Ombudsmen as Human Rights Institutions: The New Face of a Global Expansion

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Contemporary ombudsmen are as much human rights bodies as they are institutions for the advancement of administrative justice. Although many ombudsmen have adopted human rights concerns as an explicit part of their mandate, even those who have not are still inevitably involved in significant human rights work today; several examples of this are referred to in this paper. This makes the distinction between so-called classical and 'hybrid' ombudsmen no longer relevant. Ombudsmen everywhere should make this role more apparent, adopting an explicit frame of reference for the human rights components of their work. This does not require changes in their legislative mandates, since clear similarities exist in the operating methods between ombudsman institutions and specialized human rights bodies at national and international levels. Indeed, human rights institutions and ombudsmen could potentially merge, a move that could cut costs significantly for some countries and potentially reduce bureaucratic overlap and turf wars.

Introduction

Two hundred years after it was first established in Sweden as the *Justitieombudsman*, the ombudsman in 2009 is a significantly different institution from its ancestor. Two particular features stand out here. First is the phenomenal popularity of the institution worldwide as demand for its particularly flexible and cost-effective services continues to grow. By way of illustration, the early office was not transplanted until after 110 years when Finland adopted it in 1919. West Germany adopted the concept in the military in 1954; however, it was not until 1962 that it effectively reached the English-speaking world when New Zealand adopted the idea. Second, and related to the first point, is the expansion in the role of the ombudsman from its traditional function, expressed exclusively in terms of administrative justice, to a broader role that explicitly addresses the protection and promotion of human rights[2].

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[2] See, for example, M. Senevirante, *Ombudsman – Public Services and Administrative Justice*, London, Butterworths, 2002; V. Ayeni, V, L Reif and H. Thomas (eds), *Strengthening Ombudsman and Human Rights Institutions in Commonwealth Small and Island States – The Caribbean Experience*, London, Commonwealth Secretariat with The International Ombudsman Institute, Alberta, Canada, 2000.

Contrary to the uncertainties expressed in this regard even as recently as a decade ago[3], it is safe to conclude that the human rights role has now evolved into an integral part of the ombudsman function, inextricably linked to the fundamental character of the institution. Today's ombudsman is undeniably a human rights institution, and cannot succeed otherwise in the face of the issues and challenges that confront it in the 21st-century environment.

The aim of this paper is to elucidate this "new face" of the ombudsman. In doing so, it will show that the ombudsman, in whatever form it is created, no longer undertakes human rights work just as an add-on or incidental function, but as an essential and necessary part of its fundamental existence. Nor is a human rights role the exclusive preserve of some so-called newer or "hybrid" offices. Indeed, ombudsmen are as much human rights bodies as they are institutions for the advancement of administrative justice. The two functions have become fused for traditional and newer ombudsman offices alike.

This conclusion is strongly evident from the last three decades or so of the ombudsman's 200- year history. In fact, for most of the 50 years since the ombudsman reached the English-speaking world, we have seen a deepening involvement of ombudsmen in the human rights function. However, this development signifies, albeit in concert with other global forces, a significant re-writing of the common conception of the ombudsman, including that held by those who had previously acknowledged the growing expansion of its role[4]. Even more remarkable, the transformation of the ombudsman has not happened, as some had feared, at the expense of the traditional features of the institution[5]. Instead, it has enriched and made the institution stronger and even more regarded. The fact that the "traditional" now comfortably sits alongside the "new" features of the ombudsman is arguably one of the hallmarks of the 200th anniversary of the institution.

The rest of this paper is divided into four parts. The first section provides a brief overview of the ombudsman institution and its essential features as they have evolved over the years. This is followed by an equally brief discussion of the concept of human rights and its pervasive influence. The third section, the main thrust of the paper, details the various dimensions of the human rights work of the ombudsman. The final section concludes the paper, and highlights the main implications of the ombudsman's human rights role for the study and practice of ombudsmanship in the future.

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[3] J. Robertson, "The Ombudsman Around the World", *The International Ombudsman Journal*, Volume 2, 1998, pp. 112–128.

[4] For example: L. Reif, "Building Democratic Institutions: The Role of National Human Rights Institutions in Good Governance and Human Rights Protection" *Harvard Human Rights Journal*, Vol 13, Spring 2000.

[5] J. Robertson, *note 3.*

The Resilience of the Ombudsman Concept

As indicated, the ombudsman has multiplied phenomenally since it was first established by Sweden in 1809. By the mid-1980s, the concept had emerged clearly as a global phenomenon. But the best was yet to come. By the 1990s, the number of ombudsman offices around the world more than doubled. Establishing an ombudsman became a good measure of a country's seriousness about democratic reforms, so much so that it is hard to find a post-1990 constitutional reform where, at the very least, the benefits of having an office have not been seriously discussed. Partly because of its spread and diversification, the precise number of ombudsman and ombudsman-like offices around the globe is uncertain. Sir John Robertson, former President of the International Ombudsman Institute, spoke eloquently to the challenge this situation now presents. As he observed:

> it has been impossible to assess with accuracy just how many persons there are around the world who are described as an ombudsman, describe themselves as ombudsman or who have the ombudsman role in their functions … I doubt, therefore, whether it is ever going to be possible to compile a full and accurate list and profile of all ombudsman-type positions around the world.[6]

Be that as it may, it is my estimation, based on Internet research and the International Ombudsman Institute (IOI) records, that there are no less than 945 offices (state and non-state; at national and sub-national levels) in about 140 countries on the 200th anniversary of the institution. The countries that have established ombudsmen can be broken down as follows: 34 in Africa; 13 in Asia; 9 in the Pacific; 29 in the Caribbean and Latin America; 53 in Europe; and 2 in North America. Ombudsman offices have also been established at the international level in institutions, including the European Union; United Nations, United Nations Development Programme (UNDP), and the World Bank. This global proliferation has been well documented, and need not take up more of our time here[7].

