

LST REVIEW

Volume 10 Issue 148 February 2000



THE OFFICE OF THE OMBUDSMAN

THE IMPORTANCE OF THE OFFICE OF THE OMBUDSMAN

PROFESSOR G.L. PEIRIS

01

THE OMBUDSMAN SYSTEM IN CANADA

MS. ROBERTA JAMIESON

08

A CRITIQUE OF THE OFFICE OF THE OMBUDSMAN

IN SRI LANKA

ROHAN EDRISINHA

16

DISCUSSION

24

PUBLIC SECTOR TRADE UNIONS AND THE ROLE OF

THE OMBUDSMAN

31

LAW & SOCIETY TRUST

Editor's note

The Law & Society Trust organised a series of events to mark the visit of the Ombudsman of Ontario, Ms Roberta Jamieson last year. This issue of the LST Review carries the papers presented and a summary of the discussions held during the visit of Ms Jamieson.

While the importance of the Office of the Ombudsman is highlighted by all the speakers, they also highlight the problems in the present system. Lack of resources, the low profile of the Office as well as the rather limited mandate given to the Ombudsman under the law are given as the main problems in the system. Professor G.L. Peiris stresses the need to appoint Deputy/Regional Ombudsmen either for different areas or for different subject matter. It is hoped that the government would take necessary measures to implement the recommendations in this report, particularly, the need to appoint deputy Ombudsmen.



The Importance of the Office of the Ombudsman

*Professor G. L. Peiris**

The importance of the Ombudsman in both our countries - Sri Lanka and Canada - has to be assessed in the overall context of the political culture which places a very sharp focus on remedy. I think this is one of the characteristics of the British legal tradition as opposed to the continental tradition. The British legal tradition tends to emphasise the remedies more than the articulation of rights in the abstract. It is one of the hallmarks of the British public law that an effective remedy is always conceived of to remedy injustices, which may be complained of. Now in a modern democratic polity it is absolutely essential that all segments of society should have, at their disposal, remedies to secure redress for grievances which they complain of with justification. Both in Canada and Sri Lanka in the evolving human rights jurisprudence looms large in the horizon of public law. In both our countries, there is an impressive Bill of Rights which is part and parcel of the Constitution. It is an enforceable Bill of Rights, which puts very definite limitations on the competence of Parliament. But we certainly have found in our own country that while, an enforceable Bill of Rights is absolutely necessary, it is by no means sufficient.

One of the problems in Sri Lanka is that as far as enforcement of fundamental rights is concerned the Supreme Court is the court, ironically enough, for the first and last resort. If there is a violation of fundamental rights, you have to take the case to the Supreme Court and there is no appeal from a decision of the Supreme Court. Our Constitution also has a provision to the effect that where in any litigation a matter arises pertaining to the interpretation of a constitutional provision, whatever the other court is dealing with the matter must suspend those proceedings and refer the constitutional point to the Supreme Court. And it is only the apex judicial tribunal of the land - namely the Supreme Court - which has the jurisdiction to deal with any matter involving the interpretation of the Constitution of the Republic of Sri Lanka. So it is the sole and exclusive jurisdiction that is conferred upon the apex court in respect of any matter touching directly or obliquely on the interpretation of the fundamental law of the country.

* Presented at the inauguration of the visit of the Ombudsman of Ontario, Ms. Roberta Jamieson. Edited for publication.

That may appear to be somewhat strange. In the USA, for example, some of the most valuable judicial decisions interpreting the constitution have been handed down by State Courts, for example, the courts in California. This is also true of India. The courts of Uttar Pradesh, for example, have made a very valuable contribution to the interpretation of the constitutional laws of India. That is not possible in our country. One of the problems with constitutional adjudication by the Supreme Court is that everything has to be done necessarily by affidavit. There is no question of presentation of oral testimony.

There is no scope for cross-examination. Such procedure is not necessarily the best for this kind of adjudication. It is also quite evident that ordinary people have great difficulty in taking their cases to the Supreme Court because of the expenses involved. In such a situation we certainly find a very pressing need to have the adjudicated mechanisms of the Supreme Court buttressed and supplemented by other remedies of a less formal character. Certainly there is great value attaching to the remedies which are dispensed by the Supreme Court but there must be other levers which are available to ordinary citizens to secure effective and speedy redress of grievances. In Japan, very considerable success has been achieved, in the enforcement of fundamental rights by a high bred multi-faceted mechanism which begins at the grassroots level. The village elders, people who are held in high esteem by the village community, will make an attempt to resolve these problems in a very informal and conciliatory manner. You then proceed step by step, level by level, until you reach the highest court in the country. But it is a process that begins far lower down much closer to the grassroots. In Sri Lanka, a tradition that goes back several centuries to the times of the Kandyan kings, for example, there were institutions known as the "Gam Sabas" and the "Rate sabas" which were very informal conciliatory mechanisms that enabled problems to be resolved by negotiation and discussion without the use of strong cohesive mechanisms. That tradition was part of our culture and was not seen as an imposition from extrinsic sources.

In this kind of situation, the institution of the Ombudsman is very important. It is an institution which has its genesis in the Scandinavian jurisdiction - speedy, informal, non-technical redress of grievances. The whole idea of the Scandinavian jurisdiction was that somebody who had a problem would be able to pick up the telephone and talk to the Ombudsman about his or her grievances and secure an expeditious relief. There is no need to go to lawyers, and no need to be caught up in the complexities and the

technicalities of the law. In a simple and straightforward manner, justice was dispensed as rapidly as possible.

As far as our own country is concerned, the institution of the Ombudsman was engrafted on to the public law of Sri Lanka in 1978 with the adoption of the second Republican constitution of our country. Prior to that the Office of the Ombudsman did not exist. The 1978 Constitution gave particular sanctity to the Office of the Ombudsman. It was a constitutionally entrenched institution. There were, however, very serious problems at that time. The Office of the Ombudsman was acknowledged by no less than the paramount law of the country - the Constitution. We had a very able person with a very wide range of experience appointed to that position - Mr. Sam Wijesinghe who had served for a long period of time, as clerk to the House of Representatives. He had a whole reservoir of practical experience with regard to systems and procedures of the legislatures of our country ever since gaining independence.

There was, therefore, a combination of elements which was certainly very positive and promising, as far as delivery by the Ombudsman was concerned. However, there were very significant constraints and inhibitions. As Dr. Neelan Tiruchelvam pointed out, there were problems with the structure and the procedures which had been established at that time. Some of these procedures were unsatisfactory. In fact, the manifesto of the People's Alliance dealt with this issue in 1994. While we greatly value the institution of the Ombudsman, there were a lot of defects associated with the Office. What were the shortcomings? Whoever wished to approach the Ombudsman could certainly not telephone him, as one could in Sweden, Denmark, or Norway. One had to find a Member of Parliament who would be prepared to raise this matter on the floor of the parliament. That is not so difficult. One can always find an opposition MP for this. Now that was not very different from the position in the United Kingdom, where one has to find an MP who was sufficiently obliging to agree to raise one's grievance on the floor of the House of Commons. That is perhaps not too cogent an objection. But the rest of it made the situation unacceptable. When a Member of the Parliament raises an issue on the floor of the house, it is referred to a committee where, naturally and inevitably, the government of the day would find itself in the majority. It is the statutory function of that committee of the parliament to examine whether there is a *prima facie* case which warrants further examination. That necessarily means that matters that are of a sensitive or embarrassing nature are immediately swept under the carpet. One does not hear about them and they

do not reach the Ombudsman at all. He knows nothing of them at least officially because he cannot be informed of the substance of the grievance because of an elaborate filtering process. I am not sure that "filtering" is the right word. There are many layers, which one has to penetrate before one obtains access to the Ombudsman at all. Cumulatively, these constraints and inhibitions operated in such a manner as to deprive the institution of the Ombudsman of a modicum of efficacy on the ground. This was an unsatisfactory and potentially dangerous situation because it is just the kind of thing that breeds or engendered a spirit of cynicism.

Looking at the Constitution, the Ombudsman would seem to be a wonderful institution. Everybody has access to him and he can dispense speedy justice. In fact, however, the situation is loaded with practical constraints, which make access to the Ombudsman extremely difficult in a generality of circumstances. You thus have a wide gulf, a very striking stratum, between aspiration and reality. That is always dangerous in the political culture, especially in the third world. If you are encouraging the aspirations, if you make out that these institutions and remedies are available, then there must be in reality a reasonable prospect of the grievances being redressed in the manner that is promised. As Dr. Tiruchelvam pointed out, at the end of 1994, a Bill was presented in parliament to amend the law as these fetters were unnecessary and self-stultifying.

There were certain objectives which we were committed to accomplishing. What needed to be done was to impart much greater efficacy to the institution of the Ombudsman in Sri Lanka. There was no disagreement in Parliament whatsoever. The parliament unanimously accepted what was proposed and we expunged from the applicable law, all the fetters and constraints that existed during the period 1978-1994. In 1994 Professor Bastiampillai was appointed as the next Ombudsman.

