

26th Australasian and Pacific Ombudsman Regional Conference

25 March 2011

Sheraton Taipei, Taiwan

Workshop 4: 'Promoting Good Governance and Protecting Human Rights'

The Ombudsman and the Constitution of Liberty¹

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1. Introduction

Nǐ hǎo. It is a privilege to be in Taipei with you as a guest of the Control Yuan and have the opportunity to spend time with APOR colleagues. Can I take this opportunity to thank the President, Vice-President, Members and staff of the Control Yuan for their warm welcome, hospitality and outstanding organisation of the APOR conference. As you know, in this session we are discussing the promotion of good governance and the protection of human rights. Since each speaker only has a short time for their presentation, I have decided to focus my attention on one human right only, but one that I am sure you will agree is one of the most central of human rights, that of the right to liberty. In doing so, I propose to touch upon four issues that hopefully will help provoke some further discussion during the session. The first is asking the question, 'Why does liberty matter'? The second is what role the Ombudsman plays in safeguarding liberty. The third is the role of the rule of law, with particular reference to the Ombudsman. The fourth is the role of personal responsibility, once again with particular reference to the Ombudsman. Before I commence, I mention two preliminary matters. First, while I will in my speech refer to Ombudsman, my comments are generally intended to apply to other forms of standing commissions of administrative inquiry and those institutions that review executive power, including the Control Yuan. Second, I have taken as the inspiration for my presentation two works by the Nobel prize winning Austrian economist and social scientist Friedrich Hayek, namely *The Road to Serfdom* and *The Constitution of Liberty*.² Taken together, these books represent one of the most singular defences of liberty ever conceived.

2. Why does liberty matter?

So why does liberty matter? Liberty is the right to live one's life freely, without coercion and not to be deprived outside of the rule of law. Liberty has long been defended as a human right and has a very considerable history, in both Western and Asian thinking, prior to the post second world war adoption of a structured human rights dialogue. John Locke, the great seventeenth century English philosopher recognised that life, liberty and property were the natural rights of all people.³ The United States Declaration of Independence famously states that "[w]e hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life,

¹ The title of my presentation is inspired by Friedrich Hayek, *The Constitution of Liberty*, Routledge Classics, 1960.

² Hayek, n 1 above and Friedrich Hayek, *The Road to Serfdom*, Routledge Classics, 1944.

³ John Locke, *Two treatises of Government*, Cambridge University Press, 1960 at 327-344.

Liberty and the pursuit of Happiness".⁴ In short, liberty matters for its intrinsic value – it is an inseparable part of the human condition and is valued, and seen as a right, accordingly. Liberty also matters for its instrumental value – the practical consequences that can be observed from its protection and promotion in civil society.⁵ In my view, history has decisively demonstrated that societies that embrace economic and personal freedom are the most stable and successful.⁶ They are the societies where, among other things, prosperity is the greatest, opportunities for advancement are their strongest, health and education outcomes are the highest and safety-nets the most generous.⁷

Recent events in Egypt serve to remind us that governments that do not respect liberty are ultimately not sustainable. As the Australian Minister for Trade, Craig Emerson recently observed:

... governments anywhere in the world that ignore the natural desire of their citizens to live free of oppression, censorship and economic despair do so at their peril. Sooner or later the resentment and frustration such governments generate boils into the streets.⁸

3. The safeguards of liberty – the role of the Ombudsman

Of course, even in the most liberal and successful societies, government and its agencies have the power to remove or alter property rights and voluntary exchange, deprive citizens of liberty, by force of law take the gains of their labour to spend on them and others (that is, tax), licence, unlicence, approve or disapprove of a range of activities otherwise to be enjoyed freely.

We can obviously debate the level and breadth of powers to be given to government agencies, but if there is a need to cede a level of power to government agencies (and it would be almost universally conceded that there is), then, if liberty is to be protected, there will be a concomitant need to ensure that this power is held to account. This is true because there is always the possibility of such powers being used corruptly, maliciously, capriciously, without procedural fairness or certainty, arbitrarily, unfairly or simply wrongly. While Parliament creates these powers it cannot, however, test on a day to day basis, the administration of these powers by government agencies to ensure that it is correct. The Ombudsman, as an officer of the Parliament, is empowered to undertake this function. Indeed, Hayek surmised that "[o]nce wide coercive powers are given to governmental agencies for particular purposes, such powers cannot be effectively controlled by democratic

⁴ United States Declaration of Independence, <http://www.ushistory.org/declaration/document/> (viewed 22 March 2011).

