

January 2008

## Comparative Case Study 7

# Ombudsmen, People's Defenders and Mediators: Independence and administrative justice in state transformation

Mariteuw Chimère Diaw

### Summary

Ombudsmen have played an important role in the process of state transformation in recent decades. From slow beginnings, the institution has been taken up on all continents and in many countries, albeit with varying levels of political commitment and uneven success. This paper examines the history and functioning of contrasting types of ombudsmen for the light that they can shed on forest verification. Different models are considered and the key conditions determining their effectiveness are compared. The paper highlights an essential parallel between the aims of ombudsmen and forest verification: their relation to self-strengthening systems of democratic governance and to questions of institution building and state accountability.

### POLICY CONCLUSIONS

- The institution of ombudsman is part of the story of state transformation in the twentieth century; its effectiveness needs to be situated within the functioning of the encapsulating state.
- Verification is a core working principle shared by all ombudsmen; however, the way an ombudsman is appointed, its legal statutes and security of office, the institutions to which it is accountable, as well as the possibility to hire staff and control its budget all affect its ability to act, and to act independently, in its verification role.
- The effectiveness of an ombudsman is structurally conditioned by three sets of enabling conditions: the functioning of rule of law; the extent of the ombudsman's legal authority; the behaviour and political culture of state actors.
- There is evidence that the most effective ombudsmen are those who seek to improve the workings of the administrative system not to expose its deficiencies.
- Enforcement is not, as such, the prime rationale of ombudsmen; rather, the main concern of the successful ombudsman is with administrative justice.
- An effective ombudsman is not a stand-alone bearer of justice, but a building block in a broader architecture of checks of balance on the functioning of public administration.

### Introduction

The work of ombudsman is an integral part of the story of state transformation in the twentieth century. The Ombudsman, an institution headed by a high level public official with independent authority to oversee public administration, has become a feature - and a standard- of the modern democratic state. First established in modern law at the beginning of the 19th century in Sweden,

ombudsman institutions have spread into myriad forms of public oversight and corporate accountability, and have contributed to the globalization of ideas and bureaucratic norms.

This case study looks at the ombudsman story from the comparative standpoint of verification systems. It provides interesting evidence in this regard. Among the cases documented by the VERIFOR project<sup>1</sup>, it is the only one



that is both outside the forest sector and nationally-based, self-spreading, and loosely tied to international processes through horizontal networks. A well functioning ombudsman is a verification institution in its own right, with all the generic attributes of verification systems.

We start, first, with the historical conditions that gave rise to ombudsman institutions and explain its spread and diversification as well as its meaning for the broader story of state edification (Section 1). Section 2 reviews the different models of ombudsmen internationally. The fact that there is not one but several ombudsman models is a reflection of the ways in which issues of legality, ethics, and natural rights play out differently in different political contexts and systems of law (Section 3). Section 4 explores the difficult question of the performance and effectiveness of different types of ombudsmen. The final section (Section 5) compares the aims of ombudsmen with those of forest verification.

## 1. Genesis of the institution: a multi-secular origin<sup>2</sup>

The term 'ombudsman' refers to an independent official appointed to receive, investigate and address complaints about unfairness in the administration of public services. An ombudsman works on behalf of the public and usually has the authority to launch investigations on its own initiative.

Though a recent innovation in many societies, the concept is far from new. The most direct antecedent of the modern ombudsman, the '*Justitieombudsman*' (ombudsman for justice), was created as a new independent institution of Parliament by the Swedish Constitution of 1809. However, systems in which people were appointed to control government have existed for millennia. The word comes from 'om-buds-man', "the man about the fine", a neutral person appointed to collect blood money (*wergild*) during family feuds in primitive Germanic tribes (Anderson, 1969). However, the first public organ created under that name was tailored after the *Qadi al-Qadat*, a magistrate overseeing the Ottoman Caliphate in accordance with Islamic law (*shari'a*), whom King Charles XII of Sweden had observed during a five-year self-exile in Turkey. The first Swedish ombudsman was in the service of the king and was to ensure that the judges, military officers and civil servants in Sweden observed the laws of the country. This ombudsman still exists today with the title of 'Chancellor of Justice'.

### The Global spread

For more than a century, the Swedish parliamentary ombudsman remained an isolated figure on the European landscape. Finland was the first to replicate the model, 111 years later, and it took another 34 years before the next country, Denmark, followed suit. New Zealand and Norway joined a decade later. By 1960, 150 years after its birth, only five countries had adopted the institution. The first global surge occurred in the mid-1960s, and stirred up controversies in many countries. The very idea seemed to question the integrity of Western constitutional systems. In the United States, its introduction was considered 'an unspectacular and relatively minor governmental reform ... to remedy marginal defects in a basically sound system' (Anderson, 1969). In France, 'the general opinion was that such an institution had

no place in a State which had the most sophisticated system of jurisdictional control of administration in existence' (Garant, cited in Acka, 2000). Canada was more receptive because of very favourable circumstances and strong championing from influential figures (Hyson, 2004). In Great Britain, it was rather a mellow version of the ombudsman that was instituted in 1967 with the title of 'Parliamentary Commissioner for Administration'. It took twenty five years of debates and motions in Bangladesh, between the first passage into law of the institution and its effective establishment in 2002.

