

## **RECENT DOCUMENT**

### **REPORT OF A SPECIAL COMMITTEE OF JUSTICE JAMAICA (JAMAICAN SECTION OF THE INTERNATIONAL COMMISSION OF JURISTS)**

#### **ON THE FEASIBILITY OF INSTITUTING THE OFFICE OF OMBUDSMAN IN JAMAICA**

##### **FOREWORD**

The Secretary-General of the International Commission of Jurists has, on a recent visit to Jamaica, invited Justice Jamaica to prepare a report on the feasibility of the institution of the Ombudsman in Jamaica as a means of ensuring the more effective protection of civil and political rights. It is in compliance with that request that this report is now presented.

##### **REPORT**

The Office of Ombudsman originated in Sweden in 1809. It was adopted in Finland in 1919, in Denmark in 1955, in Norway and New Zealand in 1962, Guyana in 1966, and the United Kingdom in 1967. It is now being actively considered and discussed in countries as far apart and as different in constitutional structure as Canada, Holland, India, Ireland, and the United States of America.

The Swedish word 'Ombud' refers to a person who acts as a spokesman or representative of another person. In his supervisory position the "Justitie-Ombudsman" is a representative of the Parliament and thereby of the citizens.

It is true to say that the Ombudsman scheme is remarkably flexible and is capable of being adopted in a country like Jamaica, that has inherited the common law and the British parliamentary system. This character of flexibility emerged very clearly at the Seminar organized by the United Nations in cooperation with the Government of Jamaica, held at the Myrtle Bank Hotel in Kingston, Jamaica, from the 25th April to the 8th May, 1967. In the conclusions of the Seminar it was stated that in the case of countries other than the Latin American countries the consensus was in favour of the institution of the Ombudsman system such as it prevails in Sweden, Denmark, Norway, New Zealand, Guyana and the United Kingdom, suitably adapted to the needs of the country. It was the general view that this system would be of considerable assistance to ensure, both more efficient administration and more effective protection of civil and political rights. The Latin American countries nonetheless shared the view that the Ombudsman represents an effective instrument for the defence of human

rights, and bespoke the assistance of the United Nations in preparing the ground for introducing the system throughout Latin America.

In a most impressive paper, prepared for the Seminar, Mr. Alfred Bexelius, the Justitie-Ombudsman for Sweden, says that "little is known of what was behind the creation of the office of Ombudsman, or even with whom the proposal originated. Certainly the office was established against the wishes of the government of that time. It was formed entirely during discussions in the Parliamentary Committee, which, in 1809, drafted the new constitution. Regarding the office of Ombudsman, the Committee pronounced only that the general and individual rights of the people should be protected by a guardian, appointed by Parliament, who should watch how judges and other officials followed the laws. Thus, the office was to guarantee civil rights."

From the pen of distinguished writers on the subject one is enabled to examine the variations in the system and the experience of those countries that have embraced it. An effort is made herein to extract the main features of the Ombudsman's office and how it operates, without going too deeply into its fascinating history and constitutional origins.

Sweden, like many other countries, has long been confronted with the problem of how best to protect her citizens from undue interference, negligence, and errors by government officials.

The right to appeal to higher authorities is the most important process for rectifying erroneous decisions. Within the various fields of government administration there is a system of appeals equivalent to that found in the judicial system. In addition, if a judge or civil servant, through neglect, imprudence or want of skill, disregards his duties according to statutes, instructions or the nature of his office, he shall be condemned in the ordinary courts to a fine or suspension for neglecting his duty. There is also an obligation to compensate for damages caused by an error.

All documents from which government officials make their decisions are public — available not only to the parties concerned but also to any other citizen who wishes to consult them. To this there are several significant exceptions, e.g., papers dealing with a person's private life; where special provisions ensure that papers of this nature be kept secret.

The powers of the Ombudsman as defined in the constitution have remained unchanged since they were first set down 150 years ago. They are to supervise how judges, government officials and other civil servants observe the law, and to prosecute those who have acted illegally or neglected their duties. He has access to all documents even secret ones. The right to be present at all deli-

berations at which judges or administrative officials make their rulings. All officials are obliged to provide him, on request, with the information they have on a matter in question. He has the right to ask for the assistance of any official for the purpose of making necessary investigations. He does not have the authority to change the decisions of courts or administrative officials. In the majority of cases he finds that a public reprimand or criticism of the decision is all that is necessary. He presents an annual report to Parliament.

In status, both formally and in reality, he is entirely independent of the government and of Parliament itself. He is dependent only on the law.

