

**THE OMBUDSMAN AND GOOD GOVERNANCE**

by

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OCCASIONAL PAPER # 74

ISSN 7116349

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## THE OMBUDSMAN AND GOOD GOVERNANCE

Sir Brian Elwood, C.B.E., D.Litt. (Hon.) LL.B. \*

New Zealand is a small country of 3.8 million people with a governance system based on the Westminster parliamentary democracy model. The parliamentary term is limited to a maximum of three years and elections are conducted on the basis of universal suffrage pursuant to a system of proportional representation. New Zealand was the first country outside of Scandinavia to adopt the modern ombudsman institution in 1962, and today can be described as an open, accountable democracy.

Much of the credit for that observation must be given to the country's freedom of information legislation, the *Official Information Act 1982*. Until that date there was in force an *Official Secrets Act* whereby official information could only be released with appropriate authority. Since 1982 every citizen has the right to request official information, which shall be made available unless there is a good reason in law to withhold it. This right includes the right to request access to Cabinet papers. It is a role of the New Zealand Ombudsmen to resolve disputes between the citizen and the government when the government or its agencies declines to make the information available.

The International Ombudsman Institute is the professional body representing public sector ombudsmen throughout the world, with headquarters in Canada. Membership of the Institute is open to a public sector ombudsman whose role includes characteristics such as the investigation of complaints against government or semi-government agencies. Ombudsmen from more than 100 countries or states are members of the Institute, which is a network of collegial support and assistance.

I will discuss concepts based on an acceptance that citizens in this modern world have rights wherever they may be. It is in the nature of the human condition that each person wishes to be treated fairly and reasonably having regard to their identity as an individual. This is sometimes recognized by reference to the "catch all" phrase "human rights". I suggest it goes further than that: it is a fundamental characteristic of being human, of being who we are.

There is a growing recognition of the universality of basic human rights although sociological, religious or political realities may express them in different ways or with different priorities.

What is significant, however, is that this emphasis on rights is as a result of a gradual movement away from societies structured around obligations (to the leader) and the emergence of societies structured around rights (of the individual). This reality has had a profound significance for the structure of governments and how they operate. Justice Michael Kirby of the Australian High Court in his book *Through the World's Eye*, when discussing an Asian philosophical approach to the universality of human rights, said that approach placed "... emphasis ... upon duties, not rights; upon the community, not the individual; and upon the rule of powerful men of virtue, not the rule of law."

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\* Chief Ombudsman of New Zealand; President, International Ombudsman Institute. Address delivered at Indonesian National Ombudsman Seminar on Good Governance, Jakarta, July 3-4, 2000.

As the transition from that approach has occurred so has the ombudsman institution been adopted by more countries in Asia and elsewhere.

At this stage, I raise with you a number of general issues of relevance to the Ombudsman institution, which you may find of interest and help as you set about establishing your identity and purpose as the Ombudsman Commission of Indonesia. How you succeed in that endeavour will depend as much on your performance during the early years as on the manner in which your work is perceived by the Indonesian Government and people. You can rest assured, however, that you are established with the goodwill of ombudsmen around the world and I am pleased to be here with you to share with you this significant occasion.

During the last twenty years in particular, world attention has been focused upon the conduct of governments particularly in their relationships with citizens, both individually and collectively. The reality of the global village and the global economy has reinforced this focus.

Governments of whatever kind and throughout history have required the support of a bureaucracy in order that they may function and survive. Governments require bureaucracies and vice versa. Yet governor and citizen have over the years expressed concern about the manner in which bureaucracies function. There seem to be four basic reasons for this:

- Growth of bureaucracies, particularly since the 1930s, have tended to overshadow individual citizens and the governor's capacity to contain them;
- They can appear unresponsive and inefficient;
- Individual contact with them can be difficult;
- The power balance between individual citizens and the bureaucracy is unequal.

Harold Laski, in 1930, described bureaucracy as "The term usually applied to a system of government the control of which is so completely in the hands of officials that their power jeopardises the liberties of ordinary citizens."

Laski would have been surprised by the extent of bureaucratic growth the world over, but the information highway constructed as a result of advances in information technology is bringing best practice concepts of governance to the attention of governments and would-be governments everywhere.

Access to information lifts the expectation of each individual as to what he or she may come to expect in their interface with authority. Information empowers individuals. One consequence of this has been the need to ensure a better balancing of the power relationship between a citizen and that citizen's government.

With citizen empowerment comes the need for new constitutional mechanisms or alterations to existing arrangements, in order to sensibly manage and respond to the change in relationships which occurs as citizens lose a sense of subservience to any system which endeavours to rule over them. Thus, increasing tension between government and citizen is an almost inevitable consequence of moving from what was, to what is new. That tension is not a reason for resisting change, but a challenge to how best manage it.