The next issue that arose was when you have swept away all the constraints and inhibitions, there was a certain consequence - there would be a flood of applications. These are applications that could not have been made in the past because of the barriers that existed. When you remove the barriers, naturally you have to expect a phenomenal increase in the number of applications that would be made to the Ombudsman. There again one has to be careful. You have to have sufficient personnel to deal with the enhanced number of applications made to the Ombudsman after the law was amended. I do not pretend that everything that was necessary was done in that regard, and this

certainly is a tribute to Professor Bastiampillai that with minimum of resources he has been able to achieve much within a short period of time.

Dr Neelan Tiruchelvam referred to the provision in law relating to the appointment of a Deputy Ombudsman. We recognise that a Deputy Ombudsman has to be appointed. Now the constraints in that area are largely, if not entirely, financial. But there is also a policy decision to be made. There are two ways of doing this. It seems to me that one approach is to appoint not one Deputy Ombudsman but a number of Deputy Ombudsmen for different geographical areas. The whole idea is that people do not have to travel long distances to reach the capital city to find relief for their problems. It is part of the essence, the spirit of the Ombudsman, that it is readily accessible. He is not remote from you, that the idea of proximity or propinquity, is part of the pragmatic rationale of the Ombudsman. From that point of view it would certainly make sense to appoint several Ombudsmen to different parts of the country to provide easy access to people. That is one avenue. The other approach which has found acceptance in other jurisdictions including Australia, and, to some extent in the United Kingdom, is to carve out particular subject areas, and to attribute responsibility for these sectors to Deputy Ombudsmen.

For example, in Sri Lanka, there are very serious problems with regard to the transfer of school teachers. In the United Kingdom, there is an Ombudsman to deal with the problems arising in the Police force and in the Armed forces. In Australia there is an Ombudsman dealing with the problems relating to the Banking sector. Now the choice of the sectors is very much a matter of cultural and social context. I fervently believe, not only in this area but in others, that it is by no means necessary or even desirable to endeavour to reinvent the wheel. That is one of the reasons why exchanges of this kind are exceedingly beneficial. We can look at the experiences of other jurisdictions and extract from it what is of value and relevance for our own country. But we must remember that no two countries, no two cultures, no two experiences are exactly identical. So one has to have a certain degree of flexibility, resilience and adaptability in these matters. You have to extract what is desirable, what is productive and useful for the culture of a different country, and adapt it to suit the unique permutation and combination of circumstances that would exist in one's own environment. But we have to examine for ourselves the critical areas for our own country. And if you are traversing the second root, then we would have to identify the areas where particularly vexed problems have arisen in our own country and appoint Deputy Ombudsmen with special responsibility in

respect of those designated areas. So there are two alternatives, modalities or mechanisms which we can choose from either geographical regions or subject-wise divided responsibilities. We will, in due course, make that decision having made financial provisions for the appointment of a Deputy Ombudsman or Ombudsmen as is contemplated by the empowering law. If there should be a virile jurisprudence relating to the implementation of human rights on the ground, you need an armoury of remedies and the Ombudsman would simply be one of those.

It gives me particular pleasure to express these thoughts to you in the presence of Her Excellency High Commissioner for Canada, our own Deputy Speaker, who also has an unrivaled knowledge of parliamentary matters, and of course Ms. Roberta Jamieson, the Ombudsman of Ontario, who brings us to the insides of our own jurisdiction respect of the functioning of the Office of the Ombudsman. Canada is a country relevant to us in many ways. In the Parliamentary Select Committee, as Dr Neelan Tiruchelvam would no doubt recall, we have paid particular attention, for example, for the Meech Lake Codes and the Charlotte Town Agreement. We have found particularly relevant and valuable the mechanisms relating to the double majority stipulated in the Charlotte Town Agreement - that is legislation effecting the cultural rights of the minority community. In Quebec, for example, legislation could be enacted by the Canadian senate not only if there is a simple plurality of Senators voting for that measure, but there would also need to be a majority of francophone senators supporting the legislation before the House. Of course, the Charlotte Town Agreement was never implemented because it was narrowly defeated at the referendum. But it contains within it a certain core of concepts and suggestions which if suitably adapted, would be of great relevance to our country.

There is a substantial overlap I would say between all our problems although again contextual factors are of decisive importance. Therefore, it is entirely appropriate that we should look to Canada in this regard as a source of guidance and inspiration to further refine the structures that we have established in our country for the protection of human rights of our people. I welcome Ms. Roberta Jamieson cordially to our shores. She assures me that notwithstanding her busy schedule she hopes to visit Kandy and other places of interest in Sri Lanka. I hope the onerous duties in Colombo will not prevent her from seeing for herself the scenic beauty of our country, the vibrancy of our culture and the warmth and the hospitality of our people, not to mention the unique quality that is found in our political and social institutions. We are very happy indeed that you are here

with us to share your thoughts and experiences. Thank you very much for visiting us to tell us about your experiences in Ontario.

The Ombudsman System in Canada

*Roberta Jamieson**

As the Ombudsman of Ontario, I have been active in the extension of the institution of the Ombudsman internationally, always advocating that the institution be shaped by and adapted to the special characteristics of each people, each nation.

The growth of the Asian Ombudsman Association has been rapid and I have been honoured to work with your Ombudsman as the vice-president and board member of the International Ombudsman Association. What I have to say is shaped by my experience in Canada. Canada's diversity, cultural realities and socio-economic imperatives are, of course, different from those of Sri Lanka, and you must be the author of your own solutions. I am also aware that while we have our differences, there are also things we have in common, including a history of colonialism.

Let me begin by sharing with you a little bit about Canada and our realities. As the Ombudsman, one of the central themes I have explored is that of a service that is relevant and appropriate to a population whose central characteristic is one of diversity. In Toronto alone, a city of 2.5 million people - the largest in the province of Ontario, which has 11 million people, and thus one-third of the population of Canada - over 110 different languages are spoken; over 50% of school-aged children are racial minorities. The far north of Ontario is sparsely populated, mostly by indigenous people in rural areas bounded by poverty, linguistic diversity, enormous transportation problems and few services that are accessible. In the south, urban centres give rise to a different set of realities. All this indicate that Ontario's population is a rich mix of ethnicity, race, culture and religion. Seventeen percent of our population comprises people with disabilities.

For many years, even as late as the 1970s, Canada saw itself as a country populated by Caucasians, predominately British (50%) and French (31%). Ninety-eight percent of the country shared a common religion, Christianity. Immigration - most recently from Africa, Latin America and Asia - has changed that picture. As a country which has become a microcosm of the world, we know that if we are all to have an adequate

* Ombudsman of Ontario, Canada. Presentation made at the inauguration of the Ombudsman meeting held on 19 July 1999 at Trans Asia Hotel.

standard of life, it will happen because we have found a way to work productively together. We have to create fertile ground for diversity to flourish.

Today, in addition to people of different cultures and races, a diversity of people and groups are coming forward demanding to be heard: people with disabilities, people with literacy challenges, people of different sexual identities, people who are older and younger, people who are disenfranchised, people who have been marginalised for a myriad of reasons. And all these factors are often compounded by poverty and class.

Generally speaking, these groups share a common expectation. Should it be any surprise that they all seem to want what each of us wants for ourselves?

- to be respected for our inherent worth as human beings;
- to be able to exercise and enjoy our fundamental and universal human rights collectively and individually;
- to be able to share our gifts as productive members of society;
- to be heard when decisions are being made that have a significant impact on our lives; and
- to believe we have a place to go when we feel we have been wronged.

We have found in this experience that acknowledging diversity is not enough: we have to create space for diversity to flourish, space for all people to use their talents.

We have had to do this despite the historical reality that diversity was never contemplated in the post-colonial design of our country. Canada's building blocks were all in place before anyone thought about the value, potential and importance of diversity. Those from other cultures and races were to be admitted into what was essentially a British system, on the system's own terms. As long as you were willing to play by the rules inherent in this system you had an opportunity to participate - even succeed.

The problem is that this way of thinking is based on an assumption which is fundamentally flawed that we are all the same. It assumes a number of things: that we are in the same condition to run in the race, that we have all agreed on the rules, or indeed, that we have agreed to race at all.

We are not the same - we are people of differing abilities, social locations, cultures and values. We can expect confrontation and conflict as the natural forces of the human spirit cause people to create space for themselves where no space has been opened up for them.

We have started to learn that every person must be able to see his/her face reflected in every public institution. Each of us needs to feel that our institutions are responsive to us, that they respect our dignity as human beings in all of our diversity. All of us must be able to feel we are in our own home, a house big enough to encompass wide diversity, rather than to feel we are visitors in someone else's home.