What is even more significant is that the global expansion of the ombudsman has preserved certain essential attributes that not only continue to stand the institution out from other oversight bodies but have also enabled it to naturally adapt into a veritable human rights instrument. As noted, the word "ombudsman" has a Swedish origin, where it translates as "agent or representative of the people or group of people." Putting together various attempts to define it, the following represents an appropriate summary of what an ombudsman is today:

> An independent and non-partisan officer (or committee of officers) often provided for in the Constitution, who supervises the administration. Tradi-

[6] J. Robertson, *note 3.*

[7] See, for example: G. E Caiden (ed), *International Handbook of the Ombudsman, Volumes I and II*, Westport, Connecticut, Greenwood Press, 1983; V. Ayeni, et.al (eds), *note 2*. Also, R. Gregory and P. Giddings (eds), *Righting Wrongs – The Ombudsman in Six Continents* (IIAS Monograph Series Volume 13), Amsterdam, IOS Press, 2000.

tionally, he/she deals with complaints from the public on administrative injustice and maladministration, but also increasingly with human rights and corruption related matters. He/she has the power to investigate, report upon, and make recommendations about individual cases, administrative procedures and relevant system-wide changes. The ombudsman, as an individual, is a person of prestige and influence who operates with objectivity, competence, efficiency and fairness. He/she is readily accessible to the public and does not ideally charge for the use of the service. He/she uses fast, inexpensive and informal procedures. In other words, the ombudsman is not a judge or tribunal, and has no power to make orders or to reverse administrative action. He/she seeks solutions to problems by processes of investigation and conciliation. The ombudsman's authority and influence derive from the fact that he/she is appointed by and reports to one of the principal organs of state, usually either Parliament or the chief executive. Generally, he/she can also publicize administrative actions.

Bearing a few differences, most authorities on the subject would agree that this definition encompasses the main elements of the concept.

In lay terms, the ombudsman role is essentially about making a world under the authority of the state a better place for the ordinary individual to live in. It performs a vital role in the interface between individuals and the state. The ombudsman affects human lives and aims to promote principles of justice and fairness. In the 2005 Annual Report of the Ombudsman of Malta, the fundamental functions of the office are identified as follows:

- Protecting the rights of individuals in their dealings with those entrusted with the exercise of public power;
- Recommending appropriate redress where it is found that these rights have been infringed;
- Promoting good governance and high standards of public administration; and
- Assisting Parliament in exercising control over the Executive in the interest of proper, fair and impartial administration.

The important role of the ombudsman has also been expressed powerfully and eloquently in the Annual Report of the Ombudsman of British Columbia, Canada in 2006:

Every person … almost every day, feels the impact of an administrative decision or action by a public authority. A licence denied; a re-zoning application granted; a medical device not provided; a program changed; an application for a benefit denied; these are administrative decisions or actions by public authorities that have come to our office for evaluation and resolution after all the available internal dispute resolution mechanisms within an organization have been exhausted. While many people may hear about the handful of significant issues that the Ombudsman decides to make public, all these individual matters, dealt with confidentially and without fanfare, also make [this] a fairer, better place to live. Each inquiry provides the opportunity to give people useful, practical, assistance. Every investigation provides the potential of identifying a way to improve an administrative process. A single resolution can change how a public authority deals with its clients.

The word "ombudsman" is often used in both a generic sense and to refer to the name of a particular organization. Countries such as Antigua and Barbuda, Belize, Botswana, Canada, Malawi, Lesotho, Malta, Seychelles, Trinidad

and Tobago, etc. officially call their respective institutions by that name. These offices typify the so-called classical ombudsman. Most international organisations, such as the European Union, have adopted this name too. On the other hand, and in response to the growing influence in the area, a number of countries add a designation such as "Human Rights Ombudsman" – adopted by many former Eastern European countries – and "Parliamentary Ombudsman" (as in Denmark and Ireland).

A host of different titles are used in other countries, mostly for the more specialized offices. This is besides the fact that the office is often called by more than one name in jurisdictions that have two or more nationally recognized languages. Examples of these other names of the institution include: Peoples Advocate (Albania); *Defensor del Pueblo* (Argentina, Colombia; Ecuador; Paraguay; Spain); *Oficina del Procurador del Ciudadano* or Office of the Citizen's Procurator (Chile); *Médiateur de la Republique* (France); Commissioner for Data Protection (Germany); Commission for Human Rights and Administrative Justice (Ghana); *Procurador de los Derechos Humanos* or Human Rights Procurator (Guatemala) Parliamentary Commissioner for Civil Rights (Hungary); *Lok Pal* and *Lok Ayukta* (India); Public Defender (Jamaica); Parliamentary Commissioner (St Lucia); Police Complaints Authority (Trinidad and Tobago); Public Complaints Commission (Nigeria), Public Grievances and Correction Board (Sudan); Control Yuan (Taiwan); Inspector-General (Uganda), Commission for Human Rights and Good Governance (Tanzania); Parliamentary Commissioner for Administration (United Kingdom), etc.

In addition to the so-called classical ombudsman, often fashioned on the Danish and subsequent New Zealand adaptations, three notable categories of ombudsmen have become commonplace. First, are the so-called "hybrid ombudsmen" mostly found in the newly emerging democracies. This is a compromise term generally used to refer to institutions that have significantly modified the traditional focus on mal-administration with an extensive mandate in human rights and anti-corruption. However, this apparent separation of the "classical" from the "hybrid" is no longer tenable, as it largely misses the intensifying fusion of the ombudsman's traditional and human rights roles. The other two ombudsman types are the in-house or agency-based offices; and offices that specialize in specific functional areas, usually referred to as specialty or single-purpose ombudsman offices. Business and non-governmental institutions have also joined the movement with several of them establishing their own offices to both advance their primary objectives and promote the different interests of their clientele. The United States, most OECD and developed Commonwealth countries have a noticeable number of this type of office. Arguably, the development of specialty offices has some close correlation with the contemporary growth of the market economy hence they tend to be more commonly found in developed market countries.

One other feature of the institution should not go without mentioning here. As Marc Hertogh has observed, "one of the institution's most interesting

puzzles is its apparent effectiveness despite minimal coercive capabilities."[8] The ombudsman is established on a fundamental commitment to avoiding the iterative control process that necessarily results from the fear that an authority established to guard the conduct of another could itself abuse such powers. Marten Oosting, former President of the International Ombudsman Institute, describes this as "the key to the significance of the ombudsman."[9] As human beings are fallible and, therefore, prone to abuse when in authority, there is always a need to ensure that those charged to guard others are themselves under some guardian. But this could result in an endless chain of control mechanisms.