There are now ombudsman offices in more than 120 countries, at the national, regional and local levels, as well as in corporations, universities and the media (IOI, 2005<sup>3</sup>). From extremely slow beginnings, from the mid-1970s onwards the institution has achieved spectacular growth. Today, and with a few exceptions, ombudsman report steadily increasing numbers of cases they handle each year. The position is clearly satisfying some important needs in society.

Table One is a visual representation of the spread of the institution. Four distinct 'moments' can be distinguished: The first moment of containment within Scandinavia, which has already been described, was followed by a movement of regional diffusion, from 1966 to the late 1970s, primarily through the Commonwealth network. All major political regions of the world, except Latin America and Eastern Europe, were touched during that period, but the effect was limited. Non-anglophone Western European countries joined the movement only at the end of this period, with a handful of newcomers such as France, Portugal and Spain. The 1980s were a period of stabilization and slow growth, touching Latin America at last, as well as 14 other countries, particularly in Europe and Asia. The horizontal globalization of the ombudsman movement takes place in the 1990s and 2000s, in close connection with democratic changes in Africa, Latin America, Asia-Pacific, and East-Central Europe and Central Asia. Close to 70 countries from all world regions established ombudsman offices at that time. The political and social context of this mushrooming affects significantly the form and mandate of the institution and requires further elaboration.

## 2. Types of ombudsman: the plurality of ombudsman institutions

There are a number of features common to all ombudsmen but also several ways to distinguish between them. This paper deals mainly with public sector ombudsmen, the central actors and inspiration for the global spread of the institution. It focuses on general-purpose ombudsmen but takes into account specialty and single-purpose ombudsmen in the public sector. Box 1 highlights six areas, which provide a first line of distinction between different ombudsman figures.

There are three major types of general public sector ombudsman:

- i) The parliamentary ombudsman;
- ii) '*Le Médiateur de la République*'
- iii) '*El Defensor del pueblo*', a variant of which is the 'Ombudsman for human rights'.

A fourth type, not typically considered an ombudsman but with several common features, is the Control Yuan in the Republic of China. We will review each of these in turn.

**Table 1: The planetary growth of the ombudsman institution**

Timeline		Scandinavia	Commonwealth & Pacific	Africa	Asia	Western Europe	Latin America & Caribbean	East-Central Europe & Central Asia
	1989	Sweden '19 Finland '53 Denmark Norway	1962 New Zealand		Dynastic China '31 RoChina Control Yuan			
	1963							
	1966		'66 British Guyana '67 United Kingdom Most Canadian Provinces '69 Québec, Hawai (US) '70 Nova Scotia '71 Fiji, Israel '72-'79 Australian States  '75 Papua New Guinea '76 Australia – Federal  '78 Solomon Islands	'68 Tanzania Mauritius  '73 Zambia '75 Nigeria	'71 India  '73 France '75 Portugal '77 Austria  '78 Switzerland Spain (law 81)	'73 Puerto Rico, Trinidad & Tobago '78 Jamaica '79 St. Lucia		
	1979							
	1980		'84 Cook Islands  '88 Samoa	'80 Ghana  '81 Sri Lanka '83 Pakistan  '87 Philippines '88 Hong Kong	'80 Ireland '81 The Netherlands '82 Germany  '87 Iceland	'81 Barbados  '85 Chile, Guatemala  '88 Poland		
	1989							
	1990		'94 Vanuatu	'90 Namibia '91 Senegal, South Africa '92 Gabon, Tunisia, Madagascar '93 Mauritania, Seychelles '94 Burkina-Faso '95 Côte D'Ivoire, Malawi, Botswana, Lesotho '96 Zambia '97 Mali, Gambia '98 Congo, Sudan, Etiopia '99 Djibouti  '99 Macau, Malaysia	'90 Nepal  '94 Korea  '95 EU, Malta Belgium, Greenland  '98 Gibraltar, Andorra	'90 Mexico, Colombia '91 Brazil, El Salvador '92 Costa Rica, Honduras '93 Argentina '94 Bolivia '95 Antigua/ Barbuda, Nicaragua '96 Peru (law 93) '97 Haiti, Ecuador  '99 Belize, Venezuela	'92 Estonia '93 Croatia '94 Slovenia, Lithuania '95 Hungary, Bosnia Herzegovina '96 Latvia '97 Macedonia, Romania, Uzbekistan, Czech Rep '98 Russia, Ukraine, Moldova '99 Albania	
	1999							
	2000		'01 Tonga	'00 Zimbabwe '01 Morocco, Monzambique '03 Togo '04 Rwanda '05 Swaziland, Angola '06 Benin	'00 Indonesia  '02 Bangladesh	'00 Greece	'01 Paraguay '03 Dominican Republic, Chile, Brazil, Uruguay did not yet have pertinent laws in '03 '05 Bermuda	'00 Kosovo '01 Georgia '02 Slovak, Azerbaijan, Kazakhstan, Kyrgyz '05 Bulgaria
	To date							

