

## THE OMBUDSMAN OFFICE

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### Summary

Ombudsman offices are a form of watchdog on government, investigating and resolving citizen complaints. This chapter reviews the history of ombudsman offices. It also addresses the question, "What is an Ombudsman?" by looking at the characteristics of the 'classic' ombudsman office and the characteristics necessary for membership in the International Ombudsman Institute. It reviews the recent rapid spread of ombudsman offices around the world and the organizations that have evolved to support them. Next is a step-by-step description of how a typical classical ombudsman office operates, followed by a comparison of ombudsman offices to courts and other avenues for remedy.

### 1. Introduction

The term ombudsman comes from Sweden, where the first such office was established. An ombudsman takes citizen complaints against government agencies, with the intent to resolve the complaint quickly and at no cost to the complainant. In order to accomplish this task, an ombudsman needs to have independence from the administrative branch the

office investigates, power to gather relevant data, and credibility with both citizens and the government. While ombudsman offices have considerable power, ultimately they can only make recommendations; they cannot compel compliance. Sweden's legislature appointed its first ombudsman in 1809, and it was not until the twentieth century that Finland, Denmark, and Norway followed suit. The idea spread to the British Commonwealth, and today there are ombudsman offices in over 80 countries at the national, provincial, and local level.

Ombudsman offices are a form of check on government agencies. They are different from courts, because they are no cost to the complainant and their procedures are relatively informal. Ideally, an ombudsman takes a complaint, talks to the agency involved, and works out a resolution suitable to the complainant and the agency. In the best of circumstances this can be accomplished quickly with a short phone call. When an agency is less forthcoming, the ombudsman has investigatory powers and can compel an agency to provide information. Sometimes an ombudsman can absolve an agency of blame in a situation. The ombudsman does not have the power to compel an agency to act; it can only make recommendations. The ombudsman's power comes from its persuasive abilities, its reputation, and its ability to publicize cases if necessary.

The ombudsman described above is what Gotteher and Hostina have termed "the classic ombudsman." The proliferation of ombudsman offices around the world, and the use of the term "ombudsman" for complaint departments in private corporations, means that today not all ombudsmen have these characteristics. There is a small but rich literature on this office. This chapter highlights the key aspects therein.

## 2. The Historical Creation of Ombudsman Offices

The accounts of the first official "ombudsman" office vary. Ulf Lundvik tells how King Charles XII of Sweden first created the office of *justitieombudsman* in 1713, from exile in Turkey, after his 1709 military defeat in Russia. In order to stem the civil strife in Sweden, the ombudsman's job was to ensure that laws were carried out, and that civil servants did not abuse their power. In 1809, the *riksdag* (Parliament) reconvened for the first time in many years, and adopted a new Constitution which realigned the power between the king and the *riksdag*. The Constitution also provided for the "election by the Riksdag of a justitieombudsman. The latter should be 'a man of known legal ability and outstanding integrity.' His duty was to supervise, in his capacity as a representative of the Riksdag, the observance of laws and statutes by all officials and judges." The ombudsman originally functioned as a special prosecutor. That power has been greatly reduced and today. Lundvik writes, "The ombudsman's main weapon is the power to admonish or criticize officials found at fault".

In 1809, though prior to the establishment of the new Swedish Constitution, Finland had become an autonomous grand duchy, separated from Sweden and ruled by the Russian Emperor. However, Swedish law remained in force. A local government was formed which included a Chancellor of Justice. When Finland gained independence from Russia in 1919, the new Constitution included a parliamentary ombudsman. Nielson writes that Norway created ombudsman offices for the armed forces in 1952 and for the general public in 1962. Denmark followed in 1954 when the Parliament created the

ombudsman office. A key difference between the Danish (and Norwegian) model and the Swedish model is the absence of prosecutorial powers in the Danish model.

### **3. What is an Ombudsman?**

#### **3.1 The mission of the ombudsman**

The basic goal is to give citizens a reasonably quick and cost free means of resolving complaints against government bureaucracy. But a good ombudsman office in pursuit of the goal does much more. In 1976 Hill outlined seven goals which characterized the office of ombudsman. Danet writes that these have been generally accepted, and even used as benchmarks to evaluate how ombudsmen perform. According to Hill, the ombudsman is:

- a goal-oriented mechanism for ameliorating citizen-bureaucracy relations;
- righting specific administrative wrongs;
- bringing humanity into bureaucracy;
- lessening popular alienation from government;
- reforming administration;
- acting as a bureaucratic watchdog; and
- vindicating civil servants when they were unjustly accused of maladministration.

In recent years, the term ombudsman has gone from obscurity to a certain level of recognition and respect. For those familiar with the term “ombudsman”, the connotations are generally positive. This appears to be a key reason why many are adopting the term “ombudsman” for any position which takes complaints. Within ombudsman circles, much time has been spent on the question of what exactly an ombudsman is. The debate is generally between the notion of a “classical ombudsman” and other types of complaint offices. Those who argue for the “classical ombudsman” feel strongly that the effectiveness of the ombudsman depends on a set of characteristics, which give the office the autonomy and power to conduct investigations of people in power without fear of retaliation—either in terms of budget cuts or removal from office. Without this protection, they argue, the office is in danger of being simply a way for management to present an image of receptiveness, while preventing the office from doing any work that might seriously affect those in power. The proponents of the classic definition of ombudsman are concerned that the respect and relative “purity” of the term “ombudsman” will be tarnished by what they consider the misuse of the term. Proponents of the “executive” ombudsman—an office appointed by the executive rather than the legislative body—argue for the legitimacy of their structure. Anderson writes, “The Executive Ombudsman office should not be viewed as a perversion or distortion of the Ombudsman idea, but rather as a variation of it, and possible combination with it, presenting slightly different congeries of advantages and weaknesses”.