However, because the ombudsman normally functions without executive authority, which largely removes the fear of abuse on the part of the institution, some form of brake can be placed on the chain. The ombudsman does not become yet another court that only rehashes the problems it is out to avoid. Some observers also refer to this as a non-confrontational approach. Of course, a few exceptions to this rule are now to be found (for example Ghana) but even in such cases, the practice points to a strong avoidance of the ombudsman's binding authority (often by way of a court ruling) especially in ordinary matters of maladministration[10]. The ombudsman's lack of enforcement authority is indeed a source of reassurance in the face of increasing public suspicion about the way those in authority exercise their powers. Thus, the 2004 report of the Ombudsman of Malta (at page 12) emphasized that "despite the non-binding nature of the Ombudsman's recommendations, public confidence in the institution remains vibrant." Similarly, as one leading observer has rightly concluded, "because it (the office of the ombudsman) does not have the powers to control, it does not interfere unduly with the administrative process. For these reasons, the ombudsman plan will continue to spread throughout the democratic world."[11]

The International Significance of Human Rights

The development of an established international framework of human rights was one of the most notable achievements of the latter part of the 20th century. Thus, as Todd Landman has suggested, "human rights are a set of individual and collective rights that have been formally promoted and protected through international and domestic law since the United Nations Declaration

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[8] M. Hertogh, "The Policy Impact of the Ombudsman and Administrative Courts – A Heuritic Model", *The International Ombudsman Journal*, Volume 2, 1998, pp. 63–85.

[9] M. Oosting, "The Ombudsman and His Environment – A Global View" in L. Reif (ed), *The International Ombudsman Anthology*, Alberta, Canada, International Ombudsman Institute, 1999.

[10] For example: E. Short, "The Development and Future of the Ombudsman Concept in Africa", *The International Ombudsman Journal*, Volume 5, 2001, pp. 56–72. Also, W. Gelhourn, *Ombudsmen and Others*, Cambridge, MA, Harvard University Press, 1966.

[11] D. C. Rowat, *The Ombudsman Plan – the Worldwide Spread of an Idea*, Latham, MD, American University Press, 1985.

of Human Rights in 1948 (UDHR)."[12] Further, while arguments, theories and protections of such rights have been in existence for much longer, human rights concepts were nevertheless largely unknown prior to the Second World War. Yet within just a few decades, human rights had become a fundamental part of the new international system of governance, through the UN Constitution, the UDHR, and the establishment of the ICCPR (International Covenant on Civil and Political Rights) and ICESCR (International Covenant on Economic, Social and Cultural Rights).

These latter two documents have, over the years, attracted increasing numbers of signatories, and the majority of the world's nations (a vast majority in the case of the ICCPR) have now signed and ratified these two treaties, rendering them legally binding. These two key documents have also been complemented by a growing range of instruments dealing with specific human rights issues, such as women's rights, children's rights, racial discrimination and the rights of people with disabilities. There are also regional arrangements, whereby groups of nations come together to form their own human rights commitments, as in the cases of Europe, Africa and the Americas. In the case of Europe, there is a central court in Strasbourg with permanent, full-time judges, which rules regularly and effectively on human rights cases pertaining to all 47 members of the Council of Europe. The essential idea is that there are certain things to which all human beings are entitled, simply by virtue of being human. That is to say, their gender, sexuality, nationality, race, or any other potentially defining feature is irrelevant to these entitlements; they apply to all humans. Such entitlements include access to certain things, such as fair trial procedures, food and shelter, and the absence of others, such as torture or arbitrary detention. An individual's rights are conceived of in relation to human dignity; the thought is that if these rights are not respected and fulfilled then there is a contravention of a fundamental aspect of human dignity.

This is a very broad concept intended to cut across all aspects of human relations. However, in practice, human rights are primarily concerned with the relationship between individuals and states. This is because states are uniquely empowered and entrusted to respect and fulfil human rights. The state-sanctioned horrors of the Second World War were at the forefront of the minds of those who drafted the foundational human rights documents, and state failure to comply with human rights standards has remained the focus of the human rights movement ever since. The reasons for this are clear, as states are in a particular position of power; they have immense resources, for example, and the ability to enact laws that affect the entire population. This gives states enormous potential to protect and promote human rights, yet it also makes it particularly important that they do not go the other way. They have the power to do widespread good and harm, and by focusing human

[12] T. Landman, *Studying Human Rights*, Abingdon, Oxon, Routledge, 2006.

rights standards on states, the intention has been to push for the former in the face of potentially conflicting geopolitical or personal considerations.

To recognize this is not to imply that other actors do not have a role to play in protecting and promoting human rights; certainly the roles and relevance of NGOs (non-governmental organizations) and private businesses in human rights work have expanded in recent years and look set to continue to do so in future[13]. Rather, it is simply to acknowledge that the relationship between the state and the individual has been the focus of the human rights movement to date, and for good reason. It is interesting to note the obvious influence this reasoning has had on ombudsman offices. Thus, for example, the *médiateur* (mediator) model, which predominates in francophone nations, represents an institution that is designed to act as a mediator between individuals and the state. Similarly, the concept of the Public Protector in South Africa or the Public Defender in Jamaica provide literal illustration of this motivation to protect the rights of ordinary citizens from the potential overbearing powers of the state.

As mentioned, there are a variety of actors involved in human rights work, and they use a wide range of instruments and techniques. The best known and most referenced statement of human rights is the UDHR. This document has exceptional moral authority and is a powerful tool for campaigners worldwide. It is not legally binding, but many of its principles are widely considered to have become legally binding as part of customary international law. Similarly, UN "treaty bodies" are institutions that are designed to monitor the implementation of specific international human rights treaties. There are eight such treaty bodies, corresponding to eight key treaties. Two of these treaty bodies are the Human Rights Committee (CCPR) and the Committee on Economic, Social and Cultural Rights (CESCR), which correspond to the two main treaties already mentioned. The remaining treaty bodies are CEDAW (women's rights), CERD (racial discrimination), CAT (torture), CRC (rights of the child), CMW (rights of migrant workers) and CRPD (rights of people with disabilities). These treaty bodies consider reports from states that are party to the treaty and are able to issue "general comments."

