

MEETING AND GENERAL ASSEMBLY OF THE INTERNATIONAL OMBUDSMAN INSTITUTE - EUROPEAN REGION, JUNE 2006

The implementation of human rights and the role of Ombudspersons - 'from a negative position'

The story is told in UK ombudsman circles of the occasion some years ago when the Local Commissioner for Administration in England and Wales (the then Local Government Ombudsman, Sir David Yardley) was invited to speak at an ombudsman conference in Latin America. Surprised by the presence of television cameras and a sell-out audience, he was even more at a loss when he found his tales of suburban housing repairs competing with harrowing accounts of major human rights abuses. Ombudsmen whose offices housed laboratories to analyse the human remains of '*the disappeared*' were clearly creatures of a rather different species, or so it appeared.

The story illustrates well the perception that UK ombudsmen are strangers to a human rights remit. Cast in the mould of '*conventional*', UK ombudsmen are, so the standard account goes, more likely to regard themselves as the guardians of hygienic administration than as '*defenders of the people*', more concerned with good form and procedural propriety than with merit and substantive rights.

The perception is not exclusive to commentators from outside the UK. When the Westminster Parliament's Joint Committee on Human Rights reported on public sector ombudsmen in 2003, it found that most did not see it as part of their duty to foster a culture of human rights, or to incorporate human rights considerations in their approach to assessing the quality of public service.

The suggestion that ombudsmen should settle for a rather modest view of their role had in fact been reinforced by the domestic courts as long ago as 1979, when the High Court drew a hard and fast line between an administrative decision and the manner in which that decision is taken, appearing to confine the ombudsman's remit to the latter, to matters of form and process rather than substance and content (*R v Local Commissioner for Administration for the North and East Area of England ex parte Bradford City Council*).

Indeed the classic UK formulation of the meaning of '*maladministration*' rather serves to reinforce that narrow conception of the ombudsman's role: '*bias, neglect, inattention, delay, incompetence, ineptitude, perversity, turpitude, arbitrariness*' and so on may not rule out from ombudsman criticism the most outrageously indefensible procedures of public authorities but they do tend to leave intact the clear boundary between the merits of reasonable decisions (none of the ombudsman's business) and the manner in which they are made (very much the opposite).

The title of this talk - *The Implementation of Human Rights and the Role of Ombudspersons - from a Negative Position* - invites me to contribute further to this well-established denigration of the UK ombudsmen and their perception of their role. The '*negative position*', I take it, is supposed to concede not only that this caricature of UK ombudsmen is pretty near the mark, but more importantly that it is inevitably so, that UK ombudsmen are necessarily and habitually at odds with human rights talk.

I want at the outset to declare my hand - and that of my collaborator in the preparation of this speech - Nick O'Brien, a former colleague ombudsman and now Director of Legal Services in the Disability Rights Commission of England and Wales: the only sense in which my position on this issue will be '*negative*' is in challenging the perception that UK ombudsmen really have operated outside a human rights brief, that now or in the future they are as a matter of irrevocable principle, or even habit, constrained from taking a human rights brief to heart as part and parcel of what they are about.

In taking up that challenge, I will say something about how such a negative perception of UK ombudsmen may have arisen and whether it is deserved, what it says about the role of ombudsmen on the one hand and the meaning of human rights discourse on the other, and finally where a more balanced view of the relationship between ombudsmen and human rights is likely to lead ombudsman policy and practice in the next few years, whether in the UK or elsewhere in Europe.

So, first of all, what of UK ombudsmen's alleged parsimony when it comes to human rights? I have already said that the perception is widespread even among UK commentators. For some UK ombudsmen it seems almost to have been a badge of honour.

No doubt this reflects the broader reticence in the UK to embrace in its jurisprudence and public discourse the language of human rights, despite the fact that the European Convention on Human Rights itself was to a considerable extent shaped by British lawyers. Since the introduction of the Human Rights Act 1998 in October 2000, debate has continued about whether the domestic common law and the heritage of Magna Carta has not already incorporated all that is sound about human rights principles.

For ombudsmen, the common law tradition and the deference it has typically entailed to judicial opinion - '*the rule of lawyers*', as much as '*the rule of law*' - has meant that the ombudsman institution has tended to carve for itself a niche that does not trespass on the hallowed ground of the courts. Thus, historically, ombudsmen have tended to stay within their 'comfort zone' of commenting on administrative process and have left to the judges the task of grappling with the more substantive issues. It was perhaps typical of this approach that when the Human Rights Act received Royal Assent in 1998, the

first thought of many ombudsmen was whether Article 6 would require them to conduct oral hearings. The question of whether there might be helpful implications too for the values that underpin ombudsman scrutiny received rather less attention.

