social accountability Professional accountability	Assessment inquiries Internal complaint mechanism
	Effectiveness	Enforceability	Acceptability	Celerity Simplification Coordination Effective organisation

993 P. Craig, "The nature of the community. Integration, democracy and legitimacy", in P. Craig and G. de Búrca, *The evolution of EU law*, Oxford: Oxford University Press, 1999, p. 22.

Accountability, through its relation to the notion of control and the principle of separation of powers, is connected to the rule of law. The principle has evolved based on the idea that the exercise of power, in order to be legitimate, must be based on the possibility of its justification to citizens. Thus, control mechanisms are essential for democracy, as well as for ensuring the quality and the effectiveness of public administration. From a classical perspective, effectiveness – understood as the enforcement of the law – also relates to the rule of law. However, it has broadened its scope beyond law enforcement and is concerned with the performance of public administration in terms of procedural and organisational aspects, as well as policy implementation in order to obtain a particular result.

Table 2 shows the connection between the principles of properness, transparency, participation, accountability, and effectiveness and the fundamental values of rule of law, democracy, and good governance. Each one of these three cornerstones reflects how different rationales co-exist in the modern constitutional state, and how these rationales characterise its development process. Specifically, each cornerstone is primarily connected with a particular rationale, or dimension: the rule of law is connected with the protecting dimension; democracy is linked to the participatory dimension; and good governance to the steering dimension.

The relationship between the specific principles of good governance and the three cornerstones of the modern constitutional state is established by the elements of the specific principles of good governance. This study chooses to focus on properness, transparency, and participation based on their relevance for the ombudsman's interventions. As can be observed, some elements of the principles of good governance are linked to the rule of law, while others are related to the principle of democracy or good governance. Thus, it is easy to verify the evolving status of the principles of good governance based on existing legal values.

It is possible to affirm that properness is closely connected to the rule of law. Both are concerned with the principles of legal certainty, prohibition of arbitrariness, misuse of power, proportionality, and legitimate expectations. However, properness, through equality, has also been developed in relation to the democratic principle. In this regard, the principle of equality not only prevents arbitrary distinctions in order to avoid discrimination, but is also an important criterion in policy implementation. Thus, equality is related to the possibility of fostering social inclusion and citizen consent of the system. But properness goes beyond legality and democracy, relating also to the steering dimension of good governance in terms of guiding the performance of public officials, in connection with the principle of due care or due diligence. Specifically, it entails the positive obligation of all branches of government to pursue quality in the

performance of their functions by carefully establishing and reviewing the relevant factual and legal elements of a case prior to making decisions. This is in accordance with the constitutional provisions that refer to the exercise of public functions for the service of the general interest, and how they are considered as elements of the embracing concept of properness as a good governance principle. As far as the administration can be defined as "power in action", the principle of properness has a direct (although not exclusive) application at the level of the administration.

At the European Union level, the good governance dimension of properness has been developed in connection with the concept of good administration. As developed, good administration is expanding the scope of administrative principles. And as a result of Europeanisation, the notion of good administration is being introduced to national legal orders. From a narrow perspective, this principle is solely related to decisional processes. From a broader perspective, good administration is a principle that guides how administrative activities are conducted in terms of both legal and factual acts. From this perspective, legally binding and non-legally binding rules (rules of good administrative conduct or soft law) emerge for the assessment of the performance of the administration.[994]

As regards the principle of transparency, Table 2 shows how the scope of this principle has spread through the development of elements traditionally linked to the principle of legality. Thus, it might be affirmed that legality, which is directly connected to properness through the rule of law dimension, also has an extra function in the development of transparency as a good governance principle. Thus, transparency in the form of clear drafting is related to legal certainty and as such it also functions as a mechanism to prevent arbitrary behaviour. With respect to clarity of procedures, transparency has been related to procedural standards, proportionality, and legal certainty. It has also been applied through publication and notification of decisions. Thus, the connection between publication, transparency, and legal certainty is well established as far as the European Court of Justice is concerned.

In the case of participation, Table 2 describes how the rights of defence, and particularly the right to be heard – traditionally linked to the rule of principle – have were recognised as a means of ensuring participation and legitimising decision-making in individual cases. Later, the increasing concern for the protection of collective interests led to spread participation beyond adjudication. Then, participatory mechanisms in rule-making, in the form of consultation periods and similar devices, where established in connection to the principle of democracy. As to political participation, modern democracies have incorporated

994 For the relation between good governance and good administration see Section 6.1.3.

mechanisms of direct democracy, such as citizens initiatives and referenda, with the purpose of enhancing legitimacy in the political arena by allowing citizens to get involved and ensuring politicians are more accountable. Modern democracies have also fostered the electoral participation of disadvantaged or vulnerable groups such as persons with disabilities, women, and ethnic groups, particularly by setting down legal measure to ensure their right to vote is respected.

On the other hand, as a good governance principle, participation enhances citizen participation in policy-making. The purpose of this is to allow citizens to influence the decision regarding the policy to be implemented, legitimising it through a deliberative process between the authorities and the persons directly affected. In the policy process, participation is enhanced through community-level participatory mechanisms such as citizens' panels and public hearings. It is also fostered in the policy implementation and control stages. Finally, Table 2 shows how principles of good governance in connection to the three modern constitutional state dimensions can improve the institutional framework to strengthen legitimacy.

In this analysis of the role of the ombudsman in developing good governance, the focus is on some of the elements of properness, participation, and transparency described above. The study places emphasis on those elements connected with the steering dimension of the modern constitutional and democratic rule of law with the aim of determining to what extent the ombudsman is contributing to the development of the legal content of these principles (and in turn, to the development of normative standards) through the performance of its normative functions. Then, the implications of the normative function of the ombudsman is analysed in relation to the fundamental values (rule of law, democracy, good governance) of the modern state.

PART III

THE OMBUDSMAN'S APPLICATION OF THE PRINCIPLES OF GOOD GOVERNANCE FROM A COMPARATIVE PERSPECTIVE

Part III evaluates the role of the ombudsman in developing good governance, particularly in terms of applying good governance-based standards, through its (indirect) normative function as a developer of legal norms and its ability to codify standards for assessing the behaviour of the administration. Chapters 7, 8 and 9 will analyse the assessment standards applied by the ombudsman in relation to three national ombudsman institutions operating in Europe: The National Ombudsman of the Netherlands, the Parliamentary Ombudsman of the United Kingdom, and the Ombudsman of Spain. The aim is to determine to what extent these ombudsmen share the same values and apply similar normative standards, and how they are connected by the principles of good governance and the fundamental values of the modern constitutional state. The focus will be on the principles of properness, transparency and participation.

CHAPTER 7
THE NATIONAL OMBUDSMAN OF THE NETHERLANDS

This chapter analyses the normative function of the National Ombudsman of the Netherlands (the Dutch Ombudsman) in order to determine the degree to which the institution codifies and applies good governance-based standards when assessing the propriety of the administration's conduct. With this purpose, its functions and powers, assessment orientation, standard of control, and investigation procedure are outlined. Later, the Dutch Ombudsman's application of standards of proper conduct are examined in the Dutch legal context, to identify whether the general values that underlie them can be considered principles of good governance.

7.1. LEGAL BASIS AND MANDATE

7.1.1. THE OMBUDSMAN WITHIN THE DUTCH LEGAL CONTEXT

The Constitution of the Netherlands (*Grondwet)* has been in force since 1814, and amended several times since then – extensively so in 1983, after which it was also re-promulgated. The Netherlands is a constitutional monarchy with a parliamentary system of government. The bicameral parliament (*Staten-Generaal*) has a legislative period of four years. The first chamber, the Senate, is comprised of 75 senators who are elected by the provincial parliaments (*Provinciale Staten*); while the second, the House of Representatives, has 150 members who are elected in a general ballot according to the principle of proportionality and following a specific mechanism by which parties are required to reach a minimum percentage of votes. The government consists of the King and the ministers. The Council of State (*Raad van State*) is one of the government's highest consultative organs.

The High Council of the Netherlands *(Hoge Raad der Nederlanden)* is the Netherlands highest judicial authority – it is the Supreme Court – in civil and criminal matters. In turn, the Supreme General Administrative Court was

established in 1978 for administrative disputes, while regional administrative courts followed in 1994.[995] With only a few exceptions, individual acts of administrative organs can be appealed to these courts. Although there is no court tasked specifically with exercising constitutional jurisdiction, such functions are performed by the Council of State on a very limited basis as part of their advisory role for new drafts of legislation.

The first part of the Constitution contains an extensive charter of fundamental rights, which sets out the classical liberal rights and freedoms. The Constitution also contains some social rights (health, education, environmental, social care). These rights are not directly enforceable, but there are some indirect effects, however there are remarkable recent cases.[996]

The Netherlands is one of the founding members of the Council of Europe. The European Convention on Human Rights was ratified in 1954 and, like other general binding norms ratified by international treaties, it has – according to the Constitution – priority over the domestic legal order, including the Constitution itself.

7.1.2. LEGAL BASIS AND MANDATE

The National Ombudsman of the Netherlands (*de Nationale ombudsman*) was created by the National Ombudsman Act of 1981 (*Wet Nationale ombudsman*).[997] Since 1999, the institution has been explicitly incorporated into the Constitution.[998] According to Article 78a of the Constitution of the Netherlands, the Dutch Ombudsman is required to investigate, on request or of its own accord, actions taken by governmental and other administrative authorities designated by or pursuant to act of parliament.[999]

The Dutch Ombudsman was established in order to give individuals an opportunity to access an independent and expert complaint body regarding

995 There are also specific supreme administrative courts for specific issues. In that regard appeals against administrative law judgements are lodged at the competent specialised administrative law tribunal – the (General) Administrative Jurisdiction Division of the Council of State and the more specific the Central Appeals Tribunal (civil servant and social security issues) or the Trade and Industry Appeals Tribunal (economic issues), also known as Administrative High Court for Trade and Industry, depending on the type of case.

996 On that regard, see the Urgenda climate case against the Dutch Government at www.urgenda.nl.

997 Act 35 of 4/2/1981. Entered into force on 1 January 1982. Most recently amended on 11 February 2012.

998 As amended by Act 133 of 25/2/1999.

999 Article added by Act of 25 February 1992, which entered into force on 25 March 1999.

practices of government.[1000] The position of the Dutch Ombudsman in the Constitution as one of the high offices of the state (*hoge colleges van staat*)[1001] guarantees its independence and impartiality.[1002] According to the Dutch legal system, the high councils of the state are characterised by formal independence from the government.

The National Ombudsman[1003] is appointed by the second chamber of parliament – (*de Staten-Generaal*) with a simple majority of votes rather than by the Crown.[1004] This type of appointment procedure is highly unusual in Dutch constitutional law and reflects the special position of the Dutch Ombudsman in relation to the parliament. In this regard, the Dutch Ombudsman can be seen as supplementing and supporting parliamentary scrutiny of the executive.

The appointment takes account of a recommendation made by a committee composed by the vice-president of the Council of State, the president of the High Council, and the president of the Court of Audit (*Algemene Rekenkamer*). The committee has to present a non-binding list proposing at least three candidates for the office. Then, the National Ombudsman is appointed for a term of six years, with possible re-appointment.[1005] No formal legal requirements for the appointment are prescribed, but legal expertise and knowledge of the administrative system are considered as a necessity.[1006]

According to the National Ombudsman Act (hereafter, the Ombudsman Act), the office is incompatible with elected membership of a public body, holding a public office for which a fixed salary is received, membership of a permanent government advisory body, or acting as a lawyer or notary. In general, the National Ombudsman is not allowed to hold any position that is incompatible with the proper performance of their official duties, their impartiality and independence, or public confidence.[1007]

The incumbent can only be dismissed on the grounds laid down in the Ombudsman Act, which are similar to those applicable to members of the

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1000 National Ombudsman, *Institution, task and procedures of the National Ombudsman of the Netherlands*, The Hague, 2008, p. 5.

1001 J.M.C. Meulenbroek, *Klachtrecht en ombudsman: een praktische handleiding*, Kluwer, 2008, p. 73.

1002 Article 78a inserts the Ombudsman in Chapter 4 of the Constitution. Then, the National Ombudsman is in the same level as the Chambers of Parliament, the Council of the State and the Court of Audit.

1003 This study refers to the incumbent of the Dutch Ombudsman Office as the National Ombudsman. For the institution the term "Dutch Ombudsman" is used.

1004 Dutch Constitution, Article 78a(2).

1005 Ombudsman Act, Article 2.

1006 National Ombudsman, op.cit., p. 9.

1007 Ombudsman Act, Article 5.

judiciary. Hence, the House of Representatives can remove an incumbent from office if that individual is permanently unable to carry out their duties due to illness or disability, if they accept a position incompatible with the office of Ombudsman, or if they lose their Dutch nationality. The incumbent can also be dismissed if they are convicted of an offence or deprived of liberty by a final court decision, if they have been declared bankrupt, have agreed to a debt rescheduling agreement, have been granted a moratorium on the payment of debts, or have been imprisoned for non-payment of debt by a final and conclusive court judgment. An additional grounds for dismissal occurs when, in the opinion of the House of Representatives, the incumbent has seriously undermined the confidence placed in them as a result of their actions or omissions. In any case, an incumbent must be removed by the House of Representatives if they reach the age of sixty-five while in office.[1008]

The competences and procedures of the Ombudsman are laid down in the General Administrative Law Act of 1994 (*Algemene wet bestuursrecht* – GALA). According to the GALA, the main task of the Dutch Ombudsman is to determine whether or not the administrative authority has acted *properly*.[1009] In this regard, Article 9:18(1) of the GALA states that any person has the right to request that the Dutch Ombudsman investigate any improper actions by an administrative authority towards that person or a third party (whether a natural or legal person). Moreover, the Dutch Ombudsman is entitled to institute an own-initiative investigation into any cases in which an administrative authority has acted in a remarkably way (in the opinion of the Ombudsman) with regard to a particular matter.[1010] The Dutch Ombudsman has the power to issue recommendations as a result of its investigation.[1011]

As an external and independent complaints body, the Dutch Ombudsman provides a second line of appeal not only against the initial actions of the administrative authority, but also against the way in which the administrative authority has dealt with the complaint internally. In this regard, it is important to mention that in recent years the Dutch Ombudsman has been promoting complaint management within state institutions. This means that if there are signs of public disaffection with the way a government institution is working, the institution should ask itself at the highest levels what this might say about the flaws in the administrative system or in the way service delivery is performed.[1012] Thus, the Dutch Ombudsman has a good overview of how government is

1008 Ombudsman Act, Article 3.
1009 GALA, Article 9:27(1).
1010 GALA, Article 9:26.
1011 GALA, Article 9:27(3).
1012 Based on an interview with Adriana Stehouwer, former Deputy – and former acting – Dutch Ombudsman on 21 May 2014.

currently performing, and is in a position to act as a kind of barometer of the quality of public administration in the Netherlands.[1013]

It is also important to mention that in April 2011, a deputy ombudsman for children (*de Kinderombudsman)* was incorporated into the National Ombudsman Office.[1014] The task of the Dutch Children's Ombudsman is to promote observance of children's rights by both administrative authorities (at the central and local level) and organisations constituted by private law, in the field of education, child care, youth care, or health care.[1015] Unlike the National Ombudsman Office, the Children's Ombudsman is involved in the law-making process in order to monitor the fulfilment of children rights.[1016] Although created as part of the Dutch Ombudsman, the Children's Ombudsman is an independent body and as such it reports directly and independently to the Dutch Parliament just as its overarching entity does.[1017]

7.2. SCOPE OF CONTROL AND FUNCTIONS

7.2.1. SCOPE OF CONTROL

The Dutch Ombudsman's mandate is to determine whether or not administrative authority has acted properly. For this purpose, any act carried out by a public servant as part of their duties is deemed to have been carried out by the administrative authority under whose responsibility that public servant is working.[1018] According to Article 1a(1) of the Ombudsman Act, the objects of control of the Ombudsman include the actions of ministers, provincial-level administrative authorities, municipalities, water boards, and administrative bodies set up under the Joint Arrangements Act[1019] that do not have their

1013 National Ombudsman, *Annual Report 2003. Summary*, p. 4.

1014 The legislation installing the Ombudsman for Children was approved by Parliament in June 2010. Accordingly, the Act amending the National Ombudsman Act in connection with the establishment of the Children's Ombudsman was approved on 20 September 20 2010 and has been in force since 1 April 2011.

1015 Ombudsman Act, Article 11b.

1016 Based on an interview with Adriana Stehouwer, former Deputy Dutch Ombudsman.

1017 In addition, the Dutch Ombudsman has a special mandate to act as the ombudsman for military veterans.

1018 Ombudsman Act, Article 1a(2).

1019 The Joint Arrangements Act (*Wet gemeenschappelijke regelingen*) regulates cooperation between provinces and municipalities. It is a policy coordination instrument at regional level. Under the Joint Arrangements Act, provinces and municipalities (but also water boards and other public bodies and legal entities) can cooperate with one another on a voluntary basis. For more detailed information on inter-municipal cooperation based on the Joint Arrangements Act in the Netherlands, see Rudie Hulst & André van Montfort (eds), *Inter-Municipal cooperation in Europe*, Dordrecht: Springer, 2007, pp. 141–146. See also Council

own mechanism for dealing with complaints.[1020] Administrative authorities with duties relating to the police, as well as other independent administrative agencies, are also included within the jurisdiction of the Ombudsman.

According to Article 1:1 of the GALA, the legislature, the two houses of parliament, the judiciary, the Council of State, and the Court of Audit are not deemed to be administrative authorities under that law. As such, they are excluded from the jurisdiction of the Dutch Ombudsman.

The Dutch Ombudsman is only permitted to assess the manner in which administrative authorities carry out public tasks. In this sense, its remit does not include every kind of administrative action. As a rule, the cases examined by the Dutch Ombudsman concern government actions that do not take the form of administrative decisions (since administrative decisions are under the competence of administrative courts). Issues of policy as well as the direct review of normative acts are excluded from the competence of the Dutch Ombudsman. Thus, the Ombudsman cannot deal with complaints regarding general government policymaking or the content of generally binding regulations.[1021] These restrictions refer to the actions of administrative authorities in their legislative capacity, a sphere in which they cooperate with and are accountable to the parliament. Similar arrangements are in place for political accountability as regards general policy.[1022] The Dutch Ombudsman is only allowed to investigate individual acts, with the exception of administrative decisions that can be brought before the administrative courts.

The Dutch Ombudsman, through its investigations and by mediating between complainants and administrative authorities accused of acting improperly, helps to reveal deficiencies in the actions of government. The aim of its investigations,

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of Europe, *Structure and operation of local and regional democracy: Netherlands*, Strasbourg: Council of Europe, March 1999.

1020 According to Dutch regulations, provinces, municipalities, and water boards may institute their own ombudsman institution (or *ombudscommittee*). If they do not make arrangements to this end the National Ombudsman *de jure* has jurisdiction. On 10 October 2012, the Dutch Ombudsman was awarded additional powers to handle complaints about local authorities on the islands of Bonaire, St. Eustatius and Saba, to the extent that they have not created their own complaints committees. At present, the Dutch Ombudsman has jurisdiction over all 12 Dutch provinces and about half of the 418 municipalities. On the role of ombudsmen institutions at the local level, see Angel Manuel Moreno (ed), *Local government in the Member States of the European Union: A comparative legal perspective*, Madrid: INAP, 2012, pp. 479–480.

1021 GALA, Article 9:22(a) and (b).

1022 Ric de Rooij, "National Ombudsman of the Netherlands", in K. Hossain et al (eds), *Human Rights Commissions and Ombudsman Offices. National experiences throughout the world*, The Hague: Kluwer Law International, 2000, p. 345.

mediation and recommendations to authorities is to improve the effectiveness of government and to restore public confidence in it.[1023]

7.2.2. FUNCTIONS

The Dutch Ombudsman's main task is to assess the actions of administrative authorities and determine whether or not they were proper (*behoorlijk*). In so doing, the Dutch Ombudsman performs three central functions: the protective function, the preventive function, and the normative or codifying function.

The Dutch Ombudsman exercises the protective function through the handling of complaints, in order to provide individual protection to citizens. In this way, the Ombudsman supplements the powers of the courts through additional measures to protect the rights of individuals.[1024] Complaints offer inputs for reflecting on how the administration operates, as well as the way individuals operate in relation to the administration. The ultimate purpose is to repair citizens' trust in the government and to improve relations between them.[1025]

As to the preventive function, the Dutch Ombudsman points to shortcomings in governmental organisation and offers suggestions to improve the quality of government. In this way, unfair activities by administrative authorities can be prevented. The fulfilment of this preventive function is related to the Ombudsman's own-initiative investigations, which focus on structural problems in the relationship between citizens and government. Such investigations may culminate either in reports containing proper conduct decisions or in guidelines for administrative authorities. In the latter case, the Ombudsman refrains from criticising the past actions of government. Instead, it offers guidance by suggesting concrete improvements in the way administrative authorities fulfil their duties.[1026]

Finally, the codifying function is connected with defining the meaning of acting properly in a concrete situation, and stems from articles 9:27(1) and 9:36(2) of the GALA. As such, the Ombudsman performs the codifying function through its ability to assess the behaviour of administrative authorities. To this end, the

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1023 National Ombudsman, *Annual Report 2006. 'A rule is a rule' is not enough. Summary*, The Hague, 2007, p. 3.

1024 National Ombudsman, *Institution, task and procedures of the National Ombudsman of the Netherlands*, p. 19.

1025 De Nationale Ombudsman, *Wat vindt u ervan? Reflectie op burger en overheid. Verslag van de Nationale ombudsman over 2010*, Den Haag, 2011, p. 10.

1026 National Ombudsman, *Annual Report 2010. What is your view? Reflections on the citizens and government. Summary*, The Hague, 2011, p. 14.

Dutch Ombudsman has developed and codified its own normative standards on proper conduct.

In the investigations conducted by the Ombudsman, the behaviour of administrative authorities is assessed against the standards of proper conduct established by the institution. The Ombudsman not only determines whether or not administrative authorities acted properly[1027], but also states in the investigation report what standard of proper conduct was violated, if any.[1028] In this regard, it can be affirmed that the codifying function derives from the investigating function (on request or on its own initiative) of the Ombudsman. The Dutch Ombudsman's reports show how the normative standards are applied in practice as standards of assessment.[1029] Hence, both the codified standards and the reports are an expression of the normative function of the Dutch Ombudsman. The standards it develops and the reports it issues also provide guidance to both the administration and citizens about what to expect from each other. In this way, the Ombudsman also performs an educative function.

7.3. ASSESSMENT ORIENTATION AND STANDARD OF CONTROL

7.3.1. ASSESSMENT ORIENTATION

The Dutch Ombudsman defines its mission as one of protecting individual citizens against improper government actions.[1030] Thus, dealing with citizens' complaints about government is the basis of its job.[1031] This definition reflects the institution's redress-oriented function. Given this function, the Ombudsman is regarded as a stable part of the administrative justice system in the Netherlands specialised in the handling of complaints.[1032] Indeed, as Remac points out, Dutch legal theory considers the National Ombudsman and the whole Dutch ombudsman system[1033] as part of the external and independent

1027 GALA, Article 9:27(1): "The ombudsman shall assess whether or not the administrative authority conducted itself properly in the matter investigated by him".

1028 GALA, Article 9:36(2): "If it is the opinion of the ombudsman that a conduct was improper, it shall state in the report what standard of conduct was violated".

1029 Milan Remac, *Coordinating ombudsmen and the judiciary*, p. 35.

1030 National Ombudsman, *Institution, task and procedures of the National Ombudsman of the Netherlands*, p. 6.

1031 De Nationale Ombudsman, *Jaarverslag 2010*, p. 10.

1032 Milan Remac, *Coordinating ombudsmen and the judiciary*, p. 27.

1033 Chapter 9.2 of the GALA regulates the handling of complaints by the ombudsman institutions of the Netherlands. Article 9:17 provides for two types of ombudsman: the National Ombudsman and the ombudsmen, or *ombuds-committees*, established by specialised statues.

complaint mechanism that stands apart from the administrative authorities.[1034] The investigation of complaints forces government to constantly pursue improvements in the quality of its services, thus providing greater benefits to the public.[1035]

As mentioned above, the Dutch Ombudsman's remit does not cover legal acts or general issues of policy, but factual acts. This mainly relates to the administrative practices of government bodies.[1036] As Dutch Ombudsman officials point out, they are aware of rules but they go beyond the law in writing. In this regard, when the Dutch Ombudsman investigates a case, it is said to interpret the situation instead of interpreting law.[1037] However, this limitation applies only to the Ombudsman's competence to institute investigations, and not to its ability to recommend changes in legislation or policy as a result of its investigations.[1038] Thus, by exercising its power to issue recommendations, the Ombudsman's aim may involve either solving a specific case or achieving a more generic beneficial effect regarding the operation of the administration. In this regard, it may be argued that the Ombudsman also performs a control-oriented function.

This control-oriented function is clearly reflected in its power to initiate own-initiative investigations. Own-initiative investigations provide the institution with the opportunity to focus on problems of a more structural kind in the practices of administrative authorities. They seek to expose these problems and to contribute to improvements in the administration.[1039] This can be done either as an extension of investigations into specific cases, or as separate investigations in their own right. They address the root causes of problems rather than individual cases.[1040] It is important to mention that from the perspective of Dutch Ombudsman officials, the institution clearly performs both a redress and a control-oriented function. They point out that just as important as solving individual cases is to solve structural problems; hence, there would be no point in focusing solely on individual cases without also addressing the structural

1034 Milan Remac, *Coordinating ombudsmen and the judiciary*, p. 27. See also, B. Hubeau, "Klachtenbehandeling en ombudswerk in Nederland en België/Vlaanderen: zo dichtbij… en toch zo verschillend", in G.H. Addink, G.T.J.M. Jurgens, Ph.M. Langbroek, R.J.G.M. Widdershoven, *Grensverleggend bestuursrecht*, Kluwer, 2008, p. 377.

1035 National Ombudsman, *Annual Report 2010. Summary*, p. 6.

1036 Ric de Rooij, loc.cit., p. 346.

1037 Based on an interview with Sabine Wesseldijk and Walter de Bruin, Dutch Ombudsman officials, on 21 May 2014.

1038 National Ombudsman, *Institution, task and procedures of the National Ombudsman of the Netherlands*, p. 16.

1039 De Nationale Ombudsman, *De burger in de ketens. Verslag van de Nationale ombudsman over 2008*, Den Haag, 2008, p. 40.

1040 National Ombudsman, *Institution, task and procedures of the National Ombudsman of the Netherlands*, p. 14.

problems.[1041] In this regard, in the last years the Dutch Ombudsman has tended to be more focused on "proactive research"[1042] and own-initiative investigations has been strengthened.[1043] However, as Remac has pointed out, own-initiative investigations are not very frequent.[1044]

Therefore, from this study perspective, the emphasis of the Dutch Ombudsman's role within the Dutch legal system is directed towards redress of complaints as a consequence of the improper behaviour of administrative authorities. As the National Ombudsman has pointed out, the institution has lent traditional complaint handling a new dimension by operating in a solutions-oriented way.[1045] The Dutch Ombudsman's perception of its role as a complaint-solving mechanism underlies the redress orientation of the institution. Hence, the National Ombudsman fits with the quasi-judicial ombudsman model.[1046] This is in accordance with the initial design of the Dutch Ombudsman as a kind of institution that was intended primarily to conduct non-legality review of the activities of administrative authorities. However, there is a clear concern to have more influence over structural problems.

7.3.2. STANDARD OF CONTROL: PROPRIETY

The National Ombudsman of the Netherlands is required to determine whether or not the administrative authority acted properly in a given matter under investigation. The principle of propriety or proper conduct (*Behoorlijkheid*), laid down in Article 9:27(1) of the GALA, constitutes the normative concept of the Dutch Ombudsman and is the distinctive hallmark of the system.[1047]

Propriety is applied by the Dutch Ombudsman as the standard of control of government actions. As standard of control, proper conduct on the part of administrative authorities is important not only as a matter of common courtesy

1041 Based on an interview with Sabine Wesseldijk, Dutch Ombudsman official on 21 May 2014.

1042 Yvonne van der Vlugt, "The National Ombudsman of the Netherlands and proper police conduct", in M. Hertogh & K. Kirkham (eds), *Research Handbook on the Ombudsman*, Cheltenham-Northampton: Edward Elgar Publishing, 2018, p. 351.

1043 Maaike de Langen, Emily Govers & Reinier van Zutphen, "Effectiveness and independence of the ombudsman's own-motion investigations: a practitioner's perspective from the Netherlands", in M. Hertogh & K. Kirkham (eds), *Research Handbook on the Ombudsman*, Cheltenham-Northampton: Edward Elgar Publishing, 2018, p. 391.

1044 Milan Remac, *Coordinating ombudsmen and the judiciary,* p. 32. It is important to mention that only 61 cases between 2005 and 2013 have led to a written report. See, www.nationaleombudsman.nl/onderzoeken-uit-eigen-beweging (last visited in September 8, 2013).

1045 National Ombudsman, *Annual Report 2010. Summary*, p. 6.

1046 See Section 3.5.2.2.

1047 Milan Remac, *Coordinating ombudsmen and the judiciary,* pp. 33–34.

towards members of the public, but also as a major factor for ensuring the continuing legitimacy of government.[1048]

The principle of propriety is composed of a series of normative standards developed by the institution, which are enshrined in a *list of norms of proper conduct* created by the Ombudsman (*Behoorlijkheidswijzer*).[1049] This list sets out the general principle of propriety, which can be broken down into four groups of norms for the actions of government. According to the Dutch Ombudsman, a proper government action is: (1) *Open and clear*; (2) *Respectful*; (3) *Caring and solution focused*; and, (4) *Fair and reliable*. Adriana Stehouwer, former Dutch deputy ombudsman, has described these four standards in the following terms: 1) giving a chance to citizens to participate in the decisions of the government; 2) making citizens feel respected; 3) allowing the possibility of personal contact with state officials; and 4) being able to trust that the government acts according to guidelines of properness.[1050] The Ombudsman has established specific standards related to each of these four categories or principles.

The requirements of proper conduct have been created on case-law bases in order to contribute to improving the effectiveness of government. As the Dutch Ombudsman recognises, many of the standards of proper conduct reflect legal norms, as laid down in conventions and statutes. However, this does not mean that the Dutch Ombudsman reviews the action of administrative bodies only on the basis of the provisions of legal rules. According to Walter de Bruin, senior Dutch Ombudsman official, the requirements of proper conduct are norms of procedural justice, which go beyond law. Hence, the criterion of proper conduct may be enshrined in law but it need not necessarily be.[1051] In any case, the Dutch Ombudsman finds an action improper only if it is in breach of a specific criterion of proper conduct.[1052] In this regard, it may be said that the Dutch Ombudsman decides on the basis of evolving, objective non-legal standards of proper conduct existing alongside legal standards.[1053] Thus, although the Dutch Ombudsman has applied its standards more like legal rules, in more recent times these standards are conceived more like open-ended parameters for

1048 National Ombudsman, *Annual Report 2005. Good Governance. Towards healthy relationships between government and citizens*. Summary, The Hague, 2006, p. 5.

1049 The list of norms of proper conduct was first created by the then ombudsman Dr. M. Oosting. In its first version it was known as *Oosting's list*. The new version of the *Behoorlijkheidswijzer* can be found at www.nationaleombudsman.nl/sites/default/files/guidelines_on_proper_conduct_october_2012.pdf.

1050 Based on an interview with Adriana Stehouwer, former Dutch deputy ombudsman.

1051 Based on an interview with Walter de Bruin, Dutch Ombudsman official on 21 May 2014.

1052 A.F.M. Brenninkmeijer & W.J. van Hoogstraten, *The arquitecture of good administration*, The Hague: National Ombudsman, 2008, p. 4.

1053 National Ombudsman, *Annual Report 2005. Summary*, p. 4.

Ombudsman interventions.[1054] As former Dutch deputy ombudsman Adriana Stehouwer points out, proper conduct requirements specify property as a normative standard, which gives the government a guideline on how to react in certain cases.

The concept of propriety per se is not defined in Dutch legislation, and it is the Ombudsman itself that develops the content of this term.[1055] As such, the institution has defined propriety as a chiefly ethical category. According to the Dutch Ombudsman, good administration should be understood in terms of good manners. Good manners imply that the conduct of the administration should be not only lawful, but also proper. Hence, behind the codification of general administrative principles lies the category of proper conduct as an ethical standard.[1056]

From this perspective, propriety represents the ethics of good administration. It emphasises the ethical dimension of administrative behaviour. Therefore, even though there is not a legal definition of the notion of propriety, the administration has to act in accordance with the law and in accordance with the requirements of propriety.[1057] They are two different sides of government action and each has their own value.[1058]

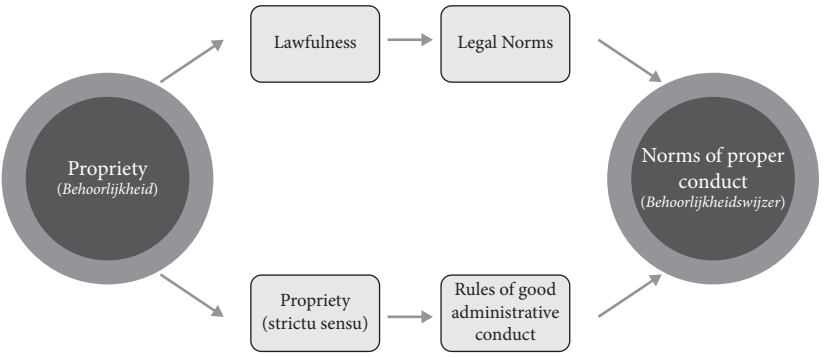
This perspective is better clarified when Dutch Ombudsman officials explain their understanding of the principle of legality. According to them, legality implies that the government abides by the law, comprised mainly of written law, legislation and jurisprudence.[1059] For this study, this definition reflects a narrow perspective of legality.[1060] Indeed, as former deputy ombudsman Adriana Stehouwer proposes, the Dutch Ombudsman operates in more aspects "outside" legality. Therefore, proper conduct requirements are composed of both legal norms and ethical norms, whereby the Dutch Ombudsman deals mainly with the ethical part.[1061]

Along these lines, according to some authors, the meaning of propriety is seen to be derived from general administrative law principles, and secondarily

1054 Based on an interview with Sabine Wesseldijk, Dutch Ombudsman official.
1055 M. Remac & P.M. Langbroek, loc.cit., p. 159.
1056 A.F.M. Brenninkmeijer, "Fair governance: a question of lawfulness and proper conduct", The Hague: National Ombudsman, 2006, p. 3. Available at: www.nationaleombudsman.nl/articles (last visited in October 16, 2012).
1057 M. Remac & P.M. Langbroek, loc.cit., p. 159.
1058 De Nationale Ombudsman, *Burgerschap verzilverd. Verslag van de Nationale ombudsman over 2007*, Den Haag, 2007, p. 17.
1059 Based on an interview with Adriana Stehouwe, Sabine Wesseldijk, and Walter de Bruin.
1060 See Section 1.1.2.
1061 Based on an interview with Adriana Stehouwer, former Deputy Dutch Ombudsman.

from a number of good practice requirements.[1062] Hence, the principle of propriety includes both lawfulness and effectiveness.[1063] Effectiveness should be understood here as encompassing good administration in terms of good manners.[1064] Good manners imply adequate treatment in terms of both courteous citizen-oriented service and access to appropriate, well-organised and -managed public services.[1065] These factors are important determinants of whether individuals feel they have been treated fairly and reflect the ethical behaviour of the administration.[1066] It is this dynamic approach that goes beyond written law, from which the Dutch Ombudsman can obtain new norms of conduct, which are a kind of legal norms of a procedural nature.[1067]

Chart 5. The Principle of Propriety as the Standard of Assessment of the Dutch Ombudsman



Unlike administrative courts, which limit themselves to the (enforceable) legal dimension, the Dutch Ombudsman aims to operate in both dimensions through the assessment criteria of propriety, which considers both the lawfulness of administrative action and the application of rules of good administrative conduct. The second category of the assessment criteria, which may be defined as propriety *stricto sensu,* has been characterised by Oosting, former National Ombudsman, as serving the administration as guiding principles (*oriëntatienormen*).[1068]

The Dutch Ombudsman views the relationship between the administration and citizens as a reciprocal relationship with both a legal and a social dimension,

1062 G.H. Addink, "The ombudsman as the fourth power", p. 271.
1063 Ibid., p. 266.
1064 A.F.M. Brenninkmeijer, loc.cit., p. 2.
1065 Terhi Arjola-Sarja, loc.cit., p, 93–94, *supra* note 290.
1066 A.F.M. Brenninkmeijer, loc.cit., pp. 2–3.
1067 Based on an interview with Walter de Bruin, Dutch Ombudsman official.
1068 G.H. Addink, "The ombudsman as the fourth power", p. 266.

whereby this relationship is better reflected by the notion of propriety as a normative concept.[1069] In this regard, lawfulness and proper conduct are two parallel systems, which usually overlap and are condensed in the principle of propriety.

However, as stated earlier in this chapter, in my opinion this perspective of the principle of propriety as composed of two parallel sets of norms – legal and ethical norms – reflects a narrow understanding of the principle of legality. From this study perspective, proper conduct norms (propriety *stricto sensu*) implies a broader perspective of legality, which implies that government must act in accordance not only with written law, but also with non-written legal principles and values intrinsic to the democratic rule of law that are not enforceable by the judiciary; in other words, the integrity branch of the constitution.[1070]

7.4. INVESTIGATION PROCEDURE FOR THE DETERMINATION OF PROPER CONDUCT

7.4.1. CHARACTERISTICS OF THE INVESTIGATION PROCEDURE

To determine whether an administrative authority has acted in a proper manner, the National Ombudsman of the Netherlands is entitled to institute an investigation on request or on its own initiative. In the former case, before initiating an investigation the Ombudsman must first decide on the admissibility of the request.

The first step is to determine whether the Dutch Ombudsman has jurisdiction per Article 9:22 of the GALA. The Ombudsman will not start an investigation if the request relates to general policy issues; a generally binding regulation; or conduct open to a judicial review or to an administrative complaint leading to a binding decision (or where a binding decision is pending), unless the conduct consists of failure to make a timely decision. Actions on which an administrative court has made a decision, and in general actions subject to the jurisdiction of the courts, are also excluded from the jurisdiction of the Ombudsman.

Before filing a complaint with the Ombudsman, the complainant must first do so with the administrative authority concerned, unless this cannot reasonably

1069 National Ombudsman, *Institution, task and procedures of the National Ombudsman of the Netherlands*, pp. 26–29.

1070 See Sections 1.1.2, 4.2.3 & 5.2.1.

be expected of them.[1071] The complaint must be filed within one year from the date on which the administrative authority has notified the complainant of the findings of its investigation, or from the date on which the administrative authority terminated or should have terminated the handling of the complaint.[1072] The complaint must be submitted in writing[1073] and meet certain formal criteria, such as containing the name and address of the complainant, the description of the conduct concerned, the details of the person subject to the complaints, the grounds for the complaint, among others.[1074]

If the complaint does not satisfy these formal requirements, the Dutch Ombudsman is free to decide not to institute or continue with an investigation. Likewise, the Dutch Ombudsman is not obliged to start an investigation, even though it has formal jurisdiction, if the complainant is not the person who has experienced the conduct referred to in the complaint, or if any of the other circumstances provided for in Article 9:23 of the GALA apply. However, as far as own-initiative investigations are concerned, the Ombudsman cannot initiate an investigation of its own accord in cases in which it has no competence to institute an investigation on request.[1075] As mentioned above, an own-initiative investigation may be an extension of investigation resulting from individual complaints, or separate investigations in their own right. The criteria to be typically used by the Ombudsman to determine whether or not an issue merits an own-initiative investigation are: the size of the problem (i.e. the number of complaints received, the number of people potentially affected); those affected (i.e. vulnerable groups, minority groups, etc); the type of the problem (i.e. impact on people's live, whether human rights are at stake, which norms of proper conduct are violated); among others.[1076]

There are two ways in which the Dutch Ombudsman may approach an investigation: the *intervention method* and the *investigation method*, which is that leading to a report. The *intervention method* is the most used by the institution, especially in cases where the complainant's primary need is prompt action by the Dutch Ombudsman to resolve a problem. It is appropriate where there are no complex legal issues and it is possible to reach a quick solution.[1077] The intervention method can be exercised through intervention (*interventie*) or mediation

1071 GALA, Article 9:20(1).
1072 GALA, Article 9:24(1).
1073 Nowadays, complaints can be also filed online. In practice oral complaints at the Dutch Ombudsman's office are also possible.
1074 GALA, Article 9:28.
1075 GALA, Article 9:26.
1076 Maaike de Langen, Emily Govers & Reinier van Zutphen, loc.cit., p. 379.
1077 National Ombudsman, *Institution, task and procedures of the National Ombudsman of the Netherlands*, p. 21.

(*bemiddeling*). It is aimed at restoring public confidence in the government in concrete situations.[1078] Thus, it can be defined as a speedy and very informal form of investigation.[1079] In these cases, the Dutch Ombudsman will inform the relevant administrative authority about the complaint and ask whether there is any prospect of the complaint being solved. If the response from the administrative authority is satisfactory, the complainant will be informed and the intervention will be halted, since its continuation would not be in the complainant's interest.[1080] The Ombudsman will notify all parties involved, in writing, about its decision not to continue the intervention.[1081] As former Dutch deputy ombudsman Adriana Stehouwer observes, the institution takes such a practical approach in its attempts to solve most cases.[1082] As noted, the intervention method does not lead to the issuance of a report. Only in some cases does the institution produce a report. In this regard, if in the opinion of the Ombudsman there is reason to start a full investigation, it may decide to resort to the full procedure. It is in this context that the Dutch ombudsman applies the ombudsnorms.[1083]

In turn, the *investigation method* involves an investigation intended to establish the facts regarding the actions of an administrative authority. It focuses, to a certain extent, on situations in which confidence in government can come under pressure. In these situations, the key question for the Dutch Ombudsman is: What can government and citizens reasonably expect from each other (*Wat kunnen overheid en burgers in redelijkheid over en weer van elkaar verwachten?*).[1084] As a rule, such investigations result in a report in which the Ombudsman determines whether or not the action of the administrative authority is proper. It usually begins with the preparation of a summary of the complaint. The complainant is notified when, in response to their request, the Ombudsman has decided to start an investigation. The administrative authority is sent the summary of the complaint, the petition itself, and sometimes a list of specific questions. Both the complainant and the administrative authority are given the opportunity to make comments and explain their position.[1085] Hence, the investigation method is a mixture of oral and written procedures.[1086]

The Dutch Ombudsman has far-reaching statutory investigative powers. The administrative authority, persons working under its responsibility, persons

1078 De National Ombudsman, *Een Vertrouwde overheid. Verslag van de Nationale ombudsman over 2011*, Den Haag, 2011, p. 6.
1079 Milan Remac, *Coordinating ombudsmen and the judiciary*, p. 31.
1080 GALA, Article 9:23(c)(l).
1081 GALA, Article 9:25.
1082 Based on an interview with Adriana Stehouwer, former Deputy Dutch Ombudsman.
1083 Based on an interview with Adriana Stehouwer, former Deputy Dutch Ombudsman.
1084 De National Ombudsman, *Jaarverslag 2011*, p. 6.
1085 GALA. Article 9:30(1).
1086 Milan Remac, *Coordinating ombudsmen and the judiciary*, p. 32.

formerly employed by it, witnesses, and the complainant have the obligation to provide the institution with the information necessary for its investigation. In addition, they must appear in person before the Dutch Ombudsman if so requested.[1087] The Ombudsman can also request, in writing, any document in possession of the administrative authority, the person to whose action the petitions relates, and other parties.[1088] If there are serious reasons to do so, the Ombudsman may permit the refusal to comply with these demands.[1089] Moreover, the Ombudsman is entitled to carry out on-site investigation. For this purpose it can access any place, with the exception of a dwelling without the consent of the occupant. The administrative authorities must provide any assistance required for an on-site inspection.[1090]

Through its powers of investigation, the Dutch Ombudsman seeks to influence the actions of government regarding not only individual cases, but also the way administrative authorities deal with the public on a structural basis. As de Langen points out, in practice, it requires to achieve changes like: a change in policy implementation, a change in procedures, a change of law or regulation, a change of interpretation of the law or regulation, among others.[1091] According to the Dutch Ombudsman, proper treatment is not just a question of courtesy but lies at the root of the legitimacy of government action and public compliance. As such, proper conduct is the concrete expression of procedural fairness[1092] and the basis of a more reflexive approach through influence and dialogue.[1093]

7.4.2. FORMULATION OF DECISIONS

The judgement of the Dutch Ombudsman can take two forms: whether the behaviour investigated was proper or improper. In order to make a decision, the Ombudsman assesses government action against both lawfulness and proper conduct. The basic proposition is that the government is required to act not just lawfully, but also properly. As mentioned earlier, the principle of propriety embraces these two dimensions. The former reflects the *legal relationship* between government and citizens, and the latter the *social relationship*.

1087 GALA, Article 9:31(1).

1088 GALA, Article 9:31(3).

1089 GALA, Article 9:31(4)(5).

1090 GALA, Article 9:34(1)(2). For all the Dutch Ombudsman's investigative powers, see GALA, Article 9:31 to Article 9:34.

1091 Maaike de Langen, Emily Govers & Reinier van Zutphen, loc.cit., p. 388.

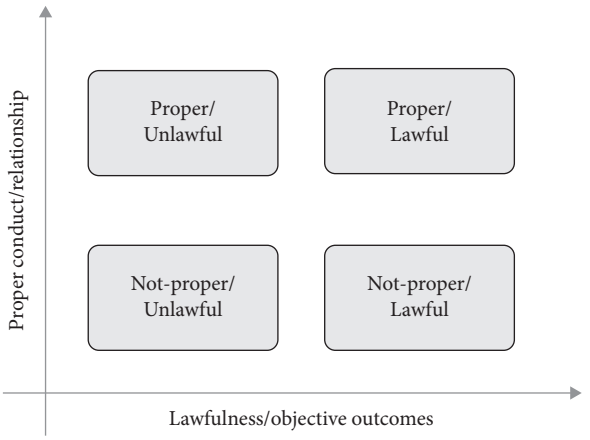
1092 A.F.M. Brenninkmeijer, *Compliance with recommendations*, The Hague: National Ombudsman, 2010, p. 5.

1093 M. Hertogh, "Coercion, cooperation and control: understanding the policy impact of administrative courts and the ombudsman in The Netherlands", in *Law & Policy*, Vol. 23, No 1, January 2001, p. 61.

From a good governance perspective, administrative actions must be proper and lawful. Consequently, according to the Ombudsman, to achieve good governance it is important not simply to blindly follow the 'rule is a rule' principle, but also to deal with individual members of the public in a proper manner.[1094] This is the best way to satisfy citizens' sense of fairness.

Fairness expresses the balance between properness and lawfulness, and captures the substance of the principle of propriety. Hence, according to the Dutch Ombudsman proper conduct helps to create acceptance, legitimacy, and ultimately, public confidence in government.[1095] If the administrative authorities follow the principle of propriety, citizens will feel that they are treated with due care and consideration and will perceive their relations with the administration to be more democratic.[1096]

Chart 6. Ombudsquadrant – Dutch Ombudsman



The Dutch Ombudsman has defined the relationship between lawfulness and proper conduct on the basis of complaints against the administration in its contact with citizens. This relationship has been exemplified by the institution in the *Ombudskwadrant* (Ombudsquadrant). Thus, the institution has categorised the results of its assessment of government action in four ways: i) both lawful and proper; ii) lawful but improper; iii) unlawful but nevertheless proper; and iv) both unlawful and improper.

In determining whether an action under investigation is proper or improper, the Dutch Ombudsman refers to the list of standards of proper conduct (the

1094 National Ombudsman, *Annual Report 2006. Summary*, p. 3.
1095 A.F.M. Brenninkmeijer, "Fair governance: a question of lawfulness and proper conduct", pp. 5–8.
1096 Ibid.

Behoorlijkheidswijzer). It applies these standards in the deliberations leading up to the final judgment on the propriety of the conduct investigated. The combination of standards and facts leads to the judgment on whether the act under investigation was proper or not. If the conduct of the administrative authority concerned satisfies the criteria relevant to it in the particular context of the case, the action will be found to have been proper.

The translation of the general principle of propriety into a series of specific standards of proper conduct is helpful in many ways. First of all, the criteria form the basis for the reasons given for decisions regarding actions under investigation, and encourage uniformity in the way the Ombudsman formulates these decisions. In its reports, the Ombudsman invariably states which of the proper conduct criteria have been used to assess the action in question.[1097]

In addition, the standards of proper conduct established by the Dutch Ombudsman help administrative authorities to deal with citizens and their interests in a proper way. According to case law on the ombudsman, for citizens it is important not only that administrative actions should be objectively lawful, but also that they themselves should be treated in a respectful, fair, and proper manner. Notably, according one Dutch Ombudsman official's interpretation of the standards of proper conduct, state officials should treat citizens with the same care with which they would be expected to treat their mothers.[1098] In the day-to day practice of policy implementation, the emphasis is generally on lawfulness, and the issue of whether decisions are taken and communicated in a proper manner tends to be disregarded. However, citizens' dissatisfaction with government may be significantly greater if the individual concerned feels that the treatment they have received is improper or unfair.[1099] According to the Dutch Ombudsman, proper conduct should be personal, respectful and participatory. As such, proper conduct increases trust and confidence, creating a meaningful relationship between government and citizens.[1100] In this regard, wherever possible, the Ombudsman uses the selected proper conduct criteria to produce guidance on the way the administrative authority must act. In addition, the institution draws attention to any statutory provisions that apply to the action under investigation.

The main aim of the Dutch Ombudsman is to achieve courteous and helpful treatment of the individual in the particular matter of concern to them, and to ensure reliable procedures for processing cases and handling complaints by the

1097 GALA. Article 9:36(2).
1098 Based on an interview with Walter de Bruin, Dutch Ombudsman official.
1099 A.F.M. Brenninkmeijer & W.J. van Hoogstraten, *The architecture of good administration*, p. 7.
1100 National Ombudsman, *Annual Report 2011. Trust in Government. Summary*, The Hague, 2012, p. 2.

administrative authority concerned. The aim is rarely to produce a decision that an action has been improper. Therefore, the Dutch Ombudsman's investigation, determination of the facts, decision, and (where relevant) recommendations can help to restore public confidence.[1101]

7.4.3. CLOSURE OF DECISIONS

The Dutch Ombudsman's investigation concludes with the preparation of a summary of its findings. This is sent to the relevant administrative authority, the complainant, and the person to whom the action under investigation relates. These parties are given the opportunity to comment on the findings within a time limit – usually, within two weeks[1102] – to be determined by the Dutch Ombudsman.[1103] This procedure is intended to ensure that the facts in relation to the act under investigation are established as firmly as possible.[1104]

Finally, the Dutch Ombudsman will prepare a report containing its findings and decision, whereby the latter must be based on the former. As mentioned above, in this report the Ombudsman will state its decision on whether the action under investigation was proper or improper, and, if so, what standard of proper conduct was infringed. The Ombudsman must send the report to the administrative authority concerned, the complainant, and the person to whom the complaint relates.[1105]

Recommendations may be included in the report. In practice, three kinds of recommendations can be discerned: "specific recommendations" about individual complaints, "general recommendations", and "generic guidelines" on administrative procedures.[1106] Specific recommendations are addressed to provide remedy in individual cases. General recommendations are less common than specific ones. They are aimed at improving particular administrative practices, the administrative rules on which these practises are based, or specific administrative procedures. Generic guidelines on administrative procedures are considered a new kind of recommendation that have emerged in recent years as an outcome of large-scale investigations on structural problems conducted by the Dutch Ombudsman on its own initiative. The principles of proper administration have been translated into decisions on certain general topics.

1101 National Ombudsman, *Annual Report 2005. Summary*, p. 8.
1102 National Ombudsman, *Institution, task and procedures of the National Ombudsman of the Netherlands*, p. 23.
1103 GALA, Article 9:35.
1104 Ric de Rooij, loc.cit., p. 350.
1105 GALA, Article 9:36(1)(2)(3).
1106 A.F.M. Brenninkmeijer, *Compliance with recommendations*, p. 6.

The consequent recommendation establishes guidelines on administrative procedures, which are produced in collaboration with the administrative authorities and are designed to help them to follow proper conduct. Different sets of guidelines (*aanwijzingen*) have been produced over the last few years, such as the guidelines on correspondence (*Correspondentiewijzer*); guidelines on enforcement (*Handhavingswijzer*) and guidelines on public participation (*Participatiewijzer*). These broaden the requirements of proper administration set out in the Guidelines on Proper Conduct, and apply them to specific situations.[1107]

By means of recommendations, the Dutch Ombudsman can use the selected proper criteria to produce guidance on the way the administrative authority is required to act in the type of circumstances in which the action under investigation took place. In this way, recommendations may be aimed either at achieving a resolution of a specific case or at a more generic beneficial effect on the authority's operations.

If the Ombudsman makes a recommendation, the administrative authority must notify the Ombudsman about the action that it intends to take with regard to the recommendation. If the administrative authority considers taking no action, it must notify the Ombudsman of this and state its reasons.[1108]

7.5. THE DUTCH OMBUDSMAN AS A DEVELOPER OF GOOD GOVERNANCE NORMS

7.5.1. FROM PROPRIETY TO GOOD GOVERNANCE

The normative standard of the National Ombudsman of the Netherlands is the principle of propriety. This principle has been translated into a series of general standards of proper conduct intended to help administrative authorities deal with citizens and their interests, thus ensuring proper administration.

Proper administrative conduct means taking citizens seriously and respecting them[1109], mediating between the efficiency approach and the legality approach in the performance of the administration.[1110] It seeks a balance between both perspectives in order to enhance government legitimacy. As Adriana Stehouwer,

1107 Milan Remac, *Coordinating ombudsmen and the judiciary,* p. 35.
1108 GALA, Article 9:36(4).
1109 A.F.M. Brenninkmeijer, "Management and fairness", in *The NISPAcee Journal of public administration and policy*, Volume IV, number 2, Winter 2011/2012, p. 129.
1110 Ibid., p. 125.

former Dutch Deputy Ombudsman has acknowledged, proper conduct, or proper administration, can be perceived as a Dutch version of good administration. In this regard, she pointed out that from the perspective of the Dutch Ombudsman, good administration is understood as good service delivery, which starts with listening to citizens closely to establish what the problem is, and then dealing with the problem.[1111] And as stated earlier, from this study perspective good administration concretises the principles of good governance at the level of the administration. In addition, it can help to harmonise the relationship between human rights and good governance.

In its Guidelines on Proper Conduct the Dutch Ombudsman describes the normative content of the standards it develops. This section analyses the normative content of the standards of proper conduct as established by the Ombudsman. In this way, this study will attempt to identify the general values enshrined by the Dutch Ombudsman's norms of proper conduct in order to determine to what extent these standards reflect good governance principles.

As noted, the Dutch Ombudsman has developed a set of four general standards or categories of proper conduct. To recap, these general standards are: (1) open and clear; (2) respectful; (3) caring and solution-focused; and (4) fair and reliable. The institution has developed specific normative standards or sub-principles regarding each one of these four general categories. Table 3 shows the list of these standards, as well as their corresponding sub-principles.

According to the Dutch Ombudsman, the "open and clear" standard requires the following government actions: transparency; providing adequate information; listen to citizens; and giving adequate reasons. Transparency implies that actions by the administrative authorities should be open and foreseeable. They should ensure that citizens are informed about decision-making procedures, that citizens can understand how and why the government is taking a particular decision, and that their actions are open to critical scrutiny. Providing adequate information entails proactivity by public authorities in providing relevant information. The information should be clear, correct, and complete. Listening to citizens requires that public authorities listen actively and seriously to citizens, taking interest in their priorities. Adequate reasons means that authorities should supply clear and understandable statements of the reasons for their actions and decisions. An adequate statement should include: the statutory basis, the facts and interests, and a clear explanation of the reasoning.

[1111] Based on an interview with Adriana Stehouwer, former Deputy Dutch Ombudsman. See also, Milan Remac, *Coordinating ombudsmen and the judiciary*, p. 35.

Table 3. List of Standards of Proper Conduct Developed by the Dutch Ombudsman – *Behoorlijkheidswijzer*

Open and Clear	Respectful	Caring and solution focused	Fair and reliable
Transparent	Respect for human rights	Individualised approach	Integrity
Providing adequate information	Promotion of active public participation	Cooperation	Trustworthiness
Listening to citizens	Courtesy	Leniency	Impartiality
Adequate reasons	Fair play	Promptness	Reasonableness
	Proportionality	De-escalation	Careful preparation
	Special care		Effective organisation
			Professionalism

The "respectful" standard includes the following specific criteria: respect for human rights; promotion of active public participation; courtesy; fair play; proportionality; and special care. Respect of fundamental rights requires the observance of civil and political rights, as well as economic and social rights established in both the Dutch Constitution and in international conventions. Promotion of active public participation means that public authorities should strive to give citizens an active role in their operations and in the development and implementation of their policies. Courtesy means that authorities should be respectful, courteous, and helpful towards citizens, taking account of their individual circumstances. Fair play implies that authorities give citizens the chance to exhaust all the procedural avenues at their disposal and are proactive in informing about them. Proportionality means that measures adopted are not disproportionate to the aims concerned. Authorities should avoid unnecessary negative impacts on citizens. Finally, special care means that authorities have the duty to take good care of citizens in their custody, including the provision of medical services.

The "caring and solution-focused" standard entails: individualised approach; cooperation; leniency; promptness and de-escalation. Individualised approach implies that authorities should seek tailor-made solutions to fit the specific circumstances of the individual citizen. They should be prepared to waive general policies or rules in cases where their enforcement would have undesirable consequences. Cooperation requires that authorities cooperate with other governmental and non-governmental bodies in the interests of the citizens. Leniency means that authorities should admit their mistakes and offer apologies for them. They also should treat compensation claims in a flexible manner by seeking ways to reach appropriate solutions. Promptness requires that actions

by administrative authorities be as prompt and effective as possible. Authorities should strive to operate within statutory time limits. Where there are no such time limits, authorities should seek complete processes within a reasonably short time. De-escalation means that authorities should seek to prevent escalation in their contact with citizens.

In turn, the "fair and reliable" standard includes: integrity; trustworthiness; impartiality; reasonableness; careful preparation; effective organisation; and professionalism. Integrity implies that authorities perform their duties conscientiously and exercise their powers only for the purposes for which they were conferred. Authorities should refrain from abusing their positions of power and from wasting time and resources. Trustworthiness requires that public authorities act within the framework of the law. They should keep promises and commitments. They should comply with court judgments. Impartiality entails authorities being impartial in their attitude and unprejudiced in their actions. Reasonableness requires that public authorities weigh up the various interests involved and examine all the relevant facts and circumstances before making a decision. Careful preparation means that authorities should gather all the information necessary to make a well-considered decision. Effective organisation comprises the promotion of high (organisational and administrative) standards of services to the public, the careful gathering and processing of information, and good record-keeping. Finally, Professionalism means that civil servants should act in accordance with relevant standards and that they are expected to be expert and well-informed in their particular fields.

As verified by the description of the content of the standards of proper conduct developed by the Dutch Ombudsman and the general values that underlie them, the propriety criteria can be divided into two groups of standards: i) standards linked to legal regulations and principles (lawfulness/notion of rule of law); and ii) rules of good administrative conduct (proper conduct *stricto sensu*).

With regard to the first group (legal norms), ten central criteria can be discerned: 1) legality; 2) legitimate expectations; 3) legal certainty; 4) equality; 5) prohibition of misuse of power; 6) prohibition of arbitrariness; 7) proportionality; 8) reasonableness; 9) due process; and, 10) human rights. These criteria are mainly linked with the fundamental value of the rule of law and properness as a good governance (constitutional) principle.[1112]

[1112] For the principles of good governance as constitutional principles and their relationship with the three cornerstones of the modern constitutional state, see Chapter 6.

In relation to the second group (rules of proper conduct *stricto sensu*), it can be said that the criteria used by the Dutch Ombudsman is more related with the good governance (steering) dimension as a fundamental value of the modern constitutional state in connection with the principles of effectiveness and transparency. This second group can be divided into the following sub-criteria: 1) courtesy; 2) special care, 3) individualised approach; 4) leniency; 5) de-escalation; 6) promptness; 7) providing adequate information; 8) effective organisation; 9) professionalism, and 10) cooperation.

Table 4. Standards of Proper Conduct in Relation to the General Values Protected by the Dutch Ombudsman

Standards of Proper Conduct of the Dutch Ombudsman		
Principles	**Sub-Principles**	
	Sub Principles	***Elements / Values***
Open and clear	Transparent	Clear drafting Access to information
	Providing adequate information	Active provision of information Provision of accurate information
	Listening to citizens	Appropriateness
	Adequate reasons	Due process
Respectful	Respect for human rights	Legality
	Promotion of active public participation	Participation
	Courtesy	Respect Courtesy Helpfulness
	Fair Play	Due process
	Proportionality	Proportionality
	Special care	Appropriateness
Caring and solution-focused	Individualised approach	Equality – non discrimination Flexibility
	Cooperation	
	Leniency	Admitting mistakes Apologies for mistakes Seeking solutions
	Promptness	
	De-escalation	Appropriateness

Standards of Proper Conduct of the Dutch Ombudsman		
Principles	**Sub-Principles**	
	Sub Principles	***Elements / Values***
Fair and reliable	Integrity	Prohibition of arbitrariness Non-abuse of power
	Trustworthiness	Compliance with law (Legality) Keeping of commitments (legitimate expectations) Compliance with court decisions (Enforceability)
	Impartiality	
	Reasonableness	
	Careful preparation	Due care or due diligence
	Effective organisation	Good record-keeping Good information handling
	Professionalism	Professional standards Expert staff

As developed by the institution, the requirements of proper conduct contained in the *Behoorlijkheidswijzer* are mainly connected with the principles of properness and effectiveness. Even though many of the specific standards related to properness are linked to legal norms derived from the rule of law principle (like prohibition of misuse of power, prohibition of arbitrariness, legitimate expectations, and proportionality) most of them have been created in connection to the good governance (steering) dimension of the modern constitutional state. As standards linked to the good governance dimension of properness, they are developed in connection with the concept of good administration.

As mentioned, good administration implies a concern for legal quality in the performance of public functions, which goes beyond limiting discretion (like properness in connection to the rule of law principles does). So, good administration is also steering discretion by more flexible mechanisms in order to achieve quality in public interventions. This implies a positive obligation to pursuing the quality performance of administrative functions. It is reflected not only in procedural standards of proper conduct like careful preparation and promptness, but also regarding guiding principles such as courtesy, de-escalation and the requirement of individualised approach. Thus, many of the specific rules of proper conduct developed by the Dutch Ombudsman and linked to properness are also related to the principle of effectiveness. The

requirements of proper conduct regarding effectiveness are also connected to the good governance dimension. They can be defined as purely rules of proper conduct, or as guiding principles such as effective organisation, cooperation and professionalism. In addition, rules of proper conduct have been also created in connection to transparency, including the requirement to provide adequate information.

It is also important to note that the requirements of proper conduct are also addressed to the protection of human rights, which is enriched by the complaint procedures overseen by the ombudsman institution. In this regard, the Dutch Ombudsman plays a complementary role in the protection of human rights to that performed by the courts.[1113] According to A.F.M. Brenninkmeijer, the Dutch Ombudsman bases its interpretation of the concept of proper conduct not only on notions recognised as principles of good administration but also on human rights.[1114] Therefore, it is possible to attest that the standards of proper conduct are closely related to legal norms such as human rights and principles of good administration.[1115] For this study this reflects the hybridisation of the modern ombudsman, which means that when it comes to standards of control, good administration and human rights can be seen as two sides of the same coin.[1116] In this sense, as former Deputy Ombudsman Adriana Stehouwer observes, the Dutch Ombudsman is increasingly involved with human rights issues through cases involving Article 3 of the European Convention of Human Rights on the prohibition of torture or inhuman or degrading treatment, mainly related to mistreatment by law enforcement officers at police stations.[1117] The institution is also involved in human rights, especially regarding the handling of asylum cases. However, in human rights cases, the Dutch Ombudsman (unlike the Spanish or Peruvian Ombudsman institutions) does not indicate that human rights have been violated but applies a positive approach by reminding public officials that government has the obligation to respect human rights.[1118]

It is worth mentioning that although a more encompassing test had been intended in the beginning, some authors argue that in practice, from a substantive point of view, the Dutch Ombudsman's assessment of government action based on its normative standards seems not to be that different

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1113 A.F.M. Brenninkmeijer & Y. van der Vlugt, *Principles of proper conduct as guarantee of human rights*, The Hague: National Ombudsman, 2009, p. 3.

1114 Ibid., p. 6.

1115 Ibid., p. 4.

1116 See Section 3.4.2.

1117 Linda C. Reif, "Building democratic institutions: The role of national human rights institutions in good governance and human rights protection", in *Harvard Human Rights Journal*, Vol. 13, 2000, pp. 34–35.

1118 Based on the interview with Adriana Stehouwer, former Deputy Dutch ombudsman.

from the courts' application.[1119] Hence, as part of its normative function, the Dutch Ombudsman also interprets the law, leading in practice to an extensive application of principles of good governance. In this regard, the *Behoorlijkheidswijzer* is an example of the application (and development) of good governance principles by the ombudsman n in the Dutch legal context. In the following section, I will examine the application of these standards in practice.

7.5.2. APPLICATION OF GOOD GOVERNANCE-BASED STANDARDS IN THE OMBUDSPRUDENCE OF THE DUTCH OMBUDSMAN

7.5.2.1. Normative standards in practice

Based on a qualitative analysis of the ombudsman reports, this section will describe how the standards are applied in practice by presenting some examples. As it will be shown, these standards can fit the good governance model developed in this study.

Open and clear: Adequate reasons

Report 2011/141 of 14 May 2011

In Report 2011/141 of 14 May 2011, the Dutch Ombudsman dealt with a complaint against the Centre for Vehicle Technology and Information with regard to its refusal to register the complainant's car in the Dutch register of vehicles.[1120] The complainant had bought a diesel campervan with a special filter installed in Germany. The Centre refused to register this car, arguing that according law it is the only body that can approve the installation of a special filter. During the investigation the Ombudsman found that the Centre's decision referred only to former secondary legislation concerning grants, which was not applicable to the present case. It was not clear which regulations were applicable to the present case and based on what regulation the Centre had rejected the registration. The Ombudsman found that the reasoning of the decision not to register the vehicle was not adequate. As such, the conduct of the Centre was in breach of the requirement for proper administration of adequate reasons (*motiveringsvereiste*). The Dutch Ombudsman recommended that the Centre provide the complainant with specific reasons for its decision to refuse to register his car.[1121]

1119 Milan Remac, *Coordinating ombudsmen and the judiciary*, pp. 102–108; G.H. Addink, "The ombudsman as the fourth power", p. 271.

1120 Report 2011/141 of 14 May 2011, Klacht.

1121 Ibid, Feiten.

Respectful: respect for human rights

Report 2010/157 of 14 June 2010

In this case, the complainant was placed in a detention centre for asylum seekers. According to the complainant's information, at the time of his detention he complained about several psychological problems, and claimed that his psychological problems worsened during his confinement. He tried to obtain the medical records pertaining to the treatment he received at the detention centre from the Custodial Institutions Agency (DJI), which he considered important given his previous medical treatment in his country of origin. After the DJI rejected his request, he complained to the Dutch Ombudsman that the DJI cannot forbid him access to his own medical records. During the investigation the Dutch Ombudsman noted that the complainant had an interest in knowing what his medical treatment was. The Ombudsman found that the complainant's file was missing, which amounted to negligent conduct by the DJI.[1122] The institution also noted that the Dutch Constitution and other international treaties require the right to privacy, which includes the right to have one's medical reports handled carefully. By losing (misplacing) this documentation, the DJI breached the complainant's right to privacy, leading to a breach of the requirement of proper administration to respect an individual's fundamental rights.[1123]

Respectful: Courtesy

Report 2013/112 of 5 September 2013

In Report 2013/112 of 5 September 2013, the Dutch Ombudsman dealt with a complaint that an official report by the Child Abuse Counselling and Reporting Centre (*Advies- en Meldpunt Kindermishandeling*) into a child abuse case was not satisfactory. This report had been sent to the complainant, who several times pointed to various factual mistakes therein. In response, the Centre altered parts of the official report dealing with the complainant three times. During its investigation the Ombudsman found that the altered parts of the report that dealt with the complainant give a completely different complexion to its conclusions, and that such conclusions were not an accurate reflection of the contents of the report. But despite these changes in substance, the Ombudsman considered that the core of the reasoning remained unaltered and that the end result in itself complied with the Centre's professional standards. However, the Ombudsman found that the Centre was barely responsive to the complainant's feedback and that it did not provide the complainant with reports of sufficient

1122 Ibid, para 13.

1123 Report 2010/157 of 14 June 2010, Klacht, para. 2.

quality. This led in the opinion of the Dutch Ombudsman to breach of the requirement of courteous conduct.[1124]

Caring and solution focused: Individualised approach

Report 2013/084 of 11 July 2013
In this case, the Dutch Ombudsman dealt with a complaint by a Surinamese national, living in Surinam, against the Visa Service (*Visadienst*), which had required her to submit a special form even though as a partner of an EU national she was legally entitled to receive an ordinary entry visa. During its investigation the Ombudsman found that the complainant applied for her visa by written letter in which she included all of the necessary information. The Ombudsman noted that in its understanding, the Visa Service used prescribed application forms in order to deal with applications in an efficient and effective manner. However, this was not to say that if an individual applied for an entry visa in a different (but still written) way that this application should be rejected for the sole reason of not being the prescribed form – especially when applying in this other way was not found to lead to administrative problems. The Ombudsman also found that the Visa Service did not give the complainant the option of re-submitting her data within the prescribed time limit. Because of that the Dutch Ombudsman reached the conclusion that the Visa Service was in breach of the requirement of individualised approach.[1125]

Caring and solution focused: Leniency

Report 2012/183 of 6 November 2012
The police, acting on information that the son of the complainant sold weapons, proceeded to raid the complainant's home. At the time of the raid, the mother and several children were present. The son suspected of selling weapons was not found in the house, and nor were any weapons. The raid had a negative impact on the family but the police offered no aftercare or compensation. Moreover, although complaints submitted by the complainant to the police force were well-founded, subsequent communications about compensation did not reach a concrete outcome. The complainant filed a complaint with the Dutch Ombudsman that after two years the police did not provide them with any compensation for non-material damage, even though such compensation was recommended by the Commission for Police Complaints. The Dutch Ombudsman found that the police had taken a very formal approach. In the Ombudsman's opinion, the police should have provided the complainant and his family with an apology for late provision of aftercare along with

1124 Report 2013/112 of 5 September 2013, Klacht.
1125 Report 2013/084 of 11 July 2013, Klacht.

immediate financial compensation. But because the police failed to do this, the Dutch Ombudsman considered it in breach of the requirements of proper administration, and specifically the requirement of leniency.[1126]

Fair and reliable: Trustworthiness

Report 2013/089 of 16 July 2013
In this case, the complainant's house was raided by the police team in error, causing damage to the front door of her apartment. The damage was temporarily repaired and the complainant was told that she should take charge of the remaining repairs and then bill the police. The complainant had the door repaired by a carpenter who charged her € 3,000. Then the police, after receiving the bill, informed the complainant that only € 2,500 would be reimbursed as the price of the new door was higher than that of the original one. The complainant subsequently complained to the Dutch Ombudsman that the Ministry of Justice and Security had refused to reimburse her for the damage. Its initial intervention was not successful. However, during its investigation the Ombudsman found that the police did not inform the complainant of as to the type of the door she could use, the company, or the maximum price of the reimbursement. As such, she was left to rely only on the assurances that her declared claim would be reimbursed. Because this did not happen, the limitation on the reimbursement provided to the complainant breached the requirement of trustworthiness. This conduct was not proper.[1127]

Fair and reliable: Professionalism

Report 2013/205 of 23 December 2013
This report referred to a complainant, the father, who was involved in custody proceedings with the mother of their child. In connection to this, the Council for Protection of Children (*Raad voor de Kinderbescherming*) carried out an investigation and wrote an official report. The report inter alia included the transcript of a telephone conversation with the mother's therapist, in which the latter made an assessment of the complainant as a person, despite never having met or spoken to him, and provided advice. The complainant complained to the Dutch Ombudsman about the Council's inclusion of this transcript in its report. The National Ombudsman reached the conclusion that the Council's report should only include in data of relevance to its advice. The part of the report with the transcript of the conversation with the therapist was, in its opinion, not relevant since the therapist had never any contact with the complainant and was therefore not in a position to make an assessment of him. However, the inclusion

1126 Report 2012/183 of 6 November 2012, Algemeen.
1127 Report 2013/089 of 16 July 2013, Klacht.

of this transcript in the report gave the appearance that it was important to the terms of that advice, which was not the case. Thus, the Ombudsman considered the Council to have breached the requirement of proper administration – specifically, the requirement of professionalism.[1128]

7.5.2.2. Ombudsnorms as good governance-based standards

As the Dutch Ombudsman has pointed out, its work shows that there are many situations in which officials fail to display sufficient humanity as a result of the bureaucratic systems within which they work. The Ombudsman considers that one contribution to preventing this situation is by allowing citizens to participate in decision-making processes.[1129] Likewise, the institution has insisted on the importance of actively developing and providing information, as well as other due care standards, as indispensable factors in establishing healthy relationships between government and members of the public.[1130]

The application of principles of proper administration by the Dutch Ombudsman may also be described in accordance with the good governance scheme developed as part of this study normative framework. The following section analyses the ombudsprudence of the Dutch Ombudsman with regard to properness (careful preparation), transparency (active provision of information), and participation (consultation).

a. Properness: careful preparation

The requirement of proper administration of careful preparation (*goede voorbereiding*) by the Dutch Ombudsman is included in the Guidelines on Proper Conduct under the heading "fair and reliable" administration. This requirement, among other instructions, asks the administration to *ensure that its organisational and administrative systems promote the standard of their services to the public* i.e. the administration, while adopting its decisions, should exercise its functions carefully. The Ombudsman has applied and developed this particular requirement of proper administration in the following cases and reports.

Report 2013/214 of 27 December 2013
In this case the complainant was a party in a car accident which he did not cause. While being taken to hospital by ambulance, police officers gave him his

1128 Report 2013/205 of 23 December 2013, Bevindingen.
1129 De Nationale Ombudsman, *'Regel is regel' is niet genoeg. Verslag van de Nationale ombudsman over 2006*, Den Haag, 2006, p. 24. Also see National Ombudsman, Annual Report 2006. Summary, p. 5.
1130 National Ombudsman, *Annual Report 2005. Summary*, p. 5.

documents and folded European damage report form. Later, he found out that this European damage report form did not state reasons for the accident, nor the contact information of any potential witnesses. Ultimately, the complainant was unable to receive anything from the insurance company, as no police record (*proces-verbaal*) had been kept, and he could not find out which police officers were present. Thus, he filed a complaint to the Dutch Ombudsman complaining about the conduct of the police officers.[1131]

During its investigation the Ombudsman found that there was not even a note about the accident, let alone an official report. The Ombudsman noted that a requirement of a good preparation is that police officers actively acquire information in the case of an accident. This should lead to a report by the police officers present at the scene of the accident, except for those cases where there is nothing or very little to report. An observation should also have been made about the fact that the complainant was taken to the hospital. In order to be able to assess the case it is necessary to have all the information recorded. But because this did not occur, the actions of the police officers were improper and they led to a breach of the requirement of careful preparation.[1132]

Report 2013/158 of 31 October 2013
This case, initiated by the Dutch Ombudsman of its own accord, is connected with several complaints that, between 2010 and 2012, decisions made by ABP (a pension fund for civil servants) on behalf of the Minister of Defence in objection proceedings relating to military disability issues were quashed by the administrative court because of their non-careful preparation.[1133]

Based on the information received by the Ministry of Defence, the Dutch Ombudsman investigated the numbers of decisions quashed by the courts. The institution underlined that it cannot assess the contents of the quashed decisions, as only the appeal court has authorisation to this end. The Ombudsman also noted that the requirement of careful preparation requires the administration to collect all information of relevance to the decision to be taken. This requirement inter alia implies that citizens can trust the administrative institutions concerned to carefully assess the case in the objection procedure before taking a decision, so that the individual does not need start unnecessary procedures before the judge.[1134] Based on the information about the cases from 2010–2012, the actual numbers of objection procedures, and the numbers of quashed administrative decisions, the Dutch Ombudsman decided that the Ministry of Defence had not

1131 Report 2013/214 of 27 December 2013, Klacht.
1132 Ibid, Beoordeling.
1133 Report 2013/158 of 31 October 2013, Aanleiding.
1134 Ibid, Beoordeling.

acted improperly. Its actions therefore had not led to a breach of the requirement of careful preparation.[1135]

Report 2013/108 of 28 August 2013
In this case, the complainant was not working because of his illness. His employer had asked the UWV (Employee Insurance Agency, an institution providing social benefits) for an expert opinion regarding the complainant's possible reintegration to work. During the reintegration process the complainant was interviewed by his doctor and the work expert. The latter reached the conclusion that the efforts by the complainant for reintegration were not sufficient, even though his reason was sound reason. This was based on the information given by the complainant's doctor that his conduct was partially due to his illness. Thus, the complainant argued that the work expert, based on the facts of the case, would not have come to the same opinion if he had made careful preparations.[1136]

During the investigation the Dutch Ombudsman found that the expert opinion did not cover the complainant's situation, as it did not clearly state which facts and what conduct by the employer or the complainant led to the conclusion that the complainant had not tied hard enough to reintegrate. The Dutch Ombudsman also found that the respective accounts of the complainant and the employer about the character of the reintegration activities differed. The expert did not deal properly with these discrepancies as he should have; that is, he should have clearly determined which activities were carried out by the complainant and which were not carried out sufficiently, but failed to do either. He based his report mainly on the statement of the doctor, who noted that the complainant was showing avoidance behaviour. Likewise, the export again failed to specify clear reasons during the investigation of the Ombudsman. This constituted a breach of the requirement of careful preparation by the expert.[1137]

b. Transparency: active provision of information

Providing adequate information (Goede informatieverstrekking) as a normative standard of the Dutch Ombudsman is included in the Guidelines on Proper Conduct (Behoorlijkheidswijzer) under the heading of "open and clear" governmental action. Inter alia, the provision of adequate information requires that *the administration should adopt a service-oriented attitude in this respect and be pro-active in providing relevant information at the appropriate time* i.e. the administration should be active in providing information. The Dutch

1135 Ibid.
1136 Report 2013/108 of 28 August 2013, I Bevindingen.
1137 Ibid, II Beoordeling.

Ombudsman has applied and developed this particular requirement of proper administration in the following cases and reports.

Report 2011/305 of 11 October 2011
In this report, the Dutch Ombudsman dealt with the complaint of a patient of the University Medical Centre in Groningen (UMCG) that the UMCG did not inform her about the rates for medical treatment, and that it subsequently refused to provide her with these specifications on her invoice. In connection with the treatment, the complainant had to pay an exceptionally high sum for the treatment, which was not covered by basic health insurance but fell within the group of so called "own mandatory risk" (eigen verplicht risico), i.e. medical treatments that should be covered by the patient himself/herself. In this regard, the UMCG claimed that it was not usual to proactively inform a patient before treatment about what falls or does not fall under the basic health insurance, and that this was usually done only if the patient actively asked for this information. The UMCG also referred to its website, where it is stated that it is not always possible to declare rates because treatment can be based on several factors.[1138]

Nonetheless, the Dutch Ombudsman concluded that the UMCG should actively inform patient about its rates, even in cases where patients do not ask for them. The Ombudsman noted that the UMCG's actions stemmed from the obligatory basic health insurance in the Netherlands and that all basic health insurance coverage there are certain medical actions that should be covered by the patient (*eigen verplicht risico*). In this particular case, the UMCG should have informed the patient about the rates for treatment that fell into the "*eigen verplicht risico*-group", as these rates were exceptionally high. But because the UMCG had not done this, the Dutch Ombudsman ruled that its conduct was not proper, and it was therefore in breach of the requirement to provide information in an active and adequate manner.[1139]

Report 2012/164 of 10 October 2012
This report dealt with a complaint against the behaviour of the Rent Tribunal (*Huurcommissie*). The complainant argued that this body did not inform him that a (positive) decision by it could have an impact on the amount of his rent supplement. Because of maintenance failures in a house, the complainant had started a procedure before the Rent Tribunal with a view to decreasing his rent. The proceedings before the rent tribunal led to the decision that he should pay a lower amount of rent. As a consequence, the complainant had to return the *rent supplement* (*huurtoeslag*) of € 2,000 to the tax authorities.[1140]

1138 Report 2011/305 of 11 October 2011, Bevindingen paras. 3 – 9.
1139 Ibid, Beoordeling, paras. 10 – 11.
1140 Report 2012/164 of 10 October 2012, Klacht.

In its investigation, the Dutch Ombudsman found that the Rent Tribunal informed the complainant that its decision to increase the rent could have consequences for the amount of his rent supplement. This information is particularly important for all tenants who have received the rent supplement, because an increase in rent has a bearing on the amount of this supplement. However, the Dutch Ombudsman found that the Rent Tribunal did not actively inform the complainant that its decision about decreasing the rent could also have an impact on the rent supplement. Because of this the Rent Tribunal did not act properly and its conduct was in a breach of the requirement of proper administration in terms of providing of information in active and adequate manner.[1141]

Report 2011/238 of 9 August 2011

In this case the Dutch Ombudsman dealt with a complaint against improper conduct by the agency with the competence to collect maintenance payments (*Landelijk Bureau Inning Onderhoudsbijdragen – LBIO*) from and for divorcees. The complainant was an employer of person X who was supposed to pay monthly child support payments. However, person X did not make these payments and the LBIO asked the employer to deduct the due sum from the wages of person X. But the LBIO failed to inform the employer about the amount of money that would be deducted. Moreover, during the process the LBIO did not inform the employer about the development of the case connected with the deduction of the due sum. The complainant had to ask the LBIO several times for clarification on the data. Because of this the complainant argued that the LBIO had not provided him with sufficient information about the procedures that he had to follow as an employer in connection with retaining a proportion of the income of one of his employees due to unpaid child support payments.[1142]

During the investigation the Dutch Ombudsman noted that the LBIO was expected to inform the employer about the newest development in the case precisely and in a timely manner. It should not have waited for a request for information. It found that in this case the LBIO did not actively or adequately inform the complainant about important issues. The LBIO's conduct was thus improper and it led to a breach of the requirement of proper administration in terms of providing information in an active and adequate manner.[1143] The Dutch Ombudsman also recommended that the LBIO should actively inform the concerned persons in the event that there are unexpected changes in their case that (can) have financial consequences.[1144]

1141 Ibid, Oordeel Nationale ombudsman.
1142 Report 2011/238 of 9 August 2011, Bevindingen en beoordeling, Algemeen.
1143 Ibid, Beoordeling.
1144 Ibid, Aanbeveling.

c. Participation: consultation

The Dutch Ombudsman's requirement to promote active public participation (*bevorderen van actieve deelname door de burger*), as part of proper administration, requires that the administration should strive to give citizens an active role in their operations and in the development and implementation of their policies i.e. this requirement asks the administration to try to have consultations with the citizens. This requirement is included under the heading of "respectful" administration. The Dutch Ombudsman has applied and developed this particular requirement of proper administration in the following cases and reports.

Report 2013/075 of 1 July 2013
In this case the Dutch Ombudsman had to deal with a complaint by the resident's initiative 'Seghwaert in Protest' that the Board of Mayor and Aldermen of Zoetermeer did not take the local residents seriously about the planning of an Islamic cultural centre/mosque in the area. The complainants also argued that the authorities had not dealt with the negative feelings related to this plan. This happened as a result of a new zoning plan, whereby the municipality sold the parcel to an Islamic foundation to build a mosque. Although the municipality held several public meetings about this new zoning plan, the plans to build the mosque were not included on the agenda at any point. Regardless, the matter was sparked public debate and the representatives of the resident's initiative even used their right to talk before the municipality board. The municipality subsequently admitted that its communication with the residents was not as good as it should have been. Nonetheless, it approved the plan to build a mosque, but ultimately revoked this approval after an objection was filed.[1145]

The Dutch Ombudsman noted that the process of civilian participation did not go well in this particular case. This did not mean that the residents' feelings were not dealt with seriously. The Ombudsman noted that the authorities did indeed deal with this point as they should have. Despite that the Ombudsman found a breach of the requirement of active public participation. The Ombudsman noted that the choices the authorities made in connection with citizen participation led to confusion. According to the institution, the municipality should have made clear and motivated choices about the character of the participation in order to ensure a constructive solution to the situation. The actions by the authorities should have been open and transparent from the beginning. This led to improper conduct by the authorities.[1146]

1145 Report 2013/075 of 1 July 2013, pp. 5 – 7.
1146 Ibid, pp. 11 – 15.

The Dutch Ombudsman also noted that participation encompasses all methods that involve citizens in municipal policy. Citizen participation takes many forms, ranging from providing information to citizens, citizen advice, seeking input from citizens, co-deciding with the citizens, and the most extreme form: letting the citizens decide. Statutory public participation (*wettelijke inspraakprocedure*) is a form of civic participation.[1147]

Report 2012/177 of 26 October 2012

In relation to the introduction of a big cattle farm (*megastal*), the municipality requested an environmental impact assessment. The board of the municipality took the report into account and published it on the municipal website alongside information about other subjects such as municipal council, companies and village councils. It also published a press release about the report. The complainant was one of the companies that were dissatisfied with the actions of the municipality, on the basis that they were not properly informed about this report.[1148]

The Dutch Ombudsman in this case found improper administration because the municipality had not involved the citizens in its processes to the maximum possible extent. In this regard, the Ombudsman noted that one of the elements of proper participation is proper provision of information throughout the whole decision-making process.[1149] During its investigation the Ombudsman found that the municipality had not intended to base its positive or negative decision about the cattle farm on the abovementioned report alone. Indeed, the municipality admitted that it wanted to base its decision on other sources and reports as well. However, the Ombudsman found that the municipality had failed to inform the complainant about these other sources. Although the ombudsman could not decide whether the municipality informed the complainant correctly, the *way* in which the municipality communicated with the complainant was not proper.[1150]

Report 2013/043 of 1 May 2013

The complainant was worried about the quality of the care being provided to his mother in a nursing home, so raised the issue with the Inspectorate of Care Providers (IGZ). The IGZ informed the complainant that it would make an unannounced inspection of the nursing home. It promised to inform him in advance about the inspection so that he could be present. The IGZ only tried to call the complainant on the morning of the inspection. Because it was not possible to get in touch with the complainant, he was not present during the inspection.[1151]

1147 Ibid, p. 15.
1148 Report 2012/177 of 26 October 2012, Bevindingen.
1149 Ibid, para. 31.
1150 Ibid, para. 32.
1151 Report 2013/043 of 1 May 2013, Bevindingen.