Some of the treaty bodies perform additional monitoring functions, including considering complaints from individuals; however, they do not have the power to enforce compliance with their recommendations. In this respect, they are very similar to ombudsmen. They are also similar in other ways, for example, the complainant must have exhausted all other potential remedies before applying, as is required by most ombudsmen, and they often suffer from the same resourcing problems as many ombudsmen, leading to large backlogs of complaints. The treaty bodies are, however, subject to significant criticism and are almost certainly less effective in achieving satisfactory outcomes than the average ombudsman.

[13] For example: A. Clapham, *Human Rights Obligations of Non-State Actors*, Oxford, Oxford University Press, 2006.

Human rights have become an inevitable imperative in the 21st century. Thus, for many human rights proponents, the goal is to explicitly enshrine human rights principles in national, regional and international legal systems. Significant successes have been achieved in this regard at all levels. As already mentioned, human rights principles are a key part of international law, while on a regional level the European Court of Human Rights is highly effective. On a national level, many countries, including the U.K. for example, have their own human rights acts that are legally binding. Human rights have also increasingly become ingrained in national constitutions. South Africa is a case in point, with its progressive post-apartheid constitution. Equally, NGOs are very active in human rights protection and promotion and use a variety of techniques, from grassroots activism, to campaigning, training, direct programming and "naming and shaming."

Finally, on a national level, there are a number of human rights commissions, in countries such as Australia, Greece, Indonesia, Malaysia, Nepal, Sri Lanka and Uganda. In many cases, these institutions are strikingly similar to ombudsmen, although they are led by committee rather than by individuals. These institutions may also operate in conjunction with a national ombudsman, or their mandates may overlap and conflict.

These examples are by no means an exhaustive account of the domain of human rights promotion and protection, but they give some idea of the context of the contemporary role of the ombudsman and the inescapable demands on it. Against the foregoing background, let us now look at how the institution has invariably taken on a significant human rights role in addition to its traditional function.

Deepening Human Rights Work of Ombudsmen

The ombudsman's human rights role has attracted increasing interest of scholars and practitioners.[14] An appropriate starting point is a 1998 article published in the *International Ombudsman Journal*. In this article, Barbara von Tigerstrom aptly captured the philosophical foundation of what has been described as the ombudsman's new face[15]. As she rightly notes, "a role in the protection of human rights comes naturally to the ombudsman." This is because:

> The ombudsman as an institution is founded on principles of human dignity and justice, and is devoted to the fair and equitable treatment of all individuals in society. An essential function of the office is to equalize the balance of

[14] Prof. Linda Reif provides a good summary of this literature in her authoritative work, *The Ombudsman, Good Governance and the International Human Rights System*, Leiden & Boston, Martinus Nijhoff, 2004. Also see, V. Ayeni, 'The Ombudsman in the Achievement of Administrative Justice and Human Rights in the New Millennium', *International Ombudsman Yearbook*, Volume 5, 2001; R. Gregory and P. Giddings (eds), *note 7*; Note 1 above.

[15] B. Von Tigerstrom, "The Role of the Ombudsman in Protecting Economic, Social and Cultural Rights" *The International Ombudsman Yearbook*, Volume 2, 1998.

power between the rulers and the ruled, by providing people with the means to complain about, and hopefully rectify a failure on behalf of the rulers to fulfil their obligations and respect the rights of the ruled. All these are also fundamental to human rights. The ombudsman is also particularly well placed to deal with a category of rights that has traditionally been neglected: economic, social and cultural rights. These rights are implicated in many of the functions and services of the government that it is the job of the ombudsman to oversee. In responding to individual complaints or undertaking systemic investigations, an ombudsman will often be addressing, either directly or indirectly, the deprivation of the individual's or group's right to health, education, work, social benefits or housing, for example. This activity is all the more crucial given the continuing scarcity of implementation mechanisms for the protection of economic, social and cultural rights at both national and international levels.

This proposition has been clearly self-evident to most post-1990 and Latin American Ombudsman offices that explicitly adopted a human rights role from inception[16]. It has been more of an issue for so-called classical ombudsman offices. Even for these ombudsmen, their decisions are typically based on a more or less formal conception of administrative justice, depending on the individual institution in question. While the decisions of some of these ombudsmen seem to be guided by little more than a relatively subjective conception of "fairness" or "justice" in administration, others have fully codified norms on which to base their decisions. An example of the latter is the Ombudsman of British Columbia, whose Code of Administrative Justice, developed in the 1980s and reissued in 2003, details over some 19 pages the standards and principles upon which it bases its decisions. The ways in which this Ombudsman may find fault in a public body's actions fall under the following categories:

Contrary to law; unjust; oppressive; improperly discriminatory; mistake of law; mistake of fact; irrelevant grounds or consideration; arbitrary procedure; unreasonable procedure; unfair procedure; otherwise wrong; improper purpose; adequate and appropriate reasons; negligent; act improperly; unreasonable delay.

In fact, some of the concepts behind these principles require little in the way of clarification and overlap strongly with human rights. The concepts of discrimination and arbitrariness as they are used here, for example, chime strongly with the fundamental human rights principle, codified in all the main human rights documents, of non-discrimination. Other concepts elucidated by the Ombudsman of British Columbia rely on notions of "propriety" or "reasonableness," for example; notions that are comparatively subjective and maybe in need of further elucidation. Yet it can be seen that there is no real dividing wall between the principles used by a so-called classical ombudsman and specialized human rights organizations to make their decisions; rather, there is clear overlap. While the two types of organizations may sometimes base their decisions on different sets of principles, those principles are not

[16] For more: L. G. Volio, 'The Institution of the Ombudsman – The Latin American Experience', *Revista IIDH*, Number 37, June 2003. Also, L. Reif, *note 14.*

entirely distinct from one another and share a number of common features, including the important concepts of "justice" and "non-discrimination."

