

**The Ombudsman and the Judge  
Redressing grievance and holding to account**

**Address to NI Ombudsman's 40<sup>th</sup> anniversary event  
Dunadry Hotel**

**25<sup>th</sup> November 2009**

**The Right Honourable Sir Declan Morgan  
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**Introduction**

I am delighted to have been invited to join you today to mark the 40<sup>th</sup> anniversary of the creation of the Ombudsman's office. It is certainly a day for celebration, but also one for reflection. Looking back over the 40 years since 1969, I can say without fear of contradiction that government has been getting bigger and more complicated. In a modern welfare state, more functions are undertaken than ever before by government Departments, agencies, non-departmental public bodies, quangoes and even private bodies under contract. More recently, commentators have also begun to note the ebbing of power away from the traditional nation state to locations above it – like the European Union, below it – like our Northern Ireland Assembly and the Scottish Parliament, and outside it – to multinational corporations and other non-state bodies. One of the challenges which face lawyers and judges in respect of these changes is how to respond to a national supreme court and supra-national courts within a devolved environment.

**New accountability mechanisms**

As the question of who exercises power gets more and more complicated, one pertinent question is whether the traditional mechanisms of constitutional accountability in the UK are sufficient to keep a check on the exercise of power by all of those in positions of authority. You know, of course, that the United Kingdom is one of only a tiny minority of countries in the world that does not have a written constitution. That does not mean that we have no constitution. It is a largely unwritten, slowly evolving agglomeration of principle, practice and custom, knitted together over centuries by the three branches of the state – the legislature, the executive and the judiciary. It is an ecosystem of checks and balances which prevents each of the three branches from becoming too dominant. Traditionally, the Executive – the government – was kept in check by being answerable to Parliament, and Ministers were responsible to Parliament for everything that went on in their Departments. These checks still apply, but even with the Parliamentary Committee system, everyone recognises that it is impossible for just over 600 individual MPs and

just over 700 members of the House of Lords to oversee the whole business of government at a suitable level of detail. Thus, the traditional checks at Westminster – and in the devolved Parliament and Assemblies – have been augmented. As the business of government has got steadily busier, a raft of new regulatory and accountability mechanisms has been developed – largely in the past 40 years.

The judicial review court and the Ombudsman are only two of these. The others range from the informative – the Freedom of Information Act, for example – to the curative – such as the setting up of a public inquiry. Financial oversight, of increasing importance, is provided by the Audit Office and the Public Accounts Committees at Stormont and Westminster, a role that started in its modern form in the 1860s. Independent oversight on the Ombudsman model is provided for many different state, privatised and wholly private sectors – from the Police Ombudsman to the Press Complaints Commission, the Judicial Appointments Ombudsman to the Advertising Standards Agency. A range of more recently set up Commissions on human rights, equality, children, older people and victims combine the ability to investigate individual cases with the function of championing and advocating for changes in policy.

### **The Ombudsman's role**

The ombudsman is a Scandinavian concept – his name is a Nordic word for an officer or commissioner. The first country to have an ombudsman in the modern sense was Denmark which established the office after 1954. The “missionary spirit” of the first Danish ombudsman is credited by two legal authors (Wade and Forsyth) with as having a major role in creating the international popularity of the concept. They report that after a visit to Britain, he even received a number of complaints by hopeful Britons. The first Commonwealth country to introduce an Ombudsman was New Zealand in 1962, and England and Wales follows suit with the Parliamentary Commissioner Act 1967. Northern Ireland followed in 1969, creating the posts of Parliamentary Commissioner for Administration, who dealt with central government functions, and the Commissioner for Complaints, who dealt with local government functions, including the disputed areas of housing and education. The two roles have been carried out by one officeholder since their inception (although there have been several incumbents) and the Commissioner for Complaints is also empowered to carry out investigations into complaints about the Health Service, which is the function of a third ombudsman in England. In 1996, the legislation was refreshed, and the Parliamentary Commissioner role is now carried on under the title “Assembly Ombudsman”. The two offices together are known as the “Northern Ireland Ombudsman”, and the Ombudsman's role is well-known in the community.

The ombudsman's office received 233 complaints last year in relation to Assembly Ombudsman business. These are supposed to be referred by an MLA, and while 103 were, 130 more were received directly. It is typical of the robust good sense of the office that where complaints are received directly, the Ombudsman refers them, with the complainant's permission, to an MLA who will sponsor them. A further 193 cases were received in relation to Commissioner for Complaints business, of which by far the greatest number dealt with housing issues. Finally, 117 complaints were made on health service issues. In relation to each of these categories, something over half of complaints did not clear the first 'validation' stage of investigation, as they were not within the Ombudsman's jurisdiction, either because they were ineligible or because the complainant had not exhausted other remedies.

