

Safeguarding the rights of detained persons: A paradigm of the challenges facing Ombudsmen in the modern world

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Abstract

There are now over ten million men, women and children in the prisons of the world. Taken as a whole they represent some of the most vulnerable members of humanity. While the vast majority are men, a significant minority are women or juveniles who are particularly at risk in the abnormal world of the prison. Minorities of all types are vastly disproportionately represented, including the mentally ill, the drug addicted and the homeless. It has been said that if one wishes to discover which are the marginalised groups in any society one only has to look into the prisons; there one will find the ethnic and racial minorities and increasingly, in our globalised world, foreign nationals. A small number of prisoners are likely to be highly dangerous and to pose a real threat to the safety and security of society. The manner in which they are treated is a reflection of the humanity or otherwise of the rest of us.

Ombudsmen of the world, either in their mainstream role of dealing with complaints about maladministration, or through their specific responsibility in some countries as the National Preventive Mechanism under the Optional Protocol to the Convention against Torture, have

an important role to play in guarding the rights of prisoners, especially in circumstances where they attract little or no public sympathy.

Introduction

As I travel around the world I have come to appreciate increasingly the important role which ombudsmen in many countries play in safeguarding the rights of so many of the most vulnerable members of our communities and protecting them against violation of these rights. The International Ombudsman Institute, which represents national and other ombudsmen on the global stage, has a key function as a channel of communication and information for sharing best practice among ombudsmen and for communicating on their behalf.

New Zealand has a distinguished history of ombudsmen who have contributed much to the development of human rights and access to justice on this country. I first visited New Zealand in 1998 and became aware of the work being done by Sir Anand Satyanand and his staff, particularly in the monitoring of what went on in the closed world of prisons. In this country the Ombudsman was given a formal role in these matters in the early 1990s.

The late John Belgrave took on several high profile inquiries into prison matters during his period of office as Chief Ombudsman. Speaking at the Asian Ombudsman Association Conference in 2005 Ombudsman Belgrave summarised his responsibilities with the following words:

It might be argued that prisoners forfeit many rights by their status as prisoners. Imprisonment results in loss of freedom and requires conformity with certain rules and regulations. However, it is not the function of the penal system to make that loss of freedom more unpleasant by abusing lawful powers or by exercising unlawful powers. In this regard, I note that the purposes of the corrections system as set out in ... the Corrections Act include contributing “to the maintenance of a just society by ... ensuring that ... custodial sentences ... are administered in a safe, secure and humane, and effective manner.” In my opinion, the Ombudsmen play a valuable role in ensuring that this is the case.

Since following in the footsteps of John after this untimely death in 2007, Dame Beverley Wakem has continued in that tradition. I had the pleasure of meeting her when I last visited New Zealand in 2008 and learned more about the work being done on prisons issues by her and her deputy, Dr David McGee. This work has continued with a number of influential reports in recent years.

The main theme of this conference is *Speaking Truth to Power*, a phrase first used by Quakers in the 18th century referring to the responsibility which each individual has to speak to the factual truth regardless of the consequences. This concept goes absolutely to the heart of the role of the ombudsman, particularly in defence of those who are vulnerable and marginalised in our increasingly individualistic world.

I would like to suggest to you that the whole issue of prisons and prisoners can be used as a very good case study of the associated themes of this conference: Good Governance, Access to Justice, and Transparency and Accountability. These are responsibilities which some of us spend a great deal of time disseminating to those who are responsible for prisons in many countries. The message applies in developing countries and in those which are in transition to democracy. It is equally valid for developed countries but for many of them the message is not so well accepted. It seems to me that Ombudsmen can have a key role to play in these matters and that is what I want to discuss briefly today.

Imprisonment around the world

Let me begin by saying a few things about imprisonment around the world. Today there are well over ten million men, women and children in the prisons of the world. The last forty or so years have seen a massive expansion in the use of imprisonment across the world. This increase has occurred in democratic countries and in totalitarian states; it has happened in rich countries and in poor; it has happened in countries in the north, the south, the east and the west.

