THE DEVELOPMENT OF OMBUDSMEN

In the 1997 number of the Commemorative Issue of **The Journal of Malaysian and Comparative Law**, I published an article entitled **'Ombudsmen in the United Kingdom'**[1], in which I endeavoured to set out the general principles of government accountability in the UK, and to stress the ways in which in recent years there had been increased encouragement and provision for methods of pursuing grievances which are alternative to the court process.

The major development had been the introduction of ombudsmen, starting in 1967. At first limited in scope, the ombudsman procedure had rapidly been extended to cover the whole of the public sector of government, and then been adopted throughout much of the private sector as well. I drew attention to the particular advantages of the process, including private investigation, informality, lack of expense and an ability to deal with matters which are not just limited to strict legal right. The main disadvantage appeared to be an absence of enforcement procedures, though this had not proved to be serious in practice, and the popularity of the process had been great. I concluded my article by mentioning that the ombudsman institution was now to be found in many countries all over the world.

My intention today is to develop these themes a little further, and then comment upon the desirability or otherwise of current trends. Although I must again base my study upon what has been happening in the UK, I wish to take a rather more global overall view. After all, the ombudsman institution was certainly not a British invention. Some scholars trace its origins to ancient China; others find aspects of it in ancient Greece; and in it's modern form it was consciously invented

[1](1997) 24 JMCL 87

in nineteenth century Sweden, and then developed in the middle of the twentieth century in Denmark into a form which has been broadly copied in the United Kingdom and in many other countries throughout the world.

Until the 1980s there were no ombudsman institutions to be found in Central or South America, none in Communist countries, and only a few rare examples in Asia and Africa. But the 1980s brought a considerable change in this pattern, and the collapse of the Soviet Union at the end of that decade heralded a positive stampede of ombudsmen into countries behind what had been known as the Iron Curtain.

Today ombudsmen are to be found in probably a majority of all countries, though often called by titles which reflect the habits and language of their own nations. In Spain, for example, the ombudsman is called El Defensor del Pueblo (The Defender of the People), which is the kind of office that probably fits comfortably in that passionate latin nation. I am sure you will realise that anyone who was called Defender of the People in the UK would be most likely to provoke laughter and jeers!. Many ombudsmen act individually, rather in the same way as a judge will often preside alone in his or her own court. But a number of countries have adopted a corporate type of ombudsman. Thus in Mexico, the institution came into being about 1990 in the form of a corporate Commission of Human Rights. The national variations are legion, and no great significance attaches to them. The important feature of all such institutions is that they provide for methods of obtaining redress of grievances brought about by maladministration, and without the necessity to engage in full-blown litigation in a court.

It is sometimes odd, however, to realise the identities of some countries which still lack ombudsmen. It is scarcely surprising to find that the institution has not yet penetrated to all countries in South America, Africa or Asia, because these areas embarked on the experiment later than other parts of the world, though examples of quite early creations of ombudsmen can be identified in these newer pastures – e.g. in Hong Kong some 20 years ago.

The surprises really occur in those parts of the world where the ombudsman institution was generally accepted during the 1960s and 1970s – Europe, North America and Australasia. In Australasia the take-up of ombudsmen was fairly comprehensive, starting with New

Zealand, and it has included a good number of small nations in the Pacific, but in North America there has been a marked contrast between Canada and the USA. Both countries cover vast area of territory, and the USA also has a large population of some 260 million. The general government attitude in the USA has been that ombudsmen are a good thing, but the size of their territory and of their population make it an impractical proposition to introduce such an institution on a national scale. As a result there are no national or federal ombudsmen in the USA, but a large number of so-called ombudsmen for cities, universities, newspapers and other local bodies. The drawback to these 'ombudsmen' is that they lack the essential characteristic of independence which I shall refer to again presently.

Canada at an early stage showed the way to introduce true ombudsmen in large countries by creating an ombudsman for each of the ten provinces, and in addition a small number of federal ombudsmen to deal with specific issues, such as privacy. It is fair to point out that one of the provincial ombudsman offices, that for Newfoundland, was abolished about ten years ago because of dissatisfaction by the provincial legislature with the work of the ombudsman, but a suitable pattern for incorporating ombudsmen into a large country had been shown. It is a pattern which was followed by a handful of the states within the USA, eg Ohio, but has not yet been widely emulated throughout the United States. India has embarked on a gradual policy of encouraging its component states to create state ombudsmen, but it is as yet only in the early stages of implementation.