But it was not just a matter of what ombudsmen thought of themselves and their relationship to the courts. It also had something to do with the image of human rights. Perhaps like many western democracies, the UK has tended to think of human rights as somebody else's problem. True, public services in the UK may have their limitations, but equally the social and political climate (with the obvious exception of Northern Ireland) has often seemed remote indeed from the search for '*the disappeared*', from the extinction of torture and arbitrary exclusion from the political process. The rule of lawyers may have been at times a little tiresome but it was at least a decent proxy for the rule of law and so a reliable prophylactic against human rights abuses. Or so the story went.

It is not entirely surprising then that UK ombudsmen earned their reputation for being more concerned with maladministration than with any more substantive notion of justice, whether rights based or otherwise. Indeed the remit of the '*conventional*' schemes was explicit about the limitation, and the courts were always keen to reinforce the message. But without always noticing the fact, many ombudsmen were in fact surreptitiously drawn into investigations that entailed adjudication on what were, in all but name, human rights issues.

It would be virtually impossible for a local government ombudsman to investigate disputes about social housing provision, social services, education admissions and exclusions without addressing issues of human dignity and using a measure of proportionality for adjudicating between competing interests.

My own role as Parliamentary and Health Service Ombudsman inevitably entails exploring aspects of public service delivery that have direct repercussions for the dignity of individual citizens and their relationship with the State.

The Prisons Ombudsman, whose remit has been extended to cover deaths in custody, is regularly confronting situations where the daily grievances of prisoners and their families touch upon matters that go to the heart of what even the most marginal can reasonably regard as the basic dignity afforded to their humanity.

In Northern Ireland the Police Service Ombudsman has quickly established herself as a significant force in the political culture of that troubled community, taking on investigations that go to the heart of human decency, respect and tolerance.

There are two factors at play. The first is to do with ombudsmen themselves. UK ombudsmen, without straying from their maladministration remit, have always been strong in the defence of their ability to make decisions founded not just on the law but on '*what is fair and reasonable in the circumstances of the case*'. Released from the constraints of legal precedent and formal rules of evidence, ombudsmen have developed their own jurisprudence, which seeks an ethical authority higher than the domestic law.

It is not surprising that in reaching for that higher ethical authority UK ombudsmen should have found themselves, perhaps even *despite* themselves, nudging towards a lexicon of fairness and decency that is not a million miles away from human rights discourse.

The second factor is to do with human rights discourse itself. There is of course a rather grand version that sees human rights as always concerned with the most dramatic of human situations, with policing and security, with civil liberties of the most basic kind. I am of course conscious of the political debate in the UK at the moment about the implications of that grand version.

Yet quite independently of that debate, human rights commentators have increasingly emphasised the later waves of human rights thinking that have been more concerned with social and economic rights, and with the positive obligations of the State to enable and facilitate lives of dignity for all its citizens. These later waves are more likely to be concerned with the ordinary daily lives of very ordinary people than with the extraordinary actions of individuals or states, with social housing and benefit entitlement, with decent and humane treatment in their dealings with potentially inhumane bureaucracies, than with torture or imprisonment without trial.

As Eleanor Roosevelt, so active in the promotion of the Universal Declaration of Human Rights in 1948, later remarked: '*Where after all, do universal human rights begin? In small places, close to home? So close and so small that they can't be seen on any map of the world. Yet they are the world of the individual person*'.

This realistic account of human rights is reflected in a number of initiatives current in the UK. First, there is the Human Rights Act 1998 itself, described by one influential commentator (Connor Gearty, Professor of Human Rights Law at the London School of Economics) as more '*mission statement*' than legislation of the usual variety, a scheme for the inculcation of principle in ordinary life more than the legalistic application of a set of rules. That approach was picked up by the UK Government with its well-publicised ambition to promote a '*human rights culture*', and it is an approach which sits behind the provisions for the new GB Commission for Equality and Human Rights, which is due to open in October 2007 and has within its remit the function of '*encouraging and*

supporting the development of a society in which...there is respect for and protection of each individual's human rights'.

Critical in encouraging this more principled approach has been the British Institute of Human Rights, whose new Director (Katie Ghose) has spoken of the need to make human rights '*a living, breathing tool that can be used by people who are delivering services and also people who are on the receiving end of them*'. In that spirit of public service reform, the British Institute of Human Rights has, for example, put much of its efforts into training social workers, care assistants and local authority managers in what the application of human rights principles might do to '*add value*' to public sector delivery.

That theme has been adopted too by the Audit Commission in its report, *Human Rights: Improving Public Service Delivery (2003)*, which stressed the importance of human rights for local government; and by the Institute for Public Policy Research, whose report by Frances Butler, *Human Rights: Who Needs Them? (2004)* approached the same issues from the perspective of the users of services and of the opportunities offered to the voluntary sector to use human rights to bring about change for its client groups.