#### The classical model: the parliamentary ombudsman Reporting and sanctions

The parliamentary ombudsman is the basic model from which derives all the other ombudsman figures. It was propelled worldwide by the basic similarity of parliamentary forms between Scandinavia and the Commonwealth

countries. In parliamentary systems of government, the executive and the legislature are fused into a unified system of government in which the legislature holds supreme power. The prime minister and other cabinet members are members of, and accountable to Parliament. Logically, the ombudsman also has to report to the legislature. In the UK's 'Westminster system', public access to the ombudsman is

### **Box 1: Main lines of distinction between ombudsmen**

- 1) Denomination: Different names carry different connotations and meanings, in relation mainly to variables 4 and 5
- 2) Public status:
  - a. Public sector ombudsman
  - b. Private or corporate sector ombudsmen
- 3) Coverage/Scope:
  - a. General-purpose ombudsman (transversal oversight charge on public administration)
  - b. Specialty or single-purpose ombudsmen (public and private sectors)
- 4) Oversight mandate (public):
  - a. Maladministration, administrative justice
  - b. Human rights
- 5) Line of accountability:
  - a. Classical Ombudsman:
    - (i) reports to parliament;
    - (ii) reports to Board of corporation or institution
  - b. Executive Ombudsman: Reports to executive chief
    - (i) 'Presidential ombudsman' (e.g., African, French Mediators);
    - (ii) Executive ombudsman reporting to CEO of a corporation
- 6) Powers: ombudsman powers and effectiveness differ following the above and a number of other variables (see tables 2, 3)

restricted to Members of Parliament, by the 'so-called MP filter', which makes explicit the notion that the British Ombudsman is intended to be an instrument in the hands of Parliament and its Members (Giddings, 2001). In general, the ombudsman in this classical parliamentary model acts independently and on behalf of parliament to investigate allegations of maladministration. It is also a place of last resort - an impartial agent who can intervene when complaints directed to a particular government agency are alleged not to have been adequately addressed or when procedures have not been properly followed. The ombudsman is neither an elected representative nor a parallel authority to governmental agencies. It reports to Parliament and to the public but does not have the power to force an agency to comply with a recommendation. It is not a substitute or duplication of appeal rights to courts or administrative tribunals and cannot make binding orders. However – and for these very reasons - ombudsmen can address issues that are outside the scope of an appeal; they can proceed with less formality and without the adversarial hearings and high costs associated with court cases.

### ***Le Médiateur de la République***

Aside from the UK, France was the first Western European country to adopt an ombudsman, a decade after the institution started moving out of Scandinavia. The form it took was again influenced by the particular institutional context. The French system of government is a hybrid presidential system in which executive and legislative powers are separate and the President is a dominant figure elected separately from the parliament. The President appoints the Prime Minister from the ranks of the parliamentary majority. When they created the office of the ombudsman in 1973, French politicians brought

an important change to it. They made it a 'Mediator of the Republic', a high administration official appointed by the President to the Council of Ministers to 'mediate disagreements between citizens and the administration'. To counter allegations that it was too closely linked to the executive, it was decreed that the Mediator should 'not receive or accept orders from any authority'; should be nominated for a single term of six years; cannot be removed from office; and is protected by a parliamentary form of immunity. As in the UK, public access to the Mediator is screened by MPs. The Mediator's lines of reporting and accountability to the President, the cabinet, the parliament, and the public are essentially fuzzy; its status has not been enshrined in the Constitution.

Other countries, mainly in former French colonies of Africa and the Indian Ocean, have followed the French model. African legislators adapted the French Mediator prototype in two major ways. Except for a few countries, they gave it a constitutional status and allowed for direct citizen access to the Mediator, by law or *de facto* (as in Djibouti). The link to the executive and its strong administrative focus remained major characteristics of the institution. In exceptional cases, such as in Côte d'Ivoire, it was made a direct 'presidential organ', which seems to put its independence into question (Acka, 2000).

### ***El Defensor del pueblo***

The *defensor del pueblo*, with its variant, the 'ombudsman for human rights', has become the standard model for the new democracies of Latin America, Eastern Europe, parts of Africa and the Caribbean. The Latin American ombudsman was directly inspired by the post-revolutionary constitution of Spain (1978). Starting with Guatemala in 1985, 'Defenders of the People' were written into the constitutions of 16 Latin American countries<sup>4</sup>. The Latin American ombudsmen differ from the classical and Francophone counterparts in that they are parliamentary ombudsman (nominated by and reporting to Congress) but operating in presidential systems of government.