The Ombudsman may investigate action taken 'in the exercise of administrative functions' by a wide range of public bodies where a member of the public claims to have sustained injustice as a consequence of maladministration. The Minister, Richard Crossman, told Parliament during the passage of the 1967 Act that it included 'bias, neglect, inattention, delay, incompetence, ineptitude, arbitrariness and so on', but the categories are not closed. The Ombudsman, like the judicial review court, is not entitled to find against an authority merely because he disagrees with their decision.

His working methods, however, are very different to ours. While he has power to call for papers and to interview persons, formal investigations are not the only means by which he can carry out his role. A more informal series of meetings, and if possible the negotiation of an early settlement between the public authority and the complainant are used where possible.

### **Development of judicial review**

Judicial review - a court-granted remedy for the individual where a state body has acted improperly or outside its powers - has been theoretically available for a very long time. The balance of power in the nineteenth century constitution placed great emphasis on the sovereignty of Parliament, and for that reason the courts were very unlikely to challenge a decision by a body under the supervision of Parliament.

The past 40 years in particular, has seen a sea-change in that approach perhaps more so in the last 10 to 15 years. A judicial willingness to adopt a more purposive approach to the interpretation of statutes was perhaps influenced by a more activist approach by judges in the United States, France and some Commonwealth countries. Opportunities to develop the law would not have arisen without a class of progressive legal practitioners willing to push the boundaries of accountability and a renewed interest on the part of the citizen or consumer in asserting his or her rights against bodies in both the public and private sector.

It was in 1969 that the Law Commission in England, on foot of its own earlier recommendation, was asked by the Lord Chancellor to undertake a review of the procedures for judicial review. As a result of this, the unified action for judicial review was introduced in 1978 - in Northern Ireland by the Judicature Act and the Rules of the Supreme Court.

Judicial review has taken off in Northern Ireland, as in England and Wales, with numbers increasing exponentially since 1978. In 1988 there were 88 applications for leave for judicial review here, many of them in prisoner cases. In 1999 there were 164, of which 108 were granted leave and proceeded to a full hearing. Last year, there were 295 applications for leave, of which 127 proceeded to full hearing. These cases now cover a wide range of executive action.

Traditionally, the judicial review court's role has been explained as being about procedure rather than substance. The question is not whether the right decision was taken, but whether the decision was taken in the right way. A metaphor which is sometimes used is that of a football referee, whose role is to decide whether a goal was properly scored, or was offside [*Chief Justice, I think that if you use this you almost have to say "or the result of a handball", but you may want to leave the football metaphor out entirely*].

## Human Rights and the Separation of Powers

The original grounds of illegality, unreasonableness, procedural unfairness and bias have been added to by the incorporation of the European Convention on Human Rights into our law by the Human Rights Act 1998. The remedy for an individual who believes that their human rights have been breached by a state body is through the mechanism of judicial review.

There has been much debate about whether the addition of human rights to the canon of judicial review has changed the role of the judiciary. Has it moved them from being uninvolved in policy, which is the proper concern of the elected branches of the State, to becoming decision-makers on some of the most ethically difficult decisions of our time?

The Human Rights Act has certainly changed our role. It is too early to say how much. But it is an interesting feature of our constitution that the two biggest shifts in power towards the judiciary in the late C20th – the unified judicial review mechanism and the human rights jurisdiction – have both been the gift of Parliament and the Executive. In this context it is also impossible to leave out of account the influence of the Freedom of Information Act. This demonstrates a fundamental recognition of the importance of accountability which is most heartening. Similarly, the courts have responded by repeatedly restating the principle that there are classes of decision which it is more appropriate for the elected branches to deal with – issues such as social policy, national security and taxation – and that with these they will not interfere. The three branches of the state all demonstrate a mature awareness of the importance of the separation of their powers to the constitution remaining in a proper balance.

The boundaries of this doctrine of judicial restraint have been set out in a series of House of Lords cases at the turn of the current century – *R v DPP., ex p. Kebilene* [2002] A.C. 326, *Secretary of State for the Home Department v Rehman* [2003] 1 AC 153, *R (Pro Life Alliance) v BBC* [2004] 1 AC 185 and *A v Secretary of State for the Home Department* [2005] 2 AC 68 are some noteworthy landmarks. Lord Justice Laws in *International Transport Roth GMBH v Secretary of State for the Home Department* [2003] QB 728, 765 – 767 neatly summed up the delicate balancing act which the separation of powers requires:

“(i) ‘Greater deference is to be paid to an act of Parliament than to a decision of the Executive or subordinate measure ...’

(ii) ‘There is more scope for deference where the Convention itself requires a balance to be struck, much less so where the right is stated in terms which are unqualified’ ....

(iii) 'Greater deference will be due to the democratic powers where the subject matter in hand is peculiarly within their constitutional responsibility, and less when it lies more particularly within the constitutional responsibility of the courts' ...

(iv) 'Greater or less deference will be due according to whether the subject matter lies more readily within the actual or potential expertise of the democratic powers or the courts'."