He decides for himself which subjects he shall investigate and makes his own decision on what action should be taken. He does not receive instruction as to which cases he should investigate. Nor will anybody in Parliament try to influence him to act in a certain way when he is investigating a particular case. Throughout the history of the office there has never been any evidence in the annual reports to support an assumption that undue influence has ever been exerted on him.

The political parties in Parliament always try to unite in the selection of an ombudsman. This is done to ensure that his decisions are made without regard to political pressure and that the general public may have full confidence in his political independence. The Ombudsman is usually chosen from among the Justices of the Courts and his office staff, which includes six jurists, are appointed by himself.

To maintain public confidence the Ombudsman must avoid political conflicts. This is an essential advantage of his work. How Ministers perform their duties is controlled by Parliament.

The Ombudsman has great freedom to decide the direction of his supervisory activity. Actually, it is determined principally by the complaints that are brought to him by citizens. It is believed that the number of complaints would be fewer if administrative officials would explain their decisions in greater detail. In a good many cases the petitioner does not understand why the official rules as he did, and therefore imagines he has been discriminated against. Complaints must be in writing. The first step in handling a case is to request from the authorities concerned the documents in the case. It is usually possible from these documents to judge if there is a sufficient cause for complaint. If it is not clear that the complaint is unwarranted he requests further information. He may ask the police for further investigation and questioning of persons involved. He may himself hold a hearing or assign the questioning to one of his assistants. If the judgment demands

knowledge of some special field the expert relevant governmental authority is obliged to assist and give his opinion. He often initiates investigation without being motivated by a complaint; sometimes on the basis of reports appearing in the newspapers or as a consequence of observations made on inspection tours. He and/or his assistants visit courts, prosecutors, police authorities, and government officials of all types, and inspects jails, guard rooms, mental hospitals, and homes for wayward children.

The steps taken after investigation, where a fault is found, range from ordering prosecution to sending a reminder to the official concerned. Chiefly, prosecutions are initiated in cases where there has been a disregard of a citizen's legal rights. He must not be content simply to state his opinion, he must support it by clearly stated and convincing reasons.

The mere existence of an Ombudsman, independent of the bureaucracy, to which anybody may carry his complaints, will act to sharpen the attention of the authorities in dealing with cases and to counteract tendencies toward abuse of powers and arbitrary decisions. Awareness of the fact that an official action may be questioned by the Ombudsman will certainly ensure that officials take greater pains in doubtful cases. Proclaimed rules are necessary to safeguard important public and private interests, and their neglect may, in the long run, add up to a serious loss of the citizen's rights.

By the rejection of unwarranted complaints, after proper investigation and on grounds clearly stated, the Ombudsman contributes to strengthening public confidence in the authorities, and thus in the well-being of society.

Consideration has been given to allowing a right of appeal against the Ombudsman's decision. There is nothing to prevent the Ombudsman from himself retrying the case. Where a complainant brings further evidence the Ombudsman may re-open the case and intervene. He may on further evidence, or on having overlooked some provision of law, change his opinion. Beyond this it is considered that to allow a formal right of appeal against the Ombudsman's decision would create too many serious difficulties.

In Sweden every day a representative of the press calls at the Ombudsman's office. The reporter selects cases of interest and circulates the information. Some of the Ombudsman's more important decisions are commented on in the press. Such articles often contain criticism — based upon the facts disclosed by the Ombudsman's investigation — of Government, the practice of administrative bodies or the content of some statute. Sometimes the Ombudsman is criticized for the way he has handled or decided a case.

It is important to know what may technically be achieved in practice by the several types of controlling authority. It is a poli-

tical question what system of controls a country wants to have, but it is important that lawyers and political scientists provide sufficient material for the politicians and the public, in order to make the best possible choice.

It is worth noting that the courts cannot take any initiative on their own: they are not entitled to make general investigations, but must decide the issues put before them by litigants. Their function is to settle questions of law and fact, not of discretion.

A prerequisite for a successful fulfilment of the task seems to be that the institution of the Ombudsman is kept above political issues.

Another prerequisite is that the ordinary remedies against maladministration function satisfactorily. If they do not, the Ombudsman will be paralyzed by an overwhelming work-load.

It is indispensable that the Ombudsman is given full and unlimited investigatory power. He must also have an unlimited power of pronouncing his opinion and of persuasion by reasoned argument. His pronouncements will not lead to any considerable results if there are not effective channels of communications for him to use. An Ombudsman operates most successfully in a democratic society with a free press and a vigorous and enlightened public opinion. He becomes a natural cog in the machinery of democracy.