The Dutch Ombudsman assessed the way in which the IGZ attempted to communicate with the complainant, as well as the IGZ's follow-up steps after the inspection. During the investigation the Ombudsman found that the unannounced inspection was not really 'unannounced' as the IGZ had informed the chairman of the nursing house the day before it took place. This fact, and the fact that the complainant was not informed about the inspection, led to a breach of his trust in the IGZ. The Ombudsman also found several ambiguities in the IGZ inspection report, which meant that no real consequences could have followed from the inspection. The Ombudsman's investigation also discovered that the nursing home had previously been inspected by the IGZ on several occasions. Thus, the complainant might reasonably have expected that the results of the inspection would lead to a plan to increase the quality of care provision at the nursing home, and that he would have been informed about it.[1152] The Dutch Ombudsman found that the IGZ's inaction in this regard led to a breach of the requirement to ensure active participation of the individual concerned, in which this requirement implies that the administration should involve citizens in its work as much as possible. One of the elements of this requirement is actively informing the individual. This implies that the complainant should have been properly informed about the inspection so that he could be present while it was taking place.[1153]

7.6. FINDINGS

The principle of propriety or proper conduct constitutes the normative concept of the Dutch Ombudsman, as well as the distinctive hallmark of this system. The principle of propriety is composed of a series of normative standards developed by the institution as part of its normative function. These standards are enshrined in a *list of norms of proper conduct* created by the Ombudsman, the *Behoorlijkheidswijzer*. In this regard, the Dutch Ombudsman conducts soft law review to assess the administration through the application of non-legally binding standards. However, the meaning of propriety as far as this institution is concerned is derived from general administrative law principles, and secondarily from a number of good practice requirements. As such, it is possible to affirm that the assessment criteria of propriety considers both the lawfulness of administrative action and the application of rules of good administrative conduct. In this sense, the standards of proper conduct are intended to help administrative authorities deal with citizens and their interests, thus ensuring proper administration. Therefore, proper conduct can be perceived as a Dutch version of good administration.

1152 Ibid.

1153 Ibid, Beoordeling, para 1 and Conclusie.

As developed, the norms of proper conduct reflect good governance principles. They are mainly connected with the principles of properness, transparency and effectiveness. Even though many of the specific standards related to properness are linked to legal norms derived from the rule of law principle, most of them have been created in connection with the good governance (steering) dimension of the modern constitutional state. In this regard, the *Behoorlijkheidswijzer* illustrates the Dutch ombudsman's application of principles of good governance.

As a general rule, the Dutch Ombudsman is an illustration of the ombudsman model of quasi-judicial redress. However, it is possible to argue that the norms of proper conduct show how, in practice, the hybridisation of the institution is reflected in the performance of its normative functions, in terms of the development of standards oriented to ensuring the effectiveness of the administration's managerial performance with also preventing purposes.

In practice, the breakdown of propriety into a list of specific standards of proper conduct has many functions. These are not only norms for the Dutch Ombudsman but also serve to provide guidelines to administrative authorities. In a broad sense, it can be said that the *Behoorlijkheidswijzer* contributes to enhancing legal certainty. For this study, its strength lies in its flexibility as an informal (soft law) instrument. In this regard, the *Behoorlijkheidswijzer* can promote the practical implementation and development of regulatory frameworks inspired by principles of good governance.[1154]

[1154] See for example the principles of proper public administration established by the Netherlands Code for Good Public Governance (2009) as developed by the Ministry of the Interior and Kingdom Relations of the Netherlands.

CHAPTER 8

THE PARLIAMENTARY OMBUDSMAN OF THE UNITED KINGDOM

In this chapter I will give an account of the United Kingdom Parliamentary Ombudsman's normative functions regarding principles of good governance. The UK Ombudsman has developed a positive approach to maladministration as an assessment standard, which is reflected in the codification of its List of Principles of Good Administration. The first sections analyse the legal mandate, structure and functions of the UK Ombudsman. The subsequent sections analyse what the Principles of Good Administration mean in practice in order to determine whether the normative values they intend to protect have taken the form of good governance-based standards. This reflects a shift in the emphasis of the UK Ombudsman, from identifying instances of maladministration – which arise from complaint handling in order to provide redress in the context of individual disputes ("putting it right") – to promoting good administration ("getting it right").[1155]

8.1. LEGAL BASIS AND MANDATE

8.1.1. THE OMBUDSMAN WITHIN THE UK LEGAL CONTEXT

The Constitution of the United Kingdom is not a single written document but consists mainly of customary law, statutes with a "constitutional" character and common law, (case law).[1156] There is no technical difference between ordinary

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1155 T. Buck, R. Kirkham & B. Thompson, op.cit., pp. 91ff, *supra* note 745.

1156 It is important to mention that there is an ongoing discussion in the UK on whether or not to introduce a codified constitution. Parliament's Political and Constitutional Reform Committee has prepared several reports outlining the arguments for and against codification and presented three possible options: a constitutional code, a constitutional consolidation act, or a written constitution. Of these, the written constitution blueprint (proposed as a document of basic law by which the UK is governed) includes the institution of the ombudsman (in the section on administrative justice) as part of a codified constitution. See, Political and Constitutional Reform Committee, *A new Magna Carta?* Second Report of Session 2014–2015, House of Commons, July 2014, p. 346.

statutes and law considered to be "Constitutional Law". The United Kingdom is a unitary state divided into its four constituent countries of England, Scotland, Wales, and Northern Ireland. The *Government of Wales Act* of 31 July 1998, the *Scotland Act* of 19 November 1998 and the *Northern Ireland Act* of 19 November 1998 conferred a certain degree of regional autonomy upon the latter three countries. Each now has its own Parliament and executive. In turn, each country is further subdivided for the purposes of local government.

The United Kingdom is a constitutional monarchy with a parliamentary form of government. Parliament consists of an upper house, the House of Lords, and a lower house, the House of Commons. The House of Commons has 650 Members who are elected by the people through the first-past-the-post system, a form of majority vote. The House of Lords currently has more than 820[1157] members, most of whom are life peers. The head of state is the monarch who must give royal assent to each bill passed by the two houses. The monarch appoints the prime minister, who is the leader of the largest party in the House of Commons. The prime minister then chooses a cabinet.

In matters of criminal and civil law the Supreme Court of the United Kingdom is, since the passage of the Constitutional Reform Act 2005, the highest court in England, Wales, and Northern Ireland.[1158] It is also the Supreme Court for all civil cases under Scots law, but Scotland has its own supreme criminal court, the High Court of Justice.

The UK has no specialised Constitutional Court, and traditionally no distinction was made between public law and private law based on the idea that the executive and the administration are subject to common law as administered by the ordinary courts. This is the so-called "private law" model of public law, which underpins Dicey's ideal of equality.[1159] Legal protection against acts of administrative bodies is provided either by ordinary courts by way of judicial review or by certain quasi-judicial institutions (tribunals).

The United Kingdom is party to all major international human rights treaties including the European Convention on Human Rights. The Human Rights Act 1998 aims at giving "further effect" in UK law to the rights contained in the

1157 There is no fixed number of members of the House of Lords; rather, the number varies as serving peers die and the government appoints new ones to the House.

1158 Until the passage of the *Constitutional Reform Act 2005,* the Appellate Committee of the House of Lords was the highest court in the United Kingdom judiciary system. The Supreme Court of the United Kingdom started functioning in 2009.

1159 Carol Harlow & Richard Rawlings, *Law and Administration*, Cambridge: Cambridge University Press, Third Edition, 2009, pp. 18–19.

Convention, and introduced a national remedy for breach of a right outlined in the Convention.[1160]

8.1.2. LEGAL BASIS AND MANDATE

The UK Parliamentary Commissioner is the national parliamentary ombudsman institution for Great Britain and Northern Ireland. It was legally established by the Parliamentary Commissioner Act 1967 (hereafter, the 1967 Act), and started its activities that same year. Pursuant to the 1967 Act, the UK Ombudsman was created as the "parliamentary commissioner for administration" for the purpose of conducting investigations on alleged cases of injustice arising out of maladministration.[1161] The parliamentary commissioner also holds the office of the Health Service Ombudsman for England.[1162]Although legally separate, by convention, the same person is appointed to both offices.[1163] The formal title of Parliamentary Commissioner for Administration is rarely used today. At present, the person holds the title of the Parliamentary and Health Service Ombudsman.[1164] This reflects the fact that the positions of Parliamentary

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1160 Brigitte Kofler, "The different jurisdictions: United Kingdom of Great Britain and North Ireland", in Gabriele Kucsko-Stadlmayer, *European Ombudsman-Institutions. A comparative legal analysis regarding the multifaceted realisation of an idea*, Wien: Springer, 2008 p. 434.

1161 1967 Act, Section 5(1)(a).

1162 The Health Service Ombudsman for England deals with complaints about the National Health Service (NHS) services. The NHS it is a comprehensive public health service under government administration established by the National Health Service Act of 1946. Virtually the entire population is covered, and health services are free except for certain minor charges. The NHS complaints procedure (where complaints are first raised locally and with the option of referral to the Health Service Ombudsman) is designed to provide explanations of what happened and, where appropriate, apologies and information about action taken so as to ensure that similar incidents in NHS services do not happen again. For a detailed description of the NHS procedure see Thomas Powell, Elizabeth Parkin & Andrew Mackley, *NHS Complaints Procedures in England*, House of Commons Library, Briefing Paper N° CBP 7168, 10 April 2017.

1163 The two functions are organised together and a single annual report is produced. However, unlike the Parliamentary Commissioner for the Administration, complaints can be lodged directly before the Health Service Ombudsman. It is not need to initiate a procedure through a member of the Parliament. In addition, the jurisdiction of the Health Service Ombudsman is wider to the extent that he is empowered to investigate alleged failures in providing a service as well as maladministration. See M. Purdue, "Investigations by the Public Service Ombudsmen", in David Feldman (ed), *English Public Law*, Oxford: Oxford University Press, 2009, p. 884.

1164 In addition, there are regional and local ombudsman-institutions in England, Wales, Scotland, Northern Ireland and Gibraltar, as well as non-parliamentary ombudspersons and complaint commissions. For the purpose of this research my analysis is exclusively focused on the performance and functions of the UK Parliamentary Commissioner for the Administration.

Ombudsman and Health Service Ombudsman for England have always been occupied by the same person simultaneously.[1165]

The UK Ombudsman was established as a tool of parliament. Accordingly, citizens cannot directly access the Ombudsman but must do so through a member of parliament (the so-called "MP Filter"), except in cases of complaints involving the National Health Service. Hence, access to the Ombudsman through an MP is a mechanism that supplements and improves parliament's constitutional role (while preserving its autonomy) in holding the executive accountable.[1166] The MP Filter is mainly a consequence of the UK constitutional tradition of favouring political accountability and political control of power, and adheres to the principle of ministerial responsibility to parliament.[1167]

Notwithstanding the existence of the MP Filter, the high degree of discretion conferred on the Ombudsman has proven effective in ensuring the institutional role of providing redress to citizens. In practice, the UK Ombudsman refers citizens' complaints to the constituency MP, who in turn will formally refer the complaint back. As the relationship between Parliament and the Ombudsman has been elucidated over the years[1168], MPs seem to perceive the ombudsman institution as a complaint mechanism that has contributed significantly to its ability to secure redress.[1169] However, some authors argue that the MP Filter acts as an "anachronistic barrier"[1170] and a kind of consensus has arisen about the need for reform.[1171] As such, proposals for removing the MP Filter are currently under debate.

In this regard, in December 2016 the British Government published the Draft Public Service Ombudsman Bill, which proposes the abolition of the MP Filter but stops short of framing direct access to the Ombudsman as a citizen's right.[1172] Broadly, the Draft Bill proposes merging the existing Public and Health Services Ombudsman with the Local Government Ombudsman[1173] in order to create a

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1165 Richard Kirkham, *The Parliamentary Ombudsman: Withstanding the test of time*, Parliamentary and Health Service Ombudsman, 4ht Report, Session 2006–2007, 2007, p. 21.

1166 M. Purdue, loct.cit., p. 883.

1167 Thomas Pegram, "Diffusion across political systems: The global spread of national human rights institutions", p. 734, *supra* note 214.

1168 Carol Harlow & Richard Rawlings, op.cit., p. 533.

1169 Richard Kirkham, op.cit., p. 6.

1170 Ann Abraham, "The ombudsman and the executive: The road to accountability" in *Parliamentary Affairs*, Vol. 61, No 3, 2008, p. 543.

1171 Jonathon Coe & Oonagh Gay, *The Parliamentary Ombudsman and the MP filter*, House of Commons Library, Standard Note SN/PC/05181, February 2010.

1172 The Draft Public Service Ombudsman Bill is available at https://www.gov.uk/government/publications/draft-public-service-ombudsman-bill (last visited on February 2017).

1173 The Local Government Ombudsman investigates complaints under the administrative aegis of the Commission for Local Administration in England. The Commission is a regional

single Public Service Ombudsman.[1174] It is worth mentioning that this legislative proposal was made by UK Ombudsman officials themselves.[1175] At time of writing, the Draft Bill was still under debate.

Notwithstanding the abovementioned debate about removing the MP Filter, the UK Ombudsman is not entitled to institute an investigation on its own initiative, but may only do so in response to a complaint by a member of the public who claims to have sustained injustice in consequence of maladministration. However, as mentioned, at present citizens do not have the right to lodge a complaint before the Ombudsman directly, except in cases involving the NHS. Rather, a complaint must be made to a member of the House of Commons, who will refer it to the Ombudsman along with a request to conduct an investigation (the aforementioned MP Filter).[1176] Any natural or legal person (individual, body of persons or corporation) can make a complaint, provided they are legally resident in the United Kingdom or were in the country when the event occurred.

The UK Parliamentary Ombudsman is appointed by the Crown. However, although this is not expressly stated in the 1967 Act, the Ombudsman is independent. This independence is guaranteed by giving the office the same security as a High Court Judge. The Ombudsman is appointed for a non-renewable term of seven years[1177] The incumbent can only be removed by the executive via an address from both Houses of Parliament.[1178] In addition, an incumbent may request to be relieved of office, and the office can be declared vacant if the incumbent is incapable for medical reasons of performing the duties of office.[1179] In any case, an incumbent will vacate office on completing the seven-year term of service or upon reaching the statutory retirement age of 65.

The UK Ombudsman was established as a completely distinct branch of the administrative justice system, the implication being that where legal matters

institution created by the Local Government Act 1974. In most parts of the UK the respective ombudsman institutions are also competent to supervise local government entities, but in England these competences fall to the Commission for Local Administration, which consists of three members (the so-called Local Government Ombudsman), and the UK Ombudsman. See, Brigitte Kofler, loc.cit., p. 438.

1174 The Public Service Ombudsman would deal with UK reserved matters and public services in England. Other public service ombudsmen (in Scotland, Wales and Northern Ireland) are unaffected by the Draft Bill, although it is envisaged that the new Public Service Ombudsman would work with these existing ombudsman institutions. See, Lucinda Maer & Sarah Pridy, *The Parliamentary Ombudsman: Role and proposals for reform*, House of Commons Library, Briefing Paper N° CBP 7496, 21 June 2018, p. 17.

1175 Based on an interview with Philipp Mende, UK Ombudsman official, on 23 January 2017.

1176 1967 Act, Section 5(1)(a)(b).

1177 1967 Act, Section 1(2).

1178 1967 Act, Section 1(3).

1179 1967 Act, Section 1(3)A.

were at stake, the Ombudsman is not allowed to pursue a complaint.[1180] However, the Ombudsman still has discretion to look at complaints where an alternative legal remedy is available, or can argue an instance of maladministration in cases where legal grounds could also be argued.[1181] Nowadays, the UK Ombudsman is considered to be part of the unwritten Constitution of the United Kingdom.[1182] The Ombudsman has a constitutional position in its relationship with the legislature, the executive and the judiciary[1183] and plays a particular role in the promotion of certain essential constitutional values and in the balance of power in order to ensure the "integrity branch" of the Constitution.[1184] The UK Ombudsman performs this function by calling public authorities to account for their adherence to standards of good administration.[1185]

8.2. SCOPE OF CONTROL AND FUNCTIONS

8.2.1. SCOPE OF CONTROL

The UK Ombudsman investigates whether instances of maladministration have occurred. In performing its functions, it can assess the behaviour of basically all administrative organs of central government.[1186] Section 5(1) of the 1967 Act provides that the Ombudsman may investigate any action taken by or on behalf of a government department or another authority, in the exercise of administrative functions. Thus, the jurisdiction of the Ombudsman includes certain non-departmental bodies (or 'quangos') and executive agencies as well as certain public services that have been contracted out to the private sector.[1187] However, aspects such as foreign policy, contractual or commercial transactions, and personnel matters are excluded from the jurisdiction of the institution.[1188]

According to Section 5(2) of the 1967 Act, the Ombudsman will not conduct an investigation regarding any action in respect of which the person aggrieved has or had a right of appeal, reference, or review to or before a tribunal or court

1180 Richard Kirkham, op.cit., p. 5.
1181 Based on an interview with Philipp Mende, UK Ombudsman official.
1182 First Report from the House of Commons Select Committee on the Parliamentary Commissioner, 1990–1991 HC 129 December 19 1990 XIII.
1183 Ann Abraham, "The ombudsman as part of the UK constitution: A contested role?" in: Parliamentary Affairs, Vol. 61, No 1, 2008, pp. 213–215.
1184 R. Kirkham, B. Thompson & T. Buck, loc.cit., pp. 609–610, *supra* note 41.
1185 Ibid., p. 610.
1186 Schedule 2 of the 1967 Act contains a list of all authorities and entities subject to the ombudsman's control.
1187 M. Purdue, loc.cit., p. 887.
1188 Schedule 3 of the 1967 Act contains a list of matters which are exempt of the UK Ombudsman's control.

of law. Nevertheless, the Ombudsman is allowed to investigate if it is satisfied that in the circumstances of a particular case it is not reasonable to expect the complainant to resort to a legal remedy.

The focus of the UK Ombudsman's control is placed on social and general procedural matters.[1189] Its task is to concentrate a finding of maladministration on the manner in which the policy decision has been made or implemented and not on the merits of the decision itself.[1190] Thus, in the view of its own staff, the Ombudsman focuses its performance more on procedural aspects, such as the complaint handling element, than on the substantive aspect of maladministration.[1191] Indeed, there are some areas where the Ombudsman may only look at the complaint handling aspect or another aspect of the process, whereas it is for a Tribunal to look at the substance.

Ordinarily, the Ombudsman does not have the remit to decide whether there has been a breach of the law.[1192] Therefore, it assesses issues of policy and other administrative actions regarding the behaviour of the administration in relation to citizens. It is important to mention that although the UK Ombudsman is not competent to supervise court decisions, it can investigate the administration of the judiciary as far as actions of non-judicial staff and non-judicial functions are concerned.[1193]

8.2.2. FUNCTIONS

As stated above, the main function of the UK Ombudsman, as set up by the 1967 Act, is to investigate complaints of maladministration in order to remedy injustice. The purpose of the 1967 Act was to establish an alternative system of administrative justice to judicial review directed towards the redress of grievances, which is not within the scope of the courts' redress, without overlapping remedies. By handling individual complaints, the UK Ombudsman performs a (human rights) protecting function.[1194]

1189 Brigitte Kofler, loc.cit., p. 437.

1190 Richard Kirkham, op.cit., p. 7.

1191 Based on an interview with Philipp Mende, UK Ombudsman official.

1192 However, the UK Ombudsman has interpreted that the 1967 Act left a degree of discretion on the matter. Section 12(3) of the 1967 Act prevents the Ombudsman from questioning the merits of a decision taken without maladministration. This implies that where a decision is taken with maladministration then the Ombudsman can legally consider the merit of the decision.

1193 Brigitte Kofler, loc.cit., p. 436.

1194 Ann Abraham, "The ombudsman and individual rights", in *Parliamentary Affairs*, Vol. 61, No 2, 2008, pp. 376–377.

However, to the extent that the mandate of the UK Ombudsman is to identify maladministration, the institution has the capacity (like the Dutch Ombudsman) to oversee public service and policy, and to recommend systematic change for the improvement of public service delivery. As such, the UK Parliamentary Ombudsman also performs a preventing function. This function is reflected in the ability to submit special reports to either chamber as necessary.[1195]

In addition, the UK Ombudsman has a (normative) codifying function, which is performed through the identification of patterns of maladministration disclosed by the complaints. Hence, the codifying function derives from the investigating function and is complementary to the Ombudsman's ability to issue special reports. Both the codifying function and the special reports seek to influence the highest level of policy direction by shaping the institution's preventing function.[1196] Although the Ombudsman Act does not provide for offering guidance as an explicit task of the institution, in practice both the standards developed by the UK Ombudsman and the reports guide the public sector with regard to arrangements that could lead to improving the administration. They offer a framework within which public authorities may seek to perform their functions and to learn from misconduct. Thus, the UK Ombudsman also performs an educational function.

8.3. ASSESSMENT ORIENTATION AND STANDARD OF CONTROL

8.3.1. ASSESSMENT ORIENTATION

The role of the UK Ombudsman has evolved over time. According to Harlow, there has never been full agreement on the role of the UK Ombudsman, which have been alternately described as both 'firefighting' (redress-oriented) as well as 'fire-watching' (control-oriented).[1197]

As former Parliamentary Ombudsman Ann Abraham has pointed out, the Ombudsman's remit combines investigating complaints with the possibility of improving standards of administration and assisting Parliament in its duties of protecting citizens' rights and holding the executive to account.[1198] In practice, the emphasis on the orientation of the institution will depend on the preferences of

1195 1967 Act, Section 10(4).
1196 Ann Abraham, "The ombudsman as part of the UK constitution: A contested role?", pp. 210–212.
1197 Carol Harlow & Richard Rawlings, op.cit., p. 537.
1198 Ann Abraham, "The ombudsman as part of the UK constitution: A contested role?", p. 207.

the incumbent at any given time. In this regard, Ann Abraham took the fire-watching role for granted[1199], whereby the handling of complaints was regarded as having an instrumental character. According to her, it is the core activity of investigating complaints that makes the strategic tasks of the institution operational and enables the ombudsman's broader role of delivering public benefits – that which so characterises the institution.[1200]

Under the last incumbent, Dame Julie Mellor[1201], the UK Ombudsman significantly changed the way it handles complaints by lowering its investigation threshold so that it investigates every complaint where there are signs of a citizen having been let down by a public service and of having experienced injustice. Previously, the Ombudsman only investigated if the evidence showed that it was likely to uphold the complaint.[1202] This is in line with the evolution of the institution to place more significance on control-oriented functions. As has been pointed out by Philipp Mende, UK Ombudsman official, "it may be said that increasingly the Ombudsman is trying to drive wider improvements to public services and complaint handling through publishing thematic and systemic investigations reports".[1203]

Along the same lines, some scholars uphold that the Ombudsman's higher profile thematic investigations concerning the systemic operation of the administration and oriented to promoting long-term changes are one of the most important contributions that the institution can bring to the constitution.[1204] A "systemic" investigation[1205] as a method for identifying problems in administrative agencies requires a proactive role by the Ombudsman in recognising themes in complaints and making a clear choice regarding the initiation of an investigation to achieve a deep understanding of an organisation and its problems.[1206] Since the UK Ombudsman lacks the legal capacity to start own-initiative investigations, such thematic or systematic reports are based on a number of complaints on which patterns of maladministration have been detected.[1207]

1199 Carol Harlow & Richard Rawlings, op.cit., p. 565.

1200 Ann Abraham, "The ombudsman as part of the UK constitution: A contested role?", p. 211.

1201 Current incumbent Robert F. Behrens was appointed in 2017.

1202 This has brought about a surge in the number of investigations: the UK Ombudsman investigated 3,861 complaints in 2015–16: ten times the number of investigations completed in 2012–13. Furthermore, the UK Ombudsman fully or partly upheld 1,543 of the complaints that were investigated in 2015–16, up from some 300 in 2012–13. Information provided in the interview with Philipp Mende, UK Ombudsman official.

1203 Interview with Philipp Mende, UK Ombudsman official.

1204 Richard Kirkham, op.cit., p. 7.

1205 Which differ from those investigations conducted with the aim of solving a specific complaint.

1206 T. Buck, R. Kirkham & B. Thompson, op.cit., pp. 132–133.

1207 Based on an interview with Philipp Mende, UK Ombudsman official.

Reports of systemic investigations include "administrative" recommendations[1208] which seek to prevent the repetition of maladministration. In this way the Ombudsman attempts to make broader constructive comments about the quality of administrative processes. And although there is a discussion ongoing concerning the extent to which the UK Ombudsman can review policy decisions and legislation, there is a grey area between issues of procedures and legal requirements. Therefore, nothing prevents the Ombudsman from recommending changes in legislation[1209] on the basis that it is regulation that is causing subsequent acts of maladministration within the administrative process.[1210]

The ability of the UK Ombudsman to broaden its investigatory powers and the increasing use of (systemic and thematic) investigations[1211] are evidence of the evolving role and of the growing prominence of the institution's control oriented-performance. According to Harlow, this development shifts the attention of the Ombudsman from bad to good administration focusing on identifying administrative deficiencies and recommending not only procedural reform but also policy and legislative changes.[1212] This is in line with the control assessment orientation that defines the parliamentary ombudsman model.[1213]

8.3.2. STANDARD OF CONTROL: MALADMINISTRATION

The central notion of the ombudsman system in the UK is maladministration.[1214] According to Section 5(1)(a) of the 1967 Act, the UK Ombudsman investigates whether administrative behaviour includes maladministration causing injustice. Nevertheless, maladministration as such is not defined in the 1967 Act or any other legal statute. Consequently, it is at the ombudsman's discretion to decide

1208 These recommendations are opposite to "redress recommendations" for the injustice caused to the complainant as consequence of maladministration. Both redress recommendations and administrative recommendations can be included in the report of an investigation. See T. Buck, R. Kirkham & B. Thompson, op. cit., p. 129.

1209 An example of the capacity of the UK Ombudsman to propose legislative changes in relation to preventing maladministration can be seen in the case of the institution's 2013 Report on midwifery regulations and supervisions. In late 2016, the UK government introduced to Parliament a Bill to reform such regulations in line with the Ombudsman's recommendations. The report is available at https://www.ombudsman.org.uk/publications/midwifery-supervision-and-regulation-report-health-service-ombudsman-1.

1210 T. Buck, R. Kirkham & B. Thompson, op.cit., pp. 130–131.

1211 Ibid., p. 137.

1212 Carol Harlow, "Ombudsmen: 'hunting lions' or 'swatting flies'", in M. Hertogh & K. Kirkham (eds), *Research Handbook on the Ombudsman*, Cheltenham-Northampton: Edward Elgar Publishing, 2018, pp. 82–83.

1213 See Section 3.5.2.

1214 M. Remac & P.M. Langbroek, loc.cit., p. 162.

what maladministration actually means and "to establish some guidelines in the light of experience".[1215]

In the second reading debate on the Ombudsman Act Bill in the House of Commons, Mr Richard Crossman (Lord President of the Council) suggested that "maladministration includes bias, neglect, inattention, delay, incompetence, inaptitude, perversity, turpitude, arbitrariness and so on".[1216] Later on, former Parliamentary Ombudsman William Reid extended the scope of the "Crossman Catalogue" in his Annual Report of 1993 while keeping to the view that to have a strict definition of maladministration would limit the work of the institution.[1217] Reid gave additional examples of maladministration to update the Crossman Catalogue.[1218] His purpose was to clarify the meaning of maladministration and what was expected of civil servants. Nonetheless, the meaning of the term remains elusive.

The notion of maladministration is connected with the principle of a strict separation of powers between English courts, which decide on the legality of administrative action, and the Ombudsman, which decides whether there is maladministration in administrative action. Accordingly, the UK Ombudsman does not try to decide on issues of lawfulness and courts stay out of issues of maladministration.[1219] However, as mentioned above, maladministration may

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1215 David Williams, "Parliamentary Commission Act 1967", in *The modern Law Review*, Vol. 30, Issue 5, September 1967, p. 547.

1216 This definition is known as the "Crossman Catalogue". Lord Denning endorsed this approach in the Bradford Case, in which the Court of Appeal refused to grant an order prohibiting the Local Ombudsman from investigating alleged maladministration. The case is relevant to the UK Ombudsman because the Local Ombudsman also investigates complaints of injustice due to maladministration. According to Lord Denning, maladministration could be an open-ended list "covering the manner in which a decision is reached or discretion is exercised; but excluding the merits of the decision itself or of the discretion itself". Hence, maladministration is not concerned with the merits of the decision but with the process by which the decision is made. See R v Local Commissioner for Administration for the North and East Area of England ex parte Bradford Metropolitan City Council [1979] QB 287.

1217 Diane Longley & Rhoda James, *Administrative justice. Central issues in UK and European administrative law*, London: Cavendish Publishing, 1999, p. 49.

1218 According to William Reid, maladministration includes: "rudeness; an unwillingness to treat an individual as a person with rights; a refusal to answer reasonable questions; neglecting to inform an individual on request of his or her rights or entitlement; knowingly giving advice which is misleading or inadequate; ignoring valid advice or overruling considerations which would produce an uncomfortable result for the person overruling; offering no redress or manifestly disproportionate redress; showing bias whether because of colour, sex, or any other grounds; an omission to notify those who thereby lost a right of appeal; a refusal to inform adequately of the right of appeal; faulty procedures; the failure to monitor compliance with adequate procedures; cavalier disregard of guidance which was intended to be followed in the interest of the equitable treatment of those who use a service; partiality; and failure to mitigate the effects of rigid adherence to the letter of the law where that produces manifestly inequitable treatment." Parliamentay Ombudsman, *Third Annual Report 1993–1994*, p. 4.

1219 Milan Remac, *Coordinating ombudsmen and the judiciary,* p. 178.

include behaviour that is not in accordance with the law as well as behaviour by administrative bodies that is directly connected to their administrative (legal) functions.[1220]

Maladministration is subject to a two-pronged test. Not only must maladministration be found, but there must also be a finding that injustice has been caused as a consequence of maladministration. Therefore, there must be a causal connection between maladministration and injustice, and consequently the Ombudsman must both conclude that maladministration has caused injustice and have a reasonable basis for reaching that conclusion.[1221] However, like maladministration, injustice has not been defined by any legal statute. This lack of a strict legal definition may be linked to the British legal tradition of developing non-statutory equity law in connection to the concept of natural justice alongside the body of Law consisting of statutes and court-construed common law.[1222]

Despite the lack of definition, the term "injustice" is sufficiently flexible to allow the institution to provide redress in a wide range of cases, and in practice has caused less controversy than maladministration. In this regard, to focus on injustice enables the institution to take into account aspects such as the anger, upset and indignation felt by citizens and not only financial detriments.[1223] Likewise, the UK Ombudsman has established that citizens can sustain injustice in consequence of maladministration, even when the injustice in question is caused by various factors acting together.[1224] As Philipp Mende, UK Ombudsman official, points out "injustice describes the impact that maladministration by the state may have on an individual. For example, a delay in paying unemployment benefit may result in financial hardship and distress for the individual. The delay

1220 M. Remac & P.M. Langbroek, loc.cit., p. 163.

1221 M. Purdue, loc.cit., p. 890.

1222 Equity law developed within the English legal system during the late Middle Ages (14th and 15th centuries) as an alternative to the body of Law administered by regular courts, known as common law. It was administered by the Court of Chancery, a body formally part of the Crown's Lord Chancellor Office. Equity law departed from common law both in substantive and procedural aspects, being regarded as less formalistic and more flexible, while taking into account principles of natural justice. The 1873 and 1875 Supreme Court of Judicature acts fused the Court of Chancery with the regular courts, establishing a unified court system. However, equity is still regarded as a separate body of Law comprising specific civil law subject matter, such as the Law of trusts and unjust enrichments. It can be argued that equity law has had a lasting influence on British law (and to an extent over the legal systems of English speaking countries) by promoting a less formalistic and context based approach to law that takes into account unwritten principles of natural justice, allowing for a distinction, in certain cases, between instances of injustice and unlawfulness.

1223 Richard Kirkham, op.cit., p. 8.

1224 See for example, Parliamentary Ombudsman, *Trusting in the pensions promise: government bodies and the security of final salary occupational pensions*, Sixth Report, HC 984 (2005–06), pp. 15–17.

would be the maladministration, whereas financial hardship and distress would be the injustice".[1225] In any case, the need to determine whether or not injustice has occurred has not prevented the institution from broadening investigations to conduct more systematic reviews of administrative practice where appropriate.[1226]

It must be noted, as Stacey points out, that the two-pronged test for assessing maladministration was a reflection of "the cautious approach to make a rigid distinction between discretionary decisions and maladministration."[1227] This cautious approach to administrative discretion had been recommended by the Whyatt Report, published in 1961, which served as a basis for the Parliamentary Commissioner Act of 1967, according to which appeals against discretionary decisions should be a matter for administrative tribunals in order to not interfere with the efficiency of the administration. Therefore, the legal formula "injustice in consequence of maladministration" is a policy choice made at the time of the passage of the Parliamentary Commissioner Act of 1967 to not subject the exercise of (any) administrative discretion to the oversight of the Ombudsman.[1228]

Notwithstanding the limitations regarding the oversight of administrative discretion, the UK Ombudsman's maladministration test has proven to be highly malleable in practice, providing innovative applications to new situations. One of the key aspects of the concept is that maladministration can be used to deal with complaints where legal grounds can also be argued. As defined (and developed) it also allows for a legal discussion on the development and application of non-legally binding norms to steer administrative behaviour, in order to avoid bias, neglect, inattention, delay, incompetence, among others. In this regard, the duties that can be inferred from the maladministration test can go further than equivalent doctrines in law.[1229] The courts support this principle.[1230]

The maladministration test has proven to be a powerful and permeable tool that confers a high degree of autonomy upon the UK Ombudsman for the

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1225 Interview with Philipp Mende, UK Ombudsman official.

1226 Richard Kirkham, op.cit., p. 9.

1227 Frank Stacey, *The British Ombudsman,* Oxford: Oxford University Press, 1971, p. 23.

1228 However, Stacey notes that the Whyatt Report had also proposed to reform the UK administrative tribunal system in order to facilitate appeals against discretionary administrative decisions. Nevertheless, the proposed legislative reform of the administrative tribunal system was not taken into account by UK legislators. See Frank Stacey, op.cit., pp. 21–27.

1229 See for example, Parliamentary Ombudsman, *'A debt of honor': The ex gratia scheme for British groups interned by the Japanese during the Second World War*, Fourth Report, HC 324 (2004–05).

1230 See for example, London Borough Council v Awaritefe [1999] 32 HLR 517 (per Pill LJ at 531); R v Local Commissioner for the Administration, ex parte Liverpool City Council [2001] 1 All ER 462.

fulfilment of its task.[1231] Generally focused on the quality of administrative decision-making, the test allows not only individual redress of grievances but also the promotion of general standards of good administrative practice. It is precisely its malleability that allows for the evolution of principles and standards over time for different intensity of the test's application.[1232] Thus, as Philipp Mende, UK Ombudsman official, has stated, the work of the UK Ombudsman "has helped to give meaning to the term 'maladministration'. It is not defined in law, but has partly been defined by what the Ombudsman has identified as maladministration over the last five decades." Furthermore, the work of the Ombudsman has also helped to shape the understanding of good administration in the UK. In these terms, maladministration might simply be regarded as the opposite of good administration, the content of which has been more precisely defined by the UK Ombudsman.[1233] Thus, it might be argued that the UK Ombudsman, as a mechanism of administrative justice, is linked to "green light theory", which advocates alternative forms of accountability to courts[1234] through the application and development of (more flexible) general legal principles and standards, underlying (to a certain extent) the concept of natural justice.

Aiming at providing a better understanding of the test to be applied in determining maladministration and the reasoning behind findings in individual cases, the UK Ombudsman issued a set of six key Principles of Good Administration in 2007. These principles are: (1) getting it right; (2) being customer focused; (3) being open and accountable; (4) acting fairly and proportionately; (5) putting things right; and (6) seeking continuous improvement.[1235]

Table 5. List of Principles of Good Administration Developed by the UK Ombudsman

Principles of Good Administration	
(1) Getting it right	(4) Acting fairly and proportionately
(2) Being customer focused	(5) Putting things right
(3) Being open and accountable	(6) Seeking continuous improvement

The Principles of Good Administration are also intended to clarify the behaviour expected from public servants to deliver customer service. The Principles of Good Administration are aimed not only at providing openness on the concept

1231 Richard Kirkham, op.cit., pp. 7–8.
1232 T. Buck, R. Kirkham & B. Thompson, op.cit., p. 37.
1233 Based on an interview with Philipp Mende, UK Ombudsman official.
1234 Carol Harlow & Richard Rawlings, op.cit., pp. 31–40.
1235 The Principles of Good Administration of the UK Ombudsman are available at www.ombudsman.org.uk/improving-public-service/ombudsmansprinciples/principles-of-good-administration.

of maladministration but also at taking a positive approach to the process of humanisation of state bureaucracy by shaping administrative practice to fit the needs of citizens.[1236]

Although the protection of human rights is not considered an independent task of the UK Ombudsman[1237], these principles indirectly influence the actions and decisions of the institution.[1238] It is not for the Ombudsman to determine human rights infringements but to point out when a public authority fails to comply with the expectations laid down by human rights principles. As such, it may be affirmed that the institution "uses human rights, alongside other standards, relevant policies, and guidance to determine whether maladministration has occurred and to decide the extent of injustice that needs to be remedied".[1239] Thus, the task of making findings of maladministration is unavoidably implicated with human rights considerations.[1240] Of course, all violations of human rights concern maladministration, but not all instances of maladministration are human rights violations. However, this relationship between the UK Ombudsman's Principles of Good Administration and human rights, as in the case of the Dutch Ombudsman, reflects the institution's wider hybridisation process.

Consequently, the List of Principles of Good Administration provides a framework for injecting positive value into public administration, both as a vehicle for holding the executive to account and as a medium for translating human rights into concrete reality.[1241] The ultimate objective is not so much the retrospective eradication of maladministration but the prospective promotion of good administration: prevention rather than cure.[1242] From this perspective, Principles of Good Administration are evidence that the full force of maladministration has been recognised.[1243]

1236 Ann Abraham, "Good administration: Why we need it more than ever", in *Parliamentary Affairs*, Vol. 80, No 1, January-March 2009, pp. 25–26.

1237 The UK has a separate Equality and Human Rights Commission, which specifically deals with human rights subject matter. Based on an interview with Philipp Mende, UK Ombudsman official.

1238 The United Kingdom is party of the European Convention on Human Rights. The Human Rights Act 1998 intends to give further effect to the rights recognised in the Convention by introducing the ability of UK citizens to enforce their rights under the Convention in domestic courts. In Ann Abraham's words "the Human Rights Act seeks to make explicit those fundamental and generic principles that must inform the most basic encounter between citizens and state, from which all other particular standards, codes and charters must derive their authority and to which they must be subservient". Ann Abraham, "The ombudsman as part of the UK constitution: A contested role?", p. 209.

1239 Based on an interview with Philipp Mende, UK Ombudsman official.

1240 Ann Abraham, "The ombudsman and individual rights", p. 378.

1241 Ann Abraham, "Good administration: Why we need it more than ever", pp. 31–32.

1242 Ann Abraham, "The ombudsman as part of the UK constitution: A contested role?", p. 210.

1243 Richard Kirkham, op.cit., p. 8.

8.4. INVESTIGATION PROCEDURE FOR THE DETERMINATION OF MALADMINISTRATION

8.4.1. CHARACTERISTICS OF THE INVESTIGATION PROCEDURE

The UK Ombudsman has adopted an almost exclusively investigative approach to assess complaints. Hence, the core function of the institution is to investigate and resolve complaints as effectively and efficiently as possible.[1244] As mentioned above, the Ombudsman is entitled to initiate an investigation upon a complaint by a member of the public who claims to have sustained injustice in consequence of maladministration. The complaint has to be made to an MP, who in turn requests the Ombudsman to conduct an investigation. The Ombudsman is not allowed to start an investigation on its own initiative.

The complaint must be submitted (in writing) to the MP[1245] no later than twelve months from the day on which the complainant first had notice of the matters alleged, unless the Ombudsman considers that there are special circumstances that justify a later investigation.[1246] The Ombudsman has no obligation to investigate every complaint and may not conduct an investigation if the complainant has or had right of appeal, reference, or review to or before a tribunal or by way of legal proceedings before the judiciary.[1247] Nevertheless, the Ombudsman may conduct an investigation if it considers that in the particular situation it is not reasonable to expect the citizen to resort to a legal remedy.

During an investigation the UK Ombudsman may require any person to provide information or produce documents relevant to the investigation[1248], and has the same powers as the High Court regarding the attendance of witnesses[1249] and the production of documents.[1250] The Ombudsman also communicates with the complainant throughout the investigation process.

The investigation procedure conducted by the Ombudsman has been described as an inquisitorial one. Its function is "to secure appropriate and just remedy." It is normally conducted by correspondence and face-to-face or telephone interviews. Oral complaints, complaints by telephone, and complaints via email

1244 Ann Abraham, *Ombudsman consults on principles of good administration*, Press release 04/06, 19 October 2006.
1245 1967 Act, Section 5(1)(a).
1246 1967 Act, Section 6(3).
1247 1967 Act, Section 5(2).
1248 1967 Act, Section 8(1).
1249 1967 Act, Section 8(2).
1250 Brigitte Kofler, loc.cit., pp. 435–436.

are considered as an enquiry.[1251] The findings are not limited by strict judicial precedents; instead, the conclusions are intended to be just and reasonable in the particular circumstances of the case but not as legalistic as the judgment of a court. The remedy imposed will not be enforceable against the respondent, but will instead derive its authority from its moral force. The remedy looks for both a degree of future prevention as well as a retrospective cure.[1252]

According to the Ombudsman, good complaint handling is important not only for the complainant but also for the body concerned to the extent that it serves as a valuable source of feedback and learning.[1253] In this regard "it is essential that those bodies get the opportunity to put things right" before the Ombudsman considers the matter. If the body concerned has not had that opportunity, it is considered that the complaint has come to the Ombudsman prematurely, and the institution would thus decline to investigate it.[1254]

The Ombudsman has discretion regarding the investigation or complaint-handling procedure. It should be conducted as the UK Ombudsman considers most appropriate given the specific circumstances of the case.[1255] Thus, theoretically, each new incumbent "can change or bring something new to the procedure".[1256]

The complaint procedure has several stages. The "access" stage consists of contacting the Ombudsman by email, post, or phone, or being referred by MP. After this, at the "triage" stage, the Ombudsman evaluates whether the complaint is within its jurisdiction and whether or not the complaint can be resolved quickly without the need for investigation. Whether possible or not, at the "investigation" stage the Ombudsman communicates to the organisation concerned about the investigation. The institution conducts the investigation based on evidence, makes a decision (or "judgement"), and informs both parties.[1257] Afterwards, at the "action" stage, if the Ombudsman upholds the complaint, it asks the organisation to take steps to resolve it by providing an explanation, an apology, or financial compensation. The ombudsman can also ask for preparation of an action plan to prevent similar failures in the future.[1258] At the "insight" stage the Ombudsman uses learning from complaints to help public

1251 Milan Remac, *Coordinating ombudsmen and the judiciary,* p. 124.
1252 Ann Abraham, "The ombudsman as part of the UK constitution: A contested role?", p. 208.
1253 Parliamentary and Health Service Ombudsman, *Annual Report 2008–2009. Every complaint matters,* London, July 2009, p. 8.
1254 Ibid.
1255 1967 Act, Section 7(2).
1256 Milan Remac, *Coordinating ombudsmen and the judiciary,* p. 125.
1257 Parliamentary and Health Service Ombudsman, *Annual Report 2012–2013. Aiming for Impact,* London, July 2013, p. 20.
1258 Ibid.

services improve, to tell Parliament why things have gone wrong, and to make the complaints system better. Finally, at the "review" stage, the Ombudsman considers complaints about its decisions or service.[1259]

The Ombudsman can also conduct the so-called "intervention short method" to provide faster and more effective complaint resolution without the need for an in-depth investigation. At any stage of the assessment process the Ombudsman can attempt resolution through the intervention method.[1260] These cases can also result in a variety of outcomes, such as an explanation, an apology, or financial compensation.[1261] As Remac points out, the intervention method is a stable part of the UK Ombudsman's practice.[1262]

The investigation procedure is designed to deal with a broad range of complaints by conducting investigation regardless of whether or not there is a reasonable prospect of an Ombudsman investigation leading to a worthwhile outcome. Previously, if there was no a likelihood of a worthwhile outcome, the case was declined for investigation. Thus, the UK Ombudsman sought to make sure that it made the best use of resources in order to maximise the impact of its investigations.[1263] But with the complaint procedure introduced in 2013, the Ombudsman seeks to investigate whether there is a case in need to answer based on indications of injustice linked to a fault or service failure, and whether the injustice is still unremedied.[1264]

8.4.2. FORMULATION OF DECISIONS

In determining whether an instance of maladministration causing injustice has occurred, the UK Ombudsman assesses the behaviour of civil servants against the List of Principles of Good Administration. The purpose of the Principles of Good Administration is to establish a benchmark of good practice and to facilitate fulfilment of those standards.[1265] They underpin the Ombudsman's assessment of the performance of public authorities. The Ombudsman reports are expected to refer back to elements of the Principles in explaining findings of maladministration.

1259 Ibid.

1260 Parliamentary and Health Service Ombudsman, *Annual Report 2009–2010. Making an Impact,* London, July 2010, p. 11.

1261 Ibid., p. 14.

1262 Milan Remac, *Coordinating ombudsmen and the judiciary,* p. 125.

1263 Parliamentary and Health Service Ombudsman, *Annual Report 2008–2009,* p. 9.

1264 Parliamentary and Health Service Ombudsman, *Annual Report 2013–2014. A voice for change,* London, July 2014, p. 13.

1265 Ann Abraham, "The ombudsman and individual rights", p. 373.

The Principles of Good Administration sketch out the Ombudsman's perception of the approach that public bodies should adopt to provide good administration and customer services. Thus, the Principles are fleshed out in broad statements with the purpose of giving guidance to public bodies.

The Principles of Good Administration are not intended to be a checklist, nor are they the final means by which the ombudsman decides individual cases. If the Ombudsman concludes that a public body has not followed the Principles, the institution does not automatically find maladministration. A broad test of fairness and reasonableness is applied by taking into account all the circumstances of each particular case. It is not a "test of perfection".[1266] Hence, the Principles are applied fairly and sensitively to individual complaints.

In the oversight of public service delivery and policy, the UK Ombudsman can influence and contribute to improving the performance of public administration itself. Through its recommendations in individual case reports or special reports submitted to Parliament, the Ombudsman promotes good administrative practice and provides guidance, seeking to prevent any repetition of maladministration. In this regard, as UK Ombudsman official Philipp Mended points out "while providing individual redress is the core business of the UK Ombudsman, promoting wider improvements and the public good is an important function that draws on the evidence from the handling of individual complaints."[1267]

It can be asserted that there is a necessary link between good administration and the improvement of service delivery. As such, the maladministration test allows the UK Ombudsman not only to adjudicate administrative justice as the "purveyor of individual benefit," but also to transcend this function as the "purveyor of much broader public benefit," promoting a sustainable change in the public service culture for the benefit of the entire society.[1268] Thus, the UK Ombudsman is undergoing an evolution from a redressed-based institution – as part of the British administrative justice system – to more of a standard-setting institution that defines guidelines for best public service practices that go beyond maladministration in order to promote good administration.[1269] The UK Ombudsman's List of Principles of Good Administration has a distinctive part to play in that regard.

1266 Based on an interview with Philipp Mende, UK Ombudsman official.

1267 Based on an interview with Philipp Mende, UK Ombudsman official.

1268 Ann Abraham, "The ombudsman as part of the UK constitution: A contested role?", pp. 207–212.

1269 T. Buck, R. Kirkham & B. Thompson, op.cit., pp. 141–144.

8.4.3. CLOSURE OF DECISIONS

UK Ombudsman investigations can lead to three possible decisions regarding the cases brought before it: i) maladministration causing injustice; ii) maladministration not causing injustice; and iii) no instance of maladministration.[1270] In those cases where the investigation finds maladministration, it prepares an investigation report. Before the report is issued, and in order to ensure a fair investigation process, the Ombudsman submits a draft report both to the complainant and to the body subject to the complaint, in order to give both parties a chance to comment on the findings and recommendations before the closure of the investigation.

Upon closure of the investigation, the Ombudsman must send a report with the findings to the MP to whom the investigation request was made. The Ombudsman is also required to send a report to the complainant and to the principal officer of the department or body concerned and to any other person alleged to have been involved in or to have authorised the action complained about. The Act does not state any deadlines for the body concerned to reply to the report. It is important to mention that as part of the investigation process, the UK Ombudsman provides a copy of the draft report to the interested parties so that both the complainant and the body complained about have the opportunity to comment on the findings and recommendations before the Ombudsman finalises them.[1271] In the event that the investigation finds no instance of maladministration, the Ombudsman usually rejects the complaint without a report and sends the MP and the complainant a "statement of reasons for not investigating a complaint."[1272]

The recommendations of the Ombudsman are not legally binding.[1273] However, if it appears that injustices have been caused in consequence of maladministration and these injustices have not been, or will not be, remedied, the Ombudsman may submit a special report on the case to each chamber, and may recommend that disciplinary or penal proceedings be brought against any official mentioned

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1270 Milan Remac, *Coordinating ombudsmen and the judiciary,* p. 125.

1271 Based on an interview with Philipp Mende, UK Ombudsman official.

1272 Milan Remac, *Coordinating ombudsmen and the judiciary,* p. 125.

1273 However, if the government decides to reject the Ombudsman's findings or recommendations, this decision can be taken to judicial review by the complainants, and the High Court can quash it, thus "enforcing" the Ombudsman's findings or recommendations. One example of this is in Bradley vs. Secretary of State for Work and Pensions [2008] EWCA Civ 36. See www.landmarkchambers.co.uk/cases-r_bradley_and_others_v_secretary_of_state_for_work_amp_pensions.aspx. On the Bradley Case and the enforceability of the ombudsman's recommendations through judicial review see R. Kirkham, B. Thompson & T. Buck, "When putting things right goes wrong: Enforcing the recommendations of the ombudsman", in *Public Law*, 2008, pp. 510–530.

in the reports.[1274] The Public Administration and Constitutional Reform Committee (which replaced the Select Committee on Public Administration)[1275] has the power to apply political pressure to government departments to provide remedies in cases where these departments have shown reluctance to do so. The Select Committee also scrutinises the annual reports of the ombudsman. Thus, although the Ombudsman's recommendations do not have a legally binding effect, they have an indirect legal effect to the extent that, as soft law instruments, they aim to produce practical effects.[1276]

The investigation procedure is marked by relative informality, equitable principles, and flexibility, and seeks to deliver an effective and appropriate remedy to both parties. In this sense, the investigation function consists of establishing the facts, applying the principles, and making definitive findings, leading to the proposal of remedial action. The task is to adjudicate upon the issues arising, making judgments that are informed by evidence and principle.[1277]

8.5. THE UK OMBUDSMAN AS A DEVELOPER OF GOOD GOVERNANCE NORMS

8.5.1. FROM MALADMINISTRATION TO GOOD GOVERNANCE

As mentioned, maladministration is the central notion of the ombudsman system in the UK. Despite its lack of definition, the term has proven to be elastic enough to allow the UK Ombudsman to perform its tasks. However, this vagueness was understood by one former incumbent as potentially encouraging an unintended side effect of evasion.[1278] Thus, an update of the concept was promoted in order to relate maladministration to current concerns regarding the place of the Ombudsman and what to expect from the administration in the UK constitutional framework. The Principles of Good Administration represent a positive approach to maladministration. They express shared understandings of what makes for good administration and of the respective roles of the Ombudsman, the Parliament, the government, and the judiciary.[1279] In this

1274 1967 Act, Section 10(3).
1275 Which in turn replaced the Select Committee on the Parliamentary Commissioner for the Administration.
1276 On soft law and legal effect, see Section 2.1.2.
1277 Ann Abraham, "The ombudsman as part of the UK constitution: A contested role?", pp. 208–209.
1278 Ann Abraham, "Good administration: Why we need it more than ever", pp. 25–26.
1279 Carol Harlow & Richard Rawlings, op.cit., p. 535.

regard, the Principles of Good Administration have significant constitutional implications.[1280]

According to the UK Ombudsman, the Principles of Good Administration endorse the principles of legality, flexibility, transparency, fairness, and accountability.[1281] It may be said that these principles also reflect good governance principles such as properness (legality and fairness), transparency, accountability, and effectiveness (flexibility). Consequently, specific good governance-based standards may stem from the UK Ombudsman's Principles of Good Administration.

The UK Ombudsman has set out what the Principles of Good Administration mean in practice, giving further details on each of them. From the above statements some normative values can be deduced. This paper takes a two-stage approach to considering the general values protected by the Principles of Good Administration. First, because the Principles have been developed as active descriptions of the behaviour expected of the administration, an attempt is made to translate the broad statements into specific standards or sub-principles. Secondly, the general values that underlie each standard are identified.

In so doing, this paper intends to obtain a clearer perspective of both the standards-values asserted by the Principles of Good Administration and the relationship between the Principles, good governance, and the fundamental values of the modern constitutional state.[1282] Table 6 shows the sub-principles extracted from the UK Ombudsman's set of Principles of Good Administration.

As mentioned above, the Principles of Good Administration are: (1) getting it right; (2) being customer focused; (3) being open and accountable; (4) acting fairly and proportionately; (5) putting things right; and (6) seeking continuous improvement. As UK Ombudsman official Philipp Mende points out, the Principles are a form of guidance, not a statutory entitlement that can be legally enforced.[1283]

1280 Ibid.

1281 Parliamentary and Health Service Ombudsman, *Ombudsman's introduction to the principles*, available at https://www.ombudsman.org.uk/about-us/our-principles/ombudsmans-introduction-principles (last visited on 17 December 2013).

1282 Described as specific normative standards, the sub-principles of good administration can be considered a more suitable tool for comparison.

1283 Based on an interview with Philipp Mende, UK Ombudsman official.

According to the principle of "getting it right," public bodies are required to act in accordance with the law and out of respect for the rights of those concerned.[1284] Thus, public bodies should act in congruence with their statutory powers and duties and any other rules governing the service they provide. On the other hand, breaches of human rights may inform findings of maladministration where a public authority has failed to give due consideration to human rights legislation (sub-principle: respect for human rights).[1285] Human rights principles (such as respect, equality and dignity) add weight to the ombudsman's adjudication.[1286]

The fact that the Ombudsman already deals with complaints related to dignity and rights in public services (in areas such as health care and persons with disabilities) makes it possible to develop these issues as matters of good administrative standards.[1287] Thus, through the "Getting it right" principle the UK Ombudsman establishes a fluid association between law and maladministration.[1288] Therefore, the Ombudsman's understanding is clearly that an infringement of law may imply maladministration.

In addition, "getting it right" means that public bodies should follow their own policy and guidance, whether published or internal (sub-principle: policy guidance). They must also act in accordance with established good practice, recognised quality standards, or both (sub-principle: good practice orientation). When they decide to depart from these, they should record why. Likewise, public bodies should provide effective service through duly trained and competent staff (sub-principle: provision of effective service). Decision-making process should be reasonable, taking account of all relevant considerations and balancing the evidence appropriately (sub-principle: carefulness).[1289] From this perspective, "getting it right" reflects a wider context of managerial and risk assessment[1290] but also a connection with a broad concept of legality and legal certainty.

1284 Parliamentary and Heath Service Ombudsman, *Principles of Good Administration*, London, 2009, p. 6.

1285 T. Buck, R. Kirkham & B. Thompson, op.cit., p. 38.

1286 Parliamentary and Health Service Ombudsman, *Ombudsman's introduction to the principles*, available at https://www.ombudsman.org.uk/about-us/our-principles/ombudsmans-introduction-principles (last visited on 17 December 2013).

1287 T. Buck, R. Kirkham & B. Thompson, op.cit., p. 38.

1288 R. Kirkham, B. Thompson & T. Buck, loc.cit., p. 604.

1289 Parliamentary and Heath Service Ombudsman, *Principles of Good Administration*, p. 6.

1290 Carol Harlow & Richard Rawlings, op.cit., p. 536.

Table 6. List of Sub-principles Taken from the Principles of Good Administration Developed by the UK Ombudsman

Principles	Sub-Principles
Getting it right	– Compliance with law and human rights – Policy guidance – Good-practice orientation – Provision of effective service – Reasonableness
Being customer focused	– Accessibility of services – Information on entitlements (provision of information) – Keeping of commitments – Customer approach – Flexibility
Being open and accountable	– Transparency – Giving reasons – Good information handling – Keeping of adequate records – Responsibility
Acting fairly and proportionately	– Impartiality and courtesy – Prohibition of discrimination and no conflict of interests – Objectivity – Proportionality and fairness
Putting things right	– Acknowledgement of mistakes – Putting mistakes right – Indication on remedies – Good complaint handling
Seeking continuous improvement	– Review of policies and procedures – Asking for feedback – Self-learning orientation

In turn, the principle of "being customer focused" implies that public bodies should ensure that citizens can access services easily (sub-principle: accessibility of services). Along these lines, policies and procedures should be clear and accurate, complete, and understandable information must be available about the service. Public bodies must inform citizens about their entitlements so that they are clear about what they can expect from each body (sub-principle: provision of information). Bodies should keep their commitments, including published service standards, or else explain why they cannot do so (sub-principle: keeping of commitments).[1291]

Furthermore, "being customer focused" means that public bodies should deal with citizens helpfully and promptly, taking into account their individual

[1291] Parliamentary and Heath Service Ombudsman, *Principles of Good Administration*, p. 7.

circumstances, as well as communicating with them effectively using clear language (sub-principle: customer approach). They should treat people flexibly, bearing in mind their individual needs and the circumstances of the case in question, including, where appropriate, coordination of a response with other service providers (sub-principle: flexibility).[1292]

The principle of "being open and accountable" implies that public bodies should be open and clear about policies and procedures, and information should be handled as openly as the law allows (sub-principle: transparency). These bodies should give citizens information and advice that is clear, accurate, complete, relevant, and timely (sub-principle: provision of information). They should state the criteria and decision-making and give reasons for their decisions (sub-principle: giving reasons). Information should be properly handled and processed in line with the law, while privacy of personal information should be respected (sub-principle: good information handling). Public bodies should create and keep appropriate records as evidence of their activities (sub-principle: keeping of adequate records). They also should take responsibility for their actions (sub-principle: responsibility).[1293]

The principle of "acting fairly and proportionately" involves treating people impartially, with respect and courtesy. Public bodies should be prepared to listen to their customers and avoid being defensive when things go wrong. They should treat people equally and impartially while respecting diversity (sub-principle: Impartiality and courtesy). These bodies should act without discrimination and ensure no conflict of interest (sub-principle: prohibition of discrimination and no conflict of interest). They also should treat people objectively and consistently. Accordingly, those in similar circumstances should be dealt with in a similar way, and difference in treatment should be justified by the individual circumstances of the case (sub-principle: objectivity and consistency). Each body should ensure that decisions and actions are proportionate and fair to the individuals concerned. If strict application of the law, regulations, or procedures is shown to lead to an unfair result, the administration should seek to address this unfairness without exceeding its legal powers (sub-principle: proportionality and fairness).[1294] In this way, the Ombudsman may uphold a complaint even if a public organization has acted within the law, but where the treatment of an individual citizen has nevertheless been unfair and led to injustice.[1295]

1292 Ibid.
1293 Ibid., p. 8.
1294 Ibid., p. 9.
1295 Based on an interview Philipp Mende, UK Ombudsman official.

The principle of "putting things right" means acknowledging mistakes, apologising where appropriate, and explaining what went wrong (sub-principle: acknowledgement of mistakes). This also implies putting mistakes right quickly and effectively, which may involve reviewing any decisions found to be incorrect as well as reviewing and amending any policies and procedures found to be ineffective, giving appropriate notice before changing rules (sub-principle: putting mistakes right). Public bodies should provide clear and timely information about the methods by which citizens can appeal or complain (sub-principle: indication of remedies). In addition, public bodies should operate effective complaint procedures, including offering a fair and appropriate remedy when a complaint is upheld. As a minimum, an appropriate range of remedies should include an explanation and apology from the public body, remedial action, financial compensation, or a combination thereof.[1296] The remedy offered should seek to restore the complainant to the position in which they would have been if nothing had gone wrong (sub-principle: good complaint handling).[1297]

Meanwhile, the "seeking continuous improvement" principle implies reviewing policies and procedures regularly to ensure they continue to be effective (sub-principle: review of policies and procedures) as well as asking for feedback and using it to improve service and performance (sub-principle: asking for feedback). This also includes ensuring that public bodies learn lessons from complaints and use these lessons to contribute to developing services (sub-principle: Self-learning orientation).[1298]

As already mentioned, an attempt is made here to capture the elements and general values protected by the List of Principles of Good Administration. These were sought in the description of each Principle provided by the Ombudsman, as well as in the special reports and digests of cases that describe their application.[1299] Table 7 outlines the outcome of this research.

1296 Parliamentary and Heath Service Ombudsman, *Principles of Good Administration*, p. 10.

1297 According to the UK Ombudsman, good complaint handling and providing fair and proportionate remedies are an integral part of good administration. The same key principles apply to each. The document Principles of Good Administration should be read in conjunction with the documents Principles of Good Complaint Handling and Principles for Remedy. Both documents are also available on the website of the UK Ombudsman.

1298 Parliamentary and Heath Service Ombudsman, *Principles of Good Administration*, p. 5.

1299 For a more detailed description of the content of some principles, see Section 8.5.2.

Table 7. List of Principles of Good Administration in Relation to the General Values Protected by the UK Ombudsman

Principles	**Sub-principles**	
	Sub-principles	***Elements / Values***
Getting it right	Compliance with law and human rights	Compliance with the law (Lawfulness) Respect for human rights (Lawfulness)
	Policy guidance	Legitimate expectations
	Good practice orientation	
	Provision of effective service	Trained staff
	Carefulness (due care or due diligence)	
Being customer focused	Accessibility of services	
	Information on entitlements (Provision of information)	
	Keeping of commitments	Legitimate expectations
	Customer approach	Promptness Helpfulness Effective communication Use of clear language
	Flexibility	Flexibility Cooperation
Being open and accountable	Transparency	Clear drafting Access to information
	Provision of information	Adequate information Publication of information Giving advice
	Giving reasons	Due process
	Good information handling	Handling information properly Protection of personal data
	Keeping of adequate records	
	Responsibility	
Acting fairly and proportionately	Impartiality and courtesy (Respect)	Impartiality Courtesy Listening to customers Avoiding being defensive (Forbearance)
	Prohibition of discrimination and no conflict of interests	Prohibition of discrimination (Equality) No conflict of interest (Abuse of power)
	Objectivity and consistency	Objectively Consistency
	Proportionality and fairness	Proportionality Fairness

Principles	**Sub-principles**	
	Sub-principles	***Elements / Values***
Putting things right	Acknowledgement of mistakes	Apologies for mistakes Explanation of mistakes
	Putting mistakes right	Review of incorrect decisions Amendment of decisions Notice of rule changes
	Indication on remedies	
	Good complaint handling	Effective complaints procedure Appropriate remedy
Seeking continuous improvement	Review of policies and procedures	
	Asking for feedback	
	Self-learning orientation	

A preliminary outcome of the analysis is that, in practice, the UK Ombudsman judges the behaviour of the administration in terms of both the lawfulness and the appropriateness of governmental action[1300], based on its assessment of administrative bodies according to the Principles of Good Administration. Hence, although the Ombudsman is not allowed to interpret the law, its findings may be informed by legal considerations.[1301] This means that theoretically speaking, the UK Parliamentary Ombudsman's Principles of Good Administration can be divided into two groups: standards connected to legal principles (linked to the notion of rule of law); and ii) rules of good administrative conduct.

In relation to the first group of standards (legal principles) nine central criteria might be discerned: 1) legality; 2) legitimate expectations; 3) legal certainty; 4) reasonableness; 6) fairness; 5) equality; 7) due process; 8) prohibition of arbitrariness; and 9) human rights. These criteria are manifestly connected with the rule of law; however, it should be borne in mind that the Ombudsman applies them in a different manner than do the British courts, to the extent that good administration goes further than legal standards alone and that legality is not the immediate approach of the institution.[1302]

As to the second group of standards, they can be divided into the following criteria: 1) flexibility; 2) promptness; 3) courtesy; 4) customer approach; 5) good-practice orientation; 6) forbearance[1303]; 7) good information handling; 8)

1300 See M. Remac & P.M. Langbroek, loc.cit., p. 158.
1301 R. Kirkham, B. Thompson & T. Buck, loc.cit., p. 605.
1302 In that regard see Milan Remac, Coordinating ombudsmen and the judiciary, p. 119ff.
1303 According to the "acting fairly and proportionately" principle, public bodies should be prepared to listen to their customers and avoid being defensive when things go wrong. This quality is labeled here as "forbearance," and is considered an element of the sub-principle "Impartiality and courtesy".

keeping records; 9) acknowledgement of mistakes; 10) putting mistakes rights; 11) review of policies and procedures; and 12) self-learning orientation, among others. All of these sub-standards are managerial in character. They stress the need for personal initiative, responsibility, and discretion.[1304] It can be concluded that the criteria applied by the Ombudsman is related to the good governance (steering) dimension of the modern constitutional state in connection with the principles of properness, transparency, and effectiveness as good governance principles.

This in turn corresponds to the fact that maladministration has been developed in the common law tradition as a concept that goes beyond law.[1305] It may be said that the Principles of Good Administration are intended to protect the constitutional values inherent in the rule of law, broadly considered, in the form of good governance-based standards.

8.5.2. APPLICATION OF GOOD GOVERNANCE-BASED STANDARDS IN THE OMBUDSPRUDENCE OF THE UK OMBUDSMAN

8.5.2.1. Normative standards in practice

The UK Ombudsman's Principles of Good Administration reflect good governance principles. Their application, described in annual reports, special reports, and digests of cases, develops the normative content of specific good governance-based standards. Some examples of the development of each of the six principles contained in UK Ombudsman reports will now be introduced.

Getting it right: acting in accordance with policy guidance[1306]

Following a stroke in 1998, Mrs N started receiving the highest rate care component and a higher rate mobility component of disability living allowance in September 1999. The award was made on the basis that she needed assistance during the day and help with going to the toilet at night. In October 2004, Mrs N completed a form to renew her award as of March 2005. At the request of the Disability and Carers Service (now the Pension, Disability, and Carers Service), Mrs N was examined by a doctor as part of the procedure. Based on the doctor's opinion, in December 2004 a decision-maker considered Mrs N's application

1304 Carol Harlow & Richard Rawlings, op.cit., p. 537.
1305 K.C. Wheare, *Maladministration and its remedies*, London: Stevens & Sons, 1973.
1306 Parliamentary and Health Service Ombudsman, *Improving public service: A matter of principle*, First Report Session 2008–2009, December 2008, pp. 37–39.

and awarded her the middle rate care component, refusing her the highest rate. Mrs N was notified of the decision and her appeal rights. Mrs N did not appeal because she had entrusted supervision of her financial affairs to her daughter (Ms E).

In the summer of 2006, the Independent Living Funds (which provide grants to help severely disabled people to live in the community) told Ms E that her mother's funding had to stop because Mrs N no longer received the highest rate care component. On 19 June, Ms E asked the Disability and Carers Service to look again at her mother's award. In response, a decision-maker found that Mrs N's help with going to the toilet amounted to prolonged attention and awarded the highest rate care component and the higher rate mobility component from 19 June 2006, but refused to backdate the award, as Mrs N had not notified them within one month of the 'change' in her circumstances. On 4 September 2006 Ms E appealed against the decision not to backdate her mother's award. The Disability and Carers Service told Ms E that it could not review the December 2004 decision because the time limit for appeals had expired.

In October 2006 Ms E complained to the Ombudsman on her mother's behalf. The Ombudsman considered there to be significant shortcomings in the way that the decision to reduce Mrs N's disability living allowance had been taken. In the Ombudsman's opinion, the Disability and Carers Service failed to recognise that the medical report provided by Medical Services was not fit for purpose, due to, among other things, unexplained inconsistencies in the assessment of Mrs N's needs. Despite all this, the report was not referred back to Medical Services for revision as the procedures require. Thus, the decision-maker had inadequate and incomplete information on which to make a decision, and failed to take all relevant facts into account when doing so.

According to the ombudsman, the situation involved a breach of the "getting it right" principle of good administration, which includes an expectation that public bodies should, among other things, follow their own policies and procedural guidance and make proper decisions, giving due weight to all relevant considerations. In this case, the ombudsman considered that the failure to send back the medical report for revision, together with the failure to take into account all relevant facts in coming to a decision, fell so far short of reasonable expectations that it amounted to maladministration.[1307]

[1307] In this case, the Ombudsman also found that the Disability and Carers Service did not follow the "Putting things right" principle. On this, the Ombudsman pointed out: "'Putting things right', including putting mistakes right quickly and effectively, is another of the principles. The Disability and Carers Service missed an opportunity to put matters right when Mrs N appealed against the decision not to backdate the new award. Although Mrs N did not specifically ask for the matter to be looked at on the grounds of official error, there are good

The Ombudsman concluded its investigation in August 2007 and upheld Ms E's complaint. The ombudsman recommended that the Disability and Carers Service apologise to Ms E and her mother; remade the decision of December 2004 and awarded £100 in compensation to Mrs N and £250 to Ms E.

Being customer focused: consideration of individual circumstances[1308]

Mr C undertook seasonal work from March to September 2005. In February 2006 the Citizens Advice Bureau sent HMRC a tax credit application form, together with a letter asking for the award to be backdated for the period of Mr C's employment. The letter explained that Mr C had been unable to look after his financial affairs for some time because of mental health problems and hospitalisation.

HMRC wrongly treated Mr C's application as a fresh claim and awarded tax credits from 10 February 2006 onwards. An award notice was issued on 10 March, which also set out the award for the period 2006–07. In June 2006, Mr C's mother (Mrs M) told HMRC that it had paid Mr C tax credits to which he was not entitled. HMRC terminated the award and sent Mr C notification stating that he had been overpaid by £578.88 for 2005–6 and £605.08 for 2006–07.

Mrs M complained to the adjudicator, who found no grounds for asking HMRC to remit the overpayments. She said that it was clear from the March 2006 notice that the award was for the period from 10 February 2006 onwards, and it was not reasonable for Mr C to think he was entitled to the payments received. Mr C successfully appealed against HMRC's decision not to backdate his award for the period of his employment and received arrears of £964.81.

Mr C complained to the Ombudsman that recovery of the overpayment would deny him his due benefit entitlement (his income support payments had stopped when he was awarded tax credits, and could not be reinstated retrospectively). He also complained that the adjudicator had endorsed HMRC's decision not to remit the overpayment. The Ombudsman upheld Mr C's complaint. The Ombudsman determined HMRC knew in February 2006 that Mr C had no ongoing entitlement to tax credits, but it did not terminate the award until June.

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grounds for officers to have recognised the possibility of such an error and to have addressed it. By that time, Mrs N was considered eligible for the highest rate care component from June 2006 on much the same grounds as in 1999. This, together with the contents of the GP's letter, should have suggested strongly that the December 2004 decision might need reviewing. This, too, was maladministration. The injustice flowing from the above maladministration was that Ms E suffered worry and uncertainty, while Mrs N was denied a proper consideration of her application."

1308 Parliamentary and Health Service Ombudsman, *Annual Report 2007–2008. Bringing wider public benefit from individual complaints,* London, October 2008, p. 19.

In the opinion of the Ombudsman, when considering whether to remit the overpayments, HMRC and the adjudicator took insufficient account of Mr C's personal circumstances, which were such that he was in no position to check his award notice. HMRC agreed to remit the overpayments (accepting that the tax credit award had prevented Mr C from receiving his due income support entitlement).

Being open and accountable: giving reasons[1309]

Mr H had been working in Spain for many years until ill health forced him to give up his job and return to the UK in January 2005. In November, Mr H was signed off by his doctor until March 2006. Jobcentre Plus advised him to claim disability living allowance (which he did on 11 November 2005) and income support (which he did on 5 December). Following his income support application, Jobcentre Plus told Mr H that as he was aged 61 he should claim pension credit instead. Mr H said that he then claimed pension credit twice during January 2006 and that his applications were lost in the system. He completed another application in March 2006 and was awarded pension credit, backdated to 5 December 2005. According to Mr H, he had to increase his bank overdraft because of the delay and incurred charges. (Bank statements for the period between December 2005 and March 2006 show charges totalling £123.52 in the form of interest on amounts overdrawn.)

Mr H's financial problems and ill health were further exacerbated when his son was killed while abroad in February 2006. Mr H had to pay funeral costs of more than £4,000, and was awarded a social fund funeral payment of £989 by Jobcentre Plus. Mr H appealed, as he felt he should have been awarded the full funeral costs. Jobcentre Plus then realised that it should not have made a funeral payment: the funeral took place outside the UK and neither Mr H nor his late son met the other entitlement criteria.

Meanwhile, Mr H's application for disability living allowance had been refused in January 2006. Jobcentre Plus advised him to claim incapacity benefit; that claim was also refused as he had not paid in enough National Insurance contributions in the two years prior to his application. Mr H appealed, on the grounds that he had been paying contributions into the Spanish system. Mr H telephoned Jobcentre Plus in March to discuss the refusal of his incapacity benefit application, and agreed to send them details of his earnings in Spain. Jobcentre Plus received this information from Mr H in April 2006 and forwarded

[1309] Parliamentary and Health Service Ombudsman, *Improving public service: A matter of principle*, pp. 51–53.

it to the International Pension Centre. It, in turn, requested further information from Mr H, which he submitted to his local job centre on 12 May.

In August 2006, Mr H referred his complaint to the Ombudsman. The Ombudsman declined to investigate at that time as he had not gone through the Jobcentre Plus complaints procedure. The Ombudsman referred Mr H's complaint to the Chief Executive of Jobcentre Plus, giving her an opportunity to resolve the issues. In December the Chief Operating Officer of Jobcentre Plus responded to Mr H's complaint. He apologised for the poor advice Jobcentre Plus had given Mr H about income support and pension credit, confirming that Mr H had since been paid pension credit arrears. In addition, he apologised for losing Mr H's initial pension credit application. The COO explained why the incapacity benefit claim had been refused and provided an update on the progress of this in relation to Mr H's overseas contributions. He also apologised for the information that Mr H had provided in May 2006 not being forwarded to the International Pension Centre until November 2006. Finally, he provided an explanation for Mr H's funeral payment award and confirmed that he would not be asked to repay it, as this was due to an official error.[1310]

Acting fairly and proportionately: respect and dignity[1311]

Mr N was seriously injured during a robbery over ten years ago. He lost his sight, suffered brain damage, and needed major surgery to his face. Following the attack, his solicitors applied to the Criminal Injuries Compensation Authority for compensation. A year after the robbery, the Authority obtained evidence that strongly suggested Mr N would never be able to work again. Yet five years later, when it made its final award, it decided Mr N would not need care in the future and that he would be able to return to work. When Mr N's solicitors appealed, it took three years for the Authority to revise its decision and award him £500,000.

1310 It is important to mention that Mr H felt the response from Jobcentre Plus did not resolve his complaint, and he asked the Ombudsman to look again at his grievances. The Ombudsman decided to investigate his complaint in July 2007. The Ombudsman considered that Jobcentre Plus were maladministrative in failing to compensate him for the bank charges and other expenses incurred as a result of the delay in paying him pension credit because of their misdirection. In this regard, the Ombudsman found that Jobcentre Plus failed to provide a remedy, which fairly reflects the harm someone has suffered ('putting things right'). In addition, there was no evidence that they took into consideration Mr H's individual circumstances and so fell short of meeting the reasonable expectations as set out in the Principles of Good Administration ("being customer focused" and "acting fairly and proportionately"). The Ombudsman recommended that Jobcentre Plus apologise to Mr H and pay him £200 in compensation for the worry, inconvenience, time and trouble to which he was put; £20 to cover his bank charges; £70 towards his telephone costs; and £20 towards his petrol charges.

1311 Parliamentary and Health Service Ombudsman, *Annual Report 2010–2011. A service for everyone*, London, July 2011, p. 19.

Mr N's brother complained about the delay and the Authority offered £6,000 in compensation. When it declined a request to increase the amount, Mr N's brother complained to the UK Ombudsman. The Ombudsman's investigation found that Mr N's award payment was delayed by at least six years.

The Ombudsman concluded that the Authority failed to treat Mr N with respect and dignity, causing distress, frustration, and inconvenience to him and his family. The years of delay had also deprived him and his partner of the chance to improve their living conditions, which were unsuitable for his needs. The Authority's Chief Executive apologised for its mistakes and the impact on Mr N and his family. The Authority paid him £80,000, which included compensation for its poor handling of the complaint.

Putting things right: complaint handling[1312]

Mr F complained that incorrect information provided by the Immigration and Nationality Enquiry Bureau (INEB) of the Home Office Immigration and Nationality Directorate (IND) had caused him and his wife to suffer a financial loss. On 19 August 2003, Mrs F was granted entry clearance to the UK as a spouse of a British national at a UK High Commission. The visa was valid for two years and Mrs F entered the UK on 5 September 2003. The IND advised that to qualify for indefinite leave to remain, a spouse must have completed two years in the UK as a holder of a spouse visa.

The Ombudsman found that Mr F had telephoned INEB on several occasions in March 2005 to ask when his wife would be eligible to apply for indefinite leave to remain in the UK. The information he was provided was incomplete, since he was not asked for the date when his wife had entered the UK. Unaware that she would in fact be unable to apply until August, Mr F made plans to travel abroad on 29 July. On discovering that the date he had been given was incorrect, Mr F complained to the IND complaints unit. It was unable to confirm what information he had been given because it was unable to access recordings of his telephone calls due to technical problems.

Mr F's MP took up his case with the Home Secretary, who suggested that Mrs F should apply for a short extension to her visa to enable her to travel at the end of July, and that Mr F could complain to the IND complaints unit. The unit, having finally listened to the telephone calls, rejected Mr F's complaint, stating that he

[1312] Parliamentary and Health Service Ombudsman, *Annual Report 2005–2006. Making a difference*, London, 2006, p. 12 (Case study Ref. PA-9800). On the requirement of good complaint handling, see also Parliamentary and Health Service Ombudsman, *Responsive and accountable? Statistical report on complaint handling by government departments and public organisations 2011–2012*, December 2012.

had not given the officer Mrs F's date of arrival in the UK. Meanwhile, Mrs F was granted a short extension to enable her to travel abroad and applied for indefinite leave to remain on her return to the UK. This required a total payment of £835, including a postal fee of £335, which Mr F asked IND to refund. Further letters from the MP to the Home Secretary did not resolve Mr F's complaint.

Following the Ombudsman's enquiries, IND agreed that telephone officers are expected to ensure they gather all the relevant information, but had not done so in Mr F's case. Furthermore, the officer investigating Mr F's complaint had not considered the issue of effective questioning at all. The Ombudsman considered that had IND done so, Mr F's complaint could have been resolved much sooner and without the Ombudsman's intervention. IND agreed to refund the cost of the postal fee of £335 to Mr and Mrs F. It also apologised for the stress and inconvenience caused and offered a consolatory payment of £50 in compensation. It also took measures to ensure that telephone officers ask appropriate questions in order to give accurate advice to callers.

Seeking continuous improvement: review of policies and procedures[1313]

In this case, when Ms F, a nursery owner in a small town in Kent, discovered that the Office for Standards in Education, Children's Services and Skills (OFSTED) had made mistakes in the report relating to its inspection of her nursery, she asked them to rectify these mistakes. Instead of doing so, OFSTED published the uncorrected report on its website. It later declared the report null and void, but not in time to prevent damage to Ms F's business.

Distressed, angry, and embarrassed, Ms F contacted the UK Ombudsman asking for help. The Ombudsman stated that like many other businesses, childcare providers rely on a good local reputation for their livelihoods. Therefore, the Ombudsman do not expect bodies to suspend their legal duties to publish decisions simply because someone makes a complaint, but do expect them to have mechanisms in place to ensure that those decisions are robust. In the Ombudsman's opinion, this is vital when the potential consequences of publishing a potential unsound report are great.

OFSTED accepted all of the Ombudsman's recommendations for remedy. It apologised and compensated Ms F for financial loss and interest on the money she borrowed to keep her business going during the period in question. It also agreed to review its policy on publishing reports that are disputed, and to notify parties if a report has been withdrawn.

[1313] Parliamentary and Health Service Ombudsman, *Annual Report 2011–2012. Moving forward*, London, July 2012, p. 16.

8.5.2.2. Ombudsnorms as good governance-based standards

The application of Principles of Good Administration by the UK Ombudsman may also be described in accordance with the good governance scheme developed as part of the normative framework proposed here. The focus is on transparency (provision of information) and properness (carefulness). It is important to mention that while participation is also an element for comparison, no cases referring to this principle were found in the case of the UK Ombudsman; only those concerning the handling of complaints by the Health Service Ombudsman.[1314] In addition, there is no direct reference to participation in UK Ombudsman's Principles of Good Administration.

a. Properness: carefulness

The requirement of carefulness or due care is included in the List of Principles of Good Administration as one of the elements of the "getting it right" principle. This requirement means that decision-making should take account of all relevant considerations, ignore irrelevant ones, and balance the evidence appropriately. The UK Ombudsman has applied and developed this particular requirement in the following cases.

Case: Mr P's complaint about the Immigration and Nationality Directorate (IND)
Mr P complained in 2006 that his asylum application, made in November 1998, remained unsolved. Mr P arrived in the UK in 9 November 1998 and applied for asylum. On 18 October 1999 he was granted exceptional leave to remain in the UK for one year, without consideration being given to the IND's then policy on the former Federal Republic of Yugoslavia, his country of origin. On 1 November 2000, Mr P's solicitors wrote to IND asking about his application's progress. IND (now the Border and Immigration Agency) interviewed Mr P on 25 January 2001. Mr P's asylum application was refused on the same day, but the letter setting out the full reasons for refusal and the appeal papers were never sent. The IND were unable to explain why this occurred, other than attributing it to a processing error.

[1314] Accordingly, when asked for an example regarding participation related to the UK Ombudsman's performance, UK Ombudsman official Philipp Mende made reference to cases in which patients needed to give their consent to medical treatment, and the extent to which they were actively involved in decision-making about their healthcare. He did not frame participation from a political or collective dimension. This individualised approach to participation could relate to the fact that a significant part of the UK Ombudsman's work deals with complaints involving the National Health Service. Based on an interview with Philipp Mende, UK Ombudsman official.

Following this, Mr P's file was moved around within the IND and, despite letters from Mr P's MP and solicitors, no action was taken on his application. Moreover, his solicitors did not receive replies to their letters. Finally, in late 2005, the IND withdrew the decision of 25 January 2001 but took no further action and failed to inform Mr P's solicitors, although it later confirmed the decision to Mr P's MP and said that an asylum team was dealing with his case.

In August 2006, the IND wrote to Mr P informing him of its decision to remove his permission to work, but reinstated it promptly following a letter from Mr P's MP and the Ombudsman's intervention asking them to do so. The Ombudsman found that the IND's handling of Mr P's application was exceptionally poor. His file had been unnecessarily moved around the Directorate and incorrectly placed in holding areas. The IND failed on a number of occasions to rectify the situation, even though in the later stages it was aware of its failure in serving the refusal of asylum decision on Mr P. In addition, it consistently failed to inform Mr P or his solicitors of the current status of his application.

The IND acknowledged that it had handled Mr P's case poorly. To remedy matters it agreed to invite Mr P to an interview so that he could put forward any additional information before it made a decision on his application; apologised to Mr P, his solicitors, and his MP for their poor handling and the avoidable delay in resolving his application; and awarded Mr P a consolatory payment of £250 in compensation for the distress and inconvenience he had suffered.[1315]

Case: Mr Q's complaint about Jobcentre Plus and the Child Benefit Office
Before 9 April 2001, bereavement benefits were only available to married women whose husbands had died. Following a change in the law, from 9 April 2001, widowed mother's allowance was replaced by the new widowed parent's allowance, payable to widows and widowers alike. Part of the eligibility criteria was that applicants had to be entitled to child benefit for at least one qualifying child. Claims could only be backdated three months at most.