A worldwide push in the 1990s for democratic freedoms and better governance 'from within' has been another driver of the ombudsman movements in Africa, Latin America, Asia, and Eastern Europe and Central Asia. By 2005, 23 ombudsman offices had been created in East-Central Europe and Central Asia. Provisions for an ombudsman had also been written in the 1992-1994 constitutions of Yugoslavia, Armenia, and Tajikistan and in the 2002 Ombudsman Bill of Serbia. Practically all had strong human rights mandate, with such evocative names as 'People's Advocate' (Albania), 'People's Attorney' (Croatia, Macedonia), 'Public Defender' (Georgia), 'Human Rights Commissioner' (Azerbaijan, Czech Republic, Russia), 'Ombudsman for Human Rights' (Kosovo, Bosnia-Herzegovina, Slovenia), and so on.

In Africa, most non-francophone ombudsmen still follow the classical model but many are also given additional competence over corruption (for example, South Africa, Namibia, Swaziland, Ghana, etc.). In other regions, there has been a 'reverse influence' of human rights schemes onto the classical model – as in the Caribbean, where ombudsmen deal with cases of police brutality, torture, mistreatment of detainees or children,

and other human rights violations (Thomas, H., 2003)<sup>5</sup>.

### The Control Yuan

The office of 'Control Yuan' was created in China in 1931, and offers interesting points of comparison with the concept of ombudsman. It is not generally considered an ombudsman because of its enforcement powers. It is a distinct oversight institution, with powers of impeachment, censure, recommendation and audit. The fundamental difference between the Control Yuan and the Ombudsman lies in the doctrinal bases of state organization itself. The organization of the modern state is based practically everywhere on the three power system developed in the West. All the political systems mentioned so far reflect some balance of powers between the legislative, executive and judicial branches of the state. The model founded by Sun Yat-sen in 1928, in the aftermath of the Chinese revolution, is radically different. It is a five power system that adds two Chinese traditional powers of Examination and Oversight (Control) to the Western model.

As with the ombudsmen, the activities of the Control Yuan are based on verification and fact-finding. The Control Yuan investigates people's written petitions and can carry out its own motion investigations; it can also refer cases to other organizations for investigation in its stead. It has powers of audit, censure and impeachment. Investigation is central to its powers of control. The Control Yuan's main activity is to control the Executive Yuan (i.e. the executive branch of the Chinese government) but it can also investigate the judiciary and its own personnel, if there are allegations that they have violated the law or neglected their duties. These investigation powers are larger than those of most ombudsmen. It is a collegial entity, and since 1992, has been constituted of 29 members, all of whom are appointed for a term of six years by the President of the Republic with the consent of the Parliament<sup>6</sup>.

The Control Yuan's powers of investigation, correction (against administrative bodies), censure and impeachment (against people) are exercised following procedures designed to ensure objectivity and independence. This includes assigning cases on a rotational basis or through elected task forces and deciding them through deliberations and secret ballots. Cases of impeachment, which can go as high as the President, must be initiated by at least two members and reviewed by another nine members before the case is established in a secret vote. Cases of censure require a review by three members. Only two situations fall within the remit of the Control body: violation of the law and neglect of duties. After a judgement, cases can be referred to the organization of the employee, a committee of discipline, or a relevant law court or court martial. In principle, the Control Yuan cannot investigate a case pending in a law court. It is not a judicial body, as it does not itself settle the cases on which it deliberates.

### 3. Verification and the ombudsman: forms and functionality of ombudsman institutions

Verification is a core working principle shared by all ombudsmen. Whatever the breadth of its mandate, an ombudsman has to make a series of verification decisions in the course of discharging its responsibilities. Based on the facts, it must decide whether there are grounds to justify an intervention over and above the conventional

administrative process, and, if so, whether to conduct a full investigation or to choose another mode of intervention. To resolve disputes at the earliest stage possible, ombudsmen resort increasingly to alternative dispute resolution (ADR) techniques, a growing field of theory and practice<sup>7</sup>. All ombudsmen have the authority to issue case reports and recommendations, but only some have the power to initiate the full range of remedial actions.

### Structural Independence

Independence - the ability to think and act within a mandate without interference from vested interests - is a theoretical attribute of all ombudsmen, though not always evident in practice. The way an ombudsman is appointed, its legal statutes and security of office, the institutions to which it is accountable, as well as the possibility to hire staff and control its budget all affect its ability to act, and to act independently. An ombudsman whose funding depends on the Executive is highly vulnerable. Many ombudsman offices in the world enjoy stable finances, shielded from political interference, but substantial numbers do not. Box Two reviews the actual experience in a number of countries.