Turning now to a consideration of Jamaica and its institutions, recourse is had to the Working Paper entitled "The Effective Realization of Civil and Political Rights in Jamaica" prepared by the Hon. Victor G. Grant, Attorney General of Jamaica. He states *inter alia*: "In a country that is governed by the doctrine of the Rule of Law it is normal and natural for persons to ascertain the answers to questions relating to civil and political rights by looking at its Law and Constitution." He describes sections 13-24 of Chapter III of the Constitution as an attempt to codify the common law rights of persons and citizens in Jamaica, and points out that the Constitution preserves the rights of persons which existed prior to the Constitution coming into force, and ensures that no future enactment shall abrogate those rights.

Enforcement of the Fundamental Rights and Freedoms contained in Chapter III is provided in section 25, whereby any person who alleges that any of these provisions has been, is being, or is likely to be contravened, in relation to him, then without prejudice to any other action with respect to the same matter, which is lawfully available, that person may apply to the Supreme Court for redress. The Supreme Court is empowered to make such orders, issue such writs, and give such directions as it may consider appropriate for enforcing or securing the enforcement of any of these provisions.

A right of appeal to the Court of Appeals is given to any one aggrieved by the determination of the Supreme Court.

There are laws providing for Arbitration, a Judicial Service Commission, a Public Service Commission and a Police Service Commission, with their appropriate disciplinary functions. Provision is also made for the appointment of Commissions of Enquiry wherever it is considered advisable in the public interest to enquire into the conduct or management of any department of the public service or local institutions, or the conduct of any public or local officer.

There are also prerogative Orders by means of which the courts can question administrative action, but these in practice have a very limited application for enforcing fundamental rights and freedoms.

Finally, the citizen may appeal to his parliamentary representative, the Minister, or Parliament for relief.

Part of the normal pattern of Jamaican life is the existence of free trade unions, citizens associations, and other similar movements.

The administration of the Government Departments is entrusted to the Civil Service.

The following observations may be made:—

There is no system of administrative courts or tribunals, such as exist in France, Italy, Germany and Austria, to give the ordinary citizen redress against arbitrariness. The job of Administrative Courts is not the same as that of the Ombudsman.

The shortcomings of the ordinary Courts, and, to a less extent, the Administrative Courts, are that they are slow, costly, cumbersome, complex, frightening to the average citizen, and limited in their power to review the merits of decisions. The initiative must normally be taken by one or other of the parties to the case. It is not within the power of the courts to investigate cases at their own discretion — they are only entitled to try the issues put before them and decide questions of fact and questions of law, and make orders binding on the parties.

Commissions of Enquiry are patently unsuited for meeting the needs of citizens in safeguarding fundamental rights and freedoms.

Ministers are responsible for the administrative performance of the departments entrusted to them and the acts and omissions of all its personnel. If, then, there is a complaint against one of his departments, how then, in accordance with the rules of natural justice, and the rule of law, can he investigate and adjudicate on such complaint?

The principle of impartial adjudication should be applied as widely as possible in the public interest.

In a report by Justice, entitled "The Citizen and the Administration — The redress of grievances," the Rt. Hon. Lord Shawcross has this to say: "In the ever growing complexity of the modern state, the interventions of central and local government into the lives and affairs of the ordinary citizen, inevitably multiply. For the most part, no doubt, these interventions are for beneficent purposes and have beneficent results. But the nature of governmental and local governmental activity is now such that large areas of discretion are created in regard to all sorts of matters affecting the lives and rights of ordinary people in varying degrees. The general standards of administration in this country are high, probably indeed higher than in any other. But with the existence of a great bureaucracy there are inevitably occasions not insignificant in number, when through error or indifference injustice is done — or appears to be done. The man of substance can deal with these situations. He is near to the establishment; he enjoys the status or possesses the influence which will ensure him the ear of those in authority. He can afford to pursue such legal remedies as may be available. He knows his way around. But too often the little man, the ordinary humble citizen, is incapable of asserting himself. The little farmer with four acres and a cow would never have attempted to force the battlements of Crickel Down. The little man has become too used to being pushed around; it rarely occurs to him that there is any appeal from what "thye" have decided. And as this Report shows, too often in fact there is not." This is as true in Jamaica as it is in the United Kingdom.

There is in Jamaica a lamentable lack of simple, inexpensive and effective machinery for safeguarding fundamental rights and freedoms and for enabling those who have suffered from violation of their rights to receive assistance in obtaining redress.

The preamble to the Universal Declaration of Human Rights contains these words: "It is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the Rule of Law."

