

HOW TO BE A GOOD OMBUDSMAN

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The Ombudsman Institution

The institution of the ombudsman originated in Sweden, where the first parliamentary ombudsman was elected in 1809. The idea was to supervise public authorities to ensure that they act in accordance with the law. This was not a new function. What was new was to entrust the supervisory role to a person independent of the executive. To ensure his independence, the Ombudsman is elected by Parliament by a secret ballot. When Finland gained its independence from Russia in 1917 it established an ombudsman office following the Swedish model in Finland's constitution of 1919.

Since the 1960s, the ombudsman institution, especially the later Danish model, has spread outwards from the Nordic countries. Despite differences in organization, functions, and name—*médiateur*, *defensor del pueblo*, *provedor de justiça*—the basic idea is the same: the ombudsman is an independent official who receives complaints against public authorities and who has power to investigate and make reports and recommendations.¹

Especially after ombudsman institutions were set up in the Commonwealth countries the ombudsman's mission has turned more towards settling individual disputes caused by unfair, abusive or erroneous decisions, away from the original focus on supervising the legality of administrative activities.

The rapid spread of the ombudsman institution is associated with two main developments.

The first is the growth of public administration which occurred in western democratic states, especially in the post-war period. This growth led to demands not only that the administration should be subject to the rule of law but also for recognition that the administration exists to serve citizens, not *vice versa*. In national systems of administration the latter principle is expressed in different ways such as service-mindedness, citizen-friendliness, the citizen as customer, and the concept of public service. Naturally, in states governed by the rule of law, individuals have the possibility to bring grievances against the administration before the courts. However, the ombudsman offers an additional and less formal way to solve disputes between the citizen and the administration without extra costs. Its advantages are that it is free to the citizen, it uses more flexible procedures, and, in some cases, it can deal with a broader range of grievances.

The second development is the spread of aspirations to democracy and human rights. As part of their transition to democracy, many countries have established an ombudsman with particular

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elected for a further five year mandate. He retired at the age of 65 years on March 31, 2003. Paper presented at Conference of European Ombudsmen in Higher Education, Madrid, January 12–13, 2004.

responsibility for protecting human rights, including opportunities for citizens' participation in the procedures through which public authorities make decisions.

Ombudsmen in the European Union

Twelve of the fifteen member states of the European Union have a national ombudsman, as do all 10 accession states that will join the Union in 2004. Germany has a Parliamentary Committee on Petitions which performs an analogous role. Italy has not yet succeeded in establishing a national ombudsman, although numerous proposals for legislation have been put forward. In Luxembourg too, legislation to establish an ombudsman is being considered.

Ombudsmen also exist at regional and municipal levels in many member states. For example, there are ombudsmen in the Spanish *autonomías*, the Italian regions, Belgium, Austria, and in some of the German *länder*.

The office of the European Ombudsman was established by the Maastricht Treaty as part of the creation of the citizenship of the European Union. Citizenship implies that the Union institutions and bodies should be accountable to citizens, both through elected representatives and through mechanisms of legal and administrative supervision similar to those which exist at national level to control public authorities.ⁱⁱ The role of the European Ombudsman in ensuring good administration by European Community institutions and bodies is particularly important because citizens have only limited possibilities to bring proceedings directly before the Community courts.ⁱⁱⁱ

All the national offices in the member states and accession states are linked to the European Ombudsman through a liaison network, which ensures that complaints can, if necessary, be transferred to the body competent to deal with them. You can find information about them on the European Ombudsman website (www.euro-ombudsman.eu.int). Liaison network seminars, to inform participants about Community and Union law, have been held since 1996. The European Ombudsman publishes a regular newsletter providing information about significant new legal developments and his website has links to the websites of national ombudsmen and similar bodies (<http://www.europarl.ep.ec/ombudsman/Links/En/natomeu1.htm>). The liaison network also allows the national offices to address queries about Community law to the European Ombudsman.

Good and Bad Administration

The mandate of many ombudsmen, including the European Ombudsman, is to deal with “maladministration.” Since this term is not defined by any Community or Union text, the European Ombudsman proposed the following definition after consultation with the national ombudsmen of the member states:

Maladministration occurs when a public body fails to act in accordance with a rule or principle which is binding upon it.

