

A CRITIQUE OF THE JAPANESE STUDY
GROUP'S REPORT ON THE OMBUDSMAN

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Japan already has one of the most comprehensive administrative complaint-handling systems in the world. Its prefectures and local governments have complaint bureaus, and the national government has a complaint system that is unique in its decentralization and accessibility. The Administrative Inspection Bureau of the Administrative Management Agency has attached to it about 4,600 local Administrative Counsellors. They are appointed by the Director General of the Agency, who is a minister of state, and they serve on a voluntary basis in cities, towns and villages throughout Japan. Their job is to assist local complainants with information and advice and with forwarding genuine complaints against the national administration to the Inspection Bureau. The Inspection Bureau tries to remedy well-grounded complaints by interceding with the ministries and agencies concerned. The Bureau itself maintains about 50 regional and district offices which also provide administrative counselling to the public.

The effectiveness of this system is shown by the large number of applications for counselling that the Counsellors and the Bureau receive from the public. The statistics of the Bureau show that the number has increased rapidly in -----

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recent years, and that in fiscal year 1978 there were nearly 172,000 applications.² Of these, 83.5% were received by the Counsellors and only 16.5% by the Bureau's own offices. Of the nearly 122,000 cases accepted, 59% were inquiries, 19% were requests or opinions, and 22% or nearly 27,000, were complaints. This is one of the largest numbers handled by any complaint-handling agency in the world.

The nature of the complaints received and the method by which they are handled are very similar to the ombudsman system elsewhere in the world. A complaint is a case in which the applicant claims to have sustained identifiable damage from administrative action (or non-action) and demands redress. The Bureau investigates a case by making inquiries to the administrative body concerned or by conducting spot investigations. If it finds the complaint to be well grounded, it will intercede with the body concerned either orally or in writing, and will inform the applicant of the result. If it finds the complaint to be groundless, it will explain the reasons to the applicant. The main differences between the Japanese complaint-handling system and the ombudsman institution are that the Japanese system also handles a very large number of inquiries, requests and opinions, and that it is part of the executive branch of government.

²Administrative Inspection Bureau, *Administrative Counselling* (Tokyo, 1980), p.6.

With such a comprehensive system for handling complaints, why has Japan become interested in the ombudsman institution? The main reason appears to be a feeling that the Japanese system is too closely attached to the executive government, whereas one of the main virtues of the ombudsman institution is its independence from government. If the complaint-handling agency is too closely attached to the government, which is ultimately responsible for the administrative action (or inaction) against which the citizen is complaining, the government will exert too much influence over the agency's activities. Since the government represents the political party in power, it may influence the agency's investigations or decisions for partisan reasons or to protect itself from criticism by the opposition parties. Even if it does not do this, it will be suspected of doing so by at least a segment of the complainants and the general public, who will lose confidence in the agency's impartiality and fairness. This is the reason it is considered to be essential that the ombudsman institution should be entirely independent of the executive branch of government by being attached instead to the legislative branch.

Stimulated by the work of the Provisional Commission on Administrative Reform, and by proposals for an ombudsman system made by members of the opposition parties in the Japanese parliament, the Administrative Management Agency set up a study group on the ombudsman concept. The study

group, chaired by a retired senior official and composed mainly of professors of law, prepared a report that was published in November 1981, with an appendix containing a number of background studies and documents on the ombudsmen in other countries, with concentration on those in Sweden, Denmark, the United Kingdom and France. The Commission on Administrative Reform, in its final report, submitted in December, 1982, gave general support to the study group's proposals.

The study group has proposed in its report that an independent ombudsman-like agency should be created to receive and investigate complaints against national administration, to extend relief, to observe administrative operations and to recommend necessary reforms. The new agency would be headed by three or more ombudsmen, who would be appointed by the government with the consent of parliament, but the agency would be part of the executive branch. In most other respects, the nature and powers of the agency would be similar to those of typical ombudsman offices in other countries.