This is the situation in Canada, and as the Ombudsman, it has made my challenges far greater. The Ombudsman of Sri Lanka must face challenges as well. I know Sri Lanka is a country which has protected human and fundamental rights, as well as the role of the Parliamentary Commissioner for Administration, in its Constitution. I know you have a dedicated Ombudsman mandated to investigate and report on complaints of infringements of fundamental rights and other injustices by public officials and local authorities.

I have read about your Commission for the Elimination of Discrimination and Monitoring of Fundamental Rights, as well as your Human Rights Commission. I know that you are seeking to find a balance between dealing with public emergency and your international human rights commitments. Resolving issues with roots deep back in time is done neither rapidly nor easily. As a woman from an indigenous nation of Canada, the Mohawk Nation, I know that all too well. The long-standing backlog of unresolved issues often seems to grow, rather than to diminish.

While I believe that we should seek success in resolving these issues, I also believe that we should be judged first not on success, but rather on our effort, our commitment, our good will, and our ability to compromise. Those are among the qualities which will eventually lead us to success, and without which success will never happen. And to a large degree, this is the manner in which Sri Lanka has been judged in the eyes of the world community. Rather than criticise on the grounds that there is severe conflict, human rights observers have been appreciative that your government has not interfered with the functioning of the judiciary.

The strengthening of powers and accessibility of the Ombudsman has been noted. The strengthening of human rights protections is a matter of record. But, of course, as with all countries, there is always room for improvement.

Against this broad landscape, we are here today specifically to address the institution of the Ombudsman. As people who want our governments and countries to be accountable for the quality of its governance structures, we must ask ourselves such questions as

- do our Ombudsman offices have the fiscal resources required to fulfil their mandates effectively?
- do these offices have powers to choose the staff they need, and in so doing demonstrate their independence from government?
- is the government responsive to its watchdog's investigative findings and recommendations for corrective action?

The Ombudsman can be seen by governments and public servants as a toothless tiger, a threat – or as our ally. The availability of an effective Ombudsman is not a sign of poor government, but rather of a healthy democracy. The existence of an independent Ombudsman is evidence of a consensus that government should be accountable for its administration and for its human rights record.

By providing adequate resources to an Ombudsman, the government and Parliament demonstrate in a concrete way that they are willing to be held accountable. An effective Ombudsman functions as evidence that the legislature expects governmental organisations to be accountable for fairness in their actions and decisions. By having access to an effective Ombudsman, the public's confidence in public institutions and the public service is increased. By ensuring the public has access to an Ombudsman, the public service also protects itself against unjustified complaints. Governments who respect and support an Ombudsman's mandate find they are rewarded with increased credibility and greater public confidence.

It should be remembered that an Ombudsman need not confine operations to the investigating of individual cases. An Ombudsman can also conduct systemic

investigations to deal with issues which affect many people and which may extend across many agencies and governmental systems.

The unique view of an Ombudsman across government can be useful in providing an "early warning system" of problems which can be corrected before they become expensive and/or explosive. For the Ombudsman's office to be healthy, independent and effective, appropriate political support and adequate resources, including appropriately trained staff and proper funding, are essential.

I also recognise that governments throughout the world are focused increasingly on the bottom line as they struggle to become competitive in the global marketplace. This means a preoccupation with containing costs. At the same time, governments are called upon to increase the protection of human rights. International agencies, covenants and agreements simultaneously promote a focus on both goals.

The demands for accountability have never been more pressing. In recent years, we have seen governments everywhere in the world focus narrowly on an overriding fiscal policy of reducing deficits, often at the expense of basic rights and responsibilities.

Sadly, at times governments allow people's rights to be ignored or infringed because of a declared inability to afford fair or just treatment. Yet, a dedication to treating people equitably is the cornerstone of good governance. Democracy is inherently fragile, constantly at risk. We must all be vigilant always.

While throughout the world we experience different socio-economic standards in daily life, I believe that the rights of every person in this room are in jeopardy if governments and public servants are permitted to plead a lack of resources for not behaving fairly and justly towards the people they serve.

With globalisation, governments world-wide are having to deal with improving the democracy of their operations. In this era of computerisation, competition and global mobility of capital, we all have opportunities to promote human rights, fairness and accountability. And let us be frank – often fair treatment is more about attitude than one's pocketbook.

But economic decisions have social effects, and social decisions have economic effects. We have a choice as to how this relationship is to be managed. Do we want a "bottom

line society” or a “people first economy”? Do we want to make our social decisions with the bottom line as the determining factor, or do we want to make our economic decisions with human well-being as our prime consideration? When researching on Sri Lanka, I saw the efforts of Sri Lanka in working to comply with its international undertakings.

You may already be aware of the manner in which countries in Central and South America are following Spain’s leadership in charging their Ombudsman with the protection and promotion of human rights - and with some notable success. Every country can adopt options for the delivery of public services which protect the public interest and human rights.

We can ensure that these fundamental concepts and rights are a vital part of any public-private and/or multinational partnerships. Individual departments and entire governments can establish accountability processes which are directed towards preventing or eliminating systemic inequities.

We can renew our commitment to transparency and accountability in any new governing structures. We can share our solutions with others. We must ensure we focus upon the profound problems, the priorities, of our respective countries.

Even if there were greater peace in your country than you are able to enjoy today, we should not be surprised that just such times as these of rapid, profound, often unanticipated change would find your public service experiencing great stress and strain.

Public servants are expected to do more, and to do it better and faster, and often without adequate resources. As democracies mature, public administration is expected to be more transparent, accountable, and even-handed. Groups representing different interests within society make competing demands. Because of their very nature, institutions often fail to keep up with the pace of change.

The Ombudsman is in a favoured position to witness all these forces in action, and to see the stress which results in both the public and the public service. In fact, many people who bring their complaints to the Ombudsman are under great stress. Often they are agitated, frustrated, in desperation, feeling they have nowhere to turn.

In Ontario, at the same time, increasingly, we find we are discussing complaints with public servants who feel “burned-out,” insecure, totally unappreciated, and who are

happy neither with themselves nor the quality of service they are rendering. Coping has become a major preoccupation within the public service.

The public and public servants alike continue to live with the effects of governments which are transforming themselves to become players against the global landscape. In Ontario this has included "down-sizing, right-sizing, contracting out, privatising, streamlining, and restructuring," not to mention dramatic cutbacks and shifts in resources.

Members of the public feel, of course, that all these changes should lead to an improvement in the services they receive, and indeed, in the quality of their lives. The theory is that increased privatisation will improve the market economy, that a stronger market economy, in turn, leads to economic development which, in turn, leads to greater prosperity. If this theoretical sequence is not the reality, the public will complain, as well they should.

Unfortunately, the public may perceive any poor performance as revolving around one issue, which an Ombudsman is often called upon to investigate. When the public complains to my office about unfair treatment and lack of service, in my experience, I must often determine whether these cases are about poor performance by public servants - or a lack of resources for public servants to carry out their responsibilities. It is my job to determine whether the complaints can be supported and, if so, to determine the actions which must be taken to correct the problem.

In the face of all this, there is an urgent need for a reality check. I believe the public has a right to know the truth about what they can count on government to deliver. I also believe that the public service has both a right and a responsibility to make this truth known to the public on a day-to-day basis. The Ombudsman can be useful in encouraging governments to be open and transparent.

One might assume that an Ombudsman investigating complaints would be at odds with the public service. But I find over and over again in Ontario's public service a strong dedication to providing the highest standard of service possible to the people of Ontario, and I assume that is true here in Sri Lanka. I find most public servants have a great pride in their work. I find great willingness on the part of public servants to be creative in doing the best job possible.

In this respect, I have a recommendation for your consideration. I believe every governmental organisation should adopt standards of service against which it can measure its own performance, and against which members of the public can measure the service they actually receive. The standards should address accessibility, ethics, timeliness, and quality. The standards should be publicised and available at the point of service delivery.

Information should be provided on how to complain if services are not delivered fairly and in accordance with the published standards. Information should also be given on how to complain to the Ombudsman when other avenues of appeal have been exhausted.

The statement of standards should not merely include general principles, but also be subject to an objective evaluation. Rather than say, for example, "We are committed to maintaining good communications with our clients," a standard of service should say, "We are committed to returning all phone calls within 24 hours. We answer all letters within two weeks."

The statement should not set out the standard the organization wishes to provide, but rather the standard which it is capable of providing. If the public finds the standard unacceptable, it can then take appropriate action.

I believe such standards of service will help to close the gap between what the public expects and what the public service can deliver. Transparent standards will lower levels of frustration among both service users and service providers. Public servants, in turn, must be expected by governments to live up to certain standards including the requirement to cooperate with the Ombudsman.

In our own Mohawk tradition, we have a guiding principle for our governments, our leaders. We are told that when we deliberate, when we make decisions, we should not think of ourselves. We are told we should not think of our children, nor our grandchildren. Our decisions should be made, we are told, taking into account the well-being of the seventh generation, whose faces are still coming towards us.

