
Upgrading Democracy: 'Soft Laws' and The Ombudsman

Roy Lee



Introduction

Democracy is being tested and assaulted on all fronts today.

In South-East Asia, Thailand is ruled by the military, the President of the Philippines openly advocates extra-judicial killings, Vietnam and Cambodia, although nominally democratic, are increasingly adopting the characteristics of authoritarian one-party states.

Neither are older democracies exempt. In Western Europe, right-wing parties with distinctly illiberal platforms are gaining considerable support. Far from being seen as unelectable extremists, right-wing candidates at elections are serious contenders for high political office everywhere. Donald Trump, who made building a wall to keep Mexicans out and banning the entry of Muslim visitors key features of his election campaign, has been elected president of the United States of America.

Closer to home, the Malaysian government was scandalised by IMDB (I Malaysia Development Berhad), a state-owned enterprise that was reportedly abused for election campaigning purposes. The Auditor-General's report released annually also reveals massive misappropriation of public funds.

At the 2016 Athens Democracy Forum organised by the New York Times, participants agreed that democracy everywhere was in danger, and **liberalism** — *civil rights, the rule of law, the protection of minorities* — even more so¹.

Now, more than ever, it is imperative to understand democracy in Malaysia. Democracy involves electing our political leaders, but what happens after these 'guardians of democracy' are elected?



Roy Lee is an 'old boy' of Victoria Institution Kuala Lumpur. He graduated from Victoria University of Wellington, New Zealand with a LLB (Hons) degree, and is enrolled as a barrister and solicitor of the High Court of New Zealand and the Supreme Court of Victoria, Australia. He was a solicitor in the Ministry of Agriculture and Forestry in New Zealand for several years before venturing out in sole practice and as a legal consultant. Over the last 2 decades, he has practised public law, drafted legislation and consulted in Australia, New Zealand, Guernsey, the Caribbean (Guyana), Central Asia (Afghanistan and Kyrgyzstan) and the South Pacific (Cook Islands and Kiribati). He has also trained lawyers in New Zealand and legislative drafters in the Caribbean. Since 2009, he has been one of several Legislative Counsel in the Law Officers' Chambers in Guernsey.

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¹ "A future haunted by Ghosts of the Past" S Chan, New York Times, 22 September, 2016, online edition. See <http://www.nytimes.com/2016/09/23/world/europe/a-future-haunted-by-ghosts-of-the-past.html> accessed on the 25th October, 2016.

This paper makes an argument for the establishment of the Office of the Ombudsman in Malaysia. The Ombudsman, an independently elected official would take on the crucial role of investigating and resolving disputes between citizens and public officials², investigating maladministration, corruption, abuse of power, and the misappropriation of public funds. The Ombudsman would also complement the efforts of other anti-corruption enforcement agencies as well as provide additional checks and balances to our current system.

The paper is divided into the following sections:



Part 1: Democratic Governance and Soft laws

Explains the role of 'soft laws' in democratic governance, relying on examples from the United Kingdom, New Zealand and Australia;



Part 2: Case Study: New Zealand Ombudsman

Discusses the New Zealand Ombudsman as an example of an effective 'soft law' institution;



Part 3: Malaysia's Complaints Bureau in Comparison

Compares the Public Complaints Bureau in Malaysia to the New Zealand Ombudsman, using democratic governance benchmarks; and

² For the purposes of this paper, 'public officials' includes elected as well as unelected office-holders, including statutory officers and statutory bodies discharging Executive or governmental functions.

Part I

Democratic Governance and Soft laws

A liberal democracy is a system where people freely and fairly choose their political leaders, minorities are protected and there is democratic governance.

Democratic governance is the presence of robust and effective institutions, rules, procedures and other mechanisms that by and large –

- (a) keep the Executive³ honest;
- (b) ensure the Executive does not abuse its powers;
- (c) ensure the Executive acts fairly; and
- (d) ensure the Executive works hard for the people.

In a democracy, there is always dynamic tension between Executive Power and democratic governance. Where there is dynamic equilibrium between the two, their combined forces result in **trust**, **legitimacy** and **collaboration**, the hallmarks of successful democracies. When people trust their elected leaders and see them as legitimate and credible, society makes sustainable progress economically, socially and in other ways. People collaborate best with each other and their leaders, and work together to advance the common good where there is trust and legitimacy.

There are furthermore benchmarks of democratic governance as prescribed by the transparency accountability initiative. They are described in Annex I.

Malaysia falls behind other countries in democratic governance even though it has many laws and constitutional stipulations. Interestingly, although neither the UK nor New Zealand has a written Constitution, and the Australian Constitution does not protect human rights, all three countries rank far above Malaysia in three key indices of democratic values. See table below.

