

Sabine Carl

Proliferation and Implementation of Prison Ombudsmen

Comparative Analysis of the Prisons
and Probation Ombudsman for England
and Wales and the Justizvollzugsbeauftragter
des Landes Nordrhein-Westfalen

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Patri adhortatori,
marito fautori.

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Abbreviations

ABA	American Bar Association
ADP	average daily population
ADR	alternative dispute resolution
Art.	Artikel (article)
AV	Allgemeinverfügung (ministerial decree)
BIOA	British and Irish Ombudsman Association
BverfGE	Entscheidung des Bundesverfassungsgerichts (decision of the Federal Constitutional Court)
BverfGG	Bundesverfassungsgerichtsgesetz (Law on the Federal Constitutional Court)
CDU	Christlich Demokratische Union Deutschlands
DJT	Deutscher Juristentag (German Legal Association's Annual Meeting)
ECHR	European Convention on Human Rights
ECPT	European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment
EctHR	European Court of Human Rights
EHRR	European Human Rights Reports
FCC	Federal Constitutional Court
FDP	Freie Demokratische Partei
GG	Grundgesetz (German Basic Law)
HM	His/Her Majesty
HMCIP	Her Majesty's Chief Inspector for Prisons
IBA	International Bar Association

IMB	Independent Monitoring Board
LJ	Lord Justice
MoJ	Ministry of Justice
MP	Member of Parliament
NGO	non-governmental organisation
NOMS	National Offender Management Service
NPM	National Preventive Mechanism
OPCAT	Optional Protocol to the Convention against Torture
PCA	Parliamentary Commissioner of Administration
PHSO	Parliamentary and Health Service Ombudsman
PSO	Prison Service Orders
SPD	Sozialdemokratische Partei Deutschlands
SPT	United Nations Subcommittee on Prevention of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment
StVollzG	Strafvollzugsgesetz (German prison act)
UK	United Kingdom
UN	United Nations
US	United States of America
WWII	Second World War

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A Introduction

Prisoners are denied their rights and lose their lives in prisons around the world every day. In England and Wales 60 to 100 people lose their lives in prison every year due to non-natural causes, which amounts to approximately one death every five days.¹

As so called “total institutions”, prisons are by definition closed environments designed to deprive the individual of a range of personal freedoms.² With the progressing renunciation of the death penalty, imprisonment constitutes the most severe form of state-imposed punishment for the commission of a crime. Thus, it is astonishing that “society as a whole is less than interested about what happens behind [prison] walls” leaving prisons to “operate outside the normal controls and processes of society”.³

In spite of this societal disinterest, it is now commonly acknowledged that “[j]ustice does not stop at the prison doors” and that “[p]unishment and imprisonment have meaning [only] if, while maintaining the demands of justice and discouraging crime, they serve the rehabilitation of the individual by offering those who have made a mistake an opportunity to reflect and to change their lives in order to be fully reintegrated into society”⁴. To this end, the state must not curtail rights beyond what is necessary (freedom of movement, assembly etc.).⁵ Yet, when- and wherever humans regularly exercise authority over others, unintentional as well as deliberate grievances of both petty and serious nature occur. These may concern anything from property to hygiene with issues escalating in significance pertaining to disciplinary matters possibly including instances of bodily harm.

1 Averages taken from the Inquest statistics of the last ten years – available from <http://inquest.gn.apc.org/website/statistics/deaths-in-prison>. In 2011 two prisoners were victims of homicide, 57 prisoners committed suicide and two prisoners died of other non-natural causes. North Rhine-Westphalian catalogues 20 to 45 inmate deaths per year over the last ten years (21 deaths in 2011, 12 of which are classified as suicides) – statistics available from http://www.justiz.nrw.de/Gerichte_Behoerden/zahlen_fakten/statistiken/justizvollzug/index.php (all webpages last accessed August 15th, 2012)

2 Goffman (1961); Owers (2004), p. 109

3 Owers (2004), p. 109

4 Woolf/Tumim (1991), p. 411; Pope John II, Homily at “Regina Coeli” Prison in Rome during the Celebration of the Great Jubilee (July 9, 2000), in Holy Father Visits “Regina Coeli” Prison: “I was in Prison and You Came to Me”, L’Osservatore Romano (English ed.), July 12, 2000 at p.1

5 Eady (2007), p. 266; Woolf/Tumim (1991), p. 411

It is only natural that “[a]dministrative law organizes a range of forms of redress” providing the prisoners with ample opportunities to make requests.⁶ The majority of these grievances are resolved inherent to the system by the prison authorities. Yet, “one of the fundamental principles of human rights-compliant prison policy” is the provision of regular independent oversight.⁷

