Fair governance: a question of lawfulness *and* proper conduct

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Introduction

As National Ombudsman, I am involved every day with people who are having problems with government. These problems frequently lead them to lodge a formal complaint. I believe that to deal properly with such complaints requires more than a strictly legalistic application of administrative law and in particular of the Dutch General Administrative Law Act (*Algemene wet bestuursrecht*). This is the proposition I intend to address in this lecture. I shall review a number of different aspects of this issue. Firstly, the contrast between, on the one hand, the gut feeling of the individual citizen that things are fair or unfair and, on the other, the focus on the letter of the law that predominates within the government system. Secondly, the consequences of this disparity: it quickly leads to conflict. Thirdly, the way in which the government system and the individual citizen can interact to produce behavior that is both proper and lawful. I will end with some remarks about the use of mediation in public law relationships. What I am about to say is a first attempt to structure the ideas on this subject that I have developed through my work as National Ombudsman, as a judge and as an academic lawyer. I invite you to join with me in considering these matters.

'It's not fair'

The subject of this lecture is 'fair governance', with the emphasis on the word 'fair'. In the field of public administration, we talk about good administration and the actions of authorities being 'lawful' or 'proper'. The question is whether this is how the general public looks at things. How important is it to the individual citizen that government action is both proper *and* lawful?

From a *legal* and judicial point of view, the key issue is that of lawfulness. This is a normative approach. In other words, it is based on specific norms or standards agreed by society. In contrast to this, however, a descriptive approach resting on the issue of what individual citizens see as just and fair may also be proposed. Research shows that this is what the public cares about. People's feeling that justice has been done is closely connected with their perception of having been treated fairly. This takes us into a fairly extensive area of legal theory: that of 'procedural justice'. Procedural justice is as important as distributive justice (you get what you are entitled to, for instance a right as laid down in the law). But legality is not the only issue. An important question is: what do individuals mean when they say: "This is not fair"? Most likely they mean that they have been treated in an unfair way. It is this *fairness*-based approach that I intend to pursue here.

The work of the National Ombudsman focuses on the sometimes strained relationship between individual citizens and government. This is currently a matter of great political concern in the Netherlands. In my office, I keep a copy of Kafka in a prominent position on my desk and the sight of it constantly sparks lively discussion. For me, Kafka stands for the tension between the individual and the system. On the one hand there are administrative authorities, with their own professional *mores* and rational approach. On the other, there are individual human beings. In thinking about this divide, I derive great inspiration from Michael Lipsky's exploration of this issue in his book *Street Level Bureaucracy* (Lipsky, 1980).

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Interface

My basic proposition is that government needs to develop an interface between the individual and the system. I have borrowed the word 'interface' from the computer world, in which companies develop a wide variety of interfaces (such as the mouse, keyboard and operating systems) to make it easier for ordinary people to get computers to do what they want them to do without having to concern themselves with the complex 'innards' of the machine. So long as the interface works, we don't care about the rest. We need to find a similar kind of interface to simplify the interaction between individuals and the government machine in all its capacities.

This interface needs to have three features. First and foremost, of course, it needs to be *personal*. As National Ombudsman, I often see that, even when things have gone dreadfully wrong between an individual citizen and government, they can be smoothed over simply by the administrative authority showing a human face. For instance, I spoke recently to someone at the Public Prosecution Service about a very sad case in which parents had lost a child and the subsequent criminal investigation had gone badly awry. There was considerable ill-feeling until a chief public prosecutor got out of the office and went to speak to the parents in person. The action was enormously appreciated and actually led to a satisfactory closure of the case. The important thing is often whether the individual feels that government has acted properly towards him and personal contact is frequently a powerful means of achieving this.

