

# Fundamental Elements of An Effective Ombudsman Institution

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*This paper examines the fundamental characteristics of an Ombudsman – independence; impartiality and fairness; a credible review process; confidentiality – and how they are put into effect in the constitutional provisions and laws that create such institutions. The aim is to develop a contemporary vision of abstract perfect ideal of an Ombudsman, by examining the various names and models under which Ombudsmen today operate. The Ombudsman is like a canary in the mine of democracy. Good legislation, filled with the kinds of provisions fundamental to an effective and efficient institution, encourages and enables the canary to sing and attest to the good health and future of the country – and its Ombudsman.*

The 200<sup>th</sup> anniversary of the Swedish Ombudsmen, the first Parliamentary Ombudsman system in the world, is an appropriate occasion to examine public sector Ombudsman institutions created since and to seek the fundamental elements that have made them effective. Since this paper is about defining, it is perhaps fitting to begin by defining the three parts of the topic: Fundamental elements, the Ombudsman institution, and effectiveness.

Fundamental elements could be defined in three ways:

- First, essential characteristics – those attributes critical to the Ombudsman’s effective functioning. The institution needs these attributes or it cannot function well.
- Second, irreducible minimums – those characteristics without which the institution is not an Ombudsman or cannot function effectively as one.
- Third, the elements creating an Ombudsman institution that need definition but are not generally defined in the same or similar ways.

Today, many institutions are called “Ombudsman.” A number of institutions with other names actually are Ombudsmen. This paper considers those that fit the following two definitions.

The International Bar Association defined the Ombudsman in 1974 as:

an office provided for by the constitution or by action of the legislature or parliament and headed by an independent high-level public official who is responsible to the legislature or parliament, who receives complaints from

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aggrieved persons against government agencies, officials and employees or who acts on his own motion, and who has the power to investigate, recommend corrective action, and issue reports.<sup>2</sup>

The IOI Constitution<sup>3</sup> sets criteria for institutional membership.<sup>4</sup> These criteria describe the following characteristics of Ombudsmen: They are created by law (or constitution), protect against named acts by public authorities, are independent of public authorities especially those over which they have jurisdiction, have the power to investigate complaints and make recommendations, are accountable through public reports to appropriate authorities, and have one or more incumbents appointed by the legislative body who can be removed only for cause.

This paper looks first at Ombudsmen and institutions with other names that are essentially Ombudsmen that fit those definitions. Aspects of each of the three definitions for “fundamental elements” are employed. Then the paper examines the constitutional provisions and laws that create such institutions to discuss how those fundamental elements are put into effect.

The emphasis here is on the fundamental elements. Less attention is devoted to what makes an Ombudsman institution effective. The focus is on similarities among government Ombudsmen to find unifying themes in legislation that create their offices and foster their effectiveness. Some differences are mentioned to illustrate how the similarities can be given effect in different

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<sup>2</sup> Ombudsman Committee, International Bar Association Resolution (Vancouver: International Bar Association, 1974).

<sup>3</sup> Article 6. Membership, Sub-section b) Institutional member at [http://www.law.ualberta.ca/centres/loi/docs/IOI\\_Bylaws.pdf](http://www.law.ualberta.ca/centres/loi/docs/IOI_Bylaws.pdf) and <http://www.law.ualberta.ca/centres/loi/Membership/Member-By-Laws.php>.

<sup>4</sup> A public institution whether titled Ombudsman, Mediator, Parliamentary Commissioner, People's Defender, Human Rights Commission, Public Complaints Commission, Inspector General of Government, Public Protector or like designation, shall be eligible to become an Institutional member provided it exercises fully the following functions and meets the following criteria:

- i) it is created by enactment of a legislative body whether or not it is also provided for in a Constitution;
- ii) its role is to protect any person or body of persons against maladministration, violation of rights, unfairness, abuse, corruption, or any injustice caused by a public authority;
- iii) it does not receive any direction from any public authority which would compromise its independence and performs its functions independently of any public authority over which jurisdiction is held;
- iv) it has the necessary powers to investigate complaints by any person or body of persons who considers that an act done or omitted, or any decision, advice or recommendation made by any public authority within its jurisdiction has resulted in actions of the kind specified in subparagraph ii) above;
- v) it has the power to make recommendations in order to remedy or to prevent any of the conduct described in subparagraph ii), and, where appropriate, to propose administrative or legislative reforms for better governance;
- vi) it is held accountable by reporting publicly to the Legislature or other appropriate authority;
- vii) its jurisdiction is national, regional or local;
- viii) its jurisdiction applies to public authorities generally or is limited to one or several public authorities, or to one or several public sectors; and
- ix) its incumbent or incumbents are appointed or elected, according to the relevant legislative enactment, for a defined period and can only be dismissed, for cause, by the legitimate and competent authorities.

ways while still preserving the fundamental character of an Ombudsman. Similarities unite; differences do not necessarily divide or determine that an institution is not an Ombudsman, although they might.