Mr Q's wife died in February 1998. He then took responsibility for bringing up their son, for whom Mrs Q had claimed child benefit. Mr Q was given leaflets from various sources (including the Child Benefit Office), but he could see that he was not entitled to widowed mother's allowance and so did not make a claim. Subsequently, Mr Q was not sent the letter about widowed parent's allowance. Although his computerised child benefit record should have been cross-referenced to Mrs Q's account (and so picked up by the scan), it later transpired

1315 Parliamentary and Health Service Ombudsman, *Annual Report 2006–2007. Putting principles in practice,* London, July 2007, p. 15 (Case study Ref. PA-16220).

that the scan had not recognised his record as being that of a widower because the cross-reference had been noted in a wrong section of his record.

In November 2005 Mr Q saw a television program that mentioned the possibility of widowers claiming widowed parent's allowance. He claimed the same day and was awarded the allowance backdated for three months. Mr Q appealed against the backdating decision, partly on the grounds that he had not been made aware that widowers could claim the allowance. Jobcentre Plus reconsidered, but ultimately did not change, its decision. However, the decision-maker asked if it would be appropriate to make Mr Q an *ex gratia* payment on the grounds that he had not been invited to claim when the law changed. Mr Q's subsequent appeal was disallowed in March 2006.

In response to enquiries from Jobcentre Plus, the Child Benefit Office said that it could not confirm whether it had sent Mr Q a widowed parent's allowance claim form because no clerical records of the scan results or the letters sent had been kept. It also said that none of the criteria which might have identified him as a widower was shown on Mr Q's child benefit account and so he would not have been identified by the scan. In October 2006, Jobcentre Plus refused Mr Q an *ex gratia* payment, stating that it in the Child Benefit Office's view "the onus remained with the individual customer to make a claim for benefit; the basis being that the change in provision was widely advertised and information about [sic] was freely available to the general public. I surmise therefore that there was no mandatory obligation to invite and consequently no departmental error. It follows that a special payment cannot be made."

Mr Q complained to the Ombudsman, in November 2006, that the Child Benefit Office's scan had failed to identify him as eligible to claim widowed parent's allowance, and that Jobcentre Plus had not fully considered all the circumstances of his case when deciding his request for an *ex gratia* payment. He said he had missed out on about £27,000 due to these failures. In investigating Mr Q's complaint, the Ombudsman considered whether Jobcentre Plus's actions were in line with the standards it had established.

Although the child benefit scan was relatively successful (in that it used a database, which was not intended for the purpose, to identify some 11,688 widowers to whom information was sent about changes to bereavement benefits), there were several types of widowers whom the scan could never have identified, of which cases such as that of Mr Q, where the Child Benefit Office had misfiled the cross-reference to his wife's previous record, was just one. In this regard, the Ombudsman found that Jobcentre Plus should reasonably have known there was every chance that potentially significant numbers of eligible widowers would not be identified by the scan. The Ombudsman considered that the scan was

inadequate and that the publicity campaign was insufficient to remedy the scan's defects, and that Jobcentre Plus's reliance on them to tell existing widowers about their new entitlements amounted to maladministration.

In addition, according to the Ombudsman, Jobcentre Plus's response to Mr Q's request for an ex gratia payment was inadequate. Given that he would be deprived of his entitlement unless he made a claim, that he belonged to a vulnerable group whose human rights had been violated, and that he would have no reason to make a claim unless informed about the changes to the law, the onus was squarely on Jobcentre Plus to attempt to inform him (and others like him) of his new eligibility. The Ombudsman pointed out that part of "getting it right" (one of the Principles of Good Administration) is ensuring that proper decision-making gives due weight to all relevant considerations, ignores irrelevant ones, and balances the evidence appropriately. Jobcentre Plus failed to do this, and so its decision to refuse Mr Q's request amounted to maladministration. Likewise, the Ombudsman considered that both the Jobcentre Plus and the Child Benefit Office failed to create and maintain a reliable and usable record as evidence of their activities.

The Ombudsman found that because of Jobcentre Plus's maladministration, Mr Q lost out on widowed parent's allowance between 9 April 2001 and 8 August 2005. He also suffered unnecessary delays in receiving a reply to his complaint because of the lack of adequate records.

The Ombudsman upheld Mr Q's complaint and concluded its investigation in January 2009. To remedy the personal injustice to Mr Q, Jobcentre Plus paid him £28,130.92 (equivalent to the benefits he had missed out on), plus £5,899.01 interest; £500 for gross inconvenience; £250 for severe distress; and £75 in costs. It also agreed to apologise to him, and to make a payment of £500 to him in compensation for the impact of its mistake.[1316]

Case: Mr L's complaint about the Child Benefit Office and Jobcentre Plus
In this case, Mr L complained that when the law changed to introduce widowed parent's allowance so that men as well as women could claim this bereavement benefit, the scan conducted by the Child Benefit Office failed to identify him as eligible to claim the allowance. Consequently, he missed out on several years' worth of benefit. He complained that he may not have been identified because of unreasonable bias in the way the scan was carried out. In addition, Mr L complained that when Jobcentre Plus considered his request for a special

[1316] Parliamentary and Health Service Ombudsman, *Putting this right: Complaints and learning from DWP*, Second Report Session 2008–2009, March 2009, pp. 16–129.

payment to compensate him for missing out on the allowance for four and a half years, it failed to give full consideration to all the circumstances of the case.

The Ombudsman considered the guidance set out in the Civil Service Department's 1979 report Legal Entitlements and Administrative Practices, which offers guidance on the administrative practices to be followed when a change in statutory provisions gives rise to new entitlements. In such cases, the relevant department "should act reasonably in taking such steps as may be practicable to identify those with an entitlement." The Ombudsman compared this to the actions of Jobcentre Plus and the Child Benefit Office in the lead-up to the change in the law in April 2001 to extend bereavement benefits, which had previously only been available to widows, to widowers.

The Ombudsman found that the Child Benefit Office had undertaken a scan of the child benefit database to try to identify potentially eligible widowers to whom invitations to claim bereavement benefits were sent. However, as the database was never set up for that purpose, the Ombudsman also found that there was every likelihood that potentially significant numbers of eligible widowers would not be identified by the scan. Jobcentre Plus undertook a publicity campaign, but the Ombudsman considered that given its size and scope, there was no reasonable prospect of it successfully informing all of those affected about the changes to the law. Thus, the Ombudsman concluded that Jobcentre Plus's reliance on an inadequate scan and publicity campaign to inform widowers of their new entitlements was maladministration.

In addition, the Ombudsman found further maladministration in that both Jobcentre Plus and the Child Benefit Office were unable to provide full records about the consideration they had given to the question of how to approach the task of acting reasonably in taking practicable steps to identify widowers with a new entitlement. The Ombudsman also upheld Mr L's complaint that when considering his request for an *ex gratia* payment to cover his missing benefit, Jobcentre Plus had failed to take all relevant circumstances into account. The Ombudsman concluded that if Jobcentre Plus had executed its responsibilities more thoroughly, Mr L would have claimed bereavement benefit from April 2001, when he first became eligible. As a result of the Ombudsman's investigation, Jobcentre Plus paid Mr L £34,850 for lost benefits, interest, inconvenience, distress, and costs. The Child Benefit Office also made him a payment of £500. Moreover, the Ombudsman recommended that Jobcentre Plus consider what reasonable steps it could take to identify other men in a similar position and to remedy any injustice they may have suffered.[1317]

[1317] Parliamentary and Health Service Ombudsman, *Annual Report 2008–2009*, p. 11.

b. Transparency: active provision of information

Information provision, as a normative standard, can be identified in the UK Ombudsman's List of Principles of Good Administration as one of the elements of the principle of "being open and accountable."[1318] This principle requires inter alia that public bodies give citizens information and advice that is clear, accurate, complete, relevant, and timely. For this paper, as can be observed from the UK Ombudsman's cases, giving advice is a form of actively providing information. In addition, fulfilment of this requirement requires that public bodies publish information i.e. about how to complain and how and when to take complaints further.[1319] The UK Ombudsman has applied and developed this particular requirement in the following cases.

Case: Mr W's complaint about Jobcentre Plus of the Department for Work and Pension (DWP)
In Mr W's case, Jobcentre Plus failed to provide a significant piece of information when he enquired about his benefit entitlement, giving him the impression that he would receive more help with his mortgage interest payments than he was actually entitled to receive.

Following Mr W's divorce, he gained custody of his two children. In June 2005 he went to his local Jobcentre Plus office to ask which benefits he would be entitled to if he gave up work to look after his children. He also asked what help he would receive with his mortgage. He said he was informed that he would be entitled to income support and child tax credit, and that his mortgage interest would be paid after a qualifying period of 39 weeks. Mr W was surprised to learn that his interest payments would be paid in full, and he returned on two further occasions to check that what he had been told was correct. He said that on both occasions he was given exactly the same information, which he then took to be correct. On the basis of the advice he was given, Mr W gave up work and claimed income support from August 2005.

Approximately four weeks before Mr W expected to receive his first mortgage interest payment, he telephoned Jobcentre Plus. During this conversation, Jobcentre Plus told Mr W that there is a statutory limit (the cap) of £100,000

1318 Important to mention that Philipp Mende, notes that the institution is not a 'transparency watchdog' for Government, and that promoting transparency is probably a more relevant role for UK's Information Commissioner's Office. Notwithstanding, from the Ombudsman's view, transparency is an important aspect of good administration. Based on an interview with Philipp Mende, UK Ombudsman official.

1319 The Principles of Good Complaint Handling of the UK Ombudsman are available at https://www.ombudsman.org.uk/sites/default/files/page/0188-Principles-of-Good-Complaint Handling-bookletweb.pdf.

on the amount of eligible loans on which interest payments are met by income support. The cap meant that not all of Mr W's mortgage interest payments were covered each month (the monthly shortfall was £269). Mr W subsequently contacted his mortgage lender to try to resolve the situation. He described this as being a "nightmare"; his doctor prescribed medication for stress after his mortgage lender told him that his house might be repossessed if he did not meet his payments in full. Subsequently, Mr W made an arrangement with the mortgage lender, whereby it met the shortfall and added this to his mortgage balance.

The Ombudsman received Mr W's complaint in March 2007 and investigated whether Jobcentre Plus had misadvised him that his mortgage interest payments would be paid in full. Mr W said that he had suffered significant financial loss and emotional distress as a result of Jobcentre Plus's actions. Jobcentre Plus did not dispute Mr W's contention that he was not told about the cap. In its view, the rules surrounding the cap made it too complicated to fall within the remit of general advice. According to Jobcentre Plus, the correct general advice to give potential income support claimants who had a mortgage, such as Mr W, would be merely to inform them that they may receive assistance with housing costs after 39 weeks. The Ombudsman considered that such advice gave potential claimants only some of the information they needed to know. It did not include any information about the rate of interest payable or that there is a limit on the assistance available. The Ombudsman also noted DWP's internal guidance, which stated that officials should ensure they give customers full and accurate information.

The Ombudsman concluded that Mr W should have been received full and comprehensive information. According to the Ombudsman, the information should have included the fact that there was likely to be a limit on the financial assistance available. In addition, the Ombudsman found that Jobcentre Plus's failure to give him full and comprehensive information amounted to maladministration. However, the Ombudsman did not find, on the balance of probabilities, that Jobcentre Plus's maladministration led to the financial injustice which Mr W claimed. But in the opinion of the Ombudsman, Mr W was caused significant distress, anxiety, and inconvenience and deprived of the opportunity to make a properly informed decision about how to best plan his financial situation. The Ombudsman upheld Mr W's complaint and concluded the investigation in February 2008. As a result of the investigation, Jobcentre Plus agreed to apologise to Mr W for the inconvenience, distress, and anxiety it had caused him; and to pay him compensation of £500.[1320]

[1320] Parliamentary and Health Service Ombudsman, *Putting this right: Complaints and learning from DWP*, pp. 11–12.

Case: Mr A's complaint about the Pension Service
Mr A was a pensioner who remarried in 2002. He saw a Pension Service leaflet, stating that he must inform them of any changes in circumstances. He contacted the Pension Service and was told to send in his marriage certificate, but received no further advice or assistance. The Pension Service also wrote to Mr A telling him to send in the certificate, but again did not give any further advice. Mr A did so, but heard nothing more. He assumed that his benefit would not be affected by his remarriage, as the Pension Service had not raised this matter with him.

In 2004 Mr A spoke to the Pension Service about his wife's pension. It told him he could have applied for adult dependency increase in 2002. Mr A made an immediate claim, and asked that it be backdated. The Pension Service backdated it for the maximum of three months, and Mr A appealed to the Tribunal. The Tribunal dismissed his appeal, but highlighted the fact that the Pension Service had not provided any advice in 2002. Mr A made three requests for compensation, all of which were refused, prompting him to complain to the Ombudsman.

The Ombudsman found that the Pension Service had failed to provide advice and the Pensions Procedure Guide (the Guide) failed to provide adequate guidance to staff on this issue. Mr A had been acting on a Pension Service leaflet, where he read that he had to inform the Pension Service of any change of circumstances that might affect his entitlement. Therefore, according to the Ombudsman, Mr A should have expected to receive assistance when he contacted the Pension Service in 2002.

The Pension Service initially rejected this approach. It said it was Mr A's responsibility to ensure he was getting all benefits to which he was entitled. However, it agreed to amend the Guide to ensure that in future, people in a similar situation would receive more assistance. Nonetheless, the Pension Service said that at the time Mr A had called, the guidance it provided was correct and its service was not substandard. Then, the Ombudsman referred the Pension Service to its own Service Standards Framework document, which was approved in early 2002. This stated that DWP staff should "provide a proactive service […] such as explaining options, identifying further action […] and giving assistance." As a result, the Pensions Service agreed that the procedures in place in 2002 failed to uphold these standards, and were therefore maladministration.

Consequently, Mr A received £4,204.40 (plus interest) in compensation for lost adult dependency increase, as well as a £200 consolatory award. The Pension Service have agreed to review and amend the Guide in line with the

recommendations of the Ombudsman, which include explaining potential options and giving general advice.[1321]

Case: Mr W's complaint about the Security Industry Authority
In July 2006, Mr W sent the Security Industry Authority (the Authority) an application form for a door supervisor's license. The Authority replied saying that his form was incomplete; it included not his identification documents but the application form of a third party, Mr A. Mr. W told the Authority that it had sent him back Mr A's application form, and he asked where his own form was. The Authority said human error had probably led to Mr W's application being separated from his documents, and its replacement with Mr A's application. Mr W was invited to write a complaint.

After several attempts, in November 2006 the Authority finally managed to contact Mr A, who confirmed that he had received someone else's application form. He then confirmed that he would return it to the Authority. But having failed to receive the application form after a certain period, the Authority contacted Mr A again and asked him to return it as soon as possible. Following a further exchange of correspondence with Mr W, in February 2007 the Authority refunded his £190 application fee as a goodwill gesture. Mr W acknowledged this gesture but said he could not accept that the Authority took all his complaints seriously, that he had not been made aware of its complaints policy or procedure, and that he had not been kept informed of progress. In addition, he said that the Authority has still not addressed all of his concerns.

The Ombudsman upheld Mr W's complaints in full. It found that the Authority had probably sent his application form containing personal details to a third party. It was the seriousness of this error that led the Ombudsman to find the Authority's actions maladministrative. However, the Ombudsman found nothing to suggest that the mistake was a result of systemic problems. The Authority did not answer Mr W's concerns about its complaints process and should have done more to explain this to him. The Authority agreed to apologise to Mr W for not fully explaining its complaints process to him, and to review its complaints process, with particular attention to the need to make relevant information publicly available.[1322]

1321 Parliamentary and Health Service Ombudsman, *Annual Report 2006–2007*, p. 23 (Case study Ref. PA-5916).

1322 UK Ombudsman, *Bringing wider public benefit from individual complaints*. Annual Report 2007–2008, p. 15.

8.6. FINDINGS

Maladministration is a central focus of the ombudsman system in the UK. As part of its positive approach to maladministration, the UK Ombudsman has codified its Principles of Good Administration. This codifying function marks out a very distinctive role for the institution; it, together with the ability to issue special reports, are both applied as mechanisms to influence at the policy level and define the control-oriented function that characterises the UK Ombudsman.

The Principles of Good Administration reflect good governance principles such as properness, transparency, accountability, and effectiveness. In these terms, specific good governance-based standards may be identified. These can be divided into two categories: standards connected to legal principles and the notion of rule of law; and rules of good administrative conduct. Most of the standards are connected with the steering dimension of the modern constitutional state.

The Principles of Good Administration protect the constitutional values inherent in the rule of law broadly considered, or in other words, the "integrity branch" of the constitution in order to deliver considerable benefits to the public. Thus, it may also be affirmed that the UK Ombudsman's Principles of Good Administration also serve as a demonstration of the application of principles of good governance in the UK legal system. In turn, it is possible to assert that as a mechanism of administrative justice, the UK Ombudsman not only provides individual redress but also promotes general standards and principles for influencing the functioning of the administration. In this regard, the maladministration test has contributed significantly to the evolution of general principles, which, from this study's perspective, underlie the concept of natural justice. Maladministration allows for a legal discussion on the application and development of non-legally binding norms to steer administrative behaviour. Thus, the UK Ombudsman is undergoing an evolution from a redress-based institution to more of a standard-setting institution to promote good administration.

As regards the lack of reference to the principle of participation in the ombudsprudence of the UK Ombudsman and in its List of Principles of Good Administration, a possible explanation may lie in the question of legitimacy from a double perspective: from a democratic (or political) point of view in relation to the role of the Parliament; and from the perspective of the more specific relationship between the administration and the public (administrative legitimacy).

Where the first explanation is concerned, the UK Parliament is the central authority, constituting a legal authority for government policy and administrative action. In relation to this, the working methods of Parliament, specifically the MP filter, might be revised. Underlying this might be a design conception for an institutional policy-making framework in which citizen participation should be also taking in consideration. In a modern democracy, citizens want to have the opportunity to participate in decision-making in wider sense; not merely in individualised determinations but throughout the whole administrative process including the creation of the legal and policy frameworks that govern administration.[1323]

The institutional structure through which public administration takes place is central for the question of legitimacy. Without an adequate framework for the regulation of public administration, the goal of legitimacy will be difficult to achieve.[1324] According to Le Sueur, the question of legitimacy can be approached in the UK context at two levels: the micro level and the macro level. At the "micro level", the question of legitimacy relates to the individual sphere and the ways in which particular decisions are made. It rests most clearly on how public authorities treat individuals in their particular dealings with them. In other words, the focus is on the individual experience of particular citizens in their contacts with administrative bodies.[1325] On the other hand, at the "macro level" legitimacy relates with participation in the complete cycle of the policy making process.

In the micro-level approach, two strategies have been developed as attempts to enhance legitimacy: the concept of the "user perspective,"[1326] and statements of principles of good administration, which have been developed most significantly by the ombudsmen. In this sense, the List of Principles of Good Administration is one way in which the interest of individual users may be promoted within systems of administration. However, as pointed out by Le Sueur, in the micro sphere of legitimacy, focused on individualised interactions between public bodies and users of public services, the emphasis is on administrative action narrowly defined, meaning that it is associated with how individualised decisions are made.[1327] Ultimately, the List of Principles of Good Administration

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1323 Andrew Le Sueur, "People as 'user' and 'citizens'. The quest for legitimacy in British public administration", in Matthias Ruffert (ed), *Legitimacy in European administrative law: Reform and reconstruction*, Groningen: Europa Law Publishing, 2011, p. 41.

1324 Ibid., pp. 45–46.

1325 Ibid., pp. 33–36.

1326 According to "the user perspective," individuals "are no longer to be seen as the passive subjects of top-down bureaucracy but as actors who ought to be the central focus for administrative schemes and redress mechanisms"

1327 Andrew Le Sueur, loc. cit., pp. 39–41.

is managerial and customer-oriented.[1328] Therefore, Principles of Good Administration are not focused on enhancing the participation of individuals as citizens in the policy-making process but on their interactions with the administration as customers.

However, the promotion of participation may be also carried out in a very indirect way by stressing the importance of complying with policy guidance wherever any criteria for public participation is set. One such example could be government departments making consultations, in which case they are expected to act in conformance with the Code of Practice of Consultation. It is important to keep in mind that the code does not have legal force and that the courts have stipulated that it is not possible "to read this document as any form of government promise or undertaking that policy changes will never be made without consultation".[1329]

[1328] Carol Harlow & Richard Rawlings, op.cit., p. 536.

[1329] R (on the application of Bhatt Murphy (a firm) v. The Independent Assessor [2007] EWCA Civ I495, [24].

CHAPTER 9
THE OMBUDSMAN OF SPAIN

In this Chapter I will examine the Spanish Ombudsman's normative functions in relation to good governance. Unlike its British and Dutch counterparts, the Spanish Ombudsman, or *Defensor del Pueblo*, applies human rights as its normative standard. However, I will argue that the institution is currently undergoing a hybridisation process that is being reflected in a more creative role in promoting good administration based on legally and non-legally binding norms as standards of control. The first sections of this chapter will outline the legal mandate, structure and functions of the Spanish Ombudsman. Afterwards the chapter analyses a set of cases handled by the Spanish Ombudsman in order to determine whether the institution is not only protecting human rights, but also applying good governance-based standards.

9.1. LEGAL BASIS AND MANDATE

9.1.1. THE OMBUDSMAN WITHIN THE SPANISH LEGAL CONTEXT

Spain's current Constitution came into force on 29 December 1978 (Law Gazette No 1978/311). According to Article 1.3, Spain is a parliamentary monarchy. The state is divided into 17 autonomous regions and two autonomous cities, each with certain legislative and executive powers and varying degrees of autonomy (Article 2). The national Parliament, the *Cortes Generales*, consists of two chambers, the Congress and the Senate (Article 66.1). The King is the head of state (Article 56.1). After each renewal of Congress, the King appoints as President of Government the candidate whom Congress has granted confidence by a majority of votes (Article 99.1 and Article 99.3). There is also a Council of State, which according to Article 107 of the Constitution is the supreme consultative organ of Government, and as such is an independent body.[1330]

[1330] Teresa María Navarro Caballero, "El Consejo de Estado. Origen histórico y regulación actual a la luz de la Ley Orgánica 3/2004, de 28 de diciembre", in *Anales de Derecho*, Universidad de Murcia, No 24, 2006, p. 16.

In the judicial branch, the Supreme Court, which has jurisdiction over the entire country, is the highest judicial body, except for provisions concerning constitutional guarantees (Article 123.1). The Supreme Court also has an administrative chamber. The Constitutional Court decides appeals against allegations of unconstitutionality regarding acts and statutes (*recurso de inconstitutionalidad*), individual appeals against violation of constitutional rights (*recurso de amparo*) and conflicts of jurisdiction between state bodies and self-governing communities, or within self-governing communities (Article 161).

Since 1977 Spain has been a member of the Council of Europe. The country ratified the European Convention on Human Rights in 1979. The standing of the Convention within the Spanish legal system is contentious, but at a minimum it has the status of an ordinary law (Article 96.1). Part I of the Constitution contains a list of human rights.

9.1.2. LEGAL BASIS AND MANDATE

The Spanish Ombudsman, the *Defensor del Pueblo* (*Defender of the People*), was created by the Constitution of 1978.[1331] According to Article 54 of the Constitution of Spain, the *Defensor del Pueblo* is the High Commissioner of the Parliament (*Cortes Generales*) with responsibility for defending the fundamental rights and civil liberties of citizens by monitoring the activity of the administration and public authorities. The Spanish Ombudsman was instituted as part of the transition to democracy after the end of Franco's long dictatorship. Consequently, a major emphasis was placed on the post's role in protecting citizen's rights.[1332]

The procedures and jurisdiction of the Spanish Ombudsman are laid down in the Organic Ombudsman Act 3/1981 (*Ley Orgánica del Defensor del Pueblo*).[1333] In accordance with Article 9.1 and Article 10.1 of the Organic Ombudsman Act (hereafter, the Organic Act) the Spanish Ombudsman is entitled to start an investigation *ex officio* or in response to a request from any interested party (natural or legal person) who invokes legitimate interest, without restriction. As such, there are no impediments on the grounds of nationality, gender, residence,

1331 However, the Spanish Ombudsman officially began its functions on December 1982, following the implementation of the Organic Ombudsman Act, passed in 1981. Based on an interview with Carmen Comas Matas, Head of Advisers of the Spanish Ombudsman, on 14 May 2014.

1332 Antonio Mora, *El libro del Defensor del Pueblo*, Madrid: Defensor del Pueblo, 2003, p. 118.

1333 Organic Act 3/1981, April 6, on the Ombudsman, as amended by the Organic Act 2/1992, March 5. Other legal provisions regarding the Spanish Ombudsman are stated in the Regulations on the Organisation and Functioning of the Ombudsman (*Reglamento de Organización y Funcionamiento del Defensor del Pueblo*).

legal minority, legal incapacity, confinement in a penitential institution, or any other grounds.[1334] Investigations are conducted with the aim of clarifying the actions or decisions of the public administration and its agents in relation to the citizens. In addition, Members of Parliament may request the intervention of the Ombudsman.[1335]

The Ombudsman is elected by Parliament by a three-fifths majority. The Parliament appoints a Joint Congress-Senate Committee charged with liaising with the Ombudsman and for reporting thereon to the respective plenums whenever necessary.[1336] The Joint Committee is responsible for proposing the candidate(s) for the Head of the office of the Ombudsman. The Committee's decision is to be adopted by simple majority. Once the candidate(s) have been proposed, the candidate must obtain the qualified majority of three fifths of the votes of Congress and subsequently be ratified by the Senate in order to be appointed.[1337] The Ombudsman is elected to office for a term of five years, and can be re-elected by Parliament. The law does not require that candidates have any particular qualifications.

Although the Spanish Ombudsman has the nature of a "parliamentary commissioned person" it is neither an internal nor an auxiliary body of the Parliament. The Spanish Ombudsman is not subject to an imperative mandate and consequently does not receive instructions from any kind of authority.[1338] The Ombudsman performs its duties independently and according to its own criteria.[1339] In addition, it is not affected by the anticipated dissolution of the Parliament.[1340] Therefore, both the Constitution and the Organic Ombudsman Act grant the institution its functional independence.

Notwithstanding its functional independence, it is also possible to observe, as in the Netherlands, the organic dependence of the Spanish Ombudsman with respect to the Parliament. This organic dependence is mainly reflected by the parliamentary election of the incumbent of the office as established in the Spanish

1334 The term "without restriction" must be understood with regard to the complainant and not the subject of the complaint. See Álvaro Gil-Robles Gil-Delgado, *El control Parlamentario de la Administración. El Ombudsman*, Madrid: INAP, 1983, p. 292.

1335 Organic Act, Article 10.2.

1336 Organic Act, Article 2.2.

1337 Organic Act, Article 2.4.

1338 Juan Vintró Castells, "The Ombudsman and the Parliamentary Committees on Human Rights in Spain", in K. Hossain et al (eds), *Human Rights Commissions and Ombudsman Offices. National experiences throughout the world*, The Hague: Kluwer Law International, 2000, p. 394.

1339 Organic Act, Article 6.1.

1340 According to Article 68.4 and 69.6 of the Spanish Constitution, parliamentarians are elected for a period of four years.

Constitution, and the obligation of the Ombudsman to report to the legislature on their performance through the annual report.[1341] Other elements that exhibit this organic dependence are the integration of the financial resources of the Office of the Ombudsman within the parliamentary budget[1342] and the parliamentary approval of the Regulations on the institution's organisation and functioning.

In any case, it may be affirmed that the dependence of the institution on Parliament is instrumental in character. It does not affect the constitutional design of the Spanish Ombudsman as an organ provided with full independence for the fulfilment of its duties. In this regard, some authors consider it a "constitutional body" or even as one of the new powers of the State.[1343]

9.2. SCOPE OF CONTROL AND FUNCTIONS

9.2.1. SCOPE OF CONTROL

From a functional perspective, the Spanish Ombudsman is allowed to control legal norms (law and regulations), legal acts, factual acts, and even the omissions of administrative authorities.[1344] The Ombudsman's broad scope of control also includes legal and discretionary acts.[1345] However, the Ombudsman is not empowered to modify or overrule the acts and decisions of the administration. Still, the Ombudsman may suggest modifications to the criteria applied in their formulation.[1346] Thus, the Ombudsman supplements (in a more flexible way) the role of other controlling institutions, such as the courts, in the protection of citizens' rights.[1347] In addition, if its investigations conclude that rigorous compliance with a regulation may lead to unfair or harmful situations to

1341 Juan Vintró Castells, loc.cit., p. 395.

1342 Organic Act, Article 37.

1343 Guillermo Escobar Roca, *Defensorías del Pueblo en Iberoamérica*, Madrid: Thomson-Aranzadi, 2008 p. 168. It is important to mention that the mainstream Spanish legal doctrine has characterised the Spanish Ombudsman as an "organ of constitutional relevance". Organs of constitutional relevance are those placed in a pre-eminent position by the Constitution and entrusted with certain relevant tasks for which they have been granted full functional independence. However, unlike "constitutional bodies", they do not perform indispensable functions with direct repercussions on the structure of the State. This traditional position is challenged by the daily practices and the evolution of the institution.

1344 Article 23 of the Organic Ombudsman Act makes reference to the omissions of the administration. In addition, Article 17.2 establishes the Ombudsman's obligation to ensure that the administration, in due time and manner, resolves the requests and appeals that have been submitted to it.

1345 Guillermo Escobar Roca, "Interpretación y garantía de los derechos fundamentales por el Defensor del Pueblo", in *Teoría y Realidad Constitucional*, No 6, 2010, p. 236.

1346 Ombudsman Organic Act, Article 28.1.

1347 Antonio Pérez Luño, *Nuevos retos del Estado Constitucional: Valores, derechos, garantías*, Madrid: Universidad de Alcalá de Henares, 2010 p. 137.

persons affected, the Ombudsman may suggest to the competent legislative body or the administration that it be modified.[1348] Likewise, the Spanish Ombudsman is allowed to determine whether a complaint concerning a human rights infringement was the result of abuse, arbitrariness, discrimination, error, negligence or omission on the part of the administration.[1349] The Ombudsman also discharges duties relating to the National Mechanism for the Prevention of Torture in accordance with the Spanish Constitution, its Organic Act, and the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.[1350]

The Ombudsman's object of control comprises the activities of the administration.[1351] In the Spanish case, the term "administration" is interpreted in a broad sense. According to Article 9.2 of the Organic Act, the Spanish Ombudsman has authority to assess the performance of ministers, administrative authorities, civil servants and any person acting in the service of the public administration. The Ombudsman's assessment of the administration in order to protect the rights of citizens also covers the military administration, with a limit upon interfering in the command of the national defence.[1352]

In addition, the competence of the Ombudsman extends to the performance of autonomous communities, provinces and municipalities. In the case of autonomous communities, Article 12 of the Organic Act allows the institution to supervise the activities of autonomous communities. These entities are obligated to coordinate their functions with the Ombudsman, which may request their cooperation.[1353]

The Ombudsman's jurisdiction not only extends across state bodies on the national level (whether central, regional or local administration), but also covers

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1348 Organic Act, Article 28.2.

1349 Organic Act, Article 23.

1350 Organic Act, Sole Final Provision. Introduced by Organic Act 1/2009, 3 November 2009, supplementary to the Act for the reform of the procedural legislation for the establishment of the new Judicial Office, amending Organic Act 6/1985, 1 July 1985, on the Judiciary.

1351 Organic Act, Article 1.

1352 Organic Act, Article 14.

1353 Spain is composed of seventeen autonomous communities with political autonomy. Currently, the statutes (*estatutos de autonomía*) of thirteen of the seventeen autonomous communities provide for the creation of a regional ombudsman. These are: Andalucía, Aragón, Castilla y León, Cataluña, Valencia, Galicia, La Rioja, Navarra, Cantabria, Canarias, País Vasco, Illes Balears, and Extremadura. However, of these, Cantabria and Extremadura have not formally established the institution. On the other hand, Castilla-La Mancha, Asturias, and Murcia, decided to abolish their ombudsman after ten, eight, and four years of functioning, respectively. The Law 36/1985 regulates the relationship between the (National) Ombudsman and the regional ombudsmen in the autonomous regions. Carmen María Ávila Rodríguez, *La tutela parlamentaria de la buena administración. Perspectiva estatal y autonómica de los Comisionados Parlamentarios*, Navarra: Thomson-Aranzadi, 2013, pp. 46–55.

certain public services conceded to private enterprises.[1354] The key element in legitimising the Ombudsman's intervention is the effective existence of a public service activity, regardless of who provides it. Thus, the Ombudsman can also oversee private institutions that fulfil a public function or perform certain administrative tasks. This means that the public service can be delivered either directly by the administration or by a private person by virtue of a concession or an administrative authorization. It is for this reason that the term "administration" is understood in a functional sense and not an organic one.[1355]

In relation to the courts, only the functioning of the administration of the judiciary falls under the Ombudsman's control. The objective is to guarantee citizens' right of defence through the good administrative functioning of the judiciary.[1356] In this regard, the Ombudsman is not allowed to interfere with the main jurisdictional functions. As such, Article 17 of the Organic Act states that the Ombudsman cannot investigate complaints in which a judicial decision is pending. However, it is authorised to suspend any investigation that has already commenced if a claim or appeal is lodged by the person concerned before the ordinary courts or the Constitutional Court. Whenever the Ombudsman receives complaints regarding the functioning of the administration of justice, it must refer them to the public prosecutor or to the General Council of the Judiciary, depending on the type of complaint involved, irrespective of any reference that the institution may make to the matter in its annual report to Parliament.[1357]

The Organic Act does not provide for the possibility of control by the Ombudsman of the Parliament's administrative activities. Nevertheless, the functional independence of the institution in relation to Parliament, and the broad sense in which the term "administration" has been interpreted, support that possibility.[1358]

Finally, it must be noted that, according to Articles 32 and 33 of its Organic Act, the Spanish Ombudsman must submit an annual report to Parliament, based on the specifications set out in Article 32 of the Organic Act. The annual report that the Ombudsman is required to send to Parliament is previously submitted to the Joint Congress-Senate Committee responsible for liaising with the Ombudsman. It is the submission and debate of the annual report that forms the basis of the

1354 Examples include telecommunications, energy and water supply and public transit: activities defined as public utilities (*servicios públicos*). Although healthcare and education do not fall under the definition of public utilities (but rather form part of them in a broader sense), they are regarded as public services by the Ombudsman and may be also subject to supervision when provided by private parties.

1355 Juan Vintró Castells, loc.cit., p. 404.

1356 Carmen María Ávila Rodríguez, op.cit., pp. 143–146.

1357 Organic Act, Article 13.

1358 Juan Vintró Castells, loc.cit., p. 406.

ordinary relationship between the Ombudsman and Parliament.[1359] In addition, when the seriousness or urgency of the situation makes it advisable to do so, the Ombudsman may issue a special report, in accordance with Article 32.2 and Article 32.3 of the Organic Act. It may be argued that the reports fulfil a preventive function with regard to human rights infringements insofar as they can encourage public authorities and civil servants to be more diligent in the performance of their functions.[1360]Without prejudice to the annual report and special reports submitted by the Ombudsman, the institution may also periodically report on its activities in relation to a specific period or topic. The Ombudsman also prepares specific reports on its activities regarding the National Mechanism for the Prevention of Torture. These reports are presented to Parliament, through the Joint Congress-Senate Committee, and to the UN Subcommittee on the Prevention of Torture.[1361]

9.2.2. FUNCTIONS

By virtue of its individual complaint handing, the Spanish Ombudsman is entitled to oversee public administration and policy. Moreover, the constitutional protective function assigned to the Ombudsman readily allows the institution to connect any administrative irregularity with an infringement of rights. Thus, the defence of fundamental rights and the control of the administration are two functions that in practice are inseparable.[1362]

It is important to mention that the Ombudsman is also entitled to lodge, before the Judiciary, individual appeals for relief against violations of human rights (*recurso de amparo*).[1363] Besides this, the Ombudsman can institute *habeas corpus* proceedings.[1364] Both *habeas corpus* and *recurso de amparo* are considered important instruments at the disposal of the Ombudsman for the protection of human rights.[1365]

1359 Ibid., p. 412.

1360 Carmen María Ávila Rodríguez, op.cit., p. 289.

1361 On the role of the Spanish Ombudsman as National Mechanism for the Prevention of Torture, see Carmen María Ávila Rodríguez, op.cit., pp. 182–192.

1362 Juan Vintró Castells, loc.cit., p. 404.

1363 Organic Act, Article 29.

1364 Organic Act 6/1984.

1365 However, the Spanish Ombudsman very rarely lodges either *habeas corpus* or *recurso de amparo*. Indeed, between 1982 and 2014 it only lodged two *habeas corpus* and five *amparos*. The reason for this restraint is that under Spanish law, any individual is entitled to lodge a *habeas corpus* or *amparo* without many formal requirements. Thus, if the Ombudsman receives a request to file such a remedy, it will instead explain to the individual how they can do so by themselves, except when extraordinary circumstances prevent the person from doing so. Based on an interview with Carmen Comas Matas, Head of Advisers of the Spanish Ombudsman, on 14 May 2014.

The ability to add to the content of existing rights and principles allows the institution to promote the development of legal norms for the improvement of the administration in order to ensure citizens' rights. In addition, the Ombudsman's capacity to assess the performance of administrative authorities against constitutional parameters, together with the ability to recommend changes to the administration, grant the institution with the powers of broad influence at the policy level. In this regard, it is possible to assert that the Spanish Ombudsman's investigations are also aimed at guaranteeing the quality of the administration, shaping the preventing function of the institution.

Conversely, the Spanish Ombudsman is entitled to lodge appeals alleging the unconstitutionality of acts and statues (*recurso de inconstitucionalidad*).[1366] Moreover, the institution may recommend modifications to the criteria that Parliament employs in its drafting.[1367] In this regard, the defence of the constitutional legal order may be considered an additional competence of the institution.[1368]

The Spanish Ombudsman also performs a normative function. As stated earlier, the institution applies constitutional and legal parameters as the standard for assessing administrative actions, conducting in this way a hard-law review. It is through this kind of review that, by acting as a legal norm-developer, the Ombudsman lends legal norms a wider scope. As such, appeals against violations of human rights and appeals alleging unconstitutionality play an important role. Moreover, when the Ombudsman, acting as Spain's national human rights institution, reviews proposed legislation with reference to fundamental rights enshrined in the Spanish Constitution and international treaties, it is also developing a normative function by means of legal interpretation. It is important to mention, as pointed out by Carmen Comas Matas, Spanish Ombudsman official, that the Ombudsman's functions in relation to the National Torture Prevention Mechanism is connected to its role as a human rights protection body.[1369]

1366 Organic Act, Article 29. However, the Spanish Ombudsman rarely files unconstitutionality lawsuits; between 1982 and 2014 it only brought 26 unconstitutionality cases concerning laws and statutes. This is because the Spanish Ombudsman has stated as a working principle that if another actor has the standing to file an unconstitutionality lawsuit, it will refrain from doing so itself. Based on an interview with José Manuel Sánchez Saudinós, former Secretary General of the Spanish Ombudsman, on 14 May 2014.

1367 Organic Act, Article 28.2.

1368 Defensor del Pueblo, *El Defensor del Pueblo en una España en cambio*, Madrid, 2007, p. 14. Available in: www.defensordelpueblo.es/es/Documentacion/Publicaciones/Otros/Anexos/Documentos/25Aniversario.pdf.

1369 Based on an interview with Carmen Comas Matas, Head of Advisers of the Spanish Ombudsman.

The Ombudsman's reports are also important with regard to the performance of its normative functions. By means of these reports it is possible to identify patterns of maladministration. Although in its reports the Ombudsman may resort to legal parameters as assessment standards conducting in such way a mere hard-law review; in many other cases it can be detected, through its *ombudsprudence,* that different assessment standards are being applied. On this basis it may be argued that the Spanish Ombudsman also conducts a (complementary) soft-law review.[1370] As such, it may be sustained that new good governance-based standards (which implies goes beyond mere compliance with laws) are being (often inadvertently) developed.

It should be noted that among the Spanish Ombudsman's officials there seems to exist two conflicting views with regard to the normative function of the institution: some officials hold that the Spanish Ombudsman only conducts a hard-law review of the performance of public administration; while another group of officials would be willing to go further by advising public administrations to adopt best practices beyond what is demanded by statutes.[1371] Thus, according to Sánchez Saudinós, to some extent the Spanish Ombudsman performs a soft-law review by applying non-legally binding norms as assessment standards.[1372] As explained in previous chapters, this is a characteristic of ombudsman institutions that apply good administration as their standard of control. However, most officials within the Spanish Ombudsman are not so self-conscious about their normative function, but rather assume that they are simply applying, not developing, legal norms as assessment standards, even though they frequently oversee cases that plainly deal with maladministration without clear violations to any specific statutes. In these cases, it may be argued that the Ombudsman assesses the administration also based on non-legally

1370 On hard-law review and soft-law review as part of the role of the Ombudsman as a developer of legal norms, see Section 3.6.

1371 Based on an interview with José Manuel Sánchez Saudinós, former Secretary General of the Spanish Ombudsman, and Carmen Comas Matas, Head of Advisers of the Spanish Ombudsman. Sánchez Saudinós seems to have a somewhat favourable view of the Spanish Ombudsman's normative function encompassing not only hard-law review, but also, to a certain extent, soft-law review. On the other hand, Carmen Comas Matas takes a more formal approach about the possibility that the Spanish Ombudsman might exceed a hard-law review, or even that conducting a hard-law review necessarily implies a normative function in the sense of creating legal norms. From her perspective, the Ombudsman performs a strict legality review. The views of these two officials represent the opposing conceptions of the Spanish Ombudsman's normative functions.

1372 An area of the Spanish Ombudsman where this soft-law review approach might had been assumed with special interest in recent years is the Environmental Affairs Thematic Area. Based on an interview with José Manuel Sánchez Saudinós, former Secretary General of the Spanish Ombudsman.

binding standards (or rules of good administrative conduct), aimed at ensuring the proper functioning of administrative services.[1373]

The emergence of non-legally binding standards through soft-law review can be explained based on the progressive character of human rights, and specifically of economic and social rights: since the time of the institution's creation, the civil and political rights of the Spanish people have been secured and expanded to a great extent, leading the Ombudsman to focus its attention increasingly on safeguarding social and economic rights (especially since the recent economic crisis). Because these rights are to a large extent of a provisional nature (which means they must be provided by the state either directly or indirectly), an efficient and responsive public administration becomes indispensable.[1374]

Taking into account this fact and the historic evolution of the Spanish Ombudsman, Sánchez Saudinós, Spanish Ombudsman official, makes an interesting observation: during the first years of the functioning of the institution, unlawful behaviour by Spanish State officials were relatively widespread, but over time this situation has improved and the most overtly unlawful behaviour within the public administration has diminished to a large extent. Legal compliance by itself, however, does not achieve a well-functioning administration; thus, soft-law review seeks to steer improvements in the performance of state officials and institutions, especially where responses to citizens' social rights (such as healthcare and education) are concerned, and with most urgency during periods of fiscal austerity and economic difficulties like those experienced by Spain in recent years.[1375]

To the extent that the protection of economic and social rights are immediately related with the quality of the administration's performance and its effectiveness

1373 Regarding this, it is interesting to point out that in the part of the Ombudsman annual report dealing with the performance of the police force, there is, along with a section called "mistreatment" (*malos tratos*) – concerning cases of torture, physical and psychological abuse by police officers (in which there is a clear violation of legal norms and basic rights) – another section called "improper treatment" (*trato incorrecto*), in which police officers have treated citizens with disrespect, but have not fallen into plainly unlawful behavior. In such cases, the Spanish Ombudsman resorts to the good governance principle of properness (and to the sub-principle of proper behaviour and respect), which goes beyond mere hard-law review.

1374 A similar idea is upheld by Juli Ponce Solé. In this regard, see Juli Ponce Solé, *El derecho y la (ir)reversibilidad de los derechos sociales de los ciudadanos*, Madrid: INAP, 2013, pp. 84ff.

1375 Based on an interview with José Manuel Sánchez Saudinós, former Secretary General of the Spanish Ombudsman. On the role of the ombudsman as national human rights institution in the protection of economic and social rights, see Rocío Barahona Riera, "Tutela de los derechos económicos, sociales y culturales en las sociedades actuales. Especial referencia a las Instituciones Nacionales de Derechos Humanos", in Guillermo Escobar Roca, *El Ombudsman en el Sistema Internacional de Derechos Humanos: Contribuciones al debate*, Madrid: Dykinson, 2008, pp. 57–78.

in providing services, it might be argued that the development of "non-legally binding economic and social rights" based standards is connected to the twofold function of the institution: protecting human rights and promoting good administration. It also reflects the hybridisation process of the Spanish Ombudsman's assessment standard of control.[1376]

In any case, as Sánchez Sandinós also points out, the prevalence of any of the stated positions (hard-law review based on the application of constitutional and legal parameters vs. soft-law review based on non-legally binding standards) will depend, basically, on the orientation given to the institution by the incumbent and their deputies.

9.3. ASSESSMENT ORIENTATION AND STANDARD OF CONTROL

9.3.1. ASSESSMENT ORIENTATION

The Spanish Ombudsman performs a human-rights protecting function. To this end the institution has the capacity to oversee the entire administration. The Ombudsman's broad powers and ability to make recommendations to improve the administration in order to avoid the recurrence of human rights violations are clear indicators of its control-oriented function. By issuing recommendations addressed either to the administration (aimed at changing behaviour) or to the Parliament (aimed at amending legislation), the Spanish Ombudsman influences on the policy level.

Therefore, although the institution has the basic aim of protecting fundamental rights, the task of controlling the administration has shaped the role of the Spanish Ombudsman as a mixed or twofold-mission institution. In relation to this, Escobar Roca points out that, in practice, the Ombudsman has not proven so much a defender of rights as a supervisor of the administration, irrespective of the violation or not of a right; this being so, the institution has come closer to the general European model of promotion of good administration, and departed somewhat from its role as protector of rights per the Spanish constitutional design. Thus, it can be considered a mixed ombudsman model.[1377] In that respect, for this study, it seems that assessment of the administration has more than a purely instrumental character.

[1376] See Section 9.3.2.

[1377] Based on an interview with Guillermo Escobar Roca, professor of Constitutional Law at Universidad de Alcalá de Henares, on 15 May 2014.

In sum, the Spanish Ombudsman has universal jurisdiction over the entire administration. The ultimate purpose of the institution is to defend the fundamental rights and freedoms enshrined in the Constitution. Hence, all the powers of the Ombudsman should be seen in a human rights context.[1378]

9.3.2. STANDARD OF CONTROL: HUMAN RIGHTS

According to Article 54 of the Spanish Constitution, the Ombudsman's main task is the defence of the fundamental rights of citizens. In this regard, the aforementioned constitutional provision establishes that the rights protected by the Ombudsman are those included in Title I of the Constitution.[1379] Thus, the actions of the Ombudsman as a defender of rights include not only civil and political rights, but also economic, social and cultural rights. Thus, as a standard of control, human rights should be conceptualised from a broad perspective, as Escobar points out.[1380]

As regards the nature of fundamental rights as a standard of control, Escobar considers that the Ombudsman can propose a broader scope for the core of existing rights than that established by the legislator or even the Constitutional Court.[1381] This would be possible to the extent that the institution is entitled to interpret law in the performance of its functions. Therefore, by resorting to the *apertus* clause of fundamental rights in the Spanish Constitution, the Ombudsman may extend the scope of rights.[1382] This interpretation contributes to the consideration of the Spanish Ombudsman as a developer of legal standards beyond written legislation.

In practice, the notion of human rights as a standard of control has been extended to cover not only the protection of rights but also the constitutional principles and mandates enshrined in Title I.[1383] Along the same lines, Article 9.1

1378 Brigitte Kofler, "The different jurisdictions: Spain", in Gabriele Kucsko-Stadlmayer, *European Ombudsman-Institutions. A comparative legal analysis regarding the multifaceted realisation of an idea*, Wien: Springer, 2008, p. 406.

1379 Fundamental rights are considered, *strictu sensu*, those enshrined in Title 1, Chapter II, Section 1, of the Spanish Constitution.

1380 Guillermo Escobar Roca, "Interpretación y garantía de los derechos fundamentales por el Defensor del Pueblo", p. 237.

1381 Guillermo Escobar Roca, *Defensorías del Pueblo en Iberoamérica*, p. 177.

1382 Ibid.

1383 Title I (Fundamental Rights and Duties) of the Spanish Constitution sets, in addition to fundamental rights and liberties, the rights and duties of citizens and the principles governing economic and social policy. In practice, the protecting role of the Ombudsman covers all of Title I.

of the Organic Ombudsman Act[1384] has been interpreted as providing equal protection to the principles regarding the public administration that are established in Article 103.1 of the Spanish Constitution[1385] as the fundamental rights proclaimed in Title I.[1386] It is worth mentioning that according to some Spanish scholars, an implicit constitutional principle of good administration derives from the principles enshrined in Article 103.1 of the Constitution.[1387] In this regard, Carmen Comas Matas, Spanish Ombudsman official, argues that the principle of good administration enshrined in Article 103.1 of the Spanish Constitution establishes a constitutional duty for the public administration, which the Ombudsman is in charge of overseeing. However, good administration is not regarded as a fundamental right *stricto sensu*.[1388]

On the other hand, Articles 23 and 28.2 of the Organic Ombudsman Act also appear to expand the Ombudsman's standard of control by referring to "abuse, arbitrariness, discrimination, error, negligence or omission"[1389] and "situations that are unfair or harmful to those persons affected"[1390] without mentioning the protection of human rights. Escobar has pointed out that these legal provisions have led the institution to perform, in practice, a controlling activity in relation to the behaviour of the administration, bringing it closer to control of maladministration than protection of rights. This practice is reflected by the structure of the ombudsman's annual reports, which present the information not by rights but by areas of administrative action.[1391] According to Carballo Martínez, it is the oversight of maladministration that allows the Ombudsman

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1384 Organic Act, Article 9.1: "The Ombudsman may instigate and pursue, *ex officio* or in response to a request from the party concerned, any investigation conducive to clarifying the actions or decisions of the Public Administration and its agents regarding citizens, *as established in the provisions of Article 103.1 of the Constitution and the respectful observance it requires of the rights proclaimed in Part I thereof.*" (emphasis added).

1385 Spanish Constitution. Article 103.1: "The Public Administration shall serve the general interest in a spirit of objectivity and shall act in accordance with the principles of efficacy, hierarchy, decentralization, deconcentration and coordination, in full subordination to the law."

1386 Guillermo Escobar Roca, *Defensorías del Pueblo en Iberoamérica*, p. 177.

1387 On this, see Beatriz Tomás Mallén, *El derecho fundamental a una buena administración*, pp. 102–104; Juli Ponce Solé, *Deber de buena administración y procedimiento administrativo debido*, *supra* note 136.

1388 Based on an interview with Carmen Comas Matas, Head of Advisers of the Spanish Ombudsman.

1389 Ombudsman Organic Act. Article 23: "Should the investigations conducted reveal that the complaint was presumably *the result of abuse, arbitrariness, discrimination, error, negligence or omission on the part of a civil servant*, the Ombudsman may request that the person concerned state his views on the matter." (emphasis added).

1390 Organic Ombudsman Act, Article 28.2: "If as a result of this investigation [the Ombudsman] should reach the conclusion that rigorous compliance with a regulation may lead to *situations that are unfair or harmful to those persons thereby affected*, he may suggest to the competent legislative body or the Administration that it be modified." (emphasis added).

1391 Guillermo Escobar Roca, *Defensorías del Pueblo en Iberoamérica*, p. 177.

to promote a collaborative relationship with the administration[1392], seeking to balance the general interest with that of the individuals concerned based on the most suitable interpretation of the law for the protection of their rights.[1393] The author argues that this allows the Ombudsman to recommend not only new criteria for the production of legal standards but also their amendment, thereby expanding the scope citizen's rights.[1394]

Therefore, good administration may arguably be considered as a supplementary criterion for assessing administrative behaviour.[1395] In practice, the Spanish Ombudsman might be considered a guarantor of human rights as well of good administration to ensure the well-being and dignity of citizens. As pointed out by Carmen Comas Matas, Spanish Ombudsman official, the promotion of good administration and the protection of human rights are both equally important missions for the Spanish Ombudsman and should not be viewed separately.[1396]

According to Carballo Martínez, the absence of good administration (or in other terms, the existence of maladministration) can be determined by administrative aspects linked to administrative law, but may also be related to poor legal design or "mal-legislation" and consequently also be responsible, to a certain extent, for the legislative function of Parliament.[1397] Thus, as García de Enterría points out, "it is not accurate [to say] that a good administration can replace a lack of politics or that any legal problem can be rerouted as a problem of administrative justice".[1398] Good legislation and political consensus in Parliament is also needed. Arguably, it would be the basis for the Spanish Ombudsman to suggest amending legislation or new criteria for its formulation. It is interesting to note that the idea of "mal-legislation" in opposition to good-legislation or good-legislature can be regarded as a manifestation of the general principle of good governance.[1399]

The Ombudsman investigates the activities of the administration to determine whether infringements of citizen's rights have occurred. In so doing, the

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1392 Gerardo Carballo Martínez, op.cit., p. 245, *supra* note 252.

1393 Ibid., p. 352.

1394 Ibid., p. 356.

1395 Carmen María Ávila Rodríguez, "La buena administración. ¿Objeto de supervisión o criterio de supervisión de la actividad administrativa para las instituciones de los defensores del pueblo?", in Carmen María Ávila Rodríguez & Francisco Gutiérrez Rodríguez, *El derecho a una buena administración y la ética pública*, Valencia: Tirant lo Blanch, 2011, p. 152.

1396 Based on an interview with Carmen Comas Matas, Head of Advisers of the Spanish Ombudsman.

1397 Carballo Martínez, op.cit., pp. 239–240.

1398 Eduardo Garcia de Enterria, *La lucha contra las inmunidades del poder*, Madrid: Civitas, 1974, p. 12.

1399 See Section 6.1.2.

Ombudsman ensures that the administration fulfils its positive obligation to perform its functions in accordance with the principles of efficiency, coordination, objectivity, impartiality and others derived from Article 103, as well as other provisions regarding the administration established in the Spanish Constitution. These constitutional provisions also involve an ethical dimension.[1400] Thus, for some Spanish scholars human rights as a standard of control may be applied in terms not only of strict legality but also of justice or equity, in accordance with a broader conception of the rule of law.[1401] From this perspective, the Ombudsman performs its functions, including the interpretation of legal norms, from a post-positivism or neo-constitutionalism paradigm approach.[1402] As previously explained, this means that interpretation of law must be in accordance with constitutional provisions (rules, principles and the values enshrined in the constitution), which prevail over other legal norms.[1403] Thus, it is possible to contend that the Spanish Ombudsman (like its Dutch and British counterparts) addresses its functions to enhance what this study calls the integrity branch of the Constitution[1404] in order to prevent abuse, arbitrariness, discrimination, error, negligence and unfair situations for citizens.

From the perspective of this study, an understanding of the Ombudsman's standard of control from a broader conception of law would reinforce, at least implicitly, recognition of the institution's normative function and its role as a developer of legal norms. However, for some scholars the Ombudsman does not have a normative function per se in the sense that there is no codification of the assessment criteria, nor of the definition of the content of the rights performed by the institution.[1405]

1400 Pilar Lucendo de Lucas, "Ética y función pública", in Carmen María Ávila Rodríguez & Francisco Gutiérrez Rodríguez, *El derecho a una buena administración y la ética pública*, Valencia: Tirant lo Blanch, 2011, p. 214.

1401 Important to mention here that from my perspective, when the Spanish scholars Escobar Roca and Carballo Martínez, address the legal nature of human rights as the Ombudsman's standard of control, from a broader conception of law and justice the former, and in connection to maladministration linked to equity the latter, they both, from a complementary perspective, are addressing the hybridisation process of the Spanish Ombudsman and also recognising the normative function of the institution. See, Guillermo Escobar Roca, *Defensorías del Pueblo en Iberoamérica,* p. 177; also Gerardo Carballo Martínez, op.cit., p. 356.

1402 Guillermo Escobar Roca, "Interpretación y garantía de los derechos fundamentales por el Defensor del Pueblo", p. 237.

1403 See Section 4.2.3.

1404 See Section 1.1.2.

1405 Based on an interview with Guillermo Escobar Roca, professor of Constitutional Law at Universidad de Alcalá de Henares.

9.4. INVESTIGATION PROCEDURE FOR THE DETERMINATION OF HUMAN RIGHTS INFRINGEMENTS

9.4.1. CHARACTERISTICS OF THE INVESTIGATION PROCEDURE

The Spanish Ombudsman is entitled to initiate an investigation either upon request by any party concerned or on its own initiative. *Ex officio* interventions highlight the autonomy of the institution in the exercise of its functions. As noted at the start of this chapter, any individual or legal entity that invokes a legitimate interest may address the Ombudsman, without any restrictions whatsoever.[1406] There are no legal impediments on the grounds of nationality, residence, gender, legal minority, legal incapacity, confinement in a detention institution or, in general, any special relationship of subordination to or dependence on an administrative authority.

Again, as mentioned earlier, the Organic Ombudsman Act also provides that parliamentarians may, in writing and stating their grounds, request the intervention of the Ombudsman. However, the Ombudsman may decide turn down such a request. In such cases, the Ombudsman must communicate its decision, and state reasons.[1407] This stands as additional evidence of the functional independence of the institution in relation to Parliament.

Most actions of the Ombudsman start with a complaint (*queja*) by an interested citizen.[1408] A complaint may be defined as any claim brought before the Ombudsman by a person regarding an administrative action that the complainant alleges to be irregular or which violates constitutional rights.[1409] This mechanism assures direct access to the institution without intermediaries of any kind.

As to the formal requirements, in all cases the complainant must sign the complaint, state their name and address, and state the grounds for the complaint no later than one year from when they became cognizant of the matters giving rise to it. In turn, the Ombudsman must record all complaints and acknowledge receipt.[1410]

1406 Organic Act, Article 10.1.

1407 Organic Act, Article 31.2.

1408 However, as the Spanish Ombudsman has reported, in 2012 *ex officio* interventions increased as part of an institutional attempt at reducing the impact of the economic crisis on citizens. See Defensor del Pueblo, Press Release 02/01/2013. Available at www.defensordelpueblo.es/es/Prensa/Notas/Documentos/NdP_Balance_2012.pdf (last visited on 14 May, 2014).

1409 Juan Vintró Castells, loc.cit., p. 406.

1410 Organic Act, Article 15.

The Ombudsman has to decide whether to proceed with or reject a complaint. The Ombudsman is required to reject anonymous complaints, and may also reject those which it perceives to be in bad faith, lacking in grounds or based on an unfounded claim, in addition to those whose investigation might infringe the legitimate rights of a third party. Likewise, the Ombudsman will not individually investigate any complaints for which judicial proceedings are pending. In case of rejecting a complaint, the Ombudsman is to state the reasons in writing. This decision may not be appealed. In such cases, the Ombudsman may inform the party concerned about the most appropriate channels for taking action.[1411]

Once a complaint has been accepted, the Ombudsman starts with an appropriate informal investigation in order to clarify the alleged facts and to adopt a decision. All public authorities are obliged to give preferential and urgent assistance to the Ombudsman in its investigations and inspections. During the investigation the Ombudsman may visit any agency of public administration or office delegated to deliver a public service, in order to verify any necessary information, hold applicable personal interviews or examine pertinent records and documents.[1412]

The Ombudsman may not be denied access to any administrative record or document related to the activity or service under investigation.[1413] In fact, the Ombudsman is allowed to request that public authorities deliver all the documents it considers necessary to clarify the facts, including those classified as confidential. In the latter case, refusal to deliver confidential information must be approved by the Cabinet.[1414]

The Ombudsman is to conduct its investigations and relevant procedures in strict secrecy with respect to both private individuals and offices and other public bodies. Special measures of protection are to be taken concerning documents classified as confidential.[1415]

Persistence in a hostile attitude or the hindering of the Ombudsman's work by any agency, civil servant, official or person in the service of public administration may be subject to a special report in addition to being stressed in the appropriate section of the annual report. A civil servant who obstructs an investigation by refusing to send reports or facilitate access to administrative records or documents, or who is negligent in doing so, will be guilty of the offence of

1411 Organic Act, Article 17.
1412 Organic Act, Article 19.1 & 19.2.
1413 Organic Act, Article 19.3.
1414 Organic Act, Article 22.1.
1415 Organic Act, Article 22.2.

contempt. In such cases the Ombudsman will provide the public prosecutor with the records necessary for taking appropriate action.[1416]

The Ombudsman may, *ex officio*, bring actions for liability against all authorities, civil servants and government or administrative agents, including local agents.[1417] If as a result of its investigation the Ombudsman becomes aware of an act or behaviour it presumes to be criminal, the attorney general is immediately notified. In turn, the attorney general is to notify the Ombudsman of all possible administrative irregularities of which the public prosecutor becomes aware in the performance of those duties.[1418]

In relation to own-initiative investigations, the requirements for inquiries as a consequence of complaints are not applied. Own-initiative investigations are carried out mainly in those cases in which the Ombudsman is aware of the lack of opportunities of citizens to lodge complaints, especially in the cases of vulnerable groups such as children and youths, the elderly, persons with disabilities and so on.[1419]

9.4.2. FORMULATION OF DECISIONS

In determining whether human rights violations have occurred, the Spanish Ombudsman assesses the activity of the administration. In so doing the Ombudsman examines whether the administration and its agents have acted in accordance with the law. For that purpose, the Ombudsman applies not only legal but also constitutional parameters.

Nonetheless, the assessment of the administration may take place even if there is no direct breach of rights – it is sufficient for an administrative action to be presumed ineffective or contrary to the principle of legality. This has been the pattern followed by the Ombudsman in practice.[1420]

The reasoning applied by the Ombudsman in deciding individual cases is determined by the provisions of Article 9.1 of its Organic Act. According to Ávila Rodríguez, Article 9.1 establishes three criteria. The first criterion to be taken into consideration in delimitating the investigation is that the administrative action or decision subject to evaluation must concern citizens. The Ombudsman's assessment is, in principle, *ad extra* – that is, it relates to the external relationship

1416 Organic Act, Article 24.
1417 Organic Act, Article 26.
1418 Organic Act, Article 25.
1419 Guillermo Escobar Roca, op.cit., pp. 181–182.
1420 Juan Vintró Castells, loc.cit., p. 404.

between the administration and citizens. However, this does not imply that the Ombudsman cannot conduct *ad intra* investigations in relation to actions within the administration (either between organs pertaining to the same administrative body or between different administrative agencies) that affect citizens' rights.[1421]

The second criterion for the Ombudsman's investigation referred to by Article 9.1 of the Organic Act is the provision of Article 103.1 of the Spanish Constitution, which stipulates that the Ombudsman should assess whether administrative authorities comply with the principles of efficiency, hierarchy, decentralisation and coordination in order to protect human rights. In other words, if the lack of compliance with the aforementioned principles does not result in a rights violation then the Ombudsman is not entitled to initiate an investigation.[1422]

The third element established by Article 9.1 of the Ombudsman Organic Act is related to the object of the Ombudsman's protection. As mentioned above, the Ombudsman's main task is to defend the fundamental rights enshrined in Title I of the Spanish Constitution. However, in practice the Ombudsman protects the all matters covered by Title I, including the principles governing economic and social policy regarding health protection, social security, housing and environment, among others.[1423]

The ability to add to the content of existing rights and principles allows the institution to promote the development of new standards and legal norms to improve the administration with a view to ensuring citizens' rights. In relation to this, Perez Luño refers to the significance of the Ombudsman's reports in connecting rights protection with social demands and influencing the legislative process.[1424] In addition (and as noted), the Ombudsman's capacity to assess the performance of administrative authorities against constitutional parameters, together with the ability to recommend changes for the administration, give the institution broad influence at the policy level. In this regard, it is possible to affirm that the Spanish Ombudsman's investigations are also aimed at guaranteeing the quality of the administration, which shapes the preventing function of the institution.

In sum, through its handling of individual complaints, the Spanish Ombudsman is entitled to oversee public administration and policy. The constitutional protecting function assigned to the Ombudsman allows the institution to easily

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1421 Carmen María Ávila Rodríguez, "La buena administración ¿Objeto de supervisión o criterio de supervisión de la actividad administrativa para las instituciones de los defensores del pueblo?", p. 149.

1422 Ibid., p. 150.

1423 Ibid., p. 151.

1424 Antonio Pérez Luño, *Nuevos retos del Estado Constitucional,* p. 137.

connect any administrative irregularity with an infringement of rights. Thus, the defence of fundamental rights and the control of the administration are two functions that in practice are inseparable.[1425]

9.4.3. CLOSURE OF DECISIONS

The investigation procedure conducted by the Spanish Ombudsman is concluded with an explicit final decision (*resolución*). In its decision, the Ombudsman notifies of its findings. The Ombudsman must inform the party concerned of the results of its investigation. In cases where parliamentarians requested an investigation, the Ombudsman must also inform them. In addition, the institution will communicate the results of the investigation, whether positive or negative, to the authority, civil servant or administrative office affected.[1426] The decision may state that there were no grounds for the complaint, or it may contain a declaration regarding the performance of the administration.

The Spanish Ombudsman is considered an institution of a persuasive nature. It is known as a magistrate of opinion and dissuasion.[1427] Accordingly, the Organic Act provides a set of instruments through which the Ombudsman may present an appraisal of its findings with the purpose of proposing changes. Hence, when the results of the investigation are negative to the administration the Spanish Ombudsman may adopt four types of decisions: recommendations (*recomendaciones*); suggestions (*sugerencias*); reminders of legal duties (*recordatorios*); and, warnings (*advertencias*).[1428] The legislation does not specify the meaning of each type, and the difference between them is minimal.

In particular, recommendations and suggestions barely differ and are treated together by the Ombudsman. By means of recommendations and suggestions the institution may propose the modification of a particular act; compliance with existing norms; a change of judgment in the adoption of certain administrative decisions; and the enactment of new norms, or modification of existing ones, by the administration or Parliament.[1429] It is the recommendations aimed at changing the interpretation of a norm and its application, enacting new norms and modifying existing ones that most clearly reflect the normative function of the Ombudsman as a guarantor of human rights.[1430] On the other hand, it may

1425 Juan Vintró Castells, loc.cit., p. 404.
1426 Organic Act, Article 31.1.
1427 Antonio Mora, op.cit., p. 197.
1428 Organic Act, Articles 28.2 & 30.1.
1429 Juan Vintró Castells, loc.cit., p. 409.
1430 Guillermo Escobar Roca, "Interpretación y garantía de los derechos fundamentales por el Defensor del Pueblo", pp. 240–250.

be asserted that suggestions are more often applied as a way of proposing the adoption of specific measures regarding an individual citizen.[1431]

Reminders of legal duties are addressed to the administration in order to emphasise the need to fulfil the legal obligations. Reminders are usually issued in cases in which a norm is contravened as a consequence of administrative inaction. On the other hand, warnings, which are seldom applied, are remarks on behaviour, organisational defects or the outdated nature of a rule, issued with the purpose of stopping the phenomenon in question.[1432]

In all cases administrative authorities and civil servants are obliged to reply in writing within a maximum period of one month. If within that period appropriate measures are not taken or the authority fails to inform the Ombudsman of its reasons for non-compliance, the Ombudsman may inform the minister of the department concerned, or the highest authority of the administration concerned, of the particulars of the case and recommendations made. If no adequate justification is forthcoming, the Ombudsman will refer to the matter in its annual or special report together with the names of the authorities or civil servants responsible for the situation.[1433]

9.5. THE SPANISH OMBUDSMAN AS A DEVELOPER OF GOOD GOVERNANCE NORMS

9.5.1. FROM HUMAN RIGHTS TO GOOD GOVERNANCE

As explained, the main task of the Spanish ombudsman is the protection of fundamental rights. However, the institution is undergoing a process of hybridisation. In that regard, some authors point out that the Ombudsman's standard of assessment has been extended to get closer to the concept of maladministration.

The connection between human rights and good administration is reflected in the Ombudsman's reports, in which it informs about instances of malfunctioning by the administration. From a qualitative analysis of the reports, the criteria applied by the Ombudsman in assessing the conduct of the administration can be deduced. As mentioned, according to the Ombudsman, each malfunction by the administration can be linked (in a broad sense) with the infringement of a right.

1431 Guillermo Escobar Roca, *Defensorías del Pueblo en Iberoamérica*, p. 183.
1432 Juan Vintró Castells, loc.cit., p. 409.
1433 Organic Act, Article 30.

The Spanish Ombudsman applies legal standards. This explains why it has not developed its own normative framework, although from the perspective of this study nothing would prevent the Spanish Ombudsman from doing so. Although the Spanish Ombudsman neither performs a codifying function[1434] nor (explicitly) creates specific standards to assess the role of the administration, the institution has been seen to develop normative standards in a way that goes beyond legal or human rights-based standards. These can be also identified as good governance-based standards.

In order to demonstrate the hybridisation between a human rights- and a good governance-based standard, and through a qualitative analysis of the Ombudsman's reports, decisions and recommendations, this study has attempted to extract some standards as a mean of exemplifying that the Spanish Ombudsman protects the same values as the its British and Dutch counterparts. These standards reflect the reasoning underlining the Spanish Ombudsman decisions.

With this purpose, this section analyses a set of cases extracted from the Spanish Ombudsman's reports, which can be framed within a human rights perspective. They will provide insights about the relationship between human rights- and good governance-based standards and their ongoing hybridisation, as has been argued here.[1435] These cases are presented below.

Case 1

According to a complaint filed with the Spanish Ombudsman, a patient went to the emergency department of the San Carlos Hospital, in Madrid, but did not receive the service he needed because he was not carrying an identification document. The patient was forced to go to the Jiménez Díaz Foundation, where he was properly and promptly served. Subsequently, the health administration reported that an investigation had been carried out into the events reported and that the relevant instructions were issued to the hospital's admissions section, stressing *that the right to healthcare should prevail over other considerations and that failure to present documentation proving the right to obtain such care is not an obstacle to its receipt* (emphasis added) since the administrative requirements can be formalised after clinical care.[1436] As can be inferred from the case, the underlying value in the Ombudsman's decision was that the authorities should seek tailor-made solutions to fit the specific circumstances of the individual

1434 However, some regional ombudsmen have already adopted codes of good administrative practices and within the Spanish Ombudsman itself there is an ongoing debate about adopting such a code.

1435 In this regard it is worth recalling that in the annual reports the cases are categorised not by rights but by areas of administrative action.

1436 Annual Report 2007, Case 07003270, p. 723.

citizen, avoiding the unreasonable application of formalities which could affect the right to health.

Case 2

In response to a large number of complaints, the Spanish Ombudsman issued an opinion on the increase in tuition fees at public universities following the passage of Royal Decree-Law 14/2012, dated April 21, which set forth urgent measures to streamline public spending in the educational field. The Ombudsman pointed out that although the educational austerity measures adopted by government and the autonomous communities, in principle and in their own right, did not infringe the legal system and therefore could not be deemed to be irregular, the increase in tuition fees should be accompanied by a system of exemptions, based on the economic status of each student, *in order to ensure access to higher education on an equal basis and without discrimination on economic, social or other grounds* (emphasis added).[1437] In this case, it is possible to appreciate the relationship between the right to education and the principle of equality and non-discrimination. The Ombudsman addresses respect for the right to equality by recommending that the state take positive actions ("obligations to do") rather than negative ones, which involve the fulfilment of "obligations to not do" – a feature commonly associated with political civil rights.[1438] This perspective is widely developed in the management of complaints, where the Spanish Ombudsman seeks to protect the right to equality of groups in conditions of particular defencelessness, such as persons with disabilities, the elderly, immigrants, prisoners and children, among others.[1439]

Case 3

The Spanish Ombudsman initiated an *ex officio* investigation into the leaking via an internet program of patients' clinical data – including that contained in 4,000 medical records related to voluntary termination of pregnancies at the Lasaitasuna Hospital, Bilbao – for a violation of the right to privacy along with other fundamental rights. By way of a technological procedure, clinical data contained on the centre's hard drive was made available on the eMule Internet program (a popular file-sharing platform), placing it within potential reach of millions of people. In response, the Basque Government's Health Department

1437 Annual Report 2012, Joint Case 12026455 & others, pp. 196–197.

1438 Although comparative doctrine recognises that human rights are all interdependent and interrelated and that "obligations to do" and " obligations to not do" are as much derived from civil and political rights as they are from economic, social and cultural rights. See Christian Courtis & Víctor Abramovich, *Los derechos sociales como derechos exigibles*, Madrid: Editorial Trotta, 2002.

1439 In this regard, the Ombudsman stresses the importance of the administration taking positive actions, and of differentiated treatment as a means of ensuring respect for the right to equality and non-discrimination. See Guillermo Escobar Roca, "Interpretación y garantía de los derechos fundamentales por el Defensor del Pueblo", p. 254.

stated that following an inspection of the centre, recommendations were made *to safeguard the medical records – in addition to ensuring conditions to guarantee their confidentiality, authenticity and integrity* – in closed and fireproof rooms, and to establish access codes, to be periodically renewed (emphasis added).[1440] In this case, the Ombudsman stresses the importance of keeping high administrative organization standards, and in particular, adequate information registries as a means of guaranteeing the right to privacy and the privacy of information.

Case 4

In this case, the Ombudsman reported that the Office of Education, Universities and Sustainability of the Autonomous Community of the Canary Islands had confirmed the presence of asbestos on the rooftops of many education centres in the Community, which represents a health hazard when certain levels of concentration are reached, and to which humans are exposed when inhaling. The Ombudsman recommended that the Office of Education, Universities and Sustainability of the Canary Islands proceed with the preparation and execution of a periodic inspections plan of those school buildings under its management where asbestos may be present. It also recommended that the Office of Education, Universities and Sustainability take the necessary measures to stop school buildings from being *used when inspections are carried out, warning that their use poses risks to the health of students and teachers and other users of the facilities* (emphasis added). This case exhibits an overlap between the protection of the rights to health and education, on the one hand, and the need for appropriate facilities as a standard derived from the principle of efficiency.[1441]

Case 5

The Spanish Ombudsman issued an opinion on the frequent complaints filed with respect to the processing of scholarship applications and study aids, given failures in the selection of scholarship beneficiaries by provincial units and universities (associated with non-compliance with the deadline for submitting scholarship-granting proposals to the competent units of the Ministry of Education, Culture and Sports). The Ombudsman reminded the General University Policy Board, under the aforementioned Ministry, of the need for the units responsible for scholarships and grants to *repeatedly remind the scholarship beneficiary selection bodies of their obligation to submit the files and concession proposals within the deadline established in the current regulations* (emphasis added) so that processing can be continued with; and to proceed with the corresponding concession and payment within the academic year for which the

1440 Annual Report 2008, Case 08008156, p. 386.
1441 Annual Report 2013, Case 13018566, pp. 237–238.

scholarships and grants are awarded.[1442] This case shows how a lack of speed in administrative procedures can affect the right to access education.

Case 6

In another case, a citizen pointed out that had been booked by a Barcelona municipal agent on 20 March 2006 for a traffic violation, in breach of Article 155 of the General Traffic Regulations. He added that on March 28, 2006, he submitted a written statement of allegations through the Huesca government Sub-delegation, within the period established for that purpose. However, the sanctioning resolution was issued but not communicated to the interested party in a timely manner, so the interested party was unable to file the relevant resources. On January 16, 2007, he received notice of the Barcelona Municipality's request, to which he replied in writing on 25 January 2007. In spite of this, the foreclosure proceeding was conducted, and the interested party requested that the proceeding be nullified due to the lack of receipt of notice. The Municipality of Barcelona informed the Ombudsman that in reviewing the file, it found that the decision did not answer the interested party's allegations; thus, the Municipality determined that the administrative actions carried out were not in line with the right to cancel the fine and return the amount.[1443] The case illustrates the right to be duly notified and the importance of substantiating the administration's decisions in relation to the principle of due process.

Case 7

The Spanish Ombudsman responded to a complaint regarding the lack of teaching and non-teaching personnel to provide specific instruction to students with special educational needs within the Curriculum Educational Unit (UECP) operating in a specific public school on Ibiza. The students' parents insisted that this situation had also arisen in other education centres on the island. The complaint refers to both the manifest insufficiency of staff numbers and the insufficiency of the instruction time allocated to each student in relation to their particular needs. This situation prevented the development of curricular adaptations tailored for each student, and prevented professionals from exercising the constant supervision required by students with disabilities. In this regard, the Ombudsman referred to the insufficient resources allocated to special education. It also pointed out that budget constraints should only affect educational investment when they can be offset by an increase in efficiency in the management of resources.[1444] This case shows how the lack of trained personnel can affect the right to education of students with disabilities.

1442 Annual Report 2013, Joint Cases 13008451, 12008672, 12038007, 12122866, 12123360 & others, p. 254.

1443 Annual Report 2007, Case 07018897, pp. 401–402.

1444 Annual Report 2011, Case 11007846, pp. 346–347.

Case 8

The Spanish Ombudsman distinguishes between cases involving *malos tratos* (mistreatment) (related to violations of the right to integrity, the right to life and the right to personal freedom and those related to *tratos incorrectos* (ill-treatment or unproper behaviour) associated with indifferent attitude, discouragement and even negligence on the part of authorities and public officials.[1445] While cases of mistreatment can be classified under the general "respect for human rights" standard, "improper behaviour" cases are related to the "proper behaviour" or courtesy standard.

In relation to a serious case of mistreatment, the Ombudsman initiated its own investigation into the death of a citizen detained in a police station in Roquetas de Mar, Almería, in July 2005. The deputy head of the station reported that he had attacked the deceased with an electric baton, while the complainants alleged that "stun spray" had also been used on the detainee. The Ombudsman found that the deputy and eight other agents implicated in the events were being prosecuted, were subject to disciplinary proceedings, and, as a precautionary measure, had been suspended from work. As regards the weapons used against the detainee, a report sent by the General Police Force Bureau indicated that the officers could use so-called "personal defence sprays" as regulation weapons, with the approval of the Ministry of Health. On the other hand, electric defence had not been approved for use by the Police Force since 1995, due to the risk that its use could represent to people with certain physical conditions. In view of this, the Ombudsman inquired into why the Roquetas del Mar police station had at least one electric weapon. The Police Force noted in its reply that all electric batons had been withdrawn in August 1995, and were kept in a special store. The electrical defence baton used in this act was not the same as that formerly employed by the Police Force, but rather the officer who used it stated that he had obtained it during a police search.[1446] In this case the violation of the right to life and physical integrity can be clearly seen, caused by mistreatment and disproportionate use of force by police officers against a suspect. The Spanish Ombudsman's investigation here is part of the more classic activities associated with a human rights ombudsman model.

Case 9

With regard to improper behaviour, the Spanish Ombudsman received a complaint from a citizen who had been approached by two Madrid Municipal Police officers and asked to show his identification document. Although he was about to show his ID, the officers struggled with him, handcuffed him

[1445] Although in the Ombudsman's reports, they are listed under the complaints against agents of the security forces.

[1446] Annual Report 2005, Case 05020256, pp. 224–226.

and put him in a police vehicle, and told him that he was under arrest. At the time of the arrest, the officers checked his identity card. The citizen was taken to a police station, forbidden from using his mobile phone and kept handcuffed for an hour until he was released. He was given a complaint report charging him with infringement of Organic Act 1/1992 on the Protection of Citizen Security, of February 21, for repeatedly refusing to be identified. As a result of the investigation, the Ombudsman concluded that there were indications that the complainant's detention had no legal basis (given that he had already been identified and had not committed any crime). Likewise, it could be inferred from the analysis of the case that the use of handcuffs and the forbidding the citizen from communicating constituted acts that were clearly disproportionate.[1447]

Case 10

In another series of cases, the Spanish Ombudsman dealt with the right of access to information. For example, it has highlighted that the right of access to information about the environment does not depend on the applicant's status as an interested party. It points out that the public administration must provide access to any environmental information in its possession, regardless of whether: a) the applicant is an interested party or not; b) whether or not the information requested forms part of a file; and c) whether or not the file is complete. Failure in this regard would constitute a breach of the provisions of Act 27/2006, which regulates the rights of access to information, public participation and access to justice in environmental matters.[1448] The institution understands that mandatory administrative transparency requires that the Administration provide citizens with access to the files and obtain copies of the specific documents requested in order to promote citizens´ participation. It also states that it should not be forgotten that the law allows for denial of access to unfinished documents, but does not allow denial of access to provisional documents.[1449]

Case 11

The Spanish Ombudsman referred to the complaint of a merchant who, since May 1991, had been authorised by the Municipality of Huelva to sell handicrafts at the Plaza de las Monjas, but whose space had been transferred in 2006 following the remodelling of said plaza. This measure, according to the interested party, contravened an agreement made by the municipality in February 1998 not to transfer merchants' spaces without prior consultation and agreement with the merchants in question. The Municipality of Huelva had not conducted prior consultation, noir offered compensation, to these individuals. Its representatives argued that the merchants' status was precarious, for when

1447 Annual Report 2009, Case 09000574, pp. 381–384.
1448 Annual Report 2012, Case 11021825, p. 299.
1449 Annual Report 2012, Case 12006244, pp. 299–300.

they were granted authorization to occupy the public space they did not follow the planned legal procedure to call a public bidding. Against the municipality's arguments, the Ombudsman pointed out that although the authorization had violated procedural rules at the time of granting, this did not justify repealing the previous decision, nor its substitution with another illegitimate measure. This action caused a situation of legal insecurity, proscribed by the Spanish Constitution. The Ombudsman's Office suggested that the Municipality of Huelva consider compensating the merchants affected by the change of location.[1450] This case highlights several principles, such as legitimate expectations.

Case 12

The Spanish Ombudsman has intervened in response to numerous complaints concerning improper motivation in decisions to reject applications for a visitor visa in Spain, as well as those issued in the dismissal of appeals. In some cases, the requests had been denied on the grounds that the intention to leave Spanish territory could not be established before the expiry of the visas. In these cases, the General Consular and Immigration Affairs Bureau was reminded of the need for sufficient grounds in administrative acts that limit subjective rights or legitimate interests, so that they do not appear to be a mere expression of a subjective will on the part of the issuing entity, and in order to provide applicants an explanation of the basis for the decision to refuse the visa. In other cases, according to the Ombudsman, the denial of appeals for reconsideration did not make the slightest reference to the factual and legal grounds of decisions.[1451] In this case, it is possible to observe the relationship between the duty to give reasons with regard to the transparency of decisions.

Based on the cases analysed (and those which will be examined in the following sections), Table 8 presents a non-exhaustive list of standards of proper conduct (as this study labels them) developed by the Spanish Ombudsman. It is important to mention that it is not the intention here to develop a detailed, restricted or definitive list of the identified standards, but rather to provide some examples of the standards and the connection between human rights and good governance in the approach of the Spanish Ombudsman.

As a human rights ombudsman the Ombudsman applies (binding) legal norms as assessment standards. Consequently, as can be inferred from the proposed list, most of the identified standards relate to properness, linked to legal norms derived from the rule of law principle. However, as in the case of the Dutch and UK peers, some other standards can be identified in connection with the good governance (steering) dimension of the modern constitutional state and a modern concept of good administration. In these cases, the Spanish Ombudsman is applying (and

1450 Annual Report 2009, Case 07009857, p. 1352.

1451 Annual Report 2011, Joint Cases 10010741, 10012550, 10033765, 09018147 & 10022656, pp. 304–305.

developing) standards that go beyond positive legislation. The same can be observed in relation to the proposed standards connected with the principle of effectiveness.

Table 8. List of Proposed Standards of Proper Conduct Developed by the Spanish Ombudsman

Transparency	Properness	Participation	Accountability	Effectiveness
Publication of regulations/ decisions Provision of adequate reasons Access to information Active provision of information	Proper behaviour Human rights Equality and non-discrimination Carefulness Prohibition of arbitrariness Prohibition of misuse of power Legitimate expectations Legal certainty Impartiality Proportionality Due process Consideration of individual circumstances	Consultation Promotion of participation	Adequate complaint mechanisms	Trained and competent staff Adequate facilities Effective organization Keeping adequate records Promptness Coordination and cooperation

Thus, again, two groups of standards can be discerned: i) standards linked to legal regulations and principles (lawfulness / notion of rule of law); and ii) rules of good administrative conduct. The first group (legal norms) includes: 1) legality; 2) legitimate expectations; 3) legal certainty; 4) impartiality; 5) equality; 6) prohibition of misuse of power; 7) prohibition of arbitrariness; 8) proportionality; 9) reasonableness; 10) due process; and 11) human rights. These criteria are mainly linked with the fundamental value of the rule of law and properness as a good governance (constitutional) principle.

In turn, the second group (rules of proper conduct) includes: 1) proper behaviour; 2) consideration of individual circumstances; 3) promptness; 4) active

provision of information; 5) effective organization; 6) trained and competent staff; 7) coordination and cooperation; 8) adequate facilities; and 9) adequate record-keeping, among others. This second group is more clearly related with the good governance (steering) dimension in connection with the principle of effectiveness and transparency.

These standards show how the Spanish Ombudsman is promoting good administration concern for quality, by applying more flexible mechanisms. These mechanisms reflect a more creative role of the Spanish Ombudsman based on legally and non-legally binding norms as standards of control.

The following sections will show how some of these proposed standards are applied in practice. Then, as in the case of the Dutch Ombudsman and the UK Ombudsman, there will be a focus on transparency, properness and participation in accordance with this study's good governance model.

