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The foundation of the government of a nation must be built upon the rights of the people but the administration must be entrusted to experts. Dr. Sun Yat-Sen (1867-1925), Founder and President of the Chinese Republic (1912).

A bill of rights is what the people are entitled to against every government on earth, general or particular and what no just government should refuse to rest on inference. President Thomas Jefferson (1743-1826), letter to James Madison (December 20, 1787).

Introduction

This paper traces development of the modern ombudsman concept, internationally, *i.e.* originating from the Scandinavian state model which calls upon ombudsmen to investigate allegations of government maladministration. Secondly, it notes, in a similar fashion, the broad themes of development of human rights protection and the movement from international multipartite resolutions to individual enactment and practice in states like those in Australasia and the South Pacific but with particular reference to New Zealand. Thirdly, there will be some description of the areas in which the ombudsman concept can be said to make some kind of contribution to the protection of human rights. Lastly, it will observe some differing trends overseas, but which may come to apply in countries covered by the Australasian and Pacific Ombudsman Region (APOR) countries.

The Ombudsman Concept

In emphasising the modern era regarding the ombudsman concept, one deals with, by mention only, models in China and India from as far back as 3000 B.C., involving an appointed official receiving complaints from individuals, reporting error and conveying relief if merited. In the last century, in 1809, the Swedish state appointed an official called the *justitieombudsman* to inquire into citizens complaints and report to Parliament. This model was taken up in other parts of Scandinavia, in Finland in 1917 and in Denmark in 1954. The term ombudsman means something in the nature of "*grievance representative*" or "*entrusted person*". As may be known, at least within the APOR region, New Zealand became the first English-speaking country to institute the office in 1962. The original appointee, Sir Guy Powles, was termed the Parliamentary Commissioner for Investigations, although Sir Guy favoured the term "*Ombudsman*" which itself became the term of art when the New Zealand legislation was reconstituted with wider jurisdiction and coverage in 1975.

The basis of doing this was to afford the ordinary citizen some kind of hearing and redress in a simple, inexpensive and direct fashion when allegedly dealt with adversely by the actions of a large and remote government bureaucracy. The traditional means of redress—citizens being able to raise matters in Parliament through the local Member of Parliament, or to

[*] Ombudsman, New Zealand. Contribution to the 17th APOR Conference at Port Vila, Vanuatu, August 24, 1998.

obtain judgement through the courts or to energize the press had all proved to be less feasible than when originally envisaged. A further local incentive at the time in New Zealand was the rather more practical one of reducing the volume of private "complaint" correspondence over the desks of Ministers and Members of Parliament in ever-increasing amounts. The larger problem was, however, expressed by Professor Donald Rowat, in a 1962 article called "*An Ombudsman Scheme for Canada*"[1] who, although expressing a Canadian viewpoint, registers likewise in a number of settings:

> It is quite possible nowadays for a citizen's right to be accidentally crushed by the vast juggernaut of the government's administrative machine. In this age of the welfare state, thousands of administrative decisions are made each year by governments or their agencies, many of them by lowly officials; and if some of these decisions are arbitrary or unjustified, there is no way for the ordinary citizen to gain redress.

For New Zealand, the principal policy makers of the late 1950s and early 1960s, whose work led to the legislation, were the erstwhile Minister and Secretary for Justice respectively. Their observation of the development of the concept in the Scandinavian countries (particularly in Denmark) and of reports, such as that from the United Kingdom (the *Whyatt Report* undertaken by the International Commission of Jurists advocating some kind of Parliamentary Commissioner), seem to have catalysed development of the concept. To this must be added the work of the parliamentary draftsman, whose formulation of the key sections describing the jurisdiction has not only endured in New Zealand but has been adopted in a number of other jurisdictions.

It has come to be accepted that the ombudsman concept has a number of basic items attaching to it. In brief, the Ombudsman Committee of the International Bar Association defines the term "*Ombudsman*" as follows:

> An Office provided for by the constitution or by action of the Legislature or Parliament and headed by an independent high-level public official, who is responsible to the Legislature or Parliament, who receives complaints from aggrieved persons against government agencies, officials and employees, or who acts on [his] own motion and who has the power to investigate, recommend corrective action and issue reports.