Rates of imprisonment in a country are usually quoted per 100,000 of a country's population and the world average is around 145 per 100,000. I do not wish to overwhelm you with statistics. However, it is worth taking just a moment to contrast rates of imprisonment between some neighbouring countries. The rate of imprisonment in the United States of America is 730, while that across its northern border in Canada is 117; the rate in Chile is 290, while that in

neighbouring Argentina is 145; the rate in South Africa is 310, while that in Tanzania is 84; in England & Wales the rate is 154, while in Germany the rate is 83. In this region the rate in New Zealand is 190, while that in Australia is 129

How are we to explain these differences between countries which are often broadly comparable in so many ways? The first thing to say is that it cannot be explained by reference to crime rates. It is notoriously difficult to compare crime rates internationally for a variety of reasons, including the different definitions of crime and the different way in which data is collected. However, we can safely say that the difference in rates of imprisonment between the United States and neighbouring Canada, between England & Wales and Germany, between New Zealand and Australia and between the other countries which I have mentioned cannot be explained by differences in levels of crime. Rather, we have to look for other explanations. Some of them are likely to lie within the criminal justice sphere and may be to do with the nature and extent of criminal justice legislation, or with the efficiency or otherwise of the justice system, for example, in the length of time that it takes to bring cases to trial. There is evidence that other considerations relate to issues such as social equality, social trust, consensus politics and a balanced political economy, a responsible media and a set of criminal justice structures which separate law from party politics and guarantee a judiciary which is independent from political and populist pressure.

Let me put some flesh on the figures which I have just quoted and what they mean in terms of human misery. First, what has been called the race to incarcerate in the United States of America. In 1980 the total number of people in prison in the United States was under half a million. By the end of 1996 it had risen to 1.6 million and today it stands around 2.3 million. That is to say, out of every 100,000 of the population there are 730 men, women and children in prison. More than 12 million men and women pass through America's prisons and jails each year. They are divided unequally on a racial basis. Seven per cent of the population of the United States is made up of male African-Americans, while half of all people in prison in America are African-American. Out of every 100,000 white Americans, 306 are in prison. The comparable figure for African-Americans is 1,900. In the United States one out of every three African-American men between the ages of 20 and 29 is either in prison, on probation or on parole. At least two thirds of all African-American men can expect in their lifetime to be arrested, jailed and have a criminal record.

There are several examples in South America of what happens when a massive increase in the prison population is not matched by an increase in resources. When I visited Judicial Unit 40, one of the main detention centres in Bogota, Colombia, a number of years ago cells were often so full that prisoners were forced to lie on top of each other. Up to 19 prisoners were crammed into cells designed to hold four. The Modelo Prison is the main pre-trial prison for Bogota. It has a capacity for 1500 prisoners. When I visited, it held 3450 male prisoners. At any one time there were about 150 guards on duty to look after these men, a hopelessly inadequate number to effect proper supervision. Most of the guards were in their late teens and serving their year of compulsory national service. The prisoners were held in 5 large accommodation blocks built around patios. The guards did not go inside these patios. In each of the units there is a prisoner who was nominated as "monitor". This in effect meant that prisoners had developed their own rules and regulations for running the patios. Prisoners who could not pay or who did not have influence with the lead prisoners were likely to fare very badly.

In the prisons and penal colonies of the Russian Federation in the early and mid 1990s one witnessed the terrible consequences which resulted when the infrastructure of the State was unable to support a massive increase in its prison population. At that time it was estimated that there were around 1.2 million people in prison in Russia. Conditions were worst in the remand prisons, where it was not uncommon that over 100 prisoners would be squashed into a room officially meant to hold 20 prisoners. The room would have 40 beds. Those without beds would sleep wherever they could lay their heads. Addressing a parliamentary hearing in Moscow in 1995 the Head of the General Penitentiary Department, said,

I have to confess that sometimes official reports on prisoners' deaths do not convey the real facts. In reality, prisoners die from overcrowding, lack of oxygen and poor prison conditions... Cases of death from lack of oxygen took place in almost all large pre-trial detention centres in Russia... The critical situation in SIZOs is deteriorating day by day: the prison population grows on average by 3,500 to 4,000 inmates a month.