This definition is broad enough to include within the Ombudsman's review respect for fundamental rights and for principles of administrative law and of good administration. In 1997, the European Parliament adopted a resolution welcoming the definition.

To protect the rights of citizens effectively, it is important to explain clearly the requirements of good administration. A clear explanation can help to prevent maladministration and to identify and correct it promptly when it does occur. In July 1999, following an own initiative inquiry, the European Ombudsman proposed a Code of Good Administrative Behaviour for Community institutions and bodies (available on the website in all the official Community languages <http://www.euro-ombudsman.eu.int/Recommen/En/oi980001.htm#Target4>). This Code was adopted by the European Parliament on September 6, 2001 and the Ombudsman was instructed to use it as a guideline in his work promoting good administration.

The Code includes fundamental principles of European administrative law such as legality, the right to a hearing, proportionality, and protection of legitimate expectations. The Ombudsman submitted a Special Report to the European Parliament on responses from Community institutions and bodies to the proposed Code. The European Parliament has asked the European Commission to use its powers to propose a draft for a European law on good administrative behaviour. The European Commission has been in doubt for what appears to be formal reasons.

Towards a Fundamental Right to Good Administration

In June 1999, the Cologne European Council decided to move towards the adoption of a Charter of Fundamental Rights for the European Union which expressly includes fundamental rights and freedoms as guaranteed by the European Convention on Human Rights, the special rights of citizens of the Union, as well as economic and social rights as contained in the European Social Charter and the Community Charter of the Fundamental Social Rights of Workers.

The Convention which drafted the Charter met and publicly debated the Charter draft during the year 2000. The European Ombudsman was one of the institutions which was consulted during the drafting process.

Amongst the Ombudsman's proposals was the inclusion in the Charter of the citizen's right to good administrative treatment. The Ombudsman stated that this proposal could have a broad impact on all existing and future member states, helping make the 21st century the "century of good administration".

The *Charter of Fundamental Rights for the European Union*, proclaimed in Nice in December 2000, includes the right to good administration in Article 41. It starts by stating that:

Every citizen has the right to have his or her affairs handled impartially, fairly, and within a reasonable time by the institutions and bodies of the European Union.

As the draft for a Constitutional Treaty for the European Union includes a proposal that the Nice Charter should be binding within European law, I am sure that there will be a EU law on good administration to reinforce and promote protection already given by national laws. It is important that all European citizens enjoy well-defined rights in relation to the administration or other bodies that are given public tasks.

What Can Ombudsman Offices do to Promote Good Administration?

If there is a right, there should be a remedy. In the western legal culture the judiciary forms the main remedy to uphold the rule of law. Judicial remedy is essential in cases of criminal law or when the case requires complex presentation of evidence or includes claims of significant compensation for damages.

In many disputes between citizens and administration judicial remedies too laborious to obtain. The process can also prove to be too slow and costly, so the Ombudsman steps in as an alternative, extra-judicial means to put things right. It is also possible for the Ombudsman to promote good administration in a more general way, with recommendations and reports based on the findings of an investigation into a complaint, or an own-initiative inquiry.

The classical ombudsman has a general mandate over all public administration, but over the years there has appeared to be a need for regional and municipal ombudsmen and for special ombudsmen entrusted to supervise only one institution or one administrative field or aspect. Thus we have ombudsmen for consumers affairs, equality, children, or hospitals or, as in your case, for universities.

Whatever the precise mandate, however, all ombudsmen have certain common functions and must respect certain principles in order to achieve a good result. This is what makes being an ombudsman a profession. It also means that all of the different institutions can benefit from sharing views and experiences.

In the rest of this talk I will try provide you with some ideas that could serve as a basis for your deliberations in this seminar. My experiences are based on my work as the Parliamentary Ombudsman in Finland 1989 – 1995 and as the first EU Ombudsman 1995 – 2003 and all of the exchanges of views I have had during my Ombudsman years at different international meetings.

Even if the experience appears impressive, I must emphasize that this is not meant to be the final truth on the matter, but rather an attempt to help you to find the right way to carry out your task successfully.

So What is Needed for a Successful Office?