The high vulnerability and protective needs of prisoners are reflected by the fact that many key judgments of the European Court of Human Rights (ECtHR) have been in the area of prisoners’ rights.⁸ In fact, British prisoners have made more use of the European Convention on Human Rights (ECHR) than any other single group of people in Europe.⁹

While courts are the most wide-spread form of institutionalized, national, independent oversight bodies controlling the penal system, there exists also extra-judicial redress provided by Members of Parliament (MP), petition committees etc. These bodies reflect the extension of the term control from its traditional meaning of *contre-rôle*, implying the examination of already closed cases, to include guiding influence taken on cases prior to their closure.¹⁰ The most significant of these forms of extra-judicial redress has been the Ombudsman movement as many countries have opted to include ombudsmen in their multi-pronged approach.¹¹

Nowadays, the ombudsinstitution is acknowledged as an embodiment of the democratic yearning for the control of state sovereignty.¹² As “the office of the ombudsman has attracted limited academic [or public] attention”, it may be prudent to mention that not all offices possessing the characteristics of an ombudsman actually carry the word ombudsman in their title; e. g. *Médiateur de la République*, *Defensor del Pueblo* or *Protecteur du Citoyen*.¹³

While the origin of the office itself can be traced back to Germanic tribes, the word ombudsman derives from the Swedish *ombuds* or *umbuds*, which translates as representative or agent of the people or a sub-group thereof.¹⁴ This, of course, serves as a mere elucidation instead of fully-fledged definition of the term ombudsman. This study will show that any existing attempts at the latter are insufficient in precision and topicality. In fact, a new definition will be pro-

6 Bell (2006), p. 1278

7 Martynowicz (2011) p. 82; 70.1 to 70.7 of the European Prison Rules 2006

8 Here and in the following: Eady (2007), p. 266

9 Arnott et al. (2000), p. 5

10 Puchta (1986), p. 121

11 Bell (2006), p. 1278

12 Bauer (1964b), p. 5

13 Pearce (2005), pp. 110f; offices located in France, Spain and Québec respectively

14 Stuhmcke (2010), p. 162; Caiden et al. (1983), p. 9

posed which coins ombudsmen as public sector institutions designed to protect individual rights and defend the fundamental rights of democracy such as civil and human rights via the supervision of the executive. Ombudsmen are authorized by a parliament, a ministry or a subdivision thereof to independent investigation – either upon own initiative or upon receiving complaints from citizens – of an alleged part of the administration’s acts, omissions, improprieties, and broader, systemic problems. Due to not being invested with any executive power, their only tools are personal authority, recommendations, annual and special reports and the media.

Ombudsmen have been considered a way of “fitting the forum to the fuss” and to remedy marginal defects in an overall sound system.¹⁵ They were not designed specifically for prison purposes, but are said to be of a “cloth that can be cut into any form”.¹⁶ While the remit of many general ombudsmen includes penal matters, specialty prison ombudsmen as one of many adaptations of the original idea epitomise a concept that is neither widely known nor has been met with enthusiasm – in research or otherwise – befitting its importance.¹⁷ It never was part of what has been described as “Ombudsmania” and outside of Britain – and possibly Canada or Northern Ireland – it would never be considered a feature of modern (prison) life.¹⁸ Until 2007, prison ombudsmen exclusively existed in the common law world where they have been employed as mechanisms for penal control since the 1970s.

So far, the success of ombudsinstitutions has been the assumed reason for their spread – assumed because of the marked discrepancy between the frequency of use and the extent of existing academic research.¹⁹ Ombudsmania has been identified as one reason for this lack of research. This does not mean that the need for evaluation has gone un-noted.²⁰ As Gellhorn puts it “[t]he Ombudsman has in recent years been so rapturously regarded abroad that his achievements have not often been evaluated. What he is supposed to accomplish is taken as the equivalent of what he has in fact accomplished”.²¹ Considering on the one hand the fact that ombudsmen hold the power to do much good and hide much evil²² and on the other hand the truism that “few institutions work so well that

