

Sri Lanka's Ombudsman Schemes



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I am happy to contribute this article on the above topic in the SLQS journal. As a legal academic and teacher for over thirty years I realize the value of developing into legal education, curricular of practical value which keep abreast of changing issues in Society Alternate Dispute Resolution (ADR) and mediation as apposed to litigation, is one such important area and for Sri Lanka, the Ombudsman Schemes are the newest entry to ADR. No one has yet published a comprehensive account of the country's Ombudsman Schemes, their origin, development, current position and assessment. Hence, my selection of this topic.

Ombudsman schemes are now to Sri Lanka and many Sri Lankans – including some lawyers – are unaware of all the ombudsman schemes operating in the country. For instances, only a few weeks ago, a lawyer asked this writer “what is an Ombudsman and what does he do”.

The dictionary meaning of the term Ombudsman is “a government official appointed to investigate complaints made be individuals against the government or public bodies”. According to the dictionary meaning, the origin of the word is Swedish—from umboth (commission) plus mathr (man). Thus, the term “ombudsman” can mean a “One-man Commission”

Historically, the modern office of “Ombudsman” can be traced to the establishment of such an office in Sweden in 1809. From Sweden, the Ombudsman concept was copied in other Scandinavian countries like Finland, Denmark and Norway and over the last two hundred years Ombudsman Schemes came to be established globally in most developed countries.

In Sri Lanka, during the reign of the Sinhalese Kings,

it is said that there was a senior and trusted official in the King's palace called “The Dukganna Rala” which in translation means “The person who receives or hears complaints”. However, it is generally believed that this high listened to and provided whatever relief he could only to the complaints and requests of the King and not his subjects. It is also said that the King's complaints to the “Dukganna Rala” mainly concerned the problems the King had with his wife – the Queen. Thus, it appears that the office of ‘Dukganna Rala’ was not meant for the average citizen.

Sri Lanka's Parliamentary Ombudsman

In modern times, Sri Lanka's first Ombudsman was established by the 1978 Constitution. Article 156 of the Constitution established “the office of the Parliamentary Commissioner for Administration (Ombudsman)”.

Since 1978, two legislative enactments were made relating to the office of the Parliamentary Ombudsman. These were as follows –

- i) Parliamentary Commissioner for Administration Act No.17 of 1981, and
- ii) Parliamentary Commissioner for Administration (Amendment) Act No.26 of 1994.

Under the law now applicable, the Parliamentary Ombudsman is appointed by the President and can continue in office until he reaches 68 years unless he resigns or is removed by the President on account of illness or mental incapacity. Like in the case of a Supreme Court Judge, he can also be removed by an address in Parliament. Thus, the Parliamentary Ombudsman's independence is assured.

The Parliamentary Ombudsman's functions and powers are contained in the two Acts of Parliament referred to above. His main duty is:

To investigate and report upon complaints or allegations of the infringement of fundamental rights and other injustices by public officers or public corporations, local authorities and other like institutions, in accordance with and subject to the provision of law.

The world 'injustice' is defined broadly in the legislation to include any injustice caused by any decisions / recommendation (including a recommendation to a Minister) or by any act or omission and the infringement of any right recognized by the Constitution.

Matters excluded from Parliamentary Ombudsman's purview

The Parliamentary Ombudsman is not entitled under the legislation to investigate any matter relating to:

- a) Members of the Armed Forces or Police
- b) The appointment, transfer, dismissal or disciplinary control of public officers
- c) The Auditor General and the Commissioner of Elections.

As will be seen above, the Parliamentary Ombudsman can only inquire into complaints relating to public sector and local government sector bodies and institutions. Also, his decision or award lacks implementation effect unless the institution or official to whom it is directed decides to comply with it. The first feature is a limitation on his jurisdiction. The second feature is a limitation on the effect of his award. His report is however tabled in Parliament and Parliament, if it so deems fit, can take steps to ensure that an ignored award is honoured.

Other Sri Lankan Ombudsman Schemes

Apart from the parliamentary Ombudsman, currently there are only three other Ombudsman Schemes operating in Sri Lanka. This is the Financial Ombudsman which commenced in December 2003, the Insurance Ombudsman of which commenced in February 2005, and more recently the Tax Ombudsman who was appointed by the Ministry of Finance in mid 2005. All the above three schemes are not statutory schemes but are modeled on similar schemes operating in developed countries.