The reflex principle to that of judicial restraint or deference is that of "anxious scrutiny" of cases where human rights are particularly at stake – some of the most famous recent case of course being *A v Secretary of State for the Home Department* [2005] 2 AC 68 and the cases following it about the detention without trial of those suspected of directing Al-Qaeda terrorism.

The particular contribution of the Human Rights Act is that it provides an objective, internationally agreed framework against which the acts of officials and government agencies can be measured, and against which they can be held to account. It provides a structure within which the conflicting rights of individuals can be balanced and finely-nuanced situations laid out in a way which allows the balance of rights to be struck fairly. It provides a vocabulary for justice issues which is substantive and not just procedural. Whether dealing with a school pupil's right to wear religious symbols at school or a prisoner's right to consult a lawyer at the police station without being subject to surveillance, it has proved to be both a workable and an appropriate yardstick.

### **Judicial review a remedy of last resort**

Judicial review is an increasingly sophisticated tool for measuring up the actions of public bodies of many kinds. That is not to say that judicial review should be the first port of call for the aggrieved citizen. There is a requirement that the applicant should first have exhausted their other legal remedies. There are some cases where the swift lodging of a judicial review application is undeniably the right approach. A perusal of even a small number of applications for leave can leave one wondering, though, why a proportion of applicants did not seek redress elsewhere.

Among applicants of this type, a number of common themes appear. One is that there has been a lack of communication during the incident complained of from the body whose actions are in question. Another is that there has been little meaningful explanation afterwards of what went wrong. Sometimes these cases come before the judicial review court, and sometimes before the civil courts as claims for compensation. In both cases, a phrase that is often

heard is “What I really want is an apology”. It seems to me that, whether through sectoral complaints procedures, through mediation or through the Ombudsman’s office, there is scope for some litigants, and some public bodies, to avoid the emotional trauma and expense of litigation by exploring earlier resolution by alternative means (and the costs implications mean that judicial review should not be embarked on lightly).

### **Overlap of roles of JR court and Ombudsman**

The post of Ombudsman was introduced to the administrative law of this jurisdiction when the legal landscape was bereft of any effective mechanism for rendering accountable those who administered the levers of power in government. There is no doubt that the Office has created for itself a distinctive role in the system of administrative justice. Despite our different working methods, there is a certain overlap between the remit of the Ombudsman and that of the Courts. He does not have power to investigate if the person aggrieved has or has had a remedy in any court of law, or a right of appeal, reference or review in a statutory or prerogative tribunal. He does, however, have a discretion to override this requirement if he is satisfied that in the circumstances it is not reasonable to expect the remedy or right to be invoked. This makes for a slightly messy boundary, but one which has proved remarkably trouble-free, thanks in good part – again – to the robust good sense of the Ombudsman.

But perhaps the real distinction between the work of the courts and the work of the Ombudsman lies in the differing objectives which each seeks to fulfil. The court is often well placed to identify individual or systemic failure constituting unlawfulness and to quash the decision or direct in relation to the individual case. The scope of the Ombudsman’s enquiry is much broader because it is concerned not just to identify individual or systemic failure but to engage with the systems of government to secure systemic redress in order to prevent repeated administrative failure. It seems to me, therefore, that each of us has a complementary role in ensuring an accountable and effective system of administrative law.

### **Susceptibility of Ombudsman to JR**

The good sense of the Ombudsman may also be responsible for the fact that the courts in Northern Ireland have not, to my knowledge, been asked to judicially review a decision of the Ombudsman, although this request is made around half a dozen times a year in England (without, it must be said, frequent success). Where judicial review has lain against the Ombudsman in England, it has been for defaults such as an investigation which failed to regard a public authority’s refusal to exercise a power as maladministration (*ex parte Balchin* [1998] 1 PLR 1), the provision of inadequate reasons for a refusal to conduct an inquiry and refusal to disclose interview notes

*(R(Turpin) v Commissioner for Local Administration [2001] EHC Admin 503)* or issuing a report that went beyond the formal powers of the ombudsman (*R (Bradley) v Secretary of State for Work and Pensions [2007] EWHC 242*).

### **Devolution**

On the eve of potential devolution of policing and justice to the Northern Ireland Assembly, it seems to me that it is heartening to dwell on the role of the judicial review court and the ombudsman's office. Not because of the number of public authorities who have been found to be acting *ultra vires*, or who have been found guilty of maladministration. Rather, I think it is worth celebrating the imagination of the various branches of the state, and their vigilance in developing and defining the boundaries of new mechanisms – not always to their own branch's advantage – to keep the constitution well-tuned and functioning to its best.

### **Conclusion**

I have been asked, in preparing for this conference, whether the role of the courts and the Ombudsman is the same. Both may be invoked by the individual to protect him or her from the oppressive use of state power, or simply from slovenly and neglectful decision making by those in authority. The image which occurs to me is that of the 999 service. When you telephone the emergency services, the first question you are asked is 'Fire, police or ambulance?' Each is absolutely vital – but not necessarily in the same situation.