

British and Irish Ombudsman Association

**"Human Rights and the Ombudsman"**

Presentation by

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at the Biennial Conference

University of Warwick

27 April 2007

Our conference title is "*Ombudsmen: boundaries and balance*" and it seems to me that it would be a very fitting subscript to my own presentation, "*Human Rights and the Ombudsman*". In essence, my presentation is about new ways of defining the work that we do, while all the time keeping a close eye on the outer limits of our respective mandates.

But while human rights have "*arrived*", a visitor from Mars might wonder, with justified cynicism, where this new found interest in human rights among ombudsmen had come from. Our alien friend would point out that on his last visit some eight or nine years ago, this conference was consumed with debate about possible threats to the work of ombudsman in the shape of the Human Rights Act, 1988. The fear was that Article 6 of the Convention on Human Rights might throw tried and tested complaint examination procedures into turmoil by requiring ombudsmen and other complaint handling bodies to hold oral hearings of their cases. In reality, minimal changes were required to satisfy the Article 6 test, the panic eventually subsided and life returned to normal.

So what is it exactly that has rekindled interest in human rights? One factor is the, admittedly, slow "*trickle effect*" of the Human Rights Act, 1988 and, in my own country, the European Convention on Human Rights Act, 2003. Second, is the impending establishment, later this year, of the new Commission for Equality and Human Rights in Great Britain and the creation of the Irish Human Rights Commission in 2001 and, some years previously, the Northern Ireland Human Rights Commission. These new bodies, undoubtedly have, or are about to raise the profile of human rights, and let us be honest, do cause ombudsmen and other complaint handling bodies to look seriously at any possible implications for their own mandates.

Developments at European level are also significant. The European Union's Charter of Fundamental Rights formed part of the now failed draft EU Constitution but is, nevertheless, notable for the new focus it brings, in an EU law context, to citizens' rights and, in particular, the right to good administration. Finally, there is the European Court of Human Rights - the guardian of the Convention on Human Rights - which has a constituency of 46 States which are members of the Council of Europe with a total population of 800 million people. The Court has some 90,000 cases awaiting attention, and over 90% of its case load is deemed inadmissible. Against this background the Commissioner for Human Rights of the Council of Europe has opened dialogue with ombudsmen and human rights institutions of the member states to explore whether they might possibly play a role in alleviating this problem. A pilot project was agreed earlier this month which will explore avenues for co-operation among the relevant institutions.

In parallel with these developments, the community of ombudsmen in the United Kingdom and Ireland has been asking some very serious questions about whether they ought to step forward to the human rights coal face. The enactment of specific human rights legislation in both jurisdictions has led to calls for the promotion of a human rights culture. What I mean by this is that firstly, human rights should become part of the process or "*rules of the game*" of government and political life and secondly, that human rights should become part of public consciousness. By contrast, UK and Irish ombudsman legislation seems to be concerned with a narrower set of rules and focused more on procedural propriety (the avoidance of maladministration) as opposed to the protection of basic human rights.

I say that this seems to be the case, but, of course, every day, my colleagues and I grapple with complaints about social housing, health care, disability and social services which not only raise procedural issues about the basic entitlements of individuals to monetary grants and benefits, but also the most profound issues of human dignity and respect. An example is the investigation which my Office published some years ago about payment of financial subsidies to patients in private nursing homes. The investigation uncovered serious maladministration resulting in refunds in excess of €12million to patients and their families and more recently, further maladministration which has come to light will result in further repayments estimated at €1billion. The regulations underpinning the scheme have been amended but significantly, the Ombudsman's report generated a debate about the care of the elderly in Ireland - a debate which is still ongoing.

Despite this and some other once-off successes by my Office, Ireland has a long way to go in establishing a human rights culture. But we are not alone and I

suspect my UK colleagues would probably echo the same sentiment in relation to the impact of their human rights legislation. A recently published report "*Power to the People?: Assessing Democracy in Ireland*" draws attention to the high levels of poverty and inequality in the following terms:

*".....while internationally committed to the provision of social and economic rights, the absence in Ireland of a human-rights orientation in the framing of, and access to, public services exacerbates the inequities which arise from income inequality, which is itself an outcome of political decisions that limit redistribution. Many politicians are wary of enforcing and protecting through law those rights to public services such as health, education, housing or disability services."*

I think this comment graphically illustrates the challenge faced by my Office and indeed, by the Irish Human Rights Commission and other similar institutions. Human rights principles are a necessary part of good public service delivery and, in turn, ought to be within the field of vision of every ombudsman as he or she goes about the daily task of investigating complaints. But, in a sense, we are now beginning to realise that there are some blank pages in the lexicon of maladministration. We need a new entry under the heading of "human rights principles".

