

THE COURTS, THE OMBUDSMAN AND THE PUBLIC

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The functions of the courts and the ombudsman are, in their different ways, to administer justice, to right wrongs, to uphold human rights, to mediate or arbitrate and to try to achieve for the citizen the standards of service promised by governments. They should be seen as complementing each other, not as rivals. They operate in different ways. The legal process is adversarial. That of the ombudsman is inquisitorial - and inquisitorial without sitting in public under the glare of the press. That process confers on ombudsmen different strengths, as senior legal figures have recognised. Lord Mackay of Clashfern, the Lord Chancellor, referred in his Hamlyn Lectures to ombudsmen schemes as having gained the confidence and imagination of the public. He said that "a characteristic all the Ombudsmen schemes have in common is their potential to adjudicate between disputing parties without the trappings or expense of going to the court".

1. The Ombudsman's Role

More recently in his interim report on the civil justice system in England and Wales, "Access to Justice" of June 1995, Lord Woolf wrote:

Ombudsmen schemes provide many advantages to the complainant. They are free and complainants do not need the assistance of lawyers. The Ombudsman may achieve what is needed by referring the complainant in the first instance to an internal complaints mechanism, or he may achieve a settlement without the formality of a full investigation by referring to an individual at the right level. I would recommend the relevant Government Departments to investigate whether there are areas where, with their encouragement, additional Ombudsmen schemes could be established with advantage.

In addition to their obvious function of handling individual grievances, the ombudsmen, chiefly through the publication of annual reports, also have an important role in setting and maintaining standards of good practice within their specialist sectors. The courts, which have a broad general jurisdiction and do not share the ombudsmen's investigative powers, are less well equipped to take on functions of this kind. The public ombudsmen are concerned with issues of maladministration which do not manifestly fall within the province of court proceedings and judicial review. While the courts' jurisdiction should not be curtailed in

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any way, there would be advantages if the public ombudsmen had wider scope to take on issues which could be resolved by the courts. An ombudsman's decision would not prevent a subsequent application to the courts.

If he is to fulfil his important role effectively and with the confidence of the public, like the judge, the ombudsman must have the expectation of remaining in office for an undisturbed tenure. It would be inappropriate for the government to be able to remove the ombudsman at whim without substantial constitutional guarantees of his independence in investigating complaints. His reports must carry absolute privilege and freedom from prosecution for defamation. He should have the authority to report periodically on investigations to the legislature, the head of state or the government. He must have adequate financial resources and effective investigatory powers. Although his findings, unlike those of the courts, are not enforceable in law, he must have at least the same powers as the courts to require evidence and to obtain documents and papers. He needs to be able to see matters in their full context. As the President of the International Ombudsman Institute, Mr. Marten Oosting of the Netherlands, has said:

It may not suffice for the Ombudsman to regard the cases with which he deals as isolated incidents. Because he is confronted with many different cases, he can gain a more general understanding of problems and shortcomings in the way in which a given Government Agency operates. Prevention forms an essential element of his work and one that may be reflected in recommendations relating to specific cases being placed in a broader perspective.

That is akin to the description of the work of an ombudsman given by a former Australian National Ombudsman, Professor Dennis Pearce, who said it was a combination of fly swatting and lion hunting. The flies are the small cases which may be small in the eyes of the legislature or the government, but are of extreme importance to the individual citizen. As Dr. Samuel Johnson observed to Lord Bute in 1762, "To interrupt your Lordship with such petty difficulties is improper and unseasonable; but your knowledge of the world has long taught you that every man's affairs, however little, are important to himself." The lion hunting is exemplified by my predecessor's, Sir Anthony Barrowclough's, inquiry into the Barlow Clowes scandal and by the thematic studies of maladministration which, during my time as Parliamentary Commissioner and Health Service Commissioner, I have used in respect of areas of administration which have caused widespread distress to numbers of individual citizens and where redress is needed.

2. What is Maladministration?

Where maladministration is not defined in statute law, it is a function of the ombudsman to exemplify or illustrate from time to time what he considers is represented by that term. Among the examples I gave in my Annual Report for 1993 were unwillingness to treat the complainant as a person with rights, neglecting to inform a complainant on request of his or her rights or entitlement, knowingly giving advice which is misleading or inadequate,

ignoring valid advice or overruling considerations which would produce an uncomfortable result for the overruler, offering no redress or manifestly disproportionate redress, refusal to inform adequately of the right of appeal, cavalier disregard of guidance which is intended to be followed in the interest of equitable treatment of those who use the service, and failure to mitigate the effects of rigid adherence to the letter of the law where that produces manifestly inequitable treatment.