Table of rankings in key indices of democratic values

	Malaysia	UK	Australia	NZ	Denmark	Norway	Finland
Rank in Democracy Index 2015 ⁴	68	16	9	4	1	2	4
Rank in Rule of Law Index 2015 ⁵	39	12	10	6	5	1	8
Rank in Corruption Perceptions Index 2016 ⁶ (least corrupt has the highest rank)	54	10	13	4	1	5	2

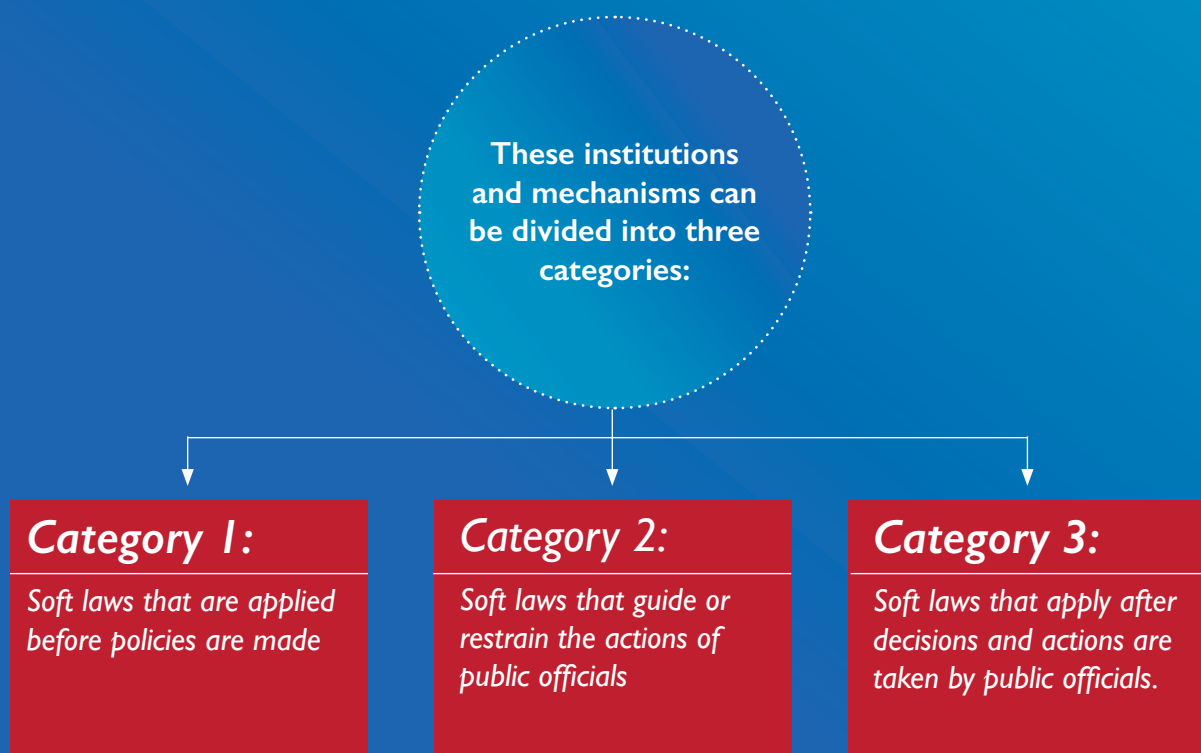
³ For the purposes of this paper "the Executive" means public officials that exert executive or coercive powers with the sanction of the State. In a Westminster-style system, this usually includes the power to propose legislation, and generally have it enacted with the support of Members of Parliament belonging to the governing party.

⁴ Compiled by The Economist Intelligence Unit; see <http://www.yabiladi.com/img/content/EIU-Democracy-Index-2015.pdf> accessed on the 22nd October, 2016.

⁵ Compiled by the World Justice Project; see http://worldjusticeproject.org/sites/default/files/roli_2015_0.pdf accessed on the 22nd October, 2016.

⁶ Compiled by Transparency International; see <http://www.transparency.org/cpi2015#downloads> accessed on the 22nd October, 2016.

Older democracies such as the United Kingdom, New Zealand and Australia rely on an array of 'soft law'⁷ institutions and other mechanisms for democratic governance. These do not rely on litigation, the Courts or even a written Constitution. Their ultimate objective is to infuse democratic values such as accountability, transparency and fairness, as well as other democratic values such as human rights and rationality, into day-to-day decision-making and actions on the part of public officials. They are effective precisely because they do not rely on the Courts⁸.



⁷ In this paper, 'soft law' includes, but does not exclusively refer to, documents or instruments that are not legally binding, such as Codes of Practice.

⁸ Even in older democracies, Executive decision-making is often informed by the likelihood of challenge. As would-be-plaintiffs are often discouraged by the high costs, delays and formality which attend litigation, only cases involving large sums of money, or where there is a determined and principled plaintiff with access to large funds, tend to get to Court.

⁹ These can be required either by Cabinet decision or legislation, and could apply to primary legislation (Acts) or only to subordinate legislation (e.g. regulations). A concise explanation of the ideas and objectives behind regulatory impact assessments can be found in the Executive Summary of "Better Regulation: Making Good Use of Regulatory Impact Assessments" Report by the Comptroller and Auditor General to the UK House of Commons (HC 329 Session 2001-2002: 15 November 2001). See <https://www.nao.org.uk/wp-content/uploads/2001/11/0102329es.pdf>, accessed on the 16th October, 2010. However, as with any regulatory system, careful thought needs to be given to the practical needs of an RIA system to ensure its effectiveness. This includes appropriate manuals, training and 'gatekeeping'; see "Ex Ante Evaluation in Australia and New Zealand: the case of Regulatory Impact Assessment" by Professor Peter Carroll of the University of Tasmania, at <http://reggov2014.ibe.org/bcn-14-papers/41-19.pdf>, accessed on the 16th October, 2016.