15 Buck et al. (2011a), p. 8; Anderson (1978), p. 243

16 Caiden (1983), p. 15

17 c.f. Gottehrer (2009), p. 5; Jacobs (2004), p. 300

18 Ascher (1967), p. 174; Gottehrer (2000), p. 47; Rowat (1968), p. xii; Seneviratne (2002), p. 29

19 Fuchs (1985), p. 19

20 Ayeni (2000), p. 16

21 Gellhorn (1966b), p. 239

22 Caiden (1983), p. 15

they cannot be improved”²³, it is all the more surprising that serious work has been few and far between²⁴. Overall, “the current scientific patchwork of knowledge on the ombudsman is a far cry from being ideal”.²⁵ This remains true despite the acknowledgement of ombudsmen as “an important object of comparative study that lies on the borderline between the disciplines of administrative law and public administration”.²⁶ The same holds true for research done on prison ombudsmen. At a first glance the list of literature may appear long, but most of these essays do no more than call for the introduction of such an office.²⁷

The lack of answers to the questions

- Do prison ombudsmen fulfil their purposes?
- Should they be recommended as penal oversight bodies and grievance mechanisms?
- And if so, how should they be moulded?

is an insupportable status quo in light of the human rights and rehabilitation requirements of prisoners, the severity of imprisonment as a form of punishment as well as the financial resources invested.

This study challenges the assumption of institutional success at the heart of the prison ombudsman spread. In order for success to trigger the spread, introducing state bodies would have to make a rational, level-headed choice to implement after proper consideration of what foreign penal oversight bodies would best suit both their local need and the already existing tableau. This assumption, however, has been never been researched let alone proven.

This study recognizes this deficiency, which ties in with Seneviratne’s recent critique that “[the ombudsmen’s] proliferation has occurred with little

23 Seneviratne (1994), p. 133

24 in depth work: Danet (1978), Male (2000), Fowlie (2005). Evaluation mentioned in: Holt (1980), Seneviratne (1994), Ayeni (1999), Aufrecht/Hertogh (2000), Male (2000), Fowlie (2005), Hyson (2006), van Roosbroek/Steven and van de Walle (2008). For the definition of success in ombudsman work see: Harrison (2004), Buck et al. (2011a)

25 Steyvers et al. (2009), p. 16

26 Bell (2006), p. 1279

27 Academic work mentioning prison ombudsmen at least in passing: Kühler (1970), Tibbles (1971), Taugher (1972), Fitzharris (1973), Münchbach (1973), Cromwell (1974), May (1975), Moore (1975), Williams (1975), Anderson (1975b, 1978, 1981a, 1983), Fulmer (1981), Barton (1983), Williams (1984), Birkinshaw (1985), Johnson (1988), Selke (1992), Lesting (1993), Ryan/Ward (1993), Jacobs (2004), Lazarus (2004), Shaw (2004), Kretschmer (2005), Owers (2006), Alarcón (2007), Heskamp (2007-2008), Sanker (2007), Laubenthal (2008), Livingstone et al. (2008), Rotthaus (2008), Sapers/Zinger (2010). For work done on general ombudsman activities in prison see: Groves (2002, 2003), Fliflet (2009).

thought as to how they relate to each other, the civil justice system, or the administrative justice system”.²⁸ The study aims to fill this research gap where the proliferation of prison ombudsmen is concerned by examining the why and how of the prison ombudsman spread across the borders of countries and legal cultures alike.

Thus, the research undertaken here is based on the questions

- How did prison ombudsmen evolve?
- What drives their spread?

which imply an enquiry into the needs state bodies seek to fill with the introduction of prison ombudsmen. However, the proliferation perspective only scrapes at the surfaces of the deeper underlying questions of

- How do such introductions proceed?
- What legal forms are employed?

which ask after the structures said state bodies utilize to meet their perceived needs. This research therefore contributes to the field by analysing the implementation of prison ombudsmen. The implementation perspective alone allows the identification of and constitutes proof of the occurrence of knowledge transfer.²⁹ The latter concept belongs to the realm of international relations, public policy, politics and sociology.³⁰ Accordingly, this study takes a comparative approach combining elements of the former with criminology, legal studies and administrative sciences.

In short, this study challenges the assumption that institutional success causes the spread of prison ombudsmen reasoning that the frequent introduction of executive prison ombudsmen makes a thorough examination process by state key-holders unlikely. This can be described in three hypotheses:

- Prison ombudsmen are only introduced during times of acute pressure on the host penal system.
- Their implementation happens via cross-fertilization.
- This frequently results in executive ombudsmen.