The difference between what the courts do on judicial review and what the ombudsman can achieve is this: the courts can quash a decision and require a fresh decision to be taken. The ombudsman can invite the government department concerned to look again at its decision, to offer redress, whether monetary or not, and to change its procedures so that the same situation is unlikely to recur. Here, observe that Mr. Justice Carnwath, in a case brought by trustees of a pension fund against the Pensions Ombudsman, ruled that, since courts do not have the power to set financial penalties on trustees for maladministration, there is no reason why the Pensions Ombudsman should instead. "There is no reason why a complainant should be in a better position because the dispute happens to be litigated before the Ombudsman than before a court", he wrote. Perhaps fortunately, the Parliament of the United Kingdom, in defining the jurisdiction of the Parliamentary, Health Service and Local Government Ombudsmen, did not empower the holders of those offices to provide redress in that way. That is why I regard it as preferable to invite Ministers and other bodies within jurisdiction to make payments by way of redress for maladministration. For such payments their Accounting Officers answer to Parliament and the relevant Ombudsmen are immune from Carnwath J.'s strictures.

3. Standards of Service to the Public

Governments are increasingly setting out, sometimes in competition with the Opposition parties, their stalls by way of charter targets and standards of service to the public. The line I have taken is that, if targets are expressed as mandatory or a promise has been given that the citizen has an expectation to compensation should they not be met or should they be missed by a specified period, the case for compensatory redress is strong. Otherwise, targets are to be taken as indicators of a satisfactory or unsatisfactory performance rather than as a firm commitment that a specific performance will be achieved in every individual case.

Because of the marked increase in the number of applications to the courts for judicial review of Ministerial decisions, the British Government issued to its civil servants (and Ministers) a leaflet, "The Judge Over Your Shoulder". Its purpose is to encourage them so to act as to minimise the chance that their decisions will be quashed by the courts after a judicial review. In December 1995, the British Government issued to its servants a leaflet, "The Ombudsman in Your Files" with the same purpose, but with the Ombudsman rather than the courts in mind.

4. Release of Information

Both the courts and the ombudsman have a function in discovery of the truth or of information. There is continuing debate about whether openness needs to be guaranteed by a freedom of information statute or by some other means. The United Kingdom Government chose a non-statutory Code of Practice on Access to Government Information and announced in July 1993 that they considered that the Ombudsman, rather than the courts, was more likely to influence the habits of public servants with a long tradition of secretiveness in persuading them to change their stance. There has been some degree of success in changing attitudes through Ombudsman investigations of complaints of refusal of information under the Code. To give one example from the United Kingdom, Her Majesty's Treasury refused to release a report on fraud in government departments and agencies on the ground that its circulation was limited to prevent details falling into the hands of fraudsters. When the Ombudsman investigated, the Treasury reviewed their refusal, agreed to release the report subject to very minor deletions and promised to publish future reports. Less than a year later, they have convened a conference on the subject. Whether that will meet public expectations - and the public generally has been very apathetic about using the new but not well advertised facilities - remains to be seen. Even with a Freedom of Information Act, there should remain a significant role for the Ombudsman to perform.

5. International Comparisons

Over the last ten years, there has been a substantial increase in the number of countries establishing national ombudsmen or commissions on human rights. In some countries there has been a corresponding growth, in the context of giving more power to the individual citizen, of complaints adjudicators, accompanied by the publication of charter statements in which the government, both broadly and in relation to particular services, have committed themselves to statements of the standards of service which citizens can expect from government departments and agencies funded largely from public funds. The International Ombudsman Institute (which has had rapid growth as the numbers of states in varying regions of the world which have appointed ombudsmen have increased) recognises that the classic Scandinavian model is not necessarily applicable to varied political structures. The Institute has therefore been prepared to accept as performing the functions of ombudsman bodies such as Human Rights Commissions, *Control Yuans*, and the Management and Co-ordination Agency in the Prime Minister's Office in Japan.

6. Scope of Ombudsman Jurisdiction

In May 1992, within the framework of the Conference on Security and Co-operation in Europe, a meeting of ombudsmen and human rights organisations considered the non-judicial protection of the fundamental rights of persons. After observing that the institution of ombudsman had developed at different speeds in the countries of Europe and that it was a significant guarantee both in countries with a long parliamentary tradition of democracy and in those countries emerging from a history of recent absence of democracy, the Conference

concluded that ideally no area of public administration should be immune from the jurisdiction of the ombudsman. Growing concern has been expressed in New Zealand, Australia and in the United Kingdom that certain changes in the pattern of government may have the effect of taking public utilities and other significant public services outside the purview of an independent and dispassionate investigator of complaints. In New Zealand, the *State-Owned Enterprises Act 1986* imposed on state enterprises certain obligations. Submissions were made supporting the removal of those enterprises from the ambit of the *Official Information Act* and the *Ombudsmen Act*. Those submissions emphasised the requirement to be as profitable and efficient as comparable private sector businesses, and maintained that the commercial nature of their operations was paramount and in some cases appeared to be to the exclusion of any other requirement. However Section 4 of the *1986 Act* stated that every state enterprise should be a good employer and exhibit a sense of social responsibility by having regard to the interests of the community in which it operates and by endeavouring to accommodate or encourage these interests when able to do so.

