

By CHARLES WILKIN QC

ADDRESS TO M.I.S ON THE ROLE OF AN OMBUDSMAN

IN A DEMOCRATIC SOCIETY

1984

I consider it an honour to have been invited to address you on an interesting topic. Your choice of this topic shows that your organisation is prepared to address issues of national importance and to stimulate much needed non partisan public debate. I congratulate you and urge you to continue such efforts. Your organisation has a distinguished history and its revival is a significant occurrence.

I thank Mr Barker for his kind reference to my grandfathers. I am proud to have inherited one trait of character from my grandfather Dr Wilkin - that is, I am unable to mince words. I assure you that tonight I will be doing some straight talking.

Ombudsman is a Scandanavian word meaning officer or commissioner. In its special sense relevant to this discussion it means a commissioner who has the duty of investigating and reporting on citizens' complaints against the government.

As the name implies the Ombudsman first appeared in Scandanavia. Sweden has had the institution for over 150 years. But it was as established in Denmark after 1954 that it captured the attention of other countries. The first British country to adopt it was New Zealand in 1962 and the UK followed in 1967. Many Commonwealth countries have adopted the institution including in our area Trinidad and Jamaica. Close

"MIS - Metal Improvement Society - Market Street"
Founded 1900

to 100 Ombudsman are now in office in various countries and states including numerous states of the USA and all the provinces of Canada as well as India, Tanzania, Nigeria, France, Italy, Australia, Austria and Israel. In some countries there are multiple Ombudsmen. Tanzania has 5, Zambia 4, Nigeria 12 and Jamaica 3. In Tanzania and Zambia the Ombudsmen travel extensively addressing many gatherings of people and sitting and investigating on the spot.

The need for such an institution became apparent as the Government bureaucracy grew and it was essential for the legal remedies of the citizen against the Government for maladministration affecting him to be supplemented by non-legal remedies. The administration of so many services and controls under the vast bureaucratic machinery of the central government inevitably causes grievances and complaints. There is no legal remedy for many of these complaints which nevertheless are real and require to be addressed in a democratic country. The traditional remedy in such cases of complaint to the citizen's parliamentary representative is hardly adequate in many cases. The need was for a system to enable the impartial investigation of complaints to take place without the cost and procedural constraints of Court proceedings.

The practical definition adopted by the International Ombudsman Steering Committee is:

"An office created by law whose incumbent is an independent, high-level, public official with responsibility to receive complaints from aggrieved persons against agencies, officials and employers of Federal, National, State, Provincial, Municipal or Local Governments or who acts on his own motion, and has the power to investigate and recommend corrective action, and issue reports."

Put less legally and more descriptively the Ombudsman is generally "a person of prestige and influence and independence who must operate with the characteristics of objectivity, efficiency, fairness and compassion."

I will examine in detail the system as it applies in Trinidad and Tobago and I will make references to the position in the UK but the basic concept is the same almost everywhere. In Trinidad the office is established by the Constitution.

The first aspect of note is that the system does not generally apply where the citizen has a clear legal remedy which can be litigated in the Courts or in a statutory tribunal. An Ombudsman is not a substitute for the ordinary Courts and tribunals. In both Trinidad and the UK however the Ombudsman has a discretion to investigate any matter which may be taken to Court if he is satisfied that in the particular circumstances it

is not reasonable to expect the complainant to take legal proceedings.

A second point of note from the outset is that the Ombudsman has no disciplinary powers such as Courts have. He can investigate, recommend and report. In a truly democratic country his report will however carry substantial weight as will his recommendations.

In Trinidad the Ombudsman is appointed by the President after consultation with the Prime Minister and the Leader of the Opposition. It is a full time office and the Ombudsman is not allowed to engage in any occupation for reward other than the duties of his office. His appointment is constitutionally entrenched by which I mean that he cannot be removed at the whims of the Government. The Ombudsman holds office for a term not exceeding 5 years and he is eligible for re-appointment. The Constitution expressly requires that the Ombudsman be provided with a staff adequate for the efficient discharge of his functions. The staff are public officers appointed by the Public Service Commission in consultation with the Ombudsman. There are certain matters which the Ombudsman cannot touch. These are much the same in the UK and Trinidad.

(P 81 Trinidad Constitution)

THIRD SCHEDULE

[[Section 94(4)(b)]]

MATTERS NOT SUBJECT TO INVESTIGATION

1. Action taken in matters certified by the Attorney General to affect relations or dealings between the Government of Trinidad and Tobago and any other Government or any International Organisation.

2. Action taken in any country or territory outside Trinidad and Tobago by or on behalf of any officer representing or acting under the authority of the Government of Trinidad and Tobago.