Secondly, I think the interface needs to feature good administration in terms of *good manners*[2]. The basis of the National Ombudsman's work is to set an example of courteous and helpful treatment and to teach administrative authorities how they can themselves ensure such treatment of individual citizens in their day-to-day work. The courtesy which they are shown is an important determinant of whether individuals feel they have been treated fairly. Fundamental issues are sometimes at stake, in particular the issue of public acceptance. A great deal of research has been done on the issue of how the police should behave in order to obtain the willing cooperation of the public. Tom Tyler from New York University has done extensive research on this subject, see for instance his book *Why people obey the law.*

Something else is also at stake: public confidence in government and the continued legitimacy of the administration. Research commissioned by the Dutch Scientific Council for Government Policy (WRR) shows that individuals' feeling of being fairly treated is a factor determining not only satisfaction, but also their confidence in government. This has extraordinarily important implications.

Finally, in this connection, I would like to touch on the subject of 'government as a learning organization'. This may not be a sexy new theme, but as a conceptual model it is certainly interesting. A learning government will invite feedback from citizens and take what they say seriously. By doing so, it will automatically learn how to function properly. In other words, a system that constantly receives effective feedback will use it to achieve constant self-improvement in all areas, including its procedures for relating to individual citizens. This will in turn improve public acceptance of its operations and eventually enhance public confidence in the system.

The third feature of the interface is participation. Depending on the kind of government action concerned, people should have a fair chance to take part in decision-making. Citizens should not get the feeling that the administration is taking decisions over their heads. They should be properly informed and their views on certain factors involved should be taken into account. To create

[2] I refer also to the Code of Good Administrative Behaviour developed by the European Ombudsman.

participation is quite a challenge. At the local level there are some promising initiatives in this respect, but Dutch government still has a long way to go in developing and applying really effective methods of interactive decision-making.

The three features of the interface between public authorities and individuals are not only relevant to the achievement of what might be called 'customer satisfaction'. A personal approach, fair treatment and public participation also help to develop and maintain a sense of citizenship. Citizens should not simply be subjected to public authority. They should be given the chance to play an active part in the bilateral or multilateral relationship between themselves and government bodies.

Ethics

I would like to return now to my initial proposition that fairness can be used as a descriptive category in contrast to the normative category of lawfulness. The yardstick for the assessment of complaints by the National Ombudsman of the Netherlands is the general principle of *proper conduct*. This is broken down into a number of specific standards of propriety based on a list of decision criteria originally devised by my predecessor, Dr Martin Oosting. The standards of proper conduct applied by the National Ombudsman are clearly not legal norms. So what is the relationship between proper conduct and lawfulness?

Let me begin with an important concept linking the two: the general principles of good administration, such as due care, reasonableness, the duty to give reasons for a decision, legal certainty and legitimate expectations. These are obviously sacrosanct. But they are applied both in the courts and in the practice of public administration primarily as legal norms, whereas their relationship to the standards of proper conduct applied by the National Ombudsman is less direct. Proper conduct can be codified, pinned down, distilled into general principles of good administration and translated into written law. But it remains, inescapably, a non-legal category. I see proper conduct as a chiefly *ethical* category. What we are really talking about is the ethics of good administration. Those ethics can be to a greater or lesser extent translated into concrete legal norms but that doesn't eliminate the ethical aspect. Behind the codification of the general principles of proper administration in statute lurks the more shadowy category of proper conduct as an ethical standard.

And that's not all: ethics (unlike written law) are not what you say you will do; ethics are what you actually do in practice. That is why I think the distinction between the application of the law and the application of – ethical - principles is so essential to the function of the National Ombudsman. Unlike the courts, which judge the lawfulness of decisions, the National Ombudsman is concerned to assess actions and judge whether conduct has been proper. The behavior of the authority concerned must be ethical, which is a different thing from simply being lawful. Ethical behavior is behavior that citizens perceive as ethical, as fair. This is why my analysis leads me to conclude that the actions of administrative authorities should be both proper *and* lawful. And by viewing these two aspects as equally important, I am calling for greater attention to be paid to the 'proper conduct' aspect.