People now expect that when they come into contact with the government or its agencies they will be listened to and treated fairly. Power after all is of an all-encroaching nature. As Justice Felix Frankfurter of the United States observed in 1957 in relation to judicial power, "It

must be on guard against encroaching beyond its proper bounds, and not the less so since the only one constraint upon it is self-constraint.”

That profound observation recognizes that the exercise of power at whatever level is not immune from human weakness.

Into that environment rides the rescuer—the Ombudsman.

Ombudsmen of one kind or another have existed for nearly 4000 years with the aim of addressing the consequence of human weakness in relation to the system of governance. The institution of ombudsman, born in vastly different historical times but modified little over the centuries, has come to help the modern Indonesia in its pursuit of governance changes.

My research suggests that the ombudsman concept can be traced back to the origins of Islam. The Prophet Muhammad placed great emphasis on the exemplary conduct of government officials and introduced the system of hisab or accountability. A former Pakistan Ombudsman once proudly proclaimed, “A great institution was thus born which today is seen to have spread to all corners of the globe.”

For the first time a worldly ruler appointed someone to check his own conduct. I cannot let pass this segment of my address without acknowledging the Chinese and Indian influence which was also evident until the modern ombudsman was introduced into Sweden in 1809.

What is significant in looking back on ombudsman history is to recognize that the first “*ombudsman*” had independence with the objective of checking the conduct of government. The Chinese saw it as a method of control rather than as a means by which administrative conduct could be reviewed which is the modern classical view of ombudsmanship.

But the wide acceptance today of the capacity of the ombudsman to be a facilitator of good governance can be contrasted with the slow adoption of the institution until the last ten years.

Given the increasing recognition of an individual’s basic human rights and the effect this has on individual behaviour, I sometimes ask myself, “Is there still a need for an Ombudsman when individual rights receive recognition in statute or in practice?” My answer simply is that the governor’s willingness to allow an independent party, an ombudsman, to overview and comment upon the governor’s conduct of the business of government can but give confidence to the governor and the governed that the business is being carried out by the bureaucracy in a fair, reasonable and lawful manner. The governor has a significant interest in seeing that the citizens being governed believe the system is functioning lawfully and reasonably.

What then are the essential features that the office of ombudsman have as its cornerstones? I suggest there are three:

1. Independence from executive government;
2. Flexibility in the conduct of investigations and recommending remedies which achieve substantial justice as between citizen and the state; and
3. Credibility both with executive government and the public.

Those features require support and underpinning by ensuring:

1. The scope of an ombudsman’s jurisdiction covers all agencies of the

- governmental system, except the courts and parliament;
2. Widening the access to the office by giving citizens the right to seek its help, in the resolution of grievances involving the state or its organizations;
  3. The citizen's accessibility to the office is enhanced by publicizing its existence;
  4. The office has adequate resources to enable it to function effectively; and
  5. There develops over time a climate of compliance with ombudsman recommendations.

It has fallen to be the lot of ombudsmen around the world that they are seen as one of the mechanisms by which a system of government is reasonably subject to checks and balances in the interests of the "*system*", being seen as a servant of the citizen and not the citizen being a servant of the "*system*". If that role of the state is important to the governor, the perception of the governed that that is so can only be enhanced if the governor embraces the ombudsman as part of the system of government.

The institution of ombudsman has earned its place beside the courts as a check and balance against the abuse of administrative powers and discretion. The services of an Ombudsman should be available without fear or favour, without hindrance and without cost to each citizen. The institution has become and should remain one to which every citizen, regardless of position or wealth, should be able to gain access.

Chief Justice Mulvain, of the Supreme Court of Alberta, put that sentiment well when he said that the Ombudsman:

... can bring the lamp of scrutiny to otherwise dark places, even over the resistance of those who would draw the blinds. If his scrutiny and observations are well founded, corrective measures can be taken in due democratic process, if not, no harm can be done in looking at that which is good.<sup>1</sup>

I go further to suggest that those who have the burden of governance should gain comfort from an ombudsman with credibility, independence and flexibility holding a lamp of scrutiny. Without prejudice or self-interest the ombudsman should look into what has taken place and where what has been done has been done lawfully, fairly, reasonably and without improper discrimination, be prepared to say so.

But when the lamp of scrutiny suggests that what has been done or not done appears to have been contrary to law, unfair, unreasonable or improperly discriminatory, the ombudsman should have the courage to say so and to recommend a means of resolution. Good government should not fear the light of the lamp of independent scrutiny.

I conclude with the observation that it is to the governor's ultimate advantage that there be an independent check on the conduct of the governor's own bureaucracy. Therein lies the foundation for the application of principles of good governance. Given the opportunity, the National Ombudsman Commission of Indonesia, by reason of the quality of its own conduct, will create for itself in your country the position of effectiveness and respect which ombudsmen generally throughout the world have attained. You embark on your responsibilities with the goodwill and support of the world's many ombudsmen.

## Endnotes

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<sup>1</sup> *Re Alberta Ombudsman Act* (1970), 10 D.L.R. (3d) 47 (Alta. S.C.) at 61.