3. Action taken under any law relating to extradition or fugitive offenders.

4. Action taken for the purposes of investigating crime or of protecting the security of the State.

5. The commencement or conduct of civil or criminal proceedings before any court in Trinidad and Tobago or before any international court or tribunal.

6. Any exercise of the power of pardon.

7. Action taken in matters relating to contractual or other commercial transactions, being transactions of a department of government or an authority to which section 93 applies not being transactions for or relating to—

(a) the acquisition of land compulsorily or in circumstances in which it could be acquired compulsorily;

(b) the disposal as surplus of land acquired compulsorily or in circumstances in which it could be acquired compulsorily.

8. Action taken in respect of appointments or removals, pay, discipline, superannuation or other personnel matters in relation to service in any office or employment in the public service or under any authority as may be prescribed.

9. Any matter relating to any person who is or was a member of the armed forces of Trinidad and Tobago in so far as the matter relates to—

(a) the terms and conditions of service as such member; or

(b) any order, command, penalty or punishment given to or affecting him in his capacity as such member.

10. Any action which by virtue of any provision of this Constitution may not be enquired into by any court.

International affairs

*Contractual or Commercial transactions
(NB Difference in Jamaica)*

*Matters relating to the
Armed forces*

The Ombudsman is also expressly precluded from inquiring into or questioning the policy of a Minister although he can investigate the manner of implementation of that policy.

The Ombudsman can investigate complaints which raise questions as to the integrity or corruption of the public service or any department or office but he cannot undertake any investigation into specific charges of corruption against individuals. The reason for this provision is that a charge of corruption is a criminal charge for the Courts. Where however in any investigation of any matter there is evidence of any corrupt act by any public officer or by any person in connection with the public service the Ombudsman is required to report the matter to the appropriate authority with his recommendation as to any further investigation he may consider proper.

It is important to note in this connection that the Ombudsman cannot compel a Minister or Parliamentary Secretary to answer any questions but he is not powerless in respect of the actions of Ministers as he can if he considers a matter to be of sufficient public importance lay a special report on the case before Parliament which brings the matter to the attention of the Opposition. In the UK the Ombudsman reports directly to Parliament and has on many occasions criticised the decisions and actions of Ministers. In both the UK and Trinidad the Ombudsman reports annually to Parliament on the performance of his functions including statistics and details of the complaints

received by him and the results of his investigations.

The procedure for complaints differs between the 2 countries.

In the UK the Ombudsman (known as the 'Parliamentary Commissioners for Administration') may receive complaints only through a member of the House of Commons but in Trinidad a citizen may complain directly or through a member of Parliament or the Ombudsman can conduct an investigation of his own initiative. He is in Trinidad an officer of Parliament. In the UK his status is regarded as equal to that of a Court of Appeal Judge.

In the UK there is a House of Commons Select Committee on the Parliamentary Commissioner which frequently examines the Ombudsman and officials of the department which he criticises. He makes quarterly case reports to the Committee as well as his annual report to Parliament.

The procedure followed by the Ombudsman in the investigation of complaints is simple and practical. It is not adversarial as in the Courts but he has power of the High Court to summon witnesses (other than Ministers and Parliamentary Secretaries) and to compel them to give evidence on oath and to produce documents. He also has power to enter and inspect the premises of any department or authority and to examine and retain any document found there. He cannot however subpoena Cabinet papers or income tax information. He himself cannot be subpoenaed to Court to give evidence on any matter coming to his knowledge in the exercise of his functions.

No proceeding or decision of the Ombudsman can be challenged in any Court except on the ground of lack of jurisdiction. In both the UK and Trinidad no fees are charged to complainants.

The office is clearly a very powerful and influential one. The main constraint is that he has no direct jurisdiction over Ministers or Parliamentary Secretaries although if Parliament is functioning effectively and the Ombudsman is strong he can take on Ministers through Parliament.

Another constraint is his inability to investigate and decide on allegations of corruption against individual Ministers or Civil Servants. The Trinidad Constitution addresses this constraint to some extent by the establishment of an Integrity Commission to which elected representatives, Ministers of Government, Parliamentary Secretary, Permanent Secretaries and Chief Technical Officers must declare in writing their assets, liabilities and income and risk prosecution and forfeiture of property not declared. That however is not the subject of this talk and I have not done extensive research on the Trinidad legislation. Suffice it for me to quote from the 1974 Report of the Constitution Commission of Trinidad.