'Dual concern' model

To link proper conduct and lawfulness, I use the *dual concern* model. This model was developed as a way of analyzing interpersonal relations at the individual level (for instance, between a particular official and a particular member of the public). The model looks at the relationship between 'concern about own outcomes' and 'concern for the other side's outcomes'. These two dimensions are common to all human interactions. In the present context, however, I intend to apply the dual concern model at the institutional level. 'Own outcomes' are then those of the institution, while 'the other side's outcomes' are those of the citizen engaging in a transaction with the institution. This means that lawfulness (the outcome of concern to the institution) is seen in opposition to proper conduct (the outcome primarily of concern to the citizen). So, you see, I am establishing a specific relationship

between lawfulness and proper conduct. Evert van de Vliert catalogues these dual concern models in his 1997 book, *Complex Interpersonal Conflict Behaviour*.

Negotiating and conflict styles

The dual concern model provides the basis for an analysis of negotiating and conflict styles. Figure 1 shows the four basic positions.

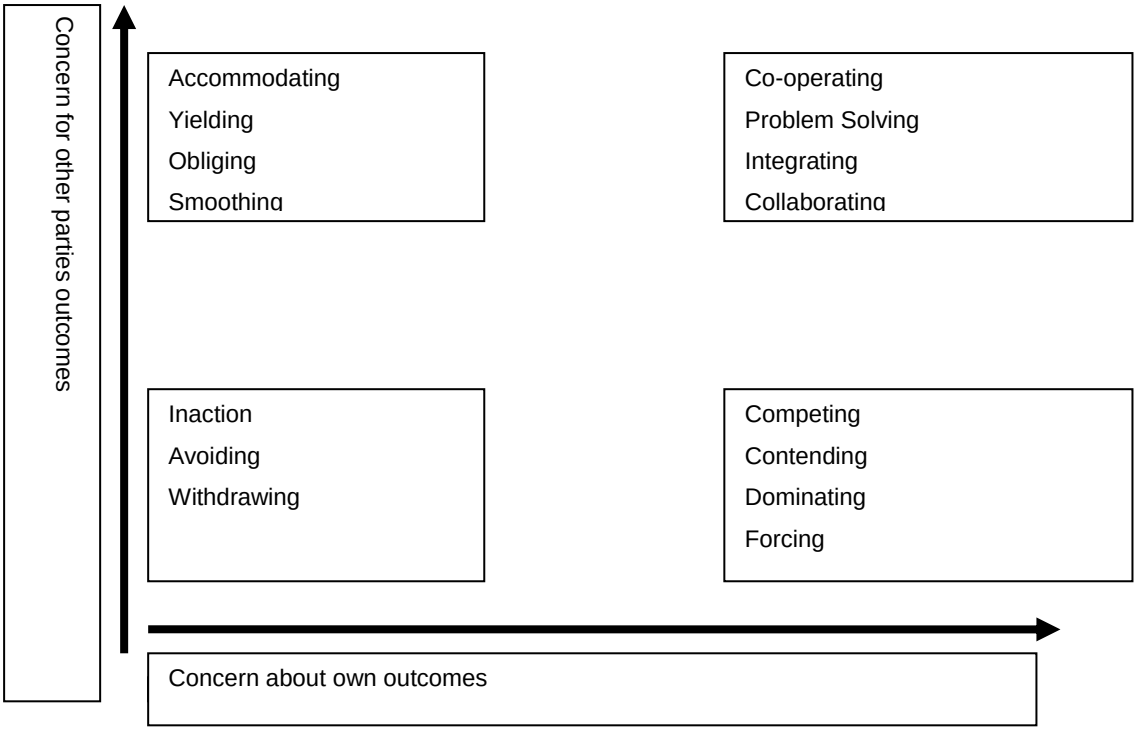


Figure 1. Negotiating and conflict styles, *Source:* Pruitt

A party that attaches little value to achieving either its own outcomes or those of the other side will tend to avoid conflict. One that attaches a lot of value to achieving its own outcomes and little to achieving those of the other side will adopt an aggressive, competitive attitude. This is conflict-seeking behavior. One that attaches a lot of value to achieving the outcomes of the other party but little to its own will tend to be accommodating. And one that attaches equal value to achieving both sets of outcomes will seek collaboration.