In his Annual Report for 1992-93, the Queensland Ombudsman made known to his government his dissatisfaction that the Government Owned Corporations Bill proposed to remove totally from his jurisdiction certain agencies, electricity boards, harbours corporations and so on, amounting to possibly 20 per cent of his current jurisdiction. The Ombudsman brought to the government's attention the considerable research and debate going on as to whether corporatised bodies should be removed from an ombudsman's jurisdiction. He made the point that many such bodies would be in monopoly or near monopoly situations and therefore would not be held accountable through whatever commercial constraints may exist in a competitive marketplace to protect the consumer and the public. He took the stance that, even if corporatised bodies were in a competitive situation, they were still publicly owned, handling public monies, performing public functions and representing the public interest. He did not regard it as appropriate that they be removed totally from his jurisdiction which was designed to ensure that public sector standards of accountability were observed.

In the United Kingdom, the statutes which set down the jurisdiction of the Parliamentary Ombudsman and the Local Government Ombudsman make it clear that the Ombudsman may investigate a complaint about an action taken "by or on behalf of" an authority within jurisdiction. The Local Government Ombudsmen have taken the line that this includes the actions of firms or individuals undertaking work on behalf of a local authority. That applies whether the external contractor is engaged as a result of a compulsory tendering arrangement required by legislation or through voluntary action by the authority. In one instance, the Local Government Ombudsman investigated the actions of a QC engaged by a council to undertake an independent inquiry to examine allegations of corruption in the operation of street markets in its area. When there was a growth in the number of agencies as distinct from departments in 1992, the government confirmed in response to a Parliamentary Question that the Parliamentary Ombudsman's jurisdiction would not be affected by those changes and members of the public would still have recourse to the Ombudsman in cases of maladministration by private sector contractors carrying out work done previously by government departments. A concern to members of the Select Committee on the Parliamentary

Commissioner for Administration has been the changes which take functions previously undertaken by government outside the area of government altogether. One such example was transferring television licences to the British Broadcasting Corporation. What had previously been within the jurisdiction of the Home Office was therefore taken outside the Ombudsman's jurisdiction. Whether services are provided in-house or by contractors, I see as vital the need for the providers to deal fairly with all, to keep adequate records and appropriate audit trails, and to show willingness in justified cases to offer redress when matters go wrong - even if at a financial penalty to those providing the service.

7. Regulators and Complaints Adjudicators

In the United Kingdom, the existence of regulators as watchdogs of public utilities has been the pattern for some years. All those regulators are in the purview of the Comptroller and Auditor General and within the jurisdiction of the Parliamentary Ombudsman. The complaints which reach him about their actions relate chiefly to the perception of members of the public of the way in which they have inadequately handled complaints about the industries within their terms of reference. Obviously the pattern of regulation and complaint handling in relation to public utilities varies from one country to the other. What is encouraging is the growth of voluntary ombudsmen schemes where different companies in a particular sector of the economy will unite and appoint an ombudsman with powers to investigate complaints and, in some instances, to award compensation for injustice. While that is encouraging, it is not comprehensive since not all companies in a particular sector agree voluntarily to belong to an ombudsman scheme. It is perhaps significant that statutory ombudsmen had to be established in England and Wales and in Scotland to take complaints about those who deliver legal services.

8. Innovation in the Field of Health

New ground is to be broken in the United Kingdom in 1996 by conferring on the Health Service Ombudsman the power, hitherto withheld specifically, to investigate complaints about action taken in consequence of the exercise of clinical judgment. The proposal was made in the light of recommendations by the Select Committee on the Parliamentary Commissioner for Administration and of the Wilson inquiry into health service complaints procedures. If, as a result, the Ombudsman is able to help patients and their families to have an explanation and an apology for an operation or an episode of care which has gone wrong without having to take the matter to court, that may make it possible to avert some long and costly legal proceedings, traumatic both for the complainant and for the doctor or other professional involved. Consequently, the Ombudsman may also be a means of generally improving service standards and practices. In that way, the interests of justice and of the citizen may be served in a new form. This is one example of the flexibility and adaptability of non-legal process provided by ombudsmen. The use of ombudsmen and adjudicators which has grown rapidly in many countries and in the private as well as the public sectors is likely to increase in the next few decades - not in competition with the courts but as an inexpensive alternative.

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