Ombudsmen In The United Kingdom

Government action is generally accountable in law in the United Kingdom, usually through court proceedings. Yet there have always been some areas of administrative power or executive discretion which have remained immune from the possibility of judicial review. A decision made by an administrative officer which is within his lawful jurisdiction, and which is made neither in breach of natural justice nor in error of law may well therefore be valid, and of course technically reasonable, but nevertheless harsh, or delayed, or inadequately explained.

Again, there are whole areas of executive discretion which have always been held to be immune from any type of judicial review. Examples are the discretion of the Crown to grant or refuse so-called political asylum to refugees, or the powers of local education authorities to make discretionary grants to certain types of students. In such cases the traditional remedy available to anyone who considers himself aggrieved has been to approach a Member of Parliament, with a view to getting him to ask a question in the House of Commons of the responsible Minister, or to approach a local councillor in the hope that he will take the matter up and prevail upon those responsible to change their minds. Any such approach may well be backed up by letters to the press, or by the agitation of some pressure group, but its success is always bound to be problematical, and doubts would be likely to remain one way or the other as to the justice of the eventual outcome.

It was in response to this haphazard state of affairs that the movement first grew in the United Kingdom for the establishment of some form of extra-judicial channel for the consideration and possible remedy of complaints. Special impetus to the movement was given by the notorious Crichel Down affair. Shortly before the Second World War certain land, known as Crichel Down, had been compulsorily

acquired on behalf of what was then known as the Air Ministry, a predecessor of part of the present Ministry of Defence. The transaction was perfectly legally executed under the emergency legislation then in force, but an undertaking was given at the time to the owner from whom it was purchased that he would be given the chance to repurchase it if the Crown should have no further use for it, and it was passed to the Ministry of Agriculture, which in its turn let it be known that it was prepared to consider disposing of the land either by sale or by lease. The original pre-war owner was by then dead, but his son-in-law, one Lieutenant-Commander Marten, who with his wife was farming adjoining land which had not been compulsorily acquired, made a bid to purchase the land. This was not accepted, and Crichel Down was sold to the Commissioners of Crown Lands, who then selected another tenant for it. Commander Marten protested and persisted in his protests at his treatment, and eventually the Minister appointed Sir Andrew Clarke QC to conduct an inquiry into the affair. Sir Andrew's report was published in 1954, and contained serious criticisms of impropriety by several civil servants within the Ministry of Agriculture who had, without any apparent justification, formed an aversion for Commander Marten, and revealed in a series of internal minutes passed within the Ministry a determination to prevent Marten acquiring the land, regardless of the financial or moral merits of his claim. In the event there was a debate in the House of Commons; the Minister, Sir Thomas Dugdale, resigned; and the civil servants concerned were reprimanded and moved to other posts within the civil service.

But the Crichel Down affair did not rest there, for it was clear from Sir Andrew Clarke's Report that, however improper or undesirable the conduct of the civil servants, it had at no stage been illegal. The undertaking given to the original owner was no more than morally binding, and in any case could be argued as not extending to his son-in-law, even though Marten and his wife were still farming the adjoining land inherited from the original owner of Crichel Down. The Ministry, like any other lessor or vendor, was entitled to dispose of its own property as it thought fit. Thus Marten had no claim in law which he could have prosecuted against the Ministry in any court or tribunal.

Eventually the British section of the International Commission of Jurists, JUSTICE, set up an independent committee under the chairmanship of a former Chief Justice of Singapore, Sir John Whyatt, to investigate the Scandinavian institution of the 'Ombudsman', and the report of the committee, often known as the Whyatt Report, was published in 1961. There is no completely satisfactory English translation of the word 'ombudsman', but it has been variously rendered as 'complaints officer', 'commissioner' or (in countries like Spain and Portugal) 'defender of the people'. The first ombudsman appeared in Sweden in 1909, though the full powers of the Swedish Ombudsman, which included the right to institute prosecutions, including prosecutions against judges, have not been copied by many of those countries in the present century which have instituted ombudsmen. The first twentieth century ombudsman office was set up in 1919 in Finland, and the next was in Denmark in 1954 and it was this latter ombudsman institution which particularly influenced the finding of the Whyatt Report, for the Danish Ombudsman is an officer of Parliament with wide powers of investigation, but relying upon its prestige and influence to achieve results, rather than any positive executive authority. The first Commonwealth country to borrow from the Scandinavian experience was New Zealand by the Parliamentary Commissioner (Ombudsman) Act 1962, but the Whyatt Report had its effect in the United Kingdom, after prolonged debate both within and outside Parliament, when the first British Ombudsman was established in 1967.