I began thinking, researching and writing about this nearly 15 years ago. New Ombudsman institutions were being created then in countries of the former Soviet Union. I was fortunate to be asked to consult in a number of them about what provisions to include in laws creating Ombudsmen. With financial support from the Canadian International Development Agency to the IOI, I began reading all Ombudsman laws available in print. This was before Internet access to legislation. As a result of that project, I developed the international *Ombudsman Legislative Reference Document*. It contains principles, provisions and commentary for legislation to create classical and human rights national Ombudsman institutions. The IOI published it in March 1998 as Occasional Paper #65.<sup>5</sup>

About the same time, Ombudsmen in the United States started struggling with this question. More and more institutions called “Ombudsman” lacked one or more of the essential characteristics. That discussion led to “Essential Characteristics of a Classical Ombudsman,” a paper I co-wrote later in 1998 with colleague Michael Hostina, a former Deputy Ombudsman of the State of Alaska.<sup>6</sup> The paper sought the absolutely necessary, irreducible minimum attributes that would define an authentic Ombudsman institution.

This paper draws on both documents as well as the work of some other researchers.

In the “Essential Characteristics” paper, we attempted, as this paper will, to develop a contemporary vision of the Platonic ideal of the Ombudsman – the abstract perfect ideal of an Ombudsman against which one could “identify the imperfect reflections of (Ombudsmen) all around us.”<sup>7</sup> Ombudsman institutions around the world are very diverse, but this paper avoids the conclusion reached by former U.S. Supreme Court Justice Potter Stewart when he sought to determine whether a movie before the court was “pornography.” He wrote in a concurring opinion: “I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description; and perhaps I could never succeed in intelligibly doing so. But I know it when I see it, and the motion picture ... in this case is not that.”<sup>8</sup>

Describing the Platonic ideal of an Ombudsman is not easy. Ombudsmen have spread to more than 125 countries<sup>9</sup> since the Swedish institution was created by the Constitution of 1809. The legal basis for an effective Om-

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<sup>5</sup> May be ordered at <http://www.law.ualberta.ca/centres/ioi/Publications/Occasional-Paper-Series/index.php> or available on-line for IOI members after logging on at <http://www.law.ualberta.ca/centres/ioi/Publications/Members-Only-Area/index.php>.

<sup>6</sup> At <http://www.usombudsman.org/documents/PDF/References/Essential.PDF>.

<sup>7</sup> Wikipedia at [http://en.wikipedia.org/wiki/Platonic\\_ideal](http://en.wikipedia.org/wiki/Platonic_ideal).

<sup>8</sup> Justice Potter Stewart, concurring opinion in *Jacobellis v. Ohio* 378 U.S. 184, at 197 (1964), regarding possible obscenity in *The Lovers*. [http://supct.law.cornell.edu/supct/html/historics/USSC\\_CR\\_0378\\_0184\\_ZC1.html](http://supct.law.cornell.edu/supct/html/historics/USSC_CR_0378_0184_ZC1.html).

<sup>9</sup> The current IOI List is found at: <http://www.law.ualberta.ca/centres/ioi/Links/Worldwide-Offices.php>.

budsman is not immediately obvious or intuitive. In discussing the irreducible characteristics an Ombudsman institution must have, it might be tempting to say they can't easily be defined, but can be recognized when seen. The problem many Ombudsmen observers would have is that they are so influenced by their own institutions that they describe the essential characteristics of those institutions. They are the air Ombudsmen breathe, the water in which they swim. Observers of the institution should have a better definition than "We know one when we see it."

Describing how easy something is, one could say that it is not "rocket science." Ombudsmanry *is* rocket science in government. Understanding how difficult the question is can be illustrated by comparing it to developing the Platonic ideal of a table. What are the irreducible minimum characteristics for a piece of furniture to be recognized by all as a table? What are the essential attributes of a table? Reading the word "table," what comes to mind?

Probably it has legs. But how many? For most, a table would have four legs. But it could have three. It might have six or eight or more, depending on its design and size. Could it have two? One? None? Must it be capable of having items placed on it? Does it have a surface that will support them? If so, how high off the ground must the surface be?

Ombudsman institutions, like tables, come in a wide assortment or combination of characteristics and designs. Like tables, some are better than others at accomplishing their tasks.