¹⁰ Examples of sectors include the environment, businesses, minority groups, vulnerable sectors of the population, or any region or sector disproportionately affected.

¹¹ Section 19 of the Human Rights Act 1998 (UK) requires the Minister introducing a Bill to state before its Second Reading whether the Bill is compatible with rights in the European Convention of Human Rights and Fundamental Freedoms, and if not, that the Government wished to continue with the Bill. Section 7 of the New Zealand Bill of Rights Act 1990 requires the Attorney-General to report to Parliament whenever a Bill is introduced containing any provision that is inconsistent with the Act. Section 30 of the Charter of Human Rights and Responsibilities Act 2006 (Victoria, Australia) requires the Scrutiny of Acts and Regulations Committee to report to Parliament as to whether any Bill introduced into Parliament is incompatible with human rights.

Category 1: *Soft laws that are applied before policies are made*

The first category of 'soft laws' operates before new powers are given to the Executive or additional obligations are imposed on people, businesses or non-profit organisations. For example, a regulatory impact assessment may be required before legislation is enacted or significant policy proposals adopted.⁹ The assessment should outline and where possible quantify the costs, benefits and likely impacts of policy or legislation, focusing on sectors or matters considered significant¹⁰. Regulatory impact assessments are usually published and require public consultation, giving the public an opportunity to participate in governance. Another example of the first category of 'soft laws' is a requirement for statements to be made to Parliament concerning any Bill introduced into it. These statements declare whether the Bill is or is not compatible with human rights norms specified in a Bill or Charter of Rights or an international Convention.¹¹

Category 2: *Soft laws that guide or restrain the actions of public officials*

The second category of 'soft laws' require public officials to consider and apply democratic values such as human rights norms in their day-to-day decisions and actions.¹² These frequently operate in high-risk contexts, such as where the powers of arrest, investigation, search and detention are conferred on law enforcement officers¹³, or where the powers of initiating, maintaining and ending criminal proceedings are given to a specific agency¹⁴. These are areas where the potential for abuse is high, and the consequences of abuse or unfair exercise on people's lives, or even the democratic life of the country, potentially monumental. Typically, codes, policies, principles or other guidance must be followed by public officials who exercise power or discretion in these high-risk contexts. These guidelines must be published for *transparency* and *accountability*.

Category 3: *Soft laws that apply after decisions and actions are taken by public officials.*

The final category of 'soft laws' consists of processes by which decisions and actions of public officials, and sometime even policies, can be examined and taken to task. One example is the Ombudsman, and another is a quasi-judicial tribunal that provides low-cost, accessible and independent dispute resolution services for administrative decisions, unhampered by legal formality and legal representation.¹⁵ Again, these mechanisms could target specific high-risk contexts, for example, prisons¹⁶ or the Police¹⁷.

'Soft law' mechanisms are triggered long before Courts are involved, do not need Constitutional provisions, and generally need little if any involvement of the Courts. Their very existence (and the occasional reminder or reprimand by 'soft law' institutions and the Courts, if necessary) is usually sufficient to influence the conduct of public officials, without the citizen having to do anything. That is their strength.

By analogy to a football team, these 'soft law' mechanisms are the midfielders and defenders of democracy, whilst the Courts are the goalkeepers (required to make a heroic 'save' if the rest of the team fails). However, just as a football team that keeps relying on its goalkeeper to make fantastic saves is doomed to fall to the bottom of the league, a democracy that relies only on its Courts and the Constitution to uphold democratic values is not sustainable.

The next part of this paper will examine a prime example of an effective 'soft law' institution, the New Zealand Ombudsman.

¹² Examples are the Human Rights Act 1998 (UK), the New Zealand Bill of Rights Act 1990 and the Charter of Human Rights and Responsibilities Act 2006 (Victoria, Australia).

¹³ For example, the Codes of Practice under the Police and Criminal Evidence Act 1984 (UK) cover stop and search, arrest, detention, investigation, identification and interviewing detainees. See <https://www.gov.uk/guidance/police-and-criminal-evidence-act-1984-pce-codes-of-practice> accessed on the 22nd October, 2016.

¹⁴ The Prosecution of Offences Act 1985 gives the Crown Prosecution Service, under the leadership of the Director of Public Prosecutions (DPP), this function for England and Wales. Under the Code for Crown Prosecutors made under the Act, the DPP issues policies and guidance that must be followed by Crown Prosecutors. See <http://www.cps.gov.uk/Publications/Prosecution/index.html> accessed on the 2nd October, 2016.

¹⁵ For example, the Victorian Civil and Administrative Tribunal under the Victorian Civil and Administrative Tribunal Act 1998. See <https://www.vcat.vic.gov.au/>, accessed on the 16th October, 2016.

¹⁶ For example, the UK has Independent Monitoring Boards for its prisons and New Zealand relies on the Ombudsman to investigate complaints about Prison staff.