That tradition has served me well and often in my work as Ombudsman. The benefit of much of what we do today will be reaped by future generations. I wholeheartedly add my encouragement and support to your efforts in this direction.

A Critique of the Office of the Ombudsman in Sri Lanka

*Rohan Edrisinha**

I have been asked to make a presentation critiquing the Ombudsman system in Sri Lanka. In recent years there has been considerable interest in the Office of the Ombudsman and the need to strengthen the Office. The Centre for Policy Alternatives actually organised a workshop with the Swedish Ombudsman in April 1998, at which a number of issues were discussed. Professor Bastianpillai and Mr. Sam Wijesinghe, the former Ombudsman attended this workshop. We had a very useful discussion on the shortcomings in the system and possible suggestions for reform. Ms. Jamieson used a nice phrase in her speech. She spoke about the need for a "reality check." I hope you will forgive me for giving a reality check perspective into the proceedings today. I think that is what I'm expected to do. We have heard politicians speak and we have heard the Ombudsman speak and I think as an academic and a member of civil society, it is important that a slightly more critical perspective is brought into this discussion.

The first point is that the discussion on the Office of the Ombudsman cannot be taken in isolation. It has to be viewed in the context of the political culture of this country. The 1978 Constitution provided for the Office of the Ombudsman and the 1981 Act provided the details. The 1994 Amendment certainly introduced some very important improvements. If you look at the developments in the last 20 years you will see that the whole political culture or the ethos of our country has indeed influenced the development and the evolution of the Office of the Ombudsman.

If I were to identify the main feature of the political culture in Sri Lanka may be for the last 20-25 years, I would say that it is an obsession with executive convenience. Our political leaders are the people who frame our laws and indeed our bureaucrats are, in my view, excessively concerned with convenience for the executive. This is not only with regard to the Office of the Ombudsman but with regard to larger issues as well. One of the reasons as to why I am so frustrated with the whole constitutional reform project of this country is because I feel a number of important parts of the constitution (Chapter on Fundamental Rights, other provisions with regard to various institutions and offices) have been drafted by people who have an executive convenience mindset. For the benefit of

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our Canadian Ombudsman I would like to give three examples, which she might find rather surprising. Under the three Constitutions, drafted since Independence (including the one that is now proposed by the Parliamentary Select Committee), there is no judicial review of legislation. A law once passed cannot be challenged before the courts for unconstitutionality. We have a provision which, in my view, is a world record, which validates all existing laws, even though they violate the provisions of the Constitution and the Chapter on Fundamental Rights. If a comparison is made between the restriction clauses in the Chapter on Fundamental Rights and the Canadian Constitution's restriction clause, you will see that it is so weighted in favour of the executive, that it demonstrates this argument that I am trying to make. Our laws and institutions are framed with executive convenience in mind.

Secondly, a lot of lip service is paid to good governance. The UNDP, in particular, has been referring a lot to it in the last couple of years. We talked about accountability, transparency and anticipation. Our political culture, has a culture of authority, and a culture of secrecy, as opposed to a culture of justification, and a culture of transparency. I am making this point because I think we need to view the Office of the Ombudsman, and the laws that set up the office, and the whole attitude towards the strengthening the Office of the Ombudsman, with this political culture in mind.

The other point that I would like to make is that our Ombudsman is called the Parliamentary Commissioner for Administration. I think Dr. Tiruchelvam spoke about the debate about the Law Commission. Both he and Professor Peiris were on the Law Commission when it was debated as to whether the Ombudsman should be independent of parliament or whether it should be an agent of parliament or work with parliament. The decision to link it with parliament is perhaps unfortunate in the context of the way in which parliament as an institution has evolved in the last 20 years, with disrespect to Mr. Hakeem, Mr. Sambandan and Dr. Wijeratne who are distinguished parliamentarians. The institution of parliament has, since 1977, ceased to be the main focus of political deliberation and debate. The institution has become devalued for a number of reasons, the Executive Presidency being one such reason. But also because of this dangerous notion that has gained currency in Sri Lanka that with the system of proportional representation, MPs are somehow not important. It is the political parties that they represent which are important. This has contributed to the lack of independence, lack of motivation, and lack of commitment on the part of the Members of the Parliament. They

are ultimately ambassadors for political parties, rather than the representatives of the people. And, indeed, in our set up Members of Parliament do not have the freedom of conscience: if they are expelled from their parties, they can be expelled from parliament. All these reasons have contributed to the devaluation of parliament as an institution, and has somehow served as a disincentive for MPs to be independent and robust in their performance. This has a bearing on the Public Petitions Committee, the Committee that links up with the Office of the Ombudsman.

Professor Bastiampillai has been particularly efficient with regard to the production of the Annual Reports. So far he has produced three or four Annual Reports. It is, however, very significant that there has never been a debate in parliament on these reports. I have often asked him why an Opposition MP does not raise the issue of the Annual Report in Parliament. The Speaker can be requested for a day to be assigned so that the annual report could be debated and discussed, so that some of the problems and the difficulties in his reports can be presented to parliament and discussed in Parliament. Professor Bastiampillai in his reports has highlighted a number of very important issues. For example, the lack of resources and the lack of co-operation on the part of Ministers and the Attorney-General's Department. The Public Petitions Committee has a vital role to play to ensure that these reports are publicised and debated in parliament. I have been informed that sometimes there is a problem of obtaining a quorum for the meetings of the Public Petitions Committee. The point I am trying to make is that you have to look at the larger picture: the Constitution, the mindset of the people who frame our laws, and also the institution of the parliament for a reality check on the Office of the Ombudsman.

Another problem is that there is a lack of political will to improve and strengthen the Office of the Ombudsman. Let us be frank here and look at it from the government's point of view. The government has introduced an amendment in 1994, so they have done something to strengthen the Office of the Ombudsman so I do not think there is no pressure on the government to do anything further. They have stuck to their election promise. The Opposition, I think, has failed to perform not only in terms of demanding that the Ombudsman's Annual Report be debated in the Parliament, but even in pressing the Government for reform. Because of that, there does not seem to be a real likelihood that there is going to be any significant changes to the Ombudsman law. The only hope is that in the run up to the national elections, which are due later this year or early next year, political parties might feel motivated to address the issue of strengthening human

rights, and include some concrete proposals in the manifestos. I think that is what civil society have to hope for and, perhaps, press for. The Office of the Ombudsman, and indeed similar institutions like the Human Rights Commission, have failed to live up to the expectations. As a result, fundamental rights petitions have over-burdened the Supreme Court of the country, a lot of people are struck by the fact that the Supreme Court has to deal sometimes with cases which involve very minor issues like transfers and appointments. One would have thought that the Office of the Ombudsman and the Human Rights Commission would be dealing with this. This has created its own set of problems. It is important to note that the Supreme Court is viewed by the government today as a controversial institution. There are all sorts of interpretations as to why the Supreme Court is asserting itself in the fundamental rights realm. One of the things that we are extremely concerned about is that there is going to be a strong likelihood that the person who should be appointed the Chief Justice will not be appointed and someone who is viewed more "executive friendly" is going to be appointed instead. Now you can see the pressure: if the Office of the Ombudsman, and the Human Rights Commission will not perform and the Supreme Court gets caught up as the sole institution which has to stand up to executive redress, grievances etc. This then it creates its own set of problems, which is particularly unfortunate.

With regard to the Office of the Ombudsman, I would like to throw out some ideas for discussion. I was very interested in what Mr. Rauf Hakeem said. In his view, the fact that the Office of the Ombudsman is not very high profile is one of the reasons for its success. I think that is an important point which we need to consider. I was going to argue exactly the opposite. I am interested to hear what the other members of the audience would like to say. Ms. Siriwardena in the paper that she presented at the seminar last year organised by the CPA stated that the office of the Ombudsman lacks visibility and stature. This is something which we have to address in our discussion. Very few people know about the Office of the Ombudsman or know what the powers of the Ombudsman are. The Ombudsman has had problems about even publishing leaflets advertising what the Ombudsman can do. I think it is very important that perhaps the Ombudsman establishes linkages with not only parliament, but also civil society groups and the media. The Public Protectors Office in South Africa uses the media very skilfully to raise awareness about what its Office can do. I would suggest that perhaps the time has come for the Ombudsman to adopt slightly unorthodox, by Sri Lankan standards,

strategies: for example, releasing his report at a press conference. Instead of just sending it to the Speaker, sending it to parliament that he becomes a little bit more pro-active. At a press conference he could discuss the substance of the report, so that the press can take it up independently of parliament.