### 4. Independence, autonomy, influence, and style in Ombudsmen's work

One must be careful not to confuse the legal statutes and theoretical powers of ombudsmen with the actual process of achieving independence. Independence is not necessarily synonymous with effectiveness. What matters in the end is not the theory of 'ombudsmanship', but the impact of the role. The following section is thus guided by four questions:

- How effective is the ombudsman institution?
- What correlation, if any, can be established between independence and effectiveness in the case of the ombudsman?
- What dynamic factors seem to account most for the independence and effectiveness of different ombudsmen?
- How does this all relate to the raison d'être of ombudsmen and to different concepts of justice in the transformation of states and societies?<sup>8</sup>

Uggla (2004) makes the point that, while the various Latin American ombudsmen might have similar legal and institutional bases, their impact on state and society has been very variable. He develops a two dimensional typology - 'autonomy' and 'ability to influence' - to account for these differences. Four types of ombudsman were identified on this basis:

- i) A 'proper ombudsman', strong in both dimensions;
- ii) A 'political instrument' – powerful, but lacking independence and servicing the goals of other actors;
- iii) A 'dead-end street', autonomous but lacking in influence and ability to affect public decisions and policy;
- iv) A 'façade' - "an elevated dustbin for complaints against the state" - lacking in both independence and political influence.

Figure One is an adaptation of Uggla's typology. Among the six country cases he studied, three appear to be autonomous and commanding more respect and influence than the others, Honduras, Peru and Bolivia conforming

## Box 2: Ombudsmen in theory and practice

In a comparative study of six Latin American countries, Uggla (2004) identifies the appointment and budget allocation as a time feared by most ombudsmen. In El Salvador, the appointment of an incompetent and corrupt ombudsman in 1998 nearly destroyed the institution and plunged it into chaos for several years. In Peru, the Congress failed for several years to elect a replacement to an ombudsman who had resigned in 2000, because of partisan politics. In 1999, following the Hurricane Mitch disaster and a critical report by the Honduran ombudsman on deficient planning and corruption, the government introduced a bill to curb the institution. This was thwarted by a national and international outcry, but “in its stead came a starvation budget for the institution for the following year” (Uggla, 2004). The following year, in Nicaragua, the ombudsman’s budget was dealt a ‘punishing’ cut of 40 %. In 1988, the Irish senate was the theatre of hot adversarial debates following a motion, deplored a politically motivated, ‘savage staff cutbacks’ of 50 % in the ombudsman’s budget<sup>9</sup>.

The powers and authority vested in different ombudsman vary enormously. Ombudsman offices differ in what and who they can investigate, and how they can follow up the cases they investigate. The Botswana ombudsman has constitutional jurisdiction over human rights violation, but is not allowed to investigate matters related to state security, criminal investigations, and actions ordered to the Police Force (Berg, 2005)<sup>10</sup>. In Malawi, the Constitution empowers the ombudsman to investigate ‘any and all’ cases of injustice (but getting cooperation from the police over allegations of police brutality is another matter).

Similarly, Namibia’s ombudsman has far-reaching powers ‘to access information, issue subpoenas, and fine or imprison those not cooperating with investigations’, refer issues to the Prosecutor General or Attorney General or initiate legal proceedings. But complaints against the police were referred back to internal police disciplinary units; thereby ‘negating the independence of the Ombudsman’ (Berg, 2005). The Commonwealth Ombudsman of Australia also has jurisdiction over the Defense Force (ADF), police telecommunication interceptions, and immigration detention facilities.

In terms of investigative powers, the standard for ombudsmen today is to deal directly with the public and to initiate own motion cases whenever needed. In this regard, the UK and France operate more ‘conservative’ schemes than other countries in that complainants still have to go through MPs to access the ombudsman who can only act after receiving a complaint. Many ombudsmen can also carry out ex-officio investigations or comprehensive audit projects, or subpoena witnesses and documents. Some, however, have significant limitations in matters of state security. Despite its very broad powers, the Ombudsman Commission of Papua New Guinea cannot obtain documents likely to prejudice the security, defence or international relations of the country (Illa Geno, 2005). Transparency International made the case that this ombudsman ‘lacked the teeth’ to effectively prosecute corruption cases (Bird *et al.* 2007). This point contrasts with one of the strengths of the Control Yuan<sup>11</sup>.