¹⁷ For example the Independent Police Complaints Commission for England and Wales under the Police Reform Act 2002, the Office of the Police Ombudsman for Northern Ireland (OPONI) under the Police (Northern Ireland) Acts of 1998 and 2000 and the Independent Police Conduct Authority in New Zealand under the Independent Police Conduct Authority Act 1988.

Part 2

Case Study: The New Zealand Ombudsman

New Zealand was the first English-speaking country to establish the office of the Ombudsman, in 1962. Its Ombudsman was modelled after the Swedish Ombudsman, which originated more than 100 years ago¹⁸ and spread to Finland, Denmark and Norway before New Zealand adopted it.

Each Ombudsman in New Zealand is appointed under the Ombudsmen Act 1975 ("the Act") on the recommendation of Parliament. They are appointed as Officers of Parliament and generally prohibited from holding any other office of trust or profit¹⁹.

The Ombudsman is empowered to "investigate any decision or recommendation made, or any act done or omitted ... relating to a matter of administration and affecting any person or body of persons in his or its personal capacity"²⁰, by public officials. The Ombudsman can initiate investigations at his own initiative, on a complaint²¹ or on reference from a Parliamentary committee or the Prime Minister.²²

The Ombudsman can require information to be provided, summon persons and examine on oath²³. But the heart of its power is the simple ability to make recommendations where the Ombudsman concludes that a decision or action is contrary to law, unreasonable, mistaken in law or fact, or made or taken for an improper purpose, on irrelevant grounds or taking into account irrelevant considerations²⁴.

In addition, the Ombudsman can make recommendations where a decision or action is "unjust", "oppressive", "improperly discriminatory" or "plain wrong", or was in accordance with a statutory provision, rule of law or practice that may be unreasonable, unjust, oppressive, or improperly discriminatory. This effectively gives the Ombudsman the power to examine the reasonableness, fairness and discriminatory effect of legislation and policies made by the Government, where these are implemented in an action or decision.²⁵

New Zealand's Ombudsman was modelled after the Swedish Ombudsman, which **originated more than 100 years ago** and spread to Finland, Denmark and Norway before New Zealand adopted it.



¹⁸ The Scandinavian Ombudsman, on which the New Zealand Ombudsman is modelled, is simply the resurrection of an institution that dates back to ancient times. Ombudsman-type institutions existed in Ancient Rome (which had the *Tribuni Plebis*), in China (in the form of the *Control Yuan*) and in the Muslim world (called the *Wafiqi Mohtasib*). Today, there is an International Ombudsman Institute and there are various models of Ombudsman institutions in more than 100 countries around the world. A brief overview and history is available at http://www.iombudsman.gov.ua/en/index.php?option=com_content&view=article&id=1114 accessed on the 27th October, 2016.

¹⁹ Sections 3 and 4 of the Act. An Ombudsman can hold another office of trust or profit only with the approval of the Prime Minister. This seems to be an anomaly in what is otherwise an office independent of the Executive.

²⁰ Section 13 of the Act.

²¹ Section 13(3) of the Act.

²² Section 13(4) and (5) of the Act.

²³ Section 19 of the Act. But these powers are almost never used: see M Chen "New Zealand's Ombudsmen Legislation: the Need for Amendment After Almost 50 Years" (2010) 41 VUWLR 723. <http://www.victoria.ac.nz/law/research/publications/vuwlr/prev-issues/vol41-4/chen.pdf>.

²⁴ Section 22(1) and (2) of the Act. These are classical grounds for judicial review: anyone who cannot afford to bring judicial review proceedings, or wishes to avoid long delays, can make a complaint free of charge to the Ombudsman instead.

²⁵ In a way, this takes the Ombudsman beyond the realms of Courts, because Courts cannot generally review the reasonableness or fairness of e.g. an Act of Parliament, although they might be able to review the Constitutionality of an Act.

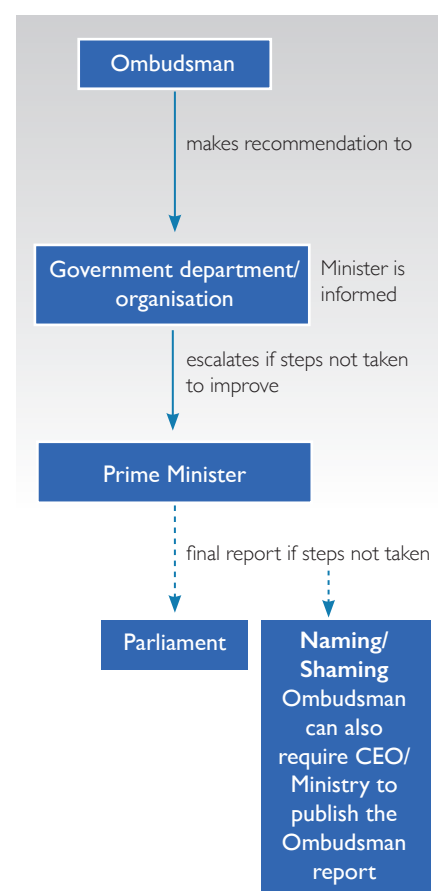
In this respect, the Ombudsman is the classic embodiment of democratic governance. Democracy does not end at the polling booth or counting station. Once MPs are elected, the Prime Minister chosen, and the Government formed, the real work of democratic governance begins: to impose restraints on and temper what would otherwise be the unchecked power of the Executive to enact laws (by virtue of commanding a Parliamentary majority) and make policies and administrative decisions.