In my view, the two main problems regarding these proposals are whether the proposed agency should be attached to parliament instead of the executive branch, and what its relationship to the existing complaint system would be. Less important problems on which I will comment briefly are whether the agency should be headed by a collegial body, whether it should supervise prefectural and local

government, and whether the new complaint system would be an adequate substitute for a comprehensive system of legal appeals.

AN AGENCY OF PARLIAMENT?

The study group has made a number of proposals to ensure that the new agency would be more independent of the government than is the Administrative Inspection Bureau, which is responsible to a minister of state. It has proposed that, though the ombudsmen would be appointed by the government, the appointments would have to be approved by parliament. The ombudsmen would serve for a specified term of years, and would not be permitted to hold another public office or be an officer in a political party. However, if the ombudsmen are to be part of the executive branch, one wonders whether these provisions would free them enough from the influence of the government. A government holding a large majority in the parliament could still appoint ombudsmen who are sympathetic to the party in power. It could even appoint former politicians or cabinet ministers. It could also control the ombudsmen through budgetary and personnel controls. Even under ombudsman systems in other countries, it is difficult to prevent the government from exerting too much influence over the institution through budgetary and personnel controls. In one case, for instance, the government refused to increase the salary of the ombudsman along with a general increase in the salaries of the permanent secretaries because it did not

favour some of his actions. This is why ombudsman laws usually provide that the ombudsman's salary is to be equal to that of supreme court judges, that his budget is to be part of the parliamentary budget, and that he is to hire and control his own personnel, who are often appointed from outside the administration. The study group had little to say about the need for independence in matters of finance and personnel.

One can understand the reluctance of the study group to deal with this issue, because it was faced with the dilemma that if the new agency were to be made absolutely independent of the executive branch in the interests of its objectivity and political neutrality, how could it be made responsible for its actions? Any public agency in a democracy must have some controls over it. The answer in the case of the ombudsman institution has been to make it an agency of the legislative branch. It submits its annual report to parliament, usually has the power to issue special reports in cases where a public organization has refused to follow its recommendations, and often reports to a special committee of parliament. This committee is responsible for appointing the ombudsman, providing general guidelines for his work, studying his reports, and making recommendations to parliament on any necessary legislative amendments. In short, the ombudsman institution is part of parliament's machinery for controlling the executive and its administration and for improving legislation.

The study group's main reason for recommending that the new agency should be attached to the executive branch is not convincing. It implies that Japan is a special case because of a constitutional separation of powers. Yet Japan has a parliamentary system of government with the cabinet responsible to parliament, as in other parliamentary countries with an ombudsman. The group admits that parliament, as "the highest organ of state power" has the final power to control the administration. Even in the United States, which has a much more definite separation of constitutional powers, several states have created ombudsman institutions attached to the legislature. In saying that the remedying of administrative complaints is a "proper function of the executive branch", the group may not have been sufficiently aware of the fact that legislative ombudsmen elsewhere do not have the power to make binding decisions on individual cases. Their conclusions on cases are only recommendations to the administration and the executive government. Hence they do not interfere with "administrative actions taken under the authority of the executive", and the executive is still responsible to parliament for all such actions. In saying that a main function of the new agency would be to "extend relief" to complainants, the group may have been implying that the agency would have the executive power to make and enforce binding administrative decisions. Even a centralized complaint agency that is part of the executive branch, if it

held such a power, would have serious problems, because it would be substituting its decisions for those of the administrative bodies that are legally responsible for making the decisions. And in many cases it would be substituting its uniformed judgement for that of the officials who are experts in the field concerned. The great virtue of the ombudsman institution is that it does not directly interfere with the highly specialized work of the various administrative bodies.

Another of the group's reasons for not recommending that the new agency should be attached to parliament may have been a fear of political interference in its work by MPs. The group's report reveals that two of the ombudsman institutions intensively studied elsewhere were those of Britain and France, where complaints must be referred to the ombudsman by individual MPs and where the ombudsman is therefore more closely attached to parliament than he is elsewhere. In the case of France, the successive ombudsmen have also been former politicians. The schemes in Britain and France are not at all representative of the classical ombudsman systems. In these systems the ombudsman is independent of parliament except for matters of broad policy, and MPs are not allowed to influence the ombudsman's decisions on particular cases.