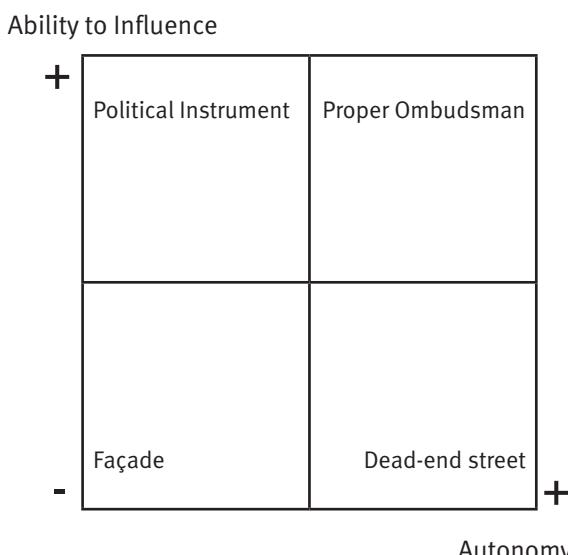
most closely to the image of a ‘proper ombudsman’. The El Salvador ombudsman (1998) can be seen as a ‘political instrument’. The Guatemalan ombudsman, a clearly autonomous figure, was disregarded by state actors in the mid-2000s and had little ability to influence their behaviour and appears as a ‘façade’. Labels are not necessarily static, however. The Columbian ombudsman kept silent for eight years in the face of the country’s civil war and massive human rights violations but the office has been redeeming

itself in recent years with critical stances on the military and the use of pesticides to eradicate coca plantation.

The four models of Figure One are ‘ideal types’ - that is, theoretical reference points against which to measure reality. They are not fixed identities to which all cases must fit. Some ombudsmen may enjoy stable and predictable work environments, but real-life political situations are generally fluid, uncertain and hardly predictable. The dynamic political underpinnings of the ombudsman institution should not be underestimated. To understand how independence and influence can be achieved – or not achieved – in the work of ombudsmen, we must thus look, beyond Uggla’s ideal types, into the nexus of ‘essential conditions’ within which all ombudsmen have to evolve. These conditions are (1) external, (2) internal, (3) structural, and (4) dynamic (Figure Two).

Together, the rule of law, the ombudsman’s legal authority, and the behaviour and political culture of state actors form a set of ‘contextual’ or ‘enabling conditions’ within which an ombudsman has to operate, struggle, manoeuvre and adapt in order to achieve something meaningful. A ‘proper ombudsman’ is structurally conditioned by these factors; its ethics, organization and work style constitute dynamic internal conditions that interact with the other three dimensions to produce certain kinds of outcome. The ‘ability to influence’ is a result of interactions between these four dimensions. ‘Cooperative politics’ tends to be the key interactive condition that can translate the mandate of an ombudsman into improved governance and administrative standards, and create a ‘strong ombudsman’. Even where the other three

**Figure One: Types of Ombudsmen**



Adapted from Uggla, 2004

conditions are ‘strong’, ‘weak politics’ (i.e. an uncooperative attitude in the administration and among political actors) can adversely affect the performance of the ombudsman despite its best intentions. However, there is also evidence that a weak, unprincipled ombudsman will fail in his/her mission no matter the strength of the other institutional and political factors.

### Rule of Law and natural justice: verification, engagement and state transformation

Quite different ombudsman models and work styles have managed to yield significant results. Vangansuren (2002) notes that, in former Soviet bloc countries (Poland, Hungary, Lithuania, Romania, Croatia, Uzbekistan and Slovenia), ombudsmen have anchored the public sector reforms and increased public participation in policy and law-making processes. They have applied to relevant courts

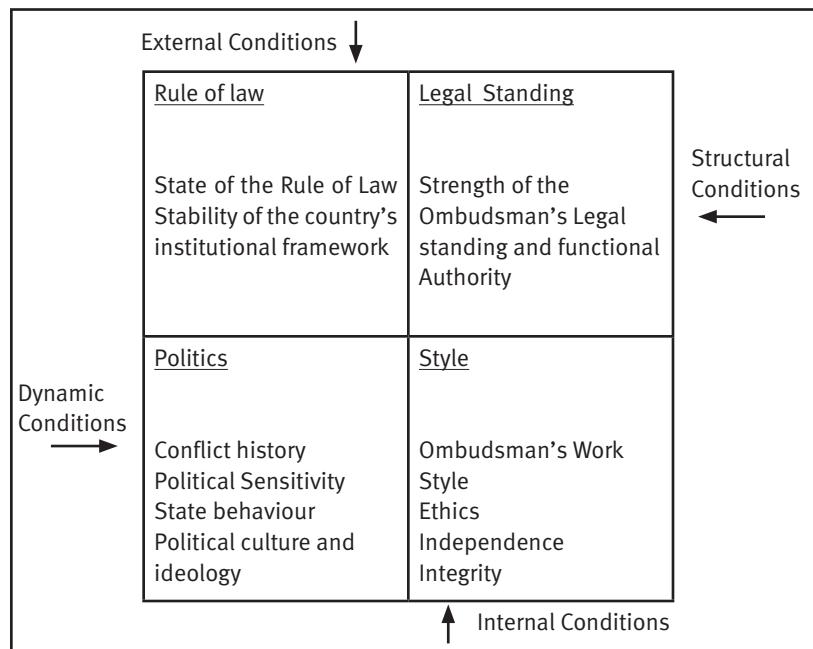
administrative behaviour, thus embedding key elements of fundamental justice in the body of codes defining its maladministration mandate. In Ontario British and Columbia, the ombudsman is required by statute to state its “opinion” in cases of maladministration or illegality but also with regard to “unjust, oppressive or improperly discriminatory” laws or statutory provision (Diaw, 2007).