Asking questions such as these might appear to be philosophical gamesmanship, like trying to decide how many angels can dance on the head of a pin. The consequences of this discussion are much more real and ultimately help illustrate what forms the foundation to support effective Ombudsman institutions. Institutions built on faulty legal foundations may easily falter and fail to fulfill their promise. Extraordinary Ombudsmen can and have overcome weak legislation. An institution, however, will likely be stronger and more effective when extraordinary leaders and staff have exceptional legal provisions.

How many legs, then, does the Ombudsman table require? What are they? How do they support the institution?

What if a newly formed democratic state were to desire to create an Ombudsman institution? Based on the experience and legal bases of Ombudsman institutions worldwide, what provisions are essential to be an Ombudsman recognized internationally and to function effectively?

The Ombudsmen described earlier function in government to receive and investigate complaints, among other responsibilities. The irreducible minimum characteristics such an Ombudsman must have are four:

1. Independence
2. Impartiality and Fairness
3. Credible Review Process
4. Confidentiality

Each of those characteristics is created by a number of essential provisions found in legal bases creating Ombudsmen. These provisions are discussed first as they support the characteristics, later as they are found in legislation.

### ***1. Independence***

People are more willing to complain to an independent office.

An Ombudsman created in a constitution or by a law is more permanent because these documents are more difficult to change than edicts, decrees or regulations. An Ombudsman who acts as an officer of a legislative body and is independent of the organizations reviewed is more difficult for others to control. Independence is strengthened when the Ombudsman is appointed or confirmed preferably by a supermajority of all members of a legislative body or entity other than those the Ombudsman reviews. The best processes prevent political appointments.

Similarly, provisions such as the following tend to increase independence:

A fixed, long term of office for the Ombudsman; providing for reappointment; allowing for removal of the Ombudsman only for cause (and preferably by a supermajority of the appointing entity); a high, fixed salary; a budget sufficient to support the office's purposes established in law; spending and accounting for funds directly to the legislative body; the Ombudsman having the sole power to appoint and remove staff; immunity for Ombudsman and staff from liability and criminal prosecution for acts performed under the law; removing Ombudsman actions from court review except to determine the Ombudsman's jurisdiction; and authorizing the Ombudsman to appeal to courts to enforce the office's powers.

Independence is the bedrock on which the other fundamental characteristics rest.

### ***2. Impartiality and Fairness***

People respect and bring their complaints to an institution they see as impartial and fair, one that favors neither government nor complainant.

Provisions such as these foster an Ombudsman's impartiality and fairness:

- Setting qualifications for the Ombudsman that are designed to select a person who is widely respected among different political groups as impartial and fair, requiring a super majority for the Ombudsman's appointment, restricting the Ombudsman's political and other activities to remove the office from politics and make it accessible to complainants from any political group.
- Allowing anyone to bring a complaint, preferably directly to the Ombudsman, without paying a fee or passing through an intermediary official.
- Stating in writing how conflicts of interest will be handled.
- Authorizing the Ombudsman to criticize any agency or person under the office's jurisdiction and make recommendations to resolve specific situations or prevent their reoccurrence. Requiring the Ombudsman to con-

sult before criticizing an agency or person and allowing those criticized to reply.

- Specifying that the Ombudsman is not an advocate for any individual or group although the Ombudsman may advocate after an investigation for recommendations that benefit a complainant.

Impartiality and fairness help the Ombudsman earn respect and credibility from the people and the Government.

### **3. Credible Review Process**

If the Ombudsman's review process is credible, people will more likely respect its investigation findings and government is more likely to implement the Ombudsman's recommendations.

Provisions such as these help create a credible review process:

- The Ombudsman has a broadly defined, general jurisdiction in government that does not restrict the Ombudsman to one agency or one type of grievance.
- Authorizing the Ombudsman to investigate anyone's grievances about anyone concerning any decision, recommendation, or any act done or omitted relating to matters specified in law, by any organization or person over whom jurisdiction exists, including government or semi-government departments and agencies. Allowing an investigation without a complaint.
- Requiring agency staff to cooperate with the Ombudsman who has access to records and agency premises. Giving the Ombudsman subpoena power or a similar power to compel production of records and people to speak with the Ombudsman.
- Ombudsman review standards stated broadly, possibly including good administration, fairness, human rights, equity, justice, freedom from corruption, environmental protection, etc.
- Authorizing the Ombudsman to make findings and recommendations after an investigation and to publish and publicize them. Ombudsman's findings are not reviewable. Ombudsmen may not make binding orders.

Professor Linda Reif notes that some Ombudsmen that are national human rights institutions "have been given stronger powers of enforcement, such as the power to make decisions, prosecute and refer or take cases to court or other tribunals for a judicial determination."<sup>10</sup> She has also written: "A growing number of ombudsmen have been given powers to apply to constitutional and other courts to bring protective actions or ask for clarification of constitutional and human rights issues." She recommended: "Human rights om-

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<sup>10</sup> L.C. Reif, "Building Democratic Institutions: The Role of National Human Rights Institutions in Good Governance and Human Rights Protection, 2000, 13 *Harvard Human Rights J.* 1, at 8.

budsmen and other hybrids should be given stronger enforcement power appropriate to their additional responsibilities.”<sup>11</sup>

The quality of the Ombudsman’s review process may determine the institution’s credibility.