The two groups of principles are at best complementary: Human rights are the principles by which states must ultimately be judged, yet adherence to principles of administrative justice is a necessary condition for the fulfilment of a state's human rights obligations. This all ties in well with the idea of a human right to good administration, elaborated below.

The point is that ombudsmen are, by the very nature of the role that they play, inevitably required to deal with complaints that are directly or indirectly related to human rights issues. Significantly, this is regardless of the legislative mandate of the institution. The Ombudsman of Malta corroborates this essential feature in the working of his own office in his 2004 report (at page 22) as follows:

> The complaints that were handled by the institution spanned across various types of maladministration where people alleged to have experienced injustice as a result of poor administrative service based on wrong or rigid interpretation of laws, regulations and policies; improper discrimination; lack of transparency; and failure to provide information. Other forms of administrative failure and irregularities included undue delay or failure to provide a service or take the necessary action; failure to respond or to show balance; inequitable or mistaken application of conditions and rules; misuse of power by public officials; and contractual disputes. Most, if not all, of these issues had a human rights aspect associated with them in the sense that failure in service provision by public authorities towards clients not only erodes their legitimate and rightful expectations of proper and efficient service as taxpayers and citizens but also at times causes injustice as well as unnecessary hardship, distress and anxiety. In recent years the Ombudsman's perspective has widened and his domain now increasingly covers the field of human rights.

Human rights norms and conventions can also provide an interpretative framework for the work of the ombudsman. This point is illustrated by the case reported in Appendix I. Here, an individual's right to life is placed at the heart of the state's decision to provide or withhold access to a new life-saving drug. The ombudsman confronts the state with its fundamental role to ensure that this right is not sacrificed at the expense of complying with bureaucratic procedures. As the author of the newspaper article concluded: "It takes time to re-evaluate new wonder drugs as they come on the market … But too often, it seems, at a time when they are fighting – literally – for their lives, cancer patients must also battle another monster, our own bloated health care bureaucracy. Patients die waiting for the drugs they need to keep them alive. It just adds to the pain ..."

Furthermore, an ombudsman can address the concern of clients by requiring that the state comply with specific aspects of its international human rights obligations. A case in point is presented by Vanuatu's Ombudsman in his Annual Report of 2002. Here the Ombudsman identified one particular instance where the poor state of the country's prison facilities had caused Vanuatu to be in breach of her International Treaty obligations relating to the rights of children. The report relates to the detention of a 12-year-old boy for five months in Santo prison pending trial. The Ombudsman reported that the child was kept in the same cells as adult prisoners, a direct breach of article

37(c) of the convention on the Rights of the Child, which Vanuatu adopted in 1992. The Convention states: “Every child deprived of liberty shall be separated from adults unless it is considered in the child’s best interest not to do so.” The Ombudsman also found that Santo prison had “no facilities for children to be kept separately and, accordingly, authorities had no option but to detain the 12-year-old in adult cells after bail was refused.” Incidentally, the sub-standard prison facilities in other prisons in Port Vila and Luganville had previously been the subject of reports by the Ombudsman as well. In conclusion, the ombudsman reiterated his call for the government to give priority to construction of new facilities and any other alternative means as the way to end its continuing human rights breaches.

The ombudsman’s human rights function, like other aspects of the role, does not always have to be in reaction to a complaint. Thus, following complaints received from inmates of Ontario’s correctional facilities, the Ombudsman initiated an own-motion investigation into the Ontario Disability Support Program’s (ODSP) practice of not allowing inmates to make application for ODSP benefits for receipt upon release into the community. Noting that section 9 of Regulation 222/98 applicable in this case states, in part, that persons detained in a lawful place of confinement are not eligible for income support, the Ombudsman was concerned that the Ministry’s practice of not making Disability Determination Packages (DDPs) available for completion by inmates prior to release may have resulted in some former inmates experiencing significant delays in receiving ODSP benefits. He observed that the applicable regulation was silent on when an application can be made. Even then, the Ombudsman decided to forward a notice of investigation to the Deputy Minister of the Ministry of Community and Social Services. In response, the Deputy Minister advised the Ombudsman that the Ministry would make DDPs available to institutional physicians so that they may assist inmates with disabilities to begin the ODSP application process as their release plan.

Ombudsmen have generally also adopted a broad view of their role, enabling them to relate their work to older and newer generations of human rights obligations at the same time. Incidentally, this is sometimes mistaken as one of the unique benefits of a specialized human rights agency[17]. In Appendices II–IV, I present further illustrative cases of human-rights-related work by ombudsmen, as well the diverse internationally recognized principles that are involved. Thus the cases touch on the right to social security (Appendix II), the rights to health and non-discrimination (Appendix III), and the right to nationality (Appendix IV). What they also show is that without administrative effectiveness and fairness human rights can be violated by the state, regardless of the legislation that is in place.

This makes conceptual sense, as administration is ultimately the machinery through which the state meets its obligations, including its human rights obligations. If the state is to be effective in promoting and protecting human rights, it seems that effective, efficient and just administration is a necessity.

[17] L. Reif, *note 14.*

Other human rights are therefore dependent on what can be, and has been, termed a right to good administration.

This is not a new idea – for example, it is well enshrined in the constitutions of Namibia and South Africa[18]. In the case of South Africa, the Bill of Rights provides that: "Everyone has the right to administrative action that is lawful, reasonable and procedurally fair." There are also references to good administration in other treaties, including the right to "effective remedy … determined by competent judicial, administrative or legislative authorities" as contained in the ICCPR, as well as references in the case law and constitutions of a number of individual countries. Similarly, the Charter of Fundamental Rights of the European Union (a body of some 500 million people with approximately 30% of the world's wealth), while not yet in force, provides explicitly for the right to good administration in Article 41: "Every person has the right to have his or her affairs handled impartially, fairly and within a reasonable time by the institutions and bodies of the Union."

Therefore, the idea of a right to good administration has philosophical weight behind it, and is intrinsically linked to what ombudsmen do. As upholders of standards of good administration and administrative justice, they are – if one accepts the principle of a human right to good administration – directly protecting and promoting human rights through their work.