And if judicial encouragement were needed for ombudsmen in particular, the judgment of Lord Woolf (a former Lord Chief Justice) in the 2003 Court of Appeal case of *Anufrijeva and Another v London Borough of Southwark* helpfully emphasised the important ability of public sector ombudsmen to award compensation for maladministration in circumstances which might otherwise have led to costly adversarial litigation through the courts.

So, what then might all this mean for the future practice both of UK ombudsmen and perhaps of European ombudsmen more generally? I have already hinted that helpful clues can be derived from three sources:

- emerging human rights jurisprudence;
- established ombudsman practice;
- and '*cultural*' interventions that lie outside formal litigation or investigative processes altogether.

To illustrate human rights jurisprudence, let me mention a case involving two young severely disabled sisters in their twenties. They had lived at home all their lives. New rules adopted by their local social services department meant that care workers were no longer able to do manual lifts in the home. But the sisters simply had to be lifted from time to time to avoid bedsores. The local authority solution was to take them into residential care, away from their family, their long-established home and their involvement in the local community (they were, for example, perfectly able to go shopping and undertake other daily activities). The ensuing dispute went to court and the judge drew upon ECHR jurisprudence on the positive human rights obligations of public authorities to find that there had been an infringement of Article 3

(inhuman and degrading treatment) and Article 8 (family life). The Health and Safety Executive produced a new guideline to reflect the judgment, and promotion was undertaken by the Disability Rights Commission of England and Wales, which had intervened in the case.

From the field of ombudsman practice, I would point by way of illustration to my own work and that of my predecessors. Although the formal decisions have not typically spoken in human rights terms, the parliamentary and health caseload brings with it human rights predicaments. I think, for example:

- of the failure of the Environment Agency to enforce the conditions of a waste management licence, with the result that the domestic neighbour of a private waste storage company experienced interference with her home life from, amongst other things, dust annoyance and loss of visual amenity which also left her home seriously diminished in value;
- of the visually impaired prisoner whose future sight depended on contact lenses (glasses were not an option) but who could not wear lenses in prison because he did not have access to the necessary cleaning materials and was unable to attend the prescribed hospital appointments: not only was his daily life impoverished but his future sight itself was put in peril;
- and of the man with a mental impairment whose behaviour led to a complaint by a neighbour and a visit from a community psychiatrist who took it upon himself to discuss the case in some detail with the porter of the apartment block in question, in direct contravention of all reasonable standards of privacy.

Finally, at a '*cultural*' level, the British Institute for Human Rights reports examples of local authorities learning to implement human rights principles in modest ways that nevertheless transform lives. Take for example the social worker who obtained additional travel subsistence for a traumatised refugee in London who experienced panic attacks if confined on a crowded bus for more than 10 minutes and so ended up incurring huge travel costs as he constantly had to break his journey. A '*small place*' indeed, well off the international map, but hugely emancipatory for the individual concerned.

What these examples suggest then (and they are merely the tip of a human rights iceberg) is an intriguing overlap between formal human rights adjudication by the courts, public sector ombudsman practice, and the gradual absorption into public service delivery of human rights principles, with ombudsmen uniquely placed to bridge the potential divide between legal enforcement and the more subtle process of cultural change. It is precisely that bridging role (the facilitation of good public administration based on human rights principles) that a public sector ombudsman can most readily fill.

So, by way of conclusion, where does the recent UK experience of human rights leave the ombudsman community more generally?
I want to propose three chief observations.

First, it is true that UK ombudsmen have been reticent about embracing human rights language but actually with human rights principles they have been on speaking terms for rather a long time. Whilst that dialogue has not always been loud it does indicate a definite conception of what ombudsmen are about and of what the relevance of human rights principles to daily life might be: an ombudsman is not a substitute for the court but an alternative to it whose jurisprudence is free to look beyond legal precedent and domestic positive law to something more ambitious and potentially more transformational. Secondly, whilst there is a place for a grand conception of human rights, such a conception is not exhaustive and can co-exist with Eleanor Roosevelt's rather less elevated, but equally constructive and perhaps more realistic, assessment of how a human rights culture can take root, a conception that forces the recognition that, like it or not, public sector ombudsmen, including those in the UK, are implicated on a daily basis in matters of human rights principle and so endowed with a critical role in shaping whatever is to become of the human rights vision and culture.

And thirdly, at a time when ombudsmen throughout Europe reflect on what it is that unites them in the hugely various political, economic and social environments in which they operate, I would argue that the UK experience, perhaps surprisingly to some, provides considerable encouragement for thinking that the increasingly self-conscious articulation in human rights terms of what ombudsmen are about is an attractive, indeed a necessary, way forward, and one that offers coherence and purpose to public sector ombudsman activity, no matter how great or how small.

And that, I trust, is a far from negative position.

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June 2006