What softens the Ombudsman's powers and ensures that it does not become anti-democratic, is that, unlike a Court or Tribunal, he does not have power to make a legally binding determination. Rather, the Ombudsman can report matters and make recommendations to the relevant department or organisation (copying in the relevant Minister) in the first instance, and require them to notify him of steps taken to implement those recommendations.²⁶ If those steps are not taken within the specified time, the Ombudsman can send a copy of his report and recommendations to the Prime Minister, and then to Parliament if necessary.²⁷ Although Ombudsmen do not work under the direct or even indirect supervision of Parliament, their ability to submit a report to Parliament is crucial as this is the final forum for holding the Executive accountable.²⁸

Finally, the Ombudsman can require the CEO of the Ministry or organisation to publish the Ombudsman's report, effectively naming and shaming that Ministry or organisation to the public²⁹. The complainant must be kept informed of the results of the investigation.³⁰

In order to ensure fairness, objectivity, and the credibility of the Ombudsman, natural justice is protected³¹; and to maintain the free-flow of information and confidence of the participants, secrecy³² is preserved.

“
The Ombudsman can require the CEO of the Ministry or organisation to publish the Ombudsman's report, effectively naming and shaming that Ministry or organisation to the public.
”



²⁶ Section 22(3) of the Act. Generally, no CEO of a department or organisation would want to be reported to their Minister as having made a mistake or acted in way that attracts the Ombudsman's criticism. If caught out, they would want to be seen to fix the 'problem' immediately, often well before the Ombudsman has completed the investigation or report.¹⁹ Sections 3 and 4 of the Act. An Ombudsman can hold another office of trust or profit only with the approval of the Prime Minister. This seems to be an anomaly in what is otherwise an office independent of the Executive.

²⁷ Section 22(4) of the Act.

²⁸ In reality, most weak democracies do not have a Parliament structured or resourced to perform effective oversight, so in order to make real progress on democratic governance, Parliamentary reforms are needed, along with 'soft law' institutions such as the Ombudsman.

²⁹ Section 23 of the Act.

³⁰ Section 24 of the Act.

³¹ Section 22(7) of the Act prohibits the Ombudsman from making adverse comment about any person unless the person has been given an opportunity to be heard.

³² Section 21 of the Act.

The Ombudsman is a real and powerful influence on the day-to-day conduct of Government officials.³³ Whilst the author was a solicitor in the New Zealand Ministry of Agriculture and Forestry, the Legal Department's standard advice to officials was not only to act lawfully, but also fairly and reasonably³⁴ at all times, due to the effectiveness and persistence of the Ombudsmen and their accessibility to members of the public.³⁵ Coupled with a free and independent media, the Ombudsmen were and still are an effective restraint on decisions and actions of public officials.

The next part of this Paper will apply the democratic governance benchmarks and Sir Anand's norms to compare the New Zealand Ombudsman with the Public Complaints Bureau in Malaysia.

Recommended Reading

- *Why is the Ombudsman so effective? A paper written by Sir Anand Satyanand³⁶, a former New Zealand Ombudsman, refers to independence, objectivity, investigative thoroughness and informality.³⁷*
- *An article that highlights essential characteristics of an Ombudsman institution resonating with the democratic governance benchmarks is "Accountability from the Perspective of Malaysian Governance" by A F Yakob, N A Kadir and K Jusoff in Journal of Politics and Law, Vol. 2 No. 3, September 2009.*

³³ Chen, above n. 27.

³⁴ The Legal Department applied the 'Front Page' test to determine what was fair and reasonable. This involved posing the question to the public official: "If your decision or action becomes tomorrow's headline on the front page of a national newspaper, would you be comfortable defending and standing by it?".

³⁵ The Ombudsman is widely used by the public to complain about public officials' decisions and actions: For example, in 2014/15, the New Zealand Ombudsmen received 2,304 complaints and completed investigations into 2,226 complaints: Annual Report 2014/2015 of the Office of the Ombudsman. See http://www.ombudsman.parliament.nz/system/paperclip/document_files/document_files/1755/original/annual_report_2014-2015.pdf?1476653602 accessed on 17th October, 2016.

³⁶ Accountability of ministers and government organisations and the role of the Ombudsmen, paper delivered at the 4th New Zealand Public Law Forum, in 2002. Sir Anand was also a lawyer and a former District Court Judge. He became New Zealand's Governor-General from 2006 to 2011. Another paper that explains the workings and success of the New Zealand Ombudsman is The Classical Ombudsman – An Effective Reviewer of Administrative Decisions by Government Agencies – A New Zealand perspective Occasional Paper #76 by Sir Brian Elwood, Chief Ombudsman of New Zealand; President, International Ombudsman Institute. Special Lecture to Faculty of Law, Nihon University, Tokyo, Japan, June 20, 2001. See <http://www.theioi.org/> accessed on the 22nd October, 2016.

