

SECOND CURACAO INTERNATIONAL OMBUDSMAN CONFERENCE
Investigative Methods and Techniques

“The Ombudsman’s Investigation: a useful addition to a lawyer’s defense”

Speech by

Karel Frielink

Attorney / Partner Spigthoff Attorneys & Tax Advisers Curacao

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Ladies and Gentlemen!

First of all, I would like to thank the Curacao Ombudsman, Alba Martijn, for inviting me to speak at this conference; and I would like to also thank you who are all still present here, for having the courage and patience to still be here after a long and tiring day. Please bear with me as it will only be for a further 30 minutes or so before you can relax and enjoy our exciting island.

What is a lawyer?

For an Ombudsman dealing with lawyers it is of importance to understand lawyers as a profession and what they may be after in a particular case. I will therefore briefly discuss the nature of this centuries old profession.

Well, what is a lawyer? The answer depends on the context in which this question is posed. In the Dutch Caribbean Islands (Aruba, Bonaire, Curacao, Saint Maarten, Saint Eustatius and Saba) for instance it is a regulated and protected profession like in most other countries.

The *Advocatenlandsverordening* 1959 [Lawyers National Ordinance 1959] talks about persons who practice a profession providing legal assistance. A person who meets certain conditions may apply to the Joint Court of Justice of the Dutch Caribbean (Aruba, Curacao, Saint Maarten and of Bonaire, Saint Eustatius and Saba) for registration as a member of the Bar. If that application is accepted they will, after taking an oath or affirmation, obtain the authority to practice law in the Dutch Caribbean. Such a formal definition does not offer much insight into the 'essence' of advocacy.

Lawyers can be found in all types and sizes. There are lawyers who (almost) exclusively do litigation but there are also lawyers who do nothing other than assisting in company take-overs or in drafting financing documents. The latter type of lawyer never enters a court room other than probably occasionally during their three-year Bar traineeship or when they are perchance called as witnesses.

So whether or not a lawyer is involved in litigation cases is not an adequate criterion for answering the question of what exactly a lawyer is. It is an established fact that a lawyer's activities are concerned with the law. It is also an established fact that the activities of a lawyer are focused on representing the interests of the party instructing him: the client. Therefore a lawyer is by definition biased! In this respect a lawyer distinguishes himself from a judge or a public prosecutor or an Ombudsman.

It is striking that a lawyer's Court documents, which are obviously drawn up in the name of their clients, often include judgments, quite often giving a rather absolute impression and lacking in any subtleties. Only those facts are mentioned or only those Sections of an Act or parts of literature and case law quoted which they think contribute to the substantiation and persuasiveness of their argument (*probatio*). So they only focus on a part of the reality known by them, while it is left to the counterpart's lawyer (or the Public Prosecutor in a criminal case) to use all that is known to him that he thinks will benefit his position and negate the arguments of the counterparty (*refutatio*).

It would be far from true to draw the conclusion from the above that lawyers are not interested in the tangible truth; however their focus will always be on the facts that support their client's position. This is what they are expected to do, given the adversarial nature of a case before the courts; the court acts on information presented by a party in evidence.

The Lawyer compared to an Ombudsman

I will not go into too much detail regarding the role and nature of an Ombudsman and investigations carried out by him. The role of Ombudsman is known in many jurisdictions and they can, just like lawyers, be found in all types and sizes. Some are described as "*Tarzan in the administration jungle*".¹ I will merely attempt to only highlight a few of the differences between an Ombudsman and a lawyer.

An Ombudsman is the obvious person for civilians to approach with their complaints about government and government agencies. The main task of the Ombudsman in Curacao is to serve the citizens (including legal entities) by conducting investigations into actions and practices of government and government bodies or agencies (both the executive and the legislative), by testing the merits of the manner in which a government body, authority, official or public servant has acted in a particular matter and by giving judgments as to whether those actions were improper or not. However, I personally also consider the function of an Ombudsman to be more that of a watchdog, keeping government in line, and guarding against excesses, abuse of power or corruption.

An Ombudsman is impartial and independent. Such a complaint-resolution mechanism was and is needed to supplement the traditional means of seeking redress. This is particularly true for Curacao, because in many cases the government and government agencies are unresponsive, or even take or refuse to take administrative decisions contrary to the laws and regulations as well as contrary to court judgments. Recently, it was established that in over 120 cases the Curacao Minister of Justice simply refused to follow court orders to decide on applications - or on objections against notional refusals - filed by aliens who applied for a (temporary) residence permit. This is a *good* example of *bad* government practices. Even a Minister of Justice must abide by the law!

¹ Rob Jagtenberg en Annie de Roo, *Interview met (oud-)ombudsman Migiel van Kinderen – een bemiddelende Tarzan*, Nederlands-Vlaams tijdschrift voor Mediation en conflictmanagement 2011 (15) 1, p. 5.