To answer the question: how to be a good ombudsman?, you must first look into the task you have been given. Secondly, you must look into defining and implementing procedures and goals. Finally, you need to examine your own commitment to the task and how well this can be communicated to the staff to create a team spirit. The work of the ombudsman is indeed a lonely job as the basic idea is that the citizen should find one human face to complain to in a dispute with the faceless bureaucracy. However, inside the office it's a team-job which benefits greatly from a committed and well-informed staff.

In setting up an ombudsman office, it is essential that there are rules to guarantee the independence of the ombudsman. The election or nomination procedure should secure a good choice and be carried out by a body that is not under the supervision of the ombudsman and which is not allowed to interfere in the ombudsman's professional work.

Two things have usually created obstacles for an ombudsman: lack of resources and a weak or unclear mandate. It is important that the budget of the office and the ombudsman's personal remuneration be adopted in fair procedure and spirit so that it does not allow undue pressure on the ombudsman. I do not mean that the ombudsman should have a huge and impressive office with a lot of staff. The Ombudsman office should not be a new bureaucracy, but an effective and slim operation with enough resources to be proactive.

The ombudsman's mandate should be set out in rules that are also binding for the administration in question. It is important that the ombudsman has access to all relevant information in the investigations and that officials are obliged to co-operate to obtain a good result. With regards to the ombudsman's power to solve cases, it is important to remember that the offices do not have executive powers. They cannot order anyone to correct their behaviour.

The ombudsman should have a clear right and obligation to try to solve cases by proposing a friendly solution as a way to undo an instance of bad administration. It should be possible to make recommendations to the institution in question in order to solve a dispute in a reasonable way.

The ombudsman should also have the right to make a more comprehensive report to the competent authority, proposing systemic reforms, when needed to promote good administration.

The ombudsman is a complaint-driven operation and citizens' complaints should always be given highest priority. Still it is of great help if the ombudsman can also investigate on his or her own initiative when there seems to be bad administration that calls for action. Many times the ombudsman's attention is drawn to these cases by articles in newspapers.

How Should an Ombudsman Office Operate?

The statutes of the office normally set down certain rules about how the office should operate. Still, there is usually a lot of space left for the ombudsman's own discretion in setting up methods and procedures for the work.

For me, it is important for the ombudsman office to work as openly and publicly as possible. First of all, this is important for the citizens that might have a reason to complain. Openness helps inform them of the right to complain and how it should be done. Secondly, it is important for the office to have the confidence of all parties. This can only be achieved if people have access to the prescribed standards and procedures of the office and how they operate on a practical level.

Accordingly, it is important that the office makes itself accessible by distributing leaflets to promote itself. It is helpful to include a form for making complaints in the booklet itself. There should also be a website including the presentation and an account of office activities. Important decisions and initiatives should also be presented. If necessary, because of rules of confidential treatment, they should be made anonymous.

The annual report that most ombudsmen are obliged to present should also be drafted in an accessible manner with a presentation of the activities and most important decisions in a reader-friendly style. A good ombudsman office should also have a good relationship with the medias and draw their attention to decisions or initiatives raising important issues of principle.

Accepting complaints by e-mail will enable greater accessibility to the ombudsman's services. As the quality of such complaints is sometimes low, an electronic complaint form for complainants will allow for a more effective way to deal with complaints. The full name and mail address should be compulsory for e-mail complainants.

The office should set standards for its work and its objectives in writing, which should also be published. These standards might include time limitation on complaint evaluation or more advanced objectives, such as criteria for taking initiatives or codes of good administration.

In conducting investigations, normal procedural fairness rules should be applied. It is crucial that all parties should have the right be heard and the possibility to comment on any allegations or evidence which are relevant for closing the case. The ombudsman should never try to make up his or her mind about a case before all involved parties are properly heard.

The closing decision should be written in clear and understandable language. However, it is necessary to include the relevant allegations and claims and to give an account of the findings of the investigations and the reasons on which the outcome of the case is based.

Writing good reasons is the key to good solutions. When you find that reasons are difficult to write for a certain outcome you need to reconsider your position carefully. A good and fair solution normally finds its clear and convincing reasons easily.

