

Extract: In my twenty minute presentation I will start by briefly describing the Ombudsman Institution, bringing out its main features (based on the New Zealand model, first set up in 1995, entrenched in the Constitution in 2007, main amendment being the introduction of the specialised commissioners).

I will then put the following question: how suitable is the Ombudsman remedy to Malta? How well does it work in an evidently litigious culture? How well has the State adapted to and accepted administrative justice? What will it take to foster real change where it matters i.e. within the higher levels of the public administration, their legal counsel, and the political class? Will the right to good administration change this?

The Ombudsman institution was introduced in Malta in 1995, by means of Act XXI of 1995 (Chapter 385 of the Laws of Malta). It built on an earlier piece of legislation, which had set up the Commission for the Investigation of Injustices. Back in 1987 when creating this Commission the Government of the day had insisted that this Commission was not an ombudsman, but would serve as a precursor until it felt that the time was right to create a fully fledged Ombudsman. This Commission made legal history because for the first time it introduced the concept of ‘injustice’ as opposed to ‘illegality’ in the sense that something might appear to be ‘legal’ (because it is in line with the wording of the law, if not the spirit) but could be ‘unjust’ (e.g. I do not renew a contract of employment in the public sector, in order to give the job to somebody from my constituency instead). Until 1987 whereas one could go to court to contest an illegality, no remedy existed in order to contest an injustice.

The Ombudsman Act of 1995 was based on the New Zealand model, widely hailed as the best model possible at least in the English speaking world. Some time around 1994 a recently retired ombudsman called Sir John Robertson was brought over by the Maltese Government to help draft the Ombudsman Act, and once it passed through parliament and an ombudsman was appointed, to help the first Maltese incumbent set up his office and get going. Bringing over this retired ombudsman from New Zealand paid off, and the Office of the Ombudsman got off to a very good start and was met with high acclaim, not least by the general public which flocked to his office with queries about his services, lodging something like double the number of complaints which were anticipated (predictions having been based on overseas experiences). The institution got off to a very good start without any particular teething problems. The law was passed, the incumbent appointed, given the resources within which to operate, the complaints flooded in, surveys carried out from time to time over the years indicated that the institution was held in high esteem, and things seemed to be running smoothly. In time the institution was entrenched in our Constitution, it was given the funds to enlarge by taking on more staff and acquiring larger and very beautiful premises, the law was also further amended to create the specialised commissioners within the Ombudsman’s institution.

The above is all positive, but to my mind is only part of the story. There were always a number of issues, a number of underlying contentions where the Ombudsman and ombudsmanship in Malta were and are concerned, which lead me to raise certain questions. Indeed I query their true

¹¹ Speech delivered at the Maltese Ombudsman Conference *The Right to Good Administration: Myth, Aspiration or Reality?* (30th October – 1st November 2023).

commitment towards the Ombudsman Institution. I do not want to sound too harsh, but I cannot help but question how deep and how real this support is. Believing in the Ombudsman does not simply mean creating an ombudsman and giving him the funds with which to operate; nor does unanimous agreement when it comes to appointing the next ombudsman necessarily indicate true support for the institution. True belief in the ombudsman and in administrative justice requires much more than this. I will thus proceed to raise some critical points which to my mind indicate either a lack of understanding, or possibly and worryingly a hesitant belief in the ombudsman system:

1. the actively following ombudsman developments and ombudsman activities. How many MPs actually read the Ombudsman's annual reports? Back in the day when I was just starting my career, and Annual Reports were printed in hard copy, the ombudsman would send multiple copies to Parliament, only to receive a call some weeks later to come pick them up again because they had not been collected by the Members of Parliament! Back in the day, this was an annual occurrence. What does the fact that the MPs did not even bother to collect their courtesy copy of the Ombudsman's Annual Report say about their true views on the ombudsman, on his doctrine and his values, and on administrative justice? Fastforward twenty odd years: annual reports are available in soft copy so at least the Ombudsman's messengers are saved the trouble of delivering hard copies only to go pick them up again, but how many MPs actually peruse the annual reports? I cannot answer this, but for certain it is very rare – not to say never – that an MP raises an issue in parliament related to the Ombudsman;

2. the ombudsman requiring his recommendations to be implemented and where not implemented, the non-implementation should be scrutinised by Parliament. In 2001 the Ombudsman, six years after the institution was created, went public complaining that too many of his recommendations were not being implemented. The Government cried foul and attacked the ombudsman, harshly criticising him for daring to go public when the vast majority of complaints were implemented. The Ombudsman's reply of course was that those in the minority found no respite in statistics, because every unresolved complaint was an unresolved grievance. As for Parliament not debating or looking into instances where recommendations were not implemented, this remains the case to this day. Parliament should, but does not do this;