The second major drawback, is resources. Ms. Jamieson said that she visited the Ombudsman's Office. I did so a couple of weeks ago. I was really surprised and shocked at the lack of resources and the conditions under which the Ombudsman and the staff in the Ombudsman's Office have to work. According to the presentation made by the Swedish Ombudsman last year, she receives much less complaints than our Ombudsman. But she has eight full time lawyers working for her. This is in addition to the fact that she enjoys much more powers. She can demand access to confidential information and government documents etc. whereas here our Ombudsman has to manage with much less staff. I believe he has only two staff grade offices, 17 members of staff, 7 of who have to do the administrative work, clerical work etc. The Ombudsman's office has no computers. Everything has to be done with very limited resources. There is a problem about the staff in the sense that the staff is seconded from the public service. The staff is not specially trained and are not committed to the Office of the Ombudsman and the work that the Ombudsman does. There is no provision for investigative officers, people with special training and expertise in how to look in to problems the citizens might have with regard to the public service. Thus, lack of resources is a major problem.

One of the ways perhaps with dealing with this issue is to allow the Office of the Ombudsman a certain amount of discretion and independence to raise funds. At present, the Ombudsman has to get permission from some middle level official in either the Finance Ministry or the Presidential Secretariat before he can even make a serious purchase of any equipment of whatever. This is very unsatisfactory. Looking at the National Commission on Women Bill, which is due to be taken up in parliament soon, the framers of that piece of legislation has provided for a special fund to be administered by the National Commission on Women, to which funds, grants and donations can be received. We might have to think of some mechanism like that. The Office of the Ombudsman can also receive funds, with appropriate safeguards, auditing etc. This might be one way of strengthening the Office of the Ombudsman.

With devolution of power, obviously regional Ombudsmen is an imperative or “special issues Ombudsman” with regard to consumer protection, language rights, rights of senior citizens is necessary. A number of complaints received by the Ombudsman relates to pensions. Standard forms or documentation to assist a person with regard to filing a complaint before the Ombudsman, special staff to assist the complainant are some of the possibilities. There are many improvements that have to be introduced. It all boils down ultimately to lack of resources.

With regard to finances, I just want to give you a couple of statistics, which would illustrate the problem. From the figures I have got, the Ombudsman’s Office had a recurrent expenditure budget of a little more than Rs.3 million in 1998. There was no money for capital expenditure. In 1999, the recurrent expenditure budget was increased to a little over Rs. 4 million, which is about US\$. 58,000/-, and the capital expenditure was Rs5000/-, that’s about US \$75/. I wonder what item of capital expenditure can be brought with \$75/. If you look at the figures you will find that 60% of the recurrent expenditure goes to salaries and the balance goes on rent and basic communication costs etc. This shows the priority that political leaders in this country have given the Office of the Ombudsman.

Another serious defect in the Ombudsman law, is section 11 of the Ombudsman’s Act which excludes a number of issues and persons from the scope of the Office of the Ombudsman. Some examples are: the conduct of Ministers and Deputy Ministers, all appointments, transfers and dismissal of public officers, any matter relating to the Public Security Ordinance, which, as you know is a part and parcel of the legal regime of this land. The only exception is where the Ombudsman feels that even with these matters, the complaint amounts to an infringement of a fundamental right. Fortunately the Sri Lankan Supreme Court has interpreted the fundamental rights provisions, particularly the equality provision, very broadly. Anything arbitrary would constitute a violation of the equality clause. I think Professor Bastiampillai adopts a similar broad approach, to the interpretation of what is an infringement of a fundamental right. This way he can expand his scope of mandate as much as possible.

In conclusion, I would like to draw your attention to some provisions of the South African Public Protectors Act, to show you how broad the mandate of the South African equivalent of the Ombudsman is. The Public Protector in South Africa is empowered to

look into mal-administration in relation to the affairs of government. This mandate is very loose and very broad. Improper conduct by a person performing a public function, and also very interestingly, capricious, discourteous, or other improper conduct or undue delay is included. The Sri Lankans in the audience would agree that if a similar provision were to be introduced to Sri Lanka, there would be more work for Professor Bastiampillai. So there is scope for amending the law, to widen the mandate of the Office of the Ombudsman.

The other major problem is the whole issue of enforcement power. The problem about enforcement is that when the Ombudsman gives a determination, there is no guarantee that the determination will be enforced. The Public Petitions Committee, in my view, has not been asserting itself adequately in this matter and has created a big problem. If you look at the South African Constitution, the Public Protector is not only empowered to report and issue a determination, but to take appropriate premedial action. We need to discuss this issue. Do we want the Ombudsman to be able to take premedial action? I understand the British, European tradition is not to give the Ombudsman actual enforcement power. He/she reports to parliament and parliament takes necessary action to ensure enforcement. But given the failure of the Public Petitions Committee in Parliament, I wonder if one should rethink that sort of conventional and traditional approach towards enforcement.

If I were to sum up, I think there is a real need for amendment. The Act needs to be amended in order to effect some of the changes I have just outlined. I would again like to make some suggestions. Would it be possible for the Ombudsman to adopt some new strategies, which are not contra the Act but might be outside the Act? Can the Ombudsman try to bypass some of the usual Government bureaucracy with regard to obtaining funds. The Ombudsman mentioned that CIDA had helped him to publish some literature on the Office of the Ombudsman.

Secondly, the Ombudsman has to be pro-active in forging links with civil society and the media, and not concentrate solely on the Parliament, the Speaker and the Deputy Speaker.

Thirdly, it seems necessary to go direct to the people, to civil society, to the consumers and talk about his/her problems.

Fourthly, cannot the Ombudsman initiate investigations on his own? I do not think there is any bar to that. The convention so far is that the Ombudsman does not do that. In Sri Lanka the scope for creativity is limited. There is no substitute for law reform. But civil society, NGOs, and academics in order to ensure the importance of the Office of the Ombudsman and the problems he is facing, is made a major issue in the run up to the next national elections.

Discussion

Rauf Hakeem, MP (Chair)

One obsession Mr. Edrisinha seems to have is with the term "executive convenience." He also referred to a culture of authority and secrecy, which I heard for the first time here. Taking the behaviour of political parties, and MPs as merely acting as ambassadors of their parties, I must agree being a party member myself, that the culture in our constitution is to give pride of place to political parties. Long gone are the days that the MPs were able to exercise their conscience in parliament.

Then we also had some daring suggestions made by Mr. Edrisinha. I would dare Professor Bastiampillai to take those challenges and do something. The Ombudsman certainly enjoys tenure of office, and security of office. He can come out of the traditional trappings of the Ombudsman, and use press conferences etc. to adopt a more visible profile. I was misunderstood when I spoke about the low profile of the Ombudsman being useful in enhancing its efficiency and usefulness to society; I meant it in a different context. With regard to the work of the Ombudsmen all over the world, in their approach to conflict resolution, there is no publicity given to individual cases purely because no party wins or no party loses. The resolution of disputes is much easier when you have to adopt persuasive and coaxing methods for parties to come to an amicable solution. I did not mean to say that to discuss the generalised comments about the office of the Ombudsman through the media would not be useful. That certainly is useful. I would now like to invite the audience to come up with

Professor Bastiampillai

I have not been conventional. I have been unconventional and unorthodox, because I have found that it is not forbidden. I can be removed if I was physically and mentally unsound, but not if I act in an unorthodox manner. Although I have resorted to them, I have not publicised them.

Question

I would like to take up the issue of initiating action by the Ombudsman. Would there be any legal barriers to his initiating any issues? In relation to the Swedish Ombudsman I

understand that it is included in his mandate. What is the position in relation to the Sri Lankan Ombudsman? What is the position in Canada?

Professor Bastiampillai

I have initiated action when I have found there has been abuse. I have called up offices and of course there is a clause of secrecy. I do not even like to reveal facts to researchers. But I have initiated action and it is not forbidden.

Rauf Hakeem

I have one question. Do you investigate into grievances suffered at the hands of local authorities and Provincial Councils?

Professor Bastiampillai

I have certainly dealt with Pradeshiya Sabha, and other local authorities like Municipalities and they have been amenable. Dealing with Provincial Councils have been rare as they have a Provincial Public Services Commission. They have not brought issues before me.

Rauf Hakeem

After the Indo-Lanka Accord and our experience with devolution, I certainly agree that there are Provincial Public Service Commissions. But when it comes to disciplinary control and other issues concerning public officials you are certainly not empowered to go to that province. But can grievances vis-a-vis the citizen and the Provincial administration be taken up?

Professor Bastiampillai

If a public officer appeals to me, if I understand it as a violation of a human right, I interpret it so and put it across to them. When a wrong is done, there is a right violated.

Ms. Nimalka Fernando

An important issue which must be recognised is that when we appoint commissions or certain offices in order to strengthen the human rights processes in society, most often I have seen in Sri Lanka and also in other countries, these institutions are established in

order to answer the international community's questions with regard to the existence of these institutions or the non-existence of the institutions. If you take Sri Lanka, for example, a task force relating to human rights was established, then it become a Commission of Human Rights. I agree with Rohan. To some extent these institutions do not take root in establishing new political cultures or new rules and new environments with regard to human rights. Human rights should seep into the parliamentary and executive processes. I see that it has a very problematic area with regard to the established Language Commission for instance. We have very good institutions and the substance is good. But the processes are just treated like a government department. You have been quite an experienced person even before taking up the post. What kind of environment should we create in the public discussions, and in the minds of the people in this country who continuously face violations of all sorts? From your experience how can you promote a public discussion with regard to the right consciousness that should be created in our society in order to make your office more effective and which could also then bear pressure on the governing processes in this country?