Translating this to the work of the National Ombudsman results in the diagram I call the ‘Ombudsquadrant’. Figure 2 shows proper conduct and lawfulness in relationship to one another.

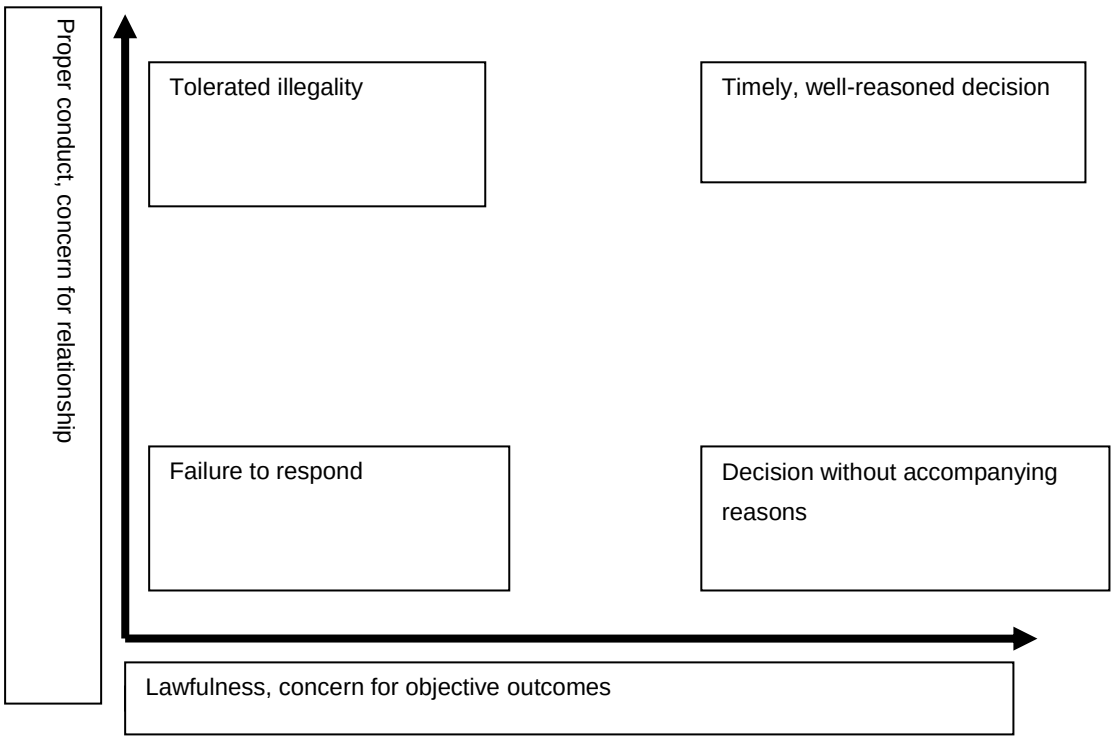


Figure 2. The 'Ombudsquadrant'

The horizontal axis represents lawfulness or concern for objective outcomes, while the vertical axis represents proper conduct or concern for the relationship. An authority that attaches little importance either to lawfulness or to proper conduct will, for instance, fail to respond and will remain silent in situations in which an individual has a right to a decision. Many examples of this attitude on the part of the government and agencies can be found.

If an administrative authority strives to achieve lawfulness but disregards proper conduct (the bottom right quadrant), the result may be, for example, a lawful decision delivered without accompanying reasons and therefore perceived by the citizen as improper. If the authority later provides a statement of the reasons for its decision, this may bring it into compliance with the law but will not change the fact that the citizen feels that he has not been treated properly.

