Using an ombudsman to oversee public officials

An ombudsman investigates complaints, makes recommendations, and tries to ensure that those recommendations are followed. But simply establishing such an office is no panacea for administrative excesses.

Public officials do not always obey the law or follow government policy. To provide a remedy, ombudsman offices have been established throughout Eastern and Western Europe and the Commonwealth. The European Union has established its own ombudsman. In several new European democracies, such as Hungary and Poland, such an office is required by the constitution and is well established. Georgia, Romania, Russia, Spain, Ukraine, and Uzbekistan have established such offices, and Bulgaria, the Czech Republic, Estonia, and the Slovak Republic are doing so.

Sweden’s ombudsman has long historical antecedents and has inspired many recent creations. But the Swedish model is country specific, deeply rooted in constitutional and historical factors that are not easily reproduced elsewhere. When transplanted to other countries, the concept of an ombudsman needs to be reconfigured to local conditions—including its relationship with other forms of administrative regulation. Moreover, there is often confusion about the relationship between an ombudsman and other institutions (such as human rights commissions). How should such an office be established, and how can it be made effective?

What does an ombudsman do?
An ombudsman investigates complaints against the administration, makes recommendations concerning those complaints, and tries to have its recommendations adopted by the administration. In most cases complaints are lodged by an individual, group, or legal entity about an act or decision by a minister, agency, or other public body, with the act or decision alleged to be illegal or improper and affecting some significant manner the rights or interests of the complainant. An ombudsman may also investigate more general matters raised by the complaint, and in some instances may initiate an investigation without a complaint. An ombudsman should be created by law, as an institution independent of the government, administration, courts, and all other public and private bodies, while being accountable to parliament.

An ombudsman normally has a duty to investigate any complaint that, after an initial inquiry, appears to raise a real issue. The public authority being investigated has a duty to cooperate with the investigation and to produce documents and other relevant evidence. If the investigation reveals that there are grounds for the complaint, the ombudsman has a duty to recommend to the public body how it should be remedied.

An ombudsman may recommend reversion or change of an act or decision or some form of restitution. Such recommendations are usually not backed by legal sanctions. Although the minister or public authority is not legally required to adopt the recommendation, the government is
likely to be under strong political pressure to do so—and may negotiate the specifics of implementation. The ultimate sanction for nonimplementation is normally a report by the ombudsman to the legislature.

**Tailoring to local conditions**

The administrative faults or failures covered by an ombudsman vary, and can include illegality, constitutional and human rights abuses, or maladministration.

**Illegality**

According to the classic Swedish model, an ombudsman investigates complaints alleging law-breaking by the administration. Illegality means that the administration has breached a statute, regulation, court-made law, the constitution, or international law.

The idea that an ombudsman should concentrate on the legality of actions of the administration has been influential in new European democracies. Poland created an ombudsman in 1987 to investigate violations by the administration of the law and of principles of community life and social justice. The success of Poland’s ombudsman has inspired other new European democracies.

**Constitutional and human rights abuses**

Some new European democracies have created ombudsman offices to deal specifically with complaints concerning the abuse of constitutional and human rights. For example, Hungary’s constitution provides for a separate ombudsman for civil rights, ethnic minority rights, and other constitutional rights. Romania and Russia offer similar protections.

**Maladministration**

A different model of ombudsman has emerged in some parts of Europe and the Commonwealth. The mediateur in France and the European Union and the parliamentary commissioners in England, Wales, Australia, and New Zealand are guided by the notion of maladministration rather than illegality. The idea is that good administration requires much more than acting legally.

Maladministration is not easy to define. It includes improprieties on the part of the administration that go beyond illegality—including carelessness, unfairness, undue delay, lack of cooperation, and procedural irregularity—although illegality is also an example of maladministration. The maladministration model may greatly increase the range of complaints to investigate, imposing heavy burdens on an ombudsman.

The trigger for a maladministration investigation can vary. An ombudsman’s investigation is usually triggered by a complaint about an administrative action, but the office may have powers to initiate an investigation on its own initiative. The trend in Western countries is to allow the ombudsman to take the initiative only in limited and special cases.

Methods for rationing scarce investigation time also vary. Among well-established ombudsman systems, practice varies between those that allow anyone to lodge a complaint directly with an ombudsman and those requiring that a complaint be made to a member of parliament who may then pass it on to the ombudsman. The second approach supports the traditional role of a member of parliament in investigating complaints, but it is also a rationing device, because many complaints will be dismissed or dealt with by the member of parliament.

Other rationing devices include the requirement that alternative forms of recourse—such as internal complaint procedures and external appeals to special courts or tribunals—be exhausted before approaching an ombudsman, or the requirement that a small fee be paid when making a complaint.

The range of authorities subject to an ombudsman also varies. In a well-developed system the presumption should be that all public bodies will be subject to an ombudsman unless—as with parliament, the head of state, and courts—there are good grounds for exemption (though courts are an exception in Sweden). Beyond these, claims for exemption should be examined carefully. One approach is to have a general ombudsman to investigate all executive and admin-
istrative bodies. Another approach is to have different ombudsman's offices for different public bodies—the police, the health service, prisons—though such proliferation can create confusion in knowing which ombudsman to approach.

