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**National Human Rights Institutions – The Ombudsman Model
By Peter Pursglove**

The Caribbean Experience

Types of National Human Rights Institutions

In recent years States have come to show their commitment to human rights by acceding to international instruments for the protection and promotion of human rights. However simply ratifying or acceding to an international human rights instrument may be little more than an empty gesture. What matters is not simply being one of a list of State parties to the instrument, but the extent to which the State puts the international instrument into domestic effect. It is important for a State committed to human rights to establish a national infrastructure, including relevant institutions, which can promote and protect human rights at the domestic level.

Human Rights Commissions

Increasingly States are creating Human Rights Commissions to implement in the domestic arena international obligations of the State with regard to the protection and promotion of human rights. As set out in the Best Practice for National Human Rights Institutions compiled by the Commonwealth Secretariat, the legislation creating such Commissions may confer upon them various powers and functions including:

- i) Undertaking investigations of alleged violations of rights. Such investigation may be based on an individual public complaint or the initiative of the Commission itself.
- ii) Providing advice to the Government on legislation, policies and programmes.
- iii) Promoting rights and educating the public.
- iv) Conducting public inquiries.
- v) Acting as a link between the Government and civil society and between groups within civil society.

The success of such Commission will depend on the Commissions being truly independent, qualified and diverse in their membership, adequately staffed and resourced and accessible to the public.

But is the creation of such a Human Rights Commission economically feasible and realistic in the context of small-island developing States?

Classic Ombudsman

In the Commonwealth Caribbean the tendency of States has been to create an office of ombudsman, usually based on the English system of a public official appointed by the Executive investigating complaints of injustice through maladministration in the public service. In this context maladministration has been given a broad interpretation but generally concerns any decision of an administrative nature that appears to be wrong. There is no express human rights mandate conferred on the classic ombudsman. The Constitution of the State may provide for the appointment of the ombudsman. However it will be the Act of the Legislature implementing the Constitutional provision that will set out the legal extent and limitations on the powers and jurisdiction of the ombudsman. No legal remedies may be available but the ombudsman may report to Parliament and will publish an annual public report of his findings.

Hybrid Human Rights Commission/Ombudsman

Some States are turning to the creation of hybrid Human Rights Commissions/Ombudsmen. Such institutions combine the attributes of both Human Rights Commission and the Classic Ombudsman. They may investigate complaints of both maladministration and breaches of human rights. Their jurisdiction may even extend to the private sector. In addition to publishing reports the hybrid Commission/Ombudsman may also have jurisdiction to take matters to court.

The Role of the Classic Ombudsman in Human Rights Matters

Unlike the Human Rights Commission or the Hybrid Human Rights Commission/Ombudsman the classic ombudsman is not expressly conferred with any human rights jurisdiction. Does this therefore exclude a role for the classic ombudsman in human rights matters? Can the classic ombudsman ever be truly considered a National Human Rights Institution?

Increasingly today human rights are not viewed as self contained rights rigidly applied within the confines of the articles of international instruments. Human rights have now come to permeate all aspects of human existence and are viewed as inherent rights of the individual or the community, rather than rights exclusively given by specific treaty provisions.

It is inevitable therefore that today, even though the jurisdiction of the ombudsman is limited by statute, human rights matters may comprise part of the administrative conduct

of an issue. For example in such matters as prison conditions, complaints against the police, child welfare, education and equal opportunities, it is becoming impossible to consider the administrative aspects of a case outside of its human rights context.

What Human Rights Obligations may the Ombudsman Enforce?

Human rights provisions contained in the Constitution of the State.

On independence from Great Britain Caribbean Territories were given constitutions which contained the so called Bills of Rights provisions. These provisions sought to guarantee to the citizen of the State basic civil and political rights. Under the Constitution the citizen may enforce these rights against the State, usually by the special procedure of bringing a Constitutional Motion before the High Court. Any laws made by the Legislature which breach the Bill of Rights provisions, to be valid, must also follow a special procedure and even then such laws may be struck down by the Judiciary as being unconstitutional.

One would think therefore that adequate safeguards and remedies already exist within the domestic system of the State to protect the human rights of the citizen, at least in the sphere of those civil and political rights guaranteed by the Constitution. The role of the ombudsman in such matters is simply to decline jurisdiction and refer an aggrieved citizen to the Constitutional remedies available to him.