To those concerned with linguistic precision the language of human rights can be frustrating. Although human rights are rightly acknowledged as "one of the great civilising achievements of the modern era" (Gearty, "Can Human Rights Survive", Cambridge University Press, 2006), the language of human rights is a case study in constructive ambiguity. Far from always representing a broader and more expansive statement of rights, international human rights norms are sometimes the irreducible and nebulously articulated minimum arrived at by far from consensual processes of international political bargaining. It may, therefore, seem surprising that the world of human rights is so dominated by human rights lawyers whom one would presume to be driven by the precise meaning of words.

While the transformative potential of human rights systems is probably impeded by (among other things) excessive legalism, recourse to the law as a means of vindicating human rights is seen as indispensable by lawyers and non-lawyers alike. My purpose is not to suggest that recourse to human rights will necessarily transform the work of my office or, indeed, the world. Instead, I would like to make an altogether more modest proposal.

In this paper I will argue that there are many ways of vindicating human rights at

an individual and collective level. While vindication through the courts is enormously valuable there are also complementary mechanisms for the protection and promotion of human rights.

This is especially apposite in the case of socio-economic rights where enforcement through the courts gives rise to so much controversy. Without wishing to enter the debate – about whether it is appropriate for judges to issue legal determinations with major cost implications, about whether litigation is an efficient means of delivering social goods, about whether there is a clear distinction between what might be called ‘law’ and ‘policy’ – I start from the position that the international mandate for socio-economic rights is ‘progressive realisation’. That does not mean that the realisation of socio-economic rights can be put off forever. It is an obligation – of an international legal nature – to provide for the progressive realisation of socio-economic rights by whatever means chosen by states bound by that obligation. States must ensure that effective measures are taken consistent with their "minimum core obligations".

The Office of Ombudsman is one element of the institutional framework established to ensure the realisation of socio-economic rights over time. While the indivisibility of civil and political rights and socio-economic rights is problematical in theory and practice there is, perhaps, too much emphasis placed on the divisibility of both ‘generations’ of rights.

My office deals with what would classically be defined as socio-economic rights. However, problems usually emerge from the process whereby such rights are alleged to be inadequately delivered. To that extent, and as I will explain later, my role is often to look at the vindication of a socio-economic right through the lens of a procedural right that might more appropriately be classified as civil and political. The concept of fair and sound administration is, therefore, the ultimate example of practical indivisibility whatever about its other definitional imperfections.

Human rights are the legitimate business of an Ombudsman. This does not in any sense challenge the legitimate and vital role of other institutions in the vindication of human rights but, rather, suggests that the value system protected by international human rights norms binding states are perfectly reconcilable with the formal legal remit of an Ombudsman. It may therefore seem strange that I will go on to discuss the *European Convention on Human Rights (ECHR) Act 2003* – the Irish equivalent of the *UK Human Rights Act 1998* – as adding to the possibilities for vindicating socio-economic rights given its apparent preoccupation with civil and political rights.

It is important, however, to note some significant differences between Ireland and the United Kingdom before proceeding further. We both operate what are called ‘dualist systems’ when it comes to the domestic application of international human rights obligations. In other words, in the absence of some formal legislative act of ‘incorporation’, international instruments ratified by our respective Governments do not become part of domestic law. That is not to say that our countries can behave like ‘global street angels’ ratifying conventions and treaties to make us look good on the international stage while ignoring their implications back home. Quite the contrary, in fact.

In dualist states, the domestic laws must first satisfy the requirements of any international human rights instrument before that instrument can be ratified by the Government. It is not uncommon for a Government to argue that its domestic law goes further than required by the specific obligations of an international instrument. This can – sometimes self-servingly – become an argument against a further act of direct legislative incorporation as a means of perfecting the process of ratification, i.e. that to incorporate might lead to a dilution of pre-existing and higher domestic legal standards or, alternatively, add nothing to those standards.

Even where an international instrument has been ratified but not incorporated into domestic law it usually enjoys what in legal terms would be described as ‘persuasive authority’ and is frequently drawn upon as a source of inspiration or means of bolstering a rationale for some ‘indigenous’ law or policy. This has been referred to by one author as ‘the belt & braces approach’ (Flynn, *Irish Journal of European Law*, 1994).

Fifty years after ratification, Ireland ‘gave further effect’ to the European Convention on Human Rights 1950 (ECHR) by passing the *European Convention on Human Rights Act 2003* which came into effect on 31st December, 2003. This was done in fulfilment of an obligation under the Good Friday / Belfast Agreement and drew heavily on the legislative precedent established by the passing of the UK *Human Rights Act 1998* but with some important differences (see generally: Kilkelly (ed.), *ECHR and Irish Law* (Jordans, 2004).

