

**THE CONCEPT AND ROLE OF THE OMBUDSMAN
THROUGHOUT THE WORLD**

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THE CONCEPT AND ROLE OF THE OMBUDSMAN THROUGHOUT THE WORLD*

Dr. Marten Oosting**

A Comparison

I should like to contribute to this conference by comparing the ways in which the institution of the ombudsman has developed in different parts of the world.

In 1955—over forty years ago now—Denmark became the third country in the world to acquire an ombudsman, after Sweden in 1809 and Finland in 1919, and it was from Denmark that the institution gained a footing all over the world. Twenty-five years ago, in 1973, ten countries, including six in Europe, had their own national ombudsman and another four had opened regional offices. Ten years later, in mid-1983, twenty-one countries, including the Netherlands, my own country, had appointed national ombudsmen, with regional offices in another six. Since then, the institution has undergone spectacular growth. Now, in 1998, eighty countries have ombudsmen at one or more levels of government. On September 1, 1995, the European Union appointed the first supranational ombudsman in the world. When we look at these figures, we can only conclude that these are impressive developments. In the space of only a few decades, ombudsmen have been appointed—sometimes under a different name—in all corners of the globe and this growth is expected to continue in the coming years, with yet more countries appointing their own ombudsman.

Characteristics

In each case, the ombudsman as an institution is an open and independent public office with far-reaching powers of investigation. Its Spanish name, *Defensor del Pueblo*—“defender of the people”—is an apt description of the nature of its work. For it is the ombudsman’s job to act as a buffer between the individual citizen and the state, to stand up for the public’s right to good governance. What this means is a government that respects and promotes the fundamental rights of its people, and acts in accordance with the laws of the land and the norms of international law. It also means a government that is free from corruption and is committed to preventing, in the words of the United Kingdom’s parliamentary ombudsman, “maladministration, leading to injustice”.

In its modern form, the ombudsman is an element in the democratic system of checks and balances, a concept that derives from the American constitutional tradition. It is based on the concept of the rule of law, in which the government not only creates the law but is itself subject to it. In short, the ombudsman plays an essential role in preventing the state from gaining absolute power without constraints, accountability or controls. For, if the public is to have confidence in its government, constraints must be imposed on the power it exercises. To be effective, a government needs legitimacy.

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I would emphasize here that the institution of the ombudsman presupposes a democratic, plural system of government. At the same time, it can contribute to the quality of democracy by making authorities account for the way in which they deal with the public in individual cases. This assumes, of course, that the public has easy access to the ombudsman. To maintain good relations with the public, the ombudsman has to be effective. The public must, after all, have confidence in the institution. And to generate this confidence, it is essential that the ombudsman maintains a high profile and, above all, that his work yields results. For without these results, the public will soon feel that there is little point in turning to him. Confidence in the ombudsman also presupposes independence and impartiality—not only of the office, but also of the person holding it.

Typology

So far I have outlined some of the characteristics of ombudsmanship in general, regardless of what the institution may be called or the specific circumstances in which it has to function. But the fact remains that the institution of the ombudsman varies from one part of the world to another. The differences between the ombudsman's specific duties and position are largely dictated by the circumstances in which he operates.

In this connection, it is useful to make two types of distinctions: firstly, a distinction in terms of democratic tradition and experience between constitutional states that have long been governed by the rule of law which, for the sake of convenience, I have grouped together under the heading of "established democracies" and the newer democracies that have appeared on the scene more recently. In the second place, a distinction can be made on the basis of economic development, in other words, between developed and developing countries. The combination of these conditions produces a typology of four categories, namely: established democracies with developed economies, new democracies with developed economies, new democracies with developing economies and traditional democracies with developing economies.

I would now like to say a few words about each category individually. I realize, of course, that, inevitably, the distinctions I have made are rough. For there are considerable variations in the two qualifications—political and economic—I have used to identify the categories. Nonetheless, I shall start by looking at the two types of democracies in countries with a developed economy and then turn to the situation in developing countries.

1. Established Democracies With Developed Economies

First, there is the situation in Scandinavian countries, the birthplace of the modern ombudsman and, indeed, my own country, the Netherlands: that of the long-established, democratic states governed by the rule of law. These are all welfare states to a greater or lesser extent. In these countries, the office of the ombudsman was established to supplement long-standing institutions which were no longer deemed sufficient to provide the general public with adequate protection against the government. This is the situation in the countries of northern and western Europe and in Commonwealth countries such as New Zealand, Canada and Australia.