Professor Donald Rowat, who thirty-five years later continues to write prolifically, produced for the International Ombudsman Institute in 1997 a paper called "A Worldwide Study of Ombudsmen". In it he used the term "original classical ombudsman system" in describing ombudsman characteristics:

> First, it is set up by a country's constitution or by a law or by-law of the legislative body, in order to ensure its permanence, neutrality and independence from the administrative organisation being complained against;
>
> Second, it receives and investigates complaints from the public against any part of the whole administration at the level of government concerned, though in many schemes it can also start investigations of alleged maladministration on its own initiative;
>
> Third, it is an appeal body in the sense that usually it will investigate a complaint

> only after the complaint has been made to the agency concerned and the complainant is still dissatisfied;
>
> Fourth, when it finds a complaint to be justified, it recommends a remedy to the agency and if the recommendation is not accepted it makes its recommendation to the chief executive and in a published report to the legislature—but it does not make binding decisions and this is what distinguishes it from a court tribunal or arbitrator.[2]

It is to be observed that the ombudsman concept has grown rapidly, effectively since the 1960s—the present number of state ombudsmen worldwide being in excess of 190 operational offices in 72 countries. Additionally, the notion is one of the few which has flowed from the public sector to the private sector, there being commercial sector ombudsmen in a number of countries, including New Zealand. Lastly, what can be called the ombudsman kind of investigative and recommendatory methodology has been utilized by a number of other related agencies such as the police complaints authorities and the human rights commissions.

Human Rights Protection

The next task in this paper is to trace the development of means to protect human rights. Putting to one side the philosophical discussions of what constituted human rights during the last two centuries, it is generally accepted that in the aftermath of two World Wars, there arose a resolve to avoid, for the future, the atrocities and excesses of that period. The United Nations arose out of the Dumbarton Oaks (near Washington D.C.) proposals involving Great Britain, the U.S.A., Russia and China in 1944. Following the end of hostilities, some fifty states met in San Francisco, in 1945. This resulted in the formation of the United Nations in June of that year: the purposes of the United Nations being divided into four groups—security, justice, welfare and human rights. The world then observed, in December 1948, the unanimous resolution adopted by the General Assembly of the United Nations—the Universal Declaration of Human Rights (UNDHR).

In a speech delivered by the United States First Lady, Mrs. Hillary Rodham Clinton, at the United Nations on December 10, 1997, marking the beginning of the fiftieth anniversary of the UNDHR, she said the following in describing the concept of the Universal Declaration:

> Some of humanity's bravest lessons emerge only after the deepest tragedies. This Declaration took shape in a world ravaged by the horrors of militarism and fascism. In the wake of the most violent revelation of the depths to which human beings can dehumanize one another, the world as a whole was ready at last to accept an agreed-upon standard for human rights.

The UNDHR, despite its importance and significance—the Chair of the United Nations Commission of Human Rights, Eleanor Roosevelt, was to describe it as "a Magna Carta for all mankind"—did not impose any obligations in terms of international law on the part of United Nations member states to put those principles into practice. The United Nations Commission of Human Rights (UNCHR) was therefore established with the aim of seeking the incorporation of the main principles into specific international treaties and to see to their implementation by the signatories or participating states. It was in line with this spirit that the two major international treaties in this field, the International Covenant on Civil and Political Rights (ICCPR) and the

International Covenant on Economic, Social and Cultural Rights (ICESCR), came to be adopted by the United Nations in 1966 and the accompanying Optional Protocol (on implementation by states) came to be adopted in 1976. The two Covenants which set out in more concrete terms the basic human rights and fundamental freedoms cited in the 1948 Declaration, impose an obligation on all participating states to implement those rights by appropriate means. New Zealand was a mover in bringing the Covenants into existence and is a party to them. New Zealand enacted a human rights statute in 1977 and a consolidating and updating *Human Rights Act* in 1993. More generally, it can be said without hesitation that these international obligations have come to permeate the New Zealand domestic law as demonstrated in some notable cases before the Courts: Tavita v. Minister of Immigration, [1994] 2 N.Z.L.R. 257 and *Patel v. Chief Executive, Department of Labour,* [1997] 1 N.Z.L.R. 102.

Ombudsman Association with Human Rights Protection—New Zealand Perspective

It will be seen from the foregoing that there is no direct reference point for ombudsmen at least to be connected to the objectives of the Universal Declaration of Human Rights, *per se* or for any necessary compliance with the two international Covenants. Ombudsmen are creatures of statute, identified as officers of Parliament, who serve to bring to account the actions of the domestic executive, that is the public sector, in the name of the individual citizen. In other words, ombudsman actions are geared primarily towards the accountability of "*the system*" rather than towards upholding the rights of the single individual.