The critical contextual difference between Ireland and the UK in the incorporation of the ECHR is the existence of written constitutions in Ireland since 1922 and the development of a robust jurisprudence of fundamental rights under the 1937 Constitution (*Bunreacht na hEireann*) since the 1960’s. To that extent, the decision to incorporate the ECHR into Irish law was not nearly as significant as the decision

to do so in the UK, at least in terms of its probable implications for the judicial development of rights protected by the Convention.

It was probably of greater symbolic significance in terms of embedding the ideal of an equivalent level of rights protection on both sides of the border on the island of Ireland although expert commentators agree that it may well bring some added-value to human rights cases being litigated before the Irish courts. So far there is little evidence of such added-value, in terms of actual court decisions, although it is probably too soon to make any definitive assessment of impact (O'Connell, Cummiskey & Meenaghan with O'Connell, *ECHR Act 2003: A Preliminary Assessment of Impact*, (Law Society of Ireland and Dublin Solicitors' Bar Association, 2006)). While the *UK Human Rights Act 1998* was heralded as introducing 'a human rights culture' in the UK it is probably the case that some of the enthusiasts for such an evolution are now much cooler about the project almost ten years on.

So, does the passing of the ECHR Act 2003 have any implications for my role as Ombudsman? Section 2 of the Act creates an interpretative obligation – where possible and subject to any countervailing rule of interpretation – to interpret all legislation in a manner that is compatible with the obligations created by the ECHR and its incorporated protocols.

Section 3 obliges 'organs of the State' which, I presume, includes my own office – where possible and subject to any countervailing statutory obligation – to discharge their duties and functions in a manner compatible with the ECHR. Where organs of the state are found wanting under Section 3 they are essentially committing the tort of breach of statutory duty with all of the consequences, in terms of remedies available to a complainant, that this entails.

Section 5 of the Act provides for a somewhat novel remedy called the 'declaration of incompatibility'. Such a declaration is only available (before the High or Supreme Courts) 'where no other legal remedy is adequate or available' and, to date, none has been granted by the Irish courts. The granting of such a declaration will not affect the validity of the law in respect of which it is granted but the Taoiseach (Prime Minister) is obliged to inform both Houses of the Oireachtas (Parliament) of the making of such a declaration within 21 days, presumably to catalyse the parliamentary process into making a legislative response if such is deemed necessary. A person who obtains a declaration of incompatibility is not entitled to damages but may be given, on the advice of the Attorney General, an *ex gratia* payment of compensation to be calculated in accordance with the standards

usually awarded by the European Court of Human Rights.

I express no definitive or comprehensive view on the extent of the interpretative obligation created by Section 2 of the *ECHR Act* for the interpretation of the primary legislation under which my office operates (the Ombudsman Act, 1980), but let us, for the moment, presume that it is relevant to the interpretation of my statutory remit. At this point let me just remind you that Section 2 of the Act creates an interpretative obligation – where possible and subject to any countervailing rule of interpretation – to interpret all legislation in a manner that is compatible with the obligations created by the ECHR and its incorporated protocols. The Office of Ombudsman is indisputably an ‘organ of the state’ for the purpose of Section 3 of the ECHR Act 2003. To that extent, I see my office as having the same obligations as any other ‘organ of the state’ to discharge its duties and functions in a manner that is compatible with the requirements of the European Convention on Human Rights and its incorporated protocols.

In so far as my office has always existed subject to the 1937 Irish Constitution – although unlike many other ombudsman offices at European level, not explicitly referenced in that Constitution – I do not see this new statutory obligation as adding enormously or even significantly to the legal obligations of my office which have always existed subject to the Constitution. This is not to understate the importance of the substantive rights and obligations protected by the ECHR but, rather, to indicate a sanguine approach to some of the opportunities for my office presented by the incorporation of the Convention into Irish law.

As I said earlier, many of the rights and obligations protected by the ECHR have enjoyed protection, as a matter of fundamental law, under the Constitution. The practice of vindicating these rights through the courts is well established and there is, therefore, far less cause for heightened expectation of a rights bonanza than might have existed at the time at which the *UK Human Rights Act* was passed. Public bodies which come under the supervision of my office also discharge their powers, duties and function subject to the Irish Constitution and are amenable to the courts and normal processes of judicial review where the incorporation of the ECHR may yet bring added-value in the area of litigation. As my predecessor, Kevin Murphy, said in 2001:

“A human rights approach may not, in fact, be all that different to what our Constitution already provides; but it may well be the catalyst to unlocking what is already contained in the Constitution.”