Conditions in Russian prisons have improved over the last decade but the country still has over 700,000 prisoners.

Some of the worst prison conditions are to be found in countries which are former colonies. A number of years ago the Nigerian Civil Liberties Organisation reported that there was significant

overcrowding in most of the country's prisons. Zaria Prison, with space for 120 prisoners, held 646; that is, overcrowding of 438 per cent. A prisoner in Zaria described what this overcrowding meant in practice:

We have three batches in my cell, and I am in Number Two. Other cells have four, even five, when there are many prisoners. When it is time to sleep, we all make space for the first batch. We stand at one end of the cell, or sit. Some of us sleep while standing, but you do not lie down. Only the first batch lies down. After four hours, they get up, and we lie down to sleep. After four hours, we get up, and the third batch will sleep.

These are shocking examples of prison conditions but they are by no means unique. In most countries in the world one will find the prisons populated by people who are at the margins of society: the mentally ill, substance abusers and people who are on the lowest rungs of society. It is a cliché, but nonetheless true, that if one wishes to know which are the marginalised groups in any country one need only look inside its prisons. A recent phenomenon in our globalised world is the increasing proportion of prisoners in many countries who are foreign nationals. In more than 40 countries over fifty per cent of prisoners are awaiting trial, yet to be convicted of any offence. In an additional 32 countries the proportion is over 40 per cent.

The need for independent inspection and monitoring of prisons

In many respects prisons are the last remaining secretive places in our societies. All prisons are places where men and women are detained against their will. The potential for abuse is always present. Therefore, they must be institutions which are managed in a way which is fair and just and the treatment of prisoners should be decent and humane. All institutions which are managed by or on behalf of the state should be subject to public scrutiny. This is especially important in the case of prisons because of their coercive nature. Even in the best managed prisons questions there is always the danger of inhuman treatment. In those which are not well managed the danger is even greater and the inhumanity may degenerate into torture.

One of the simplest and most effective ways of reducing the danger of abuse of power in a prison is by making what goes on within it as transparent as possible; by encouraging members of the community to come into the prison to befriend and offer support to the

prisoners. If the isolation and closed nature of the prison is reduced in this way it will be much less likely that there will be institutional ill treatment and that instances where it does occur will quickly be brought to notice.

Some prison administrations have developed a more formal role for members of the local community through systems of independent lay monitoring. These local monitoring bodies take on responsibility for more formal scrutiny of the work of the prison and for reporting back to the prison authorities and, in some cases, to the local community. Such systems can provide an effective means of preserving and promoting human rights and of preventing abuse. They also provide formal links between prisons and the society on whose behalf prisons are run.

However, it is often the case that ordinary members of civil society cannot easily discover for themselves what goes on behind the high walls and fences of a prison and for that reason there should also be a system of regular independent inspection by properly trained personnel. This inspection should be carried out by a body which is independent both of individual prisons and of the prison system itself. In some cases the personnel in of such an agency are appointed by the government. The most independent arrangement is when the inspecting personnel are appointed by parliament and report back to it, as is the case with most Ombudsmen.

The most comprehensive form of scrutiny will be when all of the above activities exist side by side and complement each other in their activities.

It is also worth noting that all these forms of inspection can be a safeguard for prison staff. They can be a means of dealing with any allegations of mistreatment of prisoners or improper behaviour by staff. Where these occur they should be acknowledged and the staff involved identified. At the same time they can also be a way of protecting staff against unjust allegations. Inspections are not only about failures. It is just as important that they should identify good practice which can be used elsewhere as a model. They can also give credit to staff who are doing their work in a professional manner.

An important feature of the most comprehensive form of prison inspections is that they should have a clear reporting procedure with appropriate arrangements for dealing with

matters which may require urgent attention. Independent inspectors should publish all parts of their reports on prisons except those that are related to confidential security information or details of individual persons. The effectiveness of any system of inspection, formal or informal, will be undermined if inspectors do not submit reports on their findings or if such reports are ignored. The individual prison, the prison administration and the government should also undertake to respond promptly and fully to the reports which they receive. It is useful if reports and the responses to them are made public, subject to legitimate security considerations.