³⁷ These key operational norms of any Ombudsman Institution are cited by Professor Larry Hill. Professor Hill wrote about the New Zealand Ombudsman as an institution in 1976 The Model Ombudsman: Institutionalising New Zealand's Democratic Experience (1976 republished 2015) and the Hawaiian Ombudsman in 2002 (Hill, L. B. (2002), The Ombudsman Revisited: Thirty Years of Hawaiian Experience. Public Administration Review, 62: 24–41. doi:10.1111/1540-6210.00152]. Other factors, cited by Chen, above n. 27, are the wide range of remedies available to the Ombudsman (e.g. recommending a change of policy) and the fact that there is no charge to access the Ombudsman's investigative services.

Part 3

Malaysia's Public Complaints Bureau in comparison

The Public Complaints Bureau (Biro Pengaduan Awam) (“PCB”) of Malaysia was established in 1971 by Circular issued by the Chief Secretary to the Malaysian Government. Its structure, functions and operations are governed entirely by a series of Development Circulars and Administrative Development Circulars issued by the Chief Secretary.

PCB officials and Government Ministers have in the past proclaimed that the PCB performs a similar function as an Ombudsman.³⁸ It also claims that it:

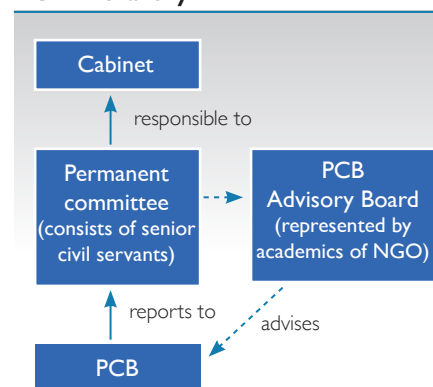
- is sufficient to investigate and address complaints of maladministration of the state³⁹
- acts as the watchdog for the government against maladministration and administrative abuse⁴⁰
- and are the eyes and ears of the public service⁴¹

It has been claimed that “[t]he PCB, being part of the government machinery does not impede its effectiveness in carrying out the task entrusted to us⁴².”

In contrast, other commentators have called for an independent Ombudsman⁴³.

The PCB is a department within the Prime Minister’s Department. It has its own Director-General, but it reports to the Permanent Committee on Public Complaints, chaired by the Chief Secretary to the Government and consisting mainly of very senior civil servants⁴⁴. The Permanent Committee is in turn responsible to Cabinet. The PCB’s officers from the Director-General downwards are civil servants. There is a PCB Advisory Board with some representation by academics and non-governmental individuals, but its mandate is simply *advisory*.⁴⁵ The PCB’s real head and ‘teeth’ appear to be the Permanent Committee. The inescapable conclusion is that the PCB is simply a branch of the Malaysian civil service.

PCB Hierarchy



³⁸ “PCB performs similar function as Ombudsman” [<https://www.malaysiakini.com/letters/127210>].

³⁹ “No urgency for Ombudsman in Malaysia”. See <http://www.freemalaysiatoday.com/category/national/2013/11/27/no-urgency-for-ombudsman-in-malaysia/> accessed on the 22nd October, 2016.

⁴⁰ Above n. 44.

⁴¹ Paper presented by Dr. Chua Hong Teck, Director-General of Public Complaints Bureau at the 10th Asian Ombudsman Association Conference, Hanoi, Vietnam, 25-28 April, 2007. See http://www.pcb.gov.my/annual/aoa_hanoi.pdf accessed on the 22nd October, 2016.

⁴² Above n. 44.

⁴³ “Why can’t we, dear citizens, petition the lawmakers, the private and public sector, the NGOs and everyone to go for an open debate and a referendum nationwide to champion the cause of an independent Ombudsman?” “Push for Ombudsperson for justice, equality”. See <https://www.malaysiakini.com/letters/127009> accessed on the 22nd October, 2016.

⁴⁴ Director General of the Public Service of Malaysia; Director General, Malaysia Administrative Modernisation & Management Planning Unit; Senior Deputy Secretary-General Prime Minister’s Department; Secretary General Ministry of Finance; and the Chief Commissioner of the Malaysian Anti-Corruption Commission (who is not a civil servant but is appointed and dismissed by the Prime Minister, with the consent of the Yang DiPertuan Agung). Source: Official Portal of the PCB <http://www.pcb.gov.my/en/about-pcb/permanent-committee>.

⁴⁵ In fact, the objectives of the PCB Advisory Board hint at public relations: they include monitoring of issues that might affect the image of the public agencies, and management of the public opinion poll regarding the Government policies and programmes (emphases added).

A bureau structured in this way and ultimately responsible to the Executive arm of Government (Cabinet) inevitably has a vested interest in projecting an image that all is well in the Executive branch of government⁴⁷. Furthermore, the PCB falls behind its New Zealand counterpart in terms of its powers and independence.

Table 2 below compares the PCB with the New Zealand Ombudsman.