"One of the root causes of the growing lack of faith in the conventional political process is the widespread belief that corruption is rife among those who hold high political office. No proof has been forthcoming of any acts of corruption, but we agree that suspicions have been not

unreasonably aroused. Such suspicions should as far as possible be removed if public service is to be preserved as an honourable career for talented citizens.

The Jamaican Government has recently tackled this problem and we have found their law, the Parliament (Integrity of Members) Act 1973, very helpful in considering our own situation.

It may be argued that these provisions could easily be evaded by having property put in the names of relatives other than spouses or infant children. If the existence of the law drives politicians to these subterfuges, they run the risk not only of being discovered but also of losing their property if those whom they trusted prove to be as corrupt as they.

There is also the possibility that the law may prevent honest men who jealousy guard the privacy of their financial affairs from going into politics. Indeed, when a similar law was introduced in Jamaica, one Senator preferred to resign rather than to comply. Despite this possibility we are convinced that the overriding interest is the maintenance of complete frankness regarding the financial affairs of those who hold political office.

There is no doubt that the temptations which beset politicians today all over the world are powerful - especially in developing countries. There is no need to

plunder the Treasury. Persons seeking concessions and favours are often ready to pay for them. The recommendations we have made should assist in promoting confidence in the integrity of public life in Trinidad and Tobago."

The institution of Ombudsman is not limited to the Civil Service. In most countries it extends to public or statutory corporations and has spread into other more specific areas of Government. Examples are in the UK the Health Commissioners who investigate complaints made in respect of the health service; there are Ombudsmen in Commonwealth Countries in such spheres as military affairs, prisons and languages. In Jamaica the Contractor General is the Ombudsman of Government Contracts. This latter area is particularly important in small countries such as ours where allegations of favouritism in the award of Government Contracts are a daily occurrence. I was in Anguilla today and discovered that there is a Tenders Board which receives tenders for the supply of goods and services to Government. A strict tender procedure is observed and invitations to tender are made over the Government radio station. For example, tenders were recently invited for the supply of airconditioners for the Governor's office. Although Anguilla remains a Colony we may have something to learn from that island which also has an Ethics Committee which reviews conflict of interest allegations against civil servants. In

fact all civil servants are required to declare in writing to the Governor their private interests and those of their spouses and immediate family. Human Rights Commissions and Rent Control Boards also fall within the scope of the institution.

It should be apparent that the effectiveness of the institution of Ombudsman is in great measure dependent on the strength and independence of the person holding the position and the respect given the institution by the Civil Service, the political executive, the legislature and the ordinary citizen for whose protection the institution is intended. The same is true of all the institutions or offices established by our Constitution to protect the rights of the citizen and to create the checks and balances so fundamental to an effective democracy. These include The Governor General, the Courts, the D.P.P, the Public Service Commission, the Police Commission, the Electoral Commission, the Constituency Boundaries Commission, the Public Service Board of Appeal, the Judicial and Legal Services Commission and the Director of Audit.

I have listed these offices and Committees to show that our Constitution contains on paper most of the mechanisms for safeguarding a democratic system. But Constitutions do not function on paper. It is necessary when considering the usefulness of institutions such as the Ombudsman to take an overall look at the way our Constitution functions. If we are honest we will all admit that we could do a lot better and I mean the country as a whole.

The heart of our problem in St Kitts is the political tribalism which has become so entrenched and the negative attitudes which have developed partly as a result of it. So long as we see everything in terms of PAM or Labour. So long as our people expect party loyalty to be translated into jobs, houses, land, scholarships, loans and other favours. So long as our politicians keep the majority of our people thinking that all power emanates from them. So long as the public mind is kept in state of squalid thoughtlessness. So long as we continue to take pleasure in personal failure and delight in dragging others down. So long as gossip is substituted for responsible public discussion. So long as we continue to believe that anyone who succeeds materially must have got his money illegally. So long as we accept mediocrity in every area of our national life - no institution whether an Ombudsman or those that already exist will protect our democracy. Disorder, lethargy and maybe even violence are bound to ensue. Our biggest need is strong leadership at every level. Constitutions do not create men nor do political propaganda and good public relations create great leaders. If we are to become a truly democratic country we need leaders of all parties and in all areas who will rise above the level of the political tribalism and who will impose the standards of fairness and equality and respect the freedoms enshrined in our Constitution. Leaders who will talk squarely to our people and insist on integrity, productivity and the

pursuit of excellence. Leaders who are prepared to stand, and fall if necessary, on principle. Leaders who will take harsh decisions where required and justify them. I hate to sound despondent but in 25 years we will still be talking about the need for an Ombudsman.

In summary whatever institutions exist in a democracy that democracy will be threatened if the people who control it and the people who elect them do not understand and respect the tenets of democracy.