Monitoring the administrative actions of the executive or public sector does, however, bring forward issues which bear on human rights protection. The recently published *11th Compendium of New Zealand Ombudsmen Case Notes* refers to the following as themes which occur on a number of occasions in Ombudsman work on a day-to-day basis—lack of adequate communication, incomplete or sometimes misleading information, inadequate administrative procedures, inadequate record keeping and delay. It should be mentioned that one of the phrases in section 22 of the *Ombudsmen Act* which founds the jurisdiction for investigation, is when an act or omission has been "*improperly discriminatory*".

Reference can be made to four distinct areas in which New Zealand Ombudsman work abuts the question of protection of human rights. The first is in the area of complaints brought to the ombudsmen by prisoners. This will amount to some 1,500 cases in 1998. Two of the 1948 UNDHR articles come up for consideration, although not in direct terms, in the day-to-day work of the ombudsmen and their prison investigating staff. Article 5 says in part that "no one will be subjected to...degrading treatment or punishment" and Article 17 says in part that "no one shall be arbitrarily deprived of his property". As to the first, the New Zealand Ombudsmen pointed out in their 1996 Annual Report that the practice of some prison cells only having buckets for toilets was something which fell below international norms. As to the second, there are many continuing disputes between prisoners and prisons as to what property may be possessed and used whilst in cell confinement which are brought to the ombudsmen.

Secondly, a large number of cases come to the New Zealand Ombudsmen each year affecting administrative procedures involved in either suspension or expulsion of pupils from schools. This brings into question Article 26 of the UNDHR which states in part that "everyone has the right to education". The ombudsmen have expended their time in many cases underlined by the need for schools and Boards of Trustees to have fair and transparent procedures. They

have assisted the Ministry of Education in the development of published guidelines for the assistance of school governors contemplating the questions of either suspension or expulsion, both of which are dire steps so far as individuals are concerned. In a case, *Maddever v. Umawera School Board*, [1993] 2 N.Z.L.R., 478, it was held that referral of this kind of case (suspension and expulsion from school) was something better suited for the informal investigative procedures of the ombudsmen rather than what were described as the more cumbersome procedures that are encountered in litigation.

Thirdly, many cases each year brought to the New Zealand Ombudsmen by social welfare beneficiaries can be said to have, as a backdrop, Article 25 of the UNDHR, which says in part that "everyone has the right to a standard of living adequate for the health of himself and of his family including... necessary social services and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control". The New Zealand Department of Social Welfare has well-developed and regularly used processes for people in need, but the residual recourse to the ombudsmen is retained and frequently utilized.

Fourthly, there can be mentioned, in the New Zealand context, the *Official Information Act 1982* in which rights can be exercised to obtain information held by government agencies. The right on the part of a defendant to be provided with information before criminal proceedings was confirmed by the Court of Appeal in *Commissioner of Police v. Ombudsman*, [1988] 1 N.Z.L.R. 385 and could be said to stand alongside the rights to fair trial envisaged by Articles 10 and 11 of the UNDHR. It can also be postulated, more generally perhaps, that information to which an individual is entitled should not be withheld without good reason. This makes it difficult for any administration which is subject to a freedom of information regime to hide any abuse of human rights.

Lastly, the New Zealand Human Rights Commission, as an organization, is subject to the jurisdiction of the Ombudsmen and if there were to be a complaint about the Human Rights Commission handling of an investigation, then the Ombudsmen might become involved indirectly in the resolution of an issue brought about human rights protection.

It can thus be stated, in the New Zealand context at least, that the ombudsmen add to a guarantee that human rights will be observed. Similar parallels can doubtless be drawn elsewhere.

What About the Future?