Benchmarks and norms	New Zealand Ombudsman	Public Complaints Bureau (PCB)
Standard setting	<ul style="list-style-type: none"> The standards for evaluating the conduct of public officials are specified in Section 22 of the Ombudsman Act. The annual report of the Ombudsman includes a summary of key cases and their outcomes. Although these cases are not binding, they set out invaluable benchmarks. The Ombudsman is authorised to take action and make recommendations where a decision or act is by law, regulation or practice unreasonable, unjust, oppressive, or improperly discriminatory. 	<ul style="list-style-type: none"> Standards for evaluating the conduct of public officials are derived from Administrative Development Circulars. The Official Portal lists success stories and examples of complaints under each 'standard' set by the PCB regime. However, these standards cannot be applied to Government practices and policies. Complaints against practices and policies are not permitted unlike the Ombudsman in New Zealand.
Investigation	<ul style="list-style-type: none"> The Ombudsman has the have power to inquire and gain access to appropriate information, speak with relevant officials and have their procedures safeguarded by secrecy. The Ombudsman is assisted by investigating officers who have varying backgrounds, many of them lawyers. 	<ul style="list-style-type: none"> The Permanent Committee has extensive powers including the right to institute investigations, and direct any officer to explain and give an account. It can also give the PCB power to access records. As Head of the Civil Service, the Committee Chairman has wide-ranging powers over civil servants. However, the investigative thoroughness may be called into question as the PCB's Standard Operating Procedures stipulates that all complaints must be resolved within 15 days.
Accountability	<ul style="list-style-type: none"> There is a to-and-fro between the Ombudsman and investigating officers with the public official which requires public officials to defend their actions and explain themselves.⁵¹ The Ombudsman can force officers to answer to Parliament by way of making recommendations in Parliament. 	<ul style="list-style-type: none"> Ministries and agencies potentially have to answer to the PCB and/or the Permanent Committee, and officers would have to explain to their Heads of Ministries and agencies. Ultimately civil servants would have to answer to the Head of the Civil Service. The PCB also cannot force officers to answer to Parliament.

⁵¹ In practice, this is often an effective form of accountability. As a solicitor for the Ministry of the Agriculture and Forestry, the author was asked by many an incredulous official why they had to act "fairly and reasonably". The reply "...or you can spend the next 6 months of your life writing letters back and forth with the Ombudsman" was usually enough to produce the required response, i.e. the fair and reasonable action or decision.

Benchmarks and norms	New Zealand Ombudsman	Public Complaints Bureau (PCB)
Sanction	<ul style="list-style-type: none"> Cannot impose criminal, civil or disciplinary sanctions. But his report and recommendations, can be escalated at each level (up to Parliament and the public), and the accompanying media It is rare for the Ombudsman to make recommendations, as the threat of this sanction is usually sufficient. 	<ul style="list-style-type: none"> The PCB could potentially invoke stronger legal sanctions, by virtue of the involvement of the Permanent Committee and Head of the Civil Service, who can take disciplinary action against civil servants. However, the PCB is missing two important potential sanctions: the power to force officers to be held accountable to Parliament, and the public.
Transparency	<ul style="list-style-type: none"> The Ombudsman can report matters and make recommendations to Parliament. These reports are made public. The Ombudsman can also force the relevant Ministry or agency to publish its own error. 	<ul style="list-style-type: none"> The PCB has no power to make matters public, and no power to report any matter to Parliament. Instead, complaints that are of public interest will be brought to the attention of the Permanent Committee and Cabinet.
Fairness	<ul style="list-style-type: none"> The grounds for the Ombudsman to take action include situations where the decision or action is e.g. "unjust", "oppressive" or "improperly discriminatory". 	<ul style="list-style-type: none"> "Unfair action" and "abuse of power" are two grounds of complaints.
Independence	<ul style="list-style-type: none"> Parliament determines the Ombudsman's funding.⁵² The appointment of the Ombudsman requires the consent of every political party in Parliament.⁵³ 	<ul style="list-style-type: none"> The PCB is not independent of the Executive. The PCB is staffed by civil servants reporting to a committee of senior civil servants, headed by the Chief Secretary to the Government, who in turn is responsible to Cabinet.
Objectivity and credibility	<ul style="list-style-type: none"> The Chief Ombudsman is an officer of Parliament independent of the civil service and the Executive This helps in ensuring its <i>objectivity</i> and <i>credibility</i> in the eyes of the public. 	<ul style="list-style-type: none"> The PCB's lack of independence from the Executive may put into questions its ability to be <i>objective</i> and <i>impartial</i> when resolving disputes between the Executive and a complainant.

⁵² The Office of the Ombudsmen (along with those of Auditor-General, Clerk of the House of Representatives and Parliamentary Commissioner for the Environment) secures funding from Parliament as a result of deliberations by the Officers of Parliament Select Committee which is chaired by the Speaker (as opposed to jurisdictions where funding and appointment need to be secured from the Government of the day or Head of State).

⁵³ In New Zealand, this is maintained by convention, but there is no reason why this cannot be guaranteed by appropriately-worded legislation.