1. Financial Ombudsman

The Financial Ombudsman was set-up in December 2003 with the approval of the Central Bank, by the banking industry and other financial institutions supervised by the Central Bank like the finance companies, the leasing companies and the primary dealers. They incorporated a company under the Companies Law called the Financial Ombudsman. Sri Lanka (Guarantee) Ltd. This Company selects and employs the Financial Ombudsman. The Ombudsman is selected on an open advertisement in the newspapers. The first Financial Ombudsman is Mr. Walter Ladduwahetty a respected retired Judge. Much of the success of the scheme is due to him.

Origin of the Scheme

This writer is indeed proud that he was closely associated with the establishment of this scheme. On my return to Sri Lanka in 2002 after teaching for several years at Monash University in Australia, he was asked and accepted office as a Consultant in Legal Reforms to our Central Bank. At that time from 2000 onwards, the Government had set-up a Financial Sector Reforms Committee (FSRC) chaired by the Central Bank Governor. I was a member of that Committee. I proposed to the Committee that we set-up a Banking Ombudsman scheme similar to the one established in several other countries. As an academic at Monash University I had worked closely with the Australian Banking Ombudsman scheme. While the idea gained favour, the heads of our banks were not overtly enthusiastic about such an Ombudsman. But then, the Government enacted the Consumer Affairs Authority Act No.9 of 2003. Under that Act, all banking and financial transactions, were also subjected to inquiry and investigation by the Consumer Affairs Authority. To overcome this problem, the banking industry quickly agreed to establish the Banking Ombudsman scheme so that any complaints can be handled by the Ombudsman rather than by the Consumer Affairs Authority. That is how the Sri Lankan Banking Ombudsman scheme came to be established. Just before the scheme started to function in December 2003, other financial institutions like the finance companies, leasing companies and primary dealers also wanted to join the scheme. Hence, the name was changed from Banking Ombudsman to Financial Ombudsman.

The Financial Ombudsman's power and functions are laid down in the Memorandum and Articles of Association of the Company Limited by Guarantee. Generally speaking

the Financial Ombudsman can inquire into complaints by customers of the banks and other financial institutions who are members of the scheme and those institutions will be bound by his decisions and awards. Like in other Ombudsman schemes in foreign countries, the Financial Ombudsman is not bound or restricted by rules relating to the laws of evidence or legal procedures which govern a normal court of law. Nor can lawyers appear before the Ombudsman. The object of freeing the Ombudsman from having to observe legal rules and preventing lawyers appearing before him is to enable him to decide disputes without delay. All that is required is that he must be reasonable, fair and just in arriving at his decisions and awards. This is how Ombudsman schemes in foreign countries also operate and the Financial Ombudsman of Sri Lanka will be guided by the foreign schemes.

Ombudsman's Powers

The powers of the Financial Ombudsman are contained in Article 43 of the Articles of Associations incorporating the Financial Ombudsman, Sri Lanka (Guarantee) Limited. Article 43 states that the Ombudsman can entertain any complaint relating to the following matters:

- (a) Non-payment/inordinate delay in payment or collection of cheques, drafts, bills etc.
- (b) Non-issue of drafts to customers and others.
- (c) Non-adherence to prescribed working hours.
- (d) Failure to honour Guarantee/Letter of Credit commitments by Banks.
- (e) Claims in respect of unauthorized or fraudulent withdrawals from deposit accounts, current accounts, savings accounts.
- (f) Fraudulent encashment of a cheque/bank draft.
- (g) Complaints by customers pertaining to the operations in any customer accounts maintained with the financial institution.
- (h) Complaints from export customers on the mishandling of export bills, collection of bills and delays in receipt of export proceeds.
- (i) Complaints from non-residents having accounts in Sri Lanka in relation to their remittances to Sri Lanka and operations in their accounts.
- (j) Complaints relating to the violation of directives of the Central Bank of Sri Lanka in relation to financial services.
- (k) Complaints in respect of charges/interest and fees levied. In relation to charges/interest and fees, the complaints shall be restricted to situations where the

actual rates charged are different to the published rates prescribed by the member financial institution.