An Ombudsman has no clients and is not paid to exclusively defend the interests of a client. An Ombudsman has no boss. No one can tell an Ombudsman to refrain from investigating certain matters because they are or might be politically sensitive. I guess that many of you know by experience that from time to time there are political forces that in subtle or less subtle ways try to prevent an Ombudsman from functioning correctly. We have seen that here in Curacao and in the Dutch part of Saint Maarten as well. The only real power one has as an Ombudsman is the power to investigate. My advice: use that power and show that you cannot be influenced, that you cannot be intimidated, and that you are unstoppable.

A lawyer is not an investigator. Generally speaking, he has no investigative skills, and, as we concluded before, he is not, at least not always, interested in the whole truth. An Ombudsman has, or should have, much easier as well as greater access to government records than a lawyer. An Ombudsman can find information that was not available to a lawyer.

Ombudsman beneficial to lawyers and their clients?

In several jurisdictions the law provides that, with certain exceptions, a statement made or an answer given by a person during an investigation by the Ombudsman, and a report or recommendation of the Ombudsman, is inadmissible in evidence in a court or in any other proceeding.

As far as legal proceedings in the Dutch Caribbean are concerned, our laws do not prohibit an Ombudsman's report from being introduced into a civil lawsuit. Based on an Ombudsman's report one may report a case to the police or the public prosecutor's office. It should be noted, however, that the Curacao Ombudsman is prevented from initiating an investigation, or from continuing to investigate a matter, if (and once) the matter at hand is subject to civil, administrative or penal proceedings, or already has resulted in an administrative decision.

Unlike, for example, England and Denmark, in the Dutch Caribbean and the Netherlands, conflicts between the administration and citizens are dealt with by specialized administrative courts.

The Ombudsman may also decide not to start an investigation if the complainant could have sought recourse in administrative proceedings, but has not done so. This is left to the discretionary power of the Ombudsman.

It is therefore of importance that a lawyer carefully assesses whether it is a good strategy to first file a complaint at the Ombudsman and subsequently use the evidence thus gathered in court proceedings for damages.

Lawyers and their clients may benefit from the Ombudsman's office in several ways. The Ombudsman is able to carry out an investigation without the client having to pay for it. And this is even better than "Going Dutch", with the bill evenly shared between all parties (like at a restaurant).

Generally, such an investigation will be more thorough than investigations carried out by lawyers. As mentioned previously, lawyers are not investigators and are as such ill-equipped.

Government and government bodies are under an obligation to provide access to their records. A lawyer may eventually get access to the same records albeit after lengthy proceedings and against high costs.

The mere fact that the investigation will be carried out independently and systematically (and in many cases rather quickly) by an impartial expert is in itself of relevance. It is all about credibility.

Another important observation is that involving an Ombudsman or his report being presented to government or the relevant government agency may help in solving the dispute out of court. We should not underestimate the potential power of an Ombudsman in terms of dispute resolution. To ensure successful dispute resolution it is essential that, for instance, cabinet Ministers and senior executive civil servants provide the political will and support to such initiatives.² The question is of course, how do we make that happen? How do we convince or force the government to live up to principles of good administration? That will often be frustratingly difficult!

Courts and Ombudsman reports

An Ombudsman determines whether a complaint is justified or not. If the Ombudsman finds that a complaint is justified or has merit, he may decide to try and persuade the government or government agency to change its policy or decision. My topic, however, is about an Ombudsman report resulting from a complaint primarily filed to establish whether there were sufficient grounds to initiate legal proceedings in a regular court. A lawyer and his client may decide to submit the Ombudsman report to the court, in the course of proceedings, as evidence that supports the client's position.³ Such a report is, however, not legally binding any way whatsoever, despite the fact that reports made by Ombudsmen are sometimes labelled as "*Ombudsprudence*".⁴

I will briefly discuss our rules on evidence in civil matters. According to Dutch Caribbean law on civil procedure, whoever asserts a fact must prove it. In other words, any party will be required, in principle, to offer evidence to prove the facts that he has asserted or been required to assert if he is to rely on them for legal purposes. A Dutch Caribbean court may only base its decision on facts. An alleged fact that is not disputed by the parties is considered to be such a fact, even if it does not correspond with reality. For example, if both parties state that they were involved in a fight in Curacao, the court will assume the correctness thereof, although both parties know that the fight was actually in Bonaire.

In principle, a Dutch Caribbean court is free to evaluate the evidence before it. This is true, in particular, when an Ombudsman report is brought into a case to support the position of one of the parties. In this respect the quality of the research done by the Ombudsman, the substantiation of his findings and the independence of the investigation will play an important role. However, even in these circumstances the courts have the last word as to whether an Ombudsman has come to the right conclusion. It goes without saying that an Ombudsman can also make mistakes, for instance, by not properly gathering the facts, misinterpreting facts, or jumping to conclusions.⁵

² See Rob Jagtenberg en Annie de Roo, *Interview met (oud-)ombudsman Migiel van Kinderen – een bemiddelende Tarzan*, Nederlands-Vlaams tijdschrift voor Mediation en conflictmanagement 2011 (15) 1, p. 7.