9.5.2. APPLICATION OF GOOD GOVERNANCE-BASED STANDARDS IN THE OMBUDSPRUDENCE OF THE SPANISH OMBUDSMAN

9.5.2.1. Normative standards in practice

After introducing fundamental rights-based *ombudsprudence,* cases will be presented based on the proposed standards of proper conduct in Table 8. Based on a qualitative analysis of the ombudsman reports, a description will be provided of how good governance-based standards are applied in practice. These standards can be related to the good governance model developed in this study, as has been shown.

Finally, cases based on the good governance principles of properness, transparency and participation will be presented.

Trained and competent staff

According to the Spanish Ombudsman, the lack of staff in the administration of justice is an issue that has implications on the exercise of rights. In this regard, one citizen who approached the Ombudsman stated that because the Court of First Instance of Mieres (Asturias) did not have a psychosocial team that could prepare a report on his relationship with his children, he was being deprived of visitation and holidays with his children and was not able to spend time with them during the summer and Christmas of 2004. The Ombudsman referred the complaint to the Department of Justice to determine whether a psychosocial team could be assigned to the Court of First Instance of Mieres (Asturias), or whether a team

working close to Mieres could take on the task since the lack thereof prevented the establishment of new holiday arrangements, making these dependent on a previous psychosocial report. The report received from the Department of Justice informed the Ombudsman that, in the absence of a psychologist under this court, the Territorial Management Office of the Department of Justice could make arrangements to recruit provisional external professionals. This was reiterated by the Department of Justice to the Territorial Management Office of Asturias. In response, the Ombudsman suggested that the interested party get in contact with the Territorial Management Office of Asturias to request, as noted by the Ministry of Justice, the recruitment of an outside professional to prepare the required psychosocial report. Through a parallel report requested by the attorney general, the Ombudsman found that the Territorial Management Office of Asturias had informed the court of that possibility. Ultimately, a psychologist was assigned to the execution of the judgment and issued the required report.[1452]

In another case, a citizen complained to the Spanish Ombudsman about the operation of the telephone assistance service by the Provincial Traffic Headquarters of Madrid, since only a limited list of options was provided to answer queries, and it was not possible to contact an operator to answer any other user queries. This was because the service was only provided by two telephone operators, and the tape with the inquiry options only covered the most common situations. The Ombudsman considered that given the large number of people requiring information on administrative procedures at the Provincial Traffic Headquarters of Madrid, it was clearly insufficient for the telephone call centre to be staffed by only two operators. This forced many people to go to the Provincial Traffic Headquarters of Madrid in person to obtain the information, where they had to queue for that purpose. Therefore, the Ombudsman suggested that this body take appropriate measures to make the telephone call service more effective (including employing more telephone operators). This recommendation was accepted.[1453]

In another case, a citizen told the Spanish Ombudsman that when he went to the Provincial Traffic Headquarters of Madrid to transfer ownership of his vehicle, he had to wait outside for over an hour and a half before he was able to enter the building. Having paid the corresponding fees, the citizen was assigned a number and had to wait for more than three hours to submit the corresponding documentation. The Traffic Bureau attributed this problem of inadequate service to a workforce vacancy rate of almost 30%, and to a tripling of the processing volume between 1998 and 2005. They stated that to address this problem, the building next to the current offices had been rented to improve customer service, and a process was underway for the acquisition and remodelling of new offices.

1452 Annual Report 2005, Case 0500212, p. 132.
1453 Annual Report 2005, Case 0501438, p. 252.

Likewise, 100 new employees were hired – 50 in February 2005 and 50 in May 2005 – to work full time for a period of six months.[1454]

Adequate facilities

The Ombudsman received a complaint from the Attorney of Castilla y Leon in which he stated that the headquarters of the Superior Court of Justice of Castilla y León (Burgos) was in very poor condition, to the point that officials working there asked that urgent measures be taken to reinforce the structure of the building and to remodel it. In July 2005, due to an official ceremony being held there, the structure of two courtrooms was reinforced to ensure the stability of the roof. The Ombudsman asked the secretary of state of the Department of Justice to report on the remodelling. In response, the Ombudsman was informed that in 2006 they would proceed with the drafting of plans for a comprehensive reform of the courthouse, but nothing was said of the measures to be adopted by the Ministry. Given Ombudsman's concerns, asked to the Superior Court of Justice of Castilla y León for an extension of the information due to the inadequate state of the building and the potential risk it posed for people working there.[1455]

In another case, the Spanish Ombudsman referred to the material conditions of the La Esperanza Juvenile Protection Centre in the Autonomous City of Ceuta, located on the border with Morocco, where foreign youngsters seeking asylum in Spain reside and receive secondary education. Although the Ombudsman highlighted the merits of the centre – administered by the Autonomous City – in the education of young people, it questioned the precarious conditions of the facilities. The Ombudsman pointed out that the building had serious structural deficiencies and over-crowding problems. It stressed the need to build a new centre as well as to provide provisional alternative accommodation for residents and improve safety conditions in case of fire or evacuation.[1456]

In another case, the Spanish Ombudsman referred to a complaint filed by the parents of primary school students in the Community of Madrid, who pointed out that the school had been operating in temporary prefabricated classrooms which were not suitable for the schooling of students, with a capacity insufficient to house the centre's student population. They added that since September 2005, the school's Parents Association had been insistently demanding that the local council and the Department of Education of the Community of Madrid take measures to provide the centre with the necessary facilities. In its response to the Ombudsman, the Department of Education stated that for that school year

1454 Annual Report 2005, Case 0428899, p. 251.
1455 Annual Report 2005, Case 05020975, p. 133.
1456 Annual Report 2008, Case 08017157, p. 279.

(2009–2010), a new classroom was planned for Grade Five students in a space which, up until then, had been used as a diner (which would be transferred to a new pre-fabricated building). The Department of Education also advised that it had requested that the locality's municipality transfer a parcel for the final construction of the school building, to replace the pre-fabricated facilities in which the school had been operating.[1457]

Provision of adequate reasons

The Spanish Ombudsman initiated proceedings following a complaint made by a Pakistani citizen who had applied for family reunification with his wife and two daughters. The Spanish consular office in Pakistan denied all three family members the visas, stating that there were "discrepancies in local public documents." The Ombudsman stated that the use of generic formulas prevents people from being aware of the specific problem, leaving them feeling helpless when appealing against the resolution in both administrative and judicial processes. The Ombudsman pointed out that it would be more in line with the general principles governing the conduct of government to review records and inform people where there is a discrepancy, and if this discrepancy has been resolved, to revoke the previous administrative act and issue a new one instead of having to start over, thereby delaying the procedures. Therefore, the Ombudsman recommended that in cases where family reunification visas have been denied, the individuals concerned should be adequately informed of the grounds for refusal without the use of general formulas that do not show the actual reasons for denial.[1458]

In another case, a citizen raised the fact that in the notification of provisional suspension of unemployment benefits for alleged fraud, he was not informed of the specific reasons for this presumption, which was related to a government campaign against the fraudulent collection of unemployment benefits, and nor was he given the opportunity to be heard. The Public Employment Service (*Servicio Público de Empleo Estatal* – SEPE) recognised that the notification of suspension did not specify the evidence of fraud that had led to the decision or that the Inspector of Labour and Social Security had been involved. SEPE proceeded to revoke the decision of provisional suspension.[1459]

In a different case, the Spanish Ombudsman referred to the problems of intelligibility in the Spanish Tax Agency's automated communications to taxpayers, in relation to the payment of personal income tax. Because of the

1457 Annual Report 2009, Case 08022711, pp. 515–516.
1458 Annual Report 2005, Case 0419538, p. 819.
1459 Annual Report 2013, Case 13021258, p. 328.

high number of taxpayers who make annual declarations of this tax, the Agency had implemented automated procedures to that effect. Accordingly, taxpayers must follow the procedures to fill out these forms, for which they are expected to be proficient in tax matters – which in reality is not normally the case. The Ombudsman stressed that these requirements would lead to numerous cases of defencelessness, caused by taxpayers failing to understand the documents sent by the Tax Agency where their tax debt is shown, and, consequently, failing to understand the underlying reasons. Although these documents refer to the rules allegedly breached and each taxpayer's statement is matched against the Agency's calculations, the explanation usually consists of no more than a literal quotation of the precepts of the law upon which the tax debt is based, rather than the facts that would justify their application. In view of this, the Ombudsman recommended that the Tax Agency consider the possibility of clarifying the information provided to taxpayers in its automated communications processes, so as to inform taxpayers of the facts that gave rise to their tax debts as well as the basis of the regulations from which they stem.[1460]

Proper behaviour and respect

The Spanish Ombudsman has stated that the need for proper behaviour, especially from the security forces, remains one of the themes that arises most frequently in the complaints it deals with. According to the Ombudsman, much of the conduct of the security forces does not comply with the regulations in force, in particular the Code of Ethics of the National Police. It has stated that the principles underlying the Organic Security Forces Act and the Code of Ethics of the National Police must be taken into consideration in all interventions that involve the use of force and any interactions with citizens.

In one such case, a citizen filed a complaint before the Ombudsman indicating that upon returning to his home in the centre of Madrid, two officers of the National Police prevented him from going along one street, forcing him to take an alternative route. During that time, according to the citizen, he had to endure shouts and shoves by police officers. In addition to the verbal and physical abuse, once he arrived at the Leganitos Street Police Station he was taunted by the agents guarding the door while being intimidated and deterred from filing a complaint. In this regard, the Ombudsman made a statement to the Directorate General of Police as a reminder to officers of the Central Police Station in Madrid about their duty to observe proper treatment and due care when dealing with the public, and to avoid any abusive, arbitrary or discriminatory practices involving physical or moral violence when performing their professional duties.[1461]

1460 Annual Report 2007, Joint Cases 07012065 & 07025391, pp. 1259–1260.
1461 Annual Report 2013, Case 12008653, pp. 155–156.

Along the same lines, the Ombudsman has pointed out that any inconsiderate treatment of citizens must be rectified when the incident in question constitutes a disciplinary infraction pursuant to the law, and the sanction imposed must serve as an example to the rest of the members of the security forces. This is the case of a complaint made by a citizen who went to a police facility to extend a complaint he had made there two days earlier, concerning a theft that took place in a building he owned; however, a sergeant told him – in an inappropriate manner – that the complaint would not be extended, and he started to beat the furniture and threaten him. After the citizen filed a complaint in the complaints and suggestions book, it was ascertained that the sergeant's actions were not appropriate, and he was therefore subjected to a disciplinary sanction, and charged with "not exercising due consideration or treatment of people in the exercise of his functions, on the occasion or when wearing a uniform", as prescribed in Article 9, Item 1 of the Law on the Police Force Disciplinary Regime.[1462]

In an area beyond police action, the Ombudsman referred to the case of a citizen who had been treated in a callous manner by an official of an investigating court in Madrid. On August 17, 2007, the citizen went to the court to collect his mother's autopsy report; after the citizen identified himself as the deceased's son, the official asked him why he was in such a hurry to find out the result of the autopsy, adding that it was probably because he wanted to collect the insurance. In an abusive and arrogant manner, according to the citizen, the official forced him to sign some papers, which turned out not to be the detailed autopsy report. When he asked for the real document, the official replied that she did not have it. After leaving the courthouse, the citizen called his sister to tell her what had happened, who in turn called the court and spoke to the same official. Not only did the official inform her that she now had the detailed report, but proceeded to read it out over the telephone, in breach of current legislation on data protection since the citizen's sister had not identified herself as the daughter of the deceased. The Ombudsman opened an investigation with the Ministry of Justice, and later with the Community of Madrid, the latter having competence for the investigation of disciplinary proceedings and the imposition of sanctions on judicial administrative officials.[1463]

Equality and non-discrimination

The Ombudsman initiated an own-initiative intervention in relation to the Department of Education, Youth and Sports of the Community of Madrid in order to determine the possible infringement of the principle of accessibility

[1462] Annual Report 2012, Case 12006717, p. 131.
[1463] Annual Report 2007, Case 07025337, p. 231.

and non-discrimination on grounds of disability at a high school in Madrid. The report, issued by the Permanent Specialised Office of the General Directorate of Support and Disability Policy, concluded that the changes in the location of the school's cafeteria would prevent the integration of students with disabilities. As such, the school would need to find a different location in order not to disrupt the school life of these students. The Department of Education, Youth and Sports said that the new location does not affect the access of students. Despite the proceedings having concluded, the Ombudsman reported that the case was still under investigation.[1464]

The Spanish Ombudsman reported numerous complaints from foreign nationals who had been systematically detained by police, in order to ascertain their identity, in different parts of Madrid. According to a report sent by the General Aliens and Borders Bureau, identification is always made with full respect for the provisions of the Organic Act of Criminal Proceedings, Organic Act for the Protection of Citizen Security, and the Aliens Act, in addition of Circular Letter Number 1/2010, issued by the Bureau in question. However, it was apparent from the complaints received that an interpretation of these restrictive rules was being made with respect to the rights of foreigners on the basis of their ethnic characteristics. Numerous individuals claimed to have been "pre-emptively" detained and transferred to police stations, even though they were well documented, when their legal residency in Spain was not proven by identification control. The Ombudsman requested a new report from the General Immigration and Borders Bureau to state whether systematic identification controls continued on the basis of ethnic characteristics.[1465]

The Spanish Ombudsman opened an investigation with the Department of Education and Social Groups of the Autonomous City of Melilla, concerning the conditions of access to three training programs organised by the municipal company Promesa. In the advertisements for these programs, it was pointed out that applicants must be Spanish citizens as a minimum requirement for access. This requirement was discriminating, as it contravened Article 9.3 of Organic Law 4/2000, Law on Foreign Nationals, based on the wording resulting from its amendment through Organic Law 8/2000 and the annulment, which refers to "residents" by way of STC 236/2007, of the Constitutional Court. Therefore, the Ombudsman requested that the Municipality of Melilla provide information on the requirement of Spanish citizenship.[1466]

1464 Annual Report 2013, Case 12247214, p. 228.
1465 Annual Report 2010, Case 10002358, pp. 462–463.
1466 Annual Report 2011, Case 10023104, pp. 329–330.

Effective organisation

In response to some complaints made against the State Tax Administration Agency (*Agencia Estatal de Administración Tributaria* – AEAT) the Ombudsman drew attention to the need for improved information services for citizens. For instance, the Ombudsman noted that the 901 information phone line provided by the AEAT was difficult to contact in view of the slow answering times and the dropped calls that caused citizens to redial. The Ombudsman insisted that the AEAT must improve its information line and its person services, especially regarding the appointment services for people seeking to file their taxes.[1467]

In the case of a worker's union, the Ombudsman was made aware of deficiencies in the health services provided to state employees affiliated through Muface and MuGeju insurance funds in Campo de Gibraltar. The Ombudsman addressed the Subsecretary of the Ministry of the Presidency about this issue. With regard to MuGeju, it was reported that the main problem was the shortage of hospitals. In order to improve the situation the upcoming construction of a hospital in Palmones was announced. With regard to Muface, it recognised the lack of health resources in this area and that inadequate health coverage in the territory caused distrust and insecurity for citizens and placed restrictions on the right to health. It was recommended that the Subsecretary of the Ministry of the Presidency adopt the appropriate measures for the provision of effective healthcare services to Muface beneficiaries in Campo de Gibraltar. The Ombudsman pointed out that since healthcare should be the primary purpose of the National Health System, comprehensive health promotion, disease prevention, treatment and rehabilitation require proper organization to ensure comprehensive provision to all citizens.[1468]

In yet another case, the Spanish Ombudsman referred to the problems in accessing the electronic portal of the Public Employment Service (SEPE). It found the SEPE platform to have an excessively complex design, which makes such communications difficult, preventing people from being able to exercise their rights and fulfil their obligations. The websites help guides did not contribute to resolving any doubts, nor did the telephone inquiry services, while there was no email channel in place to answer queries. On the other hand, although the system allowed users to make face-to-face appointments regarding inquiries by telephone or through the website, it forced users (at least on its digital form) to accept these appointments on a given date and at a given time, at least eight days ahead. The Ombudsman notified the SEPE of these incidents and recommended

1467 Annual Report 2013, Joint Cases 11010766 & 12012812, pp. 347–348.
1468 Annual Report 2008, Case 08002612, p. 760.

that the institution introduce its electronic platform in order to simplify and facilitate its use.[1469]

Coordination and cooperation

The Spanish Ombudsman noted that there were a number of complaints accusing the various autonomous communities of not providing health services of a consistent standard, preventing users from enjoying equal access to healthcare. The Ombudsman pointed out that coordination and cooperation between the respective health services of the autonomous communities should be improved. It stressed that there were restrictions on the mobility of patients within the public health system, associated with problems in the provision of continuous and high quality healthcare when users travelled to a different autonomous community. The complaints referred primarily to two problems: 1) patients with chronic diseases who, when traveling outside their communities of residence, could not access the medication they required; 2) limitations on access to specialized care consultation. Faced with this problem, the Ombudsman initiated *an ex officio* investigation with the Ministry of Health, Social Services and Equality, aimed at the National Health System's Inter-territorial Council to adopt measures to guarantee citizens' access to health services of consistent quality, regardless of where in Spain they might be at any time. In light of the Ombudsman's recommendations, the Ministry of Health stated that a specialized work group would prepare a report to include a recommendation on developing a standard unifying criteria, as well as procedures at the national level, for care to be provided to people who are temporarily outside their community".[1470]

In another case, the Spanish Ombudsman found that the universities of the Community of Madrid were not receiving financial compensation from any state or autonomous agency for the costs of measures to support students with disabilities, such as exemption from tuition fees. In this regard, the authority responsible for education in the Community of Madrid informed the Ombudsman that the exemption on fees and public prices for students with disabilities is established in the Organic Law on Universities – and in the case of national level legislation, the disbursement of compensation would relate to the State's general budgets. In turn, the Ministry of Education, Culture and Sports argued that compensation to universities for the benefits granted to students with disabilities should correspond to the Autonomous Community, because when competence on higher education is transferred thereto, mechanisms were established to finance these subsidies. The Ombudsman noted that the discrepancy has negative consequences for the financing of measures to ensure

1469 Annual Report 2013, Joint Cases 13031733 & 13029637, p. 336.
1470 Annual Report 2011, Case 11018975, pp. 408–409.

equal opportunities in higher education for those with any type of disability. In view of this situation, it recommended that the competent bodies of the national and autonomous government, in accordance with the principles of efficacy and coordination to which the performance of public administrations should be subject, clearly determine the attribution of the duty to compensate universities for the costs derived from subsidies to students with disabilities, determining which specific funding items should be included in the respective budgets.[1471]

In another case, the Spanish Ombudsman cited arrangements for the environmental assessment of a project to modify a section of a road that could affect Camino de Santiago, a route classified as a UNESCO World Heritage Site. The Ombudsman pointed out that the Jacobean Council, a body made up of representatives of the State Administration and the autonomous communities and chaired by the minister of culture, is the body in charge of coordinating the actions to be carried out by the various levels of government with respect to Camino de Santiago, and as such must be consulted regarding any project which affects this route within the framework of the Environmental Assessment Law. In view of this, the Ombudsman recommended that the Ministry of Development and the Ministry of Agriculture, Food and the Environment consult the Jacobean Council regarding any project which would affect the Camino de Santiago. It further reminded the director general of fine arts and cultural heritage of the Ministry of Culture that – as a member of the Jacobean Council – he was obliged to guarantee the preservation of Camino de Santiago and to aid in the preparation of the report issued by the Council within the framework of the environmental impact assessment.[1472]

Consideration of individual circumstances

While processing a complaint, the Ombudsman found that a citizen with a disability (reduced mobility) was sanctioned, despite having a parking permit, due to a formalistic interpretation of the regulations. In this case, besides suggesting the revoking of the sanction, the Ombudsman recommended that the City of Granada avoid such formalistic interpretation and application of regulations, which resulted in the sanctioning of persons with reduced mobility for parking in the spots designated for citizens with disabilities.[1473]

In a different case, a citizen domiciled in Madrid appealed to the institution, stating that he had been sanctioned by the Municipality for having stopped his vehicle in the bus lane in order to drop off a passenger, who was ill, near his

1471 Annual Report 2013, Joint Cases 12256406, 12256464, 12217170 & others, p. 251.
1472 Annual Report 2012, Case 09001356, pp. 301–302.
1473 Annual Report 2010, Case 10005476, pp. 1325–1326.

home. The Ombudsman requested a report from the Municipality of Madrid on whether there is any type of instruction for similar cases, involving passengers with mobility problems, so as not to proceed to report infringements. The reply obtained from the Municipality highlights the possibility of such drop-offs (which, according to law, provides for the stoppage of a vehicle for less than two minutes without the driver leaving) as long as the stop is sufficiently justified. The Municipality stressed that municipal services act on the understanding that the application of the rules must be compatible with the occurrence of special situations that require exceptional treatment. The Madrid Municipality added that it is obvious that stopping a vehicle to allow a person with serious mobility limitations to get on or off a vehicle should not be considered as a routine stop, and that such circumstances be taken into account before reporting the incident as a traffic violation. However, it must be considered that it is the users' duty to stop in places with the minimum level of disturbance; and if possible, in a non-prohibited area, since stopping otherwise would only be considered justified if there were no other acceptable alternatives within the parameters of legality.[1474]

The Spanish Ombudsman referred to the case of not allowing entry into the country, via the immigration checkpoint at Madrid-Barajas airport, of a pregnant woman who claimed to have been raped and who showed signs of being a victim of trafficking. The Ombudsman considered that a flat-out refusal to allow entry into Spain had not been correct, since the personal circumstances of the individual concerned had not been adequately assessed, nor had the risks of returning her to her country of origin, where there was an ongoing armed conflict characterized by systematic violations of women's rights. In view of this, the Ombudsman recommended that the General Foreigners and Minorities Bureau communicate with UNHCR in order to ascertain the situation in the woman's country of origin, and to determine the risks involved in her return, leaving evidence of this assessment in the file before making a decision in relation to her case.[1475]

Adequate complaint mechanisms

Following the processing of a complaint filed by an inmate of the Soto del Real Prison (Madrid) due to an accident in one of the city's courts, the Ombudsman found that the report regarding the medical treatment he received, to which he objected, had emanated from the medical services provided by the prison, so that questions regarding its impartiality could be raised. Consequently and in line with a previous recommendation accepted by the prison administration, the Ombudsman recommended to the Ministry of Interior that investigation into

1474 Annual Report 2005, Case 0426843, p. 243.
1475 Annual Report 2013, Case 13007518, p. 184.

complaints involving serious allegations of unlawful conduct by prison medical services be carried out by professionals outside the staff of the institution in question. In addition, it recommended standardising an internal protocol of action for the central prison administration.[1476]

In another case, a citizen complained to the Spanish Ombudsman about the way in which a complaint had been filed with the Leganés Municipal Consumer Information Office. On September 2, 2005, the interested party had filed a complaint against a private company. The complaint was dismissed on November 28, 2005 because the stated facts were not substantiated. The interested party subsequently submitted a new document providing documentation to prove the alleged facts, but that letter was not accepted by the official who served him. The interested party then sent it again by certified mail, but received no response. The Ombudsman intervened, asking the Municipality of Leganés for information on the procedure. The Municipality acknowledged that the interested party's claim had not been properly dealt with and agreed to continue with proceedings, which concluded in an agreement between the citizen and the company against which the claim was filed, whereby the latter was allowed to place an order again free of charge. The Ombudsman concluded its action by reminding the Municipality of Leganés of its duty to expressly resolve within the established deadlines all claims filed by citizens, in accordance with Article 42 of Act 30/1992.[1477]

9.5.2.2. Ombudsnorms as good governance-based standards

As shown above, the application of human rights-based standards by the Spanish Ombudsman may also be expressed in accordance with the good governance scheme developed as part of the normative framework of this study. In the following section the ombudsprudence of the *Defensor del Pueblo* will be analysed with regard to properness (carefulness), transparency (active provision of information) and participation (consultation).

a. Properness: carefulness

Case: Complaint about the Public Employment Service
The Ombudsman noted that as a result of its intervention, the Public Employment Service (SEPE) reviewed, ex officio, its decisions regarding refusals of benefits. SEPE found that its decisions did not conform to the rules and had not taken into account the documentation or explanations made by citizens. In this context, a citizen requested the resumption of unemployment benefits after working independently for less than 24 months. The key issue

[1476] Annual Report 2008, Case 07000212, p. 754.
[1477] Annual Report 2006, Case 06011178, p. 523.

was the calculation of the dates as an independent worker. The Public Service of Employment issued an order dismissing the appeal without considering all the information necessary to make a well-informed decision. The Directorate General of that service fully acknowledged the mistake and ordered a new resolution recognizing the benefit.[1478]

Case: Complaint about the Directorate General of Higher Training and Orientation of the Ministry of Education

Through the handling of various complaints, the Ombudsman found that it is not uncommon for students applying for scholarships and financial aid provided by the Ministry of Education to have trouble proving their independent status. It is difficult to know how to test their independence in a way that provides sufficient proof for the selecting bodies. Therefore, the ombudsman recommended that the Directorate General of Higher Training and Orientation adopt the necessary measures to ensure that applicants are well informed about the documents that would count as sufficient proof of their independence in the procedures for granting scholarships and student aid convened by the Ministry of Education. In addition, the Ombudsman recommended that once all the appropriate information is taken into account, and before making the final decision, the applicant be granted with the opportunity to be heard.[1479]

Case: Complaint about Health Department of the Community of Madrid

Regarding a complaint about the refusal to grant a leave of absence to care for a child, the Ombudsman noted that the administrative decision did not sufficiently explain the reason cited for the decision – namely, the lack of evidence of the need for the child to be cared for by the applicant claiming to exercise that right. The Ombudsman recommended that the Sub-Department of Health Planning and Infrastructure of the Community of Madrid apply the provisions interpreted in Act 39/1999 of 5 November 5 on reconciliation of work and family life, so that the needs of the minor in question could be accommodated. Specifically, all circumstances as well as the necessity and urgency of the situation, were to be taken into account.[1480]

b. Transparency: active provision of information

Case: Complaint about the State Tax Administration Agency

In this case, the Ombudsman drew attention to the need to clarify the communications of the State Tax Administration Agency (AEAT). In this regard, it noted that the administration has the obligation to inform and assist taxpayers

1478 Annual Report 2013, Case 13002467, p. 329.
1479 Annual Report 2010, Case 09005664, p. 1268.
1480 Annual Report 2008, Case 0507150, pp. 764–765.

with materials written in language that is understandable by everyone, since some find standardized models difficult to follow. Furthermore, the Ombudsman noted that communications must be clear so that recipients are fully aware that they need to review the content prior to receiving a confirmation. Therefore, all advertising campaigns must be carried out and explained accurately and in simple terms.[1481]

Case: Complaint about the Environment, Housing and Land Management Department

After conducting an investigation, the Ombudsman recommended that the Directorate General of Housing and Rehabilitation increase the availability of information (provided in the media, in writing, by phone, by email or on internet portals) regarding social housing so that the different groups know about their rights and obligations when seeking to apply for one of these homes.[1482]

Case: Complaint about the Education Department of the Community of Madrid

During the process of admitting students to pursue advanced vocational education qualifications, it was not reported that places being offered by a certain private school were offered only to male students. The school's mission included the principle of differentiated education for students of that gender. This prompted the female complainant to apply for a place there. Her request was admitted, and at no point during the processing was she informed of the restrictions – which would have prompted her to apply to another centre –that subsequently impeded her enrolment at the school. Given the difficulties for the claimant, the Ombudsman recommended that the Education Department of the Community of Madrid take the necessary initiatives or regulations to ensure that during the admission process students should be kept informed about any such restrictions.[1483]

c. Participation: consultation

Case: Public participation in the preparation of draft legislation

This case is related to public participation in the preparation of draft legislation, draft regulations and any other general provisions concerning matters listed in Article 18.1 of Act 27/2006 of 18 July, Law on the Rights of Access to Information, Public Participation and Access to Justice in Environmental Issues (incorporating directives 2003/4/EC and 2003/35/EC). The investigation took place with the Ministries of Justice, Development, and Environment regarding

1481 Annual Report 2013, Case 13013304, pp. 348–349.
1482 Annual Report 2010, Case 09015362, p. 1285.
1483 Annual Report 2008, Case 07030621, pp. 763–764.

public participation in the preparation of the draft Law on Maritime Navigation, and the draft amendment of Law 48/2003 of 26 November, Law on the Economic Regime of Ports of General Interest.

The Ombudsman stated that the fact that the application of an environmental organisation was submitted after the procedure for the preparation of draft legislation was finalised did not excuse the Ministry of Development or the Ministry of Justice from meeting the requirements of Act 27/2006 of July 18. The Ombudsman pointed out, with regard to public participation in the preparation of general regulations, that the following guarantees provided in Article 16.1 of Act 27/2006 must be observed: a) citizens must be informed through public notices or other appropriate means, including electronic, when available, of any proposed plans, programs or general provisions, or if applicable, their amendment or revision, ensuring that relevant information is intelligible and available to the public, including that related to the right to participation in decision-making; b) that the public is entitled to express comments and opinions when all options are open before decisions regarding the plan, programme or general provision are adopted; c) the results of public participation must be properly taken into account in making these decisions; and d) once comments and opinions expressed by the public are examined, the public must be informed about the decisions made and the reasons and considerations on which these decisions are based, including information on the public participation process.

In this regard, the Ombudsman recommended that the Ministry of Justice, the Ministry of Development and the Environment, and the Ministry of Rural and Marine Affairs guarantee public participation by providing clear information to citizens, receiving comments and views, and examining and reporting the decisions made and the reasons and considerations on which they are based, determining in advance that citizens are interested in participating in the proceedings.[1484]

Case: Noise pollution caused by airports and preparation of maps

In relation to a case related to noise from Barajas and El Prats airports and mapping, the Ombudsman recommended that the public entity guarantee public participation in public decision-making processes through access to information based on a different conception than strict formalities allows for, because claims cannot be made without knowing the object on which to argue. It was noted that holiday periods, especially during the months of July and August, are not the most suitable for presenting complaints. Claims can only be filed upon review, and this is only possible upon access to documentation. Citizens should not

[1484] Annual Report 2010, Case 09010415, pp. 887–898.

be required to be specialists and experts in order to understand the relevant technical documentation.[1485]

Case: Lack of information regarding the construction of an airport
The Ombudsman received numerous complaints regarding a project developed by an autonomous community for the construction of an airport in which little information was provided to citizens. The project formed part of the 2007–2025 Airport Infrastructure Plan. The Ombudsman requested information on the status of the environmental impact studies in relation to those who would be most affected. There was also interest in determining whether or not the aforementioned plan was based on a strategic environmental feasibility study, in accordance with law. From the information received it was perceived that the Airport Infrastructure Plan could not be considered a plan in the legal sense of the term. The Ombudsman recommended that the Administration use the usual categories for the matter (plan, programme, project) with the utmost meticulousness; and where this was not possible, clearly state the extent to which they were being used. Strategic environmental feasibility studies are required by law. As such, the Ombudsman stated that a plan requires a feasibility study if it fits into the legal definition, regardless of the legal, technical or management qualification that the administration seeks to provide. Therefore, an administration cannot subject the application of Law 9/2006 to the formal qualification of in its decisions (acts, regulations, agreements, plans, programmes).[1486]

9.6. FINDINGS

To recap, the Spanish Ombudsman was created as part of the transition to democracy after the end of Franco's long dictatorship. As a consequence, major emphasis is given to the protection of human rights.

As part of its protective function, the institution conducts hard-law review based on constitutional parameters (rules, principles and the values enshrined in the constitution), which prevail over other legal norms. The Spanish Ombudsman's standard of control is human rights. However, as a standard of control, the institution conceptualises human rights a broad perspective, covering the protection of rights (civil, political, economic, social and cultural rights) as well as constitutional principles and mandates enshrined in the constitution. The

[1485] Annual Report 2008, Case 07021230, p. 560.
[1486] Annual Report 2008, Joint Cases 08000077, 08000108, 08000119, 08000792, 08000796, 08000844, 08000945, 08000976, 08001009, 08001067, 08001254, 08001348 & 08002679, pp. 549–550.

Spanish Ombudsman can also propose a broader scope for the core of existing rights, to the extent that it is entitled to interpret law in the performance of its functions. This interpretation contributes to the consideration of the Spanish Ombudsman as a developer of legal standards beyond written law. The broad powers given to the Spanish Ombudsman for the protection of human rights give the institution broad influence at the policy level.

As such, it is possible to state that the investigations of the Spanish Ombudsman are also aimed at guaranteeing the legal quality of the administration, shaping the preventing function of the institution. The institution is undergoing a process of hybridisation regarding its assessment orientation and its standards of assessment. This evolving process means the standards of assessment includes not only human rights but also good governance-based norms. Indeed the Spanish Ombudsman can be said to perform a twofold function: the protection of human rights and the promotion of good administration.

The connection between human rights and good governance can be exemplified by certain standards that can be deduced from the Ombudsman's reports, decisions, and recommendations. In particular, those regarding the protection of economic and social rights, which are immediately related with the quality of the performance of the administration and its effectiveness in providing services. Thus, arguably, in practice, the Ombudsman performs both hard-law review and soft-law review when assessing the administration.

In this regard, it may be sustained that the Spanish Ombudsman assesses the administration not only (although mainly) based on legally binding norms, but also on non-legally binding standards (or rules of good administrative conduct), aimed at ensuring the proper functioning of administrative services. These standards mostly reflect principles of good governance such as properness, effectiveness, transparency and participation.

In practice, the Ombudsman has acted as a supervisor of the administration, regardless of the violation or non-violation of a right, which has brought it closer to the European ombudsman model related to the promotion of good administration, rather than the protector of rights provided for by constitutional design. Thus, in practice, there would appear to have been "a constitutional change, a change in the sense of the norm without modification of the text"[1487], regarding the role of the institution.

[1487] Based on an interview with Guillermo Escobar Roca, professor of Constitutional Law at Universidad de Alcalá de Henares.

PROVISIONAL CONCLUSIONS PART III

Part III sought to determine to what extent, despite the different legal traditions in which it operates, ombudsman institutions are applying standards of assessment that reflect principles of good governance in the European context.

Formally speaking, the legal mandate, nature and scope of control of the Dutch Ombudsman, the UK Ombudsman and the Spanish Ombudsman differ. They also apply different assessment criteria for the control of government's actions. Table 9 illustrates the three ombudsman institutions studied here from a comparative perspective. It is important to note that, as mentioned, these are theoretical constructions, which in practice are unlikely to be found in their pure states.

Table 9. National Ombudsman Institutions from a Comparative Perspective

	National Ombudsman of the Netherlands	**Parliamentary Commissioner of the United Kingdom**	***Defensor del Pueblo* of Spain**
Model	Quasi-Judicial Ombudsman	Parliamentary Ombudsman	Mix or Dual Ombudsman
Assessment orientation	Redress	Control	Control
Access	Citizens directly affected and own initiative	Inquiries only at the request of Parliament	Citizens and own initiative
Standard of Control	Propriety	Maladministration	Human rights
Object of Assessment	Executive	Public administration	All public authorities / entities
Mandate (functional sense)	Factual acts	Policy decisions (individual and general)	Administrative (individual and general) decisions and factual acts
Enforcing powers	Political backup	Court ruling / Political backup	Constitutional court ruling / Political backup

However, the three institutions are undergoing a process of hybridisation that is expressed in the combination of redress and control functions, despite the particular emphasis of their assessment orientation. This process occurs with the broadening of their powers of investigation aimed at greater influence in

policy implementation and the quality of public service delivery in order to provide greater benefit to citizens and to contribute to enhancing administrative legitimacy.

In practice, the three ombudsman institutions are involved in both the promotion of good administration and the protection of fundamental rights. The Dutch and UK institutions have both explicitly acknowledged their involvement in the protection of human rights. In the case of the National Ombudsman of the Netherlands, the human rights protection function is also made clear by the creation of the Ombudsman for Children (*de Kinderombudsman*). On the other hand, the controlling activity of the Ombudsman of Spain regarding the identification of instances of maladministration is reflected by the institution's broad powers of investigation. In practice, any alleged human rights infringement is connected to a presumably ineffective administrative action or action contrary the law.

As can be observed, these ombudsmen are undergoing a process of hybridisation of their assessment criteria. Hence, similar categories can be applied in accordance with the scope of the ombudsman's control. In the three cases, it can be affirmed that the ombudsmen are applying two categories of specific standards: standards linked to the rule of law (principle of legality) and rules of good administrative conduct.

The Dutch Ombudsman and the UK Ombudsman have developed their own normative standards. In the case of the Spanish Ombudsman, the institution has not created its own normative standards and conducts a hard-law review of the assessment of the administration, as well as recommending standards to comply with human rights that broaden the scope of legal principles developed by the courts. These normative standards can be deduced from the reports and cases. Therefore, the institution is undergoing the hybridisation of both its standard of control and its specific assessment standards.[1488]

As a result, it may be concluded that the Dutch, UK and Spanish ombudsmen share the same values and apply similar normative standards encompassing principles of good governance. These standards of assessment have been adapted to the evolution of the constitutional state, leading to the development of principles of good governance as new sources of legitimacy.

Thus the general values enshrined in the modern constitutional state are protected by the ombudsmen as a reflection of (hard) law principle-based standards and by non-legally binding norms of conduct. Therefore, the three

[1488] Milan Remac, "Standards of ombudsman assessment: A new normative concept?", p. 67.

ombudsmen perform a legal source function. They conduct norm-developing activity by applying either standards that reflect legal principles or rules of good administrative conduct. In the former case, the ombudsmen in practice have a function in the interpretation of law, even if the institution may be not allowed to pronounce against the legal content of the decision, as in the case of the Dutch and UK ombudsmen. In the latter case, the Ombudsman is, explicitly or implicitly, contributing to the creation of soft law norms. In both cases, they are also contributing to the development and clarification of the scope of the principles of good governance.

PART IV

PRINCIPLES OF GOOD GOVERNANCE AND THE PERUVIAN *DEFENSORÍA DEL PUEBLO*

In Part IV, the focus of the study is the Peruvian Ombudsman (*Defensoría del Pueblo*). The theoretical framework developed in Part II and Part III is applied to analyse the role of the *Defensoría del Pueblo* in enhancing good governance. This part scrutinises the performance of the Peruvian *Defensoría* in relation to its normative functions, particularly the development of good governance based-norms as assessment standards. This study holds that the involvement of the *Defensoría* in the development of good governance norms corresponds to an evolving hybridisation process with regard to the institution's functions, assessment orientation, and standard of control stemming from its dual mandate: the protection of human rights and the promotion of good administration. This explains why the *Defensoría* is better described as a dual or mixed ombudsman than as a human rights ombudsman. In this context, Chapter 10 examines the legal mandate, structure and powers of the *Defensoría*. Chapter 11 analyses the normative function of the institution in order to determine whether and to what extent the principles of good governance are implicit in the standards applied by the *Defensoría* and if so, how the good-governance legal approach can contribute both to improving the quality of the administration and enhancing legitimacy in the public sector in order to strengthen the democratic system.

CHAPTER 10

THE PERUVIAN *DEFENSORÍA DEL PUEBLO*: MANDATE, STRUCTURE, AND POWERS

Chapter 10 scrutinises the powers and functions assigned to the *Defensoría del Pueblo* to assess the administration. The analysis is made from the perspective of its hybridisation process. This chapter argues that in addition to its human-rights-protecting function, the *Defensoría* also applies the principles of good governance and develops their legal dimension as part of a more active role in supervising policy implementation and quality of service provision. In this regard, as an institution of (horizontal) accountability, it has a prominent place in enhancing legitimacy.

10.1. LEGAL BASIS AND MANDATE

10.1.1. THE *DEFENSORÍA* WITHIN THE PERUVIAN LEGAL CONTEXT

The current Peruvian Constitution was enacted on 29 October 1993. The Republic of Peru is a unitary and decentralised state, organised around the principle of separation of powers. According to Article 110 of the Peruvian Constitution, the president is the head of state and personifies the nation, as well as being the head of the government. The president is elected, along with two vice-presidents, by direct vote for a five-year term. The Peruvian Constitution does not permit immediate re-election.

The administration and running of the government is entrusted to the Council of Ministers (*Consejo de Ministros*) or Cabinet. The Chairman of the Cabinet is officially known as the president of the council of ministers (*Presidente del Consejo de Ministros*). The president appoints and removes the chief of the cabinet, who may be a minister without portfolio. The president also appoints and removes other ministers, with the advice and consent of the chief of the cabinet. Acts of the president require ministerial countersignature to be valid.

The chief of the cabinet is the spokesperson for the government after the president, and coordinates the duties of the other ministers.

According to Article 130 of the Constitution, the cabinet requires the parliamentary confidence to perform its functions. In this regard, the president of the council of ministers and the ministers must attend Congress to present and discuss general government policy within thirty days of having assumed office, asking for investiture. The Congress consists of a single chamber. There are 130 members of Congress, elected for a five-year term coinciding with the presidential term. It is important to mention that although the form of government established by the Constitution is defined as semi-presidential, in practice it has a strongly presidential character.

In the judicial branch, the Supreme Court is the highest judicial body, except for provisions concerning constitutional guarantees. The Constitutional Court decides appeals against the alleged unconstitutionality of acts and statutes (*proceso de inconstitucionalidad*), individual appeals against violation of constitutional rights (*proceso de amparo*), and conflicts of jurisdiction between central government and regional governments.

The institution of the *ombudsman* was firstly introduced to the Peruvian legal framework by the Constitution of 1979, as part of the functions of the Public General Attorney. As then established, this legal figure was confusing, and it was only with the 1993 Constitution that it gained recognition as a functional, separate and independent institution. Since its establishment, the constitutional design of the *Defensoría* has been influenced by the Spanish Ombudsman.

10.1.2. LEGAL BASIS AND MANDATE

According to Article 162 of the Peruvian Constitution, it is the duty of the *Defensoría del Pueblo* to defend the constitutional and fundamental rights of the person and the community, to supervise fulfilment of the state administration's duties and the delivery of public services. As in other countries in the region, the *Defensoría*[1489] was instituted in the context of a state reform process during the 90s.[1490] The institution began operating in September 1996.

[1489] As mentioned earlier, the Peruvian Ombudsman institution, the *Defensoría del Pueblo*, will be referred to as the *Defensoría*. The incumbent of the institution, the *Defensor del Pueblo*, will be refer to as the *Defensor*. See *supra* note 90.

[1490] Comisión Andina de Juristas, *Defensorías del Pueblo en la región andina. Experiencias comparadas*, p. 18.

The independence of the *Defensoría* is granted by the Constitution. According to Article 161, the *Defensoría del Pueblo* is a "constitutional autonomous body". As such, the Constitution not only recognises the prominent position of the institution but also the importance of its function within the structure of the state. Consequently, full functional independence from the other powers of the state is granted to the *Defensoría*.

The *Defensoría* is subject only to the Constitution and its Organic Act, which establish the procedures and jurisdiction of the institution. As already mentioned, the Constitution makes a distinction between the *Defensoría del Pueblo* (institution) and the *Defensor del Pueblo* (the incumbent).[1491] According to Article 5 of the *Defensoría*'s Organic Act (*Ley Orgánica de la Defensoría del Pueblo*), the *Defensor del Pueblo* performs their functions in accordance with their own dictate. There has no mandatory instructions to follow, neither receives instructions from any authority. The *Defensor* is elected by a two-thirds majority vote of the members of the Parliament.[1492] Their enjoys immunity from prosecution and cannot be called to account for the opinions their expresses in the exercise of their functions.[1493] The *Defensor* is appointed for five-year term, which may be renewed by the parliament for no more than one additional term.[1494]

In accordance with Article 9 of the Organic Act, the *Defensoría* is entitled to start an investigation *ex-officio* or on request. Any natural or legal person, including minors and foreign nationals, can make a complaint to the *Defensoría*.[1495] The Congress may also request the intervention of the *Defensoría*.[1496] However, the administrative authorities are not allowed to submit complains to the institution.[1497]

The *Defensoría*, through the performance of it functions, plays a distinctive role in the strengthening of the rule of law, the consolidation of democracy and the protection of human rights in Peru.

10.1.3. STRUCTURE

The *Defensoría* is essentially aimed at defending the constitutional and fundamental rights of the person and the community, as well as overseeing the fulfilment of public administration duties and an appropriate rendering of

1491 See Section 1.2.3.
1492 Peruvian Constitution, Article 161; Organic Act, Article 2.
1493 Peruvian Constitution, Article 161; Organic Act, Article 5.
1494 Peruvian Constitution, Article 161; Organic Act, Article 2.
1495 Organic Act, Article 10.
1496 Organic Act, Article 11.
1497 Organic Act, Article 12.

public services to the citizens. The *Defensoría*'s Organisation and Operating Regulations (*Reglamento de Organización y Funciones* – ROF)[1498] define the structure of the institution.

The *Defensoría del Pueblo* is a one-person institution; as noted, the *Defensor del Pueblo* is the incumbent and the head of the institution. According to the ROF, the Office of the ombudsman (*Despacho del Defensor*), the Cabinet, and the Office of the first deputy (*Primera Adjuntía*) are its superior management bodies. The first deputy is the highest managerial officer of the institution. In addition, another seven deputies currently exist. Their task is to assist the *Defensor* in the performance of their functions.[1499] From an organisational perspective, they are defined as line or specialised bodies of the institution. They report to the first deputy and are charged with steering and advising the *Defensor* on matters related to defence and advocacy within their jurisdiction. In some cases, they are in charge of specialised programs. The deputy Ombudsman's' Offices[1500] include the following:

- Deputy Ombudsman for Public Administration: In charge of the Decentralisation and Good Governance Programme and the Identity and Citizenship Program.
- Deputy Ombudsman for Human Rights and Persons with Disabilities: In charge of the Programme for Protection of Rights in Police Facilities; the Programme on Criminal and Penitentiary Issues; and the Programme for the Defence and Advocacy of the Rights of Persons with Disabilities.
- Deputy Ombudsman for the Environment, Public Utilities and Indigenous Populations: In charge of the Indigenous Populations Programme.
- Deputy Ombudsman for Constitutional Affairs.
- Deputy Ombudsman for Women's Rights.
- Deputy Ombudsman for Children and Adolescents.
- Deputy Ombudsman for Social Conflict Resolution and Governability: In charge of the Programme for Ethics, Prevention of Corruption and Public Policies.

The *Defensoría* has jurisdiction over the whole country, including at the decentralised level.[1501] For that purpose, the institution has decentralised bodies;

1498 The current ROF has been approved by Decision 007–2019/DP. Unlike its Spanish peer, the Peruvian Ombudsman is authorised to approve its own regulations.

1499 Organic Act, Article 7. The deputies are recruited through public selection. They are appointed for a three-year term.

1500 The term "deputy ombudsman" will be used to refer to the specialised body of the institution. For the officer, the term "deputy" will be used.

1501 According to Article 189 of the Peruvian Constitution, the territory of Peru is composed of regions, departments, provinces, and districts. In these circumscriptions, the government is organised at the national, regional, and local levels. The regional scope of government is

Decentralised Ombudsman's Offices (*Oficinas Defensoriales*) based in various regions of the country.[1502] Each Decentralised Ombudsman's Office is conducted by a head, appointed by the *Defensor*, who conducts the defence and advocacy activities lying within the corresponding geographic scope, in accordance with the *Defensoría*'s policies. The head of each Decentralised Ombudsman's Office acts as a representative of the *Defensor*.

The *Defensoría* also has with "Service Modules" (*Módulos de Atención*).[1503] They are located, on a permanent basis, in some capitals of provinces and are dependent on the Decentralised Ombudsman's Offices. Likewise, there are "Mobile Assistance Centres" (*Centros de Atención Itinerante*) tasked with serving the citizenry on a non-permanent basis in towns and villages in various remote parts of the country. Likewise, there are "Mobile Teams" (*Equipos Itinerantes*), composed of personnel from the Decentralised Ombudsman's Offices and Service Modules who travel in shifts from the headquarters to districts, villages, and communities, especially in rural areas. They hear claims and perform activities related to the functions of the *Defensoría*. This decentralisation of operations has facilitated access by the population to the *Defensoría del Pueblo*.

10.2. SCOPE OF CONTROL AND FUNCTIONS

10.2.1. SCOPE OF CONTROL

The duties of the *Defensoría* cover the entire sphere of the public administration.[1504] Like in the Spanish case, the term "public administration" is interpreted in a broad sense.[1505] It encompasses central government (executive and ministers, including independent agencies on central level), regional and local governments, autonomous bodies, military authorities, and police forces. Even though *Defensoría*'s Organic Act does not expressly refer to the armed

based on the regions and departments, which are endowed with a degree of political and administrative autonomy in certain matters. The local level of government is composed of the provinces and districts. Currently, the regional governments have jurisdiction over the territory of the departments. Thus, Peru has 26 regional governments, which are composed of the 24 departments into which the country is divided, in addition to two provinces with special regimens: the Constitutional Province of Callao, which has its own regional government without belonging to a department; and the Province of Lima, whose government is under the jurisdiction of the Metropolitan Municipality of Lima, which has the powers and competencies of a regional government.

1502 There are currently 28 Decentralised Ombudsman's Offices: 24 based in the provincial capital of departments, plus one in Callao and three additional offices in Lima.

1503 Currently, there are 10 service modules.

1504 Organic Act, Article 9(1).

1505 The definition of the ambit covered by public administration is provided by Article I of the Law 27444, General Administrative Procedure Act (GAPA).

forces, one interpretation, in accordance with the Constitution, allows the *Defensoría* to oversee the armed forces to ensure they do not obstruct the defence of fundamental rights.[1506]

The *Defensoría* also has the authority to control private parties that perform public tasks or are in charge of the provision of public services. The *Defensoría*'s actions are based on the recognition that relations between citizens, as users of public services, and public-service concessionaires is asymmetric, and unfolds on the basis of this inequality. Citizens are defenceless to some extent against private parties, so the *Defensoría* constitutes an additional mechanism for the protection of their rights.[1507] As such, the *Defensoría* is empowered to require the competent administrative authorities to exercise their powers of inspection and sanction vis-a-vis private firms providing public services.[1508] In this regard, the *Defensoría* seeks a cooperative relationship with the public service regulatory agencies, whose activities it promotes, complements and oversees.[1509] As the *Defensoría* has pointed out, while the regulatory agencies must consider the interests of companies and the rights of users in a balanced way, generally adopting the role of arbitrators, the *Defensoría* stands up for the rights of the users, and within the framework of the law, promotes the defence and protection of their rights.[1510]

In accordance with its mandate, the duties of the *Defensoría* cover all administrative actions, both upon complaint and of its own accord. Indeed, the institution is empowered to initiate and to continue, on request or ex-officio, any investigation of acts and resolutions by the public administration and its agents that may involve a breach of a constitutional or fundamental right.[1511] Thus, by means of its inquiries, the *Defensoría del Pueblo* monitors the administration with regard to any illegitimate, irregular, unlawful, neglectful, abusive or improper use of its powers in exercising its functions.[1512] Thus, it can be concluded that the task of the *Defensoría del Pueblo* is to investigate any act concerning not only legal (general and individual) and discretionary decisions made by the administration but also the exercise of practical administration and factual acts (personal behaviour), including the omissions of administrative

1506 Comisión Andina de Juristas, *Defensoría del Pueblo. Análisis comparado*, Lima: CAJ, 1996, p. 29. See also, Jorge Santistevan de Noriega, "La Defensoría del Pueblo en el Perú", in *Defensoría del Pueblo: Desafíos y Respuestas*, Lima, 1996, p. 20.

1507 Defensoría del Pueblo, *Special Report 59. Informe sobre el plazo de reclamo de los usuarios del servicio público de telecomunicaciones*, julio, 2001, p. 1.

1508 Organic Act, Article 9(1).

1509 Defensoría del Pueblo, *Second Annual Report. 1998–1999*, Lima, 1999, p. 98.

1510 Ibid., p. 99.

1511 Organic Act, Article 9(1).

1512 Organic Act, Article 9(1).

authorities.[1513] When the investigation is related to the conduct of a civil servant, the *Defensoría* must notify the individual concerned and their superior.

As a protector of citizens' rights, like its Spanish peer, the *Defensoría* also discharges duties as part of the National Mechanism for the Prevention of Torture.[1514] By way of Law 30394[1515], the Congress conferred organic and functional autonomy upon the Mechanism for the Prevention of Torture, and tasked the *Defensoría del Pueblo* with its implementation and execution. It should be noted that the *Defensoría*, from the outset, has discharged duties related to preventing torture and ill-treatment nationwide.[1516]

Under the provisions of the Constitution and its Organic Act, the administration is obliged to cooperate with the *Defensoría* and to submit the information required by the institution to perform its duties.[1517] Likewise, the *Defensoría del Pueblo* has the right to inspect any government facilities, including hospitals, police stations, military garrisons, and prisons.[1518]

The *Defensoría del Pueblo* is not permitted to change or repeal the decisions made by the administration, nor to interrupt administrative deadlines. Nonetheless, when it considers that a lawful administrative measure could be unjust to the citizenry, the *Defensoría* can recommend that the administration amend it.[1519] Thus, the *Defensoría* has the power to make recommendations and proposals regarding the adoption of new measures, or changing or determining administrative actions or decisions. Moreover, it is empowered to issue warnings and remind the administrative authorities and civil servants of their legal obligations.[1520]

In all the cases in which the *Defensoría* makes a recommendation, the administration is obliged to inform it about the measures it adopts to fulfil said recommendation in no more than 30 days. If as a consequence of the recommendations a suitable measure is not adopted and the administrative entity does not report on its reasons for not adopting it, the *Defensoría* will be able to submit the matter concerned and its recommendations to the minister of

1513 Organic Act, Article 22.

1514 Peru ratified the Optional Protocol to the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment by Supreme Decree 044–2006-RE on 25 July 2006, thereby assuming the obligations and responsibilities established in the international standards on preventing torture and other ill-treatment.

1515 Published in the official gazette *El Peruano* on 22 December 2015.

1516 In this regard see for example *Defensoría del Pueblo*, *Special Report 42. El derecho a la vida y a la integridad personal en el marco de la prestación del servicio militar en el Perú*, Lima, 2002.

1517 Peruvian Constitution, Article 161; Organic Act, Article 16.

1518 Organic Act, Article 16.

1519 Organic Act, Article 25.

1520 Organic Act, Article 26.

the sector or to the maximum administrative authority of the institution and the Court of Audit, if applicable.[1521]

If the *Defensoría* finds as a result of its inquiry that the official under investigation has presumptively committed an offense in the performance of their duties, it must inform the public prosecutor to start an investigation and bring charges before the ordinary law courts.[1522] In addition, if the institution finds that a civil servant is guilty of misconduct, the *Defensoría del Pueblo* must inform the administrative authority concerned or the official's superior in order to initiate a disciplinary investigation.[1523]

As to the actions of the judiciary, the institution it is not allowed to interfere in pending court cases. If during an ombudsman procedure a citizen initiates court proceedings, the *Defensoría* will abandon the case. The *Defensoría del Pueblo* can only intervene in instances concerning procedural or organisational matters related to the administration of justice[1524] with the purpose of guaranteeing the right to defence and due process.[1525] However, if following an investigation the *Defensoría* decides there has been an irregularity in the administration of justice, it will inform the office of general prosecutor.[1526] The *Defensoría* is allowed to intervene in judicial process as *amicus curiae*.[1527] In fact, the institution has participated widely as *amicus curiae* in judicial processes, including in the Constitutional Court and other courts.[1528]

As to the legislature, the *Defensoría* is allowed, as it does with the administration, to make suggestions to the Parliament regarding the adoption of measures, if as a result of its investigations it is persuaded that rigorous compliance with a legal norm can lead to situations that are unjust or damaging to citizens.[1529] On this basis, the *Defensoría* has also pronounced when it has found that the

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1521 Organic Act. Article 26.

1522 Organic Act, Article 28.

1523 Organic Act, Article 24.

1524 Organic Act, Article 14.

1525 Walter Albán Peralta, "El ombudsman como canal de acceso a la justicia", in *Revista Debate Defensorial*, No 3, 2001, p. 47.

1526 Organic Act, Article 14.

1527 Organic Act, Article 17.

1528 Samuel Abad Yupanqui, "La intervención de la Defensoría del Pueblo en los procesos constitucionales: un balance necesario (1996–2004)", in José Palomino Manchego (coord), *El derecho procesal constitucional peruano. Estudios en homenaje a Domingo García Belaunde*, Lima: Grijley, Tomo I, 2005, p. 215. Regarding the intervention of the *Defensoría* in ongoing proceedings as *amicus curiae*, see Defensoría del Pueblo, *El amicus curiae: Qué es y para que sirve? Jurísrpudencia, normative y labor de la Defensoría del Pueblo*. Documento Defensorial 8, 2009. The *Defensoría* has brought more than 40 *amicus cuarie* in the period covered by this study. For a compilation of cases and *amicus cuarie* brought in the period 2005–20016, see *Revista Debate Defensorial,* No 8, 2016.

1529 Organic Act, Article 24.

fundamental right to due process and to defence has not been sufficiently observed in political investigations conducted by parliamentary committees. In addition, the *Defensoría* can refer matters to the Constitutional Court to contest legislation (process of unconstitutionality). In this regard, it may be argued that the *Defensoría* also has an indirect task of controlling the Parliament with regard to its law-making function, when it finds that a law approved by Congress violates one of the rights enshrined in the Constitution.

The *Defensoría* also has competence to propose reforms of legislation or draft legislation (Legislative Initiative)[1530], whether based on the complaints it receives or as a result of the identification of structural problems, which it singles out in its special reports. Likewise, it can promote the adoption of international human rights treaties[1531] and initiate administrative proceedings or participate in any administrative procedure to protect citizens' fundamental rights.[1532]

The *Defensoría* is required to present an annual report to the Congress. The annual report describes the situation with respect to the administration and the fulfilment of its duties regarding human rights obligations. The annual report must include the number of complaints and the measures adopted by the administration to implement the institution's recommendations. However, as the *Defensoría* has pointed out, the institution not only describes actions or issues recommendations, but also seeks to provide evidence on the problems faced by citizens, as well proposing solutions and reasserting the principles that govern institutional reforms. Therefore, the annual report should be considered a useful tool for public policy-makers.[1533]

The *Defensoría* is also allowed to draft special reports when necessary.[1534] The *Defensoría*'s special reports (the so called *Informes Defensoriales*) are the instruments most commonly used by the institution to address structural problems and influence public policy. Each of these reports is the result of a specific investigation in the framework of the *Defensoría's* surveillance role on strategic topics, or to address a particular group of related complaints.[1535]

It is important to mention that the *Defensoría* has experimented in recent years with expanding its powers, tasks and functions. First of all, as part of its preventing function, the institution has broadened its own-initiative investigative powers with a view to paying closer attention to the public policy

1530 Peruvian Constitution, Article 162; Organic Act, Article 9(4).
1531 Organic Act, Article 9(5).
1532 Organic Act, Article 9(3).
1533 Defesoría del Pueblo, *Eleventh Annual Report. January – December 2007*, Lima, 2008, p. 12.
1534 Organic Act, Article 27.
1535 Defensoría del Pueblo, *Twelfth Annual Report. January – December 2008*, p. 12.

cycle, qualitative management aspects in the public sector, and other aspects regarding good governance in the country.[1536]

In this regard, the *Defensoría* is now performing anticorruption tasks as part of its functions. Although the *Defensoría* has not been given an explicit anticorruption mandate, the function of controlling the administration and the observance of law by public authorities and officials might be considered also to include corruption-prevention tasks.[1537] In fact, as Eduardo Luna points out, the *Defensoría* has assumed that the impact of corruption on human rights (specially regarding the principle/right of equality and non-discrimination) and on the principles of good governance in terms of the sound functioning of the administration legitimises the *Defensoría*'s interventions in the field of corruption.[1538]

The broadening of the *Defensoría*'s tasks can also be observed in the assessment of the quality of regional and local governments, especially regarding transparency, participation and accountability. This is also the case in relation to the role of the institution as a mediator in social conflicts, as well as close oversight of the administration's compliance with its positive obligations concerning the realisation of social rights such as the right to education and to health. For this study, the performance of these new tasks has implications on the institution's emphasis on the assessment orientation and the standard of control.[1539] Arguably, it has also an impact on its normative function, particularly as regards the development of standards of assessment from both a human rights and a good governance perspective.

Therefore, as a result of the institution's process of evolution, the *Defensoría* is less redress-oriented and more focused on the quality of the government's public actions. Arguably, the redress and control functions are mixed, placing the *Defensoría* within the dual ombudsman model. Thus, to a certain extent, the *Defensoría* not only supplements the role of the Judiciary[1540] but also of the Parliament, participating, as pointed out by Enrique Bernales, in the construction of substantive and long-term legal perspectives.[1541]

1536 For more detailed information on the *Defensoría*'s functions see Section 10.2.2.

1537 Alberto Castro, *Good governance, public administration and the ombudsman. A proposal for improving the quality of the administration in Peru*, Utrecht: Utrecht University, 2007, p. 58.

1538 Eduardo Luna Cervantes, "Sobre la legitimación constitucional del *ombudsman* peruano para enfrentar el fenómeno de la corrupción en la administración pública y un ejemplo paradigmático de su praxis", in Alberto Castro (ed), *Buen Gobierno y Derechos Humanos*, Lima: Facultad de Derecho PUCP – Idehpucp, 2014, p. 200.

1539 See Sections 10.3.1 & 10.3.2.

1540 Walter Albán Peralta, loc.cit., p. 55.

1541 Enrique Bernales Ballesteros, "La Defensoría y el desconcierto politico para la elección del defensor", in *Revista Debate Defensorial. La Fortaleza de la Persuación. Edición conmemoraitva por los dieciocho años de la Defensoría del Pueblo*, 2014, p. 163.

10.2.2. FUNCTIONS

The *Defensoría del Pueblo*'s primary task is to protect the fundamental rights of the citizens as laid down in the Peruvian Constitution, particularly with regard to the conduct of public servants. In this context, the investigation of individual complaints is the most central component of the *Defensoría*'s work. An important task in relation to the protection of fundamental rights is that the *Defensoría* is empowered to initiate constitutional processes[1542] such as *habeas corpus*, *amparo*, *mandamus* (*acción de cumplimiento*), *actio popularis* (*acción popular*), and *habeas data*.[1543] It is important to mention that the *Defensoría* has decided to intervene in constitutional processes in a limited number of cases only, regarding this to be a power that must be used on an exceptional and subsidiary basis.[1544] Some of the criteria used to determine whether to intervene are based on the existence of the following: i) no other means of guaranteeing the fundamental rights or the principle of constitutional supremacy, with all other channels having been exhausted; ii) a clear and manifest violation of constitutional rights or principles by the act or norm called into question; iii) the situation of defencelessness of the individuals affected by the norm or the decision called into question, since the institution does not seek to act in lieu of the parties or become a public defender; and iv) the collective significance that underlies the constitutional dispute, which may contribute to setting a precedent that affects other cases. Thus, the *Defensoría* intervenes in those cases in which there is no other means of remedying a problem involving constitutional rights or principles.[1545]

The *Defensoría* protects the fundamental rights of citizens by primarily assessing the actions of the administration.[1546] In this regard, in the context of its investigations, the *Defensoría* has the power to make recommendations and proposals for adopting new measures or changing administrative action or policy. Likewise, as early mentioned, it is empowered to issue warnings and reminders addressed to administrative authorities and civil servants regarding their legal obligations.[1547] Hence, the *Defensoría*'s recommendations are not only for correction but also for prevention.

1542 The aim of constitutional processes is to guarantee the supremacy of the constitution and to protect fundamental rights. The constitutional processes, or *garantías constitucionales,* are laid down in Article 200 of the Peruvian Constitution.

1543 Organic Act, Article 9(2).

1544 Samuel Abad Yupanqui, "La intervención de la Defensoría del Pueblo en los procesos constitucionales: un balance necesario (1996–2004)", p. 219.

1545 Ibid., p. 220.

1546 On the role of *Defensoría* regarding the judiciary and the legislature see Section 10.2.1.

1547 Organic Act, Article 22.

The fulfilment of the preventing function is connected with the own-initiative investigations of the *Defensoría* and its ability to issue special reports. As mentioned, the *Defensoría*'s special reports are the result of an investigation conducted to address a specific group of complaints focusing on structural problems affecting citizens' rights. They can also be the result of general investigations started on the *Defensoría*'s own initiative aimed at influencing policy on the highest level. These reports aim to improve the quality of the administration in different ways, but always with the perspective of protecting citizens' fundamental rights.[1548] The preventing function of the *Defensoría* in the framework of own-initiative investigations is also reflected by the publication of working papers (*documentos de trabajo*), and deputy ombudsman's reports (*informes de adjuntía*).

The *Defensoría* also performs a normative function. The first thing to mention is that the institution assesses administrative action from a human rights perspective. In doing so, it performs a hard-law review in close connection to the protection of the rule of law. Thus, the normative function of the institution is mainly performed by the interpretation (and application) of legally binding norms. As mentioned before, legally binding norms refers to constitutional provisions and (either explicit or implicit) principles, legislation, regulations, general principles of law (written and unwritten, including human rights principles), and international instruments.[1549] Moreover, the *Defensoría* takes recourse to other sources of law, primarily jurisprudence.[1550] Thus, the *Defensoría* performs a hard-law review from a broad conception of the rule of law and the principle of legality.

The *Defensoría* also performs its normative function when it alleges the unconstitutionality of acts and statues before the Constitutional Court (*proceso de inconstitucionalidad*), and in the case of appeals regarding breaches of human rights (*proceso de amparo*). These constitutional processes are instruments applied by the institution in order to correct regulatory gaps and inconsistencies in the interests of protecting rights.[1551] As former *defensor* Walter Alban points out, much of the work of the *Defensoría* is aimed at influencing normative production, which it does by formulating recommendations, as well as lodging constitutional processes.[1552] The *Defensoría* also performs a normative function when it submits its opinion about draft legislation or as *amicus curiae* in court

1548 Guidelines on the Elaboration of *Defensoría del Pueblo*'s Special Reports. Approved by Decision (*Resolución Administrativa*) 048–2011/DP-PAD of 27 June 2011.

1549 Regarding the role of the ombudsman institution as a developer of legal norms through the application (interpretation) of legally binding norms, see Section 3.6.2.

1550 Based on an interview with Eugenia Fernán Zegarra, First Deputy of the *Defensoría*.

1551 Víctor García Toma, *La Defensoría del Pueblo en el Perú*, Lima: Grijley, 2005, p. 131.

1552 Based on an interview with Walter Albán, former *Defensor del Pueblo*.

proceedings. And of course, the *Defensoría* also performs normative functions when recommending the enactment or amendment of law, or the codification of practices or procedures.

In addition, from this study perspective, the *Defensoría* also performs soft-law review by applying non-legally binding norms as assessment standards. It does so through the promotion of good administrative practices and the development of "rules of good administrative conduct".[1553] First deputy Eugenia Fernán Zegarra notes that the *Defensoría* applies not only legal norms but also "good or best practices" as assessment standards. The institution does so, she adds, by referring to practices adopted by other countries or other Peruvian institutions that operate from the public perspective. It also considers the recommendations of the various international human rights bodies.[1554]

Like in the Spanish case, the emergence of (non-legally binding) rules of good administrative conduct through soft-law review has come about since the institution started focusing on the protection not only of classic civil and political rights, but also economic and social rights as a consequence of the processes of democratic consolidation and socio-economic growth. This is to the extent that the realisation of these rights imposes obligations on the state linked to the implementation of public policies and management.[1555] As observed by Walter Alban, this stage no longer concerned violation of rights of the kind that had traditionally been affected (freedom, integrity); rather, it was a stage involving the construction and consolidation of institutional causes to ensure the fluidity of the rule of law and democracy, so the *Defensoría*'s focus shifted to good governance, transparency and citizens' relations with the administration.[1556]

The *Defensoría* became more active in the development of implicit rules of good administrative conduct by addressing structural problems regarding qualitative aspects of the implementation of public policies, particularly in the fields of health and education (the so-called human rights-based standards for the supervision of public policy implementation) but also for institutional reform.[1557] This has also become the case since the *Defensoría* started being more involved in assessing public-sector ethical conduct, prevention of corruption, effective management of regional and local governments, and mediating in social conflicts.[1558] In this

[1553] As regards the role of the ombudsman institution as a developer of legal norms through the development of rules of good administrative conduct, see Section 3.6.3.

[1554] Based on an interview with Eugenia Fernán Zegarra, First Deputy of the *Defensoría*.

[1555] For the Peruvian political and economic context, see Section 1.2.2. For the normative function of the Spanish Ombudsman see Section 9.2.2.

[1556] Based on an interview with Walter Albán, former *Defensor del Pueblo*.

[1557] See Sections 11.1.2, 11.2.1 & 11.2.2.

[1558] For a more detailed analysis of the normative function of the *Defensoría*, in particular regarding the development of good governance-based standards, see Chapter 11.

regard, as Alicia Abanto, deputy for the Environment, observes, the *Defensoría* develops its own standards of assessment in function of the scope of intervention. One type of intervention is limited to verifying the observance of legally binding norms or fulfilling an institutional objective, whereby the standard of assessment will be connected to the principle of legality. The other area of intervention is that of public policy, which is much more complex and requires as a standard more than legally binding norms, since it involves the evaluation of operational aspects of the state.[1559] Thus, the *Defensoría* develops standards of assessment that go beyond the law but never beyond the Constitution.[1560]

For the *Defensoría*'s officials, it is clear that the institution performs a soft-law review by applying – and developing – (non-legally binding rules) of good administrative conduct as assessment standards. In the words of Walter Albán, "the defence of rights requires going beyond what the legal norm says, and sometimes we even have to go against what it establishes, but always in the framework of the constitution and from a human rights approach."[1561] However, this is not perceived as a direct or indirect normative function.[1562]

Even though the *Defensoría*'s officials recognise that the institution, through its recommendations, reports or constitutional processes, actively contributes to the creation of standards that guide the actions of public authorities, most of them understand this as a task of "influencing normative production" and not as a normative function *stricto sensu*.[1563] In reference to this, Eugenia Fernán Zegarra stressed that the *Defensoría* has no law-making power – that is, to dictate legal norms, so the distinction between written legislation and normative content must be made. She adds that what the *Defensoría* does is, by interpreting legal norms, to propose normative meanings, and that from a "traditional perspective", its decisions are not considered a source of law.[1564]

For his part, Walter Alban argues that the *Defensoría*, when influencing normative production, cannot confront or transgress a legal norm but it can question it. To this end, the exercise of the "magistrature of conviction" – that is, to persuade the corresponding authorities, such as Congress, of the need to repeal or modify the corresponding legislation so that this is compatible with the provisions of the Constitution – is extremely important. And it is the ability

1559 Based on an interview with Alicia Abanto, Deputy for Environment of the *Defensoría*.
1560 Based on an interview with Alberto Huerta, Head of the *Defensoría*'s Decentraliced Office of Lima.
1561 Based on an interview with Walter Albán, former *Defensor del Pueblo*.
1562 Based on an interview with Walter Albán, former *Defensor del Pueblo* and Eugenia Fernán Zegarra, First Deputy of the *Defensoría*.
1563 Based on an interview with Walter Albán, former *Defensor del Pueblo* and Eugenia Fernán Zegarra, First Deputy of the *Defensoría*.
1564 Based on an interview with Eugenia Fernán Zegarra, First Deputy of the *Defensoría*.

to persuade through its recommendations that gives the *Defensoría* a sufficiently flexible and effective tool to influence the production of legal norms, because its activities cannot be focused on formulating draft legislation or lodging constitutional processes.[1565] It should also be noted that when influencing the production of legal norms, although the legal standards and parameters established by the Constitutional Court or international human rights bodies are important references to the *Defensoría*, the institution does not necessarily abide by these parameters, and is free to adopt a different or complementary position. The *Defensoría* can even "anticipate" the Constitutional Court by proposing the normative content of rights and the legal parameters of action that the state must follow for the effective guarantee of these rights.[1566]

The *Defensoría* has not codified its own normative framework for assessing the conduct of the administration.[1567] The institution had not placed a focus on the need to systematise these standards.[1568] However, some of them can be inferred from the patterns of maladministration identified by the *Defensoría* and contained in the special reports and recommendations.

Finally, as regards the institution's dispute resolution or mediation function, this role has been particularly important in recent years in the context of social conflicts around extractive industries, centred on the exploitation of natural resources and the protection environmental rights.[1569] Through its interventions, the *Defensoría* seeks to transform violent conflict into negotiation through dialogue and the defence of rights while promoting the intervention of state entities with direct competence over the matter in dispute.[1570] The importance of the mediation function may also be appreciated in relation to the "immediate actions" carried out as a mechanism for solving complaints.[1571]

1565 As in the case of the law that regulated compulsory military service, which was repealed by recommendation of the *Defensoría*. Based on an interview with Walter Albán, former *Defensor del Pueblo*. On the role of the *Defensoría* on the repeal of the mandatory military service law, see Section 11.1.2.

1566 Based on an interview with Alicia Abanto, Deputy for Environment of the *Defensoría*. This would be the case of the right to prior consultation of indigenous peoples in which the Constitutional Court had not fully pronounced the normative content or the scope. The *Defensoría* presented to Congress a draft of the law on the right to prior consultation, based on the parameters developed by international organizations. See Section 11.1.2.

1567 Based on an interview with Eugenia Fernán Zegarra, First Deputy of the *Defensoría*.

1568 Based on an interview with Eugenia Fernán Zegarra, First Deputy of the *Defensoría*.

1569 Every month, the *Defensoría* reports on the situation regarding social conflicts in the country. On this, see: www.defensoria.gob.pe/conflictos-sociales/home.php.

1570 Defensoría del Pueblo, *Ante todo el diálogo. Defensoría del Pueblo y conflictos sociales y politicos*, Lima, 2005, p. 23.

1571 As regards "immediate actions" as a form of *Defensoría* intervention, see Section 10.4.1.

10.3. ASSESSMENT ORIENTATION AND STANDARD OF CONTROL

10.3.1. ASSESSMENT ORIENTATION

As stated above, the *Defensoría del Pueblo*'s main duty is to defend and protect citizens' constitutional and fundamental rights. The handling of individual complaints concerning alleged infringements of human rights reflects the redress-oriented function of the institution. Nonetheless, from the perspective of this study, what really defines the *Defensoría* is the control-oriented performance of its functions.

The controlling role of the *Defensoría* is characterised by its broad powers of investigation, particularly in connection with the own-initiative investigations it conducts. In this regard, the *Defensoría* has developed the ability to publish special reports as a tool for a more effective human rights protection function. The *Defensoría*'s special reports are the result of general investigations that can relate to shortcomings at the level of both public policy implementation and managerial aspects regarding the functioning of the administration. The purpose is to influence at the policy level in order to promote structural changes, with a view to improving the realisation of human rights so as to strengthen democracy and the rule of law.[1572]

In this regard, and as already mentioned, according to some *Defensoría* officials, it is possible to distinguish between two clearly differentiated but interconnected areas of intervention. The first is bounded and linked to the redress-oriented performance of the institution, in which, generally, legally-biding norms are applied as assessment standards; the second is a broader field of intervention, that of public policy, in which standards related to operative aspects of the state and management are applied, and in which control-oriented performance predominates. As Alicia Abanto observes, in this later case, the institution analyses the problems that citizens experience and not only evaluates whether the current legislation is sufficient to remedy the problem identified, but also questions the design of public policy and its implementation.[1573]

Thus, as part of its process of evolution, the *Defensoría* has distinguished between the human rights-based approach and the public policy-based approach as two complementary approaches that guide its actions.[1574] The "approach"

1572 Guidelines on the Elaboration of *Defensoría del Pueblo*'s Special Reports, Section 3.

1573 Based on an interview with Alicia Abanto, Deputy for Environment of the *Defensoría*.

1574 Defensoría del Pueblo, Institutional Strategic Plan 2011–2015, Ammened and Broadened (*ampliado*) to 2016, p. 37. The *Defensoría* distinguishes other approaches that guide its actions such as the transversal approach, gender equality approach, and intercultural approach.

conditions the emphasis of the institution's actions during its interventions. Thus, under the human rights-based approach, the institution's actions seek to associate citizens' problems with their fundamental rights. Under this approach, the performance of the public administration is evaluated based on the possible infringement of a right.[1575] In turn, under the public policy-based approach, the actions of the *Defensoría* aim to influence the state's actions so that it promotes the respect of rights and attempts to reverse the causes of rights infringements, thereby lending the institution's actions greater sustainability.[1576]

Although the institution has recently specified that it assumes a human rights-based approach as the guiding focus of its interventions, it has also stressed that this approach, in turn, is a comprehensive one, composed of others more specific.[1577] Moreover, the institution holds that its interventions should be aligned with the cross-cutting principles of participation, transparency and accountability.[1578] And it is in this broader perspective that, in practice, the human rights-based approach and the public policy-based approach, which for this study could be also defined as a good governance-based approach, overlap.

In this way, although the protection of human rights is the basis of the *Defensoría*'s role, the institution has shown itself to be more concerned with the implementation of public policies and the operational aspects of the administration. It can be argued that this tendency is condensed into three lines of action: i) surveillance of the implementation of public policies; ii) supervision of government management; and iii) promotion of a culture of peace and dialogue addressed at ensuring governance in the country, which were established in the 2007–2011 Strategic Institutional Plan and then reinforced in the subsequent institutional strategic plans.[1579] The definition of these lines of action, or axes of the institution's work, has had an impact on the *Defensoría*'s special reports. The increasing number of special reports (and the topics addressed) in recent years[1580] attests to the more prominent role assigned to own-initiative general investigations with controlling purposes.

1575 Ibid.

1576 Ibid.

1577 Institutional Strategic Plan 2018–2020 (approved by Decision 014–2018/DP), pp. 4–5.

1578 Protocol on *Defensoría del Pueblo*'s Interventions (*Protocolo de Actuaciones Defensoriales*). aproved by Decision (*Resolución Defensorial*) 0014–2019/DP-PAD, Article 3(2).

1579 *Defensoría del Pueblo*'s Strategic Plan 2007–2011, pp. 24–25. See also, the Institutional Strategic Plan 2011–2015 (approved by Decision 0029–2010/DP), Institutional Strategic Plan 2011–2015, Ammeded and Broadened (*ampliado*) to 2016 (approved by Decision 045–2015/DP), and the Strategic Plan 2011–2017, Ammended (approved by Decision 002–2017/DP).

1580 Only during the period covering this study, from between 1 January 2005 and 31 December 2013, the *Defensoría del Pueblo* produced 77 special reports.

The shift in the *Defensoría*'s focus also reflects a process of hybridisation in relation to its assessment orientation. In this regard, by placing a strong emphasis in its preventing function, the *Defensoría* has embraced its position as a control-oriented institution. It is possible to argue that during the current fourth stage in the institution's development, the orientation will continue to emphasise the supervision of essential public services, the fight against the corruption and the prevention of social conflicts.[1581] The combination of redress-oriented functions for protecting human rights, with a strong emphasis on the controlling function in terms of strengthening the quality of the administration through supervision of public policy design and implementation, is what defines the *Defensoría del Pueblo* as a mixed or dual ombudsman institution model.

10.3.2. STANDARD OF CONTROL: HUMAN RIGHTS

According to Article 162 of the Constitution, the standard of control concerns the constitutional and fundamental rights of the individuals and the community. The standard is very broad, covering not only fundamental rights but all the rights enshrined in the Constitution. In this regard, the *Defensoría* protects citizens against any alleged human right infringements for the administration.[1582] As Santistevan de Noriega points out, the protection of human rights entails a permanent concern for the validity of ethical values in the exercise of the public function, and for the democratic institutional framework of the country. In this sense, respect for institutionality is a channel for the defence of rights.[1583]

As mentioned earlier, the *Defensoría* has been particularly concerned with the quality of public policy implementation. The institution controls the implementation of public policies based on a human rights approach. To this end, the *Defensoría* has developed human rights-based indicators derived from the obligations enshrined in national legislation and international instruments.[1584]

In that regard, it is interested what Alicia Abanto, deputy for environment, refers about the standards applied by the Defensoría when assessing public policies.

1581 See Institutional Strategic Plan 2018–2020, pp. 5–6.

1582 Jorge Santistevan de Noriega, "El Defensor del Pueblo en Iberoamerica", in *Gaceta Jurídica*, 2002, pp. 71–72.

1583 Jorge Santistevan de Noriega, "La Defensoría del Pueblo y su rol en la protección de los derechos humanos", in *Revista Brújula*, Año 2, No 2, Febrero 2001, p. 19.

1584 In this regard, see for example, Special Report 94, *Ciudadanos sin agua. Análisis de un derecho vulnerado*; Special Report 140, *Salud mental y Derechos Humanos: Supervisión de la política, la calidad de los servicios y la atención a poblaciones vulnerables*; and Special Report 152, *Aportes para una política Nacional de Educación Intercultural Bilingüe a favor de los pueblos indígenas del Perú*.

She stresses, as noted, that the institution performs two types of assessment: one related to assessing the problems faced by citizens and what they need to remedy these problems, in which the *Defensoría* mainly verifies compliance with the legal framework, applying standards that could be called human rights-based standards *stricto sensu*. Likewise, the *Defensoría* assesses the elements needed for public policy to work, applying standards which, according to Alicia Abanto, could be called good governance-based or good administration-based standards, and are related to the operational management of the state. In this regard, the assessment of public policies implies the application of a "human rights-based approach to its full extent", with the ultimate goal being to ensure that these are oriented to enforcing the rights of citizens.[1585]

Therefore, for this study, the human rights-based approach performed by the *Defensoría* is a comprehensive one which embraces human rights and good administration as assessment criteria. In fact, what the *Defensoría* called the public policy-based approach (as a specific and complementary approach to the human rights-based approach) could arguably be re-labelled a good governance-based approach, to the extent that its focus is on the functioning of the state apparatus regardless of whether or not a citizen's right is infringed. As pointed out by Walter Albán, although the *Defensoría*'s central mandate is the protection of fundamental rights, good governance is an indispensable instrument to this end, related to the guiding criteria for the state's administrative action, which are not always regulated.[1586]

The connection between human rights and good administration as assessment criteria is reflected again by the emphasis on the evaluation of the managerial aspects of policy implementation. As such, the human rights based-standards developed by the institution overlap with good governance based-standards.[1587] As mentioned, both are composed of legally binding norms and non-legally binding rules of good administrative conduct associated with a broader notion of the rule of law.[1588]

As in the Spanish case, human rights as the *Defensoría*'s standard of control should be conceptualised from a broad perspective. For Walter Albán, human rights mark the general orientation – the perspective regarding where the conduct of the administration should be directed. To this end, it is necessary to have specific guidelines for action, which are those provided by administrative law, but which are not always available. This is why the *Defensoría* must

1585 Based on an interview with Alicia Abanto, Deputy for Environment of the *Defensoría*.
1586 Based on an interview with Walter Albán, former *Defensor del Pueblo*.
1587 See Section 11.2.1.
1588 See Section 3.4.2.

"act creatively" in developing standards for the administration, through the interpretation of the constitution itself.[1589] In this regard, it should be noted that the *Defensoría* is entitled to interpret law and, in so doing, it is allowed to propose a broader scope for the core of existing rights, or even propose the formulation of new ones, regardless of the existing provisions of the legislature or the Constitutional Court.[1590] This falls under the *apertus* clause of fundamental rights enshrined in Article 3 of the Peruvian Constitution.[1591]

For this study, the idea of human rights as an extended standard of control of the *Defensoría* is based on the Peruvian Constitution itself. As noted by Eugenia Fernán Zegarra, the *Defensoría*'s first deputy, although the protection of human rights is the main task of *Defensoría*, assessing the behaviour of the administration (and public services) also falls within its remit. Therefore, the *Defensoría* promotes not only human rights, but also good administration.[1592]

It is important to note that although the existence of a subjective right to good administration is not recognised within the Peruvian legal system[1593], the institution included it in the overview of rights deemed to warrant the protection of the institution, and which, until recently, were contained in the *Defensoría*'s Information System (*Sistema de Información Defensorial* – SID).[1594] This corresponded to the *Defensoría*'s aim to promote respectful administration of citizens' fundamental rights, as oriented by good governance practices.[1595] Again, although the institution has not defined the meaning and scope of the right of good administration, it was possible to observe in the SID that the alleged violation of the right to good administration was directly connected with the identification of certain forms of misconduct or instances of maladministration. Formulated based on a positive approach, it might be concluded that, from the perspective of the *Defensoría del Pueblo*, the "right to good administration" implies, among other things: prohibition of misuse of powers and functions; due (good) administrative procedures; compliance with judgments and administrative decisions; good complaint handling (e.g. timely remedy of complaints); adequate

1589 Based on an interview with Walter Albán, former *Defensor del Pueblo*.

1590 See Section 10.2.2.

1591 Peruvian Constitution, Article 3: "The enumeration of rights established in this chapter does not exclude others guaranteed by the Constitution, nor others of a similar nature or based on the dignity of the human being, on the principles of sovereignty of the people, the democratic rule of law and the republican form of government".

1592 Based on an interview with Eugenia Fernán Zegarra, First Deputy of the *Defensoría*.

1593 As already mentioned, good administration has been recognised by the Peruvian Constitutional Court not as a subjective right, but as a constitutional principle. For the principle of good administration within the Peruvian legal framework, see Section 11.1.1.

1594 The SID is an institutional managerial tool for registering and systematising the *Defensoría*'s interventions in the handling of cases, whether ex-officio or on request. See Section 10.4.2.