Rauf Hakeem

I would like to comment on what Ms. Fernando said. With regard to the mandate of the Ombudsman, the legislation refers not simply to the fundamental rights recognised by the constitution. It embodies the entire human rights realm that we see in the international covenants. Although our Fundamental Rights chapter does not recognize some of these rights, the Ombudsman certainly has not stopped from going into the wide areas.

Professor Bastiampillai

While I have dealt with such issues, my problem is that it can only be done in a limited way. People do not come and openly say. I cannot do advocacy. The person himself has to complain that his rights have been violated.

Dr. Nissanka Wijeyaratne

It is necessary to ensure that those who did not agree with the party would not be pushed out because a safeguard was necessary against frequent changes of governments. In our countries, the quicker the governments go, the better it is for the bureaucrats, and a good bureaucracy is better than a bad parliament. Now in Sri Lanka we have a problem. We cannot distinguish the difference between the government and the State. People do not

have the courage to adjourn the government's decision because it can be construed as an attack on the State itself. In most countries, the origin of power was Governance. And it was good governance that was essential. That is why in ancient Sri Lanka and India, we have the principles "Dasa Raja Dharma" to control the executive. In Japan, the famous 16 articles said how good governance should take place. Parliamentary power grew up in England only in the 17th century. The judiciary itself took a long time to become independent and criticise the state. More often than not they became the arm of the state to enforce punishment.

In Sri Lanka we have had conflict sometimes in the judiciary and the executive. The judges themselves have been very careful not to tread on the executive's power. The parliament too has become the main subservient. Under the 1972 Constitution the entire bureaucracy was made subservient to parliament. Now there is an attempt to divide the power of the Public Service Commission and make it independent.

With regard to the judiciary, there is a chance that seniority may not be observed, and a more "amenable" Chief Justice be appointed. I think the greatest problem arises from the fact that the Ombudsman, who has to look at the administration, has been so far separated from the administrators themselves. The government servant, unlike a doctor, does not keep a record of the reason why he makes a decision. Judges keep a record of why he makes decisions. A bureaucrat keeps it to himself. And perhaps what the politician whispers in his ear is known only to him. The government servant making a record has to do so comprehensively, and it has to be available to the Ombudsman.

It was mentioned that the Ombudsman lacked resources. Finding it must not be so difficult. If someone was to send a contribution requesting it be made to a fund, that would be a good start. And perhaps generous donors would add to it.

The Ombudsman has to remove the veil under which he now exists. He must be visible and known to the public. He must address the public through the press occasionally. So the public will come to know what is going on his office. After all, no government will want an independent Ombudsman. And no opposition would want an independent Ombudsman because he will be a hindrance to them when they come into power. He not only has to keep the government and the administration, but also the future governments may become prone to the same weaknesses.

One thing lacking here is the faith between the administration and the Ombudsman. The bureaucrats should meet the Ombudsman. The parliamentarians too should meet the Ombudsman. They must know what is going on. And the Ombudsman will know what is existing in the minds of the public, because they are the victims. This is not done. I think the time has come for civil society led by academics to focus attention on the need for independence, and to raise awareness of this institutions.

Mr. Sambandan always used to point out that the government and the administrations are not sympathetic to the minority point of view. That is quite correct, because there has been a gulf. Ms. Jamieson referred to the multiplicity of the language of a multi-cultural society like Canada. I do not know whether those dialects are accepted as National Languages in Canada. But certainly the English language has become universal. The Minister of Local Government will also take up the question whether the Provincial Councils could refer their problems to be looked into by the "grievance friend." Municipalities and the Urban Councils which come under the Provincial Councils can bring up their problems. The more these problems are looked into and are sorted out, the better it is for our country.

Rauf Hakeem

I disagree with Dr. Wijeyaratne about the funding options available for the Ombudsman. I feel it is the primary duty of the State to raise the level of finances that are made available to such an important office. I have told Prof. Bastiampillai that he should meet some parliamentarians before the budget, particularly regarding his votes. Early action has to be taken. We parliamentarians who are gathered here see this as extremely unfortunate. Particularly, the vote on the President and the Supreme Court Judges, Attorney General's Department, Languages Commission, and various other important Organisations are taken up just on one single day with the President's vote. So it is impossible for Members of Parliament to focus attention on issues concerning the Ombudsman's vote. We have to find a way of divorcing the Ombudsman's Office from other exalted offices; otherwise the attention of the Members do not tend to focus on this Office.

Comment

One comment relates to the secrecy provisions relating to the Ombudsman. I heard Mr. Edrisinha say that the Ombudsman should be a high profile personality, where he is visible and heard. I do not know to what extent the secrecy provisions inhibit the effective functioning of the Ombudsman. I certainly do agree with Rohan that the Ombudsman should be more visible, and his efficacy should be seen and heard. That would certainly promote the importance of the Office of the Ombudsman in the thinking of the public. It would also encourage the public to resort to the Ombudsman whenever there is a need to do so in respect of their grievances and it would also add to the deterrence on wrong doers in administration. We very seldom see or read in the media about what the Ombudsman has done, or what he is doing, or the sort of complaints that come to him.

The other point that Rohan made is that there should be some rethinking on the areas that are excluded from the authority of the Ombudsman. The present law covers a fairly large area where the authority of the Ombudsman does not extend.

The third aspect which in my view that needs to be looked into is the enforceability of the Ombudsman's decisions/findings. When a petitioner goes up to the Public Petitions Committee of the Parliament one does not know what happens to it next.

Professor Bastiampillai

Through the Minister concerned, or the head of the Department, the petition goes to the Public Petition Committee. The Minister concerned could initiate action if he is interested, if he knows very well a violation of human rights has taken place. On the other hand, my colleague in England said that his powers are strengthened because the Public Petitions Committee takes it up and asks the Minister concerned why a particular decision has not been executed. While nobody here has queried so far, President has interfered on several occasions.

Comment

As a matter of routine, one must ensure that there must be provisions which enable the findings of the Ombudsman to be implemented. At the moment I do not think that really

happens. It goes up to the Public Petitions Committee and I do not think anything happens beyond that. That is another matter that needs to be addressed.

The next question is the whether the Office of the Ombudsman, either by the appointment of regional Ombudsmen or Deputy Ombudsmen, should be more accessible to all people in all parts of the country. This is another matter that needs to be looked at in reforming the law relating to the Ombudsman.

Ms. Roberta Jamieson

First on the question of enforceability, this is a live topic of debate on the Ombudsman's community internationally. I think it is a rare case when the Ombudsman is given the power to enforce any decisions or findings. There is provision in some of the statutes now, in Argentina and Peru, for particular cases for the Ombudsman to launch a court case, to have their determination enforced. The reason why more Ombudsmen have not gone after enforceability, as I have heard it over the years, and that is something that I have subscribed to personally, is that empowering an Ombudsman should not replace the responsibility on the part of the government to do the right thing. You cannot create political will to do the right thing by giving the Ombudsman the power to make the government behave appropriately. You can only do that once or twice as an Ombudsman. I think it is important as this debate on enforceability goes forward, I do not say there is a yes or no answer, because that is a live question. That has always been my view.

Public-Sector Trade Unions and the role of the Ombudsman

Vasudeva Nanayakkara, MP (Chair)

Honourable Roberta Jamieson is a well known Ombudsman, and we welcome her heartily and are honoured by her presence. This is a gathering of trade union related people, who are naturally interested in the subject. Today's discussion is on the subject of the Public Sector Trade Unions and the role of the Ombudsman.

I would first like to say a few words about our main speaker. Ms. Roberta Jamieson has been working in the field of conflict resolution and dispute settlement in a non-adversarial manner. She has received many awards from national and international bodies for her achievements and performance. She has had the rare honor of being invited to the Canadian Parliament, a committee of the Canadian parliament on this subject. And she has done an epoch-making work in that part of the world which has set a kind of global process for all countries to follow in the manner of resolving matters. She has had a Doctorate of Law conferred on her by many universities in Canada and outside for the same subject and her role played in the actual resolving of such disputes. Her presence with us, and in the country for a few days would certainly enrich our experience. I have read through the reports of our Ombudsman presented to parliament. However, our Ombudsman's complaints have not been given due attention by the Members of Parliament. I feel that there is much to communicate among ourselves as those engaged in this field. Particularly the comments made by our Ombudsman in his report are of great value and, must be discussed with an international personality like Honourable Roberta Jamieson for the purpose of explaining our conditions, in developing countries and the kind of dispensing of justice that flows from such conditions, even in relation to the work of the Ombudsman. There are other fundamentals with which we are most familiar and, therefore, these fundamentals will always guide us in that idealism. Nevertheless, given the reality of the conditions in which we live we have the constraints which our Ombudsman has complained about.