³ See Central Appeals Tribunal, 19 February 2004, LJN: AO4171 [Municipality of Amsterdam vs X].

⁴ Philip Langbroek, *Ombudsmanwerk tussen overheid en burger*, AA 56 (2007) 11, p. 910.

⁵ See for example Appeal Court 's-Hertogenbosch, 6 September 2011, LJN: BT2233 [X vs Loxodrome Architects & Planners].

There is another important observation to be made. The fact that an Ombudsman finds a complaint justified does not necessarily mean that the government or government agency committed a tort *a.k.a.* a wrongful act (in Dutch: *'onrechtmatige daad'*). Whether or not a tort has been committed must be assessed on the basis of the (Curacao) Civil Code.

The Appeal Court of The Hague,⁶ for instance, ruled that even though the Ombudsman had concluded that the Dutch tax authorities acted unfairly by not giving correct information in a particular matter to certain parties, this did not automatically mean that the State of the Netherlands had acted unlawfully against these parties, who had initiated legal proceedings against the State. Under the laws of Curacao the result would not have been different.

The District Court of The Hague,⁷ to mention another example, ruled that even though the Ombudsman had reached the conclusion in his report that the State of the Netherlands had acted improperly, this improper behavior was not necessarily also wrongful and that there was therefore not necessarily an obligation to compensate the damages.

So even if the Ombudsman went as far as to conclude that a government body had committed a tort, which I guess will not happen often given the assessment framework of the Ombudsman, it is ultimately up to the courts to interpret the facts and decide whether this is indeed the case. In this sense, an Ombudsman's report only provides an opinion, albeit in many cases a learned opinion.

In many cases an Ombudsman deals with administrative decisions or the lack thereof. It goes without saying that in his reports the Ombudsman will make reference to the principles that have been developed by the courts to help them judge administrative behaviour in conflicts with citizens. In those cases it is also up to the court to decide whether or not the Ombudsman came to the right conclusions.

In another case, there was a dispute between a client and his insurance company about certain premiums charged.⁸ There had previously been discussion about the reasonableness of such premiums and based on an Ombudsman report, settlement agreements had been concluded between several insurance companies and consumer organizations. In this particular case, the court ruled that lacking any alternative standard, it would follow the agreements mentioned, which, as said, were based on the Ombudsman report.

Based on the court cases reviewed, I get the impression that Ombudsman reports are taken seriously by the courts. Perhaps one can impress a girl by being in excellent physical shape, but to impress a court is not that simple. It requires experience, knowledge, authority and in particular the ability to draft a report supported by verifiable evidence, sound reasoning and common sense.

⁶ Appeal Court of The Hague, 14 December 2010, LJN: BO7396 [X B.V. vs State of the Netherlands]. Also see District Court Assen, 19 February 2007, LJN: AZ8836 [X vs Regionaal Politiekorps Assen] and District Court 's-Hertogenbosch, 23 June 2004, LJN: AP5823 [X vs Regionaal Politiekorps Brabant-Noord].

⁷ District Court of The Hague, 27 July 2011, LJN: BU1282 [Eurolines vs State of the Netherlands]: *"Bij de beoordeling van deze vordering wordt vooropgesteld dat het oordeel van de Nationale Ombudsman dat een klacht gegrond is (en dat het overheidsorgaan in kwestie dus in zoverre onbehoorlijk heeft gehandeld), niet zonder meer betekent dat de overheid in dat opzicht onrechtmatig heeft gehandeld en dientengevolge schadevergoeding moet betalen"*.

⁸ District Court of The Hague, 13 April 2010, LJN: BL9733 [X vs Aegon Spaarkas].

Final remark

Why do some people think that being a 'lawyer' is the best profession, or better still: the most beautiful vocation? Why do some people stake everything on becoming a lawyer? Do they not know the story, true or untrue, set in the first half of the second millennium?⁹

The lawyers from that time required a patron saint. They delegated Saint Ivo (*a.k.a.* Saint Yvo; 1253-1303) to travel from Brittany to Rome, more in particular the *Lateranum*, in order to apply for this patron saint to His Holiness. The request was honoured on the understanding that Ivo could choose one of the statues erected on the square but only after he was blindfolded.

Under loud encouragement of the prelates present he made his way until in the end he came to a halt. He placed his hand on a statue and declared that he had made his choice. His blindfold was removed and to the amusement of all spectators he appeared to have chosen a statue of the devil.

Deeply sad he returned as you understand empty-handed to Brittany to die there soon after. In the end Saint Ivo, who as a professional lawyer served as an example for many, was canonized by Pope Clemens VI. His epitaph contributed to the fact that Saint Ivo would from then on be the patron saint of lawyers. What did this epitaph read?

Sanctus Ivo erat Brito, Advocatus et non latro. Res miranda populo

(Saint Ivo was a Breton; a lawyer but not a thief. Something the people were surprised about)

Thank you very much!

⁹ See Karel Frielink and Mirto F. Murray, *Twee Curacaose Meesters* [Two Curacao Masters] , Nijmegen: Wolf Legal Publishers 2011, p. 4-5.