#### 4. Confidentiality

People who complain to the Ombudsman and government officials and employees who respond to Ombudsman investigations may fear reprisals. The Ombudsman normally may keep those communications confidential. In a very few societies, confidentiality is not required because reprisals are highly unlikely and frowned upon. In nearly all circumstances, the Ombudsman may not be forced to testify or produce records.

Those four legs – independence, impartiality and fairness, credible review process and confidentiality – support the table of the Ombudsman institution.

What, then, is placed in the laws that rest on those supports?

A research project at the University of Vienna by Prof. Dr. Gabriele Kucsko-Stadlmayer<sup>12</sup> conducted between September 2005 and October 2007 examined in detail the legal bases of 49 Ombudsmen of the European States and the European Ombudsman. Among other factors, the study examined the creation of each institution in the jurisdiction’s constitution and/or act of Parliament. It also looked at each office’s organization, specifically its independence, close relation to Parliament, qualification requirements for the Ombudsman, the number of Ombudsmen and deputies in each institution, how the Ombudsman is appointed and may be removed, the Ombudsman’s term of office, activities incompatible with the office, immunities, remuneration, budget and staff.

The study examined how an Ombudsman’s proceedings begin, who can complain, what conditions are required for complaints, whether a complaint is required, and what institutions the Ombudsman can examine or investigate – the state administration, for example, non-state entities, the judiciary.

The study detailed the standards that Ombudsmen use in investigating complaints: Good administration, equity, and human rights. It also listed the Ombudsman’s quintessential powers to investigate, recommend and report, as well as additional specific powers such as applying to the Constitutional Court, intervening before other courts and in administrative proceedings, etc.

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<sup>11</sup> L.C. Reif, *The Ombudsman, Good Governance and the International Human Rights System* (Leiden: Martinus Nijhoff Publishers, 2004) at 403–404 (footnotes omitted). Professor Reif said the power to prosecute public officials has been given to a number of hybrid Ombudsmen. “A growing number of ombudsmen have been given powers to apply to constitutional and other courts to bring protective actions or ask for clarification of constitutional and human rights issues.” She recommended that: “The enforcement powers of each hybrid ombudsman should be calibrated to enable it to fulfill all its functions effectively. However, ombudsman effectiveness does not always follow automatically from having stronger enforcement powers. [ . . . ] the non-coercive soft powers of an ombudsman can constitute a strength and one source of its effectiveness, connected with other factors such as the character and authority of the ombudsman and the government’s positive support.”

<sup>12</sup> G. Kucsko-Stadlmayer, *European Ombudsman-Institutions: A comparative legal analysis regarding the multifaceted realisation of an idea* (New York, Springer Wien, 2008).

Kevin Murphy, then the Irish Ombudsman, spoke on “The Evolving Role of the Ombudsman” at a conference in Dublin on “Defending E.U. Citizens’ Rights” organized by The European Parliament and The European Movement on March 4, 1996. In his presentation, he addressed what he said were the essential characteristics of an Ombudsman:

Despite differences between countries, there are certain essential conditions, which must be met by the Ombudsman if the use of the term Ombudsman is to be legitimate. It is generally accepted that the overriding essential for an Ombudsman is that he or she be entirely independent and impartial. Impartiality requires independence and independence in turn requires statutory underpinning, security against arbitrary removal, the power to issue and publish reports with the protection of privilege and, finally, adequate resources to do the job. [...]

In addition to being independent and impartial, the office must be effective. There are four aspects to this. First, public awareness of and access to the Ombudsman. Second, powers of investigation. Third, power to propose adequate remedies and, fourth, effectiveness in securing compliance with findings or recommendations.

A comparative study of Ombudsman legislation focuses on the factors that establish offices, identifying common characteristics and significant differences.

Not all laws creating Ombudsman institutions have all the provisions mentioned below. Some deal with these matters in ways different from those suggested. Laws creating the Ombudsman should be written to encourage Ombudsmen to function effectively in the national context while limiting or eliminating provisions that would impair effectiveness or erode the fundamental characteristics. My own examination of Ombudsman legislation showed that laws take into account a variety of local circumstances. No single model works everywhere. Some provisions listed below will be unacceptable in some jurisdictions and acceptable, perhaps even necessary, in others. And reading an Ombudsman’s legal basis does not always indicate how the institution actually functions.