Countries such as these have gained considerable experience in holding public authorities accountable for their actions and in subjecting them to the checks and balances appropriate to the rule of law. Governments seldom infringe classic, or first-generation, fundamental rights. The

standard of education is high and people are aware of their rights vis-à-vis the government and of the channels through which they can assert them. Social and economic conditions are such that people enjoy a decent, often high, standard of living. As a result, social, or second-generation, fundamental rights likewise tend to be upheld, more so than in developing countries. Because these countries are prosperous, corruption within the government is relatively uncommon. Also, there tends to be a reasonable balance between government tasks and the size of the administrative bureaucracy. I would point out here that the trend towards privatization is giving rise to changes. In many cases, the provision of major services, such as health care, postal services and telecommunications, public transport and the disbursement of pensions no longer fall within the government's remit. Nonetheless, the government continues to perform certain core tasks, both as a steering agent and service-provider, and the administrative apparatus is generally quite sizeable.

All these factors affect the nature of the ombudsman's work. Infringements of human rights, both first and second generation, generally demand less of his attention than in the type of country I shall describe later on. The same is certainly true of corruption, since cases of this kind are swiftly brought to the courts. Instead, it is the feeling of powerlessness in their dealings with large, bureaucratic organizations that lead many individuals to seek protection from the ombudsman. In these countries, therefore, the lion's share of the ombudsman's work consists of dealing with complaints about a wide variety of government actions that constitute maladministration, leading to injustice.

2. *New Democracies With Developed Economies*

Over the past fifteen to twenty years, ombudsmen have also been appointed in countries which have emerged from a period of totalitarian and often military rule and which have sought to create a new, plural democratic order. In all these cases, the office was established within the first few years of the changeover. The institution of the ombudsman was seen as one of the factors contributing to the evolution of a democratic state governed by the rule of law. The economies of these countries may be weaker than those of the welfare states I have just discussed, partly because of the previous political regime, but they are far from developing countries. Some examples in Europe are Portugal and Spain after the overthrow of their right-wing dictatorships and, more recently, Poland and Hungary after the fall of communism. Argentina is a similar case in Latin America.

The political and administrative transformation led to the enshrinement in the new constitution of the rights, freedoms and entitlements citizens may assert in relation to the new state. Not only the classic human rights—that is to say, civil and political rights—but also the second-generation human rights—fundamental social and cultural rights—play a prominent role. The general level of education is much the same as in the countries I discussed earlier. The situation in these countries is, therefore, far more favourable than in the countries I have grouped in the third category, namely new democracies with developing economies. The same applies to social and economic conditions, although standards of living are sometimes much lower than in the welfare states of the first category. In any event, it is a new experience for the members of these societies to be governed by a regime which is no longer an agent of repression on which they are almost totally dependent.

Here too, of course, the specific circumstances in any given country affect the ombudsman's work, much of which is concerned with human rights, since it is his role to

contribute to the evolution of a new, democratic state, governed by the rule of law.

But gross violations of classic human rights, like the regimes that perpetrated them, have become a thing of the past. In most of these countries, therefore, the ombudsman's role is essentially that of a watchdog. In economically and socially weaker countries where the government plays a correspondingly large part in the distribution of goods and services, his work will mainly centre on the protection of social rights relating to, for example, income, social security, housing and health care. But in these countries, once again, cases of government corruption tend to be less common than in developing countries. Also here, it is complaints of maladministration leading to injustice that play an essential role in the ombudsman's work. As for the administration itself, the ombudsman also plays an important educational role, since he guides the process of transformation from a closed, repressive regime to a government that is willing to render account and listen to criticism.

3. *New Democracies With Developing Economies*

Political change has occurred not only in comparatively prosperous countries, but also in some of the poorest. In particular, I would mention some of the developing countries in Latin America, where military dictatorship and internal armed conflict between the regime—mainly the police and the army—and guerrilla movements led, for many years, to intense human suffering. Over the past ten years, ombudsmen have also been appointed in such countries, for example, in Guatemala and El Salvador in Central America, and in Bolivia, Colombia and Peru in South America, while several other states in the region will probably follow suit.

These countries are faced with the onerous task of observing in practice the rights enshrined in their constitutions, of converting the law in the books into law in action. Although their autocratic regimes have been toppled, the new administrations are still fragile and still have to contend with ongoing violence. Also, although their police forces and armies are now subject to the law, it will take time and considerable effort for the culture change to filter through. Moreover, a fledgling democracy remains vulnerable if the new regime fails to recognize that the checks and balances inherent in the system place constraints on its power. In addition, developing countries are particularly vulnerable. For economic prosperity is concentrated in the hands of a relatively small elite which tries to maintain its position of privilege and expects the authorities to help in this endeavour. As a result, corruption is rife, not only in the higher echelons of government but, also, among minor officials who abuse their power to supplement their meagre income. Much of the population is poor and dependent on the government which has too few resources to meet even their most basic needs. The illiteracy rate is high. Also, the population of some countries includes members of indigenous peoples, many of whom, like women in general, tend to find themselves in a seriously disadvantaged position.