- (l) The Financial Ombudsman may also deal with any such other relevant matters as may be specified by the Central bank from time to time.

In the middle of 2004, the above powers of the Ombudsman were enlarged because the scheme was providing a success. Now the Ombudsman can also inquire into complaints made by persons other than individuals such as companies and partnership who are customers of banks and financial institutions. He can also inquire matters relating to special debt recovery procedures used by banks as "parate execution" procedures. As a result of enlarging the Ombudsman's powers more complaints are coming in.

The banks and the other financial institutions that are members of this scheme are giving their full support and co-operation to the Financial Ombudsman. Sometimes, the Ombudsman's decision or the relief he awards is against the bank or the financial institution and they may not be happy. However, up to date no bank or financial institution has challenged a decision or Award given by the Ombudsman. This alone proves that the scheme is a success. Many people who have gone to the Ombudsman have written very complimentary letters about the prompt and courteous manner they have been treated at his office which is situated at No. 143 A, Vajira Road, Colombo 5. Each of the banks and financial institutions who joined the scheme have also appointed Complaints Resolution Officers in each of the institutions to liaise with the Ombudsman's office. These officers also should be complimented for having made the scheme a success. Everything about the scheme is found on its Website which is www.financialombudsman.lk.

2. Insurance Ombudsman

This scheme is a replica of the financial Ombudsman scheme. It was set up by the insurance industry which today consists of fifteen private sector companies and the scheme has the concurrence and approval of the Insurance Board of Sri Lanka which is the state regulatory body for insurance. The following matters are within his jurisdiction.

- (i) A complaint on any one of the following grounds alleging deficiency in respect of general insurance or long-term insurance service, may be lodged with the Ombudsman;

- a) Non-settlement or delay in the settlement of a claim
- b) Inequitable interpretation or application of the terms and conditions of the insurance policy with regard to the following:
 - Claims including maturities of long-term insurance policies
 - Premium payable and premium refunds
- (i) Other benefits payable in terms of the insurance policy
- (ii) Any complaint by a policy-holder against an insurance agent relating to an insurance policy.
- (iii) Any complaint by an insurance agent or broker against an insurance company in relation to an insurance policy.
- (iv) Any matter referred to the Ombudsman by the Insurance Board of Sri Lanka (IBSL)
- (v) Any matter referred to the Ombudsman by the Consumer Affairs Authority of Sri Lanka (CAA)

Any decision or award of the Insurance Ombudsman upto Rs. 500,00/- is binding on the insurance company but not on the complainant who can proceed to arbitration or litigation etc. Above Rs. 500,000/- the award is not binding on the insurer but the Ombudsman decision can be made available to an arbitrator or to the court if the insurer contests it in that manner.

This writer was appointed as Sri Lanka's first Insurance Ombudsman in February 2005. In the eyes of the insurance companies which are now all in private sector hands and the insurance policy holders – the possible complainants – the insurance ombudsman scheme is working successfully.

3. Tax Ombudsman

The Tax Ombudsman scheme which was established by the Ministry of Finance and Planning in mid-2005 is an administrative arrangement designed to look into and redress grievances of the taxpaying public. It is established in terms of a Cabinet decision.

The Ombudsman will inquire into complaints of any injustice arising in consequence of any mal-administration on the part of any officers of the Department of Inland

Revenue. Mal-administration in this context is defined to include;

- (a) A decision, process, recommendation, act of commissioner or omission of which appears to;
 - i. be a departure from established practices;
 - ii. be arbitrary, unreasonable or discriminatory;
 - iii. have been given on irrelevant ground; or
 - iv. Involve the exercise of powers, or the failure or refusal to do so, for corrupt or improper motives or as administrative excesses.
- (b) Neglect, inattention, delay, incompetence, inefficiency and ineptitude in the administration or discharge of duties and responsibilities;
- (c) Repeated notices, unnecessary attendance or prolonged hearings while deciding cases concerning.
 - i. Determination of income or value;
 - ii. Assessment of liability to taxes or levies administered by the Inland Revenue Department.
 - iii. Classification or valuation of goods;
 - iv. Settlement of claims of refunds or rebate; or
 - v. Determination of fiscal and tax concessions or exemptions.
- (d) Willful errors in the determination of refunds or rebates;
- (e) Deliberate withholding or non-payment of refunds or rebates already determined;

The Ombudsman will entertain any complaint made –

- (i) directly by the person aggrieved
- (ii) in writing and addressed to Tax Ombudsman
- (iii) within a period of six (6) months from the date on which the complainant had first notice of the injustice complained of (The period may in appropriate circumstances be extended)

The Ombudsman may, where he considers it appropriate to do so, conduct an inquiry into any complaint. Every such inquiry shall be held in private; the complainant is entitled to appear before it either in person or by a representative.