1595 Defensoría del Pueblo's Guidelines on the classification of complaints (*Guía para la clasificación de quejas de la Defensoría del Pueblo*), julio 2005, p. 11.

personnel numbers and service provision; effective provision of auxiliary services (security, cleaning, etc.); simplification of requirements (no bureaucratic burdens) for granting licenses; and proportional use of administrative sanctioning powers.[1596]

It can be argued that, as such, from the *Defensoría*'s perspective, good administration can be construed more as a principle than a right, which embraces legal standards, legal duties and rules of good administration, all with (to some extent) legal effect.[1597] And although the SID no longer contains a list of rights (leaving aside the identification of the violated right, at the discretion of the officer responsible for handling the complaint)[1598], it can be argued that for *Defensoría* officials, good administration is also a criterion for the assessment of the behaviour of the administration.[1599]

However, as mentioned, the institution has not defined the operative content of good administration as an assessment criterion. In any case, it is interesting that according to some *Defensoría* officers, good governance and good administration imply, and seem to relate to something extra. Thus, for some officers good governance and good administration refer to "those tools that the public administration must have to provide what people need"[1600]; while for others, they are related to ethics, and seek to emphasise that the activity of the state need not be neutral so much as sound.[1601]

In addition, it is notable that the *Defensoría*'s standard of control is expanded by Article 9(1) of its Organic Act, which stipulates that the existence of a threat or the breach of a citizen's fundamental right has to be the consequence of "illegitimate, irregular, unlawful, neglectful, abusive or improper" conduct by the administration. As Eugenia Fernán Zegarra, *Defensoría*'s first deputy, points out, these legal provisions guide the *Defensoría*'s controlling function towards evidencing "maladministration".[1602] Thus, it would appear that good

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1596 See *Defensoría*'s Information System (*Sistema de Información Defensorial* – SID). Former list of alleged acts of infringement (*Listado de hechos vulneratorios*).

1597 Based on an interview with Alberto Huerta, Head of the Defensoría's Decentralised Office of Lima.

1598 Since February 2019, the SID has classified complaints by topic. SID lists 19 topics: public services, heath services, education services, transportation, environment and natural resources, personal well-being, personal identity, labour, justice, public security, social and assistance programs and services, pensions, formalities and procedures, discrimination, corruption, transparency and access to information, participation, freedom of expression and information, and personal freedom.

1599 Based on an interview with Alicia Abanto, Deputy for Environment of the *Defensoría* and Alberto Huerta, Head of the *Defensoría*'s Decentralised Office of Lima.

1600 Based on an interview with Alicia Abanto, Deputy for Environment of the *Defensoría*.

1601 Based on an interview with Eugenia Fernán Zegarra, First Deputy of the *Defensoría*.

1602 Based on an interview with Eugenia Fernán Zegarra, First Deputy of the *Defensoría*.

administration is also a supplementary criterion for the assessment of the administration. It stems, from this study's perspective, from the dual constitutional mandate of the institution: the protection of human rights and the promotion of good administration.

The *Defensoría*, in its anti-corruption role, also makes the relationship between human rights and good governance self-evident. In this regard, as the *Defensoría* has pointed out, good governance is required for the full enjoyment of human rights. As anticorruption strategies are within the framework of good governance, anticorruption policies and human rights protection share the same principles: participation, accountability and transparency.[1603] Thus, it is possible to conclude that the *Defensoría* applies human rights as a standard of control in accordance with a broader conception of the rule of law in order to, in common with its Dutch, British, and Spanish counterparts, enhance the integrity branch of the Constitution.

10.4. INVESTIGATION PROCEDURE FOR THE DETERMINATION OF HUMAN RIGHTS INFRINGEMENTS

10.4.1. CHARACTERISTICS OF THE INVESTIGATION PROCEDURE

The investigative power of the *Defensoría del Pueblo* can be exercised on request or on its own initiative. When the inquiry starts as a result of a complaint, it is only required to have some connection with the issue at hand and to be grounded.[1604] In addition, the complainant has to comply with some minimum requirements, such as stating their name, address, etc.[1605] Requests can be submitted in writing, orally or by email. In this way, citizens have easy and full access to *Defensoría del Pueblo*.

The *Defensoría del Pueblo*'s investigation is characterised by the existence of a threat or a breach of a citizen's fundamental right as a consequence of unlawful, irregular or inappropriate conduct by the administration. Therefore, the institution mainly conducts a hard-law review by examining complaints received. Complaints generally involve criticism of the procedures that authorities have followed or of the contents of the decisions they have made.

1603 Defensoría del Pueblo, *Special Report 147. Aportes de la Defensoría del Pueblo para una educación sin corrupción*, pp. 19–25, *supra* note 610.

1604 Organic Act, Article 20.

1605 Organic Act, Article 19.

Requests for intervention by the *Defensoría* can take one of the following three forms: i) complaint (*queja*); ii) petition (*petitorio*); and iii) query (*consulta*).[1606] A complaint has been defined as a request for intervention, either orally (*presencial*), in writing or online (*virtual*), in response to an alleged violation of a constitutional or fundamental human right, as a consequence of the actions or omissions of the administration, the administration of the Judiciary, or a private entity in charge of the provision of public services.[1607] A petition is a request for mediation by the *Defensoría* in a specific situation affecting a citizen's right in which no infringement of legal duties or misconducts have taken place.[1608] A query is a request for information or advice on a matter which is beyond the jurisdiction of the *Defensoría* and in which an infringement of a fundamental right is not involved.[1609]

Once the request for intervention is submitted, the *Defensoría* has to decide on the admissibility of the case. In this regard, the *Defensoría* will reject a complaint if it is related to a matter beyond its jurisdiction or an unfounded or groundless claim.[1610] In these cases, the *Defensoría* will not start an investigation, and the complainant will be notified of the decision in writing.

The *Defensoría* is allowed to approach a request for intervention in two ways. Thus, the intervention of the *Defensoría* regarding a case can be distinguished between: immediate action (*acción inmediata*) and regular procedure (*trámite ordinario*). An immediate action is carried with the aim of providing a prompt solution to a complaint (within five working days). This kind of intervention is allowed in cases in which the nature of the complaint requires the urgent solution of an alleged human right violation, and/or the administration has the capacity to reach a quick solution. It is characterised by its informality and verbal communications (interviews, telephone contacts, etc) are privileged.[1611]

In turn, the *Defensoría* uses the regular procedure to conduct an inquiry aimed at establishing the facts of a case in order to determine whether an alleged violation of a fundamental right actually occurred. In the event that an inquiry starts as a result of an *ex officio* intervention oriented to providing individual remedy, it may be approached either as an immediate action or a regular procedure, and be treated as a complaint or petition.[1612] The administration has the legal obligation to cooperate with the *Defensoría del Pueblo*.[1613]

1606 Protocol on Defensoría del Pueblo's Interventions, 1.
1607 Protocol on Defensoría del Pueblo's Interventions, Article 26.
1608 Protocol on Defensoría del Pueblo's Interventions, Article 58.
1609 Protocol on Defensoría del Pueblo's Interventions, Article 68.
1610 Protocol on Defensoría del Pueblo's Interventions, Article 9.
1611 Protocol on Defensoría del Pueblo's Interventions, Article 39 and Article 42.
1612 Protocol on Defensoría del Pueblo's Interventions, Article 1.
1613 Peruvian Constitution, Article 161; Organic Act, Article 16.

Since the swift response to complaints is one of the main characteristics of the institution, the methods used to deal with complaints are flexible. Indeed, they must follow principles such as discretionality (*discrecionalidad*), subsidiarity (*subsidiaridad*), celerity (*celeridad*), direct contact (*inmediación*), and effectiveness (*eficacia*), among others.[1614] In addition, as mentioned above, the *Defensoría del Pueblo* can warn, recommend and remind public officials of their duties.

In cases of own-initiative activities – general investigations regarding structural problems that will result in a special report – the investigation is based on the same criteria as an ordinary complaint. This means that the ultimate purpose of a general investigation is to create conditions for the better protection of citizens' rights. However, it is flexible enough to enable the *Defensoría* to function as a mechanism of control, and not only for individual remedy. Own-initiative general investigations can include (but be limited to) fieldwork, surveys, and work-meetings with independent experts and public institutions, etc. Through its general investigations, the *Defensoría* also performs functions as a *colaborador crítico* (critical contributor) of the administration, to the extent that its recommendations are aimed not only at pointing out problems, but also proposing solutions.[1615] Thus, the recommendations of the *Defensoría* are for prevention as well as correction.

As mentioned, the *Defensoría del Pueblo* is not vested with the power to make legally-binding decisions, and it is precisely from here that the institution derives its identity, features, and opportunities. Because the *Defensoría* does not have this power, it must exercise the "magistracy of conviction" in order to influence other institutions, which means to use dialogue and conciliation as instruments to solve problems arising between citizens and their public authorities.[1616] It is this capacity of convincing others in its power resides.

10.4.2. FORMULATION OF DECISIONS

As mentioned, the *Defensoría del Pueblo* mainly conducts hard-law review. It oversees the administration's compliance with legal principles and regulations as a mechanism for protecting human rights. It could be said that the *Defensoría del Pueblo* performs a "hard-law review from a human rights perspective". With this purpose, the *Defensoría* applies not only statutory law and secondary legislation but also constitutional parameters. In so doing, it takes into account

1614 Protocol on Defensoría del Pueblo's Interventions, Article 3(1).

1615 Guidelines on the Preparation of Special Reports (*Lineamientos para la Elaboración de Informes Defensoriales*), Section 3. Approved by Decision (*Resolución Defensorial*) 048–2011/DP-PAD.

1616 Defensoría del Pueblo, *Third Annual Report. 1999–2000. Institucionalidad democrática y ética: tareas pendientes* (Democractic institutionality and ethics: Pending tasks), Lima, 2000, p. 17.

the obligations derived from constitutional provisions, international human rights treaties, general binding laws, and specific regulations as standards of assessment. Thus, it might be said that the *Defensoría del Pueblo* also applies the rule of law as a criterion for assessing the performance of the government.

All requests for intervention presented to the *Defensoría* must be registered in the *Defensoría*'s Information System (*Sistema de Información Defensorial* – SID). As noted, the SID is an institutional managerial tool for registering and systematising the *Defensoría*'s interventions in the handling of cases, whether *ex-officio* or on request. The SID records the account of events that led to the request for intervention, the identification of the alleged right infringed or threatened, and the thematic identification, among other aspects.[1617]

As mentioned, the institution's role is intended to clarify whether the actions or omissions of the public administration have brought about the infringement of fundamental rights. The investigation is carried out within a maximum period of 60 working days.[1618] When assessing the conduct of the administration for individual redress, the *Defensoría* must verify whether the alleged instance of maladministration occurred and whether it gave rise to a human rights infringement.

Until recently, the SID presented an overview of facts or misconduct affecting specific rights. The alleged act of infringement (*hecho vulneratorio*) was linked to (the infringement of) a human right. Hence, the SID provided a list of rights (civil and political rights as well as economic, social and cultural rights) connected with the alleged act of infringement corresponding to each. In addition, the SID listed the protected rights with reference to certain legal principles. Of especial relevance are the principles of legality, proportionality, objectivity, impartiality, and due process, though others are no less important. The *Defensoría* used to classify the cases submitted before it in accordance with the categories established in the SID.

It is important to mention that since February 2019 the SID no longer classifies the complaints by protected rights but by topics.[1619] Arguably, this new practice could reflect a shift in the performance of the institution bringing it a bit closer to maladministration.

In addition, SID contains data regarding population groups subject to priority attention from the *Defensoría* (indigenous population, persons with disabilities,

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1617 Protocol on Defensoría del Pueblo's Interventions, Article 5.

1618 Protocol on Defensoría del Pueblo's Interventions, Article 46.

1619 The SID lists 19 topics of intervention, which could be regarded as areas of administrative action. See *supra* note 1598.

women, children, population affected by political violence). It contributes to the protective role of the *Defensoría* to the extent that it attempts to establish common criteria for assessment of the administration. The SID also aims to provide accurate information for the development of further investigations.

With regard to own-initiative investigations related to the preparation of special reports, the *Defensoría* sets the normative framework from which its legal obligations stem, on the basis of which the institution will assess the conduct of the administration. In other cases, especially regarding the assessment of policy implementation in areas such as health and education, the institution has developed human rights-based indicators. As mentioned before, the human rights-based indicators developed by the *Defensoría* reflect the obligations that public authorities are expected to comply with, pursuant to national and international legal instruments.

10.4.3. CLOSURE OF DECISIONS

The *Defensoría del Pueblo*'s Organic Act establishes the ways in which an investigation conducted by the institution concludes. If the investigation is finalised as a result of the *Defensoría*'s immediate intervention, an "act of closure" (*acta*) has to be made[1620], which will be signed by the staff member in charge of the case and the administrative officer involved in the complaint.

In other cases, the *Defensoría* will send an official letter (*oficio*) addressed to the administration reporting on its findings, whether positive or negative, and formulating recommendations where applicable. When the complaint concerns misconduct by a civil servant, a copy of the letter will be sent to both the civil servant in question and their superior within the administrative body.[1621] The complainant is also informed of the results of the investigation.

Where the results of the investigations are negative, the *Defensoría* is allowed to formulate recommendations (*recomendaciones*), which consist of specific requests made to the public official with direct competence to remedy the action or omission considered to be a violation of fundamental rights.[1622] Recommendations can contain: reminders (*recordatorios*), warnings (*advertencias*) and exhortations (*exhortaciones*).[1623] They can either be formulated jointly, alternately or supplementarily, depending on the complexity of the case.

1620 Organic Act, Article 21.
1621 Organic Act, Article 24.
1622 Protocol on the Defensoría del Pueblo's Interventions, Article 50.
1623 The former Defensoría Protocol, in accordance with its Organic Law, allowed the institution to formulate recommendations (*recomendaciones*), suggestions (*sugerencias*),

Reminders are addressed to the administration, to alert them of the need to comply with legal duties enshrined in both domestic and international legal instruments and jurisprudence, as well as the need to take into account focuses on human rights, gender, and interculturality, among others. On the other hand, warnings are aimed at alerting a civil servant or public authority as to the legal consequences of their behaviour, which could have led to infringement of the Constitution and the law. In the case of exhortations, the *Defensoría* asks that the administration adopt permanent measures to ensure that the actions which prompted the institution's intervention are not repeated.[1624]

In case of an investigation conducted with the purpose of publishing a special report, the investigation invariably concludes with the formulation of recommendations. These should be specific (*concretas*) – easy to be verifiable; achievable (*realizable*) – possible to be completed satisfactorily; ascertainable (*verificable*) – possible to be proven; and measurable (*mensurables*) – possible to measure the degree of compliance.[1625] The Defensoría's special report is officially approved by a *resolución defensorial* (decision), published in the official gazette. The *Defensoría*'s decision contains the main findings of the investigation as well as the recommendations addressed to the government authority concerned, whether the administration, the judiciary, or the parliament.

10.5. FINDINGS

In recent years the *Defensoría del Pueblo* has undergone a process of hybridisation with regard to its powers, tasks, functions, and the orientation of its assessment. Internal developments in Peru, in terms of both the consolidation of the democratic regime and its economic and social expansion, explains the evolution of the institution. This has mainly been manifested through a shift from an approach of individual redress in relation to human rights infringements, towards an approach with a focus on public policies as a mechanism to impact at the policy level. Thus, attention is not exclusively on classic political and civil rights but also on economic, social, and cultural rights, which have a direct connection with the provision of public services by the state and the legality of the administration's actions.

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calls (*instancias*), warnings (*advertencias*) and reminders of legal duties (*recordatorios*). The *Defensoría* called these "persuasive actions". See Protocol on *Defensoría del Pueblo*'s Interventions, approved by Decision 047–2008/DP-PAD, Article 42 & Article 43. In force until February 2019.

1624 Protocol on Defensoría del Pueblo's Interventions, Article 52.

1625 Guidelines on the Elaboration of Special Reports, Section 4.3.

Nonetheless, it may be said that the Peruvian democratic regime remains fragile. Problems regarding the legal quality of the functioning of the administration represent one of the major risks for the consolidation of the development process and the legitimacy of the political system in Peru. In order to overcome this situation, the *Defensoría* attempts to enhance democratic governance and the quality of public administration by shaping its own preventive function. The *Defensoría del Pueblo* interacts with the public powers with a view to making it more effective. In so doing, the *Defensoría* contributes to the legitimacy of the state and the consolidation and further development of the democratic system. Thus, another task of the *Defensoría del Pueblo* is to promote good governance and good administration to ensure that government authorities meet the requirements applicable to them as a democratic state governed by the rule of law.

Therefore, although from a historical point of view (but also today) the main task of the *Defensoría* is the protection of human rights, a broadening of functions has rendered the institution less focus on individual redress and more control oriented in order to contribute to enhance the quality of public authorities interventions. The lack of an adequate institutional political framework (in which the Parliament is more focused on politics than on obtaining consensus) and an insufficiently legitimised or responsive judiciary has contributed to placing the institution in an important and recognised position as a new institution of control[1626] – that is, a fourth power institution.

Hence, the *Defensoría del Pueblo*, by focusing on human rights protection while involving itself in enhancing the legal quality of the administration, has also developed its constitutional position as a guarantor of good administration. This is connected with its involvement in the qualitative aspects of the implementation of public policies for the protection of citizen's rights (civil, political, economic, social, and cultural rights), for which it applies both legally-binding norms and rules of good administrative conduct as standards of assessment. Therefore, the *Defensoría* performs both hard-law review and soft-law review when assessing the administration. As such, this study considers it more appropriate to categorise the *Defensoría del Pueblo* as based not on a human rights ombudsman model but a mixed or dual one. This consideration better reflects the hybridisation that the institution is undergoing with regard to its functions, assessment orientation, standard of control, and standards of assessment. Arguably, this affects the normative functions of the institution, especially in relation to the development of good governance-based standards.

[1626] Thomas Pegram, "Weak institutions, right claims and pathways to compliance: The transformative role of the Peruvian human rights ombudsman", p. 230.

CHAPTER 11

THE APPLICATION OF THE PRINCIPLES OF GOOD GOVERNANCE BY THE *DEFENSORÍA DEL PUEBLO*

In Chapter 11 the normative function of the Peruvian *Defensoría del Pueblo* is analysed in order to determine whether and the extent to which principles of good governance might be considered to be embraced through the standards applied by the institution, and if so, how these principles can be further developed to contribute to promoting good governance, bettering the legal quality of the administration and enhancing legitimacy in the public sector, in order to strengthen the democratic system.

11.1. GOOD GOVERNANCE AND THE *DEFENSORÍA DEL PUEBLO*

11.1.1. PRINCIPLES OF GOOD GOVERNANCE WITHIN THE PERUVIAN LEGAL FRAMEWORK

As mentioned in previous chapters, good governance is a fundamental value, or a meta-concept, connected to the rule of law and democracy. It is one of the cornerstones of modern constitutional states. As a fundamental (legal) value, it has an axiological character and is considered prima facie as the best.[1627] In this regard, good governance can be considered as a goal in itself. It functions as a mediate normative source as it operates by informing legal norms within the entire legal order.[1628]

In the realm of legal norms, good governance as a value can be concretised as a general principle, as an immediate finalistic norm. It defines a purpose to be met. It has a guiding, directive function in determining behaviour.[1629] The general principle of good governance demands the realisation of a state of affairs

[1627] Robert Alexy, *A theory of constitutional rights*, pp. 86–93.
[1628] Ángel Garrorena Morales, loc.cit., p. 36, *supra* note 129.
[1629] Humberto Ávila, *Theory of principles*, pp. 40–41.

that manifests properness, transparency, participation, accountability and effectiveness.[1630]

For this study, that good governance might be considered as both a fundamental (legal) value and a general principle makes it possible to frame it as a constitutional principle within the Peruvian legal system. Its existence might be deduced from diverse constitutional provisions, even though there is no explicit reference to it. In this sense, it can be argued that good governance, considered as a constitutionalised principle-duty, is implicitly enshrined in Article 44 of the Peruvian Constitution.[1631] According to Article 44, the fundamental duties of the state are: to defend national sovereignty, to guarantee full enjoyment of human rights; to protect the population from threats to their security, and *to promote general welfare based on justice and the comprehensive and balanced development of the nation*[1632] (emphasis added).

The Peruvian state employs a social and democratic state model based on the rule of law (*soziale und demokratische Rechtsstaat*), which is enshrined in the Constitution.[1633] States with this model are characterised by the recognition of duties by the public powers, implying a dynamic and promoting position on the part of each power underpinned by human dignity as a supreme value of the legal system.[1634]

1630 See Chapters 4, 5 & 6.

1631 Alberto Castro, *El ombudsman y el control no jurisdiccional de la administración pública como garantía del derecho a la buena administración*, p. 3. A similar opinion has been expressed by the former Peruvian Constitutional Court Justice, Gerardo Eto Cruz, in dissenting from the decision on Case 02111–2010-PA/TC.

1632 Peruvian Constitution, Article 44: "The fundamental duties of the State are to defend national sovereignty; to guarantee full enjoyment of human rights; to protect the population from threats to their security, and to promote general welfare based on justice and the comprehensive and balanced development of the Nation. It is also the duty of the State to establish and implement the border policy and to promote integration, particularly of Latin America, as well as development and cohesiveness of border zones, in accordance with foreign policy."

1633 Peruvian Constitution, Article 43: "The Republic of Peru is democratic, social, independent and sovereign. The State is solitary and indivisible. Its form of government is unitary, representative and decentralised, and it is organised pursuant to the principle of separation of powers." In this regard, the Constitutional Court has stated that: "The Peruvian State defined by the 1993 Constitution presents the essential characteristics of a social and democratic state based on the rule of law. This is a conclusion reached from a joint analysis of Articles 3 and 43 of the Basic Law. It is also based on the essential principles of freedom, security, private property, popular sovereignty, separation of the supreme functions of the State, and recognition of fundamental rights. It is from these principles that equality under the law is derived, as well as the necessary recognition that the development of the country occurs within the framework of a social market economy", Case 0008–2003-AI/TC, para. 10. See also, Case 0003–2003-AI/TC and Case 1956–2004-AA/TC.

1634 Constitutional Court, Case 0008–2003-AI/TC, para. 11. According to Article 1 of the Peruvian Constitution: "The defense of the human person and respect for his dignity are the supreme purpose of society and the State".

This model imposes on the Peruvian state a form of organisation and action that cannot be limited to guaranteeing the security of the nation or the defence of fundamental rights; it must also facilitate the role of the state in integrating and regulating the political, social and economic order, to ensure conditions that will allow for the realisation of fundamental rights.[1635] Thus, a social and democratic state based on the rule of law will recognise economic and social rights of an essentially utilitarian nature, the realisation of which requires positive action on the part of the state and the configuration of positive and negative obligations.

In order to comply with these obligations under appropriate conditions, the state must fulfil minimum standards that legitimise its performance, particularly given its role as a provider (and guarantor) of public services, in which it interacts more intensely with citizens.

Thus, from the constitutional duty of the state to guarantee the general well-being established in Article 44 of the Constitution, a series of rules and principles are emerging to guide state actions.[1636] Thus, as far as this study is concerned, good governance is configured as a constitutional principle derived from Article 44, which imposes on the public powers the duty to properly perform their functions so as to ensure general welfare and thus achieve the ends of the social and democratic state based on the rule of law. From this perspective, the principles of good governance are the minimum standards for guaranteeing the appropriate action of the State.

Although the Constitutional Court has not recognised good governance as a principle, the idea of its existence as an implicit constitutional principle is reinforced by the Constitutional Court's recognition of good administration as an implicit constitutional principle[1637] derived from the provisions of articles 39[1638] and 44[1639] of the Peruvian Constitution, whose foundation is the service of the nation.[1640] As mentioned, the principle of good administration concretises the

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1635 Constitutional Court, Case 0008–2003-AI/TC, para. 13.

1636 Constitutional Court, Case 00034–2004-PI/TC, para. 26–27.

1637 Constitutional Court, Case 2235–2004-AA/TC; Case 2234–2004-AA/TC; Case 00017–2011-AI/TC.

1638 Peruvian Constitution, Article 39: "All public officials and civil servants are at the service of the Nation. The President of the Republic is the highest official at the service of the Nation, followed in this order of importance by the Members of Congress, Members of the Cabinet, the Members of the Constitutional Court and the Council of the Magistrature, Justices of the Supreme Court justices, the Prosecutor General of the Nation and the Ombudsman in the same ranking; and below them, the representatives of the decentralised agencies and Mayors, in accordance with the law." Regarding the principles of good administration and Article 39 of the Peruvian Constitution see Case 2235–2004-AA/TC, para. 10.

1639 Constitutional Court, Case 00017–2011-AI/TC, para. 15.

1640 Regarding the "service to the Nation" the Constitutional Court has pointed out on the Case 008–2005-AI, para. 14, that "the essential purpose of service to the Nation lies in providing

principle of good governance at the level of the administration, as the best expression thereof.[1641] Therefore, for this study, the general principle of good governance underlies recognition of good administration as a principle derived from articles 39 and 44 of the Peruvian Constitution.

The Peruvian Constitutional Court has pointed out that the principle of good administration implies that public bodies, state officials, and public employees, in their capacity as servants of the nation, must serve and protect the general interest in a transparent manner. The Constitutional Court stresses that in this context, transparency requires that the state provide for all the organisational, procedural and legal means designed so as not to prevent public officials and civil servants from making sound decisions in order to ensure the good functioning of the administration.[1642] In this regard, although the Constitutional Court has not developed the normative content nor the scope of the principle of good administration (and only refers to the principle of transparency as one of its constitutive elements), since good administration is an expression of good governance, it can be argued that it underlies good governance as a broader constitutional principle[1643], as well as its constituent elements: the principles of good governance.[1644]

The Peruvian Constitutional Court has also played an important role in the recognition (and development) of principles of good governance, although it has not always fully developed their content. Indeed, former Chief Justice of the Peruvian Constitutional Court, César Landa, has stated that the Constitutional Court has assumed a jurisdictional policy for the defence of human rights and constitutional principles, which is expressed in several decisions that account for a jurisprudential development in the field of good governance.[1645]

In the view of this study, such a development in case law indicates that the constitutive elements of the general principle of good governance – the specific principles of good governance – can be found, albeit only implicitly, in the text of the Peruvian Constitution. In this regard, it could be argued that properness –

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public services to the recipients of such duties, that is to say, the citizens, subject to the primacy of the Constitution, fundamental rights, the principle of democracy, the values derived from the Constitution and democratic and civil power in the exercise of the public function.

1641 See Section 6.1.3.

1642 Constitutional Court, Case 2235–2004-AA/TC, para. 10.

1643 Yvana Novoa Curich, "El buen gobierno como bien jurídico categorial de los delitos de corrupción", in *Anticorrupción y Justicia Penal,* No 3, 2016, pp. 14–21.

1644 Eduado Luna Cervantes, loc.cit., p. 202.

1645 César Landa Arroyo, "Los principios de buen gobierno en la jurisprudencia del Tribunal Constitucional Peruano", en: Alberto Castro (ed), *Buen Gobierno y Derechos Humanos*, Lima: Facultad de Derecho PUCP – Idehpucp, 2014, pp. 51–52.

defined as a legal principle connected to the principle of the rule of law in relation to the proper performance of functions by public authorities, which implies that they are subject to the principle of legality as comprising constitutional principles and values[1646] – is an implicit principle derived from Article 51, which states that the Constitution prevails over any other legal rule.[1647] In this respect, according to the Peruvian Constitutional Court, the recognition of the supremacy of the Constitution as a legal norm implies that all public powers are subject to it and, therefore, to the principles and values that the Constitution enshrines, which restrict and delimit their acts.[1648]

In this line of reasoning, the Constitutional Court has upheld that in the constitutional (modern) state, there has been a reappraisal of the principle of legality, such that the legitimacy of laws is evaluated based on their compatibility with the Constitution.[1649] Arguably, the idea of properness as related to a conception of the principle of legality that embraces constitutional values in pursuit of integrity[1650] has been adopted by the Constitutional Court, which has stated that "the principle of legality in the constitutional state does not simply and plainly mean the execution and compliance with the provisions of a law, but also, and primarily, its compatibility with the objective order of constitutional values and principles".[1651]

In addition, it is possible to argue that many of the distinctive elements of properness can be found in the set of constitutional principles that govern the performance of public powers, which are derived from the formulation of the social and democratic rule of law enshrined in the Peruvian Constitution. Hence, for example, general principles of law such as legal certainty, interdiction of arbitrariness, impartiality, objectivity, due process and prohibition of abuse of power, which have been associated with the principle of properness, are also supported by case law of the Constitutional Court.[1652]

1646 See Section 6.2.1.

1647 Peruvian Constitution, Article 51: "The Constitution prevails over any other legal rule, the law over other lower level provisions, and so on successively. Publication is essential to enforce any legal rule of the State."

1648 Peruvian Constitutional Court, Case 5854–2005-PA/TC, para. 3–6.

1649 Peruvian Constitutional Court, Case 3741–2004-AA/TC, para. 11.

1650 Integrity in this context means compliance with the endorsed legal principles and values intrinsic to the democratic rule of law and enshrined in the Constitution. These principles and values, which are not enforceable for the Judiciary, comprise the integrity branch of the constitution. See Sections 1.1.2, 4.2.3 & 5.2.1.

1651 Peruvian Constitutional Court, Case 3741–2004-AA/TC, para. 15.

1652 According to some authors, the principle of legitimate expectations, which has been recently codified in the GAPA, is implicit in the Peruvian constitutional framework, derived from the principles of legal certainty and good faith. See Alejandro Arrieta Pongo, loc.cit., pp. 88–101. Regarding the elements of the principle of properness, see Section 6.2.1.

On the other hand, it is important to mention that the Constitutional Court refers to the principle of "functional properness" (*principio de corrección funcional)* in its case law, which is mainly applied as an interpretative principle with procedural character. This means that it functions as a method of interpretation of constitutional provisions applied by constitutional judges based on the authority of the Constitution as Law (*fuerza normativa de la constitución*).[1653]

However, the Constitutional Court's case law allows it to be argued that the principle of functional properness has a substantive dimension[1654], and consequently can be developed from a (steering) good governance legal perspective, as proposed in this study. In this regard, the Constitutional Court has pointed out that "the principle of separation of powers, as set out in Article 43 of the Constitution, seeks to ensure that the constituted powers develop their functions in accordance with the *principle of functional properness*; that is to say, *without interfering with the competence of others, but, in turn, understanding that they all play a complementary role in consolidating the normative force of the Constitution* (…)"[1655] (emphasis added). As early explained, it means that each branch is restricted to the exercise of its functions and must not unduly interfere in the functions of another branch, and also that each branch is given the power to exercise a degree of direct control over how the other institutions exercise their functions. In either case, the proper functioning of the state powers is subject to the principles and values enshrined in the Constitution.[1656] Therefore, it can be held that properness, as a good governance legal principle, is implicitly enshrined in the Peruvian constitutional framework.

The principle of transparency, for its part, is enshrined in Article 2(5) of the Peruvian Constitution, which recognises the fundamental right of access to

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1653 Peruvian Constitutional Court, Case 5854–2005-PA/TC, para. 12: "Recognition of the legal nature of the State's Constitution must also be reconciled with the possibility of being subject to interpretation. However, the particular regulatory structure of its provisions […] requires that constitutional interpretation methods not be exhausted in such classic regulatory interpretation criteria (literal, teleological, systematic and historical), but include – among other items – a series of principles that inform the hermeneutic work of the constitutional judge. These principles are: […] c) The principle of functional properness: This principle requires that the constitutional judge, in performing his interpretation task, refrain from distorting the functions and powers that the Constituent Assembly has assigned to each of the constitutional bodies, so that the balance inherent to the Constitutional State, as a budget for the respect of fundamental rights, can be fully guaranteed. Regarding principles of constitutional interpretation see Konrad Hesse, *"La interpretación constitutional"* in, *Escritos de Derecho Constitucional,* Madrid: Centro de Estudios Constitucionales, 1992.

1654 Regarding properness as a substantial principles see Antonio Pérez Luño, *La Seguridad Jurídica*, pp. 31ff. See also Section 6.2.1.

1655 Peruvian Constitutional Court, Case 0030–2005-PI/TC, para. 51.

1656 See Section 6.2.1 & Section 6.3.1.

information.[1657] It is also established in the Transparency and Access to Public Information Act.

The Peruvian Constitutional Court has stated that the right of access to information is just one of the dimensions of the principle of transparency. But it has also established that transparency is connected with democracy, and that it is a principle implied within the democratic rule of law. In consequence, as stipulated by the Constitutional Court, the principle of transparency goes beyond access to public information to the extent that it imposes a set of legal duties upon the government, regarding not only information itself but also the performance of the administration.[1658]

On the other hand, participation is recognised as a fundamental right in Article 2(17) of the Peruvian Constitution, according to which every person has the right to participate in the political, economic, social and cultural life of the nation.[1659] As developed, participation is mainly linked to its political dimension. Thus, Article 31 of the Constitution establishes that all citizens have the right to be elected and to freely elect their representatives in accordance with the law. Citizens are also entitled to take part in public affairs by means of referendum, and legislative initiative. Participation, as a direct democracy mechanism, has been framed in Law 26300, the Citizen Participation and Accountability Rights Act (*Ley de los Derechos de Participación y Control Ciudadanos*).[1660]

The Peruvian Constitutional Court has stated that the right to participation is associated with the principle of democracy, and concretised through mechanisms of direct democracy, representative democracy, and the collective exercise thereof through political organisations.[1661] Likewise, the Constitutional Court has established that political participation is a right with broad content that implies the intervention of the individual, in any decision-making process,

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1657 Peruvian Constitution, Article 2(5): "Every person has the right: […] 5. to request information, without cause, and to receive it from any public entity within the legal term, at its respective cost. Exception is hereby made of information affecting personal privacy and that expressly excluded by law or for national security reasons."

1658 Peruvian Constitutional Court, Case 00565–2010-PHD/TC, para. 5. It is important to mention that the Constitutional Court has developed extensive jurisprudence regarding the right of access to information; see for example Case 1797–2002-HD/TC, Case 2579–2003-HD/TC & others.

1659 Peruvian Constitution, Article 2(17): "Every person has the right: […] 17. to participate, individually or in association with others, in the political, economic, social and cultural life of the nation. Citizens, in accordance with the law, have the right to elect, remove from office or revoke public authorities, to legislative initiative and referendum." .

1660 Published in the official gazette *El Peruano* on 3 May 1994.

1661 Peruvian Constitutional Court, Case 0030–2005-PI/TC, para. 22 & 23.

in the various levels of organisation of the State and society.[1662] Therefore, as pointed out by the Constitutional Court, participation must be understood in a broad sense and not only as a political-electoral right, giving rise to a wide range of mechanisms for citizen participation in public affairs.[1663]

Thus, for example, Peruvian legislation has developed mechanisms for citizen consultation as an expression of the right to participation.[1664] This also includes participation mechanisms in the policy cycle, particularly at the local level (or community level).[1665] In this regard, Law 27783, Decentralisation Act (*Ley de Bases de la Descentralización*)[1666] establishes that regional and local governments are obliged to promote citizen participation in the formulation, discussion and co-ordination of development plans and budgets, and in public management. With this objective, subnational governments must guarantee access to public information as well as the establishment of mechanisms of consultation, co-ordination, control, evaluation and accountability. One example of this is so-called participatory budgeting.[1667] Thus, in the Peruvian legal system,

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1662 Peruvian Constitutional Court, Case 5741–2006-PA/TC, para. 3. However, it should be noted that the Constitutional Court case law has developed the right to participation largely in its political-electoral dimension. In this regard, see Case 0030–2005-PI/TC; Case 4677–2004-PA/TC; & Case 02002–2006-CC/TC.

1663 Hugo León Manco, loc.cit., p. 233, *supra* note 880.

1664 For example, the Regulations on Transparency, Access to Environmental Public Information, and Participation and Citizens Consultation on Environmental Affairs (*Reglamento sobre Transparencia, Acceso a la Información Pública Ambiental y Participación y Consulta Ciudadana en Asuntos Ambientales*) approved by Supreme Decree 002–2009-MINAM. Citizen consultation should be distinguished from the right to prior consultation of indigenous peoples, which is recognised in the Peruvian legal system (and doctrine) as a collective cultural right. In this regard, the Peruvian Constitutional Court has stated in Case 0024–2009-PI/TC, para. 6, that: "The right to consultation is not an individual right. It is a collective right that is recognised for the peoples specified in Article 1.1 of ILO Convention 169. For this reason, it requires appropriate procedures through the representative institutions of the indigenous peoples, and is constitutionally required whenever the State foresees legislative or administrative measures likely to affect them directly." On this, see also James Anaya, *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people*, *supra* note 909.

1665 It should be noted that the rights of citizens to participate in local development has constitutional bases, In this regard, Article 31 of the Peruvian Constitution establishes that "[…] It is a right and a duty of residents to participate in the municipal government of their jurisdiction. The law governs and promotes direct and indirect mechanisms of this participation. […]" See also Peruvian Constitution, Article 197: "Municipalities promote, support, and regulate citizen participation in local development. […]." On the other hand, Article 199 establishes that regional and local governments "formulate their budgets with citizens' participation […]".

1666 Published in the official gazette *El Peruano* on 20 July 2002.

1667 Law 28056, Framework Act on Participatory Budgeting (*Ley Marco del Presupuesto Participativo*), published in the official gazette *El Peruano* on 8 August 2003. Article 1 of the Framework Act on Participatory Budgeting defines the participatory budgeting process as follows: "[…] a mechanism for equal, reasonable, efficient, effective and transparent allocation of public resources that strengthens State–Civil Society relations. To this end, regional and

participation, as an expression of the democratic principle, has multiple facets. In a narrow sense it can be defined as a political-electoral right, while in a broader sense it can be understood as the right to participate in public affairs, which extends to the public policy cycle.

Accountability – previously defined as a principle connected to the principle of separation of powers, to the requirement for a system of checks and balances and, therefore, to the establishment of diverse mechanisms for controlling state power[1668] – can be found enshrined in several articles of the Peruvian Constitution. As such, for this study, the principle of accountability can be considered implicit in Article 45 of the Constitution, which establishes that the Peruvian state is organised pursuant to the principle of separation of powers.

More specifically, accountability can be found in Article 31 of the Constitution which, together with the recognition of citizens' right to participate in public affairs, enshrines their right to hold their authorities to account through recall or removal from office, and through the demand for accountability (*demanda de rendición de cuentas*).[1669] These mechanisms are regulated in the Citizen Participation and Accountability Rights Act.[1670] In addition, Article 199 states that regional and local governments formulate their budgets with citizen participation and are accountable for their execution, annually, in accordance with law. Based on this constitutional provision, the legal obligation has been established for regional and local level authorities to conduct "accountability

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local governments promote the development of mechanisms and strategies for participation in the planning of their budgets, as well as the monitoring and oversight of the management of public resources." It is important to mention that since the decentralisation efforts of the early 2000s, participatory budgeting has been mandatory for all subnational governments. See Peruvian Constitution, Article 199; Decentralisation Act, Article 20; Organic Act of Regional Governments, Article 32; Organic Act of Municipalities, Article 53.

1668 See Section 6.3.1.

1669 Peruvian Constitution, Article 31: "All citizens have the right to take part in public affairs by means of referendum; legislative initiative, *removal from office or recall of authorities, and the demand for accountability* […]" (emphasis added).

1670 Article 20 of the Citizen Participation and Accountability Rights Act defines recall (*revocatoria*) as the right that citizens have to remove from office certain regional and local authorities such as governors and mayors, respectively. A recall may only proceed once during the term of office, and the consultation is carried out in the third year (out of four) for all authorities. This must be requested by twenty-five percent (25%) of the voters in each constituency. On the other hand, Article 31 establishes that through accountability, citizens have the right to question authorities about budget execution and the use of public resources. A demand for accountability is only applicable to those authorities subject to recall. To certify the demand for accountability, it must be requested by no less than ten percent (10%) with a maximum of twenty-five thousand (25,000) signatures from the electoral register in the respective territorial constituency. Through this mechanism, citizens file the interpellation questionnaire, to which authorities must respond clearly and directly within a period of 60 calendar days. The authority is obligated to publish the interpellation questionnaire and the responses thereto.

public hearings" (*audiencias públicas de rendición de cuentas*).[1671] Accountability is also performed in the framework of participatory budgeting.[1672]

It should be noted that the Peruvian Constitutional Court has not explicitly made reference to the principle of accountability in its case law. Instead, it has referred to the principle of answerability (*responsabilidad*), considering it as fundamental principle of the democratic rule of law and in connection with the principle of transparency. With regard to the principle of answerability, the Peruvian Constitutional Court points out that this implies a commitment to public aims, and therefore, a demand for accountability.[1673]

As already noted, answerability is a dimension of accountability.[1674] Therefore, in the view of this study, when the Constitutional Court refers to the principle of answerability, it is actually developing the principle of accountability. In this sense, it can be argued that within the Peruvian legal framework accountability is an implicit constitutional principle associated with the democratic rule of law.

With respect to the principle of effectiveness, the Peruvian Constitution Court does not make explicit reference to this principle.[1675] However, the Constitutional Court has referred to the principle of effectiveness in various cases. For example, it has pointed out that "Public administration, composed of hierarchically ordered bodies, *assumes the fulfilment of the State's goals, taking into account the prompt and effective satisfaction of the public interest*"[1676] (emphasis added). On the other hand, in relation to public procurement, the Constitutional Court has recognised the need to establish special procedures for acquisitions as a result of "*the pursuit of greater efficacy in public administration,* due to the particular and specific needs of each entity, in terms of cost and time, which arise as a consequence of the modernisation of the State"[1677] (emphasis added).

1671 The accountability public hearings are spaces for meetings and exchange of information between authorities, public officials, representatives of organised civil society and the general population, allowing the population to be informed about the progress, achievements, difficulties and perspectives of regional or local management, respectively. On this, see, Decentralisation Basis Act, Article 17; Organic Act of Regional Governments, Article 8(3) and Article 24; and, Organic Act of Municipalities, Article 97.

1672 Accountability in the framework of the participatory budgeting process is considered a stage in the process in which the authority reports to the agents on compliance with the agreements and commitments assumed during the previous year, regarding prioritisation of the public investment budget. See, Framework Act on Participatory Budgeting, Article 6, Article 9, and Article 11. On participatory budgeting, see *supra* note 1667.

1673 Peruvian Constitutional Court, Case 00565–2010-PHD/TC, para. 6.

1674 See Section 6.3.1.

1675 Unlike the Spanish Constitution, which has established in Article 103.1 that public administration must serve the general interest with objectivity and in accordance with the principle of efficacy, among others. See *supra* note 1385.

1676 Peruvian Constitutional Court, Case 0090–2004-PA/TC, para. 11.

1677 Peruvian Constitutional Court, Case 020–2003-PI/TC, para. 20.

As pointed out above, the principle of effectiveness is connected to legality and the rule of law, insofar as it expresses the duty of the public authorities to promote conditions that will ensure the realisation of the rights of all citizens under conditions of equality, as well as the satisfaction of general interest.[1678] According to its case law, the Peruvian Constitutional Court relates effectiveness with the requirements of the social *rechtsstaat*; and, consequently, with those of a public administration which must provide public services in an effective manner. Therefore, it can be stated that effectiveness is an implicit constitutional principle linked to the principle of the social *rechtsstaat*. On the other hand, it should be noted that the principle of effectiveness has been enshrined in various legal norms, such as the Organic Act of the Executive Branch[1679], the Civil Service Act[1680], and the General Administrative Procedure Act.[1681]

As mentioned, principles of good governance can be found at the *infra*-constitutional level. As established by some Peruvian scholars, the principles of good governance are enshrined in several legal norms. For instance, Jorge Danós has pointed out that what could be identified as the main features of the principles of good governance are developed in administrative law regulations, in the form of a set of obligations, parameters, concepts and principles that guide the performance of all administrative entities in Peru, as well as their relationship with citizens, and from which a series of rights is derived.[1682] Thus, "the principles of good governance and good administration aim to democratise the administrative function in order to achieve a more participatory and deliberative public administration, which motivates its decisions".[1683]

1678 See Section 6.3.2.

1679 Organic Act of the Executive Branch, Preliminary Title, Article II: "Principle of Service to the Citizen: The entities of the Executive Branch are at the service of the people and society; they act in accordance with their needs, as well as with the general interest of the Nation, ensuring that their endeavors are carried out in accordance with: 1. Effectiveness: management is organised for the timely fulfillment of government goals and commitments."

1680 Law 30057, Civil Service Act (*Ley del Servicio Civil*), published in the official gazette *El Peruano* on 4 July 2013; Preliminary Title, Article III: "Principles of the Civil Service Act: The Principles of the Civil Service Act are as follows: […] b): Principle of Effectiveness and Efficiency: The civil service and its regime seek to achieve the objectives of the State and the provision of public services required by the State, including the optimisation of resources used for this purpose."

1681 General Administrative Procedure Act, Article IV.1.10: "Principles of the Administrative Procedure. Principle of Efficacy: subjects of administrative procedure must ensure the fulfillment of the purpose of the procedural acts, over those formalities whose realisation will not affect their validity, will not determine important aspects in the final decision, will not diminish the guaranties of the procedure, or will not cause defenselessness to the subjects […]".

1682 Jorge Danós Ordóñez, "Principios de buen gobierno en el derecho administrativo peruano y legitimidad de la actividad administrativa", p. 121, *supra* note 82.

1683 Ibid., p. 122.

Furthermore, Danós highlights three sets of administrative legal norms that contain the different rules, parameters or principles derived from the principles of good governance[1684]:

1. The legal framework governing the administrative procedure established in Law 27444, the General Administrative Procedure Act (hereafter, GAPA)

GAPA enshrines several of the fundamental principles regarding the proper functioning of the administration, which in turn are procedural enforceable rights for citizens in their relations with the public administration. GAPA aims to ensure a set of constitutional principles applicable to the activity of public administration such as the principles of legal certainty, legality, equality and due procedure, among others. Likewise, GAPA develops the basic elements of the fundamental right to due procedure[1685] and other related principles and rights (such as the duty to give reasons for administrative decisions, reasonableness, and respect for the right to defence, among others).[1686]

GAPA was conceived as a legal instrument to promote the modernisation of public administration, improving its relations with citizens.[1687] According to Danós, Article IV of the GAPA Preliminary Title establishes a set of principles which guide the administrative procedure and which are directly linked to the principle of good governance, accounting for an implicit right to good administration.[1688] These principles are: legality, due procedure, reasonableness, impartiality, procedural conduct or procedural good faith, celerity, effectiveness, participation, simplicity, equality, legal certainty, and legitimate expectations, among others.

2. The legal framework governing the organisation and functioning of the public administration at national, regional and local level

As regards the legal framework governing the organisation of the public administration in the three levels of government in Peru, Danós points out that the organic acts, which regulate the structure and functioning of the state's powers, include the principles of good governance.[1689] As an example of this, the

1684 Ibid., pp. 122–123.

1685 As mentioned, in the Peruvian legal framework the principle of due procedure or due administrative procedure is also recognised as a right derived from the constitutional principle/right of due process in administrative matters (*debido proceso en sede administrativa*). See *supra* note 701.

1686 Jorge Danós Ordóñez, "Principios de buen gobierno en el derecho administrativo peruano y legitimidad de la actividad administrativa", pp. 125–126.

1687 Ibid., p. 126.

1688 Ibid., p. 127.

1689 Ibid., p. 128.

aforementioned Organic Act of the Executive Branch stipulates that the entities making up this state power act in accordance with the principles of effectiveness, efficiency, accountability, citizen participation and transparency.[1690]

Another example is the Organic Act of Regional Governments, which states that the management of regional governments is governed, inter alia, by the following principles: administrative transparency, citizen participation, modern management and accountability, effectiveness and efficiency.[1691] Likewise, the Organic Act of Municipalities states that local governments guide their management according to, among others, the principles of participation, transparency, accountability, effectiveness, efficiency, fairness, impartiality and neutrality.[1692]

3. The legal framework regulating the behaviour of civil servants

With regard to the legal framework regulating the behaviour of civil servants, of the various existing norms, Jorge Danós highlights the provisions of the Public Function Code of Ethics Act.[1693] The Code of Ethics enshrines principles such as probity, efficiency, suitability, truthfulness, justice and equity, and observance of the rule of law.[1694] Likewise, it establishes that the duties of public servants include neutrality, transparency, proper exercise of functions, proper use of state property and responsibility.[1695]

Another norm worthy of further mention is the Civil Service Act, which establishes a set of principles that develop the principles of good governance. As already noted, the Civil Service Act establishes effectiveness and efficiency as two of its guiding principles. The Civil Service Act also include the principles of general interest, equal opportunities, merit, legality, transparency, accountability, probity and public ethics and flexibility, among others.[1696]

From the above, it can be stated that good governance as a general principle, and the specific principles of good governance, are constitutional norms, enshrined either explicitly or implicitly in the Peruvian legal system. This view has been ascertained by several Peruvian Constitutional Court decisions. Likewise, the

1690 Organic Act of the Executive Branch, Preliminary Title, Article II.
1691 Organic Act of Regional Governments, Article 8.
1692 Organic Act of Municipalities, Preliminary Title, Article IX.
1693 Jorge Danós Ordóñez, "Principios de buen gobierno en el derecho administrativo peruano y legitimidad de la actividad administrativa", p. 128.
1694 Public Function Code of Ethics Act, Article 6.
1695 Public Function Code of Ethics Act, Article 7.
1696 Civil Service Act, Preliminary Title, Article III.

principles of good governance are contained in numerous *infra*-constitutional legal norms of varied content and extent.

From this study's perspective, the *Defensoría del Pueblo*, through its indirect normative function, contributes to developing the legal content and scope of the principles of good governance by proposing better ways of steering the performance of the administration.

11.1.2. GOOD GOVERNANCE AND THE *DEFENSORÍA*'S LEGAL MANDATE

Article 162 of the Peruvian Constitution and Article 1 of the Organic Act of the *Defensoría del Pueblo* stipulate that the institution has the mandate to defend the constitutional and fundamental rights of the person and the community; to supervise fulfilment of the state administration's duties, and the delivery of public services to citizens.

It should be noted that the *Defensoría* has a dual mandate: the protection of human rights and the promotion of good administration. In general terms, the *Defensoría* can be said to protect fundamental rights by supervising public administration.[1697]

Although it lacks an explicit mandate to this end, since its establishment the *Defensoría* has construed, as part of its constitutional role, the promotion of principles of good governance practices as a mechanism to consolidate democracy and the rule of law.[1698] As far as the *Defensoría* is concerned, the observance of good governance principles on the part of public authorities is a necessary condition for the enforceability of fundamental rights.

In Peru, three different stages in the institutional life of the *Defensoría* can be discerned.[1699] Each of them belongs to a certain historical, political and social context, which in turn conditions the institution's lines of intervention and its approach to the principles of good governance.

The first stage (April 1996 – December 2000) corresponds to the tenure of Peru's first ombudsman, Jorge Santistevan de Noriega, under the authoritarian government of Alberto Fujimori. During this stage, the institution's action was

1697 See Section 10.3.2.
1698 Defensoría del Pueblo, *Second Annual Report. 1998–1999*, p. 12.
1699 Samuel Abad Yupanqui, "La Defensoría del Pueblo. La experiencia peruana", pp. 492–493.

characterised by the defence of fundamental rights and freedoms against abuses of political power.[1700]

The second stage (December 2000 – November 2005) refers to the period of democratic transition that began when Congress declared a presidential vacancy upon Fujimori's resignation by fax from Japan. After a brief period of transitional government led by Valentín Paniagua, Alejandro Toledo was elected president. During this stage, the incumbent of the *Defensoría del Pueblo* was Walter Albán, whose tenure was characterised by a more active role in the defence of economic and social rights, as well as in strengthening public institutions. The Defensoría worked intensively to promote transparency and good governance practices in public administration.[1701] It can be stated that it was during this period that the *Defensoría* began its approach to good governance-related matters.

The third stage started with the appointment of Beatriz Merino as ombudswoman (*Defensora*) in October 2005 and unfolded within a context of democratic stability and economic prosperity. Under Merino, it can be more clearly observed that the institution developed a good governance perspective (although without explicitly adopting it), reflected in its new areas of intervention.[1702] As Samuel Abad has pointed out, the emphasis during this period was on supervising public policies, monitoring and evaluating social conflicts, fighting corruption, and strengthening good governance.[1703]

It is possible to argue that a fourth stage in the development of the institution has started with the appointment of Walter Gutiérrez as the new *Defensor* (2016–2021). So far, this period has been marked by a greater emphasis on strengthening the oversight of essential public services, as well as the fight against corruption, the prevention of social conflicts and environmental protection as lines of intervention.[1704]

At each stage and throughout its institutional life, the *Defensoría* has dealt with several cases and problems, which it has reported through the handling of complaints or in its special reports. Although the matters dealt with reflect

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1700 Ibid., p. 493.

1701 Beatriz Merino Lucero, "Defensoría del Pueblo: Logros actuales, retos futuros" in *Revista Debate Defensorial. La Fortaleza de la Persuación. Edición conmemoraitva por los dieciocho años de la Defensoría del Pueblo*, 2014, p. 56.

1702 Beatriz Merino was chosen as the first woman to run the *Defensoría*, in October 2005. She held office until March 2011, when she resigned after completing her term without Congress having chosen a new incumbent. From 2011 to 2016, Eduardo Vega Luna was in charge of the institution. This period can be identified as a continuation of the institutional line of the Merino era.

1703 Samuel Abad Yupanqui, "La Defensoría del Pueblo. La experiencia peruana", p. 493.

1704 See Institutional Strategic Plan 2018–2020.

common concerns regarding (in some cases) structural problems that cut across the different stages of the *Defensoría*, an identification of key lines of intervention can be made, related to the predominant concerns of the institution during the different periods.

Next, twelve key lines of intervention[1705] will be introduced. They do not encompass all of the issues addressed by the *Defensoría*, but they do give an account of how the institution has evolved and how it has progressively approached good governance as part of its constitutional mandate.

1) Release of innocents and persons deprived of their freedom

Since its establishment, using "ombudsdiscretion" (*discrecionalidad defensorial*), the situation of innocent prisoners has been one of the issues prioritised by the *Defensoría*.[1706] Indeed, the primary focus of the *Defensoría* was originally to advocate for the release of persons who were deprived of their freedom, or who were unfairly convicted or prosecuted for terrorist offences or its aggravated version, high treason, when the incumbent presided over the Ad Hoc Commission of Pardons created during Fujimori's administration in 1996.

After the coup of 5 April 1992, the government of Alberto Fujimori issued a set of rules with the purpose of fighting terrorism, privileging criminal repression and incorporating life imprisonment, the trial of civilians by military courts, prosecution by "faceless" judges (identified by codes rather than by names), and strengthening police powers, among others.[1707] The application of these rules gave way to judicial errors, which resulted in the incarceration of a significant number of innocent people.[1708] The unfair loss of freedom was aggravated by the fact that the vast majority of these individuals were affected by exclusion and conditions of moderate or extreme poverty.[1709]

1705 The identification of thematic areas is partially based on the work of Samuel Abad, ex-deputy for constitutional affairs and ex-first deputy of the *Defensoría del Pueblo* (1996–2007). See Samuel Abad Yupanqui, "La Defensoría del Pueblo. La experiencia peruana", pp. 496–508. A detailed analysis of the cases and problems addressed by the *Defensoría* can be conducted with reference to the annual reports (www.defensoria.gob.pe).

1706 Walter Albán Peralta, "La Defensoría del Pueblo y Jorge Santistevan de Noriega: Una existencia indisoluble, vigente y…para siempre", in *Revista Debate Defensorial. La Fortaleza de la Persuación. Edición conmemoraitva por los dieciocho años de la Defensoría del Pueblo*, 2014, p. 46. The victims of political violence, the indigenous peoples from the amazon, as well as the situation and the rights of women were areas prioritised by the institution from the outset.

1707 Decree Law 25475, on terrorism, and Decree Law 25659 on high treason (aggravated terrorism).

1708 Samuel Abad Yupanqui, "La Defensoría del Pueblo. La experiencia peruana", p. 497.

1709 Walter Albán Peralta, "La Defensoría del Pueblo y Jorge Santistevan de Noriega", p. 47.

In an effort to rectify this situation, on 15 August 1996, Congress unanimously approved Law 26655, which created the Ad Hoc Commission charged with evaluating and qualifying requests for pardon and the right to grace, filed by individuals who had been unfairly prosecuted or convicted of alleged crimes of terrorism or treason. The Ad Hoc Commission, chaired by the *defensor*, was responsible for proposing that the president pardon those who had been unfairly prosecuted or sentenced for such crimes. The *Defensoría* was set as the Technical Secretariat of the Ad Hoc Commission, providing the necessary infrastructure and resources for its operation.

As Walter Albán recalls, the Ad Hoc Commission was created in a context in which political polarisation made it difficult to agree upon an alternative, even though the right to freedom of persons unfairly imprisoned for the alleged crime of terrorism had been recognised by the government itself. In this situation the *Defensoría* had a leading role. Once the first *defensor* was appointed, he developed an intense effort to persuade senior officials of the armed forces and the police force, the political forces represented in Congress, the Catholic Church and other churches, human rights organisations, and the victims themselves, arriving at the consensus which allowed for the creation of the Ad-Hoc Commission.[1710]

From the creation of the Ad Hoc Commission until the conclusion of its work in December 1999, 502 people were pardoned or granted the right to grace.[1711] This was this first line of action that set the *Defensoría del Pueblo* down the path to attaining legitimacy.[1712]

The *Defensoría* has also paid particular attention to the defence of the rights of prison inmates, as a special vulnerable group. In this sense, it has reported on the structural crisis facing the prison system as a result of prison overcrowding and poor service-provision to the prison population, leading to a violation of their fundamental rights.[1713] Concern for the rights of persons deprived of their freedom has been dealt with in various *Defensoría* special reports[1714] such as

1710 Ibid., p. 48.

1711 Defensoría del Pueblo, *La labor de la Comisión Ad-Hoc a favor de los inocentes en prisión. Logros y perspectivas*, Lima, 2000, p. 81.

1712 Samuel Abad Yupanqui, "La Defensoría del Pueblo. La experiencia peruana", p. 497.

1713 Ibid.

1714 As stated, the special reports are approved by decision (*resolucion defensorial*) and published in the official gazette. At the time of its approval, the report is assigned a number corresponding to the correlative order of publication, which accompanies the title. To facilitate reading, in this section, the body of this study will refer to the publication numbers. The footnotes will state the title and year of publication. Moreover, for informative purposes, an English translation of each title will be provided in parenthesis.

Special Report 11[1715], Special Report 29[1716], Special Report 113[1717], and Special Report 154.[1718] As regards the situation of the rights of persons deprived of their freedom, the *Defensoría* has declared this to be an "unconstitutional state of affairs" (*estado de cosas inconstitucional*), marked by permanent violation of the rights of the detainees.[1719]

In addition, the *Defensoría* makes efforts to prevent cases of arbitrary detentions as a result of having the same name as a suspect, and to ensure that authorities comply with legal provisions and duties when issuing and executing arrest warrants. It is in this context that the *Defensoría* continually makes supervisory visits to police stations to verify the correct issue of arrest warrants. In so doing, it has verified arbitrary arrests due to the lack of the necessary data to fully identify the defendant. As the *Defensoría* states in its Special Report 118, the breach of these legal provisions causes the violation of rights such as right to freedom, identity and presumption of innocence.[1720]

2) Oversight of elections

Since the 1998 municipal elections, the *Defensoría* has performed electoral monitoring in order to guarantee the right to equal political participation, within the framework of its constitutional mandate to protect human rights and to supervise public administration. As pointed out by former *defensor* Santistevan de Noriega "to guarantee the right to political participation during election processes, certain basic parameters that ensure free and transparent

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1715 Defensoría del Pueblo, *Special Report 11. Derechos humanos y sistema penitenciario: Supervisión de derechos humanos de personas privadas de libertad* (Human rights and the prison system: Monitoring the human rights of persons deprived of their freedom), Lima, 1998.

1716 Defensoría del Pueblo, *Special Report 29. Derechos humanos y sistema penitenciario. Supervisión de derechos humanos de personas privadas de libertad 1998 – 1999* (Human rights and the prison system: Monitoring the human rights of persons deprived of their freedom 1998 – 1999), Lima, 1999.

1717 Defensoría del Pueblo, *Special Report 113. Supervisión del sistema penitenciario 2006* (Oversight of the prison system 2006), Lima, 2006.

1718 Defensoría del Pueblo, *Special Report 154. El sistema penitenciario: componente clave para la seguridad y la política criminal. Problemas, retos y perspectivas* (The prison system: a key component for security and criminal policy. Problems, challenges and perspectives), Lima, 2011. Other reports in which the *Defensoría* deals with the rights of imprisoned individuals are: *Special Report 5. Informe sobre la situación del establecimiento penitenciario de régimen cerrado ordinario Lurigancho* (1997); *Special Report 28. Informe sobre el establecimiento penitenciario de Yanamayo, Puno* (1999); *Special Report 73. Informe sobre el establecimiento penitenciario de régimen cerrado especial de Challapalca* (2003).

1719 Defensoría del Pueblo, *Special Report 113*, pp. 150–151.

1720 Defensoría del Pueblo, *Special Report 118. Afectación de los derechos a la libertad personal e identidad por mandatos de detención ilegal* (Infringement of rights to personal freedom and identity due to illegal arrest warrants), Lima, 2007, p. 32.

elections are required".[1721] The *Defensoría* ensures that authorities at the three levels of government perform their functions impartially, in compliance with the principle of neutrality so that none of the political options are privileged during the election process.[1722] It should be noted that the involvement of the *Defensoría* during the election cycle covers the entire process: the campaign, the voting and the vote count.

The *Defensoría's* active engagement in electoral processes under an authoritarian political context differs from that which it displays under the current context of democratic stability. In this respect, the importance of the *Defensoría*'s intervention in the 2000 general election should be highlighted. The *Defensoría* warned at the time that the country was experiencing a serious process of "blurring of the Constitutional design" given "the inconvenience of all measures affecting the rule of law and resentment of the foundations of democracy."[1723] Some of these measures were those adopted by the government of Fujimori with a view to securing a third (and unconstitutional) presidential re-election.

According to the *Defensoría*, in allusion to the 2000 general election, the oversight of electoral processes is inevitable "in circumstances where the weakening of democratic institutions, coupled with certain decisions of the electoral system bodies" undermine confidence in the results, which involve the risk that the future authorities lack legitimacy.[1724] On this occasion the *Defensoría* noted that the basic standards for free and competitive elections, derived from the right to political participation, had not been achieved.[1725] In this context, one significant case that prompted the intervention of the *Defensoría* was the allegations of forging of signatures for the registration of a

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1721 Jorge Santistevan de Noriega, "La labor de supervision electoral de la Defensoría del Pueblo", in *Revista Debate Defensorial*, 1999–2000, No 2, p. 19.

1722 Samuel Abad Yupanqui, "La Defensoría del Pueblo. La experiencia peruana", p. 503.

1723 Defensoría del Pueblo, *First Annual Report. 1997–1998,* Lima, 1998, pp. 404–407. In expressing its concern about the "blurring of constitutional design", the *Defensoría* refers, *inter alia*, to the dismissal of three judges of the Constitutional Court by Congress of the Republic in March 1997, and to excessive regulations for the exercise of the right to referendum introduced by Law 26592, which amended Law 26300, the Citizen Participation and Accountability Rights Act, by establishing as a requirement – in addition to the support of no less than 1.2 million citizens – the mandatory intervention of the Legislative Power, which was not provided for in the Constitution or in the original law. Thus, in order to validly proceed, it was necessary at that time, as a preliminary filter, for there to be a disapproved legislative initiative; and in addition, the authorisation of a referendum by 48 congressmen (those representing no less than two fifths of the legal number of Members of Congress of the Republic).

1724 Defensoría del Pueblo, *Second Annual Report. 1998–1999*, p. 530.

1725 Defensoría del Pueblo, *Third Annual Report. 1999–2000*, pp. 666–667.

political organisation linked to the government of Alberto Fujimori in order to take part in the general elections.[1726]

As Walter Albán recalls, rigorous oversight of electoral processes was not formerly part of the regular activities of the *Defensoría*, with the classic conception of its mandate prevailing. Several of the Latin American ombudsmen stated that the work of the institution should be limited to supervising the electoral bodies, but not the entire process. For the general elections of 2000, ombudsmen from several countries in the region were invited to participate in electoral oversight. After this experience, a majority were in favour of incorporating this practice into the permanent work of the institution.[1727] As a result of this experience, the *Defensoría* extended its regular scope of action to mediation, observation or supervision to contribute to the exercise of citizens' rights such as the right to vote, the right to assembly and the right to free speech.[1728]

Electoral oversight has allowed the *Defensoría* to promote both legal and institutional changes in the electoral system in order to strengthen political parties and the democratic culture in the country. Additionally, through its intervention, the *Defensoría* promotes the political participation of women and contributes to guaranteeing the right to vote, especially on the part of vulnerable groups such as people with disabilities and indigenous peoples.[1729] This work is reinforced through activities such as training, dissemination and promotion of citizen surveillance.[1730]

3) Truth, national reconciliation and the fight against impunity

The defence of the rights of people affected by political violence and the fight against impunity, in the context of Peru's internal armed conflict caused by the actions of terrorist groups from 1980–2000, was another of the *Defensoría*'s core areas of intervention. The institution has addressed this problem by giving priority to two categories: the situation of victims of enforced disappearance

1726 Defensoría del Pueblo, *Third Report on Electoral Oversight. Actuaciones defensoriales realizadas ante la queja por la presunta falsificación de las firmas de adherentes del Frente Nacional Independiente Perú 2000,* Lima, julio, 2000, pp. 293ff.

1727 Walter Albán Peralta, "La Defensoría del Pueblo y Jorge Santistevan de Noriega", p. 51.

1728 In this regard see Defensoría del Pueblo, *Special Report 46. El ejercicio del derecho de reunion y manifestación,* Lima, 2000.

1729 See, for example, Defensoría del Pueblo, Special Report 37. *El derecho de sufragio de las Personas con Discapacidad*, Lima, 2000; Defensoría del Pueblo, Special Report 34. *Situaciones de afectación a los derechos políticos de los pobladores de las comunidades nativas. Los casos de Manseriche*, Yarinacocha, Tahuanía y Río Tambo, Lima, 2000.

1730 Samuel Abad Yupanqui, "La Defensoría del Pueblo. La experiencia peruana", p. 503.

and their surviving relatives, and the situation of the victims of terrorism who demand attention by the government.[1731]

The *Defensoría* has made efforts to clarify cases of enforced disappearances, as they impact on fundamental rights such as the right to life and truth.[1732] In this regard, the *Defensoría* has carried out investigations of a non-jurisdictional nature, as reported in Special Report 55.[1733] In that report, the *Defensoría* provides information on the characteristics of the forced disappearance of persons and extrajudicial executions in Peru[1734], the majority of the victims of which were peasants from the southern and central highlands, in order to contribute to the clarification of these cases and initiate a process of public recognition of the victims and their relatives.[1735] Along these lines, it has also promoted investigation into human remains found in clandestine graves.[1736]

For the *Defensoría*, redress for the victims of political violence, whether due to the actions of state agents or terrorist organisations, contributes to the pacification of the country, and the search for truth and reconciliation. In this regard, from the outset the *Defensoría* has pointed out the need to establish an institutional mechanism to make recommendations regarding the legal situation of victims and reparations for the harm they suffered, as well as proposals that will allow society as a whole to overcome violence.[1737] Consequently, it actively promoted the creation of the Truth and Reconciliation Commission (hereinafter, CVR, its Spanish-language acronym).[1738]

1731 Defensoría del Pueblo, *Third Annual Report. 1999–2000*, p. 86.

1732 On the relations between enforced disappearances and the right to life and truth as prioritised lines of action of the *Defensoría,* see Defensoría del Pueblo, *First Annual Report. 1997–1998*, pp. 62–64.

1733 Defensoría del Pueblo, *Special Report 55. La desaparición forzada de personas en el Perú* (Forced disappearance of persons in Peru), Lima, 2000.

1734 According to International Human Rights Law, enforced disappearance and extrajudicial execution can only be carried out by state agents or someone acting with state consent.

1735 Between 1999 and 2000, the *Defensoría del Pueblo* looked into 6,432 forced disappearance complaints and 205 extrajudicial execution complaints. See Defensoría del Pueblo, *Third Annual Report. 1999–2000*, p. 87.

1736 In this regard, see *Defensoría del Pueblo*, *Manual para la investigación eficaz ante el hallazgo de fosas con restos humanos en el Perú*, Lima, 2000.

1737 Defensoría del Pueblo, *First Annual Report. 1997–1998*, p. 427.

1738 In Special Report 55, the *Defensoría* expressly recommended that Congress pass a law for the creation of a Truth Commission "that will allow, among other things, the singling out of victims of forced disappearance cases in Peru, clarify the circumstances under which these acts took place, find out the location of the remains to make it possible for the right to burial to be granted, assign institutional and personal responsibilities, and recognise the corresponding redress." See Defensoría del Pueblo, *Special Report 55,* p. 253. The Truth and Reconciliation Commission was established by Supreme Decree 065–2001-PCM, published in the official gazette *El Peruano* on 4 June, 2001.

The *Defensoría* engaged fully in the work of the CVR. It drew up a list of persons presumed to have disappeared on the basis of documentary collection and complaints received by the Public Prosecutor's Office, and information gathered from human rights organisations and the victims' families, which was brought to the attention of the CVR. It also collaborated with the CVR in the subsequent verification of the identities of the victims. At the end of CVR's the term, the *Defensoría* monitored compliance with the recommendations made by the CVR in order to account for the problems, progress and setbacks of the process of truth, justice and reparation in the country.[1739]

The work of the *Defensoría* in relation to persons affected by political violence has also included consideration for victims of terrorist groups demanding redress from the government: public officials, civil and political authorities, members of the armed forces and the police force, members of *rondas campesinas* (peasant vigilante groups) and self-defence committees. This involved the handling of cases, oversight of government compliance with remedial policies for victims of terrorism, and review of legislation on the matter.[1740]

Likewise, the *Defensoría* has carried out actions aimed at promoting the investigation, prosecution and punishment of those responsible for gross violations of human rights. These actions have included a review of the national legal framework in order to fight impunity, demanding that the state fulfil its international obligations under human rights law, as well as the constitutional principles and values derived from the democratic rule of law. In this respect, in Special Report *57,* the *Defensoría* analysed the effects of and compliance by the Peruvian government with the Inter-American Human Rights Court's decision in the "*Barrios Altos*" case, and the compatibility of the amnesty laws passed in Peru in 1995, the obligations of which were derived from the international instruments in which Peru is a state party.[1741] In the report, the *Defensoría* makes

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1739 In this regard see Defensoría del Pueblo, *Special Report 112. El difícil camino de la reconciliación. Justicia y repraración para las víctimas de la violencia*, Lima, 2006; Defensoría del Pueblo, *Special Report 128. El Estado frente a las víctimas de la violencia. Hacia dónde vamos en políticas de reparación de justicia?*, Lima, 2007; Defensoría del Pueblo, *Special Report 139. A cinco años de los procesos de reparación y justicia en el Perú. Balance y desafíos de una tarea pendiente*, Lima, 2008; and Defensoría del Pueblo, *Special Report 162. A diez años de verdad, justicia y reparación. Avances, retrocesos y desafíos de un proceso inconcluso*, Lima, 2013. See also the Deputy Ombudsman Report 008–2014-ADHPD/DP, *Balance del nivel de cumplimiento del Programa de Reparaciones Económicas Individuales (Prei)*, Lima, 2014.

1740 See for example, Defensoría del Pueblo, *Special Report 54. La indemnización a los miembros de los comités de autodefensa y rondas campesinas víctimas del terrorismo* (Compensation for members of self-defence committees and rondas campesinas [who are] victims of terrorism), Lima, 2000.

1741 On the evening of 3 November 1991, a massacre took place at a barbecue in the *Barrios Altos* area of Lima. Fifteen people were killed, and four more injured, by assailants who were later

recommendations for the Peruvian government to comply with its constitutional obligations to guarantee human rights, as well as with the supranational decision regarding that case.[1742]

Finally, it should be noted that the *Defensoría* also dealt with life-threatening cases, as well as cases of alleged torture and cruel, inhuman or degrading treatment, attributed to police force personnel both during and after the period of political violence. As pointed out by the *Defensoría* in Special Report 91, its intervention was aimed at obtaining evidence to clarify the complaints and to encourage the relevant authorities to investigate the facts reported.[1743]

To this effect, the *Defensoría* has repeatedly urged the Peruvian government to create the National Mechanism for the Prevention of Torture[1744], in compliance with the provisions of the Optional Protocol to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. As mentioned, the *Defensoría* was designated as the National Mechanism for the Prevention of Torture in 2015.[1745]

4) Military service and military justice reform

Since the time of its creation, cases of illegal recruitment and ill-treatment during military service have been a matter of particular concern to the *Defensoría*. According to the institution, illegal recruitment and ill-treatment undermine the right to freedom, integrity and dignity of the people affected, who usually come from the lower socio-economic strata, and in practice constitute a form of discrimination.[1746]

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found to be members of *Grupo Colina*, a paramilitary squad made up of members of the Peruvian armed forces. The victims were alleged to be members of the Maoist terrorist group *Sendero Luminoso* (Shining Path). However, judicial authorities determined they were not terrorists. As part of a pair of Inter-American Court decision against Peru in relation to the *Barrios Altos Case* in 2001, Peru was ordered to overturn its amnesty laws, investigate forced disappearances, and adequately punish those found responsible.

1742 See Defensoría del Pueblo, *Special Report 57. Amnistía vs. Derechos Humanos. Buscando justicia (*Amnesty vs. Human Rights. Pursuing justice*)*, Lima, 2001.

1743 Defensoría del Pueblo, *Special Report 91. Afectaciones a la vida y presuntas torturas, tratos crueles, inhumanos o degradantes atribuidas a efectivos de la polícia nacional* (Life-threatening injuries and alleged torture, cruel, inhuman or degrading treatment attributed to police force personnel) Lima, 2005, p. 14.

1744 See Defesoría del Pueblo, *Eleventh Annual Report. January – December 2007*, Lima, 2008, p. 54; and Defensoría del Pueblo, *Twelfth Annual Report. January-December 2008*, p. 49. It should be noted that the period allocated for the Peruvian State to create or designate the National Mechanism for the Prevention of Torture expired on 14 October 2007.

1745 See Section 10.2.1.

1746 Defensoría del Pueblo, *Special Report 22. Lineamientos para la reforma del servicio militar: hacia un modelo voluntario* (Guidelines for military service reform: Towards a voluntary model), Lima, 1999, pp. 7, 71–72.

In order to eradicate this problem, the *Defensoría* made a series of recommendations aimed at both improving the professionalisation of the armed forces and replacing compulsory military service with a voluntary regime. These recommendations are contained in Special Report 3[1747], and Special Report 22. It is important to mention that in accordance with the recommendations made by the *Defensoría*, Peru's Congress passed Law 27178[1748], which prohibited forced recruitment as a military service training procedure and partially incorporated a voluntary model. The law came into force in January 2000 and was later replaced by Law 29248, which came into force in January 2009, and fully institutes voluntary military service.[1749]

The *Defensoría* has continued to protect the right to freedom, integrity and equality of citizens against cases of mistreatment or torture during voluntary military service, as reported in Special Report 42.[1750]

The *Defensoría* also intervened in response to attempts to restore aspects of the pre-existing compulsory military service regime. In this regard, the executive branch issued Legislative Decree 1146, published on 11 December 2012, which amended, among other aspects, Article 50 of Law 29248, The Military Service Act. This amendment established that in the event that the number of volunteers is not sufficient to cover personnel requirements, public lots would be drawn to select the individuals who were to join the service quarters. Likewise, it established that university students were exempt from the draw; and if those selected paid a S/. 1,850.00 fine, they could avoid the service.

In the opinion of the *Defensoría*, the drawing mechanism made military service compulsory for those people who were drawn; thus, this practice affected the fundamental rights to free development of personality and non-discrimination, since it constituted discriminatory treatment between those who had the financial means of paying the fine and those who did not – that is to say, the poor. For this reason, the *Defensoría* filed a writ of *amparo* and an injunction

1747 Defensoría del Pueblo, *Special Report 3. Informe sobre las levas y el servicio militar obligatorio* (Drafting and mandatory military service), Lima,1997.

1748 The Law 27178, published in the official gazette *El Peruano* on 29 September 1999, repealed Legislative Decree 264, the Obligatory Military Service Act (*Ley del Servicio Militar Obligatorio*). In force since 1 January 2000.

1749 Law 29248, published at the official gazette *El Peruano* on 28 June 2008.

1750 Defensoría del Pueblo, *Special Report 42. El derecho a la vida y a la integridad personal en el marco de la prestación del servicio militar en el Perú* (the Right to Life and Personal Integrity in the Framework of the Provision of Military Service in Peru), Lima, 2000. This report was updated as of August 2002, with a new list of cases. Thus, in the April 1998 to August 2002 period, the Defensoría dealt with a total of 174 cases, of which 56 related to deaths at military facilities and 188 to alleged torture and cruel, inhuman or degrading treatment.

requesting the suspension of the draw, which was scheduled for 19 June 2013.[1751] The Constitutional Courtroom of the Superior Court of Justice of Lima admitted the writ of *amparo* and issued an injunction ordering the suspension of the draw.

On the other hand, the *Defensoría* has also addressed the reform of military justice. In this regard, it proposed a review of the military crime regulations in order to circumscribe them to the prosecution of active members of the armed forces who had committed crimes on duty, as well as changes in the institutional design of military justice to ensure respect for due process.[1752] This has been reported in Special Report 6[1753], Special Report 64[1754], and Special Report 66.[1755]

5) Women's Rights

The defence and promotion of women's rights has been another priority of the *Defensoría*. In fact, from the outset, the protection of women's rights has been reflected at the highest level of its organisational structure.[1756] Consequently, the institution has promoted the incorporation of a gender perspective in every sphere of its performance.[1757]

An emblematic area in which the *Defensoría* was involved was the violation of reproductive rights in the implementation of the 1996–2000 Reproductive Health and Family Planning Program, under the Ministry of Health during the

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1751 In addition, the *Defensoría* prepared the Deputy Ombudsman Report 007–2013-DP-ADHPD, *Propuestas para el fortalecimiento del servicio military voluntario* (Proposals for the strengthening of the voluntary military service) with an analysis of the provisions contained in Legislative Decree 1146. The report presents information collected from three sources: i) complaints made by the soldiers themselves or their next of kin; (ii) visits to 24 military bases in certain regions of the country; and (iii) statements made in the process of desertion by young people who, having voluntarily entered, left the military service.

1752 Samuel Abad Yupanqui, "La Defensoría del Pueblo. La experiencia peruana", pp. 500–501.

1753 Defensoría del Pueblo, *Special Report 6. Lineamientos para la reforma de la justicia militar en el Perú* (Guidelines for military justice reform in Peru), Lima, 1998.

1754 Defensoría del Pueblo, *Special Report 64. La justicia militar en una etapa de transición: Análisis de los proyectos de reforma* (Military justice in transition: Analysis of reform projects), Lima, 2002.

1755 Defensoría del Pueblo, *Special Report 66. ¿Quién juzga qué? Justicia military vs. Justicia Ordinaria* (Who Judges What? Military justice vs ordinary justice), Lima, 2003.

1756 The *Defensoría del Pueblo* began its duties with the creation of two deputy ombudsman's offices within its institutional structure: the Deputy Ombudsman for Women's Rights and the Deputy Ombudsman for Constitutional Affairs. See Rocío Villanueva, "Protección de derechos reproductivos y actuación de la Defensoría del Pueblo: La tendencia compulsiva en la aplicación del Programa de Salud Reproductiva y Planificación Familiar (1996–2000)", in Defensoría del Pueblo, *Revista Debate Defensorial. La Fortaleza de la Persuación. Edición conmemoraitva por los dieciocho años de la Defensoría del Pueblo*, 2014, p. 207.

1757 Samuel Abad Yupanqui, "La Defensoría del Pueblo. La experiencia peruana", p. 499. On the incorporation of the gender perspective in the work of the *Defensoría*, see Defensoría del Pueblo, *Los enfoques de género e interculturalidad en la Defensoría del Pueblo*, Lima, 2015.

Fujimori government. In this context, the *Defensoría* issued a series of reports on the matter, such as Special Report 7[1758], Special Report 27[1759], and Special Report 69.[1760]

Special Report 7 marked the first time that a public institution in Peru had asserted that reproductive rights were enshrined in the Constitution.[1761] According to the *Defensoría,* the cases dealt with reproductive rights and the violation of fundamental rights such as the right to life, integrity, equality, freedom of conscience, religion and health, and to decide when and how many children to have. Thus, the reports revealed serious irregularities in the implementation of family planning programs in terms of a lack of sufficient information, prevention and healthcare for women, as well as cases of non-consensual sterilisation, among other anomalies.[1762] As a result of its investigations, in October 1999 the *Defensoría* launched the *Defensoría*'s System for Monitoring the Respect and Validity of Reproductive Rights (*Sistema Defensorial de Supervisión del Respeto y Vigencia de los Derechos Reproductivos*), with the objective of supervising the implementation of family planning policy, particularly in rural areas.[1763]

Another important intervention of the *Defensoría* in relation to the protection of reproductive rights occurred with the Ministry of Health's refusal to include emergency oral contraception as a method of family planning distributed free of charge and without restriction, in breach of the National Family Planning Program approved by the government in 2001. The Ministry of Health stated that this refusal would stand until such time as the side effects and dangers to human life originating from this method were cleared up. In Special Report 78 the *Defensoría* concluded that emergency oral contraception does not affect an ongoing pregnancy; and thus cannot be considered to be an abortion; and that it is an effective and safe method of contraception recognized by the World Health

1758 Defensoría del Pueblo, *Special Report 7. Anticoncepción quirúrgica voluntaria I. Casos investigados por la Defensoría del Pueblo* (Voluntary surgical contraception I. Cases Investigated by the *Defensoría del Pueblo*), Lima, 1998.

1759 Defensoría del Pueblo, *Special Report 27. La aplicación de la anticoncepción quirúrgica y los derechos reproductivos II* (Application of surgical contraception and reproductive rights II), Lima, 1999.

1760 Defensoría del Pueblo, *Special Report 69. La aplicación de la anticoncepción quirúrgica y los derechos reproductivos III* (Application of surgical contraception and reproductive rights III), Lima, 2002.

1761 Rocío Villanueva, "Protección de derechos reproductivos y actuación de la Defensoría del Pueblo", p. 209.

1762 Samuel Abad Yupanqui, "La Defensoría del Pueblo. La experiencia peruana", p. 500.

1763 From June 1997 to May 1999, the *Defensoría* handled a total of 157 cases of alleged irregularities by the Ministry of Health in the implementation of the 1996–2000 Reproductive Health-Family Planning Program. Between June 1999 and September 2002, the *Defensoría* reported 773 cases.

Organisation as well as the Peruvian Medical Association and the Peruvian Society of Obstetrics and Gynaecology. Likewise, restriction on access is a matter of public health and discrimination, insofar as it prevents low-income women from accessing a scientifically recognised contraceptive method to prevent unwanted pregnancies.[1764] The *Defensoría* advocated for the free distribution of emergency oral by the Ministry of Health until finally it was re-established by order of a Constitutional Judge.[1765]

On the other hand, the *Defensoría* has actively promoted the right to the political participation of women, monitoring compliance with quota laws. An example of this is Special Report 122 on gender quotas in elections.[1766] The *Defensoría* has also been involved in supervising the implementation of policies to protect women from violence, as these cases are not only a serious violation of human rights but also a public health problem.[1767] The *Defensoría* addresses this subject in Special Report 95[1768], Special Report 110[1769], Special Report 144[1770], and Special Report 173.[1771] In addition, the *Defensoría* promotes

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1764 Defensoría del Pueblo, *Special Report 78. La anticoncepción oral de emergencia* (Emergency oral contraceptives), Lima, 2003, p. 45.

1765 See Communication 05/DP/2016, *Defensoría del Pueblo reitera su posición institucional sobre la distribución de la AOE*. Available at: www.defensoria.gob.pe/modules/Downloads/documentos/05.-Distribucion-de-AOE-26–08–16.pdf. (Last visited on 14 August, 2016).

1766 Defensoría del Pueblo, *Special Report 122. La cuota de género en el Perú: Supervisión de las elecciones regionales y municipales 2006* (The gender quota in Peru: Supervision of regional and provincial municipal elections 2006), Lima, 2007.

1767 Defensoría del Pueblo, *Special Report 173. Feminicidio íntimo en el Perú: Análisis de expedientes judiciales,* Lima, 2015, p. 47.

1768 Defensoría del Pueblo, *Special Report 95. La protección penal frente a la violencia familiar en el Perú* (Criminal law protection against domestic violence in Peru), Lima, 2005.

1769 Defensoría del Pueblo, *Special Report 110. Violencia familiar: Un análisis desde el derecho penal* (Domestic violence: An Analysis from Criminal Law), Lima, 2006.

1770 Defensoría del Pueblo, *Special Report 144. Centros Emergencia Mujer: Supervisión de los servicios especializados en la atención de víctimas de violencia familiar y sexual* (Women's Emergency Centres: Supervision of specialised services for the attention of domestic and sexual violence), Lima, 2009.