Europe provides some of the oddest examples. Once the movement for the creation of ombudsmen became clear in the 1960s, most countries within what is now the European Union hastened to jump on the bandwagon; and since the demise of the Iron Curtain others such as Poland, Hungary and even Russia have followed suit. One of the most enthusiastic adherents of the new philosophy has been Holland, which, as is well known, has very close links with Belgium and Luxembourg. Yet Belgium has only very recently created an ombudsman, and Luxembourg merely entrusts complaints to a committee of its legislature. Germany relies on a Petitions Committee of its Parliament, but has no independent officer. And Italy has no national ombudsman, but has created scores of municipal ombudsmen, all appointed by their municipal councils for a short period, and renewable if they prove

satisfactory, which does not seem to me to meet the essential criterion of clear independence. Greece has no ombudsman at all.

This distinctly half-hearted approach to the creation of ombudsman institutions in Europe is all the more surprising in the light of the appointment of a European Union Ombudsman under the provisions of the Treaty of European Union 1992. This new institution came about with the enthusiastic support of all member countries of the European Union, and it is the task of the EU Ombudsman to investigate complaints of injustice caused by maladministration of the European Union (though not individual national) authorities.

As with parliamentary and local government ombudsmen in almost all countries that possess them, the EU Ombudsman' findings are only recommendations, and are not mandatory upon the authorities which may have been criticised. Most authorities all over the world are keen to support the philosophy behind the ombudsman institution, and they normally accept and implement ombudsman recommendations even if they disagree with them, but there have been some well publicised instances of the EU Ombudsman's recommendations not being accepted and implemented, and I wonder whether this may stem from the willingness of some European countries to maintain a reputation for fairness and integrity, while being quite prepared to act differently when their own interests appear so to demand.

Let me turn back to the United Kingdom. The last few years have seen a marked increase in the number and coverage of ombudsman institutions. In addition to the Parliamentary (and Health Service) Ombudsmen for Great Britain (England, Scotland and Wales) and the Parliamentary Ombudsman for Northern Ireland, and the Local Government Ombudsmen for England, Scotland, Wales and Northern Ireland respectively, there are now the Legal Services Ombudsman for England and Wales, and the Scottish Legal Services Ombudsman. Since the devolution of some legislative and executive powers to a new Scottish Parliament and new assemblies in Wales and Northern Ireland, and to executives in Scotland and Northern Ireland, new public sector ombudsmen have also been created for Scotland and Wales, though the current appointments are held by the same man who is Parliamentary Ombudsman for Great Britain.

In the private sector, separate ombudsmen have been instituted to cover banking, building societies, estate agents, housing associations,

funerals, insurance, investment, pensions and prisons. In the not very clear borderland between the public and private sectors there are also such hybrid bodies as the Police Complaints Authority, the Independent Commission for Police Complaints for Northern Ireland, the Broadcasting Complaints Commission, and a number of Adjudicators and Examiners dealing with special complaints against tax authorities and the Child Support Agency.

By the end of the twentieth century the ordinary citizen in the United Kingdom could well have been forgiven for thinking that the possible avenues for alternative dispute resolution resembled a kind of patchwork quilt or crossword puzzle. In actual practice it was not quite so complicated because all ombudsmen offices receiving applications from persons who have applied to the wrong ombudsman, readily send them on to the office which should have been the recipient. But by the year 2001 we are overdue for overt simplification of structures.

It is perhaps right therefore that discussions are currently taking place between the various parliamentary and local government ombudsmen and the Cabinet Office with a view to preparing legislation to amalgamate all these public sector offices into a single collegiate commission covering complaints against both central and local government. It is also noteworthy that since the Financial Services Authority was created in 1997 as a super regulator for the whole financial services industry in the UK, legislation has now been passed (the Financial Services and Markets Act 2000) to rationalise all the private sector ombudsmen in that area. Thus, with effect from later this year, a new single Financial Ombudsman Service will replace all those private sector ombudsmen which have dealt with banking, building societies, investment and insurance. Many ordinary citizens have only a hazy idea of the differences between banking and insurance, or between central and local government, so it is to be hoped that the changes currently under way will make complaining about injustice a little easier to pursue.

One other recent development may, however, prove to be more problematic. The United Kingdom was an original sponsor of the European Convention on Human Rights nearly 50 years ago, and indeed the Convention was largely drafted by English lawyers. But for most of its life a citizen who wished to litigate against the UK

Government on the basis of a breach of any of the civil liberties framed by that Convention had to take legal proceedings in the European Court of Human Rights in Strasbourg. Even then there was no power of enforcement of a decision of the Court, though it is fair to add that the UK Government and Parliament has had a virtually unblemished record of acceding to any adverse finding by the Court. After many years of controversy about whether or not the Convention should become a part of our municipal law, the patriation of the Convention was achieved by the Human Rights Act 1998, which came into force in October 2000.

The result is that now all the usually recognised civil liberties may be the subject of direct litigation in UK courts. I think it is well enough recognised that such liberties did already exist in our municipal law, and were usually well defended by the courts, but the effect of the 1998 Act has been to alter the former presumption in English law that we are free to do anything unless the law provides otherwise. Now the presumption is that specific civil liberties are protected virtually regardless of anything else.