**Empowering an ombudsman**

The constitution should provide for an ombudsman, and an implementing law should specify the powers of the office. Constitutional entrenchment signals the importance of the office and removes it from the political sphere. That does not mean that without constitutional entrenchment there can be no ombudsman—several countries have well-established ombudsman’s offices created by law alone.

The crucial factor is that an ombudsman should be independent of other branches of government and administration. This can be achieved with appropriate provisions in the law concerning appointment, dismissal, powers, and budget. An ombudsman is usually closely associated with parliament, but in its daily operations it should be independent of it. Still, accountability should be to parliament, normally in the form of an annual report supplemented by special reports as requested.

Budget arrangements can help ensure an ombudsman’s independence and effectiveness. Different approaches to setting the budget are possible, but the key factor is that it should not depend on the executive. The simplest approach is for the ombudsman to propose an annual budget directly to parliament, in a manner similar to that for courts and other vital institutions (such as the supreme audit institution).

**The ombudsman and other administrative regulators**

Administrative regulators that constrain the behavior of public officials can be grouped into three categories:

- If their authority derives from the constitution or from the legislature, they can be seen as largely autonomous in that they are largely impervious to the short-term designs of the executive.

- Sector regulators are executive regulators but with more clearly circumscribed authority; they include health inspectorates or boards of major state-owned trading bodies.

- If their authority derives from control over appropriated funds and from their proximity to the head of government or ministers, they can be seen as executive regulators, in that they are regulating on behalf of the government.

**Ombudsman and courts**

Because courts are important autonomous regulators of official behavior, there is potential for overlap with an ombudsman. Both entities deal with complaints, though there are fundamental constitutional and institutional differences (table 1). The general principle is that challenges to the legality of administrative actions are made to courts or special tribunals. To the extent that the ombudsman becomes involved in matters of legality, it is as an adjunct to the courts.

**Ombudsman and audit bodies**

Audit bodies inquire into and assess the performance of public bodies according

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**Table 1 Features of courts and offices of ombudsman**

<table>
<thead>
<tr>
<th>Feature</th>
<th>Courts</th>
<th>Offices of ombudsman</th>
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<tbody>
<tr>
<td>Definition</td>
<td>Judicial bodies with ultimate responsibility for adjudicating questions of law</td>
<td>Nonjudicial bodies with responsibility for investigating complaints against the administration</td>
</tr>
<tr>
<td>Powers</td>
<td>Can impose remedies—such as declarations of nullity or liability—that are legally enforceable</td>
<td>Can only recommend that certain action be taken</td>
</tr>
<tr>
<td></td>
<td>Can inquire into and rule only on the case before them</td>
<td>Can investigate and make recommendations that go beyond the specific complaint</td>
</tr>
<tr>
<td>Accessibility</td>
<td>Require legal representation and typically entail high costs</td>
<td>Are generally easier to access than courts</td>
</tr>
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to stated criteria. They have investigative powers similar to ombudsman’s offices and make findings and recommendations. However, audit bodies are not complaint bodies and typically have both mandatory and discretionary powers to investigate the administration at their own initiative.

**Ombudsman and human rights commissions**

Concern for human rights has generated a range of regulatory bodies exercising a mixture of functions—including investigating complaints, conducting inspections, offering mediation, launching civil and criminal actions, and educating civil servants. Though these hybrid bodies are often considered as ombudsman’s offices, the core ombudsman function is only one of several functions. There are significant dangers of confusion due to a combination of—and even contradiction in—responsibilities. In creating such bodies, it is wise to limit their scope to clearly defined areas of constitutional and human rights.

**Conditions for an effective ombudsman**

The key indicator of an ombudsman’s effectiveness is how readily a minister, department, or agency accepts its recommendations. This depends significantly on intangible variables such as personality and public reputation, the historical moment, and the credibility of the office-holder. More specially, effectiveness rests on:

- **Political support**—from parliament, government, administration, and courts.
- **Adequate resources**—a proper budget system must provide adequate resources for the job.
- **Public perception**—the public must be aware of and understand the ombudsman’s office and its functions.
- **Functional competence**—the ombudsman must be effective in receiving, investigating, and resolving complaints against the administration. Functional competence depends on institutional design, administrative capacity, and professional expertise, independence from the executive, and procedures for dealing with government, ministers, and departments. As an illustration of problems that arise, the ombudsman for Georgia received 100,000 complaints within a few months of its creation. Because the office cannot cope with this volume, most of the complaints will not be considered.

**Regulatory value**—the ombudsman should fit with existing arrangements for administrative regulation. The regulatory value of an institution depends on the overall system of administrative regulation within a country and on how a new institution—in this case an ombudsman—fits into it. Regulatory value also depends on an institution enduring for a significant period. Taken in isolation, the idea for an ombudsman always looks compelling. But unless it fits into the current and future administrative context, it will likely fail.

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If you are interested in related civil service topics, consider joining the Civil Service and Administrative Reform Thematic Group. Contact Barbara Nunberg, x37487. The Legal and Judicial Reform Thematic Group is also active in addressing constraints on executive action. Contact Rick Messick, x87942. Details of both thematic groups can be found on PREMnet.

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