Most often institutions will follow the ombudsman's advice if its is based on a thorough investigation and it is well presented and reasoned in a convincing way. In some cases institutions decline the ombudsman's recommendation for different reasons. In those situations it is important that an ombudsman does not give in too easily. The ombudsman could study the reasons given by the institution and, if they are not convincing, repeat the recommendation. The best weapon in these situations are good and convincing arguments and good skills for negotiation.

If this does not help, the ombudsman could remit a special report on the case to the competent authority including proposals to solve the discrepancy in opinion. In this report the reasons to decline the ombudsman's advice should be duly reported. Some ombudsmen use the annual report to draw the attention of the competent authority to the institutions or bodies in the administration that have not followed the ombudsman's advice, be it a proposal for a friendly solution or a recommendation. The ombudsman can do this by putting relevant cases in a separate chapter in the report .One ombudsman once told me that he used to publish a "black list" in the annual report of institutions that did not fully co-operate with the Ombudsman in an effort to undo bad administration. To me, that seems a little harsh.

The annual report is a public document handed over to the authority that may have executive power in the matter. If the reasons given by the ombudsman are convincing and his or her advice reasonable, publishing the matter will lead to a positive result on many occasions. Usually public bodies and officials like to look good in the media, which promotes swift solutions.

There may be other ways to act, but the most important thing is not to give in too easily. In a case where relevant new arguments or evidence are put forward only at this stage, the ombudsman should consider their impact on his findings.

How do You Know That the Office Works Well?

The normal practice in the ombudsman world is that the activities of the ombudsman are subject to external review when the competent authority, usually a parliamentary committee, is dealing with the annual report. If the members in that body are active and observant, this procedure might act as a quality control on the ombudsman's activities.

The ombudsman office should establish its own internal procedures for quality control. For example, the ombudsman should develop procedures checking how closely the time limits for dealing with cases are followed, how well the administration has followed the ombudsman's recommendations, or in how many cases the ombudsman has solved the complainant's case to full satisfaction.

There are also checklists to consider how well any administrative office works which might help the ombudsman to monitor his or her own operations. How long does it take to answer e-mails or letters or to send information material? How long does it take to inform a complainant that the complaint is outside the remit and inform them about the competent body to deal with the complaint? Does the switchboard work to satisfaction? Do the officials inform the switchboard of their absence? As I have said, these kinds of checklist can help any office to improve its activities. A survey among the clients could also be considered. As the ombudsman is working for good administration, her or his office should be a model for others.

Of course, there could also be quality checks on the substance of the work. For example, the ombudsman could use outside experts to evaluate the achievements or invite the different units in the supervised administration to give their observations. One idea that is tempting is to invite representatives of those who proposed and decided to establish the office—the founding fathers and mothers—to give their opinion on how it has turned out and perhaps to give good advice for the future. Even though many comments might be critical, some of these procedures could give the office inspiration and stimulation to improve its activities and attempt to achieve better results in the future.

Lastly, many ombudsmen come under pressure from time to time or have to deal with improper attempts to influence their activities. If the ombudsman functions openly, these attempts are usually easy to deal with. If a friendly but firm attitude does not help, the attempts could be noted and added to the file. Often a hint that this might be done is effective enough to deter most attempts. A serious and unfair attempt to influence the work must be reported to the competent authority. In the ombudsman's daily activities these kinds of events are rare.

Occasionally, it occurs that the ombudsman has a serious case to solve and a very influential party intervenes behind closed doors to advocate a certain solution. Even indications that a possible renewed mandate will be linked to the outcome of the case are hinted at. The case is difficult and the situation really unpleasant for the poor ombudsman. What to do?

The only advice I can give is that this is the moment to do the right thing. It is much better to have to leave the office for doing the right thing than for doing something wrong. It surely will also look better in public.

I do hope that my thoughts might be of some help to you in carrying out your important task. It is good for Europe that the universities are properly run and it is good to know that there are people committed to find even better ways of doing things in the academic world.

Endnotes

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1. See the Council of Europe publication, *The Administration and You: A Handbook* (Germany: Council of Europe Publishing, 1996).
 2. European Ombudsman, *The Citizen, the Administration and Community Law: General Report Prepared for the 1998 FIDE Congress* (June, 1998), online: The European Ombudsman<<http://www.euro-ombudsman.eu.int/FIDE/EN/Default.htm>>.
 3. *Ibid.*