Ms. Roberta Jamieson

If you are anything like our union leadership in Canada, you have been active in labour advocacy but also advocated strong leadership in the field of human rights over many

years. I would like to thank our chair and host for the wonderful introduction he made, the Law & Society Trust and the Governance and Institutions Strengthening Project as well as my colleague, Professor Bastiampillai, for inviting me today.

As many of you know, the fundamental purpose of an Ombudsman is to resolve complaints brought by the members of the public who feel that they have been treated unfairly by government agencies. From around the world this can range from a complaint for delay for receiving a pension payment to human rights violations such as police speeding and torture. Each country creates its own institutions according to its traditions and realities but there are some common elements for an Ombudsman to be recognised internationally. Probably the most important is that an Ombudsman must have a high degree of independence to carry out investigations. He/she must be protected from political interference and able to hire his/her own staff, and run the office as he/she sees fit. The service the Ombudsman supplies is free, easily accessible and confidential. The process that an Ombudsman uses should be flexible and informal. An Ombudsman is not limited to the legal interpretation of fairness and take all factors in taking to account in arriving at a conclusion at the end of an investigation.

The object of the Ombudsman intervention is always to resolve the problem the member of the public brings. First you try and resolve the problem; if necessary, carry out an investigation, and finally prepare a report. If the Ombudsman finds something is wrong and that someone was treated unfairly, we do not have the power to force any one to take corrective action. Instead, we try to persuade a resolution and we use media strategies in other ways to achieve resolution of the issues. If I find that the government has treated someone unfairly, I may recommend financial compensation, changes to the procedure and policy and even a change to the law. Some people think because we investigate complaints about the public service that I find problems and problem makers under every rug. In fact, very often I find just the opposite: that public servant do their task honestly, diligently, competently and without bias. Even so, having an independent office like the Ombudsman which can investigate complaints offers the public the reassurance, that even if they were unhappy about the results they have been dealt with fairly. If the Ombudsman finds that someone has been treated unfairly the recommendations that an Ombudsman puts forward gives governments and public officials an opportunity to correct errors and to put matters right. Today everywhere in the world people are

demanding that governments be accountable for their day to day action. An Ombudsman is one of the key ways that people can hold the government accountable for its action.

An Ombudsman must be impartial, and is neither an advocate for the person complaining, nor an apologist for the government. Instead, we must act between both parties. The government and the public must be treated with the same respect, evening the balance; then solutions can be found. Without an Ombudsman, injustice and unfairness may go without redress, and people are then forced to go to court for action. If your country is anything like mine, litigation costs a lot of money and it is a long wait at the court room. The Ombudsman is there for everybody to see to justice for their treatment from government.

I believe your unions could perform a valuable public service by co-operating with your Ombudsman, in an educational campaign amongst your membership on the importance or providing your Ombudsman with political support. I believe you would render a great service by encouraging your members to make their families and neighbours knowledgeable about the Ombudsman when they have complaints against government organisations. The Ombudsman is a force which furthers a primary objective of labour unions. The objective is creating greater equity in society. The more unions do to promote equity in general the more successful they would be in establishing equity for their members as employees. As many of us know the same people who raise eyebrows at any discussion on the rights of workers are likely to be the same people who are intolerant of people different than themselves or who may abuse their positions of power. It is small satisfaction for workers to find equity in their employment only to find inequity and discrimination because of culture or religion or their relationship with their government. To have equity, be it equity for women, workers, or to access the court, I believe that it is that basic understanding which has attracted labour unions internationally to promoting and protecting human rights. I believe it is the same understanding which can induce labour unions to support the Ombudsman in their own interest. If we were interested in creating a human rights culture, in any of our societies we have to be aware that we ourselves may be carrying some unfortunate baggage that we need to shed. Take the sensitive issue of seniority, for example. It is only fair that people who have dedicated their working lives to a company or agency are clear to pass for all those who follow behind. It is only fairer that they should have privileges ahead of those who have joined the enterprise. And is only fair that people who have been

excluded from access to decent employment but who have talents and skills to offer in making your country a better place should not continue to be excluded from prosperity, simply because an established order is unwilling to make space for them.

What do we do for efforts to be fair in each area and find themselves in conflict? The question is how do we strike a balance? Take the highly subjective notion of merit. Surely it is fair that those who are meritorious are rewarded. Most of what we have been accustomed to describing as meritorious is, at least in my experience in the world deeply rooted in Euro-centric notions, designed to favour patriarchy and class privilege. In other words, it is easier to be as meritorious if you subscribe to the dominant culture. Is that fair? These are just two issues where the traditional quest for labour rights can cross the centreline to collide with human rights in a rapidly changing world. In my view, human rights around the world - indeed the collective future - will depend on our ability to break out from outdated patterns of thought which arise from the exploitation of one group of human beings for the benefit of others. It is to contemplate if we put people first. If we focus on equity, if we seek human rights for all we will be in a better position to deal with the big questions. We must work together to build an equitable society and to frame all of our relationships in terms of equity. We must also work together for a society which does not allow its most fundamental decisions to be based on the bottom line. We will have to ask the question whether we have to make social decisions with the bottom line as a determining factor or economic decisions with human well-beings as our prime well being. I believe we each can use our positions and our power to increase equity and fairness for all people. I recommend to you a closer working relationship with my colleague, the Parliamentary Commissioner for Administration for Sri Lanka and a fellow Ombudsman. Despite the distance that separates our offices, we are, as Ombudsmen, united by a common sense of purpose and values, and objectives. I believe these are the same embraced by your unions. Imagine if Sri Lanka could be the first country in the world in which labour contracts contain a clause reaffirming the right of public servants to file complaints to the Ombudsman without any retaliation.

In summary, the availability of an effective Ombudsman is not a sign of poor government but rather, of a healthy democracy. The existence of an independent Ombudsman is evidence of a conscience that government should be accountable for its administration. By having access to an effective Ombudsman the public's confidence in public institutions and the public service is increased. By ensuring that the public has access to

an Ombudsman the public service also protects itself against unjustified complaints. Public servants themselves are frequent users of the Ombudsman's office. All of this is beneficial to your members.

I suggest that you consider holding workshops or conferences for particular segments of your membership who may be vulnerable in the public work places, to see if there are ways of creating equity for them. I suggest you consider taking leadership, involving non-governmental organisations, community groups and informal leadership in meeting equity challenges. All these things have been powerful resources for me and my fellow Ombudsmen and I hope you will find them useful allies. It would be taken as a sign of the maturity and professionalism of your own Trade Unions, if they take the initiative to build a human rights and fairness culture.

I welcome you as allies as friends. I wholeheartedly add my encouragement, and support for your efforts.

Professor Bastiampillai

As the Chairman pointed out, I have been lamenting and moaning for the last few years as Ombudsman. I have hardly the resources that an Ombudsman in the other parts of the world has. Nevertheless, I try to do my best with the limited resources, at least to satisfy a small group of people who appeal to me.

With regard to trade unions, I have had the opportunity of addressing the Jayces on two occasions when they invited me. I would tell you why I am here; what my role is, and what I can do to help you in your campaigns and straggles for justice and fairplay. I have gone to the Hill Country and spoken in Tamil to some of the members of the Tamil speaking Trade Unions. In the same way I have also spoken to the other side, that is the employers, at Rotary Clubs, Lions Clubs and told them why the Ombudsman is there and what he does. You may like to know whether the Ombudsman in Sri Lanka is accessed by the Trade Unions. Only a very few come to me. There may be certain members of your unions who have suffered a grievance, who are suffering from an unfairness that has been caused to them. In such cases you can very well direct them to me with their complaint. Despite the limited resources available to me, very often a case taken by me is settled within 4-6 months.

The Chairman made a very good suggestion about mediation boards. I told him that I would like to interact with them and request them to act as intermediaries between me and you before you come to me. I have found in the course of inquiry, many employees come with the complaint that some wrong has been done to them. But they little realise that a right has been violated. The moment you know your rights then you can very easily approach the Ombudsman. Notwithstanding anything in the legislation, I can investigate into any allegation very easily. In this year's report I have mentioned that I am not blaming the employees for not knowing their rights. I am blaming the employers; they do not know even the rights in the Constitution. Some of them do not know the enabling legislation. They do not even know what the Ombudsman is supposed to do even when they complain to the Ombudsman. In this context, I can only repeat what my colleague Roberta said. You can at least create awareness of the Office of the Ombudsman - a culture of the Ombudsman. This can be done and is important if we are to have equity in management, and equity in the running of establishments.