Situations can also occur in which government acts in a more than usually proper manner, but not lawfully. The National Ombudsman dealt with a memorable case of this kind (report 2006/247) concerning the use of flexible baton rounds (often called 'beanbags') by a police arrest team to make a particular arrest. A beanbag packs an enormous punch which briefly renders a person immobile. The problem was that flexible baton rounds were not listed among the weapons that the police could legally employ. The use of the beanbag was therefore unlawful. We received a complaint about it and had to decide whether it had been proper for the police to use the beanbag to make this particular arrest. At the end of the day, we decided that its use, although unlawful, was proper. We reasoned that the lawful alternative facing the police was to shoot the person being arrested. The person concerned would then have been wounded or even killed. Therefore the use of the beanbag was proportionate, even though unlawful. It followed from this report that the law should be amended on this point. Now that we have cleared this hurdle, we are encountering other cases of this kind (a development predicted by Rijpkema and Langbroek in their book *Ombudsprudentie*).

From the point of view of good governance, of course, the ideal is a decision that is delivered with reasons, on time, in accordance with all the proper conduct criteria and is lawful. Such a decision will

be perceived by the recipient as both just and fair. That is the best way to satisfy the public's sense of fairness.

Legalistic conflict-seeking behavior

One kind of issue features in many of the cases that come to me as National Ombudsman. It is described in figure 3. Once again, the vertical axis represents proper conduct and concern for the relationship with the citizen. The horizontal axis, representing the concern for objective content or lawfulness, can also be seen on the basis of figure 1 as leading to conflict. From the interpersonal point of view, the point of view of proper conduct, the exclusive pursuit of lawfulness through the application and enforcement of the law tends to look like an aggressive refusal to compromise and be perceived as conflict-seeking behavior.