I mention this development because Article 6 of the European Convention provides that, in determination of civil rights and obligations or of any criminal charge against a person, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law; and judgment shall be pronounced publicly. The Convention goes on to provide for exceptional circumstances where the press and public may be excluded from all or part of a trial in the interests of morals, public order or national security, in the interest of juveniles, to protect private life, or where publicity would prejudice the interests of justice.

Ombudsmen throughout the world usually investigate and determine complaints made to them by a private and confidential process. They do not normally hold hearings, though they may do so if they so wish, but only rarely in public. In my 12 years as an ombudsman I determined some 40,000 complaints, some after lengthy investigation with the help of skilled investigators, though many (particularly those outside my jurisdiction) after very little investigation at all; yet there was only one occasion in all those years that I found it necessary to conduct a hearing, at which I heard both parties and their representatives, but did

not throw open the hearing to the press and public. At the end of an investigation the ombudsman's report is a public document, and copies are sent to the media. On numerous occasions I was interviewed and questioned about my reports in the press or on television or radio, and I found this a sensible check upon my wide powers.

It has now been argued by some that for the future, ombudsmen should conduct all investigations by way of public hearings, in order to conform to the right to a fair trial in Article 6. The question has not yet been tested by way of judicial review, but this may come. If it does, it is my belief that the present practices of ombudsmen will still be upheld because (1) ombudsmen are not confined to dealing with legal obligations, but also cover good administrative practice; (2) they are not courts or tribunals, and indeed are precluded from dealing with matters which can reasonably be dealt with in courts or tribunals; and (3) to decide that they should always hold public hearings would destroy the basis for such alternative dispute resolution, especially speed, cheapness and informality. In my view ombudsmen should already be acting fairly, but they should not be covered by any provision in the Convention about trials.

One last issue I would like to mention: the independence of ombudsmen. For an ombudsman office to be credible, it is essential that the ombudsman, once appointed, should be independent. Most ombudsmen are appointed either by parliamentary resolution, as for example in Denmark, or by the Head of State after a process of selection and recommendation which takes into account the views of different sectors or interests within the nation concerned, as in my own case when I became Chairman of the Commission for Local Administration in England (Chief Local Government Ombudsman). In a few countries appointment is unlimited in time, but in most it is either until a retirement age (as in my case) or for a fixed period of years (usually between 4 and 6), sometimes renewable. In some other cases it is for the duration of a parliament until the next election (as for Denmark again, and the EU Ombudsman). The danger point is reached if the term of office is short and renewable, because then the office holder may be under the belief that he or she will need to please the appointing body.

The International Ombudsman Institute, of which for a few years I was one of the 15 Directors drawn from around the world, only recognises an ombudsman institution which is shown to be adequately independent in status and operation. This must surely be the right approach. But we must also accept the obvious limitations of an ombudsman. He or she is not a court of appeal from the decisions or policies of the administration. The function of the ombudsman is to detect and criticise failures in administrative process, and to recommend remedies for injustice where found. Where he or she can effect a local settlement between the two parties, that is perhaps the best result of all. But the ombudsman cannot alter or vary any policy the administration is determined to pursue, and no reputable ombudsman would consider that he ought to have that power. To possess such a power would carry with it the necessary corollary of greater formality and the provision of a right of appeal, which would in themselves destroy what I believe to be the particular virtues of the ombudsman system of review.

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Evolution of a New Financial Architecture through the Liberalisation of Financial Services

Introduction

The General Agrement on Trade in Services (the 'GATS') seek to liberalise the services sector and improve market accessibility throughout the world. Initial recommendations have been made during the earlier round of negotiations to achieve this purpose. As member countries attempt to commit themselves to the obligations under the GATS, reforms made to financial institutions, structures, and policies would lead to the emergence of a new financial architecture. It would be strengthened by a more prudent regulatory and supervisory framework.

The main objective of future round of negotiations is further deregulation of the services sector, enhanced rules on transparency, improvement in market accessibility particularly, the financial sector, and the "advancement of the neo-liberal agenda of regulatory reform".[1] These measures seek to prepare member countries to face the challenges of globalisation and the exponential growth in future world trade. The economic success of Australia, Singapore and Hong Kong has been facilitated by policies that promote an internationally oriented financial service sector. The rapid growth of the financial service sector in these countries is due to strong macroeconomic management and prudent financial sector regulation.

These pro-active measures were adopted in view of the impending changes to the global economy. It caters to the growth and development of transborder movement of investment capital. As financial markets around the world become more integrated due to technological development, market liberalisation and deregulation would improve access. It would lead to the emergence of a global financial architecture.

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[1] Arup C., *The New World Trade Organization Agreements: Globalizing Law through Services and Intellectual Property*, Cambridge University Press (Cambridge), 2000.