Rather than explore the potential for added-value through litigation when the damage is done (or allegedly done) I think it might be worth considering the value of avoiding damage – or even damages! – by a more proactive, human rights-based approach on the part of organs of the state covered by the *ECHR Act*.

Although the Office of Ombudsman is given no explicit supervisory or enforcement role under the *ECHR Act 2003* I see no reason why the general obligation stated for ‘organs of the state’ in Section 3 - to discharge their duties and functions in a manner compatible with the ECHR - cannot be factored into my assessment of complaints made against public bodies within my remit. This would not, in any sense, displace any other options open to complainants by way of legal action but, if appropriately done might well lead to a reduction in complaints where remedial action was taken. When one sees the enormous preponderance of immigration and refugee cases pending on the Irish judicial review list – most of which invoke the *ECHR Act* – one can only speculate as to the amount of litigation grief that might be avoided if my office had a statutory role in the supervision of immigration processes. This is surely an area where systemic problems might be addressed more efficiently and, ultimately, more fairly by a redress mechanism other than or in addition to the courts.

Returning to the theme of being proactive and to put it in more practical terms, I am arguing for the human rights-proofing of the usual risk assessment procedures employed by public bodies within my remit. I admit that this may not be as simple as it sounds – given the conflicting imperatives that drive all risk assessment procedures – but, at the very least, a public body cannot hope to defend itself against a claim, formulated in terms of a human rights violation, if that body has not even considered human rights implications in the course of risk assessment. Such enlightened self-interest should assist in breaking down any entrenched institutional reflex against human rights-proofing where it exists. It might even lead to the incremental emergence of a human rights culture, so-called, in the public service. While best human rights practice may not, ultimately, ‘save’ a public body faced with a claim before a court it may well prove vital in the context of more systemic or generalised inquiries conducted by my own office or other supervisory agencies. By way analogy, we might draw on the experience of the Irish Equality Authority, a statutory body with the dual role of combatting discrimination in the workplace and in the provision of goods and services and promoting equality. As an alternative to litigation, the Authority has the statutory power to conduct audits, reviews and action plans.

There is another practical question. Should an Ombudsman get involved in what

might be seen as probing human rights inquiry when another body – the Irish Human Rights Commission – exists to do precisely that? I must emphasise that I am not proposing that the office of Ombudsman would compete with or in any way challenge the role of the Commission. Rather, I see both bodies working in a co-operative manner.

I have no doubt that my reports on various areas of public administration would be infinitely more useful to a body like the Human Rights Commission for its own work in related areas if such reports, at least, referenced or considered the human rights implications of my findings in more explicit terms. Even in situations where my findings related to narrowly defined factual matters within narrowly defined public law obligations without explicitly or definitively dealing with human rights issues such findings would add to the general body of public information to be used by all redress mechanisms concerned overtly or otherwise with the vindication of rights.

What human rights provides is a common language or set of understandable benchmarks. Like all languages, it will mean different things to different people but that may also be part of its richness in the public square. The domestic laws under which we all operate can only be enriched by a ‘dialogue’ with the value system crystallised in international human rights standards. This does not have to involve one system ‘trumping’ another; nor does it have to involve the rendering of solemn obligations as theoretical and illusory by the drawing of strict jurisdictional lines. Through a process of dynamic interpretation and complementarity grounded on respect we can best advance the human rights necessary for the flourishing of true democratic order.

Again, I come back to *"boundaries and balance"*. We need to recognise that human rights begin, as Eleanor Roosevelt said, *"in small places, close to home....(and in ) the world of the individual person"*. We need to embody human rights principles in our work, but we are not, nor do we want to be, human right lawyers or judges.

We need to recognise that Governments are far more sensitive to findings of human rights abuses than they are to findings of maladministration. I am reminded of the remarks of Peter Sutherland, former EU Commissioner for Competition Policy and currently, UN Special Representative for Migration and Development. At a recent conference he said that such are the sensitivities of many countries to the human rights topic that he could only succeed in enticing them to meet to discuss the human rights of migrants provided the agenda was entitled

*"development and migration", rather than "human rights and migration".*

Above all, we need to recognise the importance of human rights as a driver of good public services. In a recent report *"Improving the Delivery of Quality Public Services"* the National Economic and Social Forum, (which advises the Irish Government on matters of equality and social exclusion) made the following comment:

*"Increasingly, there is a broader understanding and awareness in society of human rights and the balance they provide between the interests of each individual and the common good of society. To the extent that these rights become embedded in public sector practice, it should help the relationship between the citizen and government".*

While much remains to be done to ensure that human rights do become embedded in public sector practice, there seems to be a consensus that this is an aim worth pursuing for the greater good of society generally. The question is, if we accept this prognosis on the importance of human rights, can ombudsmen possibly afford to stand idly by?