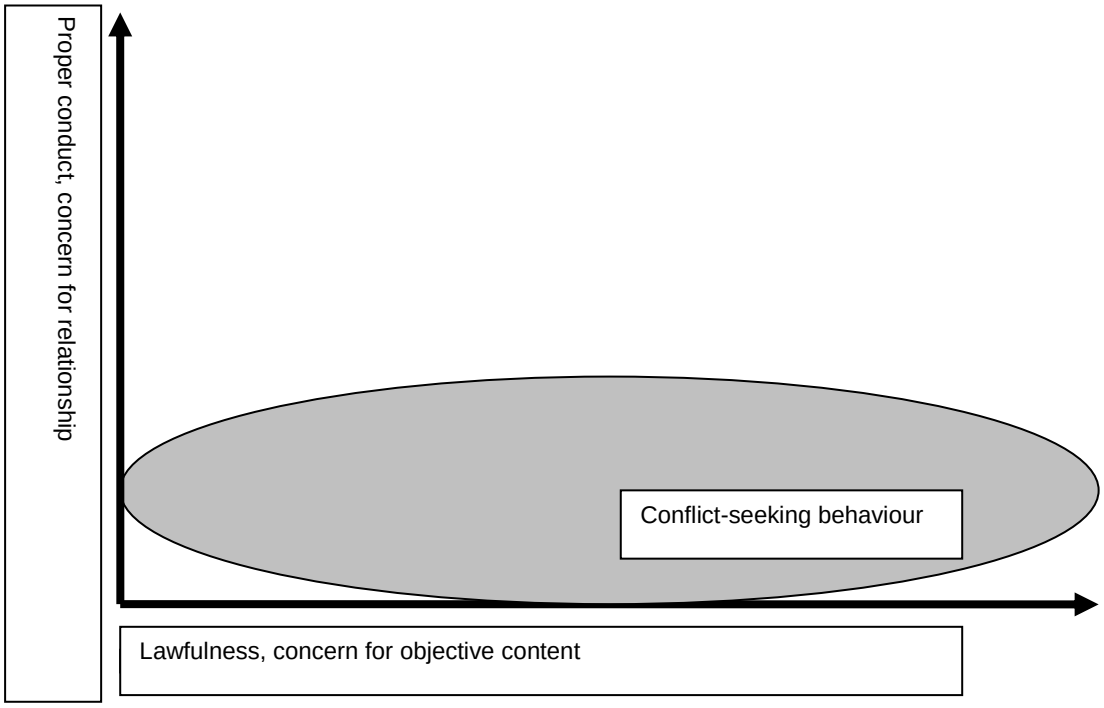


Figure 3. Conflict-seeking behavior

For me as National Ombudsman, this is an important point. At the heart of many of the complaints brought to the National Ombudsman is the complainant's feeling of having been treated *unfairly*. Complainants are angry and upset. They have a conflict with an administrative authority, but are being palmed off with the simple statement that the law has been properly applied. And so it has, but the individual involved still feels that it isn't fair. Analysis of hundreds of cases reveals that an exclusive concentration on lawfulness while ignoring the demands of proper conduct automatically produces complaints about 'fairness'.

I can illustrate this from my own experience as a judge. When administrative authorities were defending their decisions, their representatives would often admit that things could have been managed better, mostly described by the Dutch cliché that this case *could certainly not win a beauty contest*. This must be the commonest cliché to be heard in the administrative courts. The judge is expected to respond by finding that the appeal is unfounded, because there is nothing wrong with the decision in law. But this leaves the appellant with a problem, which the judge usually ignores. This phrase about "not winning a beauty contest" refers to all those deficiencies in proper conduct which, while not diminishing the lawfulness of a decision, later give rise to complaints to the National Ombudsman. Would it not be more appropriate for cases of this sort, in which "things could have been

managed better", to be placed before the National Ombudsman in the first place? In other words, I feel that the existence of the avenue of objection followed by review or appeal in the courts should not rule out a complaint to the National Ombudsman, as is currently the case under the General Administrative Law Act. In a not inconsiderable number of cases, the citizen goes to court because he feels unfairly (improperly) treated and has seen the clause at the bottom of the decision letter drawing attention to his right of objection or appeal. He goes to court not because he feels the decision was unlawful, but because he thinks the authority involved has behaved improperly. The UWV (the agency that implements employee insurance schemes in the Netherlands) has found that a swift response to objections in the form of a phone call to the individual involved to discuss how he feels he has been treated is sufficient to prevent legal proceedings being instituted in 40% of cases. The important thing is to listen to the individual, explain what has been done and why, and put right what has gone wrong.

Mediation

Mediation is a process in which an independent third party tries to bring conflicting parties together in order to let them negotiate an outcome to their conflict. In recent years quite a lot of Dutch public authorities and courts have experimented with the use of mediation in public law cases. The district courts all have a system of referring cases to external certified mediators. The results of such mediation are promising: in up to 60% of cases, mediation is successful in obtaining an agreement. The legal aid offices facilitate the use of mediation and finance independent certified mediators.
The tax authorities have also found mediation and mediation techniques a successful means of conflict resolution. They refer cases to internal certified mediators working in accordance with strict ethical rules or to external certified mediators. The UWV employee insurance agency has set up a system of early conflict identification leading to the use of mediation techniques and mediation. A lot of local authorities are trying to apply these examples of good practice in their own routine work. One of the effects of the use of mediation or mediation techniques in public law cases is their strong preventive influence on actual decision-making. The culture of public authorities often changes when they apply mediation or mediation techniques. Administrators no longer focus merely on the correct application of rules and regulations. They become aware that in a lot of public law disputes citizens simply want to be treated in a fair way. In the Netherlands, therefore, a different approach to public law cases is developing. The focus is no longer just on procedures, but also on problem-solving.

Why is mediation so effective in public administration? Firstly, I think it has to do with the three elements of the effective interface between citizens and administrators: a personal approach, fair treatment and participation. If we analyze the concept of mediation, it is evident that the mediation procedure itself is an effective interface between parties. It incorporates the three elements of the effective interface. Mediation is based on personal contact, parties are treated in a fair way, and they are allowed to participate throughout the process. Secondly, if we consider the dual concern model I talked about earlier, we can see that mediation is a highly relevant means of balancing concerns. Complaints, objections and court proceedings are mostly an expression of conflict. Mediation is a highly effective method of conflict resolution.