## 5. Conclusion

This review has sought to offer a comparative perspective to the ways in which questions of law, governance, and verification are addressed in the forest sector. We have seen the spread of the ombudsman institution as a major phenomenon of the 20th century, though one with its roots in demands for accountability and justice that stretch back over the millennia. The ombudsman movement is a particularly successful form of international horizontal network<sup>12</sup>. Of late and reflecting post-authoritarian reconfigurations in various parts of the world, people’s defenders and other human rights ombudsmen have been a dominant and successful form of diffusion of the institution. Signs of reverse influence of this model on older ombudsman types reflect the originality of this kind of international network where ideas and patterns of influence circulate horizontally rather than vertically.

We conclude by highlighting a broader, more essential parallel between ombudsmen and forest verification systems: their relation to self-strengthening systems of democratic governance and to questions of institution building and state accountability. With regards to ownership and independence, the forest sector cases studied by the VERIFOR team<sup>13</sup> broadly represent

**Figure Two: Key conditions determining the outcomes of an ombudsman’s work**



for reviews of the constitutionality of laws and the legality of regulations and decisions. For instance, between 1995 and 2001, the former Hungarian Ombudsman for Civil Rights, Katalin Gömez, made 786 legal proposals and suggested modifying or repealing 250 laws, proposals that were accepted in the majority of cases. In line with their ‘primary constructive role’ in consolidating democracy and the rule of law through the defence of human rights, these ombudsman institutions operated as what Vangansuren characterises as ‘a kind of legal factory’ (*ibid*).

In such cases, the *raison d'être* of the ombudsman goes beyond the mere application of existing laws or the ticking of boxes to verify if laws and regulations have been properly followed. Some ombudsmen do limit their verification duty to a strict interpretation of maladministration. According to the European Ombudsman (2002), maladministration occurs “when a public body fails to act in accordance with a rule or principle which is binding upon it”. Nevertheless, this ombudsman contributed to the EU Charter of Fundamental Rights, to inclusion in the Charter of European citizens’ ‘fundamental rights to good administration’ and to the European Code of good

two types of situations:

- (1) nationally-based verification systems, such as the Latin American and Malaysian systems and the Forestry Board of British Columbia;
- (2) external monitors such as the Independent Observer in Cambodia and Cameroon<sup>14</sup>.

Among these cases, the ombudsman is closer to the independent observer and to the BC Forestry Board as schemes relying on a personality or an organization external to the system subject to verification. The ombudsman, however, departs from the independent observer in one major way. While the latter is essentially a foreign organization linked to donor conditionalities, the ombudsman is always a national of the country concerned<sup>15</sup>. As with the BC Forestry Board, verification is nationally-owned and internal to the dynamics of the society.

Beyond the many models, contexts, and styles of work differentiating them, all ombudsmen share a set of working principles which are common to systems of verification. The goal of the ombudsmen in all countries is to improve the system not to expose it. All the related

processes of publicizing findings and reviewing practices, laws and procedures are meant to develop adaptive feedbacks into, and thus strengthen, an institutional framework. Enforcing legality is not, as such, the prime mover and rallying point of ombudsmen. Rather, the main concern of the successful ombudsman is justice. Ombudsmen are required to look into the legality of both state actions and citizens' claims but from the broad standpoint of administrative justice and conflict resolution.

The ombudsman movement is part of a broader development in contemporary societies to institute transparency, ethics, administrative justice and respect for human rights in the everyday practice of the state. It is not a stand-alone bearer of justice, but a building block in a broader

architecture of checks of balance to which traditional state institutions as well constitutional courts, audit institutions or decentralization processes contribute significantly. Debates, dissent, and the demand for transparency are part of an everyday struggle for democratic governance in all parts of the world. Institutional systems need to evolve to meet this challenge. This is true of the forest sector as well as the broader public space.

**Maritew Chimère Diaw** is a Social Anthropologist with 27 years of research experience in Africa, Asia and the Americas. He presently coordinates the African Model Forest Initiative in the Congo Basin.  
E-mail: mc4chim@hotmail.com

## Footnotes

1. VERIFOR project website: <http://www.verifor.org>
2. For a detailed and properly referenced account of this history, see Diaw, 2007.
3. See: <http://www.law.ualberta.ca/centres/ioi/About-the-I.O.I.-History-and-Development.php>, 15 April, 2006
4. Argentina, Bolivia, Columbia, Ecuador, Spain, Panama, Paraguay, Peru, and Venezuela. In other countries it is called differently: Defensor de los Habitantes (Costa Rica), Procurador de los Derechos humanos (Guatemala, Salvador, Nicaragua), Comisión Nacional de los Derechos Humanos (Mexico, Honduras), etc. Uruguay still lacked an ombudsman in 2006; Puerto Rico had an ombudsman before Spain in 1977. CAROA, the Caribbean Ombudsman Association regroups ombudsman from Caribbean countries.
5. Haiti and Quebec have a Citizen's Defender, Le Défenseur du Citoyen; Jamaica has a Public Defender.
6. For this and other references on the Control Yuan, consult: <http://www.cy.gov.tw/eng/>
7. For instance, the Nigerian Public Complaint Commissioner (Yaro, 2006) describes ADR as his main intervention method. In 2001, following a huge increase in the volume of complaints, the