But what is the reality? Is legal aid available for Constitutional Motions? What about situations where the government has a Constitutional majority and can therefore legislate contrary to the Bill of Rights provisions? What about the savings clause found in some Constitutions which protect from challenge laws made before the coming into effect of the Constitution? To what extent do the Bill of rights provisions extend to quasi-State bodies?

Situations may arise where a citizen suffers injustice through maladministration on the part of a State body and the case involves aspects of a human rights nature falling within the rights contained in the Constitution. However no real or effective remedies under the Constitution may be available to the citizen.

Human rights provisions contained in international law.

In the Commonwealth Caribbean English Common Law principles apply. The entering into a Treaty is therefore a prerogative act vested in the Executive. No approval by the Legislature is necessary for a State to accede to or ratify a Treaty. However the courts of the State may only apply laws made by or under the authority of the Legislature or law which forms part of English Common Law. By entering into a Treaty therefore the State will be bound by that treaty under International Law. However the Treaty will have no

effect in the domestic law of the State until the Legislature transforms the Treaty into the domestic law of the State, usually by the enactment of Parliamentary legislation. The courts will then apply the domestic legislation. The courts cannot apply the articles of the treaty itself. However the Judges may look to a treaty entered into by the State as an aid to interpretation where there is ambiguity or uncertainty in a domestic law provision. There is a presumption that Parliament never intends to legislate contrary to the international law obligations of the State. Any ambiguity or uncertainty in the application of a domestic law may be interpreted by the judge so as to ensure compliance with the international law obligation. There must however be uncertainty or ambiguity in the domestic law provision. If it is clear that Parliament did legislate contrary to an international obligation the judge must respect the will of Parliament.

Different considerations apply in respect of Customary International Law. Customary International Law is based on State practice coupled with a belief that the State has a legal obligation to behave in a particular way – the *opinio juris*. Customary International Law forms a part of English Common Law and may be applied by the domestic courts of the State as such. As with all common law there must be no conflict with statutory provisions as statute always prevails over common law. Taking the international law against torture as an example, there is a United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. As a treaty this convention will only bind those States that are parties to it. It will bind those States in International Law. However in dualist States it will only be of effect in domestic law if the Legislature has transformed the convention into domestic law by act of the legislature. However the prohibition against torture is now recognised as being a rule of customary international law. As such it forms a part of English common law. The prohibition against torture may therefore be recognised and applied in the domestic courts of the State as common law, providing there is no conflict with Statute.

Application of International/Domestic Human Rights Laws and Obligations by the Ombudsman

When dealing with a complaint how may the ombudsman approach any human rights aspects of the case? What general factors must the ombudsman consider?

Does ombudsman have jurisdiction over an investigation involving human rights issues?

The first thing the ombudsman must consider when contemplating involvement in a case concerning human rights issues is whether the matter falls within the jurisdiction of his office. The ombudsman is a creature of statute and the powers and jurisdiction of the office of ombudsman will be defined in the law. Relevant considerations will include such questions as whether the ombudsman has jurisdiction over the government department or agency in issue and whether the case involves maladministration within the terms of the ombudsman statute. It may very well be that legal remedies in respect of the human rights aspects of the case are available under the Constitution. If such remedies are effective and accessible to the citizen then they should be pursued. Similarly if there

is in existence a body better suited to deal with the issues involved in the case than that body should be permitted to deal with the matter. For example there may be a commission established within the State with jurisdiction over the class of human rights breach in issue.

What are the international human rights law obligations of the State?

Once the jurisdiction of the ombudsman has been determined the second factor to be considered is what exactly are the human rights obligations of the State? Two questions are relevant in this regard.

- i) Which human rights treaties has the State become a party to?
- ii) What is the customary international law on human rights?

When this question is determined it is then necessary to consider the extent, if any, to which these international human rights obligations of the State form part of the domestic law of the State.

In most common law countries, including of course the Commonwealth Caribbean an international instrument entered into by the State will have to have been transformed by an act of the Legislature before it can be considered to be part of domestic law and applied as such before the national courts. But even if not transformed into domestic law judges at common law may still use international law as an aid to interpretation of ambiguous domestic constitutional/statute law. Customary international law also forms part of common law and may be applied as such providing always that it does not conflict with statute.