⁵ Recognising the importance of understanding the instrumental value of liberty, Hayek says that "[s]ome readers will perhaps be disturbed by the impression that I do not take the value of individual liberty as an indisputable ethical presupposition and that, in trying to demonstrate its value, I am possibly making the argument in support of its expediency. This would be a misunderstanding. But it is true that if we want to convince those who do not already share our moral suppositions, we must not simply take them for granted. We must show that liberty is not merely one particular value but it is the source and condition of most moral values. What a free society offers to the individual is much more than what he would be able to do if only he were free. We can therefore not fully appreciate the value of freedom until we know how a society of free men as a whole differs from one in which unfreedom prevails": Hayek, n 1 at 5-6.

⁶ For reasons why this is the case, see Hayek, n 2.

⁷ There are numerous, independent and reliable reports that attest to this point. See, for example, <http://www.fraserinstitute.org/research-news/research/display.aspx?id=13006>

⁸ Craig Emerson, 'Egypt and Tunisia desperate for economic freedom', *The Australian*, 8 February 2011.

assemblies.”⁹ The Ombudsman is an institution of liberty that can be one of the safeguards, on a day to day basis, of the proper exercise of these coercive powers.

4. The Ombudsman and the rule of law

Having identified the Ombudsman as one of the safeguards of liberty, I now want to turn to the role of the Ombudsman and the rule of law. A central component of the Ombudsman’s role is to “reduce the complexity, arbitrariness and uncertainty of the administrative application of law.”¹⁰ As all of you are well aware, the Ombudsman does this in a variety of ways, but principally by investigating complaints from citizens about alleged maladministration by government agencies, through investigations of its own motion and, increasingly, through a range of monitoring, inspectorate and supervisory roles, often related to the exercise of coercive or covert powers or the deprivation of liberty. Through the performance of these functions the Ombudsman has become an important procedural safeguard against abuses of liberty in the modern State.¹¹

The Ombudsman, however, has a role beyond, or perhaps more correctly, before, ensuring that the rules of the law of Parliament are administered without error. This role is in relation to the rule of law. The rule of law is a complex notion, but:

[s]tripped of all its technicalities [it] means that government in all its actions is bound by fixed rules and announced beforehand – rules which make it possible to foresee with fair certainty how the authority will use its coercive powers in given circumstances, and to plan one’s individual affairs on the basis of this knowledge.¹²

The rule of law, as Hayek describes it, is not a “rule of the law, but a rule concerning what the law ought to be, a meta-legal doctrine or political ideal”.¹³ It is a legal doctrine that, in my view, each Ombudsman should unashamedly identify, promote and protect. This is so because, again quoting Hayek:

while [the importance of procedural safeguards] is generally recognized, it is not understood that they presuppose for their effectiveness the acceptance of the rule of law ... and without it, all procedural safeguards would be valueless.¹⁴

This does not diminish in any way the importance of the Ombudsman’s procedural role, a role whose “value for the preservation of liberty can hardly be overstated”¹⁵, but simply that the rule of law prefigures this role.

⁹ Hayek, n1 at 116.

¹⁰ See the Rule of Law Institute of Australia, Objectives at <http://www.ruleoflawaustralia.com.au/objectives.aspx> (viewed 22 March 2011).

¹¹ It is now widely accepted that the office of the Ombudsman has an important role in the modern state in defending human rights and that the human rights that the Ombudsman protects are numerous and expanding: see, for example, Gabriele Kucsko-Stadlmayer, ‘The further spread of the Ombudsman idea in Europe’ at 7 (paper presented at the International Ombudsman Institute conference in Sweden, June 2009 and available from the author). The Ombudsman has also become an important part of a governance framework that has a supervisory role over the executive. Indeed many commentators have suggested that the Ombudsman is part of a fourth branch of government, the integrity branch, joining the legislative, judicial and executive branches of government: see, for example, John McMillan, ‘The Ombudsman and the rule of law’, (2005) 44 *AIAL Forum* 1 at 4. See also Chris Field, ‘Recent Evolutions in Australian Ombudsmen’, (2010), 63 *AIAL Forum*, at 6.

¹² Hayek, n 2 at 75-76.

¹³ Hayek, n 1 at 181.

¹⁴ Hayek, n 1 at 191.

¹⁵ Hayek, n 1 at 191. Although here Hayek was referring to the role of the judiciary.