The technical terms used in these hypotheses (ombudsmen, prison ombudsmen, executive ombudsmen and cross-fertilization) will be defined and operationalized in the next chapter, which describes the current state of research. Subsequently, the methodology selected for the testing of the hypotheses as well as its

28 Seneviratne (2000b), p. 20

29 c.f. Evans (2009a), p. 246

30 Marsh/Sharman (2009), p. 269

application is explained in chapter C. Chapter D contains an analysis of the proliferation and implementation process of prison ombudsmen using the Prisons Ombudsman for England and Wales and the Justizvollzugsbeauftragter des Landes Nordrhein-Westfalen as the two primary examples. A conclusion comprising a compilation of research results, a critical analysis of this study's constraints as well as future research prospects in this field is presented in chapter E.

B Current state of research

The current state of research operationalizes the technical terms used in this study. This operationalization entails three parts. First, the ombudsman concept is examined. This includes definitions and descriptions of both ombudsman *in generaliter* and executive ombudsman *in specialiter*. The operationalization of the technical term prison ombudsman comes next. The third section on learning process explains the concept of cross-fertilization.

I. The ombudsman as a concept

This study focuses on prison ombudsmen. In order to properly analyse their implementation modes, the term “ombudsman” must be operationalized by establishing as precise a definition as possible. Only a precise definition allows the identification of the aims against which to compare prison ombudsmen.

However, the availability of such a definition is historically impaired by the spread of the ombudsman idea, which, once it left its Scandinavian crib, may effortlessly be compared to a highly contagious disease aptly named Ombudsmania.³¹ The sheer speed of this idea’s diversification left academia struggling to keep up.³² The resulting discrepancy between the factual proliferation of ombudsmen and their methodical academic assessment remains the source of many an academic disagreement on whether a new development was a valid extension or an off-shoot outside the conceptual borders. Indeed, no commonly accepted definition is currently available for the term.

The method applied in this study has led this researcher to examine multiple definitions and – when none was found to suit the purpose of this study – create a new one. This definition, which has already been outlined in the introduction, is based on an understanding of the ombudsman concept as a whole.

This section will therefore begin with a brief overview over the history of ombudsmen, which quickly reveals that the search for the conceptual borders cannot be limited to institutions bearing the ombudsman title. The grounded theory approach therefore required the researcher to look for common features, practice methods and expectations, all of which have facilitated the discovery of the plethora of technical terms describing ombudsinstitutions. Their categorization identified criteria for judging the inclusivity of the available definitions.

31 Ascher (1967), p. 174; Gottehrer (2000), p. 47; Rowat (1968), p. xii

32 Fuchs (1985), p. 19

When none was found to suit the purpose of this study, a new definition was created.

1. Short history

The method of administrative control is as prone to change over time as states and forms of government themselves are. Any method of administrative control set in stone is doomed to fail. This hypothesis is as old or new as Plato's *Politeia* VIII. Consequently, administrative control faces a constant process of adjustment. It therefore comes as no surprise that the ombudsman's roots reach back far in history. Forerunners can be found in the early history of Western Europe (e.g. the Roman tribune of the plebs³³), the Middle East (the *kadi* during the Ottoman Empire³⁴) and China (the control *yuan* during the Qin Dynasty³⁵). How much these administrative control mechanisms really resembled what is now called an ombudsman is difficult to judge – especially, since the present-day concept is by no means well-defined itself.

It is much easier to pinpoint the origin of the term ombudsman.³⁶ In 1713 Charles XII, the Swedish king, exiled in the Ottoman Empire, installed as his proxy the *högste ombudsmannen*, whose duty was to ensure that the civil servants and judges acted in accordance with the law. In 1719 this “Supreme Ombudsman” evolved into the Chancellor of Justice. With the Swedish revolution and the consequent move to a limited monarchy in 1809, the Swedish Constitution created the office of the *Riksdagens Justitieombudsman*, who was directly responsible to the Parliament and, in contrast to his predecessor, was based on Montesquieu's model of the separation of powers. Ever since, the ombudsman's role and definition has proven difficult to place, which led Münchbach to consider it a *pouvoir neutre*, while Bauer went even further and defined the ombudsman as a separate “fourth power”.³⁷ In any case, this Swedish ombudsman model was not an invention that took the world by storm.

The actual starting point of the worldwide spread of the ombudsman idea lies elsewhere. The crisis legislation in the 1930s and the growth of the state apparatus during the economic reconstruction after the Second World War (WWII) led many European citizens to perceive the administration as a potent, independ-

33 Ebert (1968), p. 9

34 Atalay (2000), p. 47

35 Owen (1993), p. 2

36 For a concise overview of the spread of the institution, see Ayeni (2000), pp. 20f

37 Münchbach (1973), p. 84; Bauer (1964a) p. 227 and (1946b), p. 3