My conclusion, then, is that the new agency ought to be attached to parliament in order to increase its independence from the executive branch. If it were to become part of the

executive branch, one wonders whether its functions would be much different from the complaint-handling functions of the Administrative Inspection Bureau. No doubt it could do much good work in handling the minor complaints with which an ombudsman ordinarily deals, but in important cases it may not be independent enough to criticize a minister or senior officials where this is warranted, or it may decide not to investigate matters about which the government is sensitive. In other words, it could swat a lot of flies but, like the Administrative Inspection Bureau, would be ill-equipped for hunting lions.

If, for special reasons peculiar to Japan, it were to be decided that the agency must be attached to the executive branch, more could be done to ensure its independence and political neutrality. For instance, the law could require that the ombudsmen appointed by the government must be approved by the leaders of the main opposition parties and/or by a specified majority of parliament, such as two-thirds, and that they could only be removed by such a majority. Also, the degree of their independence in matters of finance and personnel could be clearly specified.

For the reasons given above, I do not favour the group's proposal that the cabinet should be allowed to request the new agency to make proposals on administrative reform or on the enforcement of official discipline. Nor do I agree that the agency should not be given jurisdiction over the actions of cabinet ministers. One would expect the

policy decisions of the whole cabinet to be exempt from the agency's jurisdiction, but individual ministers must take responsibility for the decisions made by the departments and agencies under their supervision. From the viewpoint of responsibility to parliament, all administrative decisions are decisions of ministers. If the agency could not investigate the administrative decisions in which a minister played a role, many decisions would be excluded from its jurisdiction. If the agency were given power to investigate such decisions, it would have no actual control over a minister, but only the power to criticize his actions and to make recommendations. It would be expected to deal with the fairness with which a decision was made rather than its content or political wisdom. Most ombudsmen are wise enough to do this in order to avoid political controversy, which would injure the objectivity of their office. By having the power to criticize the procedural fairness of a minister's decisions, the agency would thus become an aid to parliament in holding him accountable for the administrative activities under his supervision. The ombudsman system does not interfere with ministerial responsibility because the ombudsman does not control ministers, but only makes recommendations to them. In fact, it actually helps to enforce ministerial responsibility because, if a minister refuses to accept a recommendation, he knows that he must be prepared to justify this refusal before parliament and therefore must have very good reasons for doing so.

RELATION TO EXISTING COMPLAINT SYSTEM

The second main controversial question about the study group's proposal is the role of the new agency in relation to the existing complaint-handling services of the Administrative Inspection Bureau and its Administrative Counsellors. Little is said about this in the group's report, but by saying that the new agency's staff should be small and that it should work with and co-ordinate other complaint systems, the group seems to imply that these services are to continue in their existing form. If so, the functions of the new agency would seem to overlap almost completely the complaint functions of the Bureau and its Counsellors, especially if the new agency, too, is to be part of the executive branch. If, instead, this agency were to be made an arm of the legislative branch, like the standard ombudsman institutions elsewhere, and if the complaint services of the Bureau and the 4,600 Counsellors were to become part of the new organization, Japan would then have the most decentralized and accessible ombudsman plan in the world.

If the existing complaint services were to remain in place, this would be all the more reason why the new agency should be attached to parliament, for then it would play a different role and could have a different function. Its main function could then be to hear appeals from the existing complaint system. For this purpose it would need to be independent enough of the executive branch to give it

the objectivity, neutrality and strength that would be necessary if it is to criticize decisions for which ministers are responsible. Any well-organized executive branch should have a good system for handling complaints from the public. Ordinarily this is achieved by having complaint bureaus directly within the various ministries and other public agencies. The ombudsman institution is for handling the unusual case in which the citizen feels that he did not get satisfaction by appealing directly to the agency concerned, especially if he suspects maladministration, bias or partisanship. If the existing Japanese complaint system is to remain as it is, the new ombudsman agency should be restricted to hearing appeals from the decisions of the Administrative Inspection Bureau or from the decisions of administrative bodies that have refused to accept the Bureau's recommendations. Its cases would be mainly important ones where the complainant suspected the Bureau of bias or of not pursuing the case vigorously enough because of its closeness to the government, or where the decisions of high-level officials or ministers were involved. Because it would have the power to review the activities of the Bureau, it would make the Bureau more objective and non-partisan. As a result, the number of appeals to the ombudsman agency would be small and it would not need a large staff. However; for the cases that it did investigate, it should not have to depend upon the staff of any of the executive agencies, as the study group has

proposed, but should have its own investigative staff.