1771 Defensoría del Pueblo, *Special Report 173. Feminicidio íntimo en el Perú: Análisis de expedientes judiciales* (Intimate feminicide in Peru: Analysis of judicial files), Lima, 2015. The *Defensoría* has followed up on the recommendations made in cases of violence against women through various reports prepared by the Deputy Ombudsman for Women's Rights. In this respect, see Deputy Ombudsman Report 003–2010/DP-ADM, *Derecho a la salud de las mujeres víctimas de violencia: Supervisión a establecimientos de salud de Lima y Callao*; Deputy Ombudsman Report 004–2010/DP-ADM, *Femenicidio en el Perú: Estudio de expedientes judiciales*; Deputy Ombudsman Report 004–2011-DP/ADM, *Violencia sexual en el Perú: Un análisis de casos judiciales*; Deputy Ombudsman Report 003–2012-DP, *Derecho a la salud de las mujeres víctimas de violencia: supervisión de establecimientos de salud en Arequipa, Junín, Lima, Piura y Puno*; Deputy Ombudsman Report 003–2013-DP/ADM, *Balance sobre el cumplimiento del Plan Nacional contra la Violencia hacia la Mujer*; and Deputy Ombudsman Report 003–2015-DP/ADM, *Violencia contra las mujeres en relación de pareja en el Callao: Supervisión a la Policía Nacional del Perú y al Ministerio Público*; among others.

gender equality by following up on the implementation of Law 28983, Equal Opportunity Act.[1772]

6) Transparency and access to public information

Since it started operations and in accordance with its constitutional mandate, the *Defensoría del Pueblo* has performed activities oriented to eradicating the "culture of secrecy" in the State apparatus and to fostering transparency as mechanisms for strengthening democracy. The *Defensoría* deals with transparency by solving complaints, conducting own initiative investigations, preparing reports and issuing recommendations. Thus, the principle has been operationalised through the application of assessment criteria or standards, in terms of either solving complaints lodged by citizens or reporting instances of breach of rights as a consequence of the bad functioning of the administration or non-compliance by public officials with their legal duties.

The role of the *Defensoría* as regards transparency is strongly oriented to the promotion and defence of the right of access to information. In fact, one of the institution's main lines of action is aimed at guaranteeing the full exercise of citizens' right of access to public information. In this respect, two different stages can be discerned regarding the performance of the institution in promoting transparency: the stage initiated by the coming into force of the Transparency and Access to Public Information Act, and a stage prior to its entry into force, when the *Defensoría* focused on supervising fulfilment of the constitutional provisions enshrining the right of access to public information and promoting the enactment of the law.

At present, the institution oversees public officials' compliance with the provisions of the aforementioned law. When assessing their compliance with citizens' right of access to public information, the *Defensoría* applies legal criteria developed by the Judiciary, in particular the Constitutional Court, and legal obligations laid down in the Transparency and Access to Information Act as standards for evaluating the administration. Therefore, in order to determine instances of infringement of the right to access information, the institution assesses the legality of administrative conduct.

[1772] Law 28983, Equal Opportunity Act, published in the official gazette *El Peruano* on 16 March 2007. Article 8 thereof stipulates that the *Defensoría del Pueblo* must oversee compliance with the Act and report annually to Congress. In this regard, see the Deputy Ombudsman Reports 001–2008-DP/ADDM, 001–2009-DP/ADDM, 002–2010-DP/ADM, 001–2011/DP-ADM, 004–2012-DP/ADM, 009–2013-DP/ADM, and 009–2014-DP/ADM.

Specifically, the *Defensoría* has dealt with transparency in Special Report 48[1773], Special Report 60[1774], Special Report 96[1775],and Special Report 165.[1776] As mentioned, the institutions prepared some of these reports with the aim of actively promoting debate and the subsequent enactment of the Transparency and Access to Public Information Act, as well as proposing certain guidelines for its formulation and content.[1777] Later, the reports were oriented to analysing the problems arising from the law's implementation and to developing recommendations to the authorities as regards their legal obligation to deliver information.

Along with the protection of the fundamental right to access information, the *Defensoría* is committed to fostering transparency as a mechanism for enhancing the effectiveness of the administration, the ethical behaviour of public officials and the fight against corruption. In this regard, transparency has also been addressed in a cross-cutting basis, in a variety of reports such as Special Report 109[1778] and Special Report 142.[1779]

Likewise, the *Defensoría* performs concrete actions in order to foster a "culture of transparency" in the framework of the process of decentralisation that the Peruvian state is undergoing. Thus, in order to verify fulfilment of the legal obligation of regional and local (provincial) governments to disseminate information on transparency web portals, the *Defensoría* monitors the respective websites every three months. The objective of such monitoring is to determine to what extent regional and local (provincial) governments comply with this obligation as a mechanism of active provision of information.[1780]

1773 Defensoría del Pueblo, *Special Report 48. Situación de la libertad de expresión en el Perú* (Situation of freedom of expression in Peru), Lima, 2000.

1774 Defensoría del Pueblo, *Special Report 60. El acceso a la información pública y la cultura del secreto* (Access to public information and the culture of secrecy), Lima, 2001.

1775 Defensoría del Pueblo, *Special Report 96. Balance a dos años de vigencia de la Ley de Transparencia y Acceso a la Información Pública* (An Overview: two years after the Transparency and Access to Public Information Act), Lima, 2005.

1776 Defensoría del Pueblo, Special Report 165. *Balance a diez años de vigencia de la Ley de Transparencia y Acceso a la Información Pública 2012–2013 (An Overview: ten years after the Transparency and Access to Public Information Act*), Lima, 2013.

1777 This is the case of Special Report 48 and Special Report 60.

1778 Defensoría del Pueblo, *Special Report 109. Propuestas básicas de la Defensoría del Pueblo para la reforma de la justicia en el Perú. Generando consensos sobre qué se debe reformar, quiénes se encargaran de hacerlo y cómo lo harán* (Basic proposals of the *Defensoría del Pueblo* for justice reform in Peru. Building consensus on what to reform, who will do it and how they will do about it), Lima, 2006. On transparency, see Chapter 8.

1779 Defensoría del Pueblo, Special Report 142. *Fortalecimiento de la Policia Nacional del Perú: Cinco áreas de atención urgente* (Strengthening the National Police Force of Peru: Five areas of urgent attention), Lima, 2009. On transparency, see Chapter 6.

1780 The oversight of regional and local government transparency web portals is conducted by the Decentralisation and Good Governance Programme, under the Deputy Ombudsman for Public Administration.

7) Assessing the decentralisation process

Concern over the country's institutional strengthening led the *Defensoría* to pay particular attention to the decentralisation process, which began in 2002 as a result of a constitutional reform. Thus, assessment of the implementation of decentralisation has been an issue of particular interest to the *Defensoría* since its creation.[1781]

The *Defensoría*'s interest in the decentralisation process was evidenced rather early when, in its Second Annual Report, the institution drew attention to the centralist bias of the Peruvian government and recommended that its institutional design be adapted to the decentralisation mandate prescribed in the 1993 Constitution. It also noted the need to "promote channels of citizen participation that would allow active monitoring of the actions of authorities and the use of resources".[1782]

For the *Defensoría*, decentralisation has been one of the most important reforms carried out in Peru, as it has involved a change in the political and administrative structure of the state, with the objective of improving the quality of service provision, meeting citizens' demands and promoting local, regional and national development in an articulated manner.[1783] For the *Defensoría*, decentralisation is a political process with a positive impact on the lives of citizens, especially

1781 The *Defensoría*'s early interest in promoting the decentralisation process, which preceded the 2002 constitutional reform, should be contextualised. The previous Peruvian Constitution, enacted in 1979, provided for the decentralisation of the State and the creation of regional governments. After lengthy discussions on the implementation of this constitutional mandate, in 1989 the first regional government elections for the new territorial constituencies were held. Nevertheless, they were suspended as a result of the 1992 coup d'état, and replaced by the Transitory Councils of Regional Administration, which reported directly to the central government. Although the new Constitution, enacted in 1993, provided for the reinstatement of the regional governments no later than 1995, this provision was not fulfilled until after the end of the Fujimori government in 2000. In 2002, Congress passed Law 27680, which amended Articles 188 to 199 of the 1993 Constitution, establishing that decentralisation become a permanent and mandatory state policy and determining that the regionalisation process begin with the election of regional authorities at the departmental level. In this regard, it is worth recalling that Peruvian territory is administratively divided into regions, departments, provinces and districts. In November 2000, elections were held for the new regional authorities, marking the resumption of the decentralisation process. It should be noted that the legal framework for regional governments was established by Law 27783, Decentralisation Act, and Law 27867, Organic Act of Regional Governments, both enacted in 2002.

1782 Defensoría del Pueblo, *Second Annual Report. 1998–1999*, p. 535.

1783 Defensoría del Pueblo, *Special Report 141. Hacia una descentralización al servicio de las personas: recomendaciones en torno al proceso de transferencia de competencias a los gobiernos regionales* (Towards decentralisation at the service of individuals: recommendations on the process of devolution to regional governments), Lima, 2008, p. 199.

the most vulnerable, through better provision of services.[1784] It also brings new opportunities for institutional reforms aimed at strengthening the relationship between the state and citizens, guaranteeing the exercise of fundamental rights and reinforcing commitment to the democratic system.[1785]

The *Defensoría* has addressed the issues of decentralisation in Special Report 133[1786], Special Report 141[1787], and Special Report 148[1788], as well as in several deputy ombudsman reports.[1789] As the *Defensoría* has pointed out, the institution through its interventions has promoted practices of good governance in regional and local governments as a mechanism for strengthening Peru's processes of governmental decentralisation and consolidation of democracy.[1790] As an example, the *Defensoría* developed the "Good Governance Index" (*Índice de Buen Gobierno – IBG*), which is composed of six indicators: i) access to public information, ii) transparency, iii) accountability, iv) public participation, v) preferential attention (providing attention to vulnerable persons in a proper manner) and vi) neutrality.[1791] The purpose was to measure progress made by regional governments in fulfilling the standards of good governance.[1792] The association that the *Defensoría* made between decentralisation and good governance was further reflected in the establishment of the Decentralisation and Good Governance Programme under the Deputy Ombudsman for Public Administration.[1793]

In its assessments of the decentralisation process, the *Defensoría* has emphasised the implementation of transparency, accountability and participation

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1784 Defensoría del Pueblo, *Twelfth Annual Report. January-December 2008*, p. 487.

1785 Ibid., pp. 487–488.

1786 Defensoría del Pueblo, *Special Report 133. ¿Uso o abuso de la autonomía municipal? El desafío del desarrollo local* (Use or abuse of municipal autonomy? The challenges of local development), Lima, 2008.

1787 See *supra* note 1783.

1788 Defensoría del Pueblo, *Special Report 148. Primera supervisión del Plan de Municipalización de la Gestión Educativa: aportes para su implementación* (First supervision of the Plan for Municipalisation of Educational Management: contributions for implementation), Lima, 2010.

1789 See for example, Defensoría del Pueblo, Deputy Ombudsman Report 017–2011-DP/AEE, *Estado actual del proceso de transferencia de competencias a los gobiernos regionales: Tareas pendientes* (Current status of the process of devolution to regional governments: Outstanding activities), Lima, 2011.

1790 Defensoría del Pueblo, *Sixth Annual Report. 2002–2003. Descentralización y Buen Gobierno* (Decentralisation and Good Governance), Lima, 2003, p. 4.

1791 Defensoría del Pueblo, *Eight Annual Report. 2004 – 2005. Políticas públicas para la vigencia de derechos* (Public policies for the enforcement of rights), Lima, 2005, p. 255.

1792 Gerardo Távara Castillo, "Descentralización, buen gobierno y ejercicio de derechos" in *Revista Debate Defensorial*, No 6, 2005, p. 96. It should be noted that this index was discontinued.

1793 On the structure of the institution, see Section 10.1.3.

mechanisms.[1794] This has resulted in the periodic issuance of monitoring reports on regional and local government transparency portals at the provincial level since 2004; and on public hearings for accountability at these levels of government since 2012.[1795] Based on these activities, the *Defensoría* has prepared guidelines that orientate local and regional on holding accountability public hearings and improving provision of information through their transparency portals.[1796]

Another relevant area of intervention has been the supervision of the devolution of powers from the central to the regional levels. In this regard, the *Defensoría* has drawn attention to certain deficiencies in the process, with outstanding activities including, among others, strengthening of intergovernmental coordination capacity, devolution of administrative functions to regional and local governments, formation of regions and compliance with citizen participation and accountability regulation.[1797]

The *Defensoría* has kept its commitment to the decentralisation process. Through its interventions, it is possible to appreciate the importance that the institution assigns to promoting good practices and complying with legal obligations (especially those related to transparency, participation and accountability) so that decentralisation can progressively accomplish the aims of promoting political democratisation, reducing inequalities and ensuring good governance.

8) Access to public utilities

The *Defensoría* has also promoted access to quality public utilities and to fair and equitable conditions. This intervention has covered drinking water, sanitation, electricity, telecommunications and transportation services. The *Defensoría*'s activities in this area include working meetings with government agencies, public utilities providers and consumer associations.[1798]

1794 Defensoría del Pueblo, *Ninth Annual Report. April – December 2005,* Lima, 2006, pp. 201–212.

1795 The supervised provincial municipalities are the regional capitals, including the city of Lima. Moreover, since 2013, the *Defensoría del Pueblo* has issued monitoring reports on the transparency portals and the public accountability hearings of the district municipalities of Lima. These activities are conducted under the provisions of the Transparency and Access to Public Information Act. In this regard, see for example Defensoria del Pueblo, *Working Paper 18. Diagnóstico sobre el cumplimiento de las obligaciones en materia de acceso a la información pública en seis gobiernos regionales*, Lima, 2012; Defensoría del Pueblo, *Working Paper 19. Diagnóstico sobre la realización de audiencias públicas de rendición de cuentas en seis gobiernos regionales*, Lima, 2012.

1796 See Defensoría del Pueblo, *Manual de Consulta en Materia de Rendición de Cuentas y Portales de Transparencia* (Handbook for Accountability and Transparency Portals), Lima, 2015.

1797 Defensoría del Pueblo, *Sixteenth Annual Report. January-December 2012*, Lima, 2013, p. 140.

1798 Samuel Abad Yupanqui, "La Defensoría del Pueblo. La experiencia peruana", p. 502.

In this regard, it is important to note that the *Defensoría* has developed a human rights approach into its oversight functions regarding access to quality public utilities. This has implied giving priority to the protection of rights to those who lack such services in urban and rural areas, since poverty entails lack of access to public services. Examples are Special Report 94[1799], Special Report 124[1800], and Special Report 170[1801] in which the *Defensoría* has assessed access to sanitation and sewerage services under the right-to-water approach. In the words of the *Defensoría*, "the human rights-based approach to the drinking water and sewerage service is an ideal basis for demanding concerted action between the state and its citizens, with adequate mechanisms for participation and consultation, and the use of instruments such as regulation, private investment, and improvement of public management, as means to improve service coverage and quality.[1802] Likewise, the *Defensoría* has addressed the need to expand the coverage of public utilities, particularly in rural areas. In this regard, Special Report 117[1803] and Special Report 149[1804] are worth mentioning.

The *Defensoría* has also addressed the issue of public transport, although this has not been classified as a public utility in the Peruvian legal system since the deregulation of this area in the 1990s. The *Defensoría* has invoked the protection of the right to life and integrity, which are seriously affected by the high number of accidents caused by inadequate quality standards in the provision of public transportation services. Thus, the *Defensoría* has analysed the problems of interprovincial transport in Special Report 108[1805], and those facing the urban passenger transport system in Special Report 137.[1806] Also worthy of mention

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1799 Defensoría del Pueblo, *Special Report 94. Ciudadanos sin agua. Análisis de un derecho vulnerado* (Citizens lacking water. Analysis of an enfringed right), Lima, 2005.

1800 Defensoría del Pueblo, *Special Report 124. El derecho al agua en zonas rurales: El caso de las municipalidades distritales* (Right to water in rural areas: the case of the district municipalities), Lima, 2007.

1801 Defensoría del Pueblo, *Special Report 170. El derecho humano al agua y saneamiento. El control del gasto público en la ejecución de infraestructura de acceso* (The human right to water and sanitation. Control of public expenditure in the implementation of infrastructure for access), Lima, 2015.

1802 Defensoría del Pueblo, *Special Report 94*, p. 2.

1803 Defensoría del Pueblo, *Special Report 117. El desafío de la telefonía rural: una mirada desde los ciudadanos* (The challenge of rural telephony: A glance from the citizens), Lima, 2006.

1804 Defensoría del Pueblo, *Special Report 149. La electrificación rural en el Perú: derechos y desarrollo para todos* (Rural electrification in Peru: Rights and development for all), Lima, 2010.

1805 Defensoría del Pueblo, *Special Report 108. Pasajeros en riesgo: La seguridad en el transporte interprovincial* (Passengers at risk: Safety in interprovincial transportation), Lima, 2006.

1806 Defensoría del Pueblo, *Special Report 137. El transporte urbano en Lima Metropolitana: Un desafío en defensa de la vida* (Urban transport in Metropolitan Lima: A challenge in defence of life), Lima, 2008.

is Special Report 159[1807], which addresses the need to ensure safety in the transportation service.

It is important to note that in the Special Report 137, the *Defensoría* recommends that the Government re-regulate public transport as a public utility. Thus, arguably, the *Defensoría* has extended the scope of its formal mandate regarding public utilities beyond the legal definition of public utility prescribed in the Peruvian legal system.

9) Non-discrimination and protection of vulnerable groups

As part of its institutional vision, the *Defensoría* has adopted the aim to fight exclusion, racism and all forms of discrimination, understanding that the effective protection of these fundamental rights is a condition for democracy.[1808] In this regard, since its establishment and in accordance with its constitutional mandate, the *Defensoría* has given priority to groups of people considered to be in situations of extreme vulnerability.

Thus, it can be stated that the *Defensoría* started addressing the problem of discrimination by framing it in the context of the protection of vulnerable groups, prioritising the attention of persons affected by political violence, persons deprived of their freedom, women, indigenous persons and persons with disabilities. The prioritisation of these groups has been reflected in the structure of the institution from early on[1809], in the handling of complaints and the issuance of special reports analysing structural problems that affect the rights of these groups.[1810]

In relation to indigenous peoples, the *Defensoría* has prioritised advocating for their rights, orienting its actions towards promoting the recognition of indigenous land rights from the outset, as can be seen in Special Report 12[1811]

1807 Defensoría del Pueblo, *Special Report 159. Balance del Seguro Obligatorio de Accidentes de Tránsito: Propuesta para una atención adecuada a las víctimas* (Balance of mandatory traffic accident insurance: A proposal for adequate care of victims), Lima, 2012.

1808 Defensoría del Pueblo, *Thirteenth Annual Report. January – December 2009*, Lima, 2010, p. 476.

1809 For details on the organic structure of the *Defensoría del Pueblo,* see the annual reports. See also Section 10.1.3.

1810 On the attention given to persons affected by political violence, persons deprived of liberty, and the rights of women as specific lines of ombudsman intervention, see the preceding sections of this subchapter.

1811 Defensoría del Pueblo, *Special Report 12. Análisis de la normatividad sobre la existencia legal y personalidad jurídica de las comunidades nativas* (Analysis of the regulations on the legal existence and legal status of native communities), Lima, 1998.

and Special Report 68.[1812] In addition, the *Defensoría* has oriented its actions to guaranteeing the right to access basic services such as education and health, as well as to mediating the relationship between the government, rural and native communities, and extractive industries.[1813] These matters were addressed in connection with environmental problems, as observed in Special Report 47[1814], Special Report 103[1815], and Special Report 151.[1816]

Subsequently, the *Defensoría* has emphasised the need to promote the development of a state-based institutional framework aimed at the inclusion of indigenous peoples. Thus, in Special Report 152[1817], Special Report 163[1818], and Special Report 174[1819], the *Defensoría* assesses implementation of the Ministry of Education's intercultural bilingual education policy as a contribution to ensuing access by indigenous persons to quality education. Similarly, in Special Report 134[1820], and Special Report 169[1821], the *Defensoría* seeks to contribute to the implementation of a health policy that will preserve the particular needs of indigenous peoples. These reports evidence the adoption of the intercultural perspective in the *Defensoría*'s performance.

1812 Defensoría del Pueblo, *Special Report 68. La Defensoría del Pueblo y los derechos territoriales de las comunidades nativas. El conflicto territorial en la comunidad nativa Naranjos* (The Defensoría del Pueblo and the land rights of native communities. The territorial conflict in the Naranjos Native Community), Lima, 2002.

1813 Defensoría del Pueblo, *First Annual Report. 1997–1998*, p. 419.

1814 Defensoría del Pueblo, *Special Report 47. Pueblo Urarina. Conciencia de grupo y principio precautorio* (Urarina People. Group consciousness and precautionary principle), Lima, 2001.

1815 Defensoría del Pueblo, *Special Report 103. El Proyecto Camisea y sus efectos en los derechos de las personas* (The Camisea Project and its effects on people's rights), Lima, 2006.

1816 Defensoría del Pueblo, *Special Report 151. La Política Forestal y la Amazonía Peruana: Avances y obstáculos en el camino hacia la sostenibilidad* (Forest Policy and the Peruvian Amazon: Progress and obstacles on the road to sustainability), Lima 2010. The *Defensoría* has also approached the obstacles to indigenous communities fully exercising their right to political participation, such as in *Special Report 34. Situaciones de afectación a los derechos políticos de los pobladores de las comunidades nativas. Los casos de Manseriche, Yarinacocha, Tahuanía y Río Tambo* (Situations affecting the political rights of inhabitants of indigenous communities. The cases of Manseriche, Yarinacocha, Tahuanía and Río Tambo), Lima, 2000.

1817 Defensoría del Pueblo, *Special Report 152. Aportes para una política Nacional de Educación Intercultural Bilingüe a favor de los pueblos indígenas del Perú* (Contributions to a National Bilingual Intercultural Education Policy for Peru's Indigenous Peoples), Lima, 2011.

1818 Defensoría del Pueblo, *Special Report 163. Avances y desafíos en la implementación de la política de educación intercultural bilingue 2012–2013* (Progress and challenges in the implementation of bilingual intercultural education policy 2012–2013), Lima, 2013.

1819 Defensoría del Pueblo, *Special Report 174. Educación intercultural bilingüe hacia el 2021. Una política de Estado imprescindible para el desarrollo de los pueblos indígenas* (Intercultural bilingual education towards 2021. An essential state policy for the development of indigenous peoples), Lima, 2016.

1820 Defensoría del Pueblo, *Special Report 134. La salud de las Comunidades Nativas. Un reto para el Estado* (Health of native communities. A challenge for the state), Lima, 2008.

1821 Defensoría del Pueblo, *Special Report 169. La defensa del derecho de los pueblos indígenas amazónicos a una salud intercultural* (The defence of the right of amazon indigenous peoples to intercultural health), Lima, 2015.

With regard to persons with disabilities, the *Defensoría*'s prioritisation of this group was reinforced by the enactment by Congress of Law 27050, the Persons with Disabilities Act[1822], which provided for the appointment of a deputy within the institution for the advocacy of the rights of this group.[1823] As a result, in addition to complaints, petitions and consultations, the *Defensoría* has issued various reports to promote the inclusion of and equal opportunities for disabled persons. At a first stage, the *Defensoría* assumed the defence of the civil and political rights of persons with disabilities, as well as the promotion of accessibility in urban environments to enable them to fully exercise their rights. Examples of this are Special Report 37[1824] and Special Report 114.[1825] At a second stage, the *Defensoría* started to advocate for the rights of persons with disabilities from a more structural perspective, based on the implementation of public policies, particularly in the fields of education and health. This orientation is reflected in reports such as Special Report 127[1826], Special Report 140[1827], and Special Report 155.[1828]

Issues related to childhood and adolescence have also been the subject of constant interest by the *Defensoría*. Although addressed in a tangential manner within the framework of the institution's priorities, they now configure a specific line of intervention through the Deputy Ombudsman for Children and Adolescents.[1829] This is illustrated by a series of reports including the Special

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1822 Published at the official gazette *El Peruano* on 6 January, 1999.

1823 See Defensoría del Pueblo, *Second Annual Report. 1998–1999*, pp. 25–26. In this context the institution modified its structure and the title of Deputy Ombudsman for Human Rights was changed to Deputy Ombudsman for Human Rights and Persons with Disabilities.

1824 Defensoría del Pueblo, *Special Report 37. El derecho de sufragio de las personas con discapacidad* (Voting rights of persons with disabilities), Lima, 2000.

1825 Defensoría del Pueblo, *Special Report 114. Barreras físicas que afectan a todos. Supervisión de las condiciones de accesibilidad de palacios municipales* (Physical barriers affecting all. Supervision of access conditions to city halls), Lima, 2006.

1826 Defensoría del Pueblo, *Special Report 127. Educación Inclusiva: Educación para todos. Supervisión de la política educativa para niños y niñas con discapacidad en escuelas regulares* (Inclusive Education: Education for all. Oversight of educational policy for children with disabilities at regular schools), Lima, 2007.

1827 Defensoría del Pueblo, *Special Report 140. Salud mental y Derechos Humanos: Supervisión de la política, la calidad de los servicios y la atención a poblaciones vulnerables* (Mental health and human rights: Oversigth of policy, service quality and care for vulnerable populations), Lima, 2007.

1828 Defensoría del Pueblo, *Special Report 155. Los niños y niñas con discapacidad: Alcances y limitaciones en la implementación de la política de educación inclusiva en instituciones educativas del nivel primaria* (Children with disabilities: Scope and limitations in the implementation of the inclusive education policy at primary-level educational institutions), Lima, 2011.

1829 The Deputy Ombudsman for Children and Adolescents was incorporated into the organic structure of the institution in 2006. See Defensoría del Pueblo, *Annual Report 2007*, pp. 21–22.

Report 74[1830], Special Report 150[1831], Special Report 153[1832], Special Report 158[1833], and Special Report 166.[1834]

The *Defensoría* has also addressed the situation of the elderly as a vulnerable group in relation to the right to a pension, in various reports, such as Special Report 85[1835], Special Report 99[1836], and Special Report 135.[1837] Moreover, the *Defensoría* has dealt with problems facing the migrant population[1838] and domestic workers in the exercise of their rights.[1839]

1830 Defensoría del Pueblo, *Special Report 74. La afectación de los derechos a la identidad y a la igualdad de los/as hijos/as extramatrimoniales en la inscripción de nacimientos* (The infringement of the rights to identity and equality of extramarital children in birth registration), Lima, 2003.

1831 Defensoría del Pueblo, *Special Report 150. El derecho de los niños, niñas y adolescentes a vivir en una familia: la situación de los centros de atención residencial estatales desde la mirada de la Defensoría del Pueblo* (The right of children and adolescents to live in a family: the situation of public residential care centres from the perspective of the Defensoría del Pueblo), Lima, 2010.

1832 Defensoría del Pueblo, *Special Report 153. Niños, niñas y adolescentes en abandono: aportes para un nuevo modelo de atención* (Neglected children and adolescents: contributions to a new model of care), Lima, 2011.

1833 Defensoría del Pueblo, *Special Report 158. La trata de personas en agravio de niños, niñas y adolescentes* (Human trafficking in detriment of children and adolescents), Lima, 2013.

1834 Defensoría del Pueblo, *Special Report 166. El trabajo infantil y los derechos fundamentales de los niños, niñas y adolescentes en el Perú* (Child labour and the fundamental rights of children and adolescents in Peru), Lima, 2014.

1835 Defensoría del Pueblo, *Special Report 85. La situación de los sistemas públicos de pensiones de los Decretos Leyes 19990 y 20530: los derechos adquiridos, la jurisprudencia del Tribunal Constitucional y la necesidad de una reforma integral* (The situation of public pension systems in Legislative Decrees 19990 and 20530: acquired rights, Constitutional Court case law and the need for comprehensive reform), Lima, 2004. It should be noted that in this report, the *Defensoría* recommended the adoption of a law creating a new public pension system that would unify and replace the regimes of Decree Laws 19990 and 20530. Subsequently, accepting the opinion of the *Defensoría* and other sectors of society, the executive promoted a proposal for constitutional reform in reference to the state pension scheme, with the purpose of repealing the constitutional rule that enshrines the theory of rights acquired in the area of pensions. This proposal was approved by Congress through the issuance of Laws 28389 and 28449.

1836 Defensoría del Pueblo, *Special Report 99. El Futuro de los Sistemas de Pensiones. Hacia una nueva relación entre el Sistema Público y el Privado* (The future of pension systems. Towards a new relationship between the public and private systems), Lima, 2005.

1837 Defensoría del Pueblo, *Special Report 135. Por un acceso justo y oportuno a la pensión: Aportes para una mejor gestión de la ONP* (For fair and timely access to a pension: Contributions for better management of the ONP), Lima, 2008.

1838 See Defensoría del Pueblo, *Special Report 146. Migraciones y Derechos Humanos. Supervisión de las políticas de protección de los derechos de los peruanos migrantes* (Migration and Human Rights. Oversight of policies to protect the rights of Peruvian migrants), Lima, 2009.

1839 See, Deputy Ombudsman Report 007–2013-DP/ADM, *Las trabajadoras del hogar en el Perú. Supervisión a los sectores encargados de la promoción y defensa de sus derechos*, Lima, 2013; and Deputy Ombudsman Report 001–2016-DP/ADM, *Las trabajadoras del hogar en el Perú. Balance sobre el cumplimiento de las recomendaciones defensoriales*, Lima, 2016.

The *Defensoría* has been making efforts to address discrimination in an increasingly comprehensive way. In 2007, it made an initial diagnosis of discrimination in Peru as a social and cultural phenomenon, analysing it from a legal perspective in the framework of the right to equality and the mandate of non-discrimination.[1840] Since then, the institution has taken explicit action against discrimination as a line of intervention by addressing complaints and systematising cases across the many forms in which it occurs: on the basis of sex, ethnic identity, disability, HIV/AIDS[1841], origin, age, religion, sexual orientation, among other reasons.[1842]

Likewise, the *Defensoría* has sought to influence public policies against discrimination in order to contribute to the adequate response by authorities to this problem by preventing, investigating and sanctioning acts of discrimination.[1843] This stance derives from the view that "a state which regards itself as subject to the democratic rule of law cannot tolerate behaviour of this nature because it is against the fundamental rights of people".[1844]

Accordingly, the *Defensoría*'s intervention in cases of discrimination has been extended to the protection of the rights of minorities such as the LGTBQ community. On this subject, Special Report 175[1845] deals with the violation of a series of rights faced by this group of people, such as the right to life, well-being, equality, identity, access to health care, among others. The institution

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1840 See Defensoría del Pueblo, *Working Paper 2. La discriminación en el Perú. Problemática, normatividad y tareas pendientes* (Discrimination in Peru. Problems, regulation and pending tasks), Lima, 2007.

1841 On the *Defensoría's* actions in the defence and promotion of individuals with HIV/AIDS, see *Defensoría del Pueblo*, Working Paper 3. *La Epidemia del VIH/Sida: El Rol de la Defensoría del Pueblo, Lima, 2008.* The document sets forth the institutional objectives on the matter, which are oriented to assuring access by persons with HIV/AIDS to quality public services. See also *Special Report 143. Fortaleciendo la respuesta frente a la epidemia del VIH/Sida: Supervisión de los servicios de prevención, atención y tratamiento del VIH/Sida* (Strengthening the response to the HIV/AIDS epidemic: Oversight of prevention, care and treatment services), Lima, 2009.

1842 See Deputy Ombudsman Report 005–2009-DP/ADHPD, *Actuación del Estado frente a la discriminación. Casos conocidos por la Defensoría del Pueblo*, Lima, 2009; and Deputy Ombudsman Report 008–2013-DP/ADHPD, *La lucha contra la discriminación. Avances y desafíos*, Lima, 2013.

1843 See for example Deputy Ombudsman Report 003–2011-DP/ADHPD, *Los afrodescendientes en el Perú. Una aproximación a su realidad y al ejercicio de sus derechos,* Lima, 2011. The report's objective is to raise awareness on the Afro-Peruvian population, as well as the main difficulties they face in exercising their rights especially in accessing education and healthcare. Moreover, it makes recommendations aimed at tackling the exclusion and invisibility they face.

1844 Defensoría del Pueblo, *Deputy Ombudsman Report 005–2009-DP/ADHPD*, p. 33.

1845 Defensoría del Pueblo, *Special Report 175. Derechos humanos de las personas LGTBI: Necesidad de una política pública para la igualdad en el Perú* (Human rights of LGBTQ people: The need for a public policy on equality in Peru), Lima, 2016.

put forth a series of recommendations to guarantee these rights, including a recommendation that Congress enact a law on gender identity in order to guarantee the right to identity of transgender people. Likewise, the *Defensoría* has come out in favour of the passing of a law to recognise civil union between same-sex individuals.[1846]

Finally, it should be noted that the *Defensoría*'s intervention in the fight against discrimination has also included the training of public officials and campaigns to raise public awareness against discrimination.[1847]

10) Assessment of public policies and institutional reforms

In recent years, the *Defensoría* has taken an active role in assessing public policies. As Samuel Abad has pointed out, the cases of rights infringement, which are addressed in the *Defensoría*'s special reports, are not isolated facts, but rather respond to patterns of administrative behaviour with regard to which the *Defensoría* has stressed that the government must change public policy.[1848]

The *Defensoría* has framed its public policy (design and implementation) monitoring strategy under a human rights-based approach. In this sense, the institution has stressed that it has evolved beyond the direct defence of citizens' rights through investigation of complaints to adopt the monitoring of public policies as a new defence of rights strategy.[1849]

The *Defensoría* assesses the human rights-based approach of public policies with regard to certain matters, and thus verifies the government's compliance with its obligations regarding the realisation of human rights. Hence, the work of the *Defensoría* is not limited to handling individual complaints; it also plays an essential role in assessing public policies in order to contribute to the proper functioning of the administration, in terms of its obligations to respect the rights of individuals.[1850]

1846 See the *Deputy Ombudsman Report* 003–2014-DP/ADHPD, by which the institution expresses an opinion on Draft Law 2647/2013-CR, which provides for non-matrimonial civil union for same-sex persons. See also Defensoría del Pueblo, *Special Report 175*, p. 201. It is worth mentioning that laws to guarantee the right to identity of transgender people or to recognise civil union between people of the same sex have yet to be approved in Peru.

1847 In November 2012 the *Defensoría* launched the National Campaign Against Discrimination and Racism, with the aim of raising public awareness on the importance of eradicating all forms of discriminatory behaviour. As part of this campaign, the *Defensoría* prepared three spots and organised a marathon. On that regard see Defensoría del Pueblo, *Annual Report 2012*, pp. 52–53.

1848 Samuel Abad Yupanqui, "La Defensoría del Pueblo. La experiencia peruana", pp. 503–504.

1849 Defensoría del Pueblo, *Tenth Annual Report. January – December 2006*, Lima, 2007 (Annual Report 2006), p. 503.

1850 Samuel Abad Yupanqui, "La Defensoría del Pueblo. La experiencia peruana", pp. 503–504.

It should be noted that the *Defensoría*'s emphasis on public policy oversight has (to a certain extent) involved a change in its line of intervention as compared to that followed during its early years; thus, it has shifted focus from the protection of civil and political rights, as explained above, to incorporate the defence of economic, social rights and cultural rights (ESCR) into its work. This has brought the institution closer to the implementation of public policies. It can be argued that the institution came close for the first time to the sphere of public policy (albeit implicitly) when it dealt with oversight of the ESCR, as is observed in Special Report 87 regarding the right to health and to social security.[1851] From 2005 onwards, a clear change in focus can be discerned, with more attention paid to problems regarding the design and implementation of public policies, always based on a human rights-approach, which the *Defensoría* has sought to influence. The first major expressions of this new approach might be found in certain reports, such as the aforementioned Special Report 94 regarding the public utility of water and Special Report 102 on mental health.[1852]

This change in orientation was reinforced with the adoption of the 2007–2011 Strategic Institutional Plan, which established the oversight of public policies as one of the axes of the *Defensoría*'s work. According to the *Defensoría*, it is on the basis of its constitutional mandate that the it contributes to the formulation of public policies across different spheres, while also overseeing their implementation and their effectiveness in remedying the problems affecting citizens at the national level. In this way, the *Defensoría* makes an impact during the different stages of the policy cycle.[1853] This orientation was consolidated by the subsequent institutional strategic plans.[1854] However, and as noted, the recently approved Institutional Strategic Plan 2018–2020 sets forth new institutional policy guidelines and leaves aside the oversight of public policies as one of the explicit axes of the *Defensoría*'s work, even if this role remains central in practice.[1855]

In any case, since 2005, the *Defensoría* has assessed the implementation of public policies in more than 20 special reports. These reports have covered areas such as

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1851 Defensoría del Pueblo, *Special Report 87. El derecho a la salud y a la seguridad social: Supervisando establecimientos de salud* (The Right to health and social security: supervising health facilities), Lima, 2004.

1852 Defensoría del Pueblo, *Special Report 102. Salud mental y derechos humanos. La situación de los derechos de las personas internadas en establecimientos de salud mental* (Mental health and human rights. The situation of the rights of persons confined to mental health facilities), Lima, 2005.

1853 Defensoría del Pueblo, *Twelfth Annual Report. January - December 2008,* p. 483.

1854 See the Institutional Strategic Plan 2011–2015 (approved by Decision 0029–2010/DP), Institutional Strategic Plan 2011–2015, amended and broadened (*ampliado*) to 2016 (approved by Decision 045–2015/DP), and the Strategic Plan 2011–2017, amended (approved by Decision 002–2017/DP).

1855 See Section 10.3.2.

health, education, justice system reform, citizen security, social security, among others. Of special relevance is the evaluation of public policies on health and education. In relation to healthcare, the *Defensoría* has published six reports, most notably the following: Special Report 105[1856], Special Report 120[1857], and Special Report 161.[1858] In relation to access to education policies, it is worth noting Special Report 127[1859], and Special Report 148.[1860]

In addition to health and education, the *Defensoría* has paid particular attention to public policies related to the reform of the justice system and problems associated with citizen security. In relation to the former, it is worth recalling the aforementioned Special Report 109. On citizen security, of note are Special Report 132[1861], Special Report 142[1862], and Special Report 154.[1863]

Through these reports and other interventions, the *Defensoría* has sought to influence the implementation of public policies, insofar as the rights' infringements that motivate citizen complaints are frequently associated with structural problems regarding the functioning of the State, which inhibits the realisation of rights. Moreover, it can be argued that emphasis on the oversight of public policies has permeated most of the *Defensoría*'s special reports, which have made recommendations to the government to reform or implement various policies affecting the scope of fundamental rights.

Finally, it should be noted that the assessment of public policies as the *Defensoría*'s line of intervention would reflect a hybridisation between human rights and good governance-based standards.

1856 Defensoría del Pueblo, *Special Report 105. El Derecho a la Salud y a la Seguridad Social: Segunda Supervisión Nacional* (The Right to Health and Social Security: Second National Supervision), Lima, 2006.

1857 Defensoría del Pueblo, *Special Report 120. Atención de Salud para los más pobres: El Seguro Integral de Salud* (Healthcare for the poorest: Comprehensive Health Insurance), Lima, 2007.

1858 Defensoría del Pueblo, *Special Report 161. Camino al Aseguramiento Universal en Salud: Resultados de la supervisión nacional a hospitales* (The path to universal health insurance: Results of the national supervision of hospitals), Lima, 2013.

1859 Defensoría del Pueblo, *Special Report 127. Gratuidad en las Escuelas Públicas: Un compromiso pendiente* (Free access to public schools: An outstanding commitment), Lima, 2007.

1860 Defensoría del Pueblo, *Special Report 148*. Primera supervisión del Plan de Municipalización de la Gestión Educativa: aportes para su implementación (First oversigth of the Plan for Municipalisation of Educational Management: contributions for Implementation), Lima, 2010.

1861 Defensoría del Pueblo, *Special Report 132. ¿Ciudadanos desprotegidos? Estrategias para fortalecer el Sistema Nacional de Seguridad Ciudadana* (Unprotected Citizens? Strategies to strengthen the National Citizen Security System), Lima, 2008.

1862 Defensoría del Pueblo, *Special Report 142. Fortalecimiento de la Policia Nacional del Perú: Cinco áreas de atención urgente* (Strengthening the Police Force: Five urgent areas), Lima, 2009.

1863 See *supra* note 1718.

11) Fight against corruption

As mentioned, although the *Defensoría* has not explicitly been conferred with anticorruption powers, it operates on the assumption that corruption and its effects on citizens' rights and the proper functioning of public administration are not indifferent to its legal mandate.[1864] Corruption negatively impacts not only human rights, but also good governance.[1865] In this regard, the *Defensoría* has expressly stated that acts of corruption imply misuse of public power; that is to say, the breach of the principles of good governance.[1866] Therefore, the observance of the principles of good governance generates the institutional environment that is most conducive for upholding the rights of citizens.[1867]

It is in this sense that – by virtue of its constitutional mandate – the *Defensoría* has regarded the fight against corruption as a key area of intervention, insofar as it contributes to upholding human rights. Moreover, the *Defensoría* justifies its intervention in this area by the fact that corruption often hinders the adequate provision of public services – and therefore, the effective realisation of economic, social and cultural rights.[1868]

The *Defensoría* began working on the fight against corruption as a specific area of intervention in 2008, with the establishment of its Transparency, Public Ethics and Corruption Prevention Team.[1869] From then on, the *Defensoría* has developed a strategy of intervention that has included both the handling of citizens' complaints and generating information regarding corruption cases and the impact of anticorruption policies. In addition, the institution implemented a Pilot Project for the Prevention of Corruption in five of the country's regions.[1870]

The *Defensoría del Pueblo* has developed a preventive approach with regard to the fight against corruption in order to contribute to the strengthening of the state's actions in this area, as well as to promote respect for human rights and formulate recommendations on anti-corruption policies. As part of its work in

1864 See Section 10.2.1.

1865 Eduardo Luna Cervantes, loc.cit., p. 200.

1866 Defensoría del Pueblo, *Working Paper 12. Defensoría del Pueblo, Ética Púbica y Prevención de la Corrupción* (Defensoría del Pueblo, public ethics and prevention of corruption), Lima, 2010, p. 6.

1867 Ibid., p. 9.

1868 Ibid., p. 7.

1869 In 2009, this team became the Public Ethics and Prevention of Corruption Programme, under the Deputy Ombudsman for Social Conflict Resolution and Governability. On the structure of the *Defensoría* see Section 10.1.3.

1870 Defensoría del Pueblo, *Twelfth Annual Report. January-December 2008*, pp. 271–284.

this area, the *Defensoría* has issued several reports such as Special Report 147[1871] and Special Report 176.[1872] In addition, the subject of corruption has been addressed in a cross-cutting manner in the aforementioned Special Report 142 on the police force[1873], and Special Report 154 on the prison system and criminal policy.[1874] The matter has also been addressed specifically in working papers[1875] and deputy ombudsman reports.[1876]

An example of the work of the *Defensoría del Pueblo* on anticorruption matters has been its investigation on the risks of corruption in state social welfare programs, particularly the JUNTOS Programme (National Program of Direct Aid for the Poorest).[1877] The investigation was initiated following 432 complaints filed by citizens between January 2009 and December 2010 concerning alleged irregularities in the state's social programs, such as requirements to pay illegal fees or to comply with arbitrary conditions in order for persons to access or remain on the registry of welfare beneficiaries, as well as unlawful appropriation of funds by state officials.[1878] For this reason, the *Defensoría* focused on assessing the vulnerabilities and risks in relation to acts of corruption at different stages regarded as essential to the JUNTOS Programme, such as the registration process and the transfer of cash incentives (financial aid), among others.[1879] As a result of its investigation, the *Defensoría* made a series of recommendations aimed at improving the implementation and management of

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1871 Defensoría del Pueblo, *Special Report 147. Aportes de la Defensoría del Pueblo para una Educación sin Corrupción* (Contributions of the Defensoría del Pueblo for an education free from corruption), see *supra* note 610.

1872 Defensoría del Pueblo, *Special Report 176. Planes sectoriales anticorrupción: Recomendaciones para mejorar su formulación* (Anti-Corruption sector plans: Recommendations to improve their formulation), Lima, 2017.

1873 See *supra* note 1862.

1874 See *supra* note 1718.

1875 See for example, Defensoría del Pueblo, *Working Paper* 12 regarding the role of the Defensoría in preventing corruption, *supra* note 1866.

1876 See for example, Defensoría del Pueblo, *Deputy Ombudsman Report 001–2011-DP/APCSG-PEPPCPP. Aportes de la Defensoría del Pueblo a la promoción de la ética pública en los programas sociales del Estado* (Contributions of the Defensoría del Pueblo to promoting ethics in social programs), Lima, 2011.

1877 The results of this investigation were published in *Deputy Ombudsman Report 001–2011-DP/APCSG-PEPPCPP. Aportes de la Defensoría del Pueblo a la promoción de la ética pública en los programas sociales del Estado* (Contributions by the Defensoría del Pueblo to the promotion of public ethics in State social programs), Lima, 2011.

1878 Eduardo Luna Cervantes, loc.cit., pp. 204–208.

1879 Risky circumstances are defined as factual assumptions whereby acts of corruption may be verified in the context of conditions of vulnerability. It should be noted that JUNTOS is a conditional cash transfer programme for families in extreme poverty, in exchange for compliance with health, educational and nutritional obligations for the benefit of participants and their children.

the abovementioned social program, in order to reduce the risks of corruption, most of which were adopted.[1880]

As Eduardo Luna points out, the increasingly clear link between good governance and human rights in the work of the *Defensoría del Pueblo* has given it an important position in the fight against corruption.[1881] Therefore, for this study, addressing the fight against corruption as a key area of intervention has implied not only a change in the focus of *Defensoría's* work, but also the adoption of a different approach to the principles of good governance and the legal obligations that arise from them.

12) Prevention of social conflicts

Although the *Defensoría´*s Organic Act does not specifically grant the institution with powers related to social conflict prevention or mediation, the *Defensoría* has intervened through follow-up and mediation actions in situations of social conflict almost since the time of its establishment. As such, the *Defensoría* has understood that its constitutional mandate requires it to intervene in conflict situations with the aim of upholding people's rights.[1882]

For the *Defensoría,* the violence brought about by social conflicts evidences the insufficient responsiveness of the political system. Thus, the institution seeks to contribute to putting a halt to violence, to the protection of violated rights and to the creation of spaces of constructive dialogue. From this perspective, the conflict is perceived as an opportunity to understand social problems and poor practices of public administration. Through its intervention, the *Defensoría* seeks to legitimise democratic procedures, respecting the principle of legality and establishing mechanisms of dialogue aimed at supplementing and facilitating (albeit not replacing) the work of the competent state authorities. As a result of its intervention, the *Defensoría* can issue recommendations aimed at remedying irregular, arbitrary or negligent practices of the public administration.[1883]

The *Defensoría* has witnessed an increase in its actions related to social conflicts, as a result of the increasing complexity of this phenomenon in the country over the last 15 years.[1884] Its causes are linked with problems related to poverty,

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1880 The executive board of the JUNTOS Programme gave an account on the implementation of the recommendations made by the *Defensoría* through Official Letter 872–2012-MIDIS-PNADP-DE, dated on November 29, 2012.

1881 Eduardo Luna Cervantes, loc.cit., p. 199.

1882 Defensoría del Pueblo, *Ante todo, el diálogo*, pp. 9–10.

1883 Ibid, pp. 10–11.

1884 This has been reflected in its organic structure. Thus, on 1 June 2005, through Decision 030–2005/DP, the Social Conflicts Follow-Up´ and Intervention Committee was formalised. Subsequently, the Social Conflict Unit was created. On 31 April 2009, it became the Deputy

exclusion, discrimination and insufficiently democratic institutions as a factor that limits timely and effective response by the state to social demands.[1885] This is evidenced in the emergence of conflicts of different kinds between sectors of civil society, the state and businesses, in a context of economic growth.[1886] Thus, the *Defensoría* contributes to analysing the underlying causes of the problems that lead to conflicts, focusing on these problems and monitoring their development at a national level.[1887] An example of this area of intervention is Special Report 156 on social conflicts violence.[1888]

It should be noted that in order to facilitate the monitoring of social conflicts, the *Defensoría* has formulated a system for classifying them according to their stage of development. On this basis, it is possible to discern the following types of conflicts: active, latent and solved. In addition, the *Defensoría* has developed a typology of conflicts based on the matter to which the underlying problem relates, and the responsibilities and legal powers of the state authorities in charge of dealing with them.[1889]

The *Defensoría* has developed several forms of intervention in situations of conflict, among which the *Reportes de Conflicts Sociales* (Social Conflict Reports) feature prominently.[1890]Through these reports, the *Defensoría* periodically informs the public about ongoing conflicts in the country. Likewise, the reports contribute to decision-making by authorities and state officials.[1891] This document is issued on a monthly basis and involves constant activity at the national level on the part of the institution as a whole.[1892]

Ombudsman for Social Conflict Resolution and Governability. On the structure of the *Defensoría,* see Section 10.1.3.

1885 Defensoría del Pueblo, Thirteenth Annual Report. January – December 2009, Lima, 2010, p. 241.

1886 Defensoría del Pueblo, *Special Report 156. Violencia en Conflictos Sociales* (Violence in social conflicts) Lima, 2012, p. 13. It should be noted that several conflicts have been related to the development of extractive industries and the exploitation of natural resources. See also Defensoría del Pueblo, *Deputy Ombudsman Report 001–2015-DP/APCSG. Conflictos Sociales y Recursos Hídricos* (Social conflicts and water resources).

1887 Samuel Abad Yupanqui, "La Defensoría del Pueblo. La experiencia peruana", p. 505.

1888 See *supra* note 1886.

1889 Defensoría del Pueblo, *Special Report* 156, pp. 32–34.

1890 As well as the preparation of reports on social conflicts, other ways in which the *Defensoría* intervenes in cases of conflict include: mediation (*intermediación*), preventive monitoring (*supervisión preventiva*), and formulation of proposals (*formulación de propuestas*). See, Defensoría del Pueblo, *Ante todo, el diálogo*, pp. 23–27.

1891 This task began in May 2004, when the *Defensoría* reported to Congress on the institutional participation in the conflict in Ilave province, and drew attention to 30 similar cases in various parts of the country. Since then, the institution has periodically produced reports on social conflicts.

1892 Defensoría del Pueblo, *Ante todo, el diálogo*, pp. 27–31.

The Social Conflict Reports of the *Defensoría del Pueblo* are the result of the permanent monitoring it conducts through the Conflict Monitoring System (SiMcO) computer platform. The aim of this oversight is to "assess the situation and the evolution of social conflicts in the country, and to warn – in a timely manner – of the possible outcomes of ongoing events".[1893] Thus, the Social Conflicts Report has consolidated itself as "a basic reference document in relation to social conflicts in the country".[1894] This work is reinforced via the dissemination of specialised information through the *Conflictos al día* (Daily update on conflicts) bulletin and the *Cronología semanal de conflictos sociales* (Weekly account of social conflicts).

An emblematic case of the *Defensoría del Pueblo*'s intervention in social conflicts was the "*Bagua* Case". In early April 2009, as part of a series of protests aimed at repealing a set of recently enacted laws, prominent among them legislative decrees 1064 and 1090, indigenous persons from various native communities in the Amazonas region blockaded several kilometres of the "Fernando Belaunde Terry" Highway.[1895] On 5 June 2009, the conflict escalated into a confrontation between indigenous people and members of the police force in Imasa, Amazonas, leading to the killing of police officers (whom had been taken as hostages by a group of indigenous persons) and indigenous persons. The outcome of the conflict was 33 deaths (10 civilians and 23 police officers), one missing police officer and 200 injuries (167 civilians and 33 police officers).[1896]

The *Defensoría* carried out several actions within the context of the *Bagua* Case, such as humanitarian work[1897], filing a writ of unconstitutionality against the

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1893 Defensoría del Pueblo, *Thirteenth Annual Report (2009)*, p. 244.

1894 Ibid.

1895 These regulations were part of a legislative decree package issued by the government of President Alan García, within the framework of the powers delegated by Congress to implement the Free Trade Agreement (FTA) with the United States, ratified in 2007. Legislative Decree 1064, which amended Law 26505, Act on the Promotion of Private Investment in Agriculture; reduced from two-thirds to half the majority required for (Andean) farmer assemblies and (Amazonian) native communities to dispose of their land. In turn, Legislative Decree 1090, Forest and Wildlife Act, allowed the executive to grant concessions for logging and crops in the Amazon. Both legislative decrees were published in the official gazette *El Peruano* on 28 June 2008.

1896 On the *Bagua* Case, see the Deputy Ombudsman Report 006–2009–DP/ADHPD on the humanitarian actions taken by the *Defensoría* in relation to the events of 5 June 2009 in the provinces of Uctubamba and Bagua, Amazonas region in the context of regional protests. See also Defensoría del Pueblo, *Working Paper 10. Actuaciones defensoriales en el marco del conflicto de Bagua* (Defensoría del Pueblo´s interventions in the context of the conflict of Bagua), Lima, 2010.

1897 The humanitarian work carried out by the *Defensoría* was aimed at protecting fundamental rights such as life, personal well-being and health, as well as restoring public peacefulness. Coordinations were made for the adequate medical care of the injured, as well as to verify the situation of the persons to assure them of legal defence. Information was also collected on the

contested laws[1898], and proposing dialogue and consultation mechanisms to contribute to the conflict's resolution. Likewise, it should be noted that (making use of its legislative initiative faculty) the *Defensoría* introduced to Congress a draft law on the right to prior consultation of indigenous peoples.[1899] For the *Defensoría*, the *Bagua* events were a turning point regarding the relationship between indigenous peoples and the state.[1900]

In sum, as the *Defensoría* itself has pointed out, social conflict is a matter of concern for the institution "insofar as there are fundamental rights at play a possible occurrence of violent actions, impacts on democratic institutions and a need to develop culture of dialogue, respect for the law, and orientation towards peace."[1901]

11.2. THE *DEFENSORÍA DEL PUEBLO* AS A DEVELOPER OF GOOD GOVERNANCE NORMS

11.2.1. FROM HUMAN RIGHTS TO GOOD GOVERNANCE

As pointed out, in accordance with its constitutional mandate, the *Defensoría* evaluates the performance of the public administration from a human rights perspective in close connection with protection of the rule of law. Therefore, the institution mainly carries out hard-law review based on the application of constitutional parameters and other legal norms, which are applied from a broad

identity of the persons affected, in order to prepare public lists to keep both their relatives and the general public informed. See Deputy Ombudsman Report 006–2009–DP/ADHPD.

1898 On 16 June 2009, the *Defensoría* presented a proposal to the Executive Branch for a dialogue and consultation mechanism aimed at channelling the conflict and recovering trust between the state and indigenous peoples. In this context, minimum conditions and a phased dialogue process were proposed. On 17 June 2009, the executive presented a bill to Congress for the repeal of legislative decrees 1064 and 1090, later repealed by Law 29382. On this, see Defensoría del Pueblo, *Working Paper 10, supra* note 1896.

1899 On 6 July 2009, the *Defensoría*, using its legislative initiative power, introduced Draft Law 3370/2008-DP, Framework Law on the Right to Consultation, to Congress. On 31 August 2011, following a lengthy legislative process in which various proposals (including the observations submitted by the executive on the first version of the law approved by Congress) were considered, Law 29785, the Right to Prior Consultation of Indigenous Peoples Act, was passed and published in the official gazette *El Peruano* on 7 September 2011. See Defensoría del Pueblo, *Fifteenth Annual Report. January-December 2011*, Lima, 2012, pp. 66–68. Following the passing of Law 29785, the *Defensoría* has been overseeing the implementation of the right to prior consultation of indigenous peoples. See, for example, Defensoría del Pueblo, *Deputy Ombudsman Report 003–2015/DP-AMASPPI-PPI. La implementación del derecho a la consulta previa a los pueblos indígenas, a partir de la aplicación de la Ley 29785* (The implementation of the right to prior consultation of indigenous peoples, based on the application of Law 29785), Lima, 2015.

1900 Defensoría del Pueblo, *Thirteenth Annual Report. January-December 2009,* p. 475.

1901 Defensoría del Pueblo, *Ante todo, el diálogo*, p. 11.

conception of the rule of law and the principle of legality.[1902] Thus, the normative function developed by the *Defensoría* is characterised as being derived from "substantive review"[1903] in relation to the actions of public authorities primarily based on legally binding norms, in the terms described above.

However, this normative function is not inimical to the application and development of non-legally binding norms as assessment standards through the performance of soft-law review. Many of these could be regarded as good governance-based standards, to the extent that their focus is on the functioning of the state apparatus regardless of the immediate protection of a right. The *Defensoría* applies human rights and good governance-based standards. Both are composed of legally binding norms and non-legally binding rules of good administrative conduct. Thus, for this study, human rights as *Defensoría*'s standard of control are conceptualised from a broad perspective.[1904]

One aspect that requires particular attention is the rules of good administrative conduct that go beyond human rights-based standards, and can be drawn from patterns of functional misconduct or malpractices identified by the institution and set forth in the special reports and in ombudsprudence. The *Defensoría* has produced a wealth of non-legally-binding standards that serve as criteria for evaluating the performance of government functions, and on the basis of which it makes its recommendations. Some authors have referred to this process as the creative development of social accountability mechanisms.[1905]

As the *Defensoría* itself points out, the institution aims to contribute to the protection of dignity and the construction of a state at the service of citizens. In order to achieve this objective, the *Defensoría* has incorporated, as lines of intervention, assessment of public policies, influence over the improvement of government legal quality, and prevention of corruption, among others.[1906] For this study, this state of affairs gives an account of the institution's ongoing process of hybridisation as regards its functions, assessment orientation and standard of control. Thus, as explained earlier, it is more accurate to consider the *Defensoría* not as a human rights ombudsman but rather as adhering to a mixed or dual ombudsman model.

The hybridisation process is reflected in the definition of lines of intervention, the handling of complaints and the special reports in which different dimensions

1902 See Section 10.2.2.
1903 See Section 3.6.
1904 See Section 10.3.2.
1905 For example, Thomas Pegram, "Weak institutions, rights claims and pathways to compliance: The transformative role of the Peruvian human rights ombudsman", p. 230.
1906 Defensoría del Pueblo, *Eleventh Annual Report. January-December 2007*, pp. 12–13.

of principles of good governance can be found. As former *Defensora* Beatriz Merino has pointed out, the evolution of the *Defensoría* is driven by the development of good governance-based norms, the ombudsdoctrine and the reality principle as standards of assessment".[1907]

In order to demonstrate the hybridisation between a human rights- and a good governance-based standard, and from a qualitative analysis of the *Defensoría*'s reports and the ombudsprudence, some standards have been extracted. They also illustrate that the *Defensoría* is applying similar standards and protecting the same values as its Dutch, British and Spanish counterparts as well as similar reasoning underlining its decisions.

With this purpose, this section first examines some of the *Defensoría*'s special reports to extract good governance-based standards. As an example of this analysis, Special Report 142 on the functioning of the National Police Force will be presented.[1908] Secondly, a set of cases from ombudsprudence is analysed, which can be framed as belonging to a "classic" human rights perspective. They will bring insights about the relationship between human rights- and good governance-based standards and their ongoing process of hybridisation, as has been argued through this study.

From human rights to good governance in the Defensoría's reports

In Special Report 142, the *Defensoría* aims to verify the National Police Force's compliance with the rules governing its operation. The report's main objective is to assess the functioning of the Peruvian National Police Force with the aim of facilitating its strengthening, efficiency and its status as a citizen-oriented service.

The *Defensoría* prepared this report from a human rights perspective. Thus, it is premised on the need to respect the rights of police officers as a way of promoting the efficiency of the institution. In these terms, the rights of police officers have been assessed in terms of the right to adequate working conditions (provision of weapons, clothing and equipment), the right to equitable remuneration, among others. This means that the *Defensoría* has mainly monitored the fulfilment of legal obligations laid down in written legislation. Thus, it has applied legally binding norms as standards for the evaluation of the police force's administrative conduct.

Among other things, the *Defensoría* has monitored the quality and performance of goods and services assigned to police stations. As a result, it has drawn

1907 Beatriz Merino Lucero, loc.cit., p. 68.
1908 See *supra* note 1862.

attention to the lack of office supplies, interconnected information technology (IT) systems and computers at police stations.[1909]Thus, the *Defensoría* has recommended that the Ministry of the Interior "urgently address the demands for computer equipment and provide more computers to all police stations, which must be accompanied by adequate training for police officers".[1910] From this statement it is possible to discern the principle of "adequate office equipment" and "adequate IT and interconnection systems" as elements of "effective organisation" as a broader principle.

The *Defensoría* has also monitored infrastructure conditions at police stations and linked these to the issue of the right to safe and healthy working conditions.[1911] On this point, it evaluated the condition of bathrooms and mattresses in the rooms of police officers.[1912] With regard to this, the *Defensoría* stated that "police officers, like all workers, have the right to safety and hygiene at work, which is recognised in the International Covenant on Economic, Social and Cultural Rights, as well as in the Protocol of San Salvador. However, in the investigation carried out by the *Defensoría del Pueblo* we have found some situations that go against the respect of this right".[1913] From this statement, it is also possible to discern the principle or standard of "adequate infrastructure".

In addition, the *Defensoría* has evaluated the quality of service and care that the police force provides to citizens, from the perspective of the right to dignified and respectful treatment. Specifically the *Defensoría* has monitored the existence of customer service protocols or standards, availability of public information on procedures at police stations, information on complaints related to misconduct by public officers, and information on the rights of the citizens. On this point, the *Defensoría* has said that "as a matter of priority, police stations should have minimum parameters for the service of citizens. Although the Police Force has issued a directive on public service, most of the police stations inspected were unaware of it".[1914] From here is possible to extract the principles of "active provision of information" and "service minded towards the citizens".

On the other hand, the *Defensoría* has raised concerns about the existing fragmented legislation regarding the regulation of incentives for police officers and its lack of publicity, which also affects transparency. In that regard, the *Defensoría* has stated that "the norms that regulate the incentives policy must be very clear in regulating factual situations. Thus, it is necessary to ensure its

1909 Defensoría del Pueblo, *Special Report 142*, pp. 168 – 171.
1910 Ibid., p. 170.
1911 Ibid., p. 172.
1912 Ibid., pp. 176–180.
1913 Ibid., p. 171.
1914 Ibid., p. 184.

articulation and systematization, in addition to publicizing it."[1915] According to the institution, the lack of publication of regulations regarding incentives is not only a violation of the constitutional principle of publication of legal norms but is also an infringement of the principle of transparency.[1916] On this, the *Defensoría* points out "in addition to the breach of the principle of publicity, the lack of publication of the rules that regulate the incentives policy gives rise to a lack of transparency in the granting thereof and with it the perception among police officers that said concessions are arbitrary and even violate of the right to equality since they are discriminatory."[1917] As such, here it is possible to detect the principles of "adequate regulation", "publicity of norms" and "transparency".

The *Defensoría* also drew attention to the discretion in the police force to determine changes in staffing. In this regard, it has referred to the lack of an explicit requirement to give reasons for these changes, stating that "the norms that regulate changes in police staffing do not clearly establish the need for objective and reasonable grounds for changing the employment provisions of a member of the National Police Force."[1918] Likewise, for the *Defensoría*, the police force must keep in mind that it must consider the career expectations of police officers alongside its own institutional needs, and so must act with due grounds, respecting the principles of reasonableness and objectivity, as well as the rights of police officers.[1919] Here the *Defensoría* is applying the principles of "obligation to give reasons or grounds for decisions", "reasonableness" and "objectivity".

From human rights to good governance in ombudsprudence

Case 1

During a supervisory visit to the *Docente de Trujillo* Regional Hospital (in the La Libertad region), officials from the *Defensoría* observed that posters had been displayed in the emergency area and in outpatient office stating that all patients had to pay for hospital care, including beneficiaries of the "Comprehensive Health Insurance Programme" (*Seguro Integral de Salud* – SIS)[1920], despite such beneficiaries being entitled to free care. On 8 April 2006, the *Defensoría* recommended that the hospital's director desist from charging, and warned him that *if the hospital continued to violate the right to health or the right to good administration* (emphasis added), it would inform the prosecutor general.

1915 Ibid., p. 240.
1916 Ibid., p. 246.
1917 Ibid.
1918 Ibid., p. 256.
1919 Ibid., p. 258.
1920 SIS is a free medical insurance provided by the state and designed to guarantee access to essential medical services to people lacking financial means to join public and private health insurance plans.

Likewise, *Defensoría* officials personally advised the hospital's legal counsel to comply immediately with the recommendation made by the institution. On 27 April 2006, the hospital's director informed the *Defensoría* that he had ordered for all SIS patients to be exempted from medical charges. The *Defensoría* carried out a subsequent visit and did not find any evidence of continued restriction of access to SIS patients.[1921] The case shows how undue charges constitute an arbitrary act that affects the right to health and the right to good administration.

Case 2

Mr C.G.F had twice been denied his social security claim, despite having accredited his right thereto, related to his suffering from chronic kidney failure, a life-threatening health condition requiring haemodialysis treatment. When he visited the *Defensoría*, the National Social Security Office (*Oficina de Normalización Previsional* – ONP) had not yet dealt with his appeal, even though the legal deadline had already passed. In view of his serious health condition, the *Defensoría's* office in Lima recommended that the ONP urgently look into the claim made by this citizen and by others in similar situations. As an immediate result, the ONP sent Mr C.G.F an order to undergo a medical reassessment of disability at the Guillermo Almenara Hospital in Lima, in order to continue with the procedure related to his claim. Once this hospital issued the new medical certification of disability required by the ONP, the right to social security was finally recognised for Mr C.G.F.[1922] This case shows how undue delays can affect fundamental rights such as the right to health, the right to life and the right to social security. In addition, the *Defensoría* establishes the criteria that the administration must take into account the specific circumstances of each individual citizen in order to prevent rights infringement.

Case 3

On 14 May 2009, a woman filed a complaint with the *Defensoría*, pointing out that her daughter, a student in fifth grade of high school in Jaén de Bracamoros (Cajamarca region), had been discriminated against by her class teacher and the school's head teacher in their attempts to expel her or transfer her to the night shift due to her being pregnant. *Defensoría* officials interviewed the school's principal, the assistant principal and the (female) teacher concerned. The teacher justified the student's removal on the grounds that the school would not be a suitable place to care for her should there be any contingencies related to her pregnancy. In the same vein, the head teacher admitted that he had set a deadline

1921 Defensoría del Pueblo, *Tenth Annual Report. January – December 2006*, Case 329–06/DP-LLIB, p. 180.

1922 Defensoría del Pueblo, *Fifteenth Annual Report*. January – December 2011, Case 10847–2011-LIMA, pp. 130–131.

of 14 May for the student to stop attending the educational institution, arguing that he did so in order to anticipate any situation that might affect her physical and psychological well-being. The *Defensoría* recommended that the school authorities guarantee the right to educational continuity for adolescents, and take appropriate measures to avoid any situation in their fundamental rights was restricted. As a consequence of the *Defensoría*'s intervention, the student was allowed to continue her studies at the school in the regular daytime schedule.[1923] The case shows the relationship between the right to education and the principle of equality and non-discrimination. Likewise, it shows that positive actions aimed at preventing discriminating acts may contribute to the enjoyment of rights.

Case 4

On June 1, 2007, Mrs Vilma Tumasio Wampashi, member of the native Amazonian community of Kaupan, district of Santa Maria de Cahuapanas, province of Datem del Marañón, Loreto region, informed the *Defensoría* that she had not been allowed to register her new-born son. On being interviewed by *Defensoría* officials, the civil registrar of the Santa María de Cahuapanas District Municipality stated that he had no birth registration books, despite having requested some on 7 December 2006. He reported on a second occasion that the office had run out of books, and on 29 May 2007, on his visit to the National Identification and Civil Registry Office (Registro Nacional de Identificación y Estado Civil – RENIEC) agency in Yurimaguas (provincial capital), he learned that his request had not been processed. On 3 July 2007, RENIEC officials from Tarapoto reported that the books requested by the Santa María de Cahuapanas District Municipality had by then been sent to the RENIEC office in Yurimaguas. Subsequently, on 10 July 2007, the RENIEC Coordination Office manager responsible for the District Municipality of Cahuapanas, based in Yurimaguas, reported that on 6 July 2007, the books had been sent to the said district. Following receipt of the books, the registrar proceeded to register all children born since the end of 2006, including the one that prompted the *Defensoría's* intervention.[1924] This case shows how adequate records are needed to help ensure fundamental rights, such as the right to identity.

Case 5

Mr José Gonzales requested the intervention of the *Defensoría* due to long delays in labour-related judicial proceedings in which he was involved. The delays were due to the execution of administrative resolution by the Superior Court of Lima,

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1923 Defensoría del Pueblo, *Thirteenth Annual Report. January – December 2009*, Case 404–2009/DP-JAEN, pp. 69–70.

1924 Defensoría del Pueblo, *Eleventh Annual Report. January – December 2007*, Case 697–2007/DP-TAR, pp. 202–203.

which ordered the reorganisation of labour courts to implement the new Labour Procedural Law and the redistribution of labour files. *Defensoría* officials held an interview with the manager of the General Distribution Centre (CDG) of the Appeals Court of Lima, who verified that as of 11 January 2013, 8,000 files had been received, of which only 2,956 had been redistributed (that is, 37% of the files), and that only two persons had been assigned to carry out the task, resulting in a delay of more than one month in the redistribution of files. On 14 January 2013, the *Defensoría* recommended that the president of the Appeals Court of Lima adopt measures to allow the files to be distributed to the corresponding courts as soon as possible. On 30 January 2013, the *Defensoría* was informed that the period for the redistribution of labour related files had been extended. In addition, 15 to 20 judicial servants had been assigned, and would be exclusively engaged in the redistribution of files. The *Defensoría* also committed to the ongoing monitoring of this process. As of 19 February 2013, 9,436 files had been redistributed (98%). The file redistribution was completed on 21 March 2013. Through this intervention, the distribution procedure was expedited in order to prevent undue delays in judicial proceedings in labour-related matters.[1925] This case shows the possibilities of intervention by the *Defensoría* in promoting an effective organisation/management as an underlined value, and thus avoiding instances of maladministration.

Case 6

On 19 March 2007, Mr Cirilo Cuba Jiménez filed a complaint against the Provincial Municipality of Huamanga (Ayacucho Region) about the fact that the Municipality had demanded payment of property tax for 2004, 2005, 2006 and 2007, even though he was exempted due to his status as a pensioner in the education sector. On 4 April 2007, *Defensoría* officials met with Municipality of Huamanga personnel in order to request that the payments sought from the appellant be voided. Likewise, on 14 April 2007, the *Defensoría* recommended that the director of the tax office of the Provincial Municipality of Huamanga waive the tax, pointing out that pursuant to Municipal Resolution 363–89- AJ-CPH dated 11 December 1989, the appellant was exempt from the payment of property tax because of his status as a pensioner, and that this exemption had no time limit. In addition, the *Defensoría* recommended that the same official remove the requirement to renew exemption from taxable income for pensioners from the Municipality's Single Text of Administrative Procedures (TUPA). In compliance with the recommendations of the *Defensoría*, the Provincial Municipality of Huamanga waived the charge for property tax for Mr Cuba Jiménez, and removed from the TUPA the procedure for renewal of the benefit applicable to

[1925] Defensoría del Pueblo, *Seventeenth Annual Report. January – December 2013*, Case 708–2013-LIMA, pp. 163–164.

pensioners.[1926] This case shows the protection of a legitimate expectation of a citizen to retain his status of exemption from the payment of property tax without being subject to administrative measures affecting this situation.

Case 7

On 17 November 2005, the *Defensoría* received a complaint against the Ayacucho Regional Health Hospital, because staff did not allow Mr Bernardo Gutiérrez Mercado, 78, to leave the hospital until he paid 588 soles for the health services he received, even though he had been formally discharged on 11 November 2005. The *Defensoría* contacted the hospital staff and reminded them that the detention of a patient could constitute an offense known as abuse of authority, as well as a violation of personal freedom. For these reasons, it recommended finding an alternative method of collecting the amount owed. Accordingly, after signing a document of commitment to pay, the hospital issued authorisation for the patient to leave.[1927] The *Defensoría*, in this case, highlights the importance of the principle of prohibition of misuse of power to guarantee the fundamental right to freedom.

Case 8

In May 2012, criminal proceedings were initiated against journalist Gina Elizabeth Sandoval-Cervantes for the crime of revealing state secrets. The main argument behind ordering the journalist's arrest was her absence from a hearing arranged by the general prosecutor office. However, the warrant for the journalist's arrest did not state the reasons why her absence from the hearing would be sufficient grounds to suspect that she would evade the investigation. The *Defensoría* intervened in the case by sending a report to the Fiftieth Criminal Court of Lima, requesting a re-evaluation of the arrest warrant due to insufficient grounds therefore, rendering it a disproportionate ruling. Finally, by decision of 21 May 2012, the Criminal Court changed the appellant's arrest warrant to one involving restricted appearance, guaranteeing her right to individual freedom.[1928] The case shows the principle of proportionality as a standard in the evaluation of the performance of jurisdictional bodies by the *Defensoría*, to guarantee the rights to due process and personal freedom. It also illustrates the duty to give adequate reasons.

Case 9

Indian citizen Mr Prakash Mohan Bachani asked the National Migration Agency to change his immigration status from resident to immigrant worker.

1926 Defensoría del Pueblo, *Eleventh Annual Report. January – December 2007,* Case 1120–2007/DP-AYA, pp. 227–228.

1927 Defensoría del Pueblo, *Ninth Annual Report*. April – December 2005, Case 3805–05/DP-AY, pp. 59–60.

1928 Defensoría del Pueblo, *Sixteenth Annual Report. January – December 2012*, Case 543–2012-DP, pp. 118–119.

On 9 October 2012, his application was declared inadmissible, despite his having complied with all the requirements established in the entity's Single Text of Administrative Procedures (TUPA) in force at that time. As a result, the appellant's extension of residence expired, and this prevented him from undertaking any civil acts, even though he had begun the process for change in immigration status more than 18 months earlier. The appellant appealed the resolution, declaring the nullity of everything acted. On 11 July 2013, the National Migration Agency, pursuant to the entity's new TUPA, which had just come into force, demanded that the Indian citizen fulfil additional requirements, allowing him a period of five days to submit the supporting documentation. On 9 August 2013, the *Defensoría* intervened to restore the rights of the applicant, requesting information on the reasons why he was asked to comply with requirements, which were not in force when the process began. The National Migration Agency stated that in order to deal with his application, it required the Indian citizen to comply with the requirements of the entity's new TUPA, in addition to other documents. The *Defensoría* pointed out that no new requirements could be demanded, since they were not already in force when the appellant Indian began the process, and that the case had to be resolved immediately given the expiry of his residence extension. The National Migration Agency reviewed the case and did resolve it immediately. On 5 December 2013, the entity approved the Indian citizen's application for change in his immigration status.[1929] The case shows that the principle of prohibition of arbitrariness is an underlying standard.

Case 10

Mr Sergio Katip-Kasen, president of the Parents Association (APAFA) of Educational Institution 16533, located in the indigenous community of Supayacu (province of San Ignacio, Cajamarca region), filed a complaint against the San Ignacio Local Educational Management Unit (Unidad de Gestión Educativa Local – UGEL) for having appointed Mr Porfirio Rojas Sánchez as a teacher in a bilingual post at the school, even though he did not know *Awajún*, the indigenous language of the community. The *Defensoría* sent an official letter to the San Ignacio UGEL, requesting information on the case. The UGEL informed that it had refrained from appointing Mr Rojas Sánchez as a teacher when it was found out that he had no knowledge of the *Awajún* language, but it had been forced to do so because of a court order. In a meeting with Mr Rojas, he acknowledged that he did not know the *Awajún* language; thus, he agreed to be transferred to another school so that the position could be filled by another teacher who did know the language, provided that his right to exercise the teaching profession was not affected, as he had been awarded the job through an open selection

[1929] Defensoría del Pueblo, *Seventeenth Annual Report. January – December 2013*, Case 18828–2013-LIMA, Informe Anual 2013, pp. 193–194.

process. The *Defensoría* pointed out that deficiencies in the public-school teacher selection processes in indigenous and peasant communities convened by the Regional Education Departments (DREs) and the UGELs often lead to a lack of verification of native language proficiency requirements for these places; and as a result, the positions end up being given to monolingual Spanish-speaking applicants. In this way, the right of indigenous schoolchildren to learn to read and write in their own language is affected.[1930] This case shows the importance of having trained staff in order to guarantee the right to education.

Another series of cases can be identified where the *Defensoría* draws attention to facts related to or associated with violations of the right to well-being, the right to life and the right to personal freedom. The institution's intervention in these cases, which can be classified under the general standard of "respect for human rights", occurs variously at police stations, schools and health centres. Some of examples of such cases are set down below.

Case 11
On 20 October 2011, Mrs Ana Gabriela Valles Zapata reported that a teacher at the Martín Fulgencio Elorza Educational Institution, in Moyobamba district, San Martín region, psychologically mistreated her daughter and physically mistreated her high school roommates, by hitting them on their legs with a stick for playing during recess. These allegations were brought to the attention of the head teacher of the school, but no corrective actions were taken. Immediately thereafter, the *Defensoría* met with the parents to learn more details of the case, and on 21 October, the case was reported to the educational authorities of Moyobamba, recommending the initiation of an administrative investigation into the acts and appropriate measures to safeguard the well-being of the students during the investigation, ensuring that the process would be swift and impartial. As a result, it was possible to put a halt to the abuse and a sanction was imposed upon the teacher. Furthermore, through the Commission for the Response to Complaints and Claims (Comisión de Atención de Denuncias y Reclamos –CADER), an investigation process was opened against the head teacher of the school due to her failure to carry out her duties adequately.[1931]

Case 12
On 17 August 2005, the *Defensoría* received a complaint from Mrs Norma Vega Huamán, against an employee of the Economic Benefits Office of EsSalud (the public health insurance agency), who had refused to process her application for

[1930] Defensoría del Pueblo, *Fourteenth Annual Report*. January – December 2010, Case 390–2010-DP/Cajamarca-MAD-JAÉN, pp. 216–217.
[1931] Defensoría del Pueblo, *Fifteenth Annual Report*. January – December 2011, Case 2663–2011/DP-SAN MARTIN, p. 94.

breastfeeding subsidy (to which she was entitled) because she was affiliated with independent agricultural insurance. Representatives of the *Defensoría* met with EsSalud officials, who acknowledged that the administration of that entity had made a mistake in the system with respect to the registration of independent agricultural insurance affiliates. They also admitted that the failure was the responsibility of the entity itself, and therefore, that the complaint submitted by the appellant should not work against her. For this reason, the application for breastfeeding subsidy was accepted. The *Defensoría* concluded its intervention by recommending that EsSalud open an administrative investigation against the officer subject to the complaint, for negligence in the performance of her duties.[1932]

Table 10. List of Proposed Standards of Proper Conduct Developed by the *Defensoría del Pueblo*

Transparency	Properness	Participation	Accountability	Effectiveness
Publication of regulations/ decisions Giving adequate reasons Access to information Active provision of information	Appropriate behaviour Human rights Equality and non-discrimination Due care or due diligence Prohibition of arbitrariness Prohibition of misuse of power Legitimate expectations Legal certainty Impartiality Proportionality Due process Consideration of individual circumstances	Consultation Right to vote Promotion of participation	Adequate complaint mechanisms	Trained and competent staff Adequate facilities Effective organisation Adequate record-keeping Promptness Coordination and cooperation

[1932] Defensoría del Pueblo, *Ninth Annual Report. April – December 2005*, Case 600–05/DP-MDD, pp. 225–226.

From these cases, standards corresponding to some dimensions of good governance can be extracted. These standards correspond with those applied by the Dutch, British, and the Spanish institutions, as shown in Table 10.

As a human rights ombudsman, such as the Spanish case, the *Defensoría* mainly applies binding legal norms as standards of assessment. Consequently, as can be inferred from the proposed list, most of the identified standards relate to the principle of properness linked to legal norms and derived from the principle of rule of law. However, as in the case of the Dutch Ombudsman and the UK Ombudsman, some other standards can be identified in connection with the good governance (steering) dimension of the modern constitutional state. In these cases, the *Defensoría* applies (and develops) standards that go beyond legally binding norms. These rules of good administrative conduct are mainly in connection with the principles of effectiveness. The same can be observed in relation to the proposed standards connected with the principles of transparency and participation.

Thus, again, two groups of standards can be discerned: i) standards linked to legal regulations and principles (lawfulness / notion of rule of law); and, ii) rules of good administrative conduct.

In relation to the first group (legal norms), the following can be identified: 1) legality; 2) legitimate expectations; 3) legal certainty; 4) impartiality; 5) equality; 6) prohibition of misuse of power; 7) prohibition of arbitrariness; 8) proportionality; 9) reasonableness; 10) due process; and, 11) human rights. These criteria are mainly linked with the fundamental value of the rule of law and properness as a specific principle of good governance.[1933]

In relation to the second group (rules of proper conduct) it is possible to consider: 1) proper behaviour; 2) consideration of individual circumstances; 3) promptness; 4) active provision of information; 5) effective organisation; 6) trained and competent staff, 7) coordination and cooperation; 8) adequate facilities; 9) adequate record-keeping; 10) consultation; and 11) promotion of participation. This second group is more clearly related with the good governance (steering) dimension, in connection with the principles of effectiveness, transparency and participation.

These standards show how the *Defensoría* is promoting good administration as a concern for quality by applying more flexible mechanisms. These mechanisms reflect a more creative role of the institution based on legally and non-legally binding norms as standards of assessment.

[1933] For the specific principles of good governance, see Sections 6.2 & 6.3. See also Table 2.

As the *Defensoría* has concerned itself increasingly with good governance, it has developed other norms and standards, both binding and non-binding. In this regard, the good governance perspective and the development of non-legally binding standards are part of the institution's normative function, even if they are not completely assumed by the *Defensoría*.

In the following sections, this study will show how some of these proposed standards are applied in practice. Then, as in the case of the Dutch, British and Spanish counterparts, it will focus on transparency, properness and participation in accordance with the good governance model.

11.2.2. APPLICATION OF GOOD GOVERNANCE-BASED STANDARDS IN THE OMBUDSPRUDENCE OF THE *DEFENSORÍA*

11.2.2.1. Normative standards in practice

After introducing and describing fundamental rights-based *ombudsprudence,* this study will focus on the cases based on the proposed standards of proper conduct presented in Table 10. Based on a qualitative analysis of the *Defensoría*'s reports, this section presents a description of how good governance-based standards are applied in practice. They can relate with the good governance scheme developed in this study, as has been shown.

Finally, cases based on the good governance principles of properness, transparency and participation will be presented.

Trained and competent staff

On 13 April 2008, it was found that the indigenous community of Supayaku (province and district of San Ignacio, Cajamarca region), did not have a civil registry office authorised by the National Identification and Civil Registry Office (RENIEC), and so one resident of the community, Mr Katip Kasen, was given the responsibility of registering all births in a school notebook. Although he had been trained by RENIEC, Mr Kasen had not passed the basic course required for accreditation as a registrar because he had to sit the exam in Spanish, without the support of an interpreter. Mr Kasen also pointed out that the lack of a both civil registry office and a birth registration process made it difficult for the community to access JUNTOS, a social programme. On 27 June 2008, the *Defensoría* sent an official letter to the RENIEC administrator at the Jaén agency, recommending that this office take measures to ensure that a civil registrar was appointed in the native community of Supayaku, as well as for training to be imparted to civil

registrars in indigenous communities as part of an intercultural and bilingual approach. Following this intervention, Mr Kasen participated in a new training programme at RENIEC. Finally, on 21 November 2008, RENIEC authorised the establishment of a civil registry office in the indigenous community of Supayaku, and the corresponding delegation of duties to that office.[1934]

In July 2009, Juan Edgar Arirama-Canaquiri, president of the Parents Association (APAFA) of Regular Educational Institution 47 in the Arahuante indigenous community (province of Alto Amazonas, Loreto region) filed a complaint stating that following staff changes, only one teacher remained at the school, with responsibility for 108 children between 4 and 5 years of age, in addition to acting as head teacher. The teacher informed the *Defensoría* that since January 2009, she had been asking the Local Educational Management Unit (UGEL) of the province of Alto Amazonas, to assign more teachers to the school, but to no avail. The *Defensoría* contacted the director of the Alto Amazonas UGEL, who argued that it was not possible to assign more teachers to that school due to a shortage in the province. Notwithstanding this, the *Defensoría* recommended that the Alto Amazonas UGEL adopts measures to cover the demand for teachers at Educational Institution 47. Finally, the UGEL director assigned an additional two teachers to work at that school.[1935]

During training of civil registry officers for district municipalities in the province of Arequipa, the *Defensoría* was informed that neither the Honorio Delgado Hospital nor the Goyeneche Hospital, both administrated by the Ministry of Health (MINSA), did not issue certificates of live birth (CNVs) to mothers who gave birth there. Rather, these hospitals were sending the CNVs directly to the Provincial Municipality of Arequipa, and instructing the mothers to obtain their CNV from there. This situation prevented the registration of many children (whose parents did not reside in the province of Arequipa) in the civil registry offices of their municipalities of origin, contravening MINSA regulations which set forth the procedure for issuing the CNVs as a requirement for birth certification. The *Defensoría* asked the Honorio Delgado Hospital and the Goyeneche Hospital to comply with MINSA regulations and to immediately supply the CNVs to the mothers affected. In addition, it noted that the hospitals' obstetricians did not know the procedure pertaining to CNV delivery; thus, it recommended for these staff members to be trained to this end. Subsequently, both hospitals reported that as of September 2009 they would issue CNVs

1934 Defensoría de Pueblo, *Twelfth Annual Report. January – December 2008,* Case 236–2008/DP-Jaén, p. 71.

1935 Defensoría del Pueblo, *Thirteenth Annual Report. January – December 2009,* Case 798–2009/DP-Sanmar, p. 80.

directly to the mothers, and that they had made further arrangements to comply with the *Defensoría*'s recommendations.[1936]

Adequate facilities

On August 2006, students at the Micaela Bastidas high school for females, located in the department of Huancavelica, lodged a complaint with the *Defensoría* against the school authorities. The complainants argued that the school toilet facilities were completed neglected and fell short of good hygiene standards. The *Defensoría* conducted an inspection to the education facilities and verified that the toilets were in deplorable conditions. As a consequence, the *Defensoría* reminded the head teacher of his duties and obligations in relation to the pupils' right to health and to education. In a later inspection, the *Defensoría* confirmed that the toilets were in better conditions of cleanliness.[1937]

In another case, Mr. Echeandía Arellano reported to the *Defensoría* a series of equipment and infrastructure deficiencies in the Intensive Care Unit (ICU) at Las Mercedes Regional Hospital in Chiclayo. The *Defensoría* inspected the ICU and found that: (i) multipurpose beds had castor wheel faults, and wooden sticks were used to support them because their hydraulic system was inoperative; (ii) the troughs and other appliances were rusted; iii) the air conditioning system was not working properly, and only two of the three sets were operational; iv) the forklift access area to the unit was rusty and had no lighting; v) door and window glass was broken; and vi) there was a large amount of unused material (scrap metal) on the roof of the unit, which generated dirt and a proliferation of rodents, pigeons, etc. The *Defensoría* recommended that necessary and immediate measures be taken to improve equipment and infrastructure conditions at the ICU. Accepting these recommendations, the hospital director ordered for maintenance to be performed on all devices and equipment in the ICU, as well as improvements to the facilities.[1938]

During an *ex officio* supervisory visit carried out in July 2013, the *Defensoría* verified that since December 2012, the refrigerators used for storing vaccines at the Montegrande Health Centre (province and region of Piura) had been inoperative. This forced the staff to travel daily to the La Arena Health Centre to collect the vaccines. In addition, it was noted that the Piura Regional Health Board (Dirección Regional de Salud – DIRESA) had been aware of this situation

1936 Defensoría del Pueblo, *Fifteenth Annual Report*. January – December 2011, Joint Case 2947–2011/DP-AREQUIPA & 2948–2011/DP-AREQUIPA, pp. 107–108.