The Parliamentary Commissioner for Administration

The Parliamentary Commissioner Act 1967 created the office of Parliamentary Commissioner for Administration, now commonly known as the Parliamentary Ombudsman.The Commissioner is appointed by the Crown, and holds office until the age of sixty-five, being otherwise removable only in consequence of an address from both Houses of Parliament, or for incapacity on medical grounds, so that his tenure of office is protected in the same way as that of superior judges. He may investigate any action taken by or on behalf of a government department or other listed authority, provided that there is no court or tribunal in which such action may reasonably be challenged, though this

investigation can only be set in motion as a result of the receipt of a complaint that there has been maladministration. There is, however, a set process prescribed by the Act for the reference of such complaints.

The complaint must be in writing, it must be made by someone resident in the United Kingdom who claims to have sustained injustice in consequence of the maladministration, and it must be made in the first place to an MP within twelve months of the person aggrieved first having notice of the matters alleged in the complaint (though the Ombudsman may conduct an investigation pursuant to a complaint not made within the prescribed period if he considers there are special circumstances which make it proper to do so). It is then for the MP to refer it to the Ombudsman, with the consent of the complainant, and with a request that the Ombudsman conduct an investigation into it. This 'filter' of complaints through MPs has always been controversial, but its purpose was closely related to the fear that the Ombudsman might be swamped with complaints unless some effort were made to intercept some of the more eccentric or worthless complaints before they should reach him. This fear has not been borne out by events, for the Parliamentary Ombudsman usually receives some 1000-1500 complaints a year, a caseload of only about one-fifth that carried by each of the English Local Government Ombudsmen who will be referred to presently. The House of Commons Select Committee in 1994 recorded its support for retaining the 'MP filter', but I still believe that one day it will be removed.

The Ombudsman must conduct his investigations in private, and the procedure he adopts is left to his own discretion. But his power to investigate is much strengthened by his right to require any Minister, officer or member of a department or authority concerned, or indeed anyone else, to furnish information or produce documents relevant to his investigation. He has the same powers as a court to compel the attendance and examination of witnesses; and the Crown is specifically not entitled to attempt to shelter behind any claim of Crown or public interest privilege in respect of the production of documents or the giving of evidence. On the other hand information concerning the proceedings of the Cabinet or any of its committees is understandably exempt from the Ombudsman's jurisdiction. At the conclusion of any investigation he must send to the MP who requested it a report of the

results of his investigation, or a statement of his reasons for deciding not to conduct it. A similar report must go to the initial complainant, and to the principal officer of the department or authority concerned. He may make a special report to each House of Parliament, but in any event must make an Annual Report to Parliament upon his work. It has always been the practice of the House of Commons to refer all such reports to their Select Committee on the Parliamentary Commissioner, for consideration and comment; and the Ombudsman has himself established it as his own normal practice to send all his reports upon investigations to this Select Committee.

One patent difficulty provided by the Act is that it nowhere defines 'maladministration', the one quality in an administrator which under the Act should cause an adverse report to be made by the Ombudsman. This may seem a curious omission by Parliament, but in fact it was by design for Mr Richard Crossman,the Minister who at the time was steering the Bill through the House of Commons, stated that it was believed it would be better for the Ombudsman to work out for himself the boundaries of maladministration, a concept which was hitherto unknown in the United Kingdom. Mr Crossman did however say that he would expect the term to include bias, neglect, inattention, delay, incompetence, ineptitude, perversity, turpitude and arbitrariness, and these words have always been referred to since then as the 'Crossman catalogue'. Yet they have formed only the starting point in the development of the work of the Ombudsmen, who is concerned really with the whole flavour of administrative action, and will judge whether in all the circumstances of any matter coming before him the administrative authority acted reasonably. Thus he will test the whole quality of the administrative action and its effect upon the citizen. Nevertheless it may be remembered that the commonest type of maladministration found by the Parliamentary Ombudsman, and also by the other United Kingdom ombudsmen who will be mentioned presently, is unnecessary delay, a fault which is more usually inadvertent than intentional.