In the past, distinctions have been drawn between institutions headed by one or more persons, those that focus on maladministration or on human rights violations, those that meet the requirements of the Paris Principles versus those that don’t, etc. These questions are more important in each national circumstance and in the legal basis of a specific Ombudsman than in determining whether institutions must be headed by one person, deal only with maladministration or meet the requirements of the Paris Principles. The legal bases of Ombudsmen indicate that one or more individuals can head their institutions and they can deal with maladministration, human rights and other issues.

The best legislation creates an independent, impartial, fair Ombudsman who employs a credible review process to examine and investigate complaints or other matters under the office’s jurisdiction and can guarantee confidentiality if needed.



The major factors in Ombudsman legislation include:

1. Name
2. Constitutional basis
3. Establishment of the office
4. Appointment process, qualifications, term, benefits, removal process
5. Hiring staff, Deputy Ombudsman, delegation of responsibilities, benefits
6. Powers of the office
7. Investigations
8. Reports
9. Privileges, immunities, protections and penalties
10. Miscellaneous provisions

### 1. Name:

What is the institution's name? "Ombudsman" is used here because of its link to the 1809 Swedish origins of the office, but different names have been used in different countries.<sup>13</sup> The function and structure of an office are more fundamental than its name.

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<sup>13</sup> The names used in various countries around the world are listed here to indicate the diverse titles given to Ombudsman.

Jurisdictions in which the person is called "Ombudsman": Antigua and Barbuda, Australia, Barbados, Belize, Bermuda, Bosnia-Herzegovina, Botswana, Canada, Croatia, Cook Islands, Denmark, European Union, Fiji, Finland, The Gambia, Gibraltar, Greenland, Guyana, Hong Kong, Hungary, Ireland, Jamaica, Lesotho, Lithuania, Malawi, Malta, Mauritius, Namibia, The Netherlands, New Zealand, Norway, Papua New Guinea, Seychelles, Sierra Leone, Slovenia, Solomon Islands, Sweden, Trinidad and Tobago, United Kingdom, United States, Vanuatu, Zimbabwe.

Jurisdictions that now use or have used other names (some of which are translated into English as Ombudsman): *Argentina*: Defensor del Pueblo; *Austria*: Volksanwaltschaftsgesetz (Ombudsman Board); *Belgium*: Médiateur; *Brazil*: Ouvidor; *Canada*: Province of Québec: Protecteur du Citoyen; *Colombia*: Defensor del Pueblo; *Costa Rica*: Defensor de los Habitantes; *Cyprus*: Commissioner for Administration; *France*: Médiateur; *Germany*: Petitions Committee of the German Bundestag; *Ghana*: Commissioner for Human Rights and Administrative Justice; *Georgia*: Public Defender; *Guatemala*: Procurador de los Derechos Humanos (Ombudsman is also used to describe this position, although the law in Spanish uses the first term); *Honduras*: El Comisionado de los Derechos Humanos; *Iceland*: Parliamentary Commissioner; *India*: Lokpal (when established will receive complaints about alleged corruption against Ministers or secretaries to Government nationally and in the states) and Lok Ayukta (receives complaints against other officials in the states and nationally); *Israel*: Public Complaints Commissioner; *Italy*: Difensore Civico; *Japan*: Administrative Counselor; *Latvia*: Director, National Human Rights Office; *Mexico*: President of the National Commission on Human Rights; *Nigeria*: Chief Commissioner, Public Complaints Commission; *Pakistan*: Wafaqi Mohtasib (Ombudsman); *Paraguay*: Defensor del Pueblo (national), Defensor Vecinal (Municipality of Asunción); *Perú*: Defensor del Pueblo; *Philippines*: Tanodbayan; *Poland*: Commissioner for Civil Rights Protection; *Portugal*: Provedor de Justiça; *Saint Lucia*: Parliamentary Commissioner; *Samoa*: Komesina o Sulufaiga (Ombudsman); *Senegal*: Médiateur de la République; *South Africa*: Public Protector; *South Korea*: Public Grievance Council; *Spain*: Defensor del Pueblo (National), Defensor del Pueblo (Andalucía), El Justicia de Aragón (Aragón), Diputado del Común (Canary Islands), El Procurador del Común (Castilla y León), Síndic de Greuges (Cataluña), Valedor del Pueblo (Galicia), Síndic de Greuges (Islas Baleares), Ararteko (País Vasco), Síndico de Agravios (Valencia). *Sri Lanka*: Parliamentary Commissioner for Administration (Ombudsman); *Sudan*: President, Public Control and Administrative Evaluation Bureau (Ombudsman); *Taiwan*: Control Yuan; *Tanzania*: Permanent Commission of Enquiry, replaced by Commission for Human Rights and Good Governance; *Tunisia*: Médiateur Administratif;

## **2. Constitutional basis:**

Constitutional provisions increase an Ombudsman's permanence and independence. They most often establish the office and its purposes. They may also provide for additional legislation to detail the Ombudsman's functions, duties, powers and responsibilities.