The Rule of Law has been defined as "adherence to those institutions and procedures, not always identical, but broadly similar, which experience and tradition in different countries of the world, often having themselves varying political structures and economic backgrounds, have shown to be essential to protect the individual from arbitrary government and to enable him to enjoy the dignity of man." "The Rule of Law is a dynamic concept for the expansion and fulfilment of which jurists are primarily responsible, and

which should be employed not only to safeguard and advance the civil and political rights of the individual in a free society, but also to establish social, economic, educational, and cultural conditions under which his legitimate aspirations and dignity may be realized."

Article 8 of the proclamation of the General Assembly of the United Nations reads as follows: "Every one has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted to him by the constitution or by law."

Clarence Ferguson, Jr., Dean and Professor of Law, Howard University School of Law, in a paper prepared for the United Nations Seminar on Human Rights, held in Jamaica, says "that there are at least four essentials for the effective realization and protection of civil and political rights,

- 1) Freedom of expression;
- 2) Right to an effective remedy for deprivation or denial of rights;
- 3) Right to participate in the government;
- 4) Right to assembly and petition."

Under Freedom of Expression he includes freedom to receive and transmit information.

He further said that a right without a remedy is an empty thing. Consequently it would appear that the availability of a remedy is an absolute pre-condition to the enjoyment of civil and political rights, on a national level.

The Hon. Victor B. Grant, in the introduction to the paper prepared for the Seminar and referred to earlier, records that since Jamaica became an independent sovereign state there have been very few judicial decisions relating to civil or political rights, and mentioned three important cases. Does this state of things indicate that there have been few violations of fundamental rights and freedoms in the past 5 years, or might it not demonstrate that the remedies available are too expensive, onerous, involved, intricate, hazardous, and perplexing for the ordinary citizen to invoke? The question may well be asked, "Is the remedy provided by section 25 of Chapter III of the constitution anything more to the ordinary man than a sterile shadow — taunting and unreal?"

The first Ombudsman to be appointed in a common law jurisdiction was in New Zealand, in October 1962. At the time of the inauguration of the scheme it was common for the citizen to seek relief from administrative injury by making complaint to his local member of Parliament, or direct to the Minister. Experience shows that the citizens had little prospect of success in having the decision changed, as in most cases the Minister would adhere to his own decision or stand behind his departments' decision.



The title of the act establishing the office is known as the "Parliamentary Commissioner (Ombudsman) Act 1962." The Commissioner has power thereunder to investigate a recommendation made to a Minister. Any criticism by the Commissioner is inferentially a criticism of the Minister. However, failure to act on a departmental recommendation has been rare.

The scheme is regarded as working successfully, hence the conflict of interest envisaged by critics of the scheme is more imaginary than real.

The next common law jurisdiction to establish the scheme was Guyana, a country which enjoys similar civil and political conditions and history. The Hon. S.S. Ramphal, Attorney General and Minister of State, says that in 1965, the Government, recognizing that the system of judicial review, while ensuring ultimate redress for illegal acts or omissions, does not always provide a speedy remedy for the abuse of authority or administrative malpractice, sought to find some other correctional procedure supplementary to the judicial process which could provide swift and effective redress without the financial hazards of litigation. It accordingly advanced proposals for the establishment of the office of Ombudsman in Guyana and, in due course, provisions establishing that office, guaranteeing his security of tenure of office and prescribing the scope of his functions have been included in the constitution itself.

Both New Zealand and Guyana, notwithstanding adherence to the doctrine of Ministerial responsibility, have followed as closely as their respective constitutions allow, the Scandinavian pattern.

Now that New Zealand and Guyana have paved the way by demonstrating that this Scandinavian scheme can be successfully transplanted to other countries, one may venture to predict that the Ombudsman institution or the equivalent will become a standard part of the machinery of government throughout the democratic world.

It is urged that it would be vital in Jamaica for the Ombudsman to be empowered in proper cases to give a certificate for legal aid to a citizen where he seeks to enforce his right to obtain redress.

#### CONCLUSIONS

1. The recommendation of the United Nations Seminar on Human Rights relating to the Ombudsman institution should be implemented as early as possible — perhaps before Human Rights Year 1968. This would be a meaningful realization of the principles that Jamaica has so steadfastly sponsored before the world.

2. The Ombudsman system is flexible and is capable of being established in Jamaica.
3. The workload on the office of the Ombudsman will be heavy as there is an absence of administrative courts and adequate appeal tribunals competent to reverse or alter administrative decisions.
4. The existing remedies for the safeguarding and/or enforcing fundamental rights and freedoms are often expensive, onerous, involved, intricate, hazardous and perplexing for the little man.
5. The widest possible application to the principle of independent adjudication should be established and maintained.
6. The institution contributes to the well being of the society by tending to strengthen public confidence in the authorities.
7. The institution is intended to be supplementary to the existing Administration.

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