I must, at the same time, not rouse expectations which cannot be delivered. Due to the absence of an understanding of the Ombudsman some officials are still not very willing to carry out the Ombudsman's recommendations or determinations. We must try to get them to understand the Ombudsman and respect the Ombudsman and once the Ombudsman has taken a decision, act in compliance with it. The Ombudsman gives a wonderful opportunity for them to put forward their case. The employer can say why the employee's demands are unreasonable. They do not even know that a wrong has been done. Because the Ombudsman has no mandatory power, and because it is recommendatory, they keep quiet. In this connection, may I mention that after reading my first year's report, the President wrote to every Minister requesting him/her to pay attention to the Office of the Ombudsman and to implement his determinations.

A copy of the determinations is referred to the Public Petition Committee of the Parliament. If it is not implemented and if an appeal is made, I always send the entire determination to all the Members of Parliament, plus one copy to the President. While the President has acted, Parliament has not.

Mr. Vasudeva Nanayakkara

Thank you very much, Professor Bastiampillai. Your presentation has informed us about the numerous possibilities before us, and also the constraints under which you work. But in all the circumstances, the potential still remains and this can be developed.

Question

Since 1972, the Constitution provided the authority regarding the matters of the government servants which is now vested with the Cabinet. The 1978 Constitution continued in the same way. Therefore, much of the wrong done to us is done by the Cabinet of Ministers and their divisions as workers in the government sector. And often the circulars are issued by the government, they are violated by government departments or a government institutions. In such instances can we bring this to your notice for redress? We do not often complain to you because you have no authority to enforce your power.

Professor Bastiampillai

What happened in 1972, I cannot carry out investigations. My powers relate to events from 7 September 1978. What happened since then I can carry out investigations. If the wrong is done by the Cabinet, a Minister or a Member of Parliament, I cannot carry out an investigation. For those in the Government service there is a Public Service Commission to see to their grievances. I don't know how powerful that is.

If one individual can point to another and say that person has been treated unfairly, I can look into that, and carry out an investigation. I can find solutions for that.

Can there be a conflict between human rights and labour rights?

Ms. Roberta Jamieson

I tried to give you two examples as to how there could be a conflict between human rights and labour rights. The first example is what you do when seniority rights meet the rights of people. Let me give you an example from my own society. Seniority is an international labour right, highly regarded among labour unions. On the other hand, there are so many other people who, by reason of racial discrimination or otherwise, have been kept out of the labour force. How do you figure out what is fair when the rights of those

who have been kept out of the labour force come into conflicts with the rights relating to seniority? These questions are very difficult to answer. We need to come to grips with them in the broader human rights landscape.

When does an Ombudsman deal with these questions? When all avenues of appeal have been exhausted, if you go to the Grievance Settlement Board in Ontario, and if it is still not settled then you can appeal to the Ombudsman. But if there is a collective agreement, and if there is a union dealing with issues, then you must go there first. If there is an Appeals Board then you must go there. But then you can always come to the Ombudsman, but only about the Grievance Board, and not about your union. In my case any way you can only come to the Ombudsman about what the government organisation did. It is the last stop. That is why our office is called the "last resort for fairness."

Question

I am from the Government Medical Officers' Association. How are the Provincial Councils which are in our constitution structure affected your duties?

Professor Bastiampillai

I have the power to carry out investigations about those in the Provincial Council. But if they are in the Public Service, their appointments, their dismissal and disciplinary actions should go to the Public Service Commission.

There are other cases. If one has undertaken a contract, if there has been an unjust caused while land is being distributed, they can come to me. I can call those who are initiating the action. I can carry out an investigation and I can make a decision.

With regard to Provincial Councils, there is a Provincial Public Service Commission. If, however, they are not satisfied with their judgment, there is no scope for appeal. But I have not always been very strict and if somebody has come to me we have looked into their problem.

Question

I have three issues for Ms. Jamieson. I am from the Bank Workers' Association. The Ombudsman said that any offence committed by cabinet Ministers, and if a complaint is made against them, he cannot inquire into those allegations. Is that the position in your

country? If a complaint is made against a Cabinet Minister, do you have the authority to inquire into those things?

Canada being one of the large countries, and with a larger population, roughly how many cases do you get for a month?

In our country we have very little facilities. Although the Ombudsman is appointed to see to the grievances of the people of this country, very little facilities are provided. Is that the case in your country also?

Ms. Jamieson

Three very important questions.

First the authority to investigate actions of Cabinet Ministers. Yes I can investigate the decisions of individual ministers. For example, a minister in law is given responsibility to approve or deny licence to fish. I can look at that. I can see what he/she considered, whether it was fair, what information they relied on etc. I cannot however, look into the deliberations that go on by the Cabinet as whole. So if the cabinet as a whole decides they are going to reduce health care coverage for the public, I cannot look at it whether that is a good decision or a bad decision. But I can look at how they implement the decision. So there are many cases in which I can look at the individual actions of Cabinet Ministers. But I cannot put myself in the Cabinet room when they are making their political decisions as a Cabinet. That's the difference.

I can look at even the actions of the premier, which is the highest office like the Prime Minister of our Province. I can even look at the questions about his office. This is not unusual for an Ombudsman. There are so many Ombudsmen throughout the world who can look into the decisions of individual Cabinet members, including those of the Prime Minister. A word of caution though, the decisions should not be political. It must relate to the administration of government.

With regard to the second question, I receive about 30,000 cases a year. Out of that 30,000, a little more than half are at the right place at the right time. It still takes the time of my staff, however, to deal with every one of those 30,000 people to tell them if they are in the wrong place and, if so, where they should be going with their grievance.

Your last question regarding facilities. At the moment, I have one main office in our capital city of the Province, and six other offices throughout the Province. This is very important to make the service accessible to the public. I brought some reports with me. It would give you details of how much money, how many complaints my office receives. It is well under one Canadian Dollar per person to run my office. I know some of the facilities that are available to my colleague here in Sri Lanka. I can tell you without hesitation that he needs more resources.

In some places my colleagues argue for a percentage of the government expenditure every year, even 1% or ½ % should go to an office like the Ombudsman.

Professor Bastiampillai

I have about 5000 people who come to my office per year. During the last couple of years it has reduced a little, because people have realised that I cannot examine occurrences before 1978. Some did not know the barrier regarding investigations into what the Public servants have suffered. These things were not known to them. But now we have educated them and the cases are now less.

Question

Is the status of the Canadian Ombudsman similar to that of our Ombudsman, in that you have no enforcement power, only a persuasive power? Are there any instances where you made recommendations that the parties concerned rejected it?

Ms. Jamieson

Yes, I only have persuasive power. There are very few instances that the parties concerned have rejected my recommendations. I have been the Ombudsman for ten years, and there have only been nine cases where the government has refused to implement my recommendations. In those cases I can put a special report in front of Parliament and cause a hearing on the case, and open it to the public. It is then upto the public to pressure the Parliament to address the unfairness. But nine cases over 10 years, when we get so many thousands of cases a year, I think that it speaks for itself. Public Servants do not want their unfairness to be subject to public attention. And it is a very persuasive tool, but one that I should use wisely.

There are some countries that have given the Ombudsman the power, like Argentina, Peru, Finland, etc., to take a case to court, to enforce the remedy.

I myself do not want that authority. Because in my view, my job is to be an independent investigator. It is the government's job to correct their unfair action, not mine. I think this is an issue that Ombudsmen all over the world talk about. I think the responsibility to treat people fairly rests with the government. The degree to which they are willing to listen to an Ombudsman, in my country, in my province, I remind the government, that it is about having a healthy Democracy.

Chairman

I would like to make a comment about expenditure. The Ombudsman has received only Rs. 4 million for this year. In Parliament our monthly expenditure is Rs. 30 million. Parliament has sessions 8 days a month, that means Rs. 1 million for one day. I want them to compare the difference between the value, service, and the money.

If there are no more comments and questions, I must say a few words. It is very important that we got this opportunity. Trade unions involved in this discussion are very important. One matter that was mentioned was the fact that complaints are made against the officials of the government or a semi-state body. At the same time, there are trade unions to which an appeal is made to take up this question for discussion in view of the fact that the complaints are arriving in out of the omissions or the commissions of officials.

Officials are the people against whom the complaints are made. The officials are members of the unions. The unions are set up naturally to safeguard and defend the rights of the members of the unions. And, therefore, they have a conflict about their own role. When they have to call upon their members regarding the rights of the citizens, to have the duties owing to the citizen be discharged by the citizen. The multi-national companies cannot be called to do the redistribution of resources in order to ensure equity. Similarly, these being unions which are safeguarding and looking after its members and their rights and grievances, they are not geared structurally or objectively to perform the other role. Yet, we have a task and a challenge which I recognise fully.

It is important and necessary that we open a discussion within our trade unions about this difficult question. The question of how we will function as unions and at the same time

be mindful and caring about the rights that the public service owes to the citizen must be addressed.

We owe our gratitude to Ms. Roberta Jamieson and Professor Bastiampillai, for having participated in this discussion and enriched our own understanding of matters in this field. We thank the participants who have come here and enriched this meeting by their comments and questions. Finally we pay our gratitude to the Law & Society Trust for organising this meeting.