5. The Ombudsman and personal responsibility

Finally, I want to turn to the relationship between liberty and personal responsibility and the role of the Ombudsman in this relationship. It seems to me to be important, that as we discuss rights, we also discuss responsibilities. In 1960, Hayek wrote:

[i]t would scarcely be an exaggeration to say that the greatest danger to liberty today comes from the men who are most needed and most powerful in modern government, namely the efficient expert administrators exclusively concerned with what they regard as the public good.¹⁶

Some half a century later, this danger still exists. There are administrators within government, encouraged by experts within the community and fortified by findings of new intellectual disciplines, particularly behavioural economics, that design and deliver programs that variously educate, encourage, nudge, cajole, coerce, scare or compel people to undertake the sort of behaviour that is considered to be the safest, healthiest, and least risky way for the public to lead their lives.¹⁷

Such approaches to public administration, whatever their merits (and there will be a range of valid, but different views about this), can lead to a lessening of liberty. As some expert planners and administrators seek to improve the lives of citizens (even sometimes claiming such improvements as fundamental human rights) we risk creating a situation where citizens become undesirably dependent on the State for their well being and less likely to exercise personal responsibility. This is so, because:

Liberty not only means that the individual has both the opportunity and burden of choice; it also means that he must bear the consequences of his actions and will receive praise or blame for them. Liberty and responsibility are inseparable.¹⁸

More generally, in my view, rights and responsibilities are inseparable. The Ombudsman can, and should, use its supervisory jurisdiction to safeguard against the possibility of administrators over-reaching¹⁹ in their efforts to protect people.²⁰

¹⁶ Hayek, n 1 at 228.

¹⁷ See, generally, Chris Field, 'Having one's cake and eating it too — an analysis of behavioural economics from a consumer policy perspective', Productivity Commission 2008, *Behavioural Economics and Public Policy*, Roundtable Proceedings, Productivity Commission, Canberra.

¹⁸ Hayek, n 1 at 63.

¹⁹ I use the word over-reaching here to suggest that a public sector administrator will have acted in a way not simply with which an Ombudsman might personally disagree, but that has constituted unlawful maladministration under the Ombudsman's enabling legislation. Any protective act, otherwise within the rule of law, that is the result of the lawful administration of the laws of the Parliament can never be "over reaching", at least as far as the Ombudsman is concerned. The Ombudsman is an officer of the Parliament and subordinate to the Parliament. The Ombudsman must show extreme care not to become a de-facto rule-maker, nor question the laws of the Parliament outside that which Parliament has empowered the Ombudsman to do in their enabling legislation. As an unelected official, the Ombudsman neither has the democratic mandate, nor can be held to account in the same way as elected members of Parliament. The Ombudsman, however, generally does have the capacity to consider whether Parliament's laws are fair and reasonable in their application and can make recommendations to the Parliament accordingly. The Ombudsman can also consider those laws in the context of the rule of law: see Hayek, n 1 at 181.

²⁰ It is also important those who review executive behaviour, such as the Ombudsman, never lose sight of the fact that bad outcomes can result from both a failure of a State responsibility as well as from a failure of personal responsibility. A focus in our investigations, and the reporting on those investigations, exclusively on where the State has failed, without comment on failures of personal

6. Conclusion

In conclusion, the Ombudsman is an institution of a society that takes seriously the need for the administration of its laws to be undertaken in a way that respects liberty. There is no more important guarantee that can be afforded citizens than certainty and fairness of governmental action, respect for property rights and voluntary exchange as well as the opportunity to pursue freely one's life, without either unnecessary or unwarranted restrictions on that freedom. The pursuit of that freedom, both personal and economic, underpins the extraordinary success of countries that are represented here today, countries whose prosperity is based on these freedoms, prosperity that allows every single citizen to live longer, better lives than in any generation before. We can never, however, take these freedoms for granted. They have been hard won and the freedom so prevalent throughout the world of today would have seemed unimaginable for much of human history. We only need look at a few countries in the world of today, Zimbabwe and North Korea for example, to see the consequences of a lack of respect for freedom, the rule of law and property rights. It is particularly apt that we have gathered for this conference in the "Prosperity Ballroom" to discuss human rights. We must never take for granted that protecting and promoting individual liberty, through offices such as the Ombudsman and the Control Yuan, is the path to prosperity, while the deprivation of liberty, the road to serfdom.

responsibility (where they exist), can create the unintended consequence that citizens look to others for fault, particularly government, rather than take responsibility for their own actions. This can in turn lead to greater government intervention (at more cost to citizens) to try and take even greater responsibility for those areas where citizens have become accustomed to looking to others to take responsibility. Ultimately, the task of administrative reviewers is to investigate, identify and recommend the remediation of government maladministration. In my view, however, administrative reviewers serve the public interest most effectively where they identify both the failures of State responsibility and, where appropriate, personal responsibility.