It should also have the powers that most ombudsmen possess, as the study group has proposed, to initiate investigations on its own and to make recommendations for administrative reform based on its investigations and on its review of complaints. Since investigations and complaints often reveal defects in laws, it should also be charged with recommending desirable amendments to laws, as ombudsmen often do. The decisions of the new agency would of course be only advisory. A minister could reject its advice and would be responsible for justifying his final decision before parliament, thus preserving the principle of executive responsibility to parliament.

OTHER PROBLEMS

The study group has wisely proposed that there should be several ombudsmen. Each could then become an expert in a different area of administration, and at least the most important cases could be decided by the ombudsmen themselves rather than by the agency's staff. However, a problem with multiple ombudsmen is that they may decide similar cases differently and may fail to develop uniform rules in their interpretation of statutory and administrative law. It is for this reason that I have proposed a collegial body, an ombudsman board or commission, for populous countries like Japan where the complaint system will naturally have a very large number of cases. The ombudsmen would decide minor cases individually but important cases collectively.

Meeting as a commission they would also decide on general guidelines for handling cases.³

Though a number of countries have ombudsman commissions, the only one I know of that now operates in the way I have proposed is the ombudsman board in Austria. There the three ombudsmen meet frequently as a board, are kept informed about each other's cases, and any one of them can request a case to be decided by the whole board. Scholars interested in the commission idea may wish to study the Austrian system. It is discussed more fully in a recent article of mine.⁴ I have also expanded on the idea of an ombudsman commission in a recent article proposing such a commission for the federal government in Canada.⁵

The question of whether a national ombudsman plan should also cover regional and local government has been a controversial one. In many countries the ombudsman system did not at first include the lower levels of government, but after some years was extended to include them. In a country with a large population the problems of administration at the lower levels may be sufficiently different to justify a separate complaint organization. Britain, for example, has

³Those interested in a fuller discussion of this idea may refer to my book, *The Ombudsman Plan* (Toronto, McClelland and Stewart, 1973). A revised and updated edition will be published in Japanese by Waseda University Press in 1983.

⁴"The New Ombudsman Plans in Western Europe", *International Review of Administrative Sciences* XLVI, No. 2 (1980), 135-145. A summary of this discussion will appear in the Japanese edition of the book.

⁵"A Public Complaints Commission", *Policy Options* 3, 2 (March-April, 1982), 33-35.

separate complaints commissions for local government in Northern Ireland, Scotland, England and Wales. In a country where the lower levels of government have considerable autonomy, a nationally organized complaint system for the lower levels may be regarded as infringing too much on their autonomy. In such a case it may be more desirable to encourage the lower-level elected councils to appoint ombudsmen of their own. However, it may be a long time before all of them would do so. And one should keep in mind that a national legislative ombudsman agency would not have the power to make binding decisions. Hence, it would have no direct control over the lower levels of government.

The final question for comment is whether the proposed complaint agency would be an adequate substitute for a comprehensive system of legal appeals, because I have been told that Japan lacks such a system. My answer is that it would not. Modern administration is so completely involved in the lives of average citizens that appeals to the courts must be provided for important administrative decisions. Sweden and France have found that they need both an ombudsman system and a comprehensive system of administrative courts. The English-speaking common-law countries have been moving in this direction by creating ombudsman systems and also more and more special courts for administrative appeals. Although an ombudsman system is needed to handle informally with speed and efficiency the thousands of minor complaints that do not require formal and

elaborate court procedures, courts are needed to make binding decisions regarding fair procedures in cases involving important principles.