The language often specifies the power to remove the Ombudsman. A constitutional guarantee of independence for the Ombudsman is one of the strongest.

## **3. Establishment of the office:**

Legislation to create the Ombudsman establishes it and describes its purposes. The Ombudsman is often an officer of the legislative branch of government and completely independent of other branches.

## **4. Appointment process, qualifications, term, benefits, removal process:**

The nomination and appointment process of the Ombudsman should be designed to foster independence and create a broad base of legislative and public support.

Provisions used to create independence and support include:

- The Ombudsman's qualifications are set at the minimum needed to select a person fit to hold the office. The position may be advertised and the public including non-governmental organizations may be entitled to comment on candidates, votes in the process are taken in public and recorded, etc.
- A majority vote of at least two-thirds of the full legislative body is required to nominate or elect the Ombudsman.
- The Ombudsman serves full-time and is prohibited from: public and partisan political activity outside duties of the office, earning income beside the position's pay and benefits, and holding or becoming a candidate for public office.
- The Ombudsman has a long term and serves until a successor is appointed and assumes the office. The Ombudsman may be appointed for a specified or unlimited number of additional terms.
- The Ombudsman receives a high salary and other benefits commensurate with the position, which may not be diminished during the term of office except by a law passed by the legislative body covering all salaried officers.
- The Ombudsman's benefits are enumerated in the law and where possible are the same as those of high government officials such as judges, justices or cabinet ministers.

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*Uganda:* Inspector General of Government; *United Kingdom:* Parliamentary Commissioner for Administration; *United States: Guam:* Suruhanu (Ombudsman); *Western Samoa:* Komesina o Sulufaiga (Ombudsman); *Zambia:* Investigator-General.

- The Ombudsman may be removed from office for cause specified in the law<sup>14</sup> by a two-thirds majority vote of the legislative body that appointed the Ombudsman. The Ombudsman may resign by a letter to the presiding officer of one of the legislative bodies.

#### **5. Hiring staff, Deputy Ombudsman, delegation of responsibilities, benefits:**

Provisions for hiring staff, selecting the Deputy Ombudsman, delegating responsibilities and setting staff benefits can be critical for maintaining independence, attracting competent, expert staff and fostering a high level of respect for the staff and its work. Well-written provisions here also reinforce and support the Ombudsman's independence.

Provisions used to meet those goals include:

- The Ombudsman may appoint the office's staff, set compensation and other terms and conditions of employment. All staff members serve at the pleasure of the Ombudsman and are entitled to participate in all employee benefits of the jurisdiction. The Ombudsman may dismiss staff at any time.
- The Ombudsman appoints a Deputy Ombudsman who serves as Acting Ombudsman if the Ombudsman position becomes vacant for any reason until an Ombudsman is appointed for a full term. The Ombudsman may also have the power to appoint additional Deputy Ombudsmen and other office managers.
- The Ombudsman may delegate any responsibilities conferred by the law to any member of the staff. No staff person may act in a matter where the person has interests that preclude acting in a fair, unbiased and proper way.
- The Ombudsman may contract for professional services without having to seek approval from others.

#### **6. Powers of the office:**

The office's purpose and direction are set in laws that give the Ombudsman a broadly defined general jurisdiction with specific definitions of the Ombudsman's powers and matters the Ombudsman can consider. They also establish the office's right to do what the responsibilities require with the specific powers needed to perform efficiently.

Provisions used to define the Ombudsman's powers and jurisdiction:

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<sup>14</sup> Causes that have been used in legislation include: permanent mental or physical incapacity to perform the duties of the office or other ground sufficient to remove a judge from office, bankruptcy or obtaining a moratorium on debts, misconduct, conviction and sentencing for serious violations of the law, accepting posts incompatible with the office of Ombudsman, losing citizenship, being made the subject of a guardianship order, or in the opinion of the jurisdiction's legislative body seriously undermining the confidence placed in the Ombudsman.