Other United Kingdom Ombudsmen

It was recognised very soon after the creation of the institution of the Parliamentary Ombudsman that this might be only the first step along the road towards a wider scope for extra-judicial remedies against the administration, and this very soon proved to be the case. The Parliamentary Commissioner Act 1967 was drafted in restrictive terms, which may not be all that surprising for a statute designed to institute an entirely new approach to the provision of remedies. The MP filter is only the most obvious of the restrictions imposed upon the Ombudsman's powers, yet perhaps the most unexpected effect of the Act was to give him jurisdiction over complaints against what is now called the Department of Health (in 1967 the Ministry of Health), but to deny him jurisdiction over the whole hospital service. It rapidly became clear that this lacuna could not be allowed to last, and when the Health Service was reorganised a few years later the gap was plugged. Three Health Service Commissioners were appointed, one each for England, Wales and Scotland, with a duty to investigate any alleged failure in a service provided by a health authority, or any action taken by or on behalf of such an authority, where there is a complaint of injustice in consequence of maladministration.

The procedure to be followed by the three Commissioners is similar to that laid down for the Parliamentary Ombudsman, save that a complainant need not channel his complaint through an MP, and may approach a Commissioner direct. Reports by the Commissioners must be made to Parliament, and are in fact received by the same Select Committee of the Commons which receives the Parliamentary Ombudsman's reports. All three posts have since their inception been held by the same person who for the time being is the Parliamentary Commissioner for Administration, and the net effect has been that the existence and powers of the Health Service Ombudsman amount in reality to an extension of the previously unduly restrictive provisions for the Parliamentary Ombudsmen.

As part of the very strong pressure which had been exerted after the 1967 Act for the extension and improvement of the ombudsman principle there was a movement for a similar mechanism in the field of local government. It was argued that, if there was any maladministration in central government departments with their

generally high standards of civil service morality, it was even more likely that maladministration would be found in local government, which would be largely unaffected by the strength of the civil service tradition. Accordingly, the Local Government Act 1974 established two Commissions for Local Administration, one for England and the other for Wales, and the Local Government (Scotland) Act 1975 established a similar Commissioner (though not a Commission) for Scotland. The 1974 Act does not specify how many Commissioners there should be, but in fact, there have always so far been three appointed to hold office at the same time in the English Commission (with one of them designated as Chairman, a post I held for 12 years until 1994), while only one Commissioner has been required for Wales. This is not surprising because the caseload for the English Commission, covering a population in the region of 48 million, is so much greater than that for the Welsh Commission, dealing with a population under three million. All these Commissioners are now generally known as the Local Government Ombudsmen. The English Local Government Ombudsmen divide up their work between them on a geographical basis, and currently maintain offices in London, York and Coventry. For reasons of cooperation the Parliamentary Ombudsman is an *ex officio* member of both the English and Welsh Commissions, but in fact all the public sector ombudsmen maintain close contact with each other in practice. The final pattern of these ombudsmen is completed by the existence of a separate Northern Ireland Parliamentary Commissioner and also a Commissioner for Complaints, both offices having been held in recent years by the same appointee.

The various Local Government Ombudsmen have jurisdiction to consider complaints of injustice caused by the maladministration of local authorities and certain other related bodies. Complaints must be in writing, but the provisions in the 1974 and 1975 legislation making it necessary for complaints to be made through members of the authorities complained about have since been removed, so that the ombudsmen may now receive complaints direct from the complainants. Over 90% of complaints are now made direct, and this has been one of the factors instrumental in the marked increase in the numbers of complaints to all public sector ombudsmen over the years, with the single exception of the Parliamentary Ombudsmen. For example, the

Commission for Local Administration in England received well over 15,000 complaints in the year from April 1995 to March 1996, about five times the number it had to deal with ten years before. If and when the MP filter to the Parliamentary Ombudsman is removed it can be anticipated that there will be an increase in his caseload also, though as with the other ombudsmen it will not necessarily mean that more of the complaints will in the end turn out to be justified.

To this pattern of ombudsmen in the public sector have now been added, since 1990, two Legal Services Ombudsmen, one for England and Wales and the other for Scotland, whose task is to investigate the way the legal professions deal with complaints against them by the public. The Police Complaints Authority, established in 1984, bears some resemblance to these avenues for extra-judicial remedy, though it lacks a fully independent method of investigating complaints against the police. Other fairly similar bodies include the Broadcasting Complaints Commission and the Prisons Ombudsman. In the private sector there are now a number of ombudsmen set up by professions or sections of the business community, or in a few cases by statute, and they include the Banking Ombudsman, Insurance Ombudsman, Building Societies Ombudsman, Pension Ombudsman and the Corporate Estate Agents Ombudsman.