The standards on which independent scrutiny should be based

As most of this audience will be aware, there is a raft of international standards about how people in detention are to be treated. Some of them are contained in treaties, which are legally binding on the states parties which have signed and ratified them. One of the most important of these is the International Covenant on Civil and Political Rights. The most relevant article of that covenant for our present purpose is Article 10, which states that:

All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.

The broad principles contained in the binding treaties are covered in greater detail in a variety of instruments which have been approved by the General Assembly of the United Nations.

These instruments include:

The Standard Minimum Rules for the Treatment of Prisoners

The Basic Principles for the Treatment of Prisoners

The Principles of Medical Ethics relevant to the Role of Health Personnel in the Treatment of Prisoners

The Code of Conduct for Law Enforcement Officials

The need for independent inspection of places of detention is also clearly stated in a number of international human rights standards. For example:

UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, Principle 29:

1. In order to supervise the strict observance of relevant laws and regulations, places of detention shall be visited regularly by qualified and experienced persons appointed by, and responsible to, a competent authority distinct from the authority directly in charge of the administration of the place of detention or imprisonment.
2. A detained or imprisoned person shall have the right to communicate freely and in full confidentiality with the persons who visit the places of detention or imprisonment in accordance with paragraph 1 of the present principle, subject to reasonable conditions to ensure security and good order in such places.

UN Standard Minimum Rules for the Treatment of Prisoners, Rule 55:

There shall be a regular inspection of penal institutions and services by qualified and experienced inspectors appointed by a competent authority. Their task shall be in particular to ensure that these institutions are administered in accordance with existing laws and regulations and with a view to bringing about the objectives of penal and correctional services.

Checklist for independent inspections

Let me turn finally to the matters which should be covered in any independent inspection of places of detention. One useful way of ensuring that all areas of concern are inspected is to deal with subjects thematically. On that basis, an inspection should cover the following areas:

Torture and Ill-treatment: One can sense in a prison whether there is an atmosphere of intimidation or not. If there is, the inspectors should be particularly vigilant in investigating this matter.

- It will be particularly important to speak to prisoners confidentially and out of the presence of staff.
- It may also be necessary to speak confidentially to individual members of staff.
- If a prisoner has made an allegation of torture or ill-treatment, the inspectors should consider whether it is necessary to seek his or her transfer to another prison. It is unlikely that physical evidence of torture or ill-treatment will be made available.

- The inspectors should obtain a map of the lay-out of the prison and compare this with the rooms they are shown in order to ensure that they are not being kept away from any area.
- Inspectors should visit the cells which are used for punishment or segregation. Inspectors should investigate what inquiries are made into allegations of torture or ill-treatment by staff and what action is taken against staff who have been found guilty of torture or ill-treatment.
- Inspectors should visit the prison in the evening, at night and during week-ends.
- The inspection team should include a person who is medically qualified who can have access to the medical files of prisoners.

Maintaining Human Dignity: Persons who are in prison are entitled to be treated with dignity and respect. There are a number of trigger points which can be used to assess whether this is the case.

- Arrangements for admission and release.
- The state of the living accommodation and its size relative to the number of prisoners.
- Hygiene and arrangements for washing, bathing and sanitary provision.
- Sleeping arrangements, clothing and bedding.
- The quality and quantity of food and the times at which it is served.
- Arrangements for exercise and taking fresh air.
- The general physical state of the prison and its maintenance.

Health Rights of Prisoners: Many prisoners will have a poor health profile on admission, either because of acute illness or because of their lifestyle. The abnormal conditions of life in prison are likely to exacerbate these conditions. The main issues to look out for are:

- Access to health care and to professional health staff.
- Links with community health care services.
- Healthy conditions in custody.
- Attention to the danger of infectious or contagious disease, particularly tuberculosis and HIV/AIDS.
- Health education and prevention of illness or disease, particularly in respect of illnesses such as HIV and AIDS.
- The number of trained health care staff and their qualifications.

- Medical screening of prisoners on admission.
- Specialist health care, including dentists.
- Mental health.
- The storing and dispensing of medicines.
- The recording of illnesses, injuries and deaths.
- Medical confidentiality.