3. the ombudsman had published guidelines on redress, calling it a 'new culture'. In these 2004 guidelines, he suggested that the government should not only be ready to apologise for its shortcomings, but should also be ready to make good financially, including not only paying material damages, but even moral. The result was shock and horror! Apologise? As if. Pay material damages without a court ruling resulting from an action in tort or quasi-tort: completely unheard of. As for Moral Damages, if the Brits want to make 'time and trouble payments' that's their pigeon but it will not happen in Malta! The situation remains unchanged to this day;

4. introduction of the right to good administration in Malta (the scope of this conference). This is not the first time that this matter is being raised. Various incumbents have referred to it and suggested its inclusion in Maltese law, namely into the Constitution of Malta where it rightly belongs, but to date it has been in vain. Malta remains subject to the right to good administration when applying EU law, as a member of the EU, but not when applying domestic law;

5. general attitude and approach towards the Ombudsman. On various occasions e.g. Annual Report 2020 the Ombudsman has referred to the there being problems even with information gathering, despite the law being clear and the obligation to cooperate with the Ombudsman during investigations well spelled out. There is no excuse to linger when it comes to cooperating with the Ombudsman during investigations. Granted that Administrators are very busy, and the Ombudsman

cannot always expect the administrator to drop whatever they are doing to cooperate with him, but slight delays is one thing, the Ombudsman complaining and registering in his annual report the lack of cooperation with him during investigation, is a completely different matter and indicates that there are indeed issues on the Government's part;

6. approach when it comes to individual cases. The best possible example of this, is undoubtedly the Army Officers' case, where the Ombudsman received and accepted for investigation a number of complaints by Army Officers, and found himself up against a brick wall where the government was concerned, because they did not want to cooperate. It was actually claimed in court that the appointment of Army Officers was an 'Act of State' which could not be revised whether by the Court or by any other institution such as the Ombudsman. This anachronistic argument (to put it mildly and politely) was rejected by the Courts of Justice and the Ombudsman won the day in 2016 after some three years, or at least won that day in court. The government had to obey the court ruling and cooperate in the investigation, but not before appealing the judgment of the first hall of the civil court, and having the judgment confirmed on appeal, which obviously contributed to the years of delays, but then the Government refused to implement the Ombudsman's recommendations in favour of the Army Officers who complained to the Ombudsman. Again, I ask, what does this say about the government's *real* attitude where the Ombudsman and administrative justice are concerned?

7. approach to the ombudsman institution itself. Back in 1996, following a general election, the newly elected government decided to appoint a Tribunal for the Investigation of Injustices, to receive complaints of injustices suffered under the preceding government. This Tribunal was given remit to investigate injustices committed between 1987 and 1995. The government of the day specifically stated that this Tribunal would not investigate beyond 1995 because from then on, the general public had the opportunity to complain to the Parliamentary Ombudsman. At that stage, the newly elected Prime Minister showed respect and belief in the Parliamentary Ombudsman; unfortunately in later years subsequent Prime Ministers and subsequent governments did not follow suite: in Malta's biparty system, when one political party finally manages to topple the other in a general election, the newly elected government tends to create such investigatory bodies, to investigate and put right injustices committed by the other political party. This has occurred again since 1996, except that this time the Government did not make allowance for the Ombudsman; indeed had there been a firm belief in the Parliamentary Ombudsman there would have been no need at all to appoint such investigatory entities, or at least provision would have been made to ensure that these do not investigate matters which the Ombudsman had already dealt with. The result was the creation of investigatory bodies to compete with the Parliamentary Ombudsman. I have no doubt that while politically it might seem as a good move, I cannot help but query the true priorities of those behind this.

Unfortunately this is the state of play at the moment, where the Ombudsman in Malta is concerned. For the record, I must emphasise that both political parties are just as guilty of this lack of appreciation of ombudsman-related issues, which might very well be based on a lack of understanding on the same; no matter the cause, it is there: I do not believe that our MPs are as committed towards the Ombudsman and ombudsman-related matters as they would want us to believe. It is not that they do not believe in the Ombudsman at all; perhaps they are wary of him and his activities, or on occasion other factors are given priority such as political expediency or administrative convenience. There is also another factor: Malta is a litigious society, our courts are flooded with cases, we have a Mediation centre and also an Arbitration centre but these never really

caught on, and likewise the Ombudsman and his business do not seem to suite our collective palate. This of course makes the introduction of the Right to Good Administration even more imperative: not only does the Ombudsman need this extra clout, but beyond that what our authorities do not do out of conviction, the individual should be in a position to enforce through the courts. If the authorities believe in court litigation then so be it: give me the right to Good Administration, enforceable in a court of law, so that I will be able to enforce better what is rightfully mine.

Thank you.

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