Conflict resolution in public law cases is not focused on negotiating the law. Public law usually allows the administration very limited discretion. Negotiations during mediation should not imply any willingness to disregard the law. The analyses of the dual concern model I discussed earlier showed that most conflicts are not just about the correct application of the law. Proper conduct is equally important. Mediation in public law cases tends to focus on the proper conduct of administrators.

In France the national ombudsman is called "la Médiateur de la République ". In other words, he is defined as a mediator. I feel this is correct, so far as it goes. The ombudsman can mediate between the administration and citizens. But he can do more than that. He can also report on maladministration or cases of disregard of human rights. Looking at the dual concern model, therefore, we can define the

role of an ombudsman as linking proper conduct to lawfulness. An ombudsman shows administrators how to comply not only with legal norms, but also with norms of proper conduct. To be sure, mediation is a perfect way of doing so. For that reason, I would argue that the ideal ombuds method *is* mediation.

Conclusions

All this leads me to three conclusions. The first is that an exclusive emphasis on lawfulness constitutes competitive or even conflict-seeking behavior. In some cases, this is permissible. A police officer who says that a citizen has broken the law and imposes an on-the-spot fine may certainly adopt an uncompromising attitude. He may even handcuff the person if he becomes unruly in resisting the imposition of the fine. That is perfectly lawful. Law enforcement necessarily involves uncompromising behavior. However, this can go too far and turn into unnecessarily confrontational behavior of a kind that sometimes provokes a backlash when citizens feel that they are not being treated properly. An officer who behaves in an intimidating or insulting way while handing out fines exposes himself to accusations of improper conduct, even though what he is doing is entirely lawful. Law enforcement officers need to be sensitive to this issue and exercise professional judgment.

An exclusive emphasis on lawfulness (that is, on the legal aspects of a case) constitutes competitive behavior and can lead to escalation of the conflict. An interesting illustration of this is the realization by the Dutch Ministry of the Interior and Kingdom Affairs that even engaging a lawyer to work on a case can constitute conflict-seeking behavior. The ministry has examined the risk factors for the escalation of labor conflicts with public servants and concluded, among other things, that simply involving a lawyer can be enough to lead to escalation. Lawyers can also have a de-escalating influence, but apparently experience has shown that the use of lawyers leads to a legalization of the conflict which has the effect of deepening the divide between the parties. This is a point worthy of serious consideration.

The second conclusion is that proper conduct helps to create acceptance, legitimacy and ultimately public confidence in government. The National Ombudsman's 2005 annual report contains a more detailed discussion of the issue of legitimacy and public confidence and I will return to it in future. It is an important point that improper treatment can drive citizens to show non-compliance and dispute the legitimacy of government actions. The parliamentary record shows that the remit of the National Ombudsman of the Netherlands is to decide whether the actions of administrative authorities are proper and by doing so to help restore public confidence. I think that what I have said in this lecture provides the theoretical basis for this link between proper conduct and restoration of public confidence. It seems to me that the ombudsman resolves not only the complaint, but also the underlying conflict.

The third conclusion concerns the close link between mediation and the role of the ombudsman. Mediation is a perfect interface between the administration and citizens. The use of mediation and mediation methods can transform legal procedures into problem-solving approaches to conflicts.

Closing remarks

The purpose of complaints procedures is not just to clear up complaints. There are good reasons for citizens to respond as they do. When they lodge a complaint, they are using a legal remedy to respond to government action which they perceive to be unfair and improper. Escalation resulting from an exclusive concentration on legality accompanied by a complete disregard of propriety is a pattern that emerges from many case files, both those concerned with objections, which the courts also see, and from those relating to complaints procedures. My ambition as National Ombudsman is to use concrete cases and concrete problems relating to administrative authorities to gain a better understanding of the background to and reasons for the patterns of interaction between government

and individual citizens. This may help us all to learn how structural improvements can be achieved in the relationship between government and the governed.

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