On the conclusion of every inquiry the Ombudsman will submit a report to the Commissioner General of Inland Revenue, setting out his findings and recommendations.

Where the Ombudsman decides not to conduct an inquiry he will communicate such decision to the complainant together with reasons therefore, such communication shall be treated as the conclusion of such complaint.

Every complaint with or without any inquiry being conducted will be dealt with to a finish within a period of ninety (90) days from the date on which the complaint is received.

The Press Complaints Commission of Sri Lanka

The only other non-statutory mediation/dispute resolution scheme in operation in Sri Lanka which bears some resemblance to an Ombudsman Scheme is the Press Complaints Commission of Sri Lanka (PCCSL). The PCCSL which commenced operation in October 2003 is a self-regulatory body which (like the Financial Ombudsman scheme) is incorporated under the Companies Law of Sri Lanka.

The PCCSL will act through Council consisting of eleven persons representing civil society and the media. The Council will receive, inquire into and make findings on complaints from the public on any matter published in the Press. The Council will also inquire into any breaches of the Code of Practice of the Editors Guild of Sri Lanka which the PCCSL has now adopted. This Code of Practice was compiled to provide a balance between press freedom and social responsibility. In public awareness advertisement, the PCCSL states that “our main objective is to ensure a free and responsible press in Sri Lanka. We will adjudicate complaints on a free, fast and fair basis”.

Assessment of Dispute Settlement by Ombudsman Schemes

Except for the Parliamentary Ombudsman Scheme which commenced in 1978, the other Ombudsman Schemes in Sri Lanka are of very recent origin. Hence, it's too early to pass judgment on their effectiveness and value. However as an individual who helped to set up the Financial Ombudsman and the Insurance Ombudsman schemes, this writer is of the view that the Ombudsman schemes have been a success and we should set up more such schemes. They need not be set up by the state or by an Act of Parliament, in which case the operation of the scheme would be a burden on the Consolidated Fund and ultimately the taxpayer. Voluntary, industry established schemes such as the Financial and Insurance Ombudsman are quite sufficient and their operation is

not a financial burden on the State.

Having functioned as the Insurance Ombudsman for almost two years from January 2005, I have however noticed a few main shortcomings of voluntary Ombudsman schemes. The first is that unless the industry that sets up the scheme fully supports it and is prepared to go the extra mile to support it – the public for whose benefits the scheme was set up will ultimately lose confidence in it. Bluntly put, the industry that set up the scheme – whether it be the bankers or the insurance companies – must fully abide by any awards or decisions made by the Ombudsman. This must be so even if in a few individual cases that particular bank or insurance company finds it difficult, embarrassing or uncomfortable to accept the award or decision. It is better for the sake of the concept of Ombudsman to accept a few difficult decisions rather than to oppose or reject a decision and create an impression that the ombudsman is not to be taken seriously if his decision is not to the liking of the institution concerned.

The other feature that needs improvement for all Ombudsman schemes – voluntary or State established – is to publicise them more. Many members of the Sri Lankan public are not aware that there are Ombudsmen appointed to investigate complaints into financial, insurance, tax and media matters. The Press Complaints Commission gets fair publicity because the newspapers, being part of the scheme carry media advertisements about it. But this is not so with the Parliamentary, Financial, Insurance and the Tax Ombudsman. All of them have websites and email addresses but these are not resorted to by the average Sri Lankan. Hence, more media publicity about the Ombudsman schemes is required.

Another shortcoming is that apart from the Parliamentary Ombudsman, the annual reports of the other Ombudsmen are not published and therefore not available for public scrutiny and comment. In most other countries annual reports by Ombudsman are not only compulsory but they must be published and accessible for public comment and criticism if any. A similar procedure should be followed in Sri Lanka.