By the same token, it must be emphasized that the role of an ombudsman office is not just about receiving and acting upon complaints from individuals. In many cases, ombudsmen are able to identify general problems and undertake proactive investigation, which helps to reinforce their human rights credentials. By mapping the complaints they receive according to the institution that the complaints are made against, ombudsmen can begin to identify trends and spot departments or areas where there is institutional or systematic failure, as opposed to occasional one-off mistakes or incompetencies.

This role is taken further still in the case presented in Appendix V. In the other cases reported so far, the ombudsman executes his or her influence in the assistance of an aggrieved individual or group of individuals who have been victims of the state executive instrument. In Appendix V, however, the ombudsman is seen performing an oversight function over another oversight body, namely a National Human Rights Commission's ability to live up to the commission's own standards of administrative justice. This way, the ombudsman effectively reveals that it contributes to creating and sustaining an environment of human rights protection and promotion.

Ann Abraham, The United Kingdom Parliamentary and Health Service Ombudsman for England, has eloquently highlighted the proactive and intrinsic "humanizing" element of the ombudsman, which may otherwise go unnoticed:

> There is much debate about exactly what 'maladministration' means: things like bias, neglect, inattention, delay, incompetence, ineptitude, perversity, turpitude and arbitrariness. This need to classify bad practice reflects one's dominant view of the role of ombudsman: the role of 'fire fighter'. But of

[18] See V. Ayeni, *note 14*.

course fire fighting is not, and cannot be, the whole ombudsman story. It was not long before the rather different role of 'fire watching' – of proactive prevention rather than remedial cure – came to assume its proper place in the accepted ingredients of a viable ombudsman institution. Just as public sector ethics and human rights can serve to soften the edges of the otherwise sharp and painful encounters between citizen and state, so the dissemination and adoption of 'principles of good administration' can also serve to 'humanise' those encounters, to restore to citizens their status as human persons of dignity and worth, and to encourage an ethos of good governance that is integral to any meaningful form of democracy. (Quoted in the Ombudsman for Bermuda's Third Annual Report 2008, p. 40)

Equally, it needs emphasizing that ombudsmen are effective in human rights work even with their natural non-coercive attributes. This point is especially relevant to those who are somewhat skeptical about the ombudsman's ability to secure compliance. André Marin, Ombudsman for Ontario, gives a good example of how effective an ombudsman can be:

The government's response to most of our investigations and recommendations has been very constructive. There has been a recognition among government leaders that our work is not about exposing or embarrassing them or making them look bad – although we certainly have exposed some bad things. They recognize that our investigations and recommendations are revealing problems and solutions that are going to benefit millions of people and that by acting on them, they are going to look good.

One of our very first investigations involved a medical issue – the tests that are done on newborn babies to see if they have a genetic disease or disorder that can be treated early – things like cystic fibrosis or sickle cell anemia or a number of metabolic disorders. These conditions can and have killed children or left them permanently disabled if they are not treated. In fact in our province, this was happening to about 50 children every year because our province was doing only two tests on babies [compared to more than 90 tests in some states in the US, and fewer than most countries in the world] even though we had access to and were developing the technology for some of these tests right in Toronto.

When we revealed the shocking situation, the government immediately announced that it would start doing more tests. It has recently announced that the number of tests is up to 29 – a long way from 2. The Premier in Ontario likes to say that 'we have gone from one of the worst in the world to one of the first.' It is now a point of pride for the province because there are now 50 fewer children suffering or dying needlessly each year. (Quoted in the Ombudsman for Bermuda's Third Annual Report 2008, pp. 38–9)

In another example, the Nigerian Public Complaints Commission goes so far as to claim that one of its actions in 2006 "averted anarchy":

On [19th] June 2006, the Abia State Office of the commission was thrown into a state of tumult as groups of people besieged it in their hundreds [and] threatened violence if [the] National Population Commission refused to pay them their allowances [for work as enumerators in the last national census] … The commission went into action without delay. Firstly, the protesters were calmed down and assured that they would do everything possible to ensure that justice prevailed. Secondly, a team of seasoned investigators met the State National Population Commission (NPC) Director and his management team for discussion on the matter. The Complainants' representatives were also present… When it became [obvious to the Complainants] that they had lost [the argument due to an inability to substantiate their claim against the NPC], they vowed … that they would not get involved in any national exer-

cise again … and confessed that if not for the intervention of the Commission they had concluded arrangement to burn down the NPC office in the state … The commission pleaded with them not to take laws into their hands [and through the intervention] the Nigerian Ombudsman averted what could have led to anarchy in Abia State. (Reported in the PCC Annual Report, 2007)

The foregoing cases eloquently show that ombudsmen can achieve significant results and, again, that they do so in contexts that inevitably include a significant human rights dimension. Of course the ombudsman is not foolproof, but the institution has thrived precisely because it is often able to secure significant successes in a less confrontational and costly manner than traditional legal proceedings. Yet, sadly, the foregoing perspective of the institution has been often missed or at best downplayed by an erroneous notion that a human rights function must be "explicit" in the instrument setting up the office (such a provision is, incidentally, conspicuously absent in most classical and pre-1990 institutions[19]). However, it goes without saying that ombudsmen have always been involved in human rights work, even though this was not always made explicit. If this is the case, then there are certainly benefits today in explicitly acknowledging this fact, not least to reduce organizational overlap and conflict between human rights and ombudsman institutions.

Indeed, it has been argued that for many resource-constrained countries there could be significant cost savings made by merging human rights and ombudsman institutions. If the roles of these institutions are complementary, and no significant loss of effectiveness would result from such a merger, then this idea may be worth further exploration. At the same time, it will save many national jurisdictions the needless turf wars that are commonplace between the two institutions.[20] Similarly, acknowledging this reality will mean that a number of the current approaches to implementing the ombudsman role will need to change. Key among these are the criteria for evaluating the success of the institution, which will need to include its contribution to human rights work. The characterization of so-called 'hybrid' and "classical" ombudsman types are evidently no longer useful. Ombudsmen, in whatever form they are created, should rightly become more confident about the multi-functional role they play. By the same token, there are implications for organization and operations, reporting and staff training – all of which will need, naturally, to be further investigated.