Ombudsmen in Practice

Broadly it can be said that ombudsmen have proved to be highly successful in achieving the remedies they seek. Unlike judges they do not have the power to enforce their decisions directly, and their reports are recommendations rather than binding judgments. With the exception of some of the private sector ombudsmen, who are much assisted by the voluntary agreements of their founding professions or businesses that they will hold themselves bound by the ombudsman award up to a certain maximum sum of money, ombudsmen must rely upon their powers of persuasion to achieve results. They are helped by their well respected position, and by the strong sense of justice which certainly persists in public life. The Parliamentary Ombudsman is greatly assisted by the Select Committee of the Commons which is always keen to see that his recommended remedies are achieved. The Local Government

Ombudsmen do not have such clear assistance. They report their findings to the complainant and to the authority complained about, but do not have any direct help in achieving their objectives from Parliament or any other outside body. Nevertheless their legislation makes some provision for the use of notices in local newspapers, and the high profile of local, and occasionally national, media coverage has helped to persuade reluctant councils to comply with recommendations. On occasion the ombudsman recommendations are not implemented in full, but on the whole this is a sufficiently rare occurrence for it not to detract seriously from the effectiveness of the system.

The majority of ombudsman cases are concerned with comparatively minor matters, such as delay in assessing tax liability, failure to repair a council flat adequately, or the failure to follow the normal internal procedure in dealing with a planning application. But sometimes the issue may be more far-reaching or involve a significant amount of money. A celebrated case involved the Parliamentary Ombudsman's investigation of the actions of the Department of Trade and Industry in relation to the regulation of a brokerage business known as Barlow Clowes, which had subsequently collapsed to the detriment of large numbers of small investors in the securities they offered. The Ombudsmen found the Department's monitoring of the business to have been inadequate, and that this was maladministration which had caused injustice to the investors. He reported this to Parliament in 1989, and the Secretary of State for Trade and Industry announced in the House of Commons that he and his Department disagreed with the Ombudsmen, but that 'as a mark of respect to his office' the Department would nevertheless pay out about £150 million in compensation to the investors. This large sum was 90% of the total losses found by the Ombudsman as injustice. Not only did this substantially satisfy the determination made by the Ombudsman, but it provided a powerful example of how effective the ombudsman process can be.

Further developments of the ombudsmen system can be expected in course of time. The JUSTICE-ALL Souls Review of Administrative Law, published in 1988, recommended particularly that Principles of Good Administration should be drawn up, and that this work should be carried out by the Parliamentary Ombudsman. In the event the task was given, by the Local Government and Housing Act 1989, to the

Local Government Ombudsmen who, starting in 1992, have been publishing a series of practice guidance notes for local government, one of which is of central significance and entitled *Good Administrative Practice*. With effect from 1994 the Parliamentary, Health Service and Local Government Ombudsmen have been given the task of monitoring a new freedom of information policy, and in course of time this may well increase the caseloads they bear.

From time to time there have been suggestions that all the public sector ombudsmen should be combined in a single commission for public administration or similar body. But cooperation between all the ombudsmen is so well developed, including provision for forwarding complaints sent to the wrong office on to the correct one. The present ombudsmen have specialist functions and subjects which are probably well enough understood, and developing or reforming legislation is constantly considered and enacted as necessary.

Under the provisions of the Treaty of European Union 1992, there is now a European Union Ombudsman whose task is to investigate the complaints of injustice caused by maladministration of the European Union authorities. Of course the European Union Ombudsman has no jurisdiction over matters falling under the competence of the various national ombudsmen of member countries, or indeed over those existing ombudsmen themselves.

The institution of the ombudsman has now spread throughout most of the world. Many different names and terms are used, and the individual jurisdictions and powers vary. But the main thrust of the ombudsman idea remains remarkably similar, and the institution provides a flexible and largely informal method of obtaining remedies without the need to go through formal, and often expensive, court processes. No one should pretend that it is perfect, but there is little doubt that it is a modern improvement upon the provision for legal remedies which previously existed.

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