All these factors determine the nature of the ombudsman's work and define what he can and cannot do. Also, in these countries his main task is to protect human rights. The classic human rights—those targeting individual citizens—are naturally of great importance since, unfortunately, the authorities still often fail to uphold them. But for the majority of people living in abject poverty, it is social and economic rights that are of cardinal importance, more so, perhaps, than classic human rights. It is on these rights that the ombudsman's work centres, in his endeavour to help ensure that scarce resources are distributed as equitably as possible. He is unlikely to have time to deal with cases of maladministration leading to injustice, other than those relating to violations of human rights in the area I have just mentioned. Likewise, he will

presumably investigate cases of corruption when they involve human rights violations. Finally, he will also play an important educational role in informing people of their rights vis-à-vis the authorities and of how they can assert them.

4. *Established Democracies With Developing Economies*

I started out by describing the kind of circumstances I know best and I have also had firsthand experience of countries in the other two categories. This is not the case, however, for the type of country I intend to discuss now: established democracies with developing economies. This combination can mainly be found in countries which, as former colonies, acquired and to a degree have retained the political institutions of the colonial power. After gaining independence after the Second World War, they were faced with the task of evolving as democratic states governed by the rule of law. The course they have followed in the intervening years and especially their status as developing countries may, in some cases, have produced a political system which is less open and plural in practice than longstanding democracies with developed economies. I use the term "established democracies" here mainly to distinguish them from the relatively young democracies in the category I have just discussed—countries that have recently emerged from a period of totalitarian rule. Some of the countries in this fourth category that have established the institution of the ombudsman are members of the Commonwealth, in both Asia—India, Pakistan and Sri Lanka, for example—and Africa and Tanzania, for instance. France has also left its mark on a number of African countries. Senegal, for example, has a *Médiateur*. To a certain extent, Mexico may also be included in this category, even though it gained independence far earlier.

As is the case with the countries in the third category, the political and administrative situation is determined largely by the fact that, in economic terms, these are still developing countries. They tend to have a larger government apparatus and are, therefore, likely to be more bureaucratic than countries with a comparatively developed economy. Corruption is often widespread and external accountability of government officials is less firmly entrenched in the system than in the older democracies I dealt with first.

Here again, the ombudsman's work is determined by circumstances. This means that efforts to counter corruption will occupy much of his time. In countries such as Tanzania and Zambia, where the institution has existed for many years, the ombudsman has assumed the form of an independent commission for investigation whose brief is to investigate cases of maladministration. An important element in the ombudsman's work relates to the disbursement of funds, in the form of pensions, for instance. Indeed, the ombudsman may sometimes function as a small claims tribunal, particularly in countries where the judiciary does not function well or has a serious backlog, or where recourse to the courts is beyond the pockets of many people.

Incidentally, in such countries, the ombudsman may have a special task in the field of human rights, depending on the way in which the police, intelligence service and possibly the armed forces operate, on conditions in prison and on whether the authorities discriminate against certain groups. Much will depend on whether there are alternative provisions to deal with such matters—a national human rights commission, for example.

Alternative Provisions for Dealing With Complaints

As I have already mentioned, this division into four categories is a rather rough and ready typology. In reality, individual countries within each category differ substantially in terms of both economic development and development as democratic states governed by the rule of law. But in each case, the main characteristic of the ombudsman is his independence vis-à-vis the bodies under his jurisdiction. However, there are also countries which do not have an independent body of this kind to deal with people's complaints against the authorities. Instead, they have created an inspectorate or supervisory agent, within the tradition of their own culture, which is part of the administrative system as such. This is the case in Asia, in particular, in a democratic system such as that in Japan, as well as in the People's Republic of China. The more independent these bodies are vis-à-vis the authorities they supervise and the stronger the entitlement of the public to put their complaints to them, the more they resemble the institution of the ombudsman.

Conclusion

Almost nowhere in the world has the institution of the ombudsman been in place for more than forty years. Indeed, the majority were established less than fifteen years ago. In other words, the profession is still evolving. I have presented a comparative view to show how the circumstances in which the ombudsman works affect that evolution. My analysis may arouse skepticism, or even cynicism and disbelief, as to what the ombudsman can accomplish in some circumstances. But to conclude that the institution is viable only in established democracies with relatively well-developed economies would be to do a grave injustice to the ombudsmen working in countries in the other categories I have discussed and to deny the contribution they are making to the development of a democratic system governed by the rule of law. I have the greatest respect for their work, which many of them do under very difficult conditions, and sometimes at great personal risk. It is important to be realistic but never at the cost of our ideals. For the longest journey begins with one small step.