However, one cannot be oblivious to the concerns that have been expressed in the past about the ombudsman's expanding role. A strong note of caution was sounded in a 1998 article by Sir John Robertson, former Presi-

[19] See, for example: Commonwealth Secretariat, *National Human Rights Institutions – Best Practice*, London, 2001. Also, L. Reif, *note 14.*

[20] The author can confirm this from repeated experiences in Commonwealth countries. See, among others: V. Ayeni, "The Changing Nature and Contemporary Role of National Ombudsman Institutions in the Commonwealth and Elsewhere – Lessons of Experience", *International Ombudsman Yearbook*, Volume 4, 2000. Also: *The Sixth International Conference for National Human Rights Institutions,* Copenhagen and Lund, April 2002; *Report of The Democracy, Human Rights and Gender equality Consultative Meeting*, South Africa Human rights Commission, December 1997.

dent of the International Ombudsman Institute (IOI)[21]. He argued that "the ombudsman model will only remain relevant on into the middle of the next century if it continues to operate in its core business, regardless of what other roles are assigned to it." This is not to rule out the addition of other roles, and Sir John himself admitted that these "new roles may well be complementary." It is merely to highlight that there is an extremely valuable body of work that an ombudsman does, which he called the "core role":

> The ombudsman institution was designed specifically to achieve success in reducing or eliminating the excesses of bureaucracy. Its success in this task has undeniably led to worldwide acclaim. In that role, an ombudsman takes complaints, independently and impartially forms an opinion and may or may not sustain the complaint. The ombudsman operates in a non-adversarial manner and gains moral influence for acceptance of opinions based on the integrity of processes, the intellectual logic of reasons supporting the opinion and well established goodwill. Furthermore, by performing these tasks effectively there is a positive contribution to the ethics and integrity of public administration and to the improvement of processes, practices, policies and even of legislation, all of which impact on the way a government does business with its people. Ombudsman everywhere are, as a result of investigations, tidying up governments' processes, not only because their recommendations are accepted but also by undertaking own-initiative systemic investigations where they are concerned that current practices are unreasonable and causing too many complaints or impacting unfairly on specific groups of people. They are also publicly warning the people and governments of issues that need attention as between those who govern and those that are governed. These warnings facilitate debate on public policy and have considerable political impact for change. It is this core role which has made the institution famous, exportable and credible.

Sir John went further, to say that any change that compromises this core body of work should be rejected. However, it is fair to say that events over the last three decades in particular have overtaken that position, so much so that the human rights function is now inescapably part of the ombudsman's core role. On the other hand, Sir John's concerns remain valid, were we to extend the analysis to the growing attempt to use the ombudsman in anti-corruption work.[22] Indeed, it is this trend that takes the ombudsman out of his or her comfort zone, and thereby threatens the institution's very essence. Besides, this has increasingly resulted in the calls for the ombudsman to acquire executive powers, which, as we have discovered in this discussion, is mistaken and fundamentally in conflict with the institution's essential features.

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[21] J. Robertson, *note 3*.

[22] V. Ayeni, et. al (eds), *note 2*. Also: Sam Ruburika, "Rwanda – Prosecuting Powers Needed for Ombudsman to Fight Corruption" *Focus Media* (Kigali), 21 October 2009; Gowenius Toka, "The Ombudsman remains a Toothless Bulldog" *Sunday Standard* (Gaborone), 25 October 2009.

Concluding Comments

Contemporary ombudsmen are as much human rights bodies as they are institutions for the advancement of administrative justice. As this paper has highlighted, a number of ombudsmen have adopted human rights concerns as an explicit part of their mandate. Even those ombudsman offices that do not explicitly have that function as part of their mandate are inevitably involved in significant human rights work today. All of these emphasize the need for ombudsmen everywhere to make this role more apparent, adopting an explicit frame of reference for the human rights components of their work.

Significantly too, ombudsmen do not need to undergo any changes in their legislative mandate in order to be acknowledged human rights institution. Clear similarities exist in the operating methods between ombudsman institutions and specialized human rights bodies at national and international levels. Consequently, I am suggesting that human rights institutions and ombudsmen could potentially merge, a move that could cut costs significantly for resource constrained countries – a not inconsiderable factor – and potentially also reduce bureaucratic overlap and unnecessary turf wars now evident in many national jurisdictions.

All told, I have argued that one of the hallmarks of the 200th anniversary of the ombudsman is the reality that the institution now has a new face that was largely unimagined several years back. This is a development that signifies, albeit in concert with other global forces, a significant rewriting of the conception of the ombudsman as conceived 200 years ago. The ombudsman institution, in whatever forms it takes today, no longer undertakes human rights work just as an add-on or incidental function but as an essential and necessary part of its fundamental existence. Nor is a human rights role any longer the preserve of some so-called hybrid offices. The two functions have become fused. The ombudsman is undeniably a human rights institution, and cannot succeed otherwise in the face of the issues and challenges that confront it in the 21st-century environment.

APPENDIX 1

Stuck in a medical catch-22; A new drug is helping Ronald Cleveland's cancer fight, but government rules prove a bitter pill

By: CHRISTINA BLIZZARD

Before that awful diagnosis, Ronald Cleveland had the world by its tail.

He was healthy, happy. He works as a consultant helping companies reorganize.

At 49, cancer wasn't something he thought a lot about. All that changed last November, when he was diagnosed with advanced colorectal cancer. He has a 50% chance of living two years.

As if his fight with that insidious disease isn't bad enough, Cleveland now finds himself battling the tortuous health bureaucracy, trying to get the drugs he needs to keep him alive.

Approved for funding just a year ago, the government set aside $30 million to fund Avastin as a first-line therapy for colorectal cancer patients in combination with chemotherapy.

"It's a very aggressive form of cancer, and Avastin is a very good drug," Cleveland said in a phone interview this week.

The problem is the government will only pay for Avastin if it's used in combination with other chemo drugs. He's having side effects from those drugs and wants to discontinue them -- but continue with the Avastin. If he does that, the government won't pay the costs.

He has a horrific choice: Suffer the deadly side effects of the other drugs or lose the benefits of Avastin, which Cleveland believes has slowed the growth of his tumour.