Recently, Hill has argued strongly for protecting the notion of a “real” (classical) ombudsman. Acknowledging he and others had been lax in accepting a variety of offices which used the term “ombudsman” in the 1960s, Hill says that he now regrets the earlier tolerance “because I think the result was to legitimate all of the kinds of offices and to create the impression that the classical ombudsman was simply one,

perhaps the preferred one, but no more than one of other kinds of ombudsman offices”, when, in fact, the term “ombudsman” had come into English with a very specific meaning. His concern is that the ombudsman office is a relatively low powered institution even in the classical model, and when legislators create a new office, a wide variety of even weaker offices called “ombudsman” makes it easier for legislators to choose an ombudsman structure with no real power. Hill is particularly concerned by The Ombudsman Association (TOA), which includes many corporate ombudsman offices, and which, he argues, has loosely defined the ombudsman more as a mediator in the spirit of the Alternative Dispute Resolution movement. While recognizing that the United States “cannot go as far as New Zealand has gone in passing a law saying that the term “ombudsman” cannot be used by an office without approval of the chief ombudsman”, it is clear that Hill would like the use of the term to be more restricted.

### **3.2 What is a classical ombudsman?**

The notion of a classical ombudsman stems from the original Scandinavian concept and the safeguards these offices had to maintain their autonomy. Gottehrer and Hostina list four main characteristics of a classical ombudsman: Independence; Impartiality and Fairness; Credible Review Process; and Confidentiality. The following discussion of characteristics of the classical ombudsman is based on the list of characteristics offered by Gottehrer and Hostina. They are both former deputy ombudsmen, and Gottehrer has been a consultant on establishing ombudsman offices in various nations of the former Soviet Union and Africa. Their discussion is based both on their own experiences as well as research on the topic by various individuals and organizations. The discussion here is based on their model, but my comments in cases may not exactly reflect their perspective.

#### **3.2.1 Independence from those being investigated**

The ombudsman should have as much freedom as possible to investigate powerful people without fear of removal, influence, or other obstacles. Gottehrer and Hostina would do this through a firm legal basis of the office (either in the Constitution or in statutes) to make it hard to eliminate the office; through a strong majority required to appoint or confirm; through selection by a unit different from the one it investigates (usually a legislative body appoints the ombudsman to review the administrative body); through sufficient budget for the office and a high, fixed salary for the individual ombudsman; control over appointment and termination of staff; and immunity from prosecution for official acts of the ombudsman.

#### **3.2.2 Impartiality and Fairness**

The person chosen as ombudsman must be respected as someone who can impartially investigate allegations. The perception of fairness is important for credibility with both citizens and agencies. While the ombudsman office is client-centered, Hill asserts it is *not* anti-administration. Agencies must have confidence that they will be treated fairly, and citizens must have confidence that their complaints will be treated seriously and acted upon. Just having an objective third party with whom to check is often sufficient to resolve a complaint. Often ombudsman offices receive complaints which are not

justified, and thus the office must also be able to find in favor of the agency when that is appropriate. In many cases a citizen is unsure of the rules or procedures, and an ombudsman who is seen as impartial and fair can reassure a complainant that the agency has, in fact, followed the proper procedure.

To increase the probability of impartiality and fairness, Gottehrer and Hostina recommend factors which first, focus on the ombudsman: high ethical and technical qualifications, a supermajority to appoint, restrictions on political activity; and legislation for how to handle ombudsman conflicts of interest. Second, access to the ombudsman should be available to all, without a fee, and without screening by anyone else. Finally, they focus on due process. While the ombudsman should have the power to criticize anyone within the jurisdiction, all those who would be criticized, should be consulted first, and given the opportunity to include their reply in the final report.

### 3.2.3 Credible Review Process

Again, this cuts both ways. In order for the public in general and specific individual complainants to believe in the ability of the ombudsman to resolve problems, the office must have sufficient investigatory powers to get the information necessary, to determine the validity of a complaint and options for an appropriate remedy. Yet the review must also be credible to the agencies being reviewed; they must believe that they will be fairly treated and that the ombudsman can recognize illegitimate complaints as such. Gottehrer and Hostina address four basic areas to ensure this. The first is jurisdiction. They argue for the ombudsman's jurisdiction to be reasonably broad in terms of who can file a grievance, which agencies, and what types of grievances can be investigated. The ombudsman office may also open an investigation on its own without a specific complaint. Second, there must be adequate access and cooperation. The ombudsman office must have, if necessary, subpoena power and the ability to compel testimony. Third, there must be due process for those being investigated: the agency or persons under review must be consulted, and have the opportunity to review and reply to the final report. The fourth area relates to the ombudsman's power to enforce recommendations. The aspect which balances the considerable power an ideal ombudsman has is the ombudsman's inability to enforce a recommendation. An ombudsman can only recommend. It is only through persuasion and, if necessary, the ability to publish and publicize findings that an ombudsman can get compliance.

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### **Biographical Sketch**

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