The PCB fares well on a few elements of the democratic governance benchmarks, such as standard-setting, investigatory powers, answerability and sanctions. As the eyes and ears of government, a watchdog for (not of) government, or an arm of management, the PCB seems capable of performing well or at least is not structurally impaired. However, there is no law that directly confers powers in the PCB itself. Drawing conclusion from this comparison, as an institution of democratic governance overseeing the Executive, the PCB fails miserably for the following reasons:

- Lack of structural independence from the Executive which puts into question its ability to be truly objective or credible in the eyes of the public
- No means of making Ministries or organisations accountable to Parliament or the public neither can it make any error or transgression transparent;
- Cannot question whether any legislation or Government practice itself is unreasonable, unjust, oppressive, or improperly discriminatory; and
- The PCB's investigative thoroughness is questionable given the very short time-frame allowed for resolving standard complaints (15 days).

These flaws can be summed up as a lack of *independence*, *transparency*, and *credibility*.

Of these, lack of *independence* is the PCB's fatal flaw. While the PCB may be able to investigate the conduct of public officials, it *cannot* practicably act as an effective restraint to the power of the Executive. Given this fatal flaw, the only way to ensure that an Ombudsman-type institution plays its rightful role in ensuring democratic governance in Malaysia is to abolish the PCB altogether and return to the drawing board.

An Ombudsman that is genuinely independent of the Executive needs to be established, paying special attention to democratic governance benchmarks and international best practice exemplified by countries that rank highly in recognised indices of democratic values. This needs to be combined with appropriate Parliamentary and other reforms (e.g. to ensure media freedom), in order to maximise the value and contribution of the Ombudsman to democratic governance.

“
Given this fatal flaw, the only way to ensure that an Ombudsman-type institution plays its rightful role in ensuring democratic governance in Malaysia is to abolish the PCB altogether and create a new Ombudsman office.

”

⁴⁷ See e.g. the introduction by the Prime Minister in the Annual Report of the PCB of 2015.

Conclusion

Democracy is much more than a mechanism to elect the Government: institutions and other mechanisms to impose appropriate controls on the Executive are essential.

Older democracies have established 'soft law' institutions and mechanisms that play a crucial and indispensable role in democratic governance: from the very beginning when policy and legislation is conceived, through to public officials making decisions or taking actions, and finally to taking them to task for their decisions, actions, practises and policies.

The Ombudsman in New Zealand is a highly effective 'soft law' institution. It is effective because its independence from the Executive is established and enshrined in an Act of Parliament, its founding Act well-crafted and its structure, powers and functions based on international best practice (the Scandinavian Ombudsman). The New Zealand Ombudsman scores impressively on the benchmarks of accountability, transparency, fairness and independence.

The PCB, on the other hand, scores well on a few elements of democratic governance benchmarks, such as standard-setting, investigatory powers, answerability and sanctions, but not critical benchmarks and norms such as independence, credibility and transparency. The PCB is structurally and fatally flawed as a mechanism for democratic governance. The only remedy is to abolish it and establish an independent Ombudsman based on international best practice and recognised benchmarks.

In light of the range and depth of the governance problems afflicting Malaysia currently, no one reform is the 'silver bullet' that will cure Malaysia's democratic governance deficit. Rather, a whole package of reforms is needed, including 'soft law' institutions such as the Ombudsman, Parliamentary reform and reform of laws restricting freedom of expression. As the Ombudsman-PCB comparison demonstrates, such reforms need to be planned and carried out based on recognised benchmarks of democratic governance and international best practice, rather than political expediency.

Annex I

Benchmarks of Democratic Governance

Accountability

Accountability means holding public officials responsible for their actions: ensuring that public officials are answerable for their actions and that there is redress when duties and commitments are not met. For democratic governance, public officials are held to account, and oversight institutions or the people hold them to account.

An accountability relationship may have up to four stages⁴⁸ (all four in an ideal world):



1 Standard setting:

setting out the behaviour expected of public officials and the criteria by which they might validly be judged.



2 Investigation:

exploring whether or not public officials have met the standards expected of them.



3 Answerability:

a process in which public officials are required to defend their actions, face probing questions, and generally explain themselves.



4 Sanction:

a process in which public officials are in some way punished for falling below the standards expected of them (or perhaps rewarded for achieving or exceeding them).

Transparency

Transparency means openness and communication. As a principle, public officials have a duty to act visibly, predictably and understandably to promote participation and accountability. It does not mean only one-way communication from public officials to those affected by the decisions of public officials, but wherever practicable should be a two-way process.⁴⁹ It is a crucial means of ensuring accountability.⁵⁰

⁴⁸ Adapted from The Transparency Accountability Initiative: <http://www.transparency-initiative.org/about/definitions>

⁴⁹ Adapted from The Transparency Accountability Initiative: <http://www.transparency-initiative.org/about/definitions>

⁵⁰ The role of transparency in keeping the Executive honest is best captured by the adage "Sunlight is the best disinfectant".

Fairness

Fairness means that decisions made by public officials should be made objectively, impartially and rationally, in accordance with relative merit or significance. Decisions should be free of favouritism and bias, should be just to all parties and equitable.

Independence

Independence requires an analysis of the function carried out by the institution or person concerned. Where the institution or person is to oversee the Executive arm of government, clear and meaningful provision should be made for that function to be carried out independent of the Government.

This is because oversight officials should not compromise their objectivity and impartiality, in performing their duties. They should be given as much independence as possible from those who are to be made accountable through the oversight.

Further reading

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