A preliminary observation is that there is a dynamic quality to what is meant by the term "*human rights*" and it is likely in the future that there will be other items sought to be preserved. The changing definition was aptly described by our APOR colleague, the Hong Kong Ombudsman, Mr. Andrew So, in a paper delivered in December, 1997, entitled "The Ombudsman and the Protection of Human Rights in Hong Kong" as follows:

> A right may generally be defined as something to which an individual has a just claim and "human rights" as a term owes much of its origin, historically speaking, to prominent philosophers of the 17th and 18th centuries. "Human rights" then more often referred to as "individual rights" or "natural rights" were those that individuals were considered to have by virtue of their existence as human beings,

> e.g. the basic rights to life, liberty, privacy and the basic necessities of food and clothing. The concept further developed from the 19th century onwards and has since been broadened to include the right to own property, the right to work, freedom of speech, freedom of worship, freedom from slavery, freedom from torture and inhuman punishment, and in more recent times to the right to political participation and the rights to equal opportunities, education, medical care and a standard of living conducive to the health and well-being of an individual and his family.

Another convenient expression of the expansion is provided in a reported speech of the Hon. Henry Owusu-Acheampong M.P., the Minister of Parliamentary Affairs of Ghana, who said:

> Nowadays there ha[s] been added to the concepts of basic human rights and fundamental freedoms additional important rights of good governance, accountability and probity....[3]

Thus, it seems that the role of the Ombudsmen in the human rights preservation field will also change.

Then, when one considers that many ombudsman offices around the world have been installed since the emergence of the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic Social and Cultural Rights (ICESCR), in other words during the last twenty years, it follows that many ombudsmen in the international community see the role of human rights protection with a different, though complementary, perspective to those who function in the classic "maladministration" model. Indeed an ombudsman title common in Latin American countries is that of *Defensor del Pueblo* or "*defender of the people*" which emphasises a role in human rights protection. Mr. Andrew So, in the paper already referred to, speaks of the prospect of the International Ombudsman Institute having a working relationship with the United Nations in the field of human rights. In parts of Scandinavia itself, contemporary ombudsmen have argued that the office of ombudsman is a vehicle for human rights protection in any event. The present Norwegian Parliamentary Ombudsman, Mr. Arne Fliflet, is on record as saying:

> the spirit of the ombudsman institution can be deemed to be basically the same as that enshrined in various international agreements for the protection of the fundamental rights of an individual against 'injustice and arbitrariness by authorities'. The institution of the ombudsman and human rights conventions are based on the same philosophical idea with each sharing a common goal of protecting citizens against unjust governmental actions.

Lastly, it can be predicted that change will not be simply incremental because of what may be termed the spice, which will continue to be supplied by politics, as the following by Mr. Todd Gitlin, demonstrates:

> Human rights: the literal words deserve a moment's scrutiny. Human: member of the species, the single race homo sapiens. Whatever persons are called, or call themselves, wherever they live, they are human. Therefore, human rights: benefits to which people are entitled simply by virtue of being human. The very fact that human rights has become a catch-phrase, that is inscribed on picket signs and

> diplomatic agenda everywhere, that the rights generate passions and motivate organisations like Human Rights Watch, Amnesty International and Médécins sans Frontières, even that these rights are frequently honoured in the breach represents a human achievement of enormous proportions.... The [UNDHR] is an unprecedented affirmation of the unity of the human race and a weapon against all of those who would usurp...The [UNDHR] is a resource in the hands of the unjustly deprived everywhere.[4]

To sum up, in some instances of our ombudsmen practice in New Zealand, one can notice particularly a characteristic "ombudsman" role *i.e.* to strike or hold to a line of rationality or reasonableness between two extremes. Sometimes this may involve supporting no action being taken, while on the other hand action must be solicited. It is really for others to express a definitive finding but I venture to suggest that our office has managed to tread this often difficult path with fair and decent success over the years.

One can say about "human rights" as a term, that its rise and development has not lacked for strong advocacy which some might even respectfully term on occasion "zealotry". The ombudsman, more than occasionally, must contrive to hold a balance between the forces of complacency and those of overenthusiasm.

Conclusion

It is in reflecting on the future, that the statements of Dr. Sun Yat-Sen and President Jefferson, cited at the commencement, perhaps have more than a little relevance to present day ombudsmen and present day government administrations in many countries.

Endnotes

[1] D. Rowat, "An Ombudsman Scheme for Canada" (1962), 28 Can. J. Econ. & Pol. Sci. 253.
[2] D. Rowat, "A Worldwide Survey of Ombudsmen", Occasional Paper #60 (Edmonton: International Ombudsman Institute, March 1997).
[3] "The Parliamentarian" (January 1998) at 27.
[4] New Internationalist, No. 298, (January/February 1998).