- The Ombudsman's powers are specified in the law. The Ombudsman may receive and investigate complaints about the acts of agencies and initiate an investigation without a complaint. The Ombudsman may investigate without regard to the finality of any act.
- Complaints may be made orally. The Ombudsman may require a complaint to be made in writing. Staff will assist complainants unable to put their complaints in writing.
- Who may file a complaint is defined in the law, which specifies whether complainants must be personally affected by the act that is the subject of the complaint. The law also indicates who may complain if a person affected is unable to act and whether groups or non-governmental organizations may file complaints.
- The law defines types of acts the Ombudsman may investigate and agencies under the Ombudsman's jurisdiction. Depending on the jurisdiction, the types of acts may include maladministration, violations of human rights, corruption in government or of government employees or officials, environmental protection, inequity, injustice or some combination of these and other acts.<sup>15</sup>
- The law describes what types of complaints the Ombudsman has the discretion not to investigate or may not investigate, and which agencies or institutions are excluded from the Ombudsman's jurisdiction.<sup>16</sup> Some acts specify whether complainants must exhaust their administrative and judicial remedies before the Ombudsman may investigate, limit the amount of time in which a person must make a complaint and whether the Ombudsman has discretion to investigate complaints after the limit expires.
- The Ombudsman and staff maintain confidentiality about complaints and investigations including complainants' identities and the Ombudsman's records, except as the Ombudsman deems necessary to discharge duties created under the law and make reports. The law may specify whether the Ombudsman may make public information that would otherwise be confidential and which Ombudsman records are public.
- The Ombudsman may adopt rules, regulations, policies or procedures to govern the office's activities and may not charge a fee for services.
- The law specifies the Ombudsman's responsibilities to complainants and agencies when the Ombudsman decides not to investigate a complaint.

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<sup>15</sup> The following types of acts are among those commonly included in a list of possible targets of complaints: (1) contrary to the law or regulation of the jurisdiction; (2) contrary to an international treaty or convention on human rights the jurisdiction has recognized; (3) based on mistaken facts or irrelevant grounds or considerations; (4) unsupported by an adequate statement of appropriate reasons; (5) performed in an inefficient manner; (6) arbitrary, unreasonable, unfair, unjust, oppressive or otherwise objectionable even though in accordance with law; (7) an abuse of discretion; or (8) otherwise erroneous or wrong.

<sup>16</sup> Agencies or institutions that have been excluded from the jurisdiction of Ombudsmen in various jurisdictions include: (1) any court or judge; (2) the legislative body, its members, its committees and its employees; (3) the executive and the executive's personal staff; (4) any multi-jurisdiction government entity.

- The Ombudsman may see anyone held in custody at any time without stating a reason and without being required to gain anyone's permission. Communications between the Ombudsman and persons who reside in agency dwellings or are in custody are confidential.
- The Ombudsman refers criminal and disciplinary matters to appropriate authorities.

Some laws give the Ombudsman powers to work with other agencies and institutions, bring suit in court to enforce provisions of the law creating the office, initiate action in the jurisdiction's highest or constitutional courts.

### **7. Investigations:**

While there is no single generally accepted way to conduct Ombudsman investigations, the Ombudsman must be able to discover the facts about a complaint by examining records and interviewing those who acted or saw events that are the subject of complaints and also by entering and inspecting places where events occurred.

Provisions used to meet this goal and to increase the credibility of what the Ombudsman finds and recommends include:

- The Ombudsman may conduct a preliminary inquiry before initiating a formal investigation. The Ombudsman notifies the agency of the intention to investigate and has the discretion to determine the form and timing of the notification.
- Investigations are conducted in private, while allowing the Ombudsman to hold public hearings and make necessary disclosures. No one is entitled as a right to be heard by the Ombudsman.
- The Ombudsman has access to all records, public or confidential, of any agency under the office's jurisdiction but may not disclose confidential records unless the law specifically provides that. The Ombudsman may make disclosures necessary to further an investigation, prosecute an offense, or establish grounds for conclusions, findings or recommendations.

Any limits on Ombudsman access to records or information are set in law.

In some jurisdictions, statements and testimony to the Ombudsman may not be used in any other proceedings. The Ombudsman may enter and inspect agency premises and may summon, subpoena or compel production of any records and the presence of any person to give testimony or information under oath that is related to the investigation. Complainants have the right to know why the Ombudsman believes a complaint lacks legal or factual substance and to have the opportunity to make submissions. The Ombudsman sets investigation procedures.

## **8. Reports:**

The Ombudsman's authority to issue reports is guaranteed by specific provisions on when and under what circumstances an Ombudsman makes a report, where it is sent and what can be included.

Provisions used to achieve this goal include:

- After an investigation, the Ombudsman issues a report with a finding on the complaint and any recommendations to any agency. The Ombudsman may set a date to respond to the report and recommendations.
- Before issuing a critical report, the Ombudsman consults with the agency or person about to be criticized and permits a reasonable time to reply. The law may specify whether replies or summaries of them must be included in investigative reports.
- The Ombudsman reports the results of the investigation to the complainant.
- The Ombudsman may make a report, findings and/or recommendations to the legislative body, the executive, the public or any other appropriate authority.
- The Ombudsman may make recommendations to change laws to any agency and/or to the legislative body.
- The Ombudsman reports annually and may also report periodically about the office's activities.
- The Ombudsman may make any or all reports public at a time, place and manner chosen by the Ombudsman.