1937 Defensoría del Pueblo, *Tenth Annual Report. January – December 2006,* Case 0836–2006/DP-HVCA, p. 99.

1938 Defensoría del Pueblo, *Sixteenth Annual Report*. January – December 2012, Case 0625–2012–2505/DP-Lambayeque, pp. 40–41.

since January 2013, without having solved the problem. In view of the above, the *Defensoría* recommended that the regional health director adopt measures to provide a working refrigerator to the health facility. Following this intervention, the head of the health centre informed the *Defensoría* that DIRSESA had finally provided a refrigerator to store cold packs, and another refrigerator for vaccines.[1939]

Giving adequate reasons

Mr Abraham Calle Montero asked for the intervention of the *Defensoría* at the National Social Security Office (ONP) because he had wrongly been subject to a suspension of his disability pension payment, as a result of the exercise of supervisory by the ONP. The *Defensoría* requested information from the ONP, pointing out that the appellant's administrative payment activation file (the adequate processing of which would have entitled him to get his pension), was pending review by the legal department. In the absence of due processing of the file, the *Defensoría* recommended that the ONP resume payment of disability pension to the appellant, arguing that the resolution through which his disability pension had been suspended was groundless. On 28 October 2009, through an official letter, the *Defensoría* repeated its request for the ONP to promptly deal with the complainant's case, and other similar cases still pending at that time. Finally, on 12 November 2009, the ONP reported that it had restored the recipient's disability pension, and had proceeded to make the pension payments that were due to him.[1940]

In another case, on 15 September 2010, Ms Basilia Reynaga Salas asked for the *Defensoría*'s intervention to ascertain why the RENIEC agency in Tumbes had made "observations" regarding the process for renewal of her mandatory National Identification Card (ID), which had expired on 19 August 2010. Ms Reynaga stated that RENIEC had informed her that her procedure had been subject to "observation", without adequately explaining what she should do to address the observation. The *Defensoría* asked the RENIEC agency in Tumbes for information on its reasoning. It also reminded the RENIEC that in all applicable cases, observations should be communicated to the holder in a clear and timely manner, so that applicants could obtain their ID. With regard to this particular case, RENIEC reported that the observation arose because Ms Reynaga's ID did not contain information about her birthplace, since the agency was unable to find this information during its cross-checks with the voter register. Thus,

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1939 Defensoría del Pueblo, *Seventeenth Annual Report. January – December 2013*, Case 02978–2013-PIURA, pp. 47–48.

1940 Defensoría del Pueblo, *Thirteenth Annual Report. January – December 2009,* Case 28741–2008/OD-LIMA, 2009, p. 88.

Ms Reynaga Salas would be required to present her birth certificate, although this was not explained to her at the time. The *Defensoría* informed RENIEC that birthplace is information that must be available to the registrar, since it is established by the agency when citizens are issued their ID for the first time, following birth. In the case of Ms Reynaga, her ID was subject to the renewal process, having expired for the second time. In addition, it was recommended that RENIEC seek Ms Reynaga's birthplace in the region's Registry and Civil Status Office (Oficina de Registro de Estado Civil Automatizada, OREC), so as not to pass on to her a responsibility that should not have been hers. On 12 November 2010, RENIEC reported that Ms Basilia Reynaga Salas had already been issued with her ID.[1941]

In a third case, the *Defensoría* intervened with an amicus curiae at the Third Provincial Criminal Prosecutor's Office of Piura, in criminal proceedings related to human trafficking for sexual exploitation, following a controversial ruling issued on 28 January 2013 by the Appeals Court of Justice of Piura, which acquitted four of the five defendants. The decision was particularly worrisome since it meant the conclusion of criminal proceedings without having adequately determined the culpability of those accused. Moreover, the complainant, whose initials are J.I.P.C., was placed at imminent risk, having lost the protection of the state. In its amicus curiae, the *Defensoría* provided additional evidence from its own investigation and requested that the Public Ministry provide for protective measures for the complainant and the witnesses in the case. Subsequently, in support of the challenge to the sentence, promoted by the Prosecutor's Office, the Defensoría emphasised the need to properly state the grounds for confirming or distorting the criminal culpability of those under investigation. On 30 April 2013, the contested judgment was annulled and a new trial was ordered in which the flaws of substantiation would not exist.[1942]

Proper behaviour and respect

On June 4, 2007, the *Defensoría* learned that staff at the Cajamarca customer service centre of the telecommunications firm Movistar had been treating everyday users in an inappropriate manner. Specifically, staff had not been giving interested parties necessary information concerning several procedures related to service provision, in spite of constant requests to this end. In response, the *Defensoría* asked staff at the centre to take the actions necessary to prove

1941 Defensoría del Pueblo, *Fourteenth Annual Report. January – December 2010,* Case1557–2010/DP-Tumbes, pp. 75–76.

1942 Defensoría del Pueblo, *Sixteenth Annual Report. January – December 2012,* Case 0707–2009–005373/DP- PIURA, pp. 115–116.

and/or disprove the alleged inadequate treatment of users who requested the information, and if applicable, adopt corrective measures. On 9 September 2007, the company informed the *Defensoría* that to improve the service it provided to users, it had made arrangements for the installation of six additional service points, which, together with the ten already in place, would make a total of 16 customer service points. It also reported that significant efforts were being made to resolve the problems identified in this case.[1943]

In another case, on 26 March 2008, Mr Jonas Choccelahua Torres filed a complaint with the *Defensoría* against the Cayetano Heredia Hospital in Lima, for ill-treatment and arbitrary charges against patient Ms Juana de Dios Labra Quispe, who had received inadequate care from staff during the treatment she was receiving for gastritis. Likewise, she was forced to assume payments, which, as a beneficiary of the Comprehensive Health Insurance programme (Seguro Integral de Salud, SIS), she should not have had to make. On 2 April 2008, the *Defensoría* asked the management at the hospital for a report on the care provided with respect to this complaint. In response to this request, the Cayetano Heredia Hospital reported that it had assumed the cost of treatment of the patient given her affiliation with the SIS. Furthermore, they stated that they had arranged for an audit and verification of any additional expenses that the interested party might incur as part of her proper care.[1944]

Ms Julia Francisca Oblitas de Terzi filed a complaint at the *Defensoría* office in Arequipa regarding the behaviour of the justice of the peace at the Cercado de Arequipa-Cabaña María Court. She indicated that the judge had not established clear and consistent working hours, and treated members of the public in a highly impolite way whenever he was present. On 6 September 2011, the *Defensoría del Pueblo* asked the judge to submit information about his working hours and terms for dealing with the public at his office, and made him note the discomfort of the complainant regarding his behaviour. The judge failed to reply to this request for information, prompting the *Defensoría* to inform the chief justice of the High Court of Arequipa. On 12 January 2012, the coordinator of the High Court of Arequipa informed the *Defensoría* that, through an administrative resolution enacted on 5 October 2011, the justice of the peace subject to complaint was dismissed, and a schedule for dealing with the public was established at the court's office.[1945]

1943 Defensoría del Pueblo, *Eleventh Annual Report. January – December 2007,* Case 280–2007/DP-CAJ, p. 113.

1944 Defensoría del Pueblo, *Twelfth Annual Report. January – December 2008,* Case 900–2008/DP-Lima-Norte, p. 78.

1945 Defensoría del Pueblo, *Fifteenth Annual Report. January – December 2011*, Case 2951–2011/DP-AREQUIPA, p. 117.

Equality and non-discrimination

On 20 October 2006, Ms Vilma Palma Calle lodged a complaint with the *Defensoría* against four teachers at Instituto Tecnológico Público Manuel Arévalo Cáceres, due to alleged acts of discrimination against her in relation to her motion and language disabilities. Specifically, Ms Palma stated that teachers were opposed to her internship and refused to employ her as assistant in the on-site food laboratory. Ms Palma presented the letter that the teachers had sent to the principal of the institute, expressing their dissatisfaction with her appointment as practitioner because of her "psychomotor disability and speech problems", prompting their decision to suspend her internship during the night shift so long as the internee was given responsibilities in the food laboratory. The *Defensoría* verified that Ms Vilma Palma Calle adequately performed the tasks assigned, so there was no justification for suspending her internship. In view of this, the *Defensoría* recommended that the management of the higher learning institute take action and stop the alleged acts of discrimination. However, the teachers continued to refuse giving classes when Ms Vilma Palma was present. The *Defensoría* referred the case to the General Prosecutor's Office for discrimination offence. On 24 April 2007, the Public Prosecutor filed a criminal complaint against the accused teachers.[1946]

In a second case, the *Defensoría* in Puerto Maldonado (Madre de Dios region) was informed by a local newspaper that the Appeals Court of Justice of Madre de Dios had initiated a staff selection process in which applicants were required to be women of 22 years of age. The *Defensoría* interviewed the president of the Appeals Court of Justice and recommended the suspension of the selection process until all discriminatory requirements were removed. The president was also urged to prevent similar situations from occurring in the future. Following this intervention, the Appeals Court of Madre de Dios issued an administrative resolution that adopted all of the *Defensoría*'s recommendations, cancelled the selection process involving the gender and age requirements, launched an administrative investigation to determine responsability, and forwarded an official communication to court officials, informing them of the prohibition of any acts of discrimination.[1947]

In another case, the director of the NGO *Asociación por la Vida* submitted a statement to the *Defensoría* in which it denounced the violation of the rights of an HIV positive pregnant woman. According to the statement, on 3 October

[1946] Defensoría del Pueblo, *Eleventh Annual Report. January – December 2007,* Case 1858–2006/DP-CN, pp. 67–68. It should be noted that this was an emblematic case, as it was the first in which a criminal conviction for discrimination was imposed in Peru.

[1947] Defensoría del Pueblo, *Fifteenth Annual Report. January – December 2011*, Case 181–2011/DP-MADRE DE DIOS, pp. 104–105.

2010, the pregnant woman, registered with Code FCNF-3105–1984, was admitted to Sullana Hospital (Piura region) due to labour contractions. However, she was not treated in accordance with the mandatory protocol for labouring women with HIV, which required a caesarean delivery, on the pretext that the hospital did not have the disposable clothing required. Because of this, the patient gave birth through the natural method, unnecessarily exposing the new-born to the risk of HIV transmission. The *Defensoría* met with the director of the Hospital, who stated that he had requested reports on the case. During the interview, the director provided a copy of the notebook in which the surgical interventions were recorded. This notebook showed that on 3 October 2010, the date when the appellant gave birth, two caesareans were performed without the need to wear disposable clothes. Based on this information, the *Defensoría* recommended that the hospital adopt the following measures: i) advise the staff that caesarean sections for pregnant women diagnosed as being HIV positive cannot be conditional upon the availability of disposable surgical clothing, since this is an act of discrimination; (ii) take measures to ensure that care for pregnant women with HIV is not conditional upon the purchase of disposable clothing or other supplies or medication; and (iii) investigate the acts of the staff involved in the case in order to determine liability.[1948]

Effective organisation

On 20 July 2006, Ms Gaudencia Pantoja Bolo filed a complaint about the inadequate medical care provided to her husband, Mr Braulio Estrada Gonzales, which allegedly caused his death. On 4 July 2006, Mr Estrada Gonzales was discharged from Sabogal Hospital in Callao despite not having fully recovered from a respiratory condition. When his condition deteriorated he went to Luis Negreiros Polyclinic on 5 July, where he was diagnosed with acute bronchitis, but was again released the following day. Hours later, Mr Estrada returned to the emergency area of Luis Negreiros Polyclinic, but was not immediately transferred to the Sabogal Hospital, or to any other hospital, reportedly due to a lack of beds. Mr Estrada died while waiting for his transfer to be authorised. On 7 March 2007, the *Defensoría* reminded the medical director of the Sabogal Hospital and the director of Luis Negreiros Polyclinic (both of which pertain to the EsSalud public health insurance network) that health establishments are obligated to guarantee the quality and safety of the healthcare they provide to their patients, for which they must be "properly organised" in order to provide a timely service. In addition, the case was reported to the general manager of EsSalud so that corrective actions could be taken, and for the sanctioning of those responsible. In response to the recommendations, the director of Luis

[1948] Defensoría del Pueblo, *Fourteenth Annual Report. January – December 2010,* Case file 4901–2010/DP-Piura, pp. 86–87.

Negreiros Polyclinic ordered that the emergency service staff should make sure to prioritise the emergency care of the patients. Likewise, the Medical Manager of the Sabogal Hospital informed that the persons responsible for the events had been sanctioned.[1949]

In another case, the *Defensoría* carried out a supervisory visit to the Consuelo de Velasco Health Centre (Piura region) on 31 August 2007 during which it detected a shortage of emergency oral contraception (EOC), restricting user access to this contraceptive method. *Defensoría* officials conducted an interview with the obstetrician in charge of the health centre, who reported that the on-site pharmacy had not had EOC in stock since June 2007, despite ordering a new supply from the Regional Health Bureau (DIRESA) of Piura. On 6 September 2007, *Defensoría* officials spoke by telephone with the sexual and reproductive health coordinator of the DIRESA of Piura, who reported that the health centre had not in fact ordered the aforementioned supply. On 6 September 2007, the *Defensoría* informed Piura's regional health director about the EOC shortage in the mentioned health centre, and requested information on the actions it planned to take to remedy the situation. On 14 September 2007, the regional health director stated that the Consuelo de Velasco Health Centre had again failed to order the EOC between June and August, but added that it did eventually do so on 12 September 2007.[1950]

In a third case, the *Defensoría* initiated an *ex officio* investigation involving EsSalud after a series of complaints from the public regarding delays by the entity in purchasing a set of drugs outside its official pharmacological order list. These drugs were given to patients with serious chronic diseases (oncological, haematological, cardiological and others), and the shortages were causing undue restrictions to their medical treatment. On 20 October 2010, the *Defensoría* sent to the executive president of EsSalud the Deputy Ombudsman Report 034–2010/DP-EPA, which contained the results of the *Defensoría*'s investigation and a series of recommendations for corrective measures. Subsequently, the *Defensoría* held a series of working meetings with EsSalud, which committed to take corrective measures to ensure the proper functioning of the different bodies responsible for approving the purchase of medication outside the official pharmacological request list in order to prevent any unnecessary delays for patients who needed them as part of their medical treatment.[1951]

1949 Defensoría del Pueblo, *Eleventh Annual Report. January – December 2007,* Case 1975–2006/DP-Callao, pp. 99–100.

1950 Defensoría del Pueblo, *Eleventh Annual Report. January – December 2007,* Case 4522–2007/DP-PIU, pp. 175–176.

1951 Defensoría del Pueblo, *Fourteenth Annual Report. January – December 2010,* Case 17042–2010/DP-LIMA, p. 86.

Coordination and cooperation

On 17 August 2006, the *Defensoría* received a complaint from the Tabón Alto Farmers' Defence Committee, pointing out that its land had been polluted for 14 years by the Casma oxidation pond (Casma province, Ancash region) managed by the Municipal Drinking Water and Sewerage Company of Chimbote, Casma y Huarmey S. A. (Seda-Chimbote). The *Defensoría* acknowledged that on 11 January 2006, the Ministry of Housing, Construction and Sanitation, and the Provincial Municipality of Casma and Seda-Chimbote signed an agreement to prepare and implement a pre-feasibility study for a project to improve and expand the sanitation infrastructure in Casma, which would allow for relocation of the oxidation ponds in the Chinecas area, solving the problem of the local farmers. However, these institutions did not comply with the obligations assumed in that agreement. On 21 August 2006, the *Defensoría* sent an official letter requesting information with regard to the actions taken by Seda-Chimbote and the Provincial Municipality of Casma, and recommending for those institutions to adopt measures to implement the agreement. On 1 September 2006, the general manager of Seda-Chimbote reported that a resolution would soon be issued authorising the setting aside of land in Chinecas for the establishment of oxidation ponds, which would also allow for the initiation of the project's pre-feasibility study. In turn, on 6 October 2006 the Provincial Municipality of Casma reported on the "inter-agency coordination" being carried out for the feasibility study, to guarantee the availability of the land earmarked for the oxidation pond, further stating its willingness to contribute to financing the project.[1952]

In a second case, the Insurance Unit of the *Hospital de Apoyo* in the Province of Sullana, Piura region, informed the *Defensoría* about three children, identified as JPOR, DDBP, and AYSA – all of whom had a serious medical diagnosis requiring urgent care – who were prevented from enrolling on the Comprehensive Health Insurance Programme (SIS) because they did not have National Identification Cards (ID). The *Defensoría* coordinated with the Head of the Sullana Office of the National Identification and Civil Registry Office (RENIEC), and with the head of the insurance unit at the Hospital de Apoyo, for the prompt issuance the ID for the minors, who, finally, were able to receive the medical attention they required. In addition, following the *Defensoría*'s intervention and in line with its recommendations, permanent channels of coordination were established for the RENIEC Piura office to deal with special procedures such as those arising from the case described.[1953]

1952 Defensoría del Pueblo, *Tenth Annual Report. January – December 2006,* Case 1033–06/DP-CHIMB, pp. 136–137.

1953 Defensoría del Pueblo, *Fifteenth Annual Report. January – December 2011,* Case 6736–2011/DP-PIURA, pp. 41–42.

Finally, the National Social Security Office (ONP) and EsSalud entered into an interinstitutional agreement to carry out medical exams to facilitate assessment of contributors' ONP entitlements. However, in 2012, EsSalud unilaterally disregarded the validity of this agreement and instructed its hospitals to stop providing care to those with these assessments pending, even though they had been issued orders by the ONP authorising them to undergo the medical exams at EsSalud facilities. This measure indefinitely delayed access to healthcare coverage for a large number of insured persons, since the performance of medical exams is a mandatory step in the access procedures. In mid-January, the *Defensoría* asked the ONP for information on the measures taken to solve the problems caused by the lack of coordination and interinstitutional cooperation. In response, the ONP reported that the issue had been resolved and that medical exams had been resumed by EsSalud in the beginning of February.[1954]

Consideration of individual circumstances

On 23 August 2005, Mr Guillermo Riofrío Marquina filed a complaint against the Civil Registry Office of the Provincial Municipality of Callao for refusing to admit a request for the administrative rectification of the birth certificate of his son, Guillermo Riofrío Pérez. Mr Riofrío Marquina stated that when his son was applying for his ID, officials at the RENIEC Callao agency subjected his birth certificate to "observation" because a registrar at the Municipality had amended the date of registration in 1987. In response, Mr Riofrío Marquina met with the head of the civil registry office of the Provincial Municipality of Callao, who stated that the office was unable to solve the problem because the amendment to the birth certificate had been made before his appointment, and suggested that Mr Riofrío try to solve it through court proceedings. The *Defensoría* referred the problem to the RENIEC civil registry department, which suggested carrying out an extraordinary rectification procedure for birth certificates. The possibility of this procedure as a solution was communicated to the civil registry office of the Provincial Municipality of Callao. Considering Mr Riofrío's precarious economic situation, the *Defensoría* recommended that the Provincial Municipality of Callao exempt him from payment of administrative fees by for the extraordinary rectification procedure. Accepting the recommendation of the *Defensoría*, the Provincial Municipality of Callao agreed to exempt him from payment and to carry out the rectification process. On 4 November, the rectified birth certificate was delivered to Guillermo Jorge Riofrío Pérez who restarted the process to obtain his DNI, which was issued on 23 November 2005.[1955]

1954 Defensoría del Pueblo, *Sixteenth Annual Report. January – December 2012,* Case 1478–2012/DP-LIMA, p. 152.

1955 Defensoría del Pueblo, *Ninth Annual Report. April – December 2005*, Case 1152–05/DP-CALL, pp. 94–95.

In another case, a Russian citizen (AB) and her minor son (VT) were required to extend their Peruvian residency in January 2013; but since they did not have relatives or friends who could serve as guarantors or sponsors, they could not initiate the process. This situation was aggravated by the fact that the original guarantor was AB's husband, also a Russian citizen, against whom she had filed legal proceedings for domestic violence. Mrs AB had requested protective measures in this process, and this led to the rejection of the notion that the husband could again act as sponsor for their residence permits. The minor was also at risk, since he would be removed from school if he did not have a valid permit. Moreover, Mrs AB's irregular immigration status prevented her from securing a job. In order to manage the case, *Defensoría* officials held a meeting with the head of immigration in the City of Arequipa, who was asked to guarantee immigrants the right to a treatment equal to that of Peruvians, court protection, the right to education and the right to work. After the proper steps were taken, the Immigration authority granted an extension of residency to the applicant and her son.[1956]

Third, Mrs María Colarrossi Sandoval was a retiree whose retirement pension was suspended in 2010, when she was registered as deceased at the National Social Security Office (ONP) after a death certificate had been erroneously issued in her name by RENIEC. Given this situation, Mrs Colarrossi Sandoval requested the intervention of the *Defensoría*. On 11 August 2010, the *Defensoría* informed the head of the ONP of the formal commencement of an investigation. The *Defensoría* also noted that Mrs Colarrossi had asked for her pension to be reactivated, since she, as an elderly person, who severely affected by its suspension based on erroneous information. The *Defensoría* suggested that the ONP pay immediate attention to Mrs Colarrossi's request; likewise, it recommended the review of the procedure for handling similar cases in order to establish mechanisms for swift resolution. In response, the ONP reported that following the *Defensoría*'s recommendation and after correcting the information, on 12 August 2010 it requested the reactivation of Mrs Colarossi's retirement pension, which was available for collection as of September 2010.[1957]

Adequate complaint mechanisms

On 4 March 2006, the *Defensoría* made a supervisory visit to Hospital II, administered by EsSalud, in the city of Cajamarca. During the visit *Defensoría*'s officials interviewed several users, who complained about poor service provided

[1956] Defensoría del Pueblo, *Seventeenth Annual Report. January – December 2013*, Case 0932–2013/DP-Arequipa, p. 193.

[1957] Defensoría del Pueblo, *Fourteenth Annual Report. January – December 2010,* Case 19714–2010/DP-LIMA, pp. 91–92.

by administrative staff, ill-treatment by healthcare staff and the failure to grant appointments in a timely manner. In addition, they stated that they were unaware of the mechanisms available for filing claims. The *Defensoría* recommended for the director of EsSalud in Cajamarca to establish mechanisms to provide timely medical appointments, as well as to information on procedures for filing complaints related to poor service. Accepting to the recommendations of the *Defensoría*, EsSalud implemented a user assistance unit, which would also evaluate the administrative staff. Likewise, the entity arranged for the complaints box to be checked once per week, in the presence of the head of the user service office and a randomly designated user.[1958]

Second, within the framework of the *ex officio* supervision of mental health facilities between July 2007 and November 2008, the *Defensoría* found that with the exception of one establishment (Víctor Larco Herrera Hospital), none of the supervised hospitals had regular, formally established mechanisms to allow in-patients to file complaints about possible mistreatment by healthcare staff. In this regard, the *Defensoría* pointed out that mental health establishments should implement specific procedures aimed at protecting the rights of patients. Accordingly, it recommended that mechanisms be put in place to ensure that in-patients, their families and their representatives have access to simple and effective remedies for complaints.[1959]

Finally, between April and June 2011, the *Defensoría* held work meetings with EPSEL – a public company responsible for providing public water and sanitation services in the Lambayeque region – in order to ascertain and evaluate the lack of implementation of an operational claims procedure, which caused delays in dealing with user complaints about unfinished works, leaks in the drinking water network, overflow in the sewerage network, clogging and service cuts, among other issues. The *Defensoría* recommended that EPSE comply with the implementation of a procedure to deal with complaints in its Southern, Northern and Ferreñafe regional offices, in accordance with the provisions of the General Regulation governing Sanitation Service User Complaints, approved by Resolution No. 066–2006-SUNASS-CD. This recommendation was implemented; thus, the company installed telephone lines and portals on its website to assist users, and hired technical staff to deal with complaints in each regional office.[1960]

1958 Defensoría del Pueblo, *Tenth Annual Report. January – December 2006*, Case 514–06/DP-CAJ, p. 110.

1959 Defensoría del Pueblo, *Special Report 140*, pp. 201–205.

1960 Defensoría del Pueblo, *Fifteenth Annual Report. January – December 2011,* Case 625–2011–4446/DP-LAMBAYEQUE, pp. 125–126.

11.2.2.2. Ombudsnorms as good governance-based standards

As shown above, the *Defensoría*'s application of human rights-based standards can be included in the good governance scheme proposed as part of the normative framework of this study. In the following section the ombudsprudence of the *Defensoría* will be analysed with regard to properness (carefulness), transparency (active provision of information), and participation (consultation).

a. Properness: carefulness

Case: Delay in resolving the appeal affecting the right to pension
On 23 November, 2006, Mr Barba Vera requested the intervention of the *Defensoría* due to the National Social Security Office's (ONP) delays in resolving his appeal against the entity's decision of 4 May 2006, which declared unfounded its recourse for reconsideration of the rejection of his application for a retirement pension, because he had not contributed for the minimum number of years. On 4 December 2006, the *Defensoría* asked the ONP for information on the case. On 26 April 2007, during an inspection of the central payroll archives of the ONP, it was found that Mr Barba Vera had in fact contributed for 14 years and 10 months, sufficient time to entitle him to a pension. Subsequently, the *Defensoría* asked the ONP to take into account findings concerning years of contributions when resolving Mr Barba Vera's appeal.

On 6 September 2007, the ONP declared Mr Barba Vera's appeal unfounded, acknowledging only 13 years and 11 months worth of contributions. In response, on 20 November 2007, the *Defensoría* recommended that the ONP review the decision on its own initiative, and issue a new ruling that would allow Mr Barba Vera to obtain the retirement pension to which he was entitled. On 2 December 2007, the ONP declared Mr Barba Vera's appeal to be well-founded in part, and he was granted his retirement pension.[1961]

Case: Issuance of regulatory ordinance on the motorcycle taxi service without technical grounds
On 9 March 2006, a complaint was received from Mr Robles Aguirre, who on 15 September 2005 had filed a request with the Municipality of Abancay for the amendment of Municipal Ordinance 010–2005-A-MPA. This ordinance prohibits driving smaller vehicles (such as motorcycle taxis) for any and all uses and services, on the basis of two arguments: that the characteristics of the city of Abancay are unsuitable for the use of such vehicles; and that the growth in the number of such vehicles would congest the roads.

[1961] Defensoría del Pueblo, *Eleventh Annual Report. January – December 2007*, Case 21310–2006/DP-LIM, pp. 104–105.

In response, the *Defensoría* met Mr Isaac Dávalos of the Abancay Municipality's road traffic department, who handed over a copy of the report on which the municipal ordinance was based. However, upon reviewing the report, the *Defensoría* verified the non-existence of any that study supporting the aforementioned prohibition. Thus, the *Defensoría*, through an official letter dated 5 October 2006, recommended that the Municipality of Abancay repeal Municipal Ordinance 010–2005-A-MPA and Mayoral Decree 01–2005-A-MPA, and urged it to undertake technical studies to demonstrate the feasibility or non-feasibility of the provision of special transportation services using smaller vehicles in the city of Abancay.[1962]

Case: Non-compliance with duties by Loreto region's Harbour Master's Office
In October 2007, Mr Perez Tapulima, a member of the indigenous Amazon community of San Rafael-Río Curaray (Province of Maynas, Loreto region), informed the *Defensoría* that oil company vessels had reportedly sunk a boat owned by Mr Soria Pizango (without admitting liability) and that these vessels travelled at high speeds in the area, threatening the lives of residents. On 30 October, 2007, the *Defensoría* sent an official letter to the Harbour Master's Office of Iquitos (capital of the Loreto region), explaining the situation. The Harbour Master's Office stated that Mr Soria Pizango's claim was invalid because it was not submitted within 24 hours. Likewise, according to Harbour Master's Office regulations, any boat which overtakes or crosses the path of smaller boats in areas inhabited by riparian communities must do so at a speed of less than five knots. Failure to comply with this rule would result in a sanction for jeopardising the safety of human life.

On 2 January 2008, the *Defensoría* sent a new communication to the Harbour Master's Office, recommending that, pursuant to the principles of due process and reasonableness, it applies the benefit of the distance and time element with respect to the complaint filed by Mr Soria Pizango (taking into account the problems encountered when covering the distance from the indigenous communities) and to fulfil its obligation to investigate the incident that had occurred, as well as verify whether or not boats that travelled along the Curaray River did so at an appropriate speed. In compliance with this recommendation, the Harbour Master's Office ordered an investigation to establish the facts. It also informed the *Defensoría* that it had approved a new regulation requiring all vessels traveling between the river ports of riparian communities to respect the five-knot speed limit.[1963]

1962 Defensoría del Pueblo, *Tenth Annual Report. January – December 2006*, Case 1114–06/DP-APU, pp. 129–130.

1963 Defensoría del Pueblo, *Eleventh Annual Report. January – December 2007*, Case 1878–2007/DP-LOR, pp. 201–202.

b. Transparency: active provision of information

Case: Failure by local government to provide information about town hall meetings

In an intervention on its own initiative, the *Defensoría* supervised the public hearing of the Municipal District of Jesus Nazareno (Ayacucho), which was reported to have taken place on 20 April 2008. It was found that notice of the event was issued only 15 days ahead of time, and without having previously distributed the executive summary of the accountability report to the participants and the general public to allow them to participate in the hearing in an informed manner. The *Defensoría* met with the municipal manager, who stated that the notice had been broadcast on local radio and television. The *Defensoría* recommended that the municipality distribute the executive summaries of the accountability report in advance and implement the recommendations on giving notice and registration of participants, citizen participation, structure of the hearing and so on. The municipality partially implemented the *Defensoría*'s recommendations, although it only delivered the executive summaries to the participants on the day of the hearing.[1964]

Case: Irregular hiring of public officials in the Regional Government of Pasco

The *Defensoría* initiated an *ex officio* investigation following news reports alleging that the Pasco Regional Government had hired, without a public selection process, members and followers of the political organisation to which the regional governor belonged. The director of human resources of the Regional Government reported that supporting staff had been hired without employment contracts, and that the selection process for public positions under the Government Service Procurement regime (*Contratación Administrativa de Servicios* – CAS)[1965] would be regularised, subject to the availability of financial resources from the regional government. On 4 February 2011, the *Defensoría* requested that regional government provide information regarding corrective measures to be taken to ensure that access to positions in public administration was in accordance with the principles of meritocracy and capacity.

On 9 February 2011, the Regional Government announced that the staff selection process had taken place between 3 and 17 January of that year, and

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1964 Defensoría del Pueblo, *Twelfth Annual Report. January – December 2008*, Case 1166–2008/AYAC, pp. 254–255.

1965 The CAS is a special labour law regime for State officials, regulated under the Legislative Decree 1057, enacted in 2008, which coexists with the labour regimes established under the legislatives decrees 276, enacted in 1984 and 728, enacted in 1991, all of which regulate public employment. Currently, the CAS, along with the two other legal frameworks for state employment, is in the process of being replaced by a general regime established by Law 30057, Civil Service Act, enacted in 2013.

that its results were published on the its transparency portal. It also announced that a new selection process would start on 11 January, and would also be made public through the institution's online portal. However, the *Defensoría* noted that the website had only published partial information about the recruitment process. Therefore, it recommended that the Regional Government of Pasco initiate a disciplinary process against members of the staff selection committee for violation of the principles of legality and transparency as established in the Public Function Code of the Ethics Act.

Finally, the Regional Government of Pasco appointed a new Commission for the recruitment of personnel and granted a period of 60 working days to conclude the process according to law.[1966]

Case: Irregularities in the selection process for State employees
Ms Aurea Clotilde Blanco Campos filed a complaint against the care network of the Public Health Insurance Agency (*Seguro Social de Salud – EsSalud*) in the Pasco region, citing irregularities in a staff selection process, given that the date and time of the written examination which the applicants were required to take were publicized barely one hour before the time at which the test was due to start.

The complainant, who had applied for a position as an obstetrician, stated that she had not been informed of the stages of the selection process, and that she had only learned informally that a written examination would be required, immediately after the results of the curriculum evaluation were published. However, since she was not informed in a timely manner, she arrived late to the examination and was disqualified. The *Defensoría* met with the head of human resources of EsSalud's care network in the Pasco region, who reported that the results of the curriculum evaluation were publicized on 21 April at 10:00 am on a notice board displayed at the entrance of the institution, which also informed applicants that the written examination would take place that same day at 11:00 am. Therefore, according to the official, the entity was not responsible for the fact that the applicant had not been present at the time that the results of the curriculum evaluation and the time of the written exam were published.

The *Defensoría* expressed its dissatisfaction with these arguments and recommended declaring void the stage of the selection process that followed the written exam. The institution further recommended that the applicant should be adequately informed of the stages of the selection process, giving those passing the curriculum evaluation a reasonable timeframe to be made aware of the following steps of the procedure.

[1966] Defensoría del Pueblo, *Fifteenth Annual Report. January – December 2011*, Case 48–2011-PASCO, pp. 139–140.

EsSalud did not accept the *Defensoría's* recommendations, arguing that cancelling part of the selection process would lead to administrative disruptions. However, the institution committed itself in subsequent staff selection processes to provide adequate information on the stages and dates involved.[1967]

c. Participation: consultation

Case: Complaint of residents of the *El Centenario* neighbourhood in the city of Huaraz, with regard to the installation of mobile telephone antennas
On 13 December 2005, residents of the *El Centenario* neighbourhood in the city of Huaraz (Ancash region) visited the *Defensoría*, requesting that it intercede to encourage the Municipality of Huaraz and other local authorities to take measures to dismantle telecommunication antennas installed in different parts of the city, claiming that they threatened the health of those who lived in the vicinity.

The *Defensoría* asked the Municipality of Huaraz for information on the licenses granted to the telecommunications company *América Móvil* for the installation of antennas. The municipality responded that no application for authorisation had been submitted and that the company would be notified of a demand for payment of the building license, as well as a fine for carrying out the works without authorisation. Likewise, the *Defensoría* found out that constitutional proceedings had been brought against *América Móvil* to prevent the installation of one of the antennas, but the company had refused to comply with the court order to stop the work.

The *Defensoría* organised a meeting between the local population and specialists of the National Institute of Telecommunications Research and Training (*Instituto Nacional de Investigación y Capacitación de Telecomunicaciones* – INICTEL), so that this entity could report on the effects that antenna radiation may or may not have on the health of people. It also promoted hearings between *América Móvil* and the appellants, in which the company finally chose to dismantle two of the antennas and commit to carry out a study to relocate them, which would be disseminated to the population. Finally, the *Defensoría* proposed the formation of a multisectoral commission to address the issue of antennas, with the participation of telecommunications bodies from different levels of government.[1968]

1967 Defensoría del Pueblo, *Fourteenth Annual Report. January – December 2010*, Case 415–2010/DP-Pasco, p. 96.

1968 Defensoría del Pueblo, *Ninth Annual Report. April – December 2005*, Case 659–05/DP-ANC, pp. 163–164.

Case: Mining exploration authorisation granted by the Ministry of Energy and Mines to *Majaz* Mining Company

The *Defensoría* referred to the case of the authorisation for mining exploration granted to the *Majaz* Mining Company, in the Piura region, by the Ministry of Energy and Mines (MEM). The *Defensoría* found out that in contravention of the legal framework then in force (2006), the MEM did not require the company to show evidence of having received the authorisation of the owners of the land situated in the area of the mining deposit. Therefore, on 20 November 2006, the *Defensoría* sent an official letter to the Vice ministry of Mines, with a set of recommendations aimed at implementing mechanisms to guarantee property rights, access to environmental information and the participation of the area's inhabitants.

The *Defensoría* also recommended that the MEM evaluate any irregularities in the administrative procedure for approval of the Rio Blanco Project's Environmental Assessment, and if so, to take corrective measures. Thus, the *Defensoría* sought for the MEM to prevent violent conflicts and to fulfil its duty to guarantee fundamental property rights, citizen participation, good administration, and the preservation of a healthy environment for the affected communities, by promoting space for dialogue and fair conditions for negotiation between them and the company.[1969]

Case: Intervention in dispute resolution in the *Quellaveco* Mining Project

The *Defensoría* referred to a case of a successful intervention in resolving a social conflict around a mining project. This action promoted consultation with the affected population so as to reach agreements with the state and investors.

The Quellaveco Mining Project, in the Moquegua region, had encountered resistance from residents of the adjacent area, who questioned the use of groundwater, the diversion of the Asana river for the mining project, and the pollution that the project would cause. Residents of 28 farming communities in Moquegua staged several protest actions, demanding the cessation of works and the suspension of the project.

In response to these demonstrations, the Cabinet Office (*Presidencia del Consejo de Ministros* – PCM) organised a meeting involving the *Anglo American Quellaveco* Mining Company, the Regional Government and members of civil society from Moquegua, in an attempt to find a solution through dialogue.

[1969] Defensoría del Pueblo, *Tenth Annual Report. January – December 2006*, Case 2462–06/PD-PIU, pp. 146–147. It should be noted that in 2007, residents in the vicinity of the mine voted overwhelmingly against the Río Blanco Project, in a non-binding electoral consultation. The conflict has continued in subsequent years, with several acts of violence, and exploitation of the mining project has yet to begin.

The *Defensoría* intervened by drafting regulations for the dialogue process, facilitating the issuance of notices to the parties and acting as an observer in the negotiations.

As a result of the consultation and dialogue process, in July 2012, several agreements were signed; the company made 23 commitments, including establishing a trust fund for the development of communities adjacent to the mine and financing the works included in the second stage of the special project of Pasto Grande. These agreements were to be implemented once the construction of the mining complex began.[1970]

11.3. FINDINGS

First of all, it can be argued that good governance as a general principle, as well as the specific principles of good governance, are enshrined (whether explicitly or implicitly) as constitutional principles in the Peruvian legal system. Thus, it can be argued that the principle of good governance is implicitly enshrined in Article 44 of the Constitution, regarding the duty of the state to guarantee general public well-being. This has been echoed in several rulings of the Peruvian Constitutional Court. Furthermore, principles of good governance have been developed, with varied content and scope, in several legal statutes.

Through its two decades of existence to date, the *Defensoría's* work has evolved from a perspective focused on individual remedy aimed at protecting human rights -with an initial emphasis on the defence and promotion of civil and political rights- to a broader assessment of structural problems through the oversight of public policy implementation and the analysis of various relevant social issues with preventive purposes. This approach has been reflected in numerous reports published by the institution, which have developed several key lines of intervention on issues such as equality and non-discrimination, the fight against corruption, prevention of social conflicts, and supervision of public policies, among others. Thus, the *Defensoría*'s interventions show how the institution has evolved and how it has progressively approached good governance as part of its constitutional mandate. Throughout this process the *Defensoría* has applied and developed, albeit in an implicit manner, not only human rights-based standards but also legally and non-legally binding

[1970] Defensoría del Pueblo, *Sixteenth Annual Report. January – December 2012*, "illustrative case", p. 91. In this case, the *Defensoría*'s intervention does not derive from a complaint or an *ex officio* investigation but is the result of a mediation activity; therefore, it does not have a case number but is reported as an "illustrative case" in the social conflicts section of the annual report.

standards that can be regarded as good governance-based whereas they are applied to assess administrative conduct regardless of the infringement of a right. Particular attention should be given to the non-legally binding rules of good administrative conduct, which can be drawn from patterns of functional misconduct or malpractices identified by the institution and set forth in the special reports and in ombudsprudence.

As such, two groups of standards can be discerned: i) standards linked to legal regulations and principles; and, ii) rules of good administrative conduct. Since human rights are the *Defensoría*'s standard of control, the institution mainly applies binding legal norms as standards of assessment. As such, like in the Spanish case, most of the identified standards relate to the principle of properness linked to the principle of the rule of law. However, as in the case of the Dutch Ombudsman and the UK Ombudsman, some other standards can be identified in connection with the good governance (steering) dimension of the modern constitutional state. In these cases, the *Defensoría* applies (and develops) standards that go beyond binding legal norms. These rules of good administrative conduct are mainly in connection with the principles of effectiveness. The same can be observed in relation to the proposed standards connected with the principles of transparency and participation.

These standards show how the *Defensoría,* when assessing the administrative activity of public powers, is promoting good administration as a concern for quality. They also demonstrate that even though the *Defensoría* applies human rights as the standard of control and its main assessment criterion, good administration has been arising as a recurring parameter in its interventions.

Although the *Defensoría* has not systematised nor codified its good governance-based standards, it can be noted that the institution, through the exercise of (indirect) normative functions, is contributing to the development of both the normative content of good governance principles and a more flexible legal framework to steer the exercise of public functions and enhance legitimacy in the public sector, and thus strengthen the democratic system.

PROVISIONAL CONCLUSIONS PART IV

Part IV has analysed the role of the *Defensoría del Pueblo* in enhancing good governance, particularly through the performance of its indirect normative functions. First, the legal mandate, functions and powers of the institution have been scrutinised from the perspective of its hybridisation process. Second, the *Defensoria*'s normative function have been analysed to determine whether and to what extent the principles of good governance are embraced through the standards applied by the institution. Third, this section has explored whether, through the application of such standards, the *Defensoría* is contributing effectively to improving Peru's institutional and legal framework in order to strengthen the democratic system.

In recent years the *Defensoría del Pueblo* has undergone a process of hybridisation with regard to its functions, assessment orientation and standard of control. This is evidenced by a shift from an emphasis on individual redress aimed at protecting human rights towards a focus on public policies as a mechanism to impact at the policy level. Thus, its attention is centred not solely on classic political and civil rights, but also on economic, social and cultural rights, which have a direct connection with the quality of the state's public service provision in order to ensure their adequate realisation.

According to its constitutional mandate, the *Defensoría*'s scope of control covers (the entire sphere of) the public administration. In this regard, the institution protects the fundamental rights of citizens primarily by assessing the actions of the administration. However, as a protector of citizens' rights, it can be argued that the *Defensoría* also has the indirect task of controlling the judiciary and the parliament. In the case of the former, it does so by intervening in instances concerning procedural or organisational matters related to the administration of justice, with the purpose of guaranteeing the right to defence and due process. In turn, the latter concerns parliament's law-making function, in cases where the Defensoría finds that a law approved by Congress violates one of the rights enshrined in the Constitution. But the *Defensoría* has also pronounced when it has found that the fundamental rights to due process and to defence have not been sufficiently observed in political investigations conducted by parliamentary committees. Arguably, the *Defensoría* has, in practice, extended its scope of control, making it broader than its Dutch, British and Spanish counterparts. As

a fourth power institution, the *Defensoría* supplements, to a certain extent, the role of the judiciary but also of that the parliament.

For this study, the redress and control functions are mixed, placing the *Defensoría* within the dual ombudsman model. Nonetheless, as part of its process of evolution, the *Defensoría* has come to place a greater emphasis on its role as a control-oriented institution. This is reflected in a strong focus on its preventing function, resulting, in turn, in the broadening of its own-initiative investigative powers, paying closer attention to the public policy cycle, qualitative management aspects in the public sector, and other aspects regarding good governance with a view to enhancing administrative legitimacy and strengthening the democratic system.

The *Defensoría*'s main task is the protection of human rights. However, the promotion of good administration also falls within its constitutional remit. In this regard, good administration is arguably also a supplementary criterion for assessing the administration. The connection between human rights and good administration as assessment criteria is reflected by the emphasis on the evaluation of the managerial aspects of policy implementation. In addition, the institution recognises that it is also involved in enhancing good governance, to the extent that it is a precondition for the realisation of fundamental rights and the quality of government actions. Thus, it is possible to conclude that, in a similar way to its Dutch, British and Spanish counterparts, the *Defensoría* is going through a hybridisation process with respect to its assessment criteria. As such, it can be concluded that human rights as a standard of control should be conceptualised from a broad perspective within the framework of this process.

The *Defensoría* evaluates the performance of public administration from a human rights perspective in close connection with protection of the rule of law. Therefore, the institution primarily carries out hard-law review based on the application of constitutional parameters and other legal norms, which it applies based on a broad conception of the rule of law and the principle of legality. Thus, the normative function developed by the *Defensoría* is characterised as being derived from "substantive review"[1971] in relation to the actions of public authorities based primarily on legally binding norms.

It is clear that the *Defensoría*, unlike its Spanish counterpart, also conducts soft-law review by applying and developing (non-legally binding) rules of good administrative conduct as assessment standards. However, soft-law review is not perceived as a direct or indirect normative function. According to the *Defensoría*, the institution performs the task of "influencing normative

[1971] See Section 3.6.

production" through its recommendations, reports or constitutional processes. In this way, it actively contributes to the creation of standards that guide the actions of public authorities. Nonetheless, the institution has not codified its own standards of assessment.

In conclusion, the *Defensoría* conducts norm-developing activity by applying either standards linked to the rule of law (principle of legality) or rules of good administrative conduct. In the former case, the *Defensoría* has a function in the interpretation of law. In the latter case, it implicitly contributes to the creation of soft law norms. In both cases, it contributes to developing and clarifying the scope of the principles of good governance.

As a result, the *Defensoría* and the Dutch, UK and Spanish ombudsmen share the same values and apply similar normative standards that encompass principles of good governance as new sources of legitimacy. In this way, the *Defensoría* contributes to developing a more flexible and effective legal framework aimed at positively steering government action, enhancing government legitimacy and strengthening the democratic system as a whole; it does so both by encouraging the respect of democratic values[1972] enshrined in modern constitutional sates and enhancing the quality of democracy[1973] through the proper functioning of the state apparatus.

In order to make this trend visible, this study proposes that the *Defensoría* formally adopt good administration as a supplementary assessment criteria, codify its own normative standards based on principles of good governance, and prepare guidelines on good administrative practices based on these principles in order to contribute in a more effective way to enhancing the legal quality of government.

[1972] Fernando Castañeda Portocarrero, "La Defensoría del Pueblo y su contribución a la democracia en el Perú", in *Derecho & Sociedad*, No 36, 2011, p. 296.

[1973] Iván Lanegra, "La Defensoría del Pueblo del Perú y la calidad de la democracia", in *Polita*i, Año 2, No 2, 2011, pp. 45–55. Regarding the quality aspects of democracy see Section 5.2.2.

PART V

FINDINGS, CONCLUSIONS AND RECOMMENDATIONS

Part V, the final part of this study, recaps the theoretical framework regarding the changing position of the ombudsman institution in relation to the subject matter of this research: the indirect normative function of the ombudsman from a good governance legal perspective. In addition, it presents the main findings, conclusions and recommendations, as well as proposing some explanations for these findings. In so doing, it answers the research questions.

CHAPTER 12
CONCLUSIONS AND RECOMMENDATIONS

This section summarises the object and the theoretical framework of the research. Then it presents the main findings (based on the collected data), from which the answers to the questions are drawn. Finally, it formulates conclusions and recommendations.

12.1. OBJECT OF THE RESEARCH AND OMBUDSMAN MODELS

The main purpose of this study is to determine the extent to which, through the performance of normative functions and the application of principles of good governance as assessment standards, the ombudsman institution can contribute to improving the legal quality of government while enhancing the legitimacy of the administration and the democratic system as a whole.

The study has been conducted from a comparative perspective, exploring the performance of the Dutch, UK, Spanish and Peruvian Ombudsmen. However, the main focus has been on the examination of the Peruvian Ombudsman, the *Defensoría del Pueblo*, and the situation of maladministration in Peru. In addition, the intention has not been to analyse the institution's contribution to developing the legal content of principles of good governance as such, but their application as normative standards. Hence, the concern has not so much been how the ombudsman applies and develops normative standards based on principles of good governance, as whether the ombudsman is applying these principles in practice, in accordance with the theoretical framework developed here.

In this regard, the primary focus of this study has centred on the steering function of the ombudsman with regard to the promotion of good administration rather than the (human rights-oriented) protective function of the institution. The aim is to demonstrate that the ombudsman's activities result in changed and improved public administration in modern constitutional states (results that are often underappreciated in the legal literature). The legal

approach to good governance can be a powerful tool to this end, and can also be applied to developed democracies with different legal traditions.

In analysing the legal-administrative aspects of good governance, public accountability is identified as one of the indicators of legitimacy. An effective democratic state relies on legislative, administrative, and judicial institutions, which are empowered to exercise a degree of direct control over how the other institutions exercise their functions. The notion of control is a constitutional concept, spanning and reconfiguring the whole structure and all the functions of the modern state and giving rise to new institutions that, to varying degrees, have been assigned controlling functions to complement traditional forms of accountability. In this context, the ombudsman can be considered as a modern mechanism of democratic accountability. It serves as an important element of good governance, enhancing the accountability of the government, and in so doing helps to improve the functioning of public administration.

The ombudsman is regarded not only as a mechanism for providing individual remedy, but also as one of bureaucratic quality control. As a legal concept, quality is connected with the notion of good governance.[1974] According to some authors modern administrative law is experiencing a shift from government to governance.[1975] This trend reflects new perspectives in administrative law, arising out of changes in society and administration. However, quality, as a legal concept of a procedural character, and its relationship with a broader perspective of legality, is underexplored.

Along these lines, governance from a perspective of administrative law is oriented towards the development of new and more flexible regulatory frameworks for steering the activities of the administration. These frameworks determine how the administration fulfils its functions and, particularly, the way public powers exercise discretion. In this regard, they regulate the administrative decision-making process, in which a greater number of nongovernmental actors are now involved than ever before. Hence, more transparent, participatory, and effective decision-making is encouraged.

The idea of proper exercise of powers and adequate decision-making by the administration is linked to recognition of public law as a tool for achieving quality in public administration, and in the way it is organised. The concept of good governance, and particularly the notion of good administration, emerged in connection with demands for quality in governmental activities.[1976]

1974 For the concept of legal quality see Section 2.1.2.
1975 Martin Shapiro, loc.cit., p. 369, *supra* note 54.
1976 See Section 1.2.1.

This study's hypothesis is that regardless of the specific legal contexts in which the different ombudsmen work, the institution is an evolving one that contributes to improving government quality. The mutual cohesion and hybridisation of the standards of control, and the subsequent hybridisation of ombudsman institutions per se, are what characterises this development. This hybridisation is driven by the development of good governance norms as assessment standards. In this regard, the standards applied by the institution of the ombudsman in general, and Peru's *Defensoría del Pueblo* in particular, regarding the performance of the administration, can be considered as standards based on the principles of good governance. In this manner, the ombudsman is contributing to the development of the legal content of the principles of good governance, which are founded in turn on the principles of democracy and the rule of law. Thus, the ombudsman is providing new elements to enhance the legitimacy of public administration and to strengthen the democratic system.[1977]

The contemporary ombudsman is the result of the hybridisation of the institution's different standards of control. Changes in society have made finding a pure standard of control impossible. The combination of the ombudsman's standards of control also results in a mixture of the standards of assessment. This hybridisation also has consequences for the institution's assessment orientation – understood in terms of redress and control-[1978], powers, and functions.

The literature has distinguished between different models of ombudsmen as well as proposing different classifications of the institution, all of them conceived as ideals. However, most of these classifications approach the ombudsman from a static and rigid perspective based, exclusively, on the standard of control, and do not sufficiently account for the hybridisation of the institution and its unique and innovative character in modern constitutional states.[1979]

A first classification distinguishes between classical and human rights ombudsmen. The classical ombudsman is intended to supervise the administrative conduct of the government, whereas the human rights ombudsman has been created specifically to protect human rights and to advance the process of democratisation. Nevertheless, as stated above, the classical ombudsman also has certain competences in the field of human rights.

A second classification discerns three different models: the basic or classical model; the rule of law model; and the human rights model. Under the classical model, the ombudsman is characterised by investigating instances

1977 See Section 2.2.1.
1978 See Section 3.4.1.
1979 See Section 3.5.1.

of maladministration, and protection of the rule of law and human rights may also be part of its role. In turn, under the rule of law model, the ombudsman has additional measures of control addressed at protecting the legality of the administration's behaviour in general, including compliance with human rights principles. The human rights ombudsman model assigns the institution with specific measures of control, aimed specifically at protecting human rights and fundamental freedoms.

A third classification, which takes into consideration the modern development of the ombudsman institution and its hybridisation process, identifies three groups: the first group of ombudsmen are those that mainly assess compliance with law; the second group is composed of those institutions that mainly assess compliance with a general (extra-legal) normative concept often described as good administration; and the third group denotes those ombudsmen that mainly assess compliance with human rights.

Thus, with the purpose to give a comprehensive description of the hybridisation process of the ombudsman from a dynamic perspective, this study proposed to (re)classify the ombudsman institution into three general types: the parliamentary ombudsman model; the quasi-judicial ombudsman model; and the mixed or dual ombudsman model. This classification is based on the institution's assessment orientation and the theoretical ombudsman models identified by Heede.

The purpose of the parliamentary ombudsman model is to assist parliament. It has a restricted functional autonomy and forms part of parliamentary control. The ombudsman starts an inquiry only at the request of parliament, which precludes both own-initiative inquiries and direct citizen access. The parliamentary ombudsman is control oriented, with a mandate restricted to the supervision of the executive and focused on general measures. This institution mainly conducts non-legality review following the criteria of good administration. It seeks to supervise the functioning of the administration, allowing it to hold the executive to account for its behaviour with respect to the citizens. In assessing the administration, compliance with law can be also taken into consideration. All European ombudsmen relate to parliament in one way or another. This model is linked to the classical Scandinavian ombudsman from which all modern institutions have evolved. The UK Parliamentary Ombudsman is one such example.

The quasi-judicial ombudsman model is redress oriented. It is intended to provide relief to citizens affected by administrative actions, with the aim of ensuring that public officials fulfil their duties. To this end, the quasi-judicial ombudsman can promote compliance with non-legally enforceable rules by the

administrative authorities. Thus, as part of its role, it can create and enforce non-legally binding principles of good administrative conduct to correct instances of maladministration. As such, the quasi-judicial ombudsman performs soft-law review by operating in areas outside the competence of the judiciary. However, when addressing complaints lodged by citizens, it can also evaluate the way in which public authorities interpret and apply legal norms in individual cases. Although created exclusively to conduct non-legality review, the Dutch Ombudsman can be cited as an example of the quasi-judicial ombudsman model.

Finally, the mixed or dual ombudsman model was created to address general distrust of the state on the part of citizens, thereby enhancing the legitimacy of government. Consequently, the mixed ombudsman is control oriented. It is deeply connected to the concepts of democracy, citizenship, and the protection of fundamental rights. Indeed, the protection of the fundamental rights of citizens is the ombudsman's chief task under this model, and its main standard of control. In this regard, the institution mainly performs legality review. As a mechanism of control, the mandate of the mixed ombudsman may include monitoring the administrative activities of traditional supervisory authorities (the judiciary and the parliament). In a functional sense, its mandate will focus on general acts, although it may also include individual acts. Both the Spanish and Peruvian ombudsmen (like most ombudsmen in Latin America) are based on this model.[1980]

This classification aims to facilitate the assessment of the role of the ombudsman in promoting good governance through its contribution to developing legal standards. The combination of the standards of control in terms of redress and control has serious implications for the normative function of the ombudsman and the development of standards of assessment, and consequently for the institution's contribution to good governance, the rule of law and democracy.

In common with other classifications, it is important to note that these are theoretical constructions, which in practice are unlikely to be found in their pure states. There is no a sharp division between control and redress ombudsmen, only that some ombudsmen are more oriented towards control, and others more to providing redress. But most ombudsmen combine elements of both functions. Every system that creates an ombudsman has to decide which assessment orientation (control or redress) should predominate, and accordingly, the main powers and functions that will be assigned.

[1980] See Section 3.5.2 & Table 1.

12.2. MAIN FINDINGS

This section presents the main findings of this study, allowing the two research questions to be answered. Two such questions have been formulated as follow: one focusing on the ombudsman institution on a comparative level, in terms of the performance of normative functions, to determine the extent to which ombudsmen apply normative standards based on the principles of good governance; and the other related to the Peruvian case, in terms of the application of principles of good governance in the context of the role of the *Defensoría del Pueblo* as a developer of legal norms, and how these principles can be further developed to promote good governance effectively and improve administrative legal quality and legitimacy in Peru.

To answer these questions, some sub-questions are formulated. The answers to these sub-questions consist of the main findings presented here. In turn, the answers to the two research questions are presented in the next section as part of the general conclusions.

Main findings linked to the first research question

The first research question is:

Does the ombudsman institution, despite the different legal contexts in which it operates, apply similar standards of assessment that can be regarded as standards based on principles of good governance?

To answer this question, the following sub-questions are posed, and their answers are linked to the main findings.

What effect does the hybridisation of the ombudsman have on the normative standards, assessment orientation, powers, and functions of the institution?

The contemporary ombudsman is the result of the hybridisation process characterised by a combination of different ombudsman's standards of control, in addition to the combination of assessment standards within each of the existing ombudsman models. This process also affects the institution's powers and functions. In addition, it has consequences for the institution's assessment orientation.

The ombudsman is vested with three characteristic types of powers: investigation, recommendation and reporting. It is due to these powers and their interrelation with one another that the ombudsman differs most distinctively

from all other state institutions. The institution is assigned broad powers of investigation. It can initiate an investigation on the basis of a complaint lodged by a citizen, or on its own initiative. In the case of the latter, it can both start investigations into matters where no complaints have been received, and broaden the inquiry into a complaint where necessary. The ombudsman is vested with the authority to give recommendations, which have a non-legally binding character. After an objective investigation, the ombudsman's recommendation may include suggested amendments to government policy or practice, and even legislation. As to the reporting authority assigned to the ombudsman, three types of reports can be discerned: the annual report, the special or general investigation report, and the case report. In the context of the institution's hybridisation process, the special reports merit special attention. Such reports allow the ombudsman to point out exceptionally serious cases of misconduct in the administration, and thus to raise public awareness.[1981] They contain general recommendations aimed at improving the quality of the government by proposing changes in institutional practices, procedures or regulations.

In addition, as part of its role in assessing government action, the ombudsman is assigned three main functions: a protective function, a preventive function, and a normative function. The protective function aims to safeguard citizens' rights and interests. This function is exercised by handling complaints with a view to securing the redress of grievances. As such, the ombudsman offers additional protection to that provided by the courts. While the courts assess administrative action on the basis of the law, the ombudsman usually applies broader standards than the law in a strict sense. In this regard, the institution can be considered a (complementary) part of the administrative system of justice.

In turn, the preventive function is oriented to influencing the policy level in order to improve the quality of government and public service delivery. The function is performed through own-initiative investigations or the preparation of special reports, which allow the ombudsman to focus on general problems and to recommend changes in the administration. It is performed when the ombudsman recommends legislative or regulatory reforms, or changes to institutional practices. In these cases, the institution plays the "role of reformer".[1982] As a result of the hybridisation process, the protective and preventive functions are mixed and can be found in almost all ombudsman institutions.

The hybridisation of the standard of control, together with the hybridisation of assessment standards, reflects the fact that in most cases, the existing models

1981 See Section 3.2.2.
1982 See Section 3.3.2.

of ombudsman share (and protect) similar values. The standard of control of the ombudsman institution is formulated in various ways. Some scholars have broken down these formulations into three categories: legality, principles of good administration and human rights. This categorisation, in the view of this study, tends to include the standard of control in the assessment standards based on a static and rigid perspective of the ombudsman's role. As such, it is unusual to find a pure standard of control for the ombudsman, or a particular institution that only deals with the law, good administration, or human rights.

To emphasise the principle of legality as the ombudsman's standard of control would imply that the institution only employs legally binding rules (constitutional provisions, legislation, regulations, general written and unwritten principles of law, and ratified international treaties) for the control of the administration. With regard to good administration as a standard of control, it is true, as mentioned above, that for part of the doctrine, this is related to evaluating the conduct of public authorities only against non-legally binding rules by way of soft-law review. Nevertheless – and again, as noted – the principle of good administration embraces both legally binding and non-legally binding principles. Hence, the ombudsman may apply both legal rules and soft law as part of the standard of good administration. This is also true in relation to the application of human rights as a standard of control.

For this study, it is more pertinent to formulate the ombudsman's standard of control based not on the instruments (or assessment standards) applied to the institution (legal principles/non-binding rules), but on the institutional approach implemented to assess the actions of the government. Therefore, the ombudsman's standards of control can be sorted into just two general categories: good administration and human rights. Both are comprised of legal principles and non-legally binding rules of good administrative conduct associated with a broader notion of the rule of law. Frequently, as a result of the hybridisation of the institution, these formulations are applied in an accumulative way. Therefore, as standards of control, good administration and human rights can be viewed as two sides of the same coin. They are both required to enhance the legitimacy of the government. Their application produces similar outcomes. In addition, it is possible to argue that the hybridisation of the ombudsman is leading to an emphasis on the control-oriented performance of functions (or at least to ones that go beyond the functions of citizen redress and protection) insofar as there is a major emphasis on the acceptability of government conduct in the eyes of citizens, for which it is important to develop standards and rules for the proper behaviour of the administration for prevention.[1983]

[1983] See Section 3.4.2.

There is a link between the preventive function and the need to develop structured criteria and apply objective standards for the exercise of discretion by public officials, in order to prevent maladministration. Accordingly, the third main function attributed to the ombudsman institution, and which deserves special attention, is the function concerning the development of legal norms. This function stems from the ombudsman's power to conduct investigations in connection with its ability to submit special reports.

Arguably, the emphasis on control-oriented performance that has resulted from hybridisation also reflects a focus on the need to develop standards to assess the activities of the government at the policy level, for both correction and prevention. Thus, the hybridisation of the ombudsman institution in terms of the normative function is driven by a more active role in the development of standards of assessment, which can be considered as standards based on the principles of good governance.

Can the normative standards applied by the ombudsman be classed as legal norms?

Yes, the normative standards applied by the ombudsman institution can be classed as legal norms of a soft-law nature.

In order to assess the conduct of public authorities, the ombudsman both develops and applies standards of review. The institution assesses the behaviour of the government against either legally binding or non-legally binding standards. When it applies legally binding standards to this end, it is conducting hard-law review, which implies that it is fundamentally interpreting law. In this way, the institution contributes to the development of legal principles. In this case, it can be said that the ombudsman applies similar criteria to the judiciary.

Arguably, the emphasis on control-oriented performance that has resulted from hybridisation also reflects a focus on the need to develop standards to assess the activities of the government at the policy level, for both correction and prevention. Thus, the hybridisation of the ombudsman institution in terms of the normative function is driven by a more active role in the development of standards of assessment, which can be considered as standards based on the principles of good governance.

Soft-law review is a characteristic of almost all European ombudsman systems, although the nature and use of this kind of review often differs. From a comparative perspective, soft law norms or "rules of good administrative conduct" have been developed particularly by those ombudsman institutions

that apply good administration – or its counterpoint, maladministration – as their standard of control. These rules of conduct are part of the standard of good administration, together with legal rules and general principles of law. Soft-law review can coexist with hard-law review, even within the same decision. Soft-law review, through rules of good administrative conduct, can be applied for the improvement of good administrative practices and procedures, and for a better application of existing legal rules. It can also be seen as the basis through which fundamental principles of law can be developed. As such, soft law-review can be considered as a gap-filling function, especially in countries that do not have a tradition of an administrative court system.

As mentioned, the ombudsman's decisions, recommendations and, especially, its standards of assessment have a non-binding character. However, bindingness does not define the character of the law but its legal effect. Thus, legal effect may come about not only through a legal instrument or act in itself (legally binding force), but also by way of the operation of other legal mechanisms, particularly general principles of law and interpretation (indirect legal effects). This is the case of ombudsmen that perform hard-law review based on legal parameters, as well as those that develop their own normative standards. As pointed out above, the rules of good administrative conduct created by the ombudsman as standards of assessment define obligations based on legal binding principles. The legal effect of these obligations is evident through the operation of rules of good administrative conduct.[1984]

Therefore, the normative standards that the ombudsman applies and develops in assessing government action can be classed as legal norms of a soft-law nature, derived from the (indirect) legal effect of the obligations they enshrine, either as a result of the application of legal parameters or rules of administrative conduct.[1985] In this regard, the ombudsman contributes to developing the legal character of principles of good governance.

What is the relationship between the legal dimension of good governance and constitutional principles?

This study concludes that from a legal perspective, good governance can be considered as a general principle that embraces a set of other principles operating at the constitutional level. From this perspective, good governance is related to the rule of law and democracy, but has evolved as an independent principle of constitutional law.

1984 See Section 3.6.4.

1985 For the definition of legal effect see Section 2.1.2.

The legal dimension of good governance is rooted in the term "governance". The legal meaning of governance embraces the mainstream definition provided by the social sciences, which refers to regulatory structures for steering processes. In turn, the legal dimension of governance concerns regulatory mechanisms for steering the decision-making process and policy implementation. As such, as far as the performance of public functions are concerned, the legal dimension of governance refers to the process of developing the regulatory frameworks within which the government fulfils its tasks – in other words, those which determine how the government exercises its powers. Thus, governance mechanisms are understood as new regulatory tools for steering the performance of public functions.[1986]

The impact of governance trends can be appreciated in different fields of law, especially administrative law, in which there is an ongoing debate about the reform of some of its basic institutions and the shifts from traditional legal regulatory tools towards new (governance) ones. This is a consequence of the impact of public sector modernisation, the constitutionalisation of the legal system, and the internationalisation of administrative relations at the global and regional level.

The trends described above constitute a call for the incorporation of governance trends into law, leading to a need for more flexible and comprehensive methods of regulation. In this regard, the legal approach to good governance can be considered to be operating within a legal framework by using regulatory instruments provided by the law (principles, rules, procedures and practices), with the aim of accomplishing normatively desired effects and avoiding non-desired effects. This approach also aims to steer the administration to achieve the highest possible standard of efficiency. Therefore, the legal perspective of good governance can be conceptualised as a steering mechanism implemented in order to improve the legitimacy of the government, as well as the political system as a whole. As a regulatory tool of government action, the principles governing good governance can be established at the constitutional level. Thus, good governance better reflects the normative dimension of governance from a legal perspective.

From this perspective, three different but interconnected definitions of good governance can be discerned. First, the substantive definition provides an analytical concept of good governance, considering it a process related to rules for steering government action in a desired direction. Second, the prescriptive definition considers good governance as a meta-concept or a fundamental value. As a value it is considered prima facie as the best. Understood as such, good governance can

[1986] See Section 4.2.3.

be considered as a goal in itself. In the realm of legal norms, good governance as a fundamental value can be concretised as a general constitutional principle. Third, the operational definition regards good governance as a general principle that embraces a set of other principles operating at the constitutional level, and whose effects extend across the entire government and to all regulatory levels.[1987]

The general principle of good governance sets forth a state of affairs that respects the principles of properness, transparency, participation, accountability, and effectiveness. Hence, the deontological dimension of the general principle of good governance is determined by the specific principles that embrace it. Good governance is defined by the interaction of its constituent principles, each of which must be balanced with one other. This will be realised provided that these principles can each be accomplished to the highest possible degree. The validity and legitimacy of the general principle of good governance and the specific principles thereof hinge on the constitutional framework in which they operate (and from whose provisions they are derived).

According to some authors, the combination of classic rule of law and the democratic principle, the democratic rule of law, is the main source of the good governance legal perspective.[1988] To the extent that good governance is related to the way in which public powers are exercised, it is fundamentally intertwined with administrative legitimacy.[1989] This is achieved through the application of the principles of good governance as constitutional principles for conducting administrative functions. It is in the realm of the administration that the principles of good governance have been further developed. Administrative legitimacy based on the good governance approach is founded not only on respect for the principles of rule of law and democracy, but also on demands for quality in the performance of administrative actions. Thus, good governance is aimed at improving the institutional framework through commitment to the principles of properness, transparency, participation, accountability, and effectiveness for the suitable operation of the state apparatus. The principle of good governance therefore contributes to providing institutional responses to the legitimacy deficit in order to strengthen the political system as a whole.[1990]

What is the legal content and scope of the principles of good governance?

As legal principles located at the constitutional level, the scope of the general principle of good governance and its constituent elements, the specific principles

1987 See Section 4.3.
1988 G.H Addink, "Principles of good governance: Lessons from administrative law", p. 36.
1989 For the definition of administrative legitimacy see Section 2.1.2.
1990 See Section 5.2.3.

of good governance, cover all public powers and all regulatory levels. Their legal content is defined by their evolving status, based on existing legal values enshrined in modern constitutional states.

The general principle of good governance is rooted in both the rule of law and democracy. However, as Addink points out, it has developed into a full-fledged cornerstone of the modern constitutional state, with its own core dimension, alongside the rule of law and democracy. There is an intrinsic connection between these three fundamental pillars insofar as their emergence is linked to the development of the modern state. Indeed, even though they arose at different moments in history, they have developed in mutually influential ways. Therefore, each cornerstone is primarily connected with a particular rationale, or dimension: the rule of law is connected with the protecting dimension; democracy is linked to the participatory dimension; and good governance to the steering dimension. This reflects how different rationales co-exist in the modern constitutional state.

The general principle of good governance relates to the way in which power is exercised, and approaches power from a dynamic perspective. Its concern is not primarily with the ultimate decision to be adopted but with how decisions are made. This indicates that the principle of good governance is process-oriented in nature, but also concerned with the final decision as an outcome.

As a general constitutional principle, good governance is applied to all public bodies, as well as to private bodies that perform public tasks. This general principle emphasises the steering approach of law as a means of positively guiding the conduct of public powers. In addition, it allows the application of more flexible and comprehensive methods of regulation, such as soft-law instruments (policy rules, guidelines, and recommendations, among others), to achieve desired effects. This involves a concern for quality in the performance of the government.

As a general constitutional principle, good governance takes the form of a constitutional duty by acting as a norm for the government rather than a right for citizens. The general principle of good governance encompasses a set of specific principles whose constitutional status has been recognised (either implicitly or explicitly) in most modern states governed by the democratic rule of law. These principles stand as the constitutive elements of good governance and define its core content. In this regard, the general principle of good governance imposes the constitutional duty of proper and accountable exercise of the government's powers, while providing transparent and participatory institutional frameworks for the effective functioning of the entire state apparatus, in order to ensure the equal development of citizens and the realisation of the general interest. As a

fundamental principle, the effects of good governance extend across all public powers and all regulatory levels.

The specific principles of good governance are properness, transparency, participation, accountability, and effectiveness. As constitutional principles, they inform the performance of the entire government. The relationship between the specific principles of good governance and the three cornerstones of the modern constitutional state is established by the elements of the specific principles of good governance. Some elements of these principles are linked to the rule of law, while others are related to the principle of democracy or good governance.[1991] In many cases they overlap.

Properness is connected to a broader conception of the rule of law, which implies that the proper functioning of public powers requires that they be subject to the principle of legality, which comprises constitutional provisions (rules, principles and values) for orienting the activities of the government. It also implies a concern for quality in the performance of administrative authorities, which goes beyond simply limiting discretion. Thus, properness is expanding the scope of administrative principles. It is concerned with the principles of legal certainty, prohibition of arbitrariness, misuse of power, proportionality, and legitimate expectations. However, properness has also developed in relation to the democratic principle through equality. In this regard, the principle of equality not only prevents arbitrary distinctions, but is also an important criterion in policy implementation. But properness goes beyond legality and democracy, relating also to the steering dimension of good governance in terms of guiding the performance of public officials in connection with the principle of due care or due diligence. The principle of properness implies the duty for public authorities to exercise their powers in accordance with separation of powers, the rule of law, and the democratic principle. In this regard, authorities act in accordance with the principle of legality, as well as constitutional principles and values, to serve the public interest in an objective way, guarantee respect for citizens' rights, and promote integrity in public services. Properness can be defined as the constitutional dimension, or the constitutionalisation of the principle of legality.[1992]

Transparency is essential for the sound functioning of a democratic state and its institutions, and is directly related to citizens and their opportunities to be well informed and to influence the government. It covers a variety of elements, the most developed of which is access to information. Although mainly related to the principle of democracy, the scope of transparency has spread through the

1991 See Table 2.
1992 See Section 6.2.1.

development of elements traditionally linked to the principle of legality. Thus, it might be affirmed that legality, which is directly connected to properness through the rule of law dimension, also has an extra function in the development of transparency as a good governance principle. Thus, transparency, in the form of clear drafting, is related to legal certainty and as such it also functions as a mechanism to prevent arbitrary behaviour. With respect to clarity of procedures, transparency has been related to procedural standards, proportionality, and legal certainty. It has also been applied through publication and notification of decisions. Therefore, transparency can be framed as a principle that establishes the state's duty to organise its administrative systems and procedures openly, informing actively on its processes, rules, and decisions while providing timely, accurate, complete, and up-to-date information when required by citizens. This implies that authorities and state officials carry out their actions in a clear manner, without opacity and secrecy so that citizens can anticipate, learn about, and understand the decision-making process and the actions that state authorities perform. By reducing information asymmetry, transparency promotes predictability, contributes to legal certainty, and balances the relationship between the state and citizens.[1993]

Participation, though linked to the principle of democracy, has spread from the political arena to different areas and activities of the administration in order to strengthen the legitimacy of the decision-making process and policy implementation. Two main categories of participation can be identified: political participation and administrative participation. The former can be classified among the classical political rights recognised in most modern constitutions and international treaties, and direct democracy mechanisms. On the other hand, administrative participation can be performed in different spheres, in which different forms of participation can be distinguished. Of these forms of participation, the most prolific in recent times has been the cooperative and procedural forms, the latter relating to regulatory decision-making structures. In the steering approach, participation aims to direct and rationalise the exercise of discretionary powers by the administration, especially in rule-making, in order to achieve more effective administration. As such, decision-making, policy-making and policy implementation are increasingly interconnected. Some forms or elements of administrative procedural participation are the right to be heard (participation in decision-making for individual decisions, traditionally linked to the rule of law principle); consultation (participation in rule-making or regulatory participation); and community-level participation (participation in policy making and policy implementation). The principle of participation entails the duty for public authorities to ensure citizens the right to participate, whether individually or collectively, in the political, economic, social, and cultural life

[1993] See Section 6.2.2.

of the community. Furthermore, it promotes and guarantees the conditions for citizens to take part in decision-making processes as well as in the public policy and management cycle, encouraging cooperation with citizens in the delivery of goods and services.[1994]

Accountability, by relating the principle of separation of powers and the constitutional notion of control, connects to the rule of law. As a result of the separation of powers, mechanisms of accountability are established in order to prevent each branch of the state from exceeding the powers conferred, under the rule of law, in the exercise of their functions. The principle has evolved based on the idea that the exercise of power, in order to be legitimate, must be based on the possibility of its justification to citizens. Thus, control mechanisms are essential for democracy as well as ensuring the quality and the effectiveness of public administration. As a good governance principle, accountability creates the duty for public authorities to justify their actions and decisions to citizens. It also implies the state's obligation to organise and structure mechanisms for assessing, monitoring and controlling the performance of public bodies and policies.[1995]

From a classical perspective, effectiveness – understood as the enforcement of the law – also relates to the rule of law. However, it has broadened its scope beyond law enforcement and is concerned with the performance of public administration in terms of procedural and organisational aspects as well as policy implementation in order to obtain a particular result. The principle of effectiveness has evolved as a consequence of the requirements of the social *rechtsstaat*. It enshrines the duty of the public authorities to effectively promote the conditions for the realisation of the freedom and equality of the individual to, as well as the removal of obstacles to this realisation. The emergence of the social *rechtsstaat* implies the recognition of social rights, and the duty for the state to implement actions in order to achieve this end. It implies that state intervention must be effective in order to ensure the availability and quality of the basic goods and services demanded as part of social rights. Consequently, effectiveness becomes operational at the administrative level. Thus, the principle of effectiveness is the instrumental dimension of the social and democratic rule of law. As a principle of good governance, effectiveness gives rise to the duty for public officials and agencies to direct their actions towards achieving public goals in a proportional, objective, and reasonable manner based on the responsible and optimal management of public resources, in order to meet the requirements that stem from the social and democratic rule of law. This also entails the obligation to ensure compliance with the provisions and mandates of

1994 See Section 6.2.3.
1995 See Section 6.3.1.

the law, as well as to steer government actions towards guaranteeing the quality of public service delivery and organising public procedures and management systems to achieve results that benefit citizens.[1996]

What is the relationship between the normative standards developed and applied by different models of ombudsman and principles of good governance?

The normative standards developed and applied by the three models of ombudsman proposed in this study reflect principles of good governance, despite the different legal traditions in which they operate.

These three models are primarily exemplified by the three analysed national ombudsman institutions operating in the European context: the Dutch Ombudsman corresponds to the quasi-judicial ombudsman model; the UK Ombudsman to the parliamentary ombudsman model; and, the Spanish Ombudsman to the mixed or dual ombudsman model. Formally speaking, their legal mandate, nature and scope of control differ. They also apply different standards of control for assessing government actions.[1997]

In practice, the three ombudsman institutions are involved in both the promotion of good administration and the protection of fundamental rights. Consequently, their assessment criteria is undergoing a process of hybridisation. Hence, similar categories can be applied in accordance with the scope of the ombudsman's control. In the three cases, it can be affirmed that the different ombudsmen apply two categories of specific standards: standards linked to the rule of law (principle of legality) and rules of good administrative conduct.

The Dutch Ombudsman and the UK Ombudsman have developed their own normative standards and conduct soft-law review. On the other hand, the Spanish Ombudsman has not created its own normative standards and conducts hard-law review of the administration's performance, as well as recommending standards to comply with human rights and broaden the scope of the legal principles developed by the courts. These normative standards can be deduced from the reports and cases. Therefore, the institution is undergoing hybridisation in terms of both its standard of control and its specific assessment standards.

The Dutch Ombudsman

The principle of propriety or proper conduct constitutes the normative concept of the Dutch Ombudsman, as well as the distinctive hallmark of this system. It is

1996 See Section 6.3.2.
1997 See Table 9.

applied as the standard of control.[1998] The Dutch Ombudsman is only allowed to assess the manner in which administrative authorities carry out public tasks. In this sense, as a rule, the cases examined by the Dutch Ombudsman only concern government actions that do not take the form of legal (administrative) decisions, since legal decisions are under the competence of administrative courts.[1999]

The principle of propriety is composed of a series of normative standards developed by the institution as part of its normative function. These standards are enshrined in a *list of norms of proper conduct* created by the Ombudsman, the *Behoorlijkheidswijzer*. In this regard, the Dutch Ombudsman conducts soft law review to assess the administration through the application of non-legally binding standards. However, the meaning of propriety as far as this institution is concerned is derived from general administrative law principles, and secondarily from a number of good practice requirements. As such, it is possible to affirm that the assessment criteria of propriety considers both the lawfulness of administrative action and the application of rules of good administrative conduct. The second category may be defined as propriety *stricto sensu*.[2000] In this sense, the standards of proper conduct are intended to help administrative authorities deal with citizens and their interests, thus ensuring proper administration. Therefore, proper conduct can be perceived as a Dutch version of good administration.

It should be noted that the decisions of the Dutch Ombudsman can take two forms: whether the behaviour investigated was proper or improper.[2001] In order to make a decision, the institution assesses government action against both lawfulness and proper conduct. Hence, as part of its normative function, it is possible to affirm that the Dutch Ombudsman also interprets the law. This idea is reinforced by the fact that its interpretation of what constitutes "proper" is based not only on notions recognised as (legal) principles of good administration but also on human rights.[2002] In this way, the Dutch Ombudsman plays a complementary role in the protection of human rights. For this study, this reflects the hybridisation of the modern ombudsman, leading in practice to an extensive application of the standards of proper conduct.

As developed, the norms of proper conduct reflect good governance principles. They are mainly connected with the principles of properness, transparency and effectiveness. Even though many of the specific standards related to properness are linked to legal norms derived from the rule of law principle, most of them

1998 See Section 7.3.2.
1999 See Section 7.2.1.
2000 See Section 7.3.2 & Chart 5.
2001 See Section 7.4.2. & Chart 6.
2002 See Section 7.5.1.

have been created in connection with the good governance (steering) dimension of the modern constitutional state. In this regard, the *Behoorlijkheidswijzer* illustrates the Dutch ombudsman's application of principles of good governance.[2003] Arguably, it also shows how, in practice, the hybridisation of the institution's assessment orientation is reflected in the performance of its normative functions, in terms of the development of standards of proper conduct aimed at securing individual redress and providing guidelines to steer administrative behaviour with a preventing purpose, while achieving greater influence over structural problems.

The UK Ombudsman

Maladministration is a central focus of the ombudsman system in the UK. The notion of maladministration is connected with the principle of a strict separation of powers between the English courts, which decide on the legality of administrative action, and the Ombudsman, which decides whether there is maladministration in administrative action. Even though the UK Ombudsman does not have a say on issues of lawfulness maladministration, its decisions may include behaviour that is not in accordance with the law as well as behaviour by administrative bodies that is directly connected to their administrative (legal) functions.[2004]

As part of its positive approach to maladministration, the UK Ombudsman has codified its assessment standards by way of the so-called List of Principles of Good Administration. This normative-codifying function marks out a very distinctive role for the institution: the UK Ombudsman assesses the administration by conducting soft law review through the development and application of (non-legally binding) rules of good administrative conduct encompassed in the List of Principles of Good Administration.[2005] However, since its decisions may cover behaviour that is not in accordance with the law, and may even recommend changes in legislation if existing provisions cause subsequent acts of maladministration[2006], it can be argued that, to a certain extent, the UK Ombudsman also interprets (and applies) law when assessing the administration.

The standards codified by the UK Ombudsman can be divided into two categories: standards connected to legal principles and the notion of rule of law; and rules of good administrative conduct. In the case of the first category,

2003 See Section 7.5.1, Table 3 & Table 4.
2004 See Section 8.3.2.
2005 See Section 8.2.2.
2006 See Section 8.3.1.

which is manifestly connected with the rule of law, it should be borne in mind that the UK Ombudsman applies these standards in a different manner than the British courts, to the extent that good administration goes further than legal standards alone and that legality is not part of the institution's immediate approach. In relation to the second group, the standards are managerial in character and relate to the good governance (steering) dimension of the modern constitutional state. Therefore, it is possible to assert that the List of Principles of Good Administration contains specific principles of good governance-based standards reflecting properness, transparency, accountability, and effectiveness.[2007]

It can be argued that the UK Ombudsman's Principles of Good Administration are a demonstration of the application of principles of good governance in the UK legal system. In turn, it is possible to assert that as a mechanism of administrative justice, the UK Ombudsman not only provides individual redress but also promotes general standards and principles with a view to influencing the functioning of the administration with a preventing purpose. Thus, the UK Ombudsman is still evolving, and is characterised by a pronounced emphasis on control-oriented performance, reflected in its normative function and its role as a standard-setting institution promoting good administration.

The Spanish Ombudsman

As part of its protective function, the institution conducts hard-law review based on constitutional parameters (rules, principles and the values enshrined in the constitution), which prevail over other legal norms. The Spanish Ombudsman's standard of control is human rights. However, as a standard of control, the institution conceptualises human rights a broad perspective, covering the protection of rights (civil, political, economic, social and cultural rights) as well as constitutional principles and mandates enshrined in the constitution. The Spanish Ombudsman can also propose a broader scope for the core of existing rights, to the extent that it is entitled to interpret law in the performance of its functions. This interpretation contributes to the consideration of the Spanish Ombudsman as a developer of legal standards beyond written law.

Based on the legal provisions established by its Organic Act, the institution also performs, in practice, controlling activity in relation to the behaviour of the administration, bringing it closer to control of maladministration. As such, it is possible to state that the investigations of the Spanish Ombudsman are also aimed at guaranteeing the legal quality of the administration, shaping the preventing function of the institution. Therefore, good administration may

[2007] See Section 8.5.1, Table 6 & Table 7.

arguably be considered a supplementary criterion for assessing administrative behaviour.[2008] Indeed the Spanish Ombudsman can be said to perform a twofold function: the protection of human rights and the promotion of good administration.