"I have got this catch-22. If I take the Avastin in the combination of drugs that I have to right now, that the government will pay for, it may cause complications that could kill me."

"And if I don't take it, the cancer will grow very rapidly," he explained.

His doctor would like to try a combination of other drugs to see if they can lessen the side effects.

"We want to keep the Avastin, but we want to switch the other drugs to see if that alleviates the complications. But we can't. He's not allowed to -- or I have to pay for it -- and it's $1,750 a shot at the hospital," he said.

Provincial Ombudsman André Marin announced recently he will probe the limited funding of Avastin. Not only are the terms of its use narrowly defined, there is a 16-cycle cap on the number of treatments OHIP will fund.

A spokesman for Health Minister David Caplan said Health Canada has not approved Avastin for use in second line cancer treatment, and the manufacturer hasn't requested they do so.

Steve Erwin said Avastin is not a cure, but a step in the initial treatment of patients.

"If more data comes to light that it is more effective after that period, we would look at it," he said.

Fair enough. It takes time to re-evaluate new wonder drugs as they come on the market. But too often, it seems, at a time when they are fighting -- literally -- for their lives, cancer patients must also battle another monster, our own bloated health care bureaucracy. Patients die waiting for the drugs they need to keep them alive.

It just adds to the pain for Cleveland.

"It is the needless stress that I don't need at this point in my life," he told me.

"I just want to live whatever life I've got left freely. I don't need the stress of worrying where I get the drugs from."

The terrible shame of all of this is the wheels of government grind very slowly.

And sadly, time is something most cancer patients just don't have.

(Published in: *The Toronto Sun*, Wed July 8 2009, page 19)

APPENDIX II

Trinidad and Tobago Office of the Ombudsman, Annual Report 2007
'Pension Withheld Due to Unclear Policy Directive'

"The Complainant, a retired Statistical Officer, who had completed thirty-three (33) years in the Public Service, discovered on receipt of his retirement benefit that he had been remunerated for only twenty-seven (27) years … He was informed that his period of employment as a Clerical Assistant [for six and a half years under delegated authority] … had not been considered [for pension purposes] … The Complainant therefore made representations to the Ombudsman to have his full retirement benefit paid to him … Representations were made on the Complainant's behalf … to have the entire period of the Complainant's employment count for pension purposes … The Director of Statistics reported that an approach had been made … to have the Complainant's six and a half years service … taken into account in the calculation of his retirement benefits [and] further advised that the Office was conducting a survey of its personnel records to establish the number of persons similarly affected and thereafter an approach would be made to the Cabinet for approval for service under delegated authority to count for pension purposes … The matter … is being actively pursued."

"Everyone, as a member of society, has a right to social security and is entitled to its realization." Article 22 of the UDHR

"The States Parties to the present Covenant recognize the right of everyone to social security, including social insurance." Article 9 of the ICESCR

APPENDIX III

Malta Parliamentary Ombudsman, Annual Report 2006
'Ombudsman Finds Discrimination Against Senior Citizens Aged 75 or over'

"In a complaint lodged with the Ombudsman, it was claimed that people aged 75 years and over who suffer from heart disease are subjected to injustice when the Health Division denies them of a free supply of statins which are prescribed to patients with coronary heart disease whereas other people under the age of 75 with this condition are given a regular free supply of this drug. The complainant presented the advice of medical consultants that irrespective of age, elderly patients could benefit from statin treatment and requested the Ombudsman to recommend an end to this discrimination … The Ombudsman concluded that the grievance raised by complainant is justified and that the decision to turn down the request for free medical assistance merely on the grounds of the patient's age is arbitrary and runs counter to the provisions of the law."

"The States Parties to the present Covenant undertake to guarantee that the rights enunciated … will be exercised without discrimination of any kind." Article 2 of the ICESCR

"The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health." Article 12 of the ICESCR

APPENDIX IV

Ombudsman of Trinidad and Tobago, '25 Years of Ombudsmanship (1978-2003)' 'Restoration of Citizenship', case from 2000

"The Complainant, who resided in London, sought the Ombudsman's assistance in having her Trinidad and Tobago citizenship restored. A citizen of Trinidad and Tobago by birth, she had left Trinidad in 1956 on a British Commonwealth passport. In 1959 she was married to a Nigerian national, took up residence in Nigeria in 1963 and acquired Nigerian citizenship in 1966. She [expressed] her desire to return to Trinidad and Tobago and had applied for the restoration of her Trinidad and Tobago citizenship. She produced all the documents required for such restoration with the exception of her Nigerian Citizenship Certificate, [which she stated was surrendered to the Ministry of Home Affairs in Nigeria in 1971 and never returned]. Based on the documents submitted, the Chief Immigration Officer recommended that her Trinidad and Tobago citizenship be restored and sought the approval of the Permanent Secretary, Ministry of National Security. The Permanent Secretary, however, insisted [that] the Complainant should produce her Nigerian Citizenship Certificate [before approval should be given based in a requirement of the Immigration Act. However,] there is no such requirement under the Act [and this] was drawn to the attention of the Minister of National Security who eventually restored the Complainant's citizenship."

"No one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality." Article 15 of the UDHR

APPENDIX V

Ombudsman for Bermuda, Third Annual Report 2008
'Human Rights Commission (HRC)'

"Professional FF … complained of discrimination to the HRC [regarding her application to be certified to practice her profession in Bermuda] … The HRC asked Professional FF to engage in a pilot mediation program … When the conciliation failed, the HRC voted by a margin of one to dismiss the complaint. Professional FF complained to the Ombudsman that the HRC had not adequately investigated her complaint and further, had not followed either the promised or proper procedures in dismissing her complaint. After a protracted investigation … the Ombudsman found that the HRC: (a) had erred in setting out the [complaint handling procedure]; (b) had not adequately investigated the documents that Professional FF had highlighted at the outset; (c) had improperly dismissed Professional FF's complaint by denying her a due process opportunity to be heard first, as required by the Human Rights Act 1981; and (d) failed to respond to her process inquiries … The HRC eventually accepted the Ombudsman's recommendations to edit public brochures to ensure an accurate description of its process and to revisit the conclusion of Professional FF's original complaint to ensure that she has an opportunity to be heard."

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