Can the ombudsman law be construed to enable ombudsman to use international/domestic human rights law?

At this stage of the case a distinction must be made between the human rights ombudsman and the classical ombudsman. The statute establishing and conferring jurisdiction on the human rights ombudsman will generally allow the ombudsman to use international/domestic human rights laws in investigations and other activities.

On the other hand the classical ombudsman can usually only investigate complaints of maladministration using legal standards. These standards will include illegality, discrimination, lack of procedural fairness, broader standards of “injustice” and decisions that appear to be “wrong” etc. This will encompass domestic laws, including human rights laws and may also extend to international human rights law insofar as this forms an obligation on the part of the State applicable at the domestic level.

Application of International/Domestic Human Rights Law in Ombudsman Investigations

Increasingly today in conducting an investigation the ombudsman will encounter human rights issues. There are some areas of State activity today which, even when considered from an administrative point of view, cannot be divorced from their human rights context. In reviewing the administrative conduct in such a case the ombudsman will have to have regard to human rights issues. The areas where this is more likely to arise include such matters as prison conditions, complaints against the police, child welfare, education and equal opportunities.

Where the State has accepted international human rights treaty obligations and these have been implemented domestically into the law, or where human rights provisions are contained in the Constitution, then these domestic constitutional/statutory human rights provisions will form part of the domestic law of the State. The ombudsman can use these human rights provisions of the domestic law in an investigation to determine whether the administrative conduct in question is contrary to law and/or wrong and unfair.

In adopting such an approach the ombudsman will be following the evolving judicial practice. Where the domestic constitution or statutes implement international law obligations the courts are increasingly looking to these treaties to interpret ambiguous provisions of the domestic law.

In situations where customary international law is considered to be automatically part of the common law domestic legal system, then providing there is no conflict with statute, the ombudsman can also apply relevant customary international law on human rights in ombudsman investigations.

In situations where the State has become bound by a human rights instrument in international law but the instrument has not been implemented in domestic law the ombudsman may still have regard to the human rights instrument when conducting an investigation..

Although the general rule in common law States provides that unincorporated treaties are not considered to be part of the domestic law system nevertheless unincorporated treaties may be used as aids to interpret statute or provisions of the Constitution based on the rebuttable presumption that Parliament does not intend to legislate in violation of the State's international law obligations. In order to use unincorporated treaties as aids to interpretation the domestic law must be unclear i.e. one interpretation of the law must conflict with the treaty and another meaning accord with treaty. In contrast, if domestic law is unambiguous and incapable of more than one meaning then the court cannot look to the treaty.

Providing the criteria are satisfied there is no reason why the ombudsman should not adopt this approach to construe domestic constitutional law or statutory provisions that are relevant to an investigation.

Where the domestic law is clear it is also possible to use an unincorporated treaty for comparative law purposes as a guide to the application of the domestic law. The ombudsman can use international human rights law in the same manner when applying domestic law in an investigation. Furthermore the ombudsman could also look to the unincorporated international human rights law to determine whether administrative conduct breaches wider standards of injustice or unfairness as recognised by the wider international community. For example the use of international guidelines such as the United Nations Standard Minimum Rules for the Treatment of Prisoners, in investigations into prison conditions.

A human rights commission and a human rights ombudsman may also be conferred with other functions in the field of human rights such as the dissemination of human rights information and the provision of human rights education. These bodies may also advise governments on such matters as amending domestic law so as to comply with international human rights obligations and on the signature/ratification and accession to new human rights instruments. Can the classical ombudsman play a similar role? This will of course depend upon the interpretation of the statute law creating the office of ombudsman within the State. However it must be remembered that the enforcement powers of the ombudsman such as they are, are largely informal powers based on persuasion through investigation and reporting. There can be no reason why the ombudsman, in performing this function, cannot make reference to and recommendations concerning human rights matters. For example in a Report the ombudsman could recommend that law be amended in order to bring the law into conformity with the State's international law obligations. In cases where the administrative authority under investigation can exercise discretion, it may be possible for the ombudsman to recommend that such discretion should have been exercised in accordance with the State's international law obligations.