The Spanish Ombudsman is undergoing a process of hybridisation with regard to its assessment orientation and its standards of assessment. This evolving process means that its standards of assessment include both human rights and good governance-based norms, especially those regarding the application of non-legally binding standards.[2009] In this sense, it may be argued that the Spanish Ombudsman assesses the administration not only (although mainly) based on legally binding norms, but also on non-legally binding standards (or rules of good administrative conduct), aimed at ensuring the proper functioning of administrative services. The emergence of non-legally binding standards through soft-law review can be explained by the protection of economic and social rights, which are immediately related with the quality of the administration's performance and its effectiveness in providing services.[2010] These standards mostly reflect principles of good governance such as properness, effectiveness, transparency and participation. The connection between human rights and good governance can be exemplified by certain standards that can be deduced from the Ombudsman's reports, decisions, and recommendations.

In sum, it is possible to affirm that the three ombudsman institutions perform a legal source function, conducting norm-developing activity by applying either standards that reflect legal principles or rules of good administrative conduct. In the former case, the ombudsmen in practice have a function in the interpretation of law, even if they are not necessarily allowed to pronounce against the legal content of the decision, as in the case of the Dutch and UK ombudsmen. In the latter case, the ombudsman institution is contributing, explicitly or implicitly, to the creation of soft law norms. In both cases, they are also contributing to the development and clarification of the scope of the principles of good governance.

As a result, it may be concluded that the Dutch, UK and Spanish ombudsmen share the same values and apply similar normative standards encompassing principles of good governance. These standards of assessment have been adapted to the evolution of the constitutional state, leading to the development of principles of good governance as new sources of legitimacy.

2008 See Section 9.3.2.
2009 See Section 9.5.1 & Table 8.
2010 See Section 9.2.2.

Main findings linked to the second research question

The second question is:

Does the Peruvian Defensoría del Pueblo apply principles of good governance as standards of assessment, and if so, how can these be further developed?

To answer this question, the following sub-questions are addressed, and their answers linked to the main findings:

Does the hard-law review performed by the Defensoría del Pueblo include as assessment standards the application of legal principles of good governance?

The *Defensoría del Pueblo* assesses the actions of the government by conducting hard-law review based on legal norms that include legal principles of good governance.

The *Defensoría*'s standard of control is human rights. This standard is very broad, covering fundamental rights as well as each of the rights enshrined in the Constitution.[2011] Consequently, it performs hard-law review in close connection to the protection of the rule of law. With this purpose, the *Defensoría* operates with reference not only to statutory law and secondary legislation, but also constitutional parameters. Thus, it is possible to affirm that the *Defensoría* conducts a normative function, mainly through the interpretation (and application) of legally binding norms, which include constitutional provisions and (either explicit or implicit) principles, legislation, regulations, general principles of law (written and unwritten, including human rights principles), and international instruments.[2012]

It is important to note that although the basis of the *Defensoría*'s role is the protection of human rights, the institution has shown itself to be more concerned with the implementation of public policies and the operational aspects of the administration, which are closely connected to good governance. In these cases, the focus is on the functioning of the state apparatus regardless of whether or not a citizen's right is infringed.[2013] The shift in the *Defensoría*'s focus also reflects a hybridisation process in relation to its assessment orientation. As far as the *Defensoría* is concerned, good governance is an indispensable instrument in protecting human rights, as part of the criteria guiding the state's administrative actions. In this regard, by placing a strong

2011 See Section 10.3.2.
2012 Section 10.2.2.
2013 See Section 10.3.2.

emphasis on its preventing function, the *Defensoría* has embraced its position as a control-oriented institution.[2014]

For this study, human rights as the *Defensoría*'s standard of control should be conceptualised from a broad perspective. This idea is based on the Peruvian Constitution itself, which establishes that assessing the behaviour of the administration (and public services) also falls within its remit. Accordingly, the *Defensoría*'s standard of control is expanded by its Organic Act, which stipulates that the existence of a threat or the breach of a citizen's fundamental right must be the consequence of "illegitimate, irregular, unlawful, neglectful, abusive or improper" conduct by the administration. Thus, it would appear that good administration is also a supplementary criterion for the assessment of the administration. As such, the *Defensoría* arguably has a dual constitutional mandate: the protection of human rights and the promotion of good administration.[2015]

The *Defensoría*, in its anti-corruption role, also makes the relationship between human rights and good governance self-evident. As anticorruption strategies are within the framework of good governance, anticorruption policies and human rights protection share the same principles: participation, accountability and transparency. This is also true of the *Defensoría*'s interventions for the effective management of regional and local governments, or mediation in social conflicts.

Within the Peruvian legal framework, principles of good governance have been developed, of varied content and scope, in several legal statutes. In addition, it can be argued that the general principle of good governance and the specific principles of good governance are enshrined (whether explicitly or implicitly) as constitutional principles in the Peruvian Constitution.[2016] Therefore, as far as the *Defensoría*'s hard review is concerned, it is possible to affirm that the institution applies legal principles of good governance as assessment standards.

Does the Defensoría develop assessment standards that can be regarded as standards based on principles of good governance?

The *Defensoría del Pueblo* also assesses the actions of the government by conducting soft-law review based on non-legally binding rules of good administrative conduct, which can be regarded as good governance based-standards.

From this study's perspective, in addition to hard-law review, the *Defensoría* also performs soft-law review by applying non-legally binding norms as

2014 See Section 10.3.1.
2015 See Section 10.3.2.
2016 See Section 11.1.1.

assessment standards. It does so through the promotion of good administrative practices and the development of "rules of good administrative conduct".[2017] The emergence, through soft-law review, of (non-legally binding) rules of good administrative conduct began to be more clearly observed after the institution started expanding its focus to include the protection not only of classic civil and political rights, but also of economic and social rights. This is to the extent that the realisation of these rights imposes obligations on the state linked to the implementation of public policies and management. Therefore, the *Defensoría* has become more active in the development of implicit rules of good administrative conduct by addressing structural problems related to qualitative aspects of the implementation of public policies, with the aim of both protecting human rights and preventing such problems through institutional reform.[2018] Similarly, the *Defensoría* has started becoming more involved in assessing ethical conduct in the public sector, preventing corruption, overseeing effective management of regional and local governments and mediating in social conflicts.

In this regard, it is possible to assert that the *Defensoría* develops its own standards of assessment based on the scope of its interventions. One type of intervention is focused on verifying the observance of legally binding norms, whereby the standard of assessment will be connected to the rule of law. The other area of intervention is that of public policy, which is much more complex and requires as a standard more than legally binding norms, since it involves the evaluation of operational aspects of the state. This second group of standards of assessment can be regarded as good governance-based standards, in that they are oriented to assessing the functioning of the state apparatus regardless of whether or not a citizen's rights are infringed. However, both human rights and good governance as assessment criteria are composed of legally binding norms and non-legally binding rules of good administrative conduct.

The *Defensoría del Pueblo*, by focusing on human rights protection while involving itself in enhancing the legal quality of the administration, has also developed its constitutional position as a guarantor of good administration. This is connected with its involvement in the qualitative aspects of the implementation of public policies for the protection of citizen rights (civil, political, economic, social, and cultural rights), for which it applies both legally binding norms and rules of good administrative conduct as standards of assessment. Therefore, the *Defensoría* performs both hard-law review and soft-law review when assessing the administration.

2017 See Section 10.2.2.

2018 See Sections 11.1.2, 11.2.1 & 11.2.2.

Therefore, it is possible to conclude that the standards of assessment developed by the *Defensoría* reflect principles of good governance, such as properness, effectiveness, transparency and participation. Most of the identified standards relate to legally binding norms linked with the rule of law dimension and properness. However, some other standards can be identified, in connection with the good governance (steering) dimension of the modern constitutional state. In these cases, the *Defensoría* applies (and develops) standards that go beyond binding legal norms. These rules of good administrative conduct are mainly in connection with the principles of effectiveness. The same can be observed in relation to the proposed standards connected with the principles of transparency and participation.[2019]

The *Defensoría* has produced a wealth of non-legally binding standards that serve as criteria for evaluating the performance of government functions, which are drawn from patterns of functional misconduct or malpractices identified by the institution and set forth in the special reports and in ombudsprudence. Arguably, this also demonstrates the hybridisation of the *Defensoría*'s standards of assessment in terms of the performance of its normative functions, through the development of rules of good administrative conduct for ensuring individual redress and providing guidelines to steer government action.

What legal and institutional mechanisms would be needed within the Defensoría to foster good governance?

The *Defensoría* should formally adopt good administration as a supplementary assessment criteria, codify its own normative standards based on principles of good governance, and develop guidelines on good administrative practices based on these principles in order to contribute in a more effective way to enhancing the legal quality of government.

To this end, this study suggests that the *Defensoría* makes its role explicit as a developer of normative standards in order to strengthen its role in promoting good administration, in addition to protecting human rights. The codification of good governance-based standards would have two objectives: i) to supplement their human rights protective (redress-oriented) function; and ii) to make their preventive (control-oriented) function more effective by providing guidelines to steer the behaviour of government.

From the perspective of this study, the *Defensoría* would face no constitutional obstacle to explicitly developing and codifying non-legally binding good governance-based standards for the assessment of government actions. Although

[2019] See Section 11.2.1 & Table 10.

it lacks an explicit mandate to this end, since its establishment, the *Defensoría* has construed its constitutional role to include the promotion of principles of good governance as a mechanism to consolidate democracy and the rule of law. As far as the *Defensoría* is concerned, the observance of good governance principles on the part of public authorities is a necessary condition for the enforceability of fundamental rights.[2020]

12.3. FURTHER CONCLUSIONS AND RECOMMENDATIONS

The conclusion of this study is that despite the specific legal context in which the ombudsman institution operates, it applies similar standards of assessment that can be regarded as standards based on principles of good governance. The ombudsman is an evolving institution that contributes to improving the legal quality of the government. The development of the institution is characterised by the mutual cohesion and hybridisation of its assessment standards and the subsequent hybridisation of the ombudsman institution as such. Hence, the contemporary ombudsman performs a dual function: the protection of human rights and the promotion of good administration. The hybridisation process of the ombudsman institution is led by the development of good governance norms as assessment standards. In this regard, the ombudsman is contributing to developing the legal content of the values associated with the principles of good governance.

It can be argued that depending on the specific model of ombudsman, particular connotations are derived from the institution's practice regarding the development of principles of good governance. Generally speaking, the parliamentary ombudsman is more focused on effectiveness and accountability, while the quasi-judicial ombudsman is more concerned with properness and effectiveness. On the other hand, the mixed ombudsman focuses on properness and participation. In all cases, most of the current developments in the ombudsman's assessment functions are connected with the steering dimension of the modern constitutional state. Hence, the role of the ombudsman as a fourth power is to contribute to ensuring that good governance is realised.

In this regard, it is possible to assert that the *Defensoría*, together with the Dutch, UK and Spanish ombudsmen, are experiencing a process of hybridisation of their standard of control and their assessment criteria. Consequently, they share the same values and apply similar normative standards that encompass

[2020] See Section 11.1.2.

principles of good governance as new sources of legitimacy. In this way, they contribute to developing a more flexible and effective legal framework aimed at positively steering government action, enhancing government legitimacy and strengthening the democratic system as a whole. It does so by promoting the observance of principles of good governance in decision-making in order to ensure sound decisions as well as the proper behaviour of the administration in general. Hence, by applying principles of good governance, the ombudsman contributes to improving legal quality by both guiding the behaviour of the government in order to reach better outcomes, and promoting the development of better legal frameworks.

In its recommendations, the ombudsman provides a space for debate, deliberation and reasoned conclusions about the quality of the democratic performance of the public powers. From this perspective, the institution promotes principles of properness, transparency, participation, accountability and effectiveness, which strengthen the government's legitimacy and good governance. It is precisely the current hybrid nature and status of the ombudsman, and the way in which it performs, that enables the institution to combine the instruments of parliamentary scrutiny and judicial control in a novel way, thus contributing to good governance.

Thus, the Dutch, UK and Spanish ombudsmen could stand to learn from the Peruvian *Defensoría*'s approach to the assessment of public policies to ensure the proper functioning of the administration. Indeed, this approach gives the *Defensoría* a systematic mechanism to impact at the policy level through a combination of the assessment criteria. This could contribute to expanding the scope of action of these European institutions, developing more comprehensive (and flexible) standards of assessment, and implementing a far-reaching intervention' strategy so as to contribute more effectively to strengthening good governance in order to enhance the legitimacy of the administration.

In the case of the Peruvian *Defensoría del Pueblo,* it can also be concluded that the institution is undergoing a process of hybridisation with regard to its powers, tasks and functions. This has mainly been manifested through a shift from an emphasis on individual redress aimed at protecting human rights towards a focused on public policies as a mechanism to impact at the policy level. Thus, the *Defensoría*'s attention is not exclusively on classic political and civil rights but also on economic, social, and cultural rights, which have a direct connection with the state's provision of public services and the legality of the administration's actions. The hybridisation process is also reflected in the normative function led by the application and development of good governance-based standards as a means of steering the exercise of public functions.

Therefore, although from a historical point of view (but also today) the starting point and main task of the *Defensoría* is the protection of human rights, a broadening of functions has rendered the institution less focused on individual redress and more oriented toward a preventive function. The *Defensoría* is placed within the mixed or dual ombudsman model and therefore protective and preventive functions are present. However, as part of its process of evolution, the *Defensoría* has come to place a greater emphasis on its role as a control-oriented institution in order to contribute to enhancing the quality of interventions by the public authorities.

The *Defensoría* carries out norm-developing activity by applying either standards linked to the rule of law (principle of legality) or rules of good administrative conduct. In the former case, the institution has a role in the interpretation of law. In the latter case, it implicitly contributes to the creation of soft law norms. In both cases, it contributes to developing and clarifying the scope of the principles of good governance. As the *Defensoría* has concerned itself increasingly with good governance, it has developed other norms and standards, both binding and non-binding. In this regard, the good governance perspective and the development of non-legally binding standards are part of the institution's normative function, even if they are not completely assumed by the *Defensoría*.

This study suggests that the *Defensoría* formally adopt good administration as a supplementary assessment criterion, codify its own normative standards based on principles of good governance, and develop guidelines on good administrative practices based on these principles in order to contribute in a more effective way to enhancing the legal quality of government. The institution should make explicit its normative function in order to strengthen its role in promoting good administration, in addition to protecting human rights. To this end, the institution should codify good governance-based standards, with two objectives: i) to supplement its human rights protective (redress-oriented) function; ii) to make its preventive (control-oriented) function more effective by providing guidelines to steer the behaviour of government.

As previously stated, there would be no constitutional obstacle to the *Defensoría* explicitly developing and codifying non-legally binding good governance-based standards to assess government action. The aim of codifying these standards in the form of guidelines would be to serve as a tool with which to contribute to the state's public policies for institutional reform and administrative modernisation. This would contribute to the implementation of good governance-based standards for assessing the legal quality of government.

Furthermore, these guidelines would provide institutions and citizens with valuable, clear and simple information on the obligations of the administration,

and so could serve as an important instrument for the defence of citizens' rights. The guidelines on good governance norms would help to establish an efficient, transparent and citizen-friendly administration. As such, these guidelines would constitute: i) a management and support tool for public officials; ii) a tool that provides information to citizens for the defence of their rights in relation to the administration; iii) a tool to support the work of the *Defensoría* in promoting good administration for preventive purposes; and d) a tool to support the work of the *Defensoría* in protecting the rights of citizens in relation to the administration.[2021]

Finally, it should be noted that although this study has analysed the good governance-related functions of the *Defensoría del Pueblo*, promoting the improvement of public administration ought not to detract from a focus on human rights protection. On the contrary, the improvement of public administration is a means of achieving a more effective safeguard of human rights, insofar as effective state action and good quality in the provision of public services are essential to guaranteeing rights such as health or education. This, in turn, evidences the importance of the hybridisation of the human rights and good administration, as this study has assessed.

[2021] Alberto Castro, "Legalidad, buenas prácticas administrativas y eficacia en el sector público", pp. 268–269.

SAMENVATTING

BEGINSELEN VAN GOED BESTUUR EN DE OMBUDSMAN

Een vergelijkend onderzoek naar de normatieve functies van de instelling in een moderne rechtsstaat met een focus op Peru

Het hoofddoel van deze studie is te bepalen in hoeverre de ombudsmaninstelling kan bijdragen aan verbetering van de juridische kwaliteit van de overheid door middel van de uitvoering van (indirecte) normatieve functies bij de toepassing van beginselen van goed bestuur als beoordelingsnormen, waarbij tegelijkertijd de legitimiteit van de overheid en het democratisch systeem als geheel wordt verbeterd.

Het onderzoek is uitgevoerd vanuit een vergelijkend perspectief, waarbij de prestaties van de Nederlandse, Britse, Spaanse en Peruaanse ombudsmannen zijn onderzocht. De nadruk lag echter vooral op het onderzoek van de Peruaanse ombudsman, de *Defensoría del Pueblo* en de situatie van slecht bestuur in Peru. Allereerst worden de drie nationale ombudsmaninstellingen die in de Europese context opereren geanalyseerd. Het doel is te bepalen in hoeverre deze ombudsmannen, hoewel onderling verschillend qua type ombudsman en behorend tot verschillende juridische tradities, dezelfde waarden delen en vergelijkbare normatieve regels toepassen die terug te voeren zijn op de beginselen van goed bestuur. Vervolgens wordt de *Defensoría del Pueblo* geanalyseerd als een case study van de evoluerende rol van de ombudsman in nieuwe democratieën in Latijns-Amerika. Dit weerspiegelt het bredere proces van hybridisatie van de instelling wereldwijd en hoe haar functies en beoordelingsnormen zijn aangepast aan de evolutie van de rechtsstaat, niet in de laatste plaats door toepassing van de beginselen van goed bestuur als nieuwe bron van legitimiteit.

Belangrijk is het om te vermelden dat het niet de bedoeling van deze studie is om de bijdrage van de instelling aan de ontwikkeling van de juridische inhoud van principes van goed bestuur als zodanig te analyseren, maar de toepassing ervan als normatieve regels. Daarom is de vraag niet zozeer hoe de ombudsman normatieve normen op basis van beginselen van goed bestuur toepast en ontwikkelt, als wel of de ombudsman deze beginselen in de praktijk toepast.

In dit verband is de primaire focus van deze studie gericht op de sturende functie van de ombudsman met betrekking tot de bevordering van behoorlijk bestuur in plaats van de (op mensenrechten gerichte) beschermende functie van de instelling. Het doel is om aan te tonen dat de activiteiten van de ombudsman resulteren in een veranderd en verbeterd openbaar bestuur in moderne rechtsstaten (resultaten die vaak ondergewaardeerd worden in de juridische literatuur). De juridische benadering van goed bestuur vormt hiervoor een krachtig instrument en kan ook worden toegepast op ontwikkelde democratieën met verschillende juridische tradities. Vandaar dat deze studie zich concentreert op goed bestuur vanuit een juridisch perspectief. Dit zal het conceptuele kader bieden voor het evalueren van de prestaties van de ombudsmaninstelling en het analyseren van de normen en beginselen die zij toepast. Teneinde de door de ombudsman beschermde waarden en toegepaste normen te identificeren, die worden beschouwd als centrale elementen voor goed bestuur, worden de vijf beginselen van goed bestuur (behoorlijkheid, transparantie, participatie, verantwoording en doeltreffendheid) gebruikt om de analyse een kader te geven.

Bij het analyseren van de juridisch-bestuurlijke aspecten van goed bestuur wordt publieke verantwoording aangemerkt als één van de indicatoren voor legitimiteit. Een effectieve democratische staat vertrouwt op wetgevende, bestuurlijke en rechterlijke instellingen die bevoegd zijn om een zekere mate van directe controle uit te oefenen over hoe de andere instellingen hun functies uitoefenen. Het concept van controle is een constitutioneel concept dat de hele structuur en alle functies van de moderne staat omvat en herschikt en aanzetten geeft tot nieuwe instituties die, in verschillende mate, controlefuncties hebben gekregen om de traditionele vormen van verantwoording aan te vullen. In dit verband kan de ombudsman worden beschouwd als een modern mechanisme voor democratische verantwoording. Het dient als een belangrijk element van goed bestuur, het verbetert de verantwoordingsplicht van de overheid, en helpt daarmee het functioneren van het openbaar bestuur te verbeteren.

De ombudsman wordt niet alleen beschouwd als een mechanisme voor individuele oplossingen, maar ook als één van bureaucratische kwaliteitscontrole. Als juridisch concept houdt kwaliteit verband met het begrip goed bestuur. Volgens sommige auteurs is er in het moderne bestuursrecht sprake van een verschuiving naar meer aandacht voor het bestuursoptreden. Deze trend weerspiegelt nieuwe perspectieven in bestuursrecht, die voortkomen uit veranderingen in de maatschappij en het overheid. Kwaliteit, als juridisch concept van procedurele aard, en de relatie met een breder perspectief van legaliteit, wordt echter niet voldoende onderzocht.

In deze zin is bestuur vanuit bestuurlijk perspectief gericht op de ontwikkeling van nieuwe en flexibelere regelgevingskaders voor de aansturing van de

activiteiten van de overheid. Deze kaders bepalen hoe de overheid haar taken vervult en met name de manier waarop de publieke bevoegdheden in het kader van het beleid worden uitgeoefend. In dit opzicht reguleren zij het bestuurlijke besluitvormingsproces, waarin nu meer dan ooit tevoren steeds meer niet-gouvernementele actoren betrokken zijn. Vandaar dat transparantere, participatievere en effectievere besluitvorming wordt aangemoedigd.

Het idee van een goede uitoefening van bevoegdheden en adequate besluitvorming door de overheid houdt verband met de erkenning van publiekrecht als een middel om meer kwaliteit te bereiken in het openbaar bestuur en in de manier waarop het is georganiseerd. Het concept van goed bestuur, en met name het begrip goed openbaar bestuur, komt naar voren in verband met kwaliteitseisen die gesteld werden aan overheidsactiviteiten.

Op basis hiervan zijn twee onderzoeksvragen geformuleerd; één gericht op de instelling op mondiaal niveau, en de andere op de Peruaanse case.

De eerste vraag is:

Past de ombudsmaninstelling, ondanks de verschillende juridische contexten waarin zij opereert, vergelijkbare beoordelingsnormen toe die kunnen worden beschouwd als normen die zijn gebaseerd op beginselen van goed bestuur?

Deze vraag richt zich op de normatieve functies van de ombudsmaninstelling en om te bepalen in hoeverre zij normatieve standaarden hanteert die gebaseerd zijn op de beginselen van goed bestuur. Om deze vraag te beantwoorden, zijn de volgende deelvragen gesteld:

Welk effect heeft de hybridisatie van de ombudsman op de normatieve standaarden, beoordelingsoriëntatie, bevoegdheden en functies van de instelling?

Kunnen de door de ombudsman gehanteerde normatieve standaarden worden aangemerkt als wettelijke normen?

Wat is de relatie tussen de juridische dimensie van goed bestuur en constitutionele beginselen?

Wat is de juridische inhoud en reikwijdte van de beginselen van goed bestuur?

Wat is de relatie tussen de normatieve standaarden die zijn ontwikkeld en worden gehanteerd door verschillende modellen van ombudsman en de beginselen van goed bestuur?

De tweede vraag is:

Past de Peruaanse Defensoría del Pueblo de beginselen van goed bestuur toe als beoordelingsnormen, en zo ja, hoe kunnen deze verder worden ontwikkeld?

Deze vraag heeft betrekking op de beginselen van goed bestuur in de context van de rol van de *Defensoría* als ontwikkelaar van wettelijke normen, en hoe deze beginselen verder kunnen worden ontwikkeld om op een effectieve wijze goed bestuur te bevorderen en de bestuursrechtelijke kwaliteit en legitimiteit in Peru te verbeteren. Om deze vraag te beantwoorden, zijn de volgende deelvragen geformuleerd:

Is in de "hard law"-beoordeling door de Defensoría del Pueblo als beoordelingsnorm de toepassing van de juridische beginselen van goed bestuur opgenomen?

Ontwikkelt de Defensoría beoordelingsnormen die kunnen worden beschouwd als normen die zijn gebaseerd op beginselen van goed bestuur?

Welke juridische en institutionele mechanismen zijn er binnen de Defensoría nodig om goed bestuur te bevorderen?

De hypothese van deze studie is dat ongeacht de specifieke juridische context waarin de verschillende ombudsmannen werken, de instelling evolueert en bijdraagt aan de verbetering van de kwaliteit van de overheid. De onderlinge samenhang en hybridisatie van de controlestandaarden en de daaropvolgende hybridisatie van de ombudsmaninstellingen als zodanig, kenmerkt deze ontwikkeling. Deze hybridisatie wordt gedreven door de ontwikkeling van normen voor goed bestuur als beoordelingsnormen. In dit opzicht kunnen de normen die door de instelling van de ombudsman in het algemeen en *Defensoría del Pueblo* in Peru in het bijzonder met betrekking tot de prestaties van het openbaar bestuur worden toegepast, worden beschouwd als normen die zijn gebaseerd op de beginselen van goed bestuur. Op deze manier draagt de ombudsman bij aan de ontwikkeling van de juridische inhoud van de beginselen van goed bestuur, die op hun beurt gebaseerd zijn op de beginselen van democratie en de rechtsstaat. Zo biedt de ombudsman nieuwe elementen om de legitimiteit van het openbaar bestuur te vergroten en het democratisch bestel te versterken.

Het onderzoek is gebaseerd op analyse van documenten, bestaande uit academische literatuur, analyse van wetgeving en van individuele interviews. De wettelijke normen die door de verschillende ombudsmannen worden gehanteerd, zijn geanalyseerd op basis van de verslagen en de gevallen ("*ombudsprudence*")

die door elk van hen worden afgehandeld. Om te bepalen in hoeverre de ombudsmaninstelling op goed bestuur gebaseerde normen toepast, hanteert deze studie een kwalitatieve benadering voor het analyseren van de prestaties van de ombudsman bij het vervullen van zijn functies.

Dienovereenkomstig zijn de "ombudsnormen" onderverdeeld in een reeks van vijf groepen die overeenkomen met elk van de beginselen van goed bestuur om te bepalen in hoeverre deze beginselen daadwerkelijk worden ondersteund door concrete normen die door de ombudsman zijn ontwikkeld. De analyse is echter in het bijzonder gericht op de identificatie van normen die verband houden met drie van deze principes: behoorlijkheid, transparantie en participatie. In dit kader gaat de studie verder met het identificeren van de principes en het beschrijven van de wijze van toepassing (en inhoud) ervan in de ombudsmanpraktijk. Daarbij is het niet alleen de bedoeling om goed bestuur te vestigen als een operationeel juridisch concept, maar ook om de rechten en verplichtingen te identificeren die als essentieel worden beschouwd voor de juridische betekenis van goed bestuur.

De hedendaagse ombudsman is het resultaat van de hybridisatie van de verschillende controlestandaarden van de instelling. Veranderingen in de samenleving hebben het onmogelijk gemaakt om een zuivere controlestandaard te vinden. De combinatie van de controlestandaarden van de ombudsman resulteert ook in een combinatie van de beoordelingsnormen. Deze hybridisatie heeft ook consequenties voor de beoordelingsoriëntatie van de instelling -begrepen in termen van verhaal en controle -, bevoegdheden en functies.

De literatuur maakt een onderscheid tussen verschillende modellen van ombudsmannen en stelt verschillende classificaties van de instelling voor, allemaal opgevat als idealen. De meeste van deze classificaties benaderen de ombudsman vanuit een statisch en rigide perspectief, uitsluitend gebaseerd op de controlestandaard, en houden onvoldoende rekening met de hybridisatie van de instelling en het unieke en innovatieve karakter ervan in moderne rechtsstaten. Met het doel om een uitgebreide beschrijving te geven van het hybridisatieproces van de ombudsman vanuit een dynamisch perspectief, stelt deze studie voor de instelling van de ombudsman te (her)classificeren in drie algemene types: het parlementaire ombudsmanmodel; het quasi-justitiële ombudsmanmodel; en het gemengde of duale ombudsmanmodel. Deze classificatie is gebaseerd op de beoordelingsoriëntatie van de instelling en de theoretische ombudsmodellen die eerder zijn geïdentificeerd door Heede.

Het doel van het parlementaire ombudsmanmodel is het parlement te helpen. Het heeft een beperkte functionele autonomie en maakt deel uit van de parlementaire controle. De ombudsman start een onderzoek alleen op verzoek

van het parlement, wat zowel onderzoek op eigen initiatief als directe toegang voor burgers uitsluit. De parlementaire ombudsman is controlegericht, met een mandaat beperkt tot het toezicht op de uitvoerende macht en gericht op algemene maatregelen. Deze instelling voert voornamelijk een niet-legaliteitsbeoordeling uit volgens de criteria van goed bestuur. Zij beoogt toezicht te houden op het functioneren van de overheid, waardoor zij de uitvoerende macht ter verantwoording kan roepen voor zijn gedrag ten opzichte van de burgers. Bij het beoordelen van de administratie kan ook de naleving van de wet in overweging worden genomen. Alle Europese ombudsmannen hebben op de één of andere manier een relatie met het parlement. Dit model is gekoppeld aan de klassieke Scandinavische ombudsman waaruit alle moderne instellingen zijn voortgekomen. De Britse parlementaire ombudsman is zo'n voorbeeld.

Het quasi-justitiële ombudsmanmodel is gericht op het bieden van 'verhaal' bij het openbaar bestuur. Het is bedoeld om hulp te bieden aan burgers die te maken krijgen met overheidsacties, teneinde ervoor te zorgen dat overheidsfunctionarissen hun taken vervullen. Daartoe kan de quasi-justitiële ombudsman de naleving van niet-juridisch afdwingbare regels door de overheidsautoriteiten bevorderen. Zo kan hij, als onderdeel van zijn rol, niet-juridisch bindende beginselen van goed administratief gedrag creëren en handhaven om gevallen van slecht bestuur te corrigeren. Als zodanig voert de quasi-justitiële ombudsman een soft-law-beoordeling uit door te werken in gebieden die niet onder de bevoegdheid van de rechterlijke macht vallen. Bij de behandeling van klachten van burgers kan het echter ook beoordelen in hoeverre overheidsinstanties in individuele gevallen wettelijke normen interpreteren en toepassen. Hoewel de Nederlandse ombudsman uitsluitend is opgericht om behoorlijkheid te beoordelen, kan hij worden genoemd als een voorbeeld van het quasi-justitiële ombudsmanmodel.

Ten slotte is het gemengde of dubbele ombudsmanmodel gecreëerd om het algemene wantrouwen jegens de staat bij de burgers aan te pakken, en daarmee de legitimiteit van de overheid te vergroten. Bijgevolg is de gemengde ombudsman controlegericht. Hij is nauw verbonden met de concepten democratie, burgerschap en bescherming van fundamentele rechten. De bescherming van de grondrechten van burgers is in dit model de hoofdtaak van de ombudsman en de belangrijkste controlestandaard. In dit opzicht voert de instelling voornamelijk een beoordeling van de wettigheid uit. Als een controlemechanisme kan het mandaat van de gemengde ombudsman ook het toezicht op de bestuurlijke activiteiten van de traditionele toezichthoudende autoriteiten (de rechterlijke macht en het parlement) omvatten. In functionele zin zal zijn mandaat zich richten op algemene handelingen, hoewel het ook individuele handelingen kan omvatten. Zowel de Spaanse als de Peruaanse ombudsmannen (zoals de meeste ombudsmannen in Latijns-Amerika) zijn gebaseerd op dit model.

Deze classificatie is bedoeld om de beoordeling van de rol van de ombudsman bij het bevorderen van goed bestuur te vergemakkelijken door zijn bijdrage aan de ontwikkeling van wettelijke normen. De combinatie van controlenormen op het gebied van verhaal en controle heeft serieuze gevolgen voor de normatieve functie van de ombudsman en de ontwikkeling van beoordelingsnormen, en bijgevolg voor de bijdrage van de instelling aan goed bestuur, de rechtsstaat en democratie. Het is belangrijk op te merken dat dit theoretische constructies zijn, die in de praktijk waarschijnlijk niet in hun zuivere vorm te vinden zijn. Er is geen scherpe scheiding tussen "controle-" en "verhaal-"ombudsmannen en de meesten combineren elementen van beide functies.

De ombudsman heeft drie karakteristieke bevoegdheden: onderzoek, aanbeveling en rapportage. Het is vanwege deze bevoegdheden en hun onderling verband dat de ombudsman het meest onderscheidend verschilt van alle andere staatsinstellingen. De instelling krijgt brede onderzoeksbevoegdheden toegewezen. Zij kan een onderzoek starten op basis van een klacht ingediend door een burger of op eigen initiatief. In het laatste geval kan zij zowel onderzoek starten naar zaken waar geen klachten zijn ontvangen, als het onderzoek naar een klacht waar nodig verbreden. De ombudsman heeft de bevoegdheid om aanbevelingen te doen, die een niet-juridisch bindend karakter hebben. Na een objectief onderzoek kan de aanbeveling van de ombudsman voorgestelde wijzigingen in overheidsbeleid of -praktijk omvatten, en zelfs wetgeving. Wat de rapporterende autoriteit betreft die aan de ombudsman is toegewezen, zijn er drie soorten rapporten: het jaarverslag, het speciaal of algemeen onderzoeksrapport en het casusverslag. In het kader van het hybridisatieproces van de instelling verdienen de speciale verslagen bijzondere aandacht. Dergelijke rapporten stellen de ombudsman in staat om op uitzonderlijk ernstige gevallen van wangedrag in het openbaar bestuur te wijzen en aldus het publieke bewustzijn te vergroten. Ze bevatten algemene aanbevelingen gericht op het verbeteren van de kwaliteit van de overheid door het voorstellen van wijzigingen in institutionele praktijken, procedures of regelgeving.

Daarnaast krijgt de ombudsman, als onderdeel van zijn rol bij het beoordelen van overheidsoptreden, drie hoofdfuncties toegewezen: een beschermende functie, een preventieve functie en een normatieve functie. De beschermende functie heeft tot doel de rechten en belangen van burgers te beschermen. Deze functie wordt uitgeoefend door klachten te behandelen met het oog op het herstellen van grieven. Als zodanig biedt de ombudsman extra bescherming aan die wordt geboden door de rechtbanken. Terwijl de rechtbanken administratieve actie op basis van de wet (en daarmee samenhangede algemene rechtsbeginselen) beoordelen, past de ombudsman gewoonlijk bredere normen toe dan de wet in enge zin. In dit opzicht kan de instelling worden beschouwd als een (aanvullend) onderdeel van het bestuurlijke rechtssysteem.

De preventieve functie is op haar beurt gericht op het beïnvloeden van het beleidsniveau om de kwaliteit van de overheid en de openbare dienstverlening te verbeteren. De functie wordt uitgevoerd door onderzoeken op eigen initiatief of door het opstellen van speciale verslagen, die de ombudsman in staat stellen om zich te concentreren op algemene problemen en om wijzigingen in het openbaar bestuur aan te bevelen. Het wordt in praktijk gebracht wanneer de ombudsman aanbevelingen doet voor hervormingen van wet- of regelgeving of wijzigingen in institutionele praktijken. In deze gevallen speelt de instelling de "rol van hervormer". Als gevolg van het hybridisatieproces zijn de beschermende en preventieve functies gemengd en zijn ze te vinden in bijna alle ombudsmaninstellingen.

De hybridisatie van de controlestandaard, samen met de hybridisatie van beoordelingsnormen, weerspiegelt het feit dat in de meeste gevallen de bestaande modellen van de ombudsman dezelfde waarden delen (en beschermen). De controlestandaard van de ombudsmaninstelling is op verschillende manieren geformuleerd. Sommige wetenschappers hebben deze formuleringen onderverdeeld in drie categorieën: legaliteit, principes van goed bestuur en mensenrechten. Deze indeling, in de visie van deze studie, heeft de neiging om de controlestandaard in de beoordelingsnormen op te nemen op basis van een statisch en rigide perspectief van de rol van de ombudsman. Als zodanig is het ongebruikelijk een zuivere controlestandaard voor de ombudsman te vinden, of een bepaalde instelling die alleen te maken heeft met de wet, goed bestuur of mensenrechten.

Als men het legaliteitsbeginsel benadrukt als de controlenorm van de ombudsman zou dit impliceren dat de instelling alleen juridisch bindende regels hanteert (grondwettelijke bepalingen, wetgeving, voorschriften, algemene schriftelijke en ongeschreven rechtsbeginselen en geratificeerde internationale verdragen) voor de controle van het de overheid. Met betrekking tot goed bestuur als controlestandaard, is het waar dat dit voor een deel van de doctrine verband houdt met het evalueren van het gedrag van overheidsinstanties tegen niet-juridisch bindende regels door middel van een "soft law"-beoordeling. Niettemin omvat het beginsel van behoorlijk bestuur zowel juridisch bindende als niet-juridisch bindende beginselen. Daarom kan de ombudsman zowel juridische regels als "soft law" toepassen als onderdeel van de norm voor behoorlijk bestuur. Dit geldt ook voor de toepassing van mensenrechten als controlestandaard.

Daarom is het voor deze studie relevanter om de controlestandaard van de ombudsman te formuleren, niet op basis van de instrumenten (of beoordelingsnormen) die op de instelling worden toegepast (rechtsbeginselen / niet-bindende regels), maar op de institutionele benadering die wordt toegepast om de acties van de overheid te evalueren. Zo kunnen de controlestandaarden

van de ombudsman worden ingedeeld in slechts twee algemene categorieën: goed bestuur en mensenrechten. Beide bevatten juridische beginselen en niet-juridisch bindende regels voor goed bestuurlijk gedrag in verband met een breder begrip van de rechtsstaat. Vaak, als gevolg van de hybridisatie van de instelling, worden deze formuleringen op een accumulatieve manier gehanteerd. Daarom kunnen, als controlestandaarden, goed bestuur en mensenrechten als twee zijden van dezelfde medaille worden beschouwd. Beide zijn nodig om de legitimiteit van de overheid te vergroten. Hun toepassing levert vergelijkbare resultaten op. Bovendien is het mogelijk om te stellen dat de hybridisatie van de ombudsman leidt tot een nadruk op de controlegerichte uitvoering van functies (of in ieder geval tot sommige die verder gaan dan de functies van verhaal en bescherming van burgers) voor zover er sprake is van een grotere nadruk op de aanvaardbaarheid van overheidsgedrag in de ogen van burgers, waarvoor het belangrijk is normen en regels te ontwikkelen voor behoorlijk overheidsgedrag ter preventie.

Er bestaat een verband tussen de preventieve functie en de behoefte om gestructureerde criteria te ontwikkelen en objectieve normen toe te passen voor de uitoefening van discretionaire bevoegdheid door overheidsfunctionarissen, om wanbestuur te voorkomen. Dienovereenkomstig is de derde hoofdfunctie die aan de instelling van de ombudsman is toegekend en die speciale aandacht verdient, de functie betreffende de ontwikkeling van wettelijke normen. Deze functie vloeit voort uit de bevoegdheid van de ombudsman om onderzoeken uit te voeren in verband met zijn vermogen om speciale verslagen in te dienen.

De nadruk op controlegerichte activiteiten die het resultaat zijn van hybridisatie, is aantoonbaar ook een weerspiegeling van de noodzaak om normen te ontwikkelen om de activiteiten van de overheid op beleidsniveau te beoordelen, zowel voor correctie als preventie. De hybridisatie van de instelling van de ombudsman in termen van de normatieve functie wordt dus gedreven door een actievere rol bij de ontwikkeling van beoordelingsnormen, die kunnen worden beschouwd als normen die zijn gebaseerd op de beginselen van goed bestuur.

Voor deze studie kunnen de normatieve standaarden die door de ombudsmaninstelling worden toegepast, worden geclassificeerd als juridische normen van een "*soft law*"-aard. Om het gedrag van overheidsinstanties te beoordelen, ontwikkelt en hanteert de ombudsman beoordelingsnormen. De ombudsmaninstelling beoordeelt het gedrag van de overheid tegen juridisch bindende of niet-wettelijk bindende normen. Wanneer zij daartoe juridisch bindende normen toepast, voert ze een hard-law-beoordeling uit, wat inhoudt dat ze de wet fundamenteel interpreteert. Op deze manier draagt de instelling bij aan de ontwikkeling van juridische principes. In dit geval kan worden gezegd dat de ombudsman vergelijkbare criteria hanteert als de rechterlijke macht.

Aan de andere kant, wanneer de ombudsman niet-juridisch bindende normen toepast, voert het een "*soft law*"-evaluatie uit. "*Soft law*"-beoordeling is een kenmerk van bijna alle Europese ombudsmansystemen, hoewel de aard en het gebruik van dit soort beoordelingen vaak verschilt. Vanuit een vergelijkend perspectief zijn met name "*soft law*"-normen of 'regels van goed bestuurlijk gedrag' ontwikkeld juist door die ombudsmaninstellingen die goed bestuur toepassen – of het contrapunt daarvan, slecht bestuur – als controlestandaard. Deze gedragsregels maken deel uit van de norm voor goed bestuur, samen met wettelijke regels en algemene rechtsbeginselen. "*Soft law*"-evaluatie kan naast "*hard law*"-evaluatie bestaan, zelfs binnen dezelfde beslissing. "*Soft law*"-evaluatie, via regels van goed administratief gedrag, kan worden toegepast voor het verbeteren van goede overheidspraktijken en -procedures en voor een betere toepassing van bestaande wettelijke regels. Het kan ook de basis zijn waarop fundamentele rechtsbeginselen kunnen worden ontwikkeld. Als zodanig kan "soft law"-evaluatie een functie vervullen voor het opvullen van leemten, vooral in landen die geen traditie hebben van een systeem van bestuurlijke rechtbanken.

Zoals gezegd, hebben de beslissingen, aanbevelingen en vooral de beoordelingsnormen van de ombudsman een niet-bindend karakter. Bindendheid geeft echter geen definitie van het karakter van de wet, maar van het juridische effect ervan. Het rechtsgevolg kan dus niet alleen door middel van een juridisch instrument of een handeling op zichzelf tot stand komen (juridisch bindende kracht), maar ook door de werking van andere juridische mechanismen, met name algemene beginselen van recht en interpretatie (indirecte rechtsgevolgen). Dit is het geval voor ombudsmannen die een "*hard law*"-evaluatie uitvoeren op basis van wettelijke parameters, evenals die welke hun eigen normatieve standaarden ontwikkelen. Zoals hierboven vermeld, definiëren de regels van goed bestuurlijk gedrag die door de ombudsman zijn opgesteld als beoordelingsnormen verplichtingen op basis van wettelijk bindende beginselen. Het juridische effect van deze verplichtingen blijkt duidelijk uit de werking van regels voor goed bestuurlijk gedrag.

Daarom kunnen de normatieve standaarden die de ombudsman toepast en ontwikkelt bij het beoordelen van overheidsoptreden worden geclassificeerd als juridische normen van "*soft law*"-aard, afgeleid van het (indirecte) juridische effect van de verplichtingen die zij opleggen, hetzij als gevolg van de toepassing van wettelijke parameters of regels van bestuurlijk gedrag. In dit opzicht draagt de ombudsman bij aan de ontwikkeling van het juridische karakter van de beginselen van goed bestuur.

Wat de relatie tussen de juridische dimensie van goed bestuur en grondwettelijke beginselen betreft, concludeert deze studie dat juridisch gezien goed bestuur kan worden beschouwd als een algemeen beginsel dat een reeks andere beginselen

omvat die op constitutioneel niveau werkzaam zijn. Vanuit dit perspectief is goed bestuur gerelateerd aan de rechtsstaat en democratie, maar is het geëvolueerd als een onafhankelijk grondwettelijk beginsel.

De juridische dimensie van goed bestuur is geworteld in de term 'bestuur'. De juridische betekenis van bestuur omvat de *mainstream*definitie van de sociale wetenschappen, die verwijst naar regelgevingsstructuren voor stuurprocessen. De juridische dimensie van bestuur heeft op haar beurt betrekking op regelgevingsmechanismen voor het sturen van het besluitvormingsproces en de uitvoering van het beleid. Wat betreft de uitoefening van publieke functies verwijst de juridische dimensie van bestuur als zodanig naar het proces van het ontwikkelen van de regelgevingskaders waarbinnen de overheid haar taken vervult, met andere woorden die bepalen hoe de overheid haar bevoegdheden uitoefent. Zo worden bestuursmechanismen opgevat als nieuwe regelgevingsinstrumenten om de uitoefening van publieke functies te sturen.

De impact van bestuurstrends kan worden gewaardeerd op verschillende rechtsgebieden, met name bestuursrecht, waarin er een voortdurende discussie is over de hervorming van sommige van haar basisinstellingen en de verschuivingen van traditionele wettelijke regelgevingsinstrumenten naar nieuwe (bestuurlijke) instrumenten. Dit is een gevolg van de impact van modernisering van de publieke sector, de constitutionalisering van het rechtssysteem en de internationalisering van bestuurlijke verhoudingen op mondiaal en regionaal niveau. Deze tendensen vormen een oproep voor het opnemen van bestuurlijke trends in wetgeving, wat leidt tot een behoefte aan flexibelere en alomvattendere regelgevingsmethoden. In dit verband kan de juridische benadering van goed bestuur geacht worden binnen een wettelijk kader te opereren door gebruik te maken van regelgevingsinstrumenten die door de wet worden geboden (beginselen, regels, procedures en praktijken), teneinde normatief gewenste effecten te bereiken en niet-regulerende effecten te voorkomen. Deze aanpak heeft ook tot doel de overheid te sturen om de hoogst mogelijke efficiëntienorm te bereiken. Daarom kan het juridische perspectief van goed bestuur worden geconceptualiseerd als een sturingsmechanisme dat wordt geïmplementeerd om de legitimiteit van de overheid, evenals het politieke systeem als geheel, te verbeteren. Als regelgevend instrument voor overheidsoptreden kunnen de beginselen die van toepassing zijn op goed bestuur op constitutioneel niveau worden vastgelegd. Goed bestuur weerspiegelt dus beter de normatieve dimensie van bestuur vanuit een juridisch perspectief.

Vanuit dit perspectief kunnen drie verschillende, maar onderling verbonden definities van goed bestuur worden onderscheiden. Ten eerste biedt de inhoudelijke definitie een analytisch concept van goed bestuur, door het te beschouwen als een proces dat verband houdt met regels voor het sturen van

overheidsmaatregelen in een gewenste richting. Ten tweede, de prescriptieve definitie beschouwt goed bestuur als een metaconcept of een fundamentele waarde. Als een waarde wordt het prima facie als de beste beschouwd. Als zodanig beschouwd, kan goed bestuur worden gezien als een doel op zich. Op het gebied van wettelijke normen kan goed bestuur als een fundamentele waarde worden geconcretiseerd als een algemeen constitutioneel beginsel. In de derde plaats beschouwt de operationele definitie goed bestuur als een algemeen beginsel dat een reeks andere beginselen omvat die op constitutioneel niveau werkzaam zijn en waarvan de effecten zich uitstrekken over de hele regering en alle regulerende niveaus.

Het algemene beginsel van goed bestuur beschrijft een stand van zaken die de principes van behoorlijkheid, transparantie, participatie, verantwoording en effectiviteit respecteert. Vandaar dat de deontologische dimensie van het algemene principe van goed bestuur bepaald wordt door de specifieke principes die het omarmen. Goed bestuur wordt gedefinieerd door de interactie van de samenstellende beginselen ervan, die elk met elkaar in balans moeten zijn. Dit zal worden gerealiseerd op voorwaarde dat deze beginselen elk in de hoogst mogelijke mate kunnen worden bereikt. De geldigheid en legitimiteit van het algemene beginsel van goed bestuur en de specifieke beginselen daarvan hangen samen met het constitutionele kader waarin zij opereren (en van welks bepalingen zij zijn afgeleid).

Volgens sommige auteurs is de combinatie van de klassieke rechtsstaat en het democratisch beginsel, de democratische rechtsstaat, de belangrijkste bron van het juridische perspectief van goed bestuur. Voor zover goed bestuur gerelateerd is aan de manier waarop publieke macht wordt uitgeoefend, is het fundamenteel verweven met bestuurlijke legitimiteit. Dit wordt bereikt door de beginselen van goed bestuur toe te passen als constitutionele beginselen voor het uitvoeren van bestuurlijke functies. Het is op het gebied van de overheid dat de beginselen van goed bestuur verder zijn ontwikkeld. Bestuurlijke legitimiteit op basis van de aanpak van goed bestuur is niet alleen gebaseerd op respect voor de beginselen van de rechtsstaat en democratie, maar ook op eisen aan kwaliteit bij de uitvoering van administratieve acties. Goed bestuur is dus gericht op het verbeteren van het institutionele kader door zich te committeren aan de beginselen van behoorlijkheid, transparantie, participatie, verantwoording en effectiviteit voor de juiste werking van het staatsapparaat. Het beginsel van goed bestuur draagt daarom bij aan het bieden van institutionele antwoorden op het legitimiteitstekort om het politieke systeem als geheel te versterken.

Zoals gezegd, als juridische beginselen die zich op constitutioneel niveau bevinden, bestrijken de reikwijdte van het algemene beginsel van goed bestuur en de samenstellende elementen daarvan, de specifieke beginselen van goed

bestuur, alle openbare bevoegdheden en alle regulerende niveaus. Hun wettelijke inhoud wordt bepaald door hun veranderende status, gebaseerd op bestaande wettelijke waarden verankerd in moderne rechtsstaten.

Het algemene beginsel van goed bestuur is geworteld in zowel de rechtsstaat als de democratie. Zoals Addink echter opmerkt, heeft het zich ontwikkeld tot een volwaardige hoeksteen van de moderne rechtsstaat, met een eigen kerndimensie, naast de rechtsstaat en democratie. Er is een intrinsiek verband tussen deze drie fundamentele pijlers, voor zover hun ontstaan verband houdt met de ontwikkeling van de moderne staat. Sterker nog, hoewel ze op verschillende momenten in de geschiedenis zijn ontstaan, hebben ze zich ontwikkeld op elkaar wederzijds beïnvloedende manieren. Daarom is elke hoeksteen in de eerste plaats verbonden met een bepaalde redenering of dimensie: de rechtsstaat heeft betrekking op de beschermende dimensie; democratie is gekoppeld aan de participerende dimensie; en goed bestuur aan de sturende dimensie. Dit geeft weer hoe verschillende ratio's naast elkaar bestaan in de moderne rechtsstaat.

Het algemene principe van goed bestuur heeft betrekking op de manier waarop macht wordt uitgeoefend, en benadert macht vanuit een dynamisch perspectief. Het gaat niet alleen om de uiteindelijke beslissing die moet worden genomen, maar ook om de manier waarop beslissingen worden genomen. Dit geeft aan dat het principe van goed bestuur procesgericht van aard is, maar ook betrokken is bij de uiteindelijke beslissing als uitkomst. Als algemeen constitutioneel beginsel wordt goed bestuur toegepast op alle overheidsinstanties, evenals op particuliere instanties die publieke taken uitvoeren. Dit algemene principe benadrukt de sturende benadering van het recht als een middel om het gedrag van publieke machten positief te begeleiden. Bovendien maakt het de toepassing mogelijk van flexibelere en alomvattendere regelgevingsmethoden, zoals soft-law-instrumenten (beleidsregels, richtlijnen en aanbevelingen, onder andere) om de gewenste effecten te bereiken. Dit betekent aandacht voor kwaliteit in het functioneren van de overheid.

Als algemeen constitutioneel beginsel neemt goed bestuur de vorm aan van een constitutionele plicht door eerder als norm voor de overheid te fungeren dan als een recht voor de burger. Het algemene beginsel van goed bestuur omvat een aantal specifieke beginselen waarvan de grondwettelijke status (impliciet of expliciet) is erkend in de meeste moderne staten die onder de democratische rechtsstaat vallen. Deze principes zijn de constitutieve elementen van goed bestuur en bepalen de kerninhoud ervan. In dit verband legt het algemene beginsel van goed bestuur de grondwettelijke plicht op van een behoorlijke en verantwoorde uitoefening van de bevoegdheden van de overheid, terwijl het zorgt voor transparante en participatieve institutionele kaders voor de doeltreffende werking van het gehele staatsapparaat, om te zorgen voor een

gelijke ontwikkeling van de burgers en de verwezenlijking van het algemeen belang. Als een fundamenteel beginsel strekken de effecten van goed bestuur zich uit over alle overheidsbevoegdheden en alle regulerende niveaus.

De specifieke principes van goed bestuur zijn behoorlijkheid, transparantie, participatie, verantwoording en effectiviteit. Als grondwettelijke principes oriënteren ze de verrichtingen van de hele regering. De relatie tussen de specifieke beginselen van goed bestuur en de drie hoekstenen van de moderne rechtsstaat wordt bepaald door de elementen van de specifieke beginselen van goed bestuur. Sommige elementen van deze beginselen houden verband met de rechtsstaat, terwijl andere verband houden met het beginsel van democratie of goed bestuur. In veel gevallen overlappen ze elkaar.

Wat betreft de relatie tussen de normatieve standaarden die door verschillende ombudsmanmodellen en de beginselen van goed bestuur zijn ontwikkeld en toegepast, wordt geconcludeerd dat, ondanks de verschillende juridische tradities waarin zij opereren, de normatieve standaarden die zijn ontwikkeld en toegepast door de drie modellen die in deze studie worden voorgesteld de beginselen van goed bestuur weergeven.

Deze drie modellen worden vooral geïllustreerd door de drie geanalyseerde nationale ombudsmaninstellingen die in de Europese context opereren: de Nederlandse ombudsman komt overeen met het quasi-justitiële ombudsmanmodel; de Britse ombudsman voor het model van de parlementaire ombudsman; en de Spaanse ombudsman voor het gemengde of duale ombudsmanmodel. Formeel gesproken verschillen hun wettelijke mandaat, aard en controlereikwijdte. Ze passen ook verschillende controlenormen toe voor het beoordelen van overheidsacties.

In de praktijk zijn de drie ombudsmaninstellingen betrokken bij zowel de bevordering van behoorlijk bestuur als de bescherming van de grondrechten. Daarom ondergaan hun beoordelingscriteria een proces van hybridisatie. Vandaar dat vergelijkbare categorieën kunnen worden toegepast in overeenstemming met de reikwijdte van de controle door de ombudsman. In de drie gevallen kan worden bevestigd dat de verschillende ombudsmannen twee categorieën specifieke normen toepassen: normen die verband houden met de rechtsstaat (legaliteitsbeginsel) en regels voor goed bestuurlijk gedrag.

De Nederlandse ombudsman en de Britse ombudsman hebben hun eigen normatieve standaarden ontwikkeld en voeren een “soft law”-evaluatie. Aan de andere kant heeft de Spaanse ombudsman zijn eigen normatieve standaarden niet opgesteld en voert hij een “hard law”-evaluatie van de verrichtingen van de overheid, en doet hij aanbevelingen voor normen om de mensenrechten

te eerbiedigen en de reikwijdte van de door de rechtbanken ontwikkelde rechtsbeginselen te verruimen. Deze normatieve standaarden kunnen worden afgeleid uit de rapporten en casus. Daarom ondergaat de instelling een hybridisatie in termen van zowel haar controlestandaard als haar specifieke beoordelingsnormen.

In het geval van de Nederlandse ombudsman vormt het beginsel van fatsoen of behoorlijk gedrag (behoorlijkheid) het normatieve concept, tevens het onderscheidende kenmerk van dit systeem. Het wordt toegepast als de controlestandaard. De Nederlandse ombudsman mag alleen beoordelen hoe de overheid overheidstaken uitvoert. In deze zin hebben de door de Nederlandse ombudsman behandelde zaken in de regel alleen betrekking op overheidsmaatregelen die niet de vorm aannemen van juridische (bestuurlijke) besluiten, aangezien juridische beslissingen onder de bevoegdheid van de bestuursrechter vallen.

Het principe van behoorlijkheid bestaat uit een reeks normatieve standaarden die door de instelling zijn ontwikkeld als onderdeel van haar normatieve functie. Deze normen zijn neergelegd in een lijst met normen voor behoorlijk gedrag opgesteld door de Ombudsman, de Behoorlijkheidswijzer. In dit verband voert de Nederlandse ombudsman een "soft law"-evaluatie uit om het openbaar bestuur te beoordelen door toepassing van niet-wettelijk bindende normen. De betekenis van behoorlijkheid voor wat deze instelling betreft is echter afgeleid van algemene bestuursrechtelijke beginselen, en in de tweede plaats van een aantal vereisten met betrekking tot goede praktijken. Als zodanig is het mogelijk om te bevestigen dat de beoordelingscriteria van behoorlijkheid zowel de rechtmatigheid van bestuurlijke handelingen als de toepassing van regels van goed bestuurlijk gedrag in aanmerking nemen. De tweede categorie kan worden gedefinieerd als behoorlijkheid stricto sensu. In die zin zijn de normen voor behoorlijk gedrag bedoeld om bestuurlijke autoriteiten te helpen omgaan met burgers en hun belangen, en aldus een behoorlijk bestuur te waarborgen. Daarom kan behoorlijk gedrag in de context van de ombudsman worden opgevat als een Nederlandse versie van goed bestuur.

Opgemerkt moet worden dat de besluiten van de Nederlandse ombudsman twee vormen kunnen aannemen: het onderzochte gedrag was behoorlijk of onbehoorlijk. Om een beslissing te nemen, beoordeelt de instelling het overheidsoptreden tegen het licht van zowel rechtmatigheid als behoorlijk gedrag. Daarom kan men stellen dat de Nederlandse ombudsman als onderdeel van zijn normatieve functie ook de wet interpreteert. Dit idee wordt versterkt door het feit dat de interpretatie van wat "behoorlijk" is, niet alleen is gebaseerd op noties die worden erkend als (wettelijke) beginselen van behoorlijk bestuur, maar ook op mensenrechten. Op deze manier speelt de Nederlandse ombudsman

een aanvullende rol bij de bescherming van de mensenrechten. Voor deze studie weerspiegelt dit de hybridisatie van de moderne ombudsman, wat in de praktijk leidt tot een uitgebreide toepassing van de normen voor behoorlijk gedrag.

Zoals ontwikkeld, weerspiegelen de normen voor goed gedrag de beginselen van goed bestuur. Ze zijn voornamelijk verbonden met de principes van behoorlijkheid, transparantie en effectiviteit. Hoewel veel van de specifieke normen met betrekking tot behoorlijkheid gerelateerd zijn aan wettelijke normen afgeleid van het beginsel van de rechtsstaat, zijn de meeste van hen gecreëerd in verband met de goed-bestuur- (sturende) dimensie van de moderne rechtsstaat. In dit verband illustreert de Behoorlijkheidswijzer de toepassing door de Nederlandse ombudsman van beginselen van goed bestuur. Het is aantoonbaar ook hoe in de praktijk de hybridisatie van de beoordelingsoriëntatie van de instelling wordt weerspiegeld in de uitvoering van haar normatieve functies, in termen van de ontwikkeling van normen voor goed gedrag gericht op het verkrijgen van individueel verhaal en het verstrekken van richtlijnen om bestuurlijk gedrag te sturen met een preventief doel, terwijl een grotere invloed op structurele problemen wordt bereikt. In het geval van de Britse ombudsman is slecht bestuur (*maladministration*) de focus van het ombudsmansysteem in het VK. Het begrip slecht bestuur hangt samen met het beginsel van een strikte scheiding van de bevoegdheden tussen de Britse rechtbanken, die beslissen over de wettigheid van bestuurlijke stappen, en de ombudsman, die beslist of er sprake is van wanbeheer bij bestuurlijke actie. Hoewel de Britse ombudsman geen zeggenschap heeft over kwesties van rechtmatigheid van slecht bestuur, kunnen zijn besluiten gedrag behelzen dat niet in overeenstemming is met de wet, evenals gedrag van overheidsorganen dat rechtstreeks verband houdt met hun bestuurlijke (juridische) functies.

Als onderdeel van zijn positieve benadering van slecht bestuur heeft de Britse ombudsman zijn beoordelingsnormen gecodificeerd door middel van de zogenaamde Lijst van Beginselen van Goed Bestuur. Deze normatieve codificerende functie markeert een zeer onderscheidende rol voor de instelling: de Britse ombudsman beoordeelt de overheid door soft-law-beoordeling uit te voeren via de ontwikkeling en toepassing van (niet wettelijk bindende) regels voor goed bestuurlijk gedrag die zijn opgenomen in de Lijst van Beginselen van Goed Bestuur. Aangezien zijn beslissingen betrekking kunnen hebben op gedragingen die niet in overeenstemming zijn met de wet en zelfs wijzigingen in wetgeving kunnen aanbevelen als bestaande bepalingen latere daden van slecht bestuur veroorzaken, kan worden gesteld dat de Britse ombudsman tot op zekere hoogte de wet ook interpreteert (en toepast) bij het beoordelen van de overheid.

De door de Britse ombudsman gecodificeerde normen kunnen in twee categorieën worden onderverdeeld: normen die verband houden met

rechtsbeginselen en het begrip rechtsstaat; en regels voor goed bestuurlijk gedrag. In het geval van de eerste categorie, die duidelijk verband houdt met de rechtsstaat, moet in gedachten worden gehouden dat de Britse ombudsman deze normen op een andere manier toepast dan de Britse rechtbanken, in die zin dat goed bestuur verder gaat dan wettelijk normen en dat legaliteit geen deel uitmaakt van de directe benadering door de instelling. Met betrekking tot de tweede groep hebben de normen een bestuurlijk karakter en hebben ze betrekking op de goed-bestuur- (sturende) dimensie van de moderne rechtsstaat. Daarom is het mogelijk om te beweren dat de Lijst van Beginselen van Goed Bestuur specifieke principes bevat van op goed bestuur gebaseerde normen die de behoorlijkheid, transparantie, verantwoording en effectiviteit weerspiegelen.

Er kan worden gesteld dat de Beginselen van Goed Bestuur van de Britse ombudsman een demonstratie zijn van de toepassing van de beginselen van goed bestuur in het rechtssysteem in het VK. Bovendien kan worden gesteld dat de Britse ombudsman als een mechanisme voor bestuursrechtspraak niet alleen individuele verhaalmogelijkheden biedt, maar ook algemene normen en beginselen bevordert om het functioneren van de overheid te beïnvloeden met een preventiedoel. De Britse ombudsman evolueert dus nog steeds en wordt gekenmerkt door een uitgesproken nadruk op controlegerichte acties, die tot uitdrukking komen in zijn normatieve functie en zijn rol als normbepalende instelling voor goed bestuur.

Met betrekking tot de Spaanse ombudsman voert de instelling, als onderdeel van haar beschermende functie, een "*hard law*"-evaluatie uit op grond van constitutionele parameters (regels, principes en de waarden die zijn vastgelegd in de grondwet), die prevaleren boven andere wettelijke normen. De controlestandaard van de Spaanse ombudsman is mensenrechten. Als norm voor controle, conceptualiseert de instelling de mensenrechten echter in een breed perspectief, dat gericht is op de bescherming van rechten (burgerrechten, politieke, economische, sociale en culturele rechten) en op grondwettelijke beginselen en mandaten die in de grondwet zijn vastgelegd. De Spaanse ombudsman kan ook een ruimere reikwijdte voorstellen voor de kern van bestaande rechten, voor zover hij het recht heeft om het recht te interpreteren bij de uitoefening van zijn functies. Deze interpretatie draagt bij aan de beschouwing van de Spaanse ombudsman als een ontwikkelaar van wettelijke normen die verder gaat dan het geschreven recht.

Op basis van de wettelijke bepalingen die zijn vastgelegd in haar organieke wet, voert de instelling in de praktijk ook controleactiviteiten uit met betrekking tot het gedrag van de overheid, waardoor ze dichter bij de controle van slecht bestuur komt. Als zodanig kan worden gesteld dat het onderzoek van de Spaanse ombudsman ook gericht is op het waarborgen van de juridische kwaliteit van

de overheid, daarbij vorm gevend aan de preventiefunctie van de instelling. Daarom kan een goed openbaar bestuur wellicht worden beschouwd als een aanvullend criterium voor het beoordelen van bestuurlijk gedrag. Sterker nog, men kan stellen dat de Spaanse ombudsman een tweeledige functie vervullen: de bescherming van de mensenrechten en de bevordering van goed bestuur.

De Spaanse ombudsman ondergaat momenteel een proces van hybridisatie met betrekking tot zijn beoordelingsoriëntatie en zijn beoordelingsnormen. Dit evoluerende proces betekent dat de beoordelingsnormen zowel mensenrechten als op goed bestuur gebaseerde normen omvatten, met name die met betrekking tot de toepassing van niet-wettelijk bindende normen. In deze zin kan worden betoogd dat de Spaanse ombudsman de overheid niet alleen (hoewel hoofdzakelijk) op basis van juridisch bindende normen beoordeelt, maar ook op niet-wettelijk bindende normen (of regels van goed bestuurlijk gedrag), gericht op het waarborgen van de goede werking van bestuurlijke diensten. De opkomst van niet-juridisch bindende normen door middel van "*soft law*"-beoordeling kan worden verklaard door de bescherming van economische en sociale rechten, die onmiddellijk verband houden met de kwaliteit van de prestaties van de overheid en de doeltreffendheid ervan bij het verlenen van diensten. Deze normen weerspiegelen meestal principes van goed bestuur, zoals behoorlijkheid, effectiviteit, transparantie en participatie. Het verband tussen mensenrechten en goed bestuur kan worden geïllustreerd door bepaalde normen die kunnen worden afgeleid uit de verslagen, besluiten en aanbevelingen van de Ombudsman.

Kortom, het is mogelijk om te bevestigen dat de drie ombudsmaninstellingen een wettelijke bronfunctie vervullen en normontwikkelende activiteiten uitvoeren door normen toe te passen die of rechtsbeginselen of regels van goed bestuurlijk gedrag weerspiegelen. In het eerste geval hebben de ombudsmannen in de praktijk een functie bij de interpretatie van het recht, zelfs als ze niet noodzakelijkerwijs uitspraak mogen doen tegen de juridische inhoud van de beslissing, zoals in het geval van de Nederlandse en Britse ombudsmannen. In het laatste geval draagt de instelling van de ombudsman expliciet of impliciet bij aan het opstellen van soft-law-normen. In beide gevallen dragen ze ook bij aan de ontwikkeling en verduidelijking van de reikwijdte van de beginselen van goed bestuur.

Als gevolg hiervan kan worden geconcludeerd dat de Nederlandse, Britse en Spaanse ombudsmannen dezelfde waarden delen en vergelijkbare normatieve standaarden hanteren die de beginselen van goed bestuur omvatten. Deze beoordelingsnormen zijn aangepast aan de evolutie van de rechtsstaat, wat heeft geleid tot de ontwikkeling van beginselen van goed bestuur als nieuwe bronnen van legitimiteit.

Wat betreft de toepassing van de beginselen van goed bestuur als beoordelingsnormen door de *Peruaanse Defensoría del Pueblo*, beoordeelt de instelling allereerst de acties van de regering door een hard-law-evaluatie uit te voeren gebaseerd op wettelijke normen die juridische beginselen van goed bestuur omvatten.

De controlestandaard van de *Defensoría* is mensenrechten. Deze norm is zeer ruim en omvat zowel de grondrechten als elk van de in de grondwet verankerde rechten. Daarom voert het een hard-law-evaluatie uit in nauwe samenhang met de bescherming van de rechtsstaat. Met dit doel werkt de *Defensoría* met betrekking tot niet alleen het wettelijke recht en afgeleide wetgeving, maar ook grondwettelijke parameters. Het is dus mogelijk om te bevestigen dat de *Defensoría* een normatieve functie vervult, voornamelijk door de interpretatie (en toepassing) van juridisch bindende normen, waaronder grondwettelijke bepalingen en (expliciete of impliciete) beginselen, wetgeving, voorschriften, algemene rechtsbeginselen (geschreven en ongeschreven, inclusief mensenrechtenbeginselen) en internationale instrumenten.

Het is belangrijk op te merken dat hoewel de basisrol van de *Defensoría* de bescherming van de mensenrechten is, de instelling heeft laten zien zich meer bezig te houden met de invoering van openbaar beleid en de operationele aspecten van de overheid, die nauw verbonden zijn met goed bestuur. In deze gevallen ligt de focus op het functioneren van het staatsapparaat, ongeacht of een burgerrecht wordt geschonden of niet. De verschuiving in de focus van de *Defensoría* weerspiegelt ook een hybridisatieproces in relatie tot de beoordelingsoriëntatie. Wat de *Defensoría* betreft, is goed bestuur een onmisbaar instrument voor de bescherming van de mensenrechten, als onderdeel van de criteria die de bestuurlijke acties van de staat sturen. In dit opzicht heeft de *Defensoría*, door een sterke nadruk te leggen op haar preventieve functie, haar positie als controlegerichte instelling omarmd.

Voor deze studie moeten mensenrechten als de controlestandaard van de *Defensoría* vanuit een breed perspectief worden geconceptualiseerd. Dit idee is gebaseerd op de Peruaanse grondwet zelf, die bepaalt dat de beoordeling van het gedrag van de overheid (en openbare diensten) ook onder haar bevoegdheid valt. Dienovereenkomstig wordt de controlestandaard van de *Defensoría* uitgebreid door haar organieke wet, die bepaalt dat het bestaan van een dreiging of schending van het grondrecht van een burger het gevolg moet zijn van "onrechtmatig, onregelmatig, onwettig, nalatig, beledigend of ongepast" gedrag door de overheid. Goed bestuur is dus ook een aanvullend criterium voor de beoordeling van de overheid. Als zodanig heeft de *Defensoría* aantoonbaar een duaal constitutioneel mandaat: de bescherming van de mensenrechten en de bevordering van goed bestuur.

Binnen het Peruaanse wettelijke kader zijn beginselen van goed bestuur ontwikkeld, met uiteenlopende inhoud en reikwijdte, in verschillende wettelijke statuten. Bovendien kan worden gesteld dat het algemene beginsel van goed bestuur en de specifieke beginselen van goed bestuur (expliciet of impliciet) zijn vastgelegd als grondwettelijke beginselen in de Peruaanse grondwet. Daarom is het, wat de harde beoordeling van de *Defensoría* betreft, mogelijk om te bevestigen dat de instelling de rechtsbeginselen van goed bestuur als beoordelingsnormen toepast.

Niettemin, vanuit het perspectief van deze studie, voert de *Defensoría*, naast "hard law"-beoordeling, ook een "soft law"-beoordeling uit door niet-juridisch bindende normen toe te passen als beoordelingsnormen. Het doet dit door de bevordering van goede bestuurlijke praktijken en de ontwikkeling van "regels voor goed bestuurlijk gedrag". De opkomst, door middel van een soft-law-beoordeling, van (niet-juridisch bindende) regels voor goed bestuurlijk gedrag werd duidelijker waargenomen nadat de instelling begon haar focus uit te breiden met de bescherming van niet alleen klassieke burgerrechten en politieke rechten, maar ook van economische en sociale rechten. Dit gebeurt in die mate dat de realisatie van deze rechten verplichtingen oplegt aan de staat in verband met de implementatie van overheidsbeleid en -beheer. Daarom is de *Defensoría* actiever geworden in de ontwikkeling van impliciete regels voor goed bestuurlijk gedrag door structurele problemen met betrekking tot kwalitatieve aspecten van de implementatie van overheidsbeleid aan te pakken, met als doel zowel de mensenrechten te beschermen en dergelijke problemen te voorkomen door middel van institutionele hervormingen. Evenzo is de *Defensoría* meer betrokken geworden bij het beoordelen van ethisch gedrag in de publieke sector, het voorkomen van corruptie, het toezien op effectief beheer van regionale en lokale overheden en bemiddelen bij sociale conflicten.

In dit opzicht is het mogelijk te beweren dat de *Defensoría* haar eigen beoordelingsnormen ontwikkelt op basis van de reikwijdte van haar interventies. Eén type interventie is gericht op het verifiëren van de naleving van wettelijk bindende normen, waarbij de beoordelingsnorm verbonden zal zijn met de rechtsstaat. Het andere interventiegebied is dat van het overheidsbeleid, dat veel complexer is en dat als norm meer dan juridisch bindende normen vereist, aangezien het gaat om de evaluatie van operationele aspecten van de staat. Deze tweede groep beoordelingsnormen kan worden beschouwd als normen op basis van goed bestuur, in die zin dat ze zijn gericht op het beoordelen van het functioneren van het staatsapparaat, ongeacht of de rechten van de burger al dan niet worden geschonden. Zowel mensenrechten als goed bestuur als beoordelingscriteria zijn echter samengesteld uit juridisch bindende normen en niet-juridisch bindende regels voor goed bestuurlijk gedrag.

De *Defensoría del Pueblo* heeft, door zich te richten op mensenrechtenbescherming en tegelijkertijd de juridische kwaliteit van de administratie te vergroten, ook haar grondwettelijke positie als garant voor goed bestuur ontwikkeld. Dit betreft haar betrokkenheid bij de kwalitatieve aspecten van de implementatie van overheidsbeleid voor de bescherming van burgerrechten (burgerlijke, politieke, economische, sociale en culturele rechten), waarvoor zij zowel juridisch bindende normen als regels van goed bestuurlijk gedrag toepast als beoordelingsnormen. Het is onmiskenbaar dat de ontwikkeling van regels voor goed bestuurlijk gedrag om individueel verhaal te regelen en richtlijnen te geven om overheidsingrijpen te sturen, ook de hybridisatie aantoont van de beoordelingsnormen van de *Defensoría* in termen van de uitvoering van haar normatieve functies. Daarom voert de *Defensoría* zowel "hard law"-beoordeling als "soft law"-beoordeling uit bij het beoordelen van de overheid.

Daarom kan worden geconcludeerd dat de door de *Defensoría* ontwikkelde beoordelingsnormen beginselen van goed bestuur weerspiegelen, zoals behoorlijkheid, doeltreffendheid, transparantie en participatie. De meeste van de geïdentificeerde normen hebben betrekking op juridisch bindende normen die verband houden met de dimensie van de rechtsstaat en de behoorlijkheid. Er zijn echter nog enkele andere normen te onderscheiden, in verband met de goede bestuurlijke (sturende) dimensie van de moderne rechtsstaat. In deze gevallen past de *Defensoría* normen toe (en ontwikkelt deze) die verder gaan dan bindende wettelijke normen. Deze regels voor goed bestuurlijk gedrag houden voornamelijk verband met de effectiviteitsbeginselen. Hetzelfde kan worden waargenomen met betrekking tot de voorgestelde normen die verband houden met de beginselen van transparantie en participatie.

De algemene conclusie van deze studie is dat ondanks de specifieke juridische context waarin de ombudsmaninstelling opereert, zij vergelijkbare beoordelingsnormen hanteert die kunnen worden beschouwd als normen die zijn gebaseerd op beginselen van goed bestuur. De ombudsman is een evoluerende instelling die bijdraagt aan de verbetering van de juridische kwaliteit van de overheid. De ontwikkeling van de instelling wordt gekenmerkt door de onderlinge samenhang en hybridisatie van haar beoordelingsnormen en de daaropvolgende hybridisatie van de ombudsmaninstelling als zodanig. Vandaar dat de hedendaagse ombudsman een dubbele functie vervult: de bescherming van de mensenrechten en de bevordering van behoorlijk bestuur. Het hybridisatieproces van de ombudsmaninstelling wordt geleid door de ontwikkeling van normen voor goed bestuur als beoordelingsnormen. In dit opzicht draagt de ombudsman bij aan de ontwikkeling van de juridische inhoud van de waarden die verband houden met de beginselen van goed bestuur.

Er kan worden gesteld dat, afhankelijk van het specifieke model van de ombudsman, bepaalde connotaties zijn afgeleid van de praktijk van de instelling met betrekking tot de ontwikkeling van beginselen van goed bestuur. Over het algemeen is de parlementaire ombudsman meer gericht op effectiviteit en verantwoording, terwijl de quasi-justitiële ombudsman meer bezig is met behoorlijkheid en effectiviteit. Aan de andere kant richt de gemengde ombudsman zich op behoorlijkheid en participatie. In alle gevallen houden de meeste van de huidige ontwikkelingen in de beoordelingsfuncties van de ombudsman verband met de sturende dimensie van de moderne rechtsstaat. Daarom is de rol van de ombudsman als vierde macht het bijdragen aan de verzekering dat goed bestuur wordt gerealiseerd.

In dit opzicht is het mogelijk om te beweren dat de *Defensoría*, samen met de Nederlandse, Britse en Spaanse ombudsmannen, een proces doormaken van hybridisatie van hun controlenormen en hun beoordelingscriteria. Bijgevolg delen zij dezelfde waarden en hanteren zij soortgelijke normatieve standaarden die beginselen van goed bestuur omvatten als nieuwe bronnen van legitimiteit. Op deze manier dragen ze bij aan de ontwikkeling van een flexibeler en effectiever juridisch kader om het overheidsoptreden positief te sturen, de legitimiteit van de overheid te vergroten en het democratisch systeem als geheel te versterken. Dit wordt gedaan door de naleving van de beginselen van goed bestuur bij de besluitvorming te bevorderen om te zorgen voor deugdelijke beslissingen en het behoorlijke gedrag van de overheid in het algemeen. Door de principes van goed bestuur toe te passen, draagt de ombudsman daarom bij aan het verbeteren van de juridische kwaliteit door zowel het gedrag van de overheid te sturen om betere resultaten te bereiken, en door de ontwikkeling van betere wettelijke kaders te bevorderen.

De ombudsman biedt in zijn aanbevelingen ruimte voor debat, beraadslaging en onderbouwde conclusies over de kwaliteit van de democratische werkwijze van de publieke autoriteiten. Vanuit dit perspectief bevordert de instelling principes van behoorlijkheid, transparantie, participatie, verantwoording en effectiviteit, die de legitimiteit en goed bestuur van de overheid versterken. Het is juist de huidige hybride aard en status van de ombudsman en de manier waarop deze functioneert, die de instelling in staat stelt de instrumenten voor kritisch parlementair onderzoek en rechterlijke controle op een nieuwe manier te combineren, en aldus bijdraagt aan goed bestuur.

Zo zouden de Nederlandse, Britse en Spaanse ombudsmannen kunnen leren van de aanpak van de *Peruaanse Defensoría* bij de beoordeling van overheidsbeleid om de goede werking van de overheid te waarborgen. Deze aanpak geeft de *Defensoría* inderdaad een systematisch mechanisme voor impact op beleidsniveau door een combinatie van de beoordelingscriteria. Dit zou kunnen bijdragen tot een uitbreiding van het actieterrein van deze Europese instellingen,

de ontwikkeling van meer omvattende (en flexibelere) beoordelingsnormen en de implementatie van een verreikende interventiestrategie om effectiever bij te dragen aan de versterking van goed bestuur teneinde de legitimiteit van de overheid te vergroten.

In het geval van de Peruaanse *Defensoría del Pueblo* kan ook worden geconcludeerd dat de instelling een proces van hybridisatie ondergaat met betrekking tot haar bevoegdheden, taken en functies. Dit is vooral tot uiting gekomen door een verschuiving van de nadruk op individueel verhaal gericht op het beschermen van mensenrechten naar een focus op overheidsbeleid als een mechanisme om impact te hebben op beleidsniveau. De aandacht van de *Defensoría* is dus niet uitsluitend gericht op klassieke politieke en burgerrechten, maar ook op economische, sociale en culturele rechten, die rechtstreeks verband houden met de openbare dienstverlening door de staat en de wettigheid van de acties van de overheid. Het hybridisatieproces wordt ook weerspiegeld in de normatieve functie die wordt geleid door de toepassing en ontwikkeling van op goed bestuur gebaseerde normen als een manier om de uitoefening van openbare functies te sturen.

Daarom – hoewel vanuit een historisch gezichtspunt (maar ook vandaag nog) het uitgangspunt en de hoofdtaak van de *Defensoría* de bescherming van de mensenrechten is -, heeft een verbreding van functies de instelling minder gericht gemaakt op individueel verhaal en meer gericht gemaakt op een preventieve functie. De *Defensoría* wordt geplaatst in het gemengde of duale ombudsmanmodel en daarom zijn er beschermende en preventieve functies aanwezig. In het kader van het evolutieproces heeft de *Defensoría* echter meer nadruk gelegd op haar rol als controlegerichte instelling om bij te dragen aan de verbetering van de kwaliteit van de interventies door de overheid.

De *Defensoría* voert normontwikkeling uit door normen te hanteren die verband houden met de rechtsstaat (legaliteitsbeginsel) of regels van behoorlijk bestuurlijk gedrag. In het eerste geval speelt de instelling een rol bij de interpretatie van het recht. In het laatste geval draagt het impliciet bij aan het creëren van "soft law"-normen. In beide gevallen draagt het bij aan de ontwikkeling en verduidelijking van de reikwijdte van de beginselen van goed bestuur. Omdat de *Defensoría* zich steeds meer bezig heeft gehouden met goed bestuur, heeft ze andere normen en standaarden ontwikkeld, zowel bindend als niet-bindend. In dit opzicht maken het perspectief van goed bestuur en de ontwikkeling van niet-wettelijk bindende normen deel uit van de normatieve functie van de instelling, zelfs als ze niet volledig worden overgenomen door de *Defensoría*.

Deze studie suggereert dat de *Defensoría* formeel goed bestuur aanneemt als een aanvullend beoordelingscriterium, haar eigen normatieve normen codeert op basis van beginselen van goed bestuur en richtlijnen ontwikkelt voor goede

praktijken gebaseerd op deze principes om op een effectievere manier bij te dragen aan het verbeteren van de juridische kwaliteit van de overheid. De instelling moet haar normatieve functie expliciteren om haar rol bij het bevorderen van goed bestuur te versterken, naast de bescherming van de mensenrechten. Daartoe dient de instelling op goed bestuur gebaseerde normen te codificeren, met twee doelstellingen: i) aanvulling op haar beschermende (op verhaal gerichte) mensenrechtenfunctie; ii) om zijn preventieve (controlegerichte) functie effectiever te maken door richtlijnen te geven om het gedrag van de overheid te sturen.

Zoals eerder vermeld, is er geen grondwettelijke belemmering voor de *Defensoría* om niet-juridisch bindende op goed bestuur gebaseerde normen expliciet te ontwikkelen en te codificeren om actie van de overheid te beoordelen. Hoewel zij hiertoe geen expliciet mandaat heeft, is de *Defensoría* sinds haar oprichting ervan uitgegaan dat haar constitutionele rol de bevordering van beginselen van goed bestuur behelst als een mechanisme om de democratie en de rechtsstaat te consolideren. Het doel van het codificeren van deze normen in de vorm van richtlijnen zou zijn om te dienen als een hulpmiddel om bij te dragen aan het overheidsbeleid van de staat voor institutionele hervorming en bestuurlijke modernisering. Dit zou bijdragen aan de implementatie van op goed bestuur gebaseerde normen voor het beoordelen van de juridische kwaliteit van de overheid.

De richtlijnen over normen voor goed bestuur zouden helpen om een efficiënte, transparante en burgervriendelijke overheid tot stand te brengen. Als zodanig zouden deze richtlijnen bestaan uit: i) een beheers- en ondersteuningsinstrument voor overheidsfunctionarissen; ii) een hulpmiddel dat informatie verstrekt aan burgers voor de verdediging van hun rechten met betrekking tot de overheid; iii) een hulpmiddel om het werk van de *Defensoría* te ondersteunen bij het bevorderen van goed bestuur voor preventieve doeleinden; en iv) een hulpmiddel om het werk van de Defensoría te ondersteunen bij het beschermen van de rechten van burgers met betrekking tot de overheid.

Tot slot moet worden opgemerkt dat hoewel deze studie de "goed bestuur"-gerelateerde functies van de *Defensoría del Pueblo* heeft geanalyseerd, de bevordering van de verbetering van het openbaar bestuur niet mag afleiden van een focus op de bescherming van de mensenrechten. Integendeel, de verbetering van het openbaar bestuur is een middel om tot een effectievere bescherming van de mensenrechten te komen, voor zover een doeltreffend optreden van de staat en een goede kwaliteit van de openbare dienstverlening essentieel zijn voor het waarborgen van rechten zoals gezondheid of onderwijs. Dit toont weer het belang aan van de hybridisatie van de mensenrechten en goed bestuur, zoals in deze studie is onderzocht.

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Alberto Castro was born in 1975 in Lima, Peru. He studied law at the Pontifical Catholic University of Peru (PUCP) obtaining a bachelor's degree in 2000 and a licentiate in Law. In 2007 he received his LL.M degree in Comparative Public Law and Good Governance from Utrecht University, the Netherlands. He also pursued a master's degree in Political Science, specialising in Public Management, at the PUCP.

Between 2001 and 2009 he worked at the Peruvian Ombudsman Office, where he was involved in human rights issues. In 2009 he began his PhD research at the Institute of Jurisprudence, Constitutional and Administrative Law of the Utrecht University School of Law. He is an expert in regulation, analysis and design of regulatory frameworks, administrative simplification, public law, public governance and state reform, as well as the analysis of public policies from a human rights-based approach. Between 2015 and 2019 he served as technical coordinator of the OECD team within the Office of President of the Council of Ministers of Peru, as well as coordinator of regulatory quality at the Secretariat of Public Management within the same office. During this period he represented the Peruvian state on the OECD Public Governance Committee and Regulatory Policy Committee at the headquarters of that organisation in Paris.

He has authored several articles and papers on legal aspects of good governance, particularly on the impact of governance on administrative law. Currently, he is a lecturer at the PUCP School of Law and academic coordinator of the Postgraduate Programme on Public Law and Good Governance at the same university.