- England and Wales Prison and Probation Ombudsman established faster and 'smarter' processes requiring new skills (interviewing, mediating, etc.) of his team. The expectation was that cases would be resolved informally (or restoratively) and that full formal reports would be more exceptional (see Shaw, 2002).
8. See Diaw (2007) for a fuller account of this discussion.
9. Seanad Éireann - Volume 118 - 10 February, 1988. Office of Ombudsman: Motion.
10. See also Government of Botswana: [http://www.gov.bw/government/ministry\\_of\\_state\\_president.html#ombudsman](http://www.gov.bw/government/ministry_of_state_president.html#ombudsman)
11. Both organizations display impressive statistics on individual prosecutions resulting from their investigations (under the leadership code in PNG). See Ila Geno, 2005 and <http://www.cy.gov.tw/eng/>
12. Public sector ombudsmen are regrouped into the International Ombudsman Institute (IOI) and in various regional networks. The International Association of Ombudsman regroups private sector ombudsmen.
13. See [www.verifor.org](http://www.verifor.org) for related references
14. Where it is an 'Independent Expert' with more limited mandate than Independent Observers

## Bibliography

- Acka, F.S. (2000) 'Un médiateur dans les institutions publiques ivoiriennes: l'organe présidentiel de médiation', *Afrilex* 2000 (01)
- Berg, J. (2005) 'Overview of Plural Policing Oversight in Select Southern African Development Community (SADC) Countries', Institute of Criminology, University of Cape Town.
- Bird, N., et al. (2007) 'The current legal and institutional framework of the forest sector in Papua New Guinea. Papua New Guinea Forest Studies 2', Overseas Development Institute
- Brown, D. (2005), 'Designing verification Systems for Timber Trade: learning from International Processes', *ODI Forestry Briefing* 8
- Brown, D. and Swails E. (2006) 'The Convention on International Trade in Endangered Species (CITES)', *VERIFOR Comparative Case Study* 3, ODI, London
- Diaw, C. (2007), 'The Ombudsman story: A case study in public oversight, natural justice and state transformation' [www.verifor.org](http://www.verifor.org)
- Giddings, P. (2001), 'Whither the Ombudsman', *Public Policy and Administration* 16(2):1-16
- Hyson, S. (2004), 'The institutionalization of the Ombudsman idea: The case of the New Brunswick Ombudsman', Annual Meeting of the Canadian Political Science Association, U. of Manitoba, June
- Ila Geno, O.Q. (2005), 'Developing Investigative Methods That Work. The Papua New Guinea Experience', a paper presented at the 22nd Australasian and pacific ombudsman regional conference, Wellington New Zealand, 9 -11 February
- Persbo, A. Mayo B. and Peterson M. (2006), 'An Overview of the Evolution, Operation and Status of Nuclear Safeguards', *VERIFOR Comparative Case Study* 2. ODI, London
- Shaw, S. (2002), 'New processes and new products: The reality of business change', *The Ombudsman* 18:7-8
- Smillie, I. (2006), 'The Kimberley Process Certification Scheme for Rough Diamonds', *VERIFOR Comparative Case Study* 1, ODI, London
- Uggla, F. (2004), 'The Ombudsman in Latin America', *Journal of Latin American Studies* 36:423-450
- Vangansuren, U. (2002), 'The Institution of the Ombudsman in the former Communist Countries', International Foundation for Election Systems, Washington, D.C.
- Yaro, N.V. (2006), 'Lawyers litigate, and you pay; we mediate and it's free'. Sun News Publishing, July 22, 2006

VERIFOR Case Studies present experiences of verification in various sectors to inform research in tropical forests.

Series Editor: David Brown ([d.brown@odi.org.uk](mailto:d.brown@odi.org.uk))

Administrative Editor: Francesca Iannini ([f.iannini@odi.org.uk](mailto:f.iannini@odi.org.uk))

<http://www.verifor.org/>



This paper is an output from a research project funded by the European Union, under its Tropical Forestry Budget Line, and the Governments of the Netherlands and Germany. The contents of this publication are the sole responsibility of the authors and can in no way be taken to reflect the views of the ODI, the Government of the Netherlands, Wageningen International, the European Union or other donors.



Buitenlandse  
Zaken



landbouw, natuur en  
voedselkwaliteit