Making Prisons Safe Places: Prisons should be as secure as is necessary. They should also be safe for prisoners, staff and all others who come into them. The main factors to be aware of will include:

- The physical security of the prison.
- A proper balance between public safety and the rights of the prisoners.
- Decisions made about the relative threat to security posed by individual prisoners.
- How good order and control are maintained.
- Whether there is a feeling of tension and fear in the prison.
- Whether the prison is safe for prisoners, staff and visitors.
- What happens to prisoners who are being threatened by other prisoners.
- Whether there is a published set of rules and regulations.
- Whether there is a proper disciplinary procedure.
- The punishments which can be imposed for breaches of discipline.
- The use of instruments of restraint and of force.
- Record-keeping of incidents, riots, suicides.

Making the Best Use of Prisons: Prisons should not be places of boredom or monotony. Prisoners should be given opportunities for education and to learn work and other skills.

- Arrangements to keep prisoners engaged in useful activity.
- Whether prisoners undertake industrial work.
- What sort of skills they learn.
- What hours they work and in what conditions.
- Whether they receive payment.
- Whether working conditions meet health and safety regulations.
- What vocational or skills training is available to prisoners.

- The provision of basic and further education opportunities.
- The availability of physical training and cultural activities.
- Religious observance and access for representatives of different religious faiths.
- Preparation for release and re-integration into the community.

Prisoners' Contact with the Outside World: The most important consideration here is the extent to which prisoners can make contact with family and friends.

- How many letters prisoners can send and receive and arrangements for censoring correspondence.
- Arrangements for family and friends to visit: frequency, length of time, conditions, reasonable privacy, special arrangements made for children.
- Searching of prisoners and visitors.
- Access to telephones and monitoring arrangements.
- Arrangements for home leave.
- Access to a library, to newspapers, books and the broadcast media.

Complaints Procedures

- Arrangements for prisoners to make a request or complaint or to air a grievance.
- Whether complaints can be made personally or in writing.
- Who investigates complaints.
- Whether the prisoner is told the outcome of the investigation.
- What access prisoners have to the director or head of the prison.
- Procedures for making a complaint to an external authority.
- Whether prisoners feel free to complain without any danger of formal or informal retribution.
- Record keeping of the number and content of complaints.

The majority of prisoners are likely to be adult males. Special attention should be paid to arrangements for meeting the specific needs of minority groups. They are likely to include:

Women: Note that all the issues in this section need to be considered from a gender perspective.

- Whether they are they held in separate accommodation and are looked after by female staff.
- The facilities they have access to.
- Arrangements for them to maintain contact with their children.
- The care of pregnant women or women with infants.

Children and Juveniles

- What is the minimum age.
- Whether they are kept separate from adult prisoners.
- The facilities to which they have access, including educational provision.
- Arrangements for maintaining contact with their families.
- Whether the staff who look after them are specially trained.

Non-discrimination

- Whether records are kept of minority groups in the prison.
- Any evidence of discrimination on grounds of race, colour, sex, language, religion or religious belief, political or other opinion, national, ethnic or social origin, property, birth or other status.
- Provision for foreign national prisoners.
- Arrangements for cultural, religious, dietary and dress needs.
- Availability of the rules of the prison in languages which all prisoners can understand.

Persons who are awaiting trial

- Whether the fact that they are not convicted is recognised.
- The average length of detention for prisoners who are awaiting trial.
- Arrangements for prisoners who have the possibility of release on bail.
- Access to legal representation.
- Separation from convicted prisoners and how their conditions compare.

Conclusion

The prison is a place of many aphorisms. One which is frequently quoted and attributed to a range of authors including Dostoyevsky, Churchill and Mandela is that if one wishes to

understand the real values of any society one need only look at the way it treats those who are in its prisons. As with most aphorisms, there is a great deal of truth in that statement. That brings me full circle to my opening remarks and my suggestion to you that the important role which Ombudsmen in many countries have in safeguarding the rights of detained persons can be considered as a paradigm of the challenges which face all of you in the modern world.