## **9. Privileges, immunities, protections and penalties:**

Specific privileges, immunities and protections safeguard the Ombudsman's independence, impartiality and fairness. Penalties for interfering with the Ombudsman's work add another layer of protection.

Provisions used to accomplish those goals include:

- No court may review the findings, conclusions, recommendations or reports of the Ombudsman or staff. Courts may not review the Ombudsman's acts except to determine jurisdiction.
- The Ombudsman and persons acting under the Ombudsman's direction or authority are immune from civil and criminal proceedings for any act performed in good faith under the law. Ombudsman reports and proceedings are privileged and immune from sanctions for libel or slander. If the law grants the power to suspend the Ombudsman's immunity, it is only granted to the legislative body that appointed the Ombudsman by the same majority vote of the full body required to appoint.
- The Ombudsman, staff and former staff may not be compelled to testify or produce evidence.
- Interfering with the Ombudsman's work is an offense.
- No persons shall falsely represent themselves to be the Ombudsman or members of the office staff.

- No person who files a complaint or participates in any way in an Ombudsman investigation shall be subject to reprisals or denied any rights, privileges or benefits because of such action. Anyone who subjects complainants or other participants in Ombudsman investigations to reprisals or denies them any rights, privileges or benefits is guilty of an offense with a specific penalty that may include a jail sentence. Ideally, the Ombudsman should have the power to initiate the protection, but the person subjected to reprisals or denial of rights should also be able to seek protection even if the Ombudsman declines to do so.
- Anyone who complies with a requirement of the Ombudsman is immune from prosecution for an offense.

#### 10. Miscellaneous provisions:

While not all offices have them, the following miscellaneous provisions also tend to add to the efficiency and effectiveness of an Ombudsman's office:

- A law creating an Ombudsman with jurisdiction over complaints about human rights violations contains provisions enabling the Ombudsman to promote and protect human rights.
- Agencies that contract with a person or company to provide services on behalf of the government include a clause in the contract requiring the contractor to submit to the Ombudsman's jurisdiction for services under that contract.
- The Ombudsman law does not limit or affect any other remedies or rights of appeal. The Ombudsman may act without regard to provisions in other acts that might be interpreted as limiting the Ombudsman's power to act.
- The Ombudsman's powers are not limited by the finality or appealability of any act.
- The Ombudsman is funded at a level sufficient to carry out the purposes of the law and spends and accounts for funds directly to the legislative body. Ideally the Ombudsman submits the office's budget directly to the legislative body and not through the administration.

#### Measuring the effectiveness of an Ombudsman office

Two works address measuring the effectiveness of an Ombudsman: Professor Reif's last chapter<sup>17</sup> of *The Ombudsman, Good Governance and the International Human Rights System* focuses on evaluating the effectiveness of a classical or hybrid Ombudsman by discussing some important indicators.<sup>18</sup>

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<sup>17</sup> Reif, *supra note 11* at 393-411.

<sup>18</sup> *Ibid* at 396. The factors include democratic governance of the state; the independence of the institution from government, the jurisdiction of the institution, the extent and adequacy of the powers given to the institution, the accessibility of the office to members of the public, the level of cooperation of the institution with other bodies, operational efficiency (level of financial and human resources), the accountability and transparency of the institution, the

Another approach is contained in *A Practitioner's Guide to Evaluating Ombudsman Offices*.<sup>19</sup> The guide is an evaluation program designed for Ombudsmen by Frank Fowle, an Ombudsman, and is available on the Internet.

Finally, some thoughts about the significance of legislation creating Ombudsmen, particularly for that new democracy mentioned earlier:

In the United States and other countries, men who removed minerals from the earth used to take a bird called a canary down in the mines. The bird's lungs were more sensitive to air quality in the mines than the men's lungs. If the air were dangerous, the bird would die, signaling the men to leave the mine quickly.

The Ombudsman is like a canary in the mine of democracy. If democracy is healthy, the Ombudsman sings and the future and health of the country is good.

The law creating an Ombudsman institution is part of the environment in which the Ombudsman lives and thrives, particularly in that new democracy. If the law is a good, filled with the kinds of provisions fundamental to an effective and efficient institution, it encourages and enables the canary to sing and attest to the good health and future of the country – and of its Ombudsman.

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personal character and expertise of the person(s) appointed to head the institution, the behavior of government in not politicizing the institution and having a receptive attitude toward its activities, and the credibility of the office in the eyes of the populace.

<sup>19</sup> <http://www.icann.org/ombudsman/guide-evaluate-ombudsman-offices.pdf>.