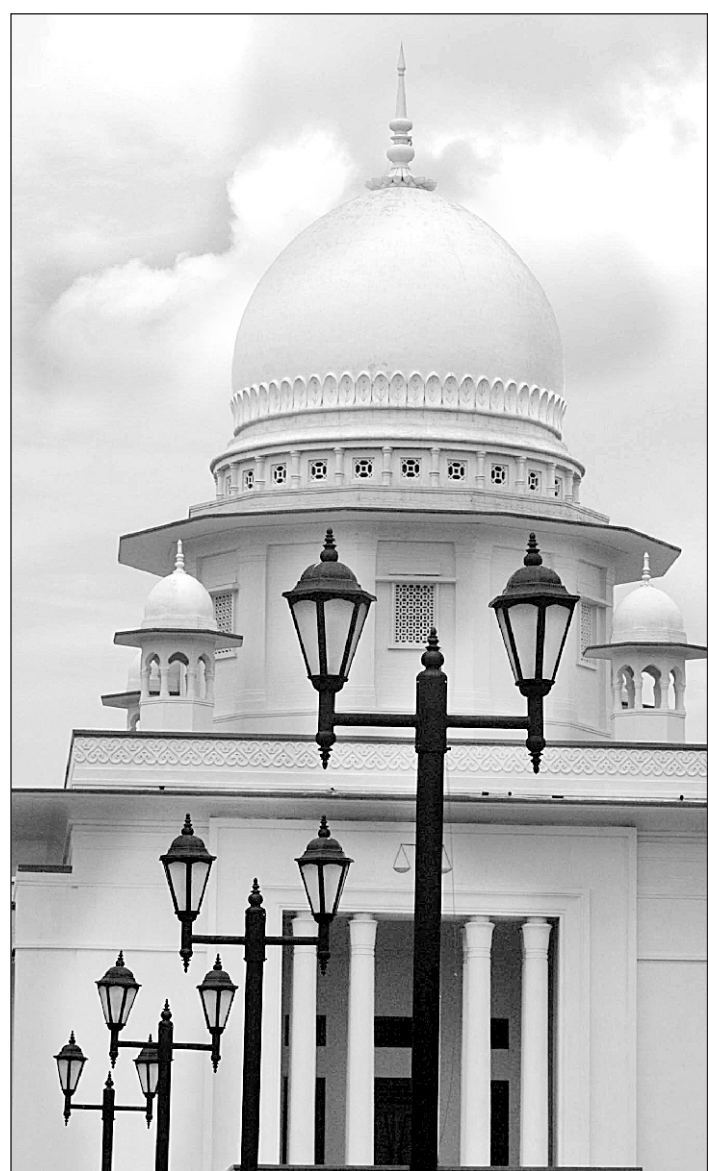




LAW vision



## Office of ombudsman: Why the delay?



BARRISTER MD ABDUL HALIM

THE lofty idealism of our Constitution makers is manifested in Article 77 of the Constitution which provides for establishment of an institution of ombudsman. However, no initiative was made to introduce this institution until 1980 when late President Ziaur Rahman took initiative to establish the office of Ombudsman in Bangladesh and

accordingly an Act was passed by the then parliament in 1980. Unfortunately no government made this law effective by establishing an office of ombudsman. But the office of ombudsman has been long overdue in view of widespread corruption and maladministration in Bangladesh.

Ombudsman was created first in 1809 when Sweden adopted its new Constitution. Following the footsteps of Sweden the institution of

ombudsman was adopted in other countries. The Swedish word 'Ombudsman' means a delegate, agent, spokesman, representative etc. So ombudsman means the man or official who represents the people in their grievances or who acts as a commissioner of parliament to redress the grievances of the people. He is also called a 'grievance man'. From the functioning of ombudsman's office established so far in various countries it may be said that it is an office created either by the constitution or law. This is a body independent of the executive and responsible only to parliament and the principal function of which is to investigate complaints of maladministration against various government departments or other public bodies.

### The need

In every country the purpose of creating the office of ombudsman was to safeguard the rights of citizens from the administrative excess, to examine complaints of infringement of the people's rights. There, are, of course, some traditional methods whereby numerous organs of the government may be monitored and kept under control in the interest of the governed and various grievances of citizens can be redressed. These methods are mostly legislative and judicial. Among the legislative methods parliamentary questions, no-confidence motion, censure, cut motion, adjournment motion etc. are prominent. But due to strict party discipline these devices no longer bring the administration under strict control and the citizens' grievances can little be redressed. The legislature is 'more a forum for the ventilation of grievances than for securing their redress.' Again, the members of parliament have little time to attend to all the grievances of their constituents. With the enormous growth of governmental authority the volumes of request for such assistance has placed an impossible burden on individual members. Hence something more is needed to meet current needs and the answer has been found in creation of the office of ombudsman.

Again, the technological development and the growing complexity of governmental functions and

responsibilities are forcing the state to leave a wide discretion to the bureaucracy. With this wide discretion has increased administrative abuse of powers affecting the lives and rights of ordinary people in varying degrees. Also the bureaucrats are not directly accountable to parliament. Complaints can, therefore, always be heard that public authorities, although they have acted within the law, have failed to observe the proper standard of administrative conduct and these are the situations where neither court nor any tribunal can offer remedy.

Moreover, experience shows that normal judicial system is not effective in preventing such abuse of power. Also judicial remedies are mostly time-consuming and expensive. These considerations and factors led the development of a system of ombudsman enabling proper investigation of the citizens' complaints against abuse of power by administrative officials and redress made easier and quicker.

There are now over a hundred local and national ombudsmen around the world. This covers almost 80 countries who maintain various categories of ombudsmen with or without parliamentary ombudsman. Such an overwhelming adoption of the institution proves its success.

### Method of work

Generally an ombudsman may receive complaints from three sources:

- i) Complaints sent to him by members of the parliament (MPs);
- ii) Complaints made to him by any person;
- iii) The ombudsman may, on the basis of a newspaper comment or otherwise, proceed suo moto.

Of these, of course, the individual complaints are the main source of cases brought to the Ombudsman's attention. Any individual feeling aggrieved by any administrative action or inaction may file a complaint to the ombudsman. It is not necessary for the complainant to employ legal advice. What he needs is to make the complaint in writing and whenever possible, with appropriate evidences and relevant documents supporting

the complaint.

Once the complaint has been received in the office of the ombudsman, the case proceeds largely by correspondence. The ombudsman forwards the complaint to the official concerned and asks for an explanation; the officer returns its version of the matter together with any relevant documents. The ombudsman, if satisfied, informs the complainant of the official explanation. If he is not satisfied, or if the complainant produces further evidences or challenges the official version, the ombudsman continues his investigation until either the complaint is found to be justified or the complaint is eventually dismissed as unjustified. It may be mentioned here that during the investigation, the ombudsman shall have access to all files and minutes of courts and agencies even to those normally privileged or secret; he may ask the department concerned to produce and submit such information as may be necessary for the ombudsman to decide upon the complaint or information.

Besides this, the Swedish ombudsman undertakes periodic tours of inspection in the provinces or central offices, normally giving only a day's notice of his intention. These inspections are at random and they may concentrate on the financial affairs of the office concerned. Normally the ombudsman or his deputy carries out about four or five tours of inspection a year, each tour lasting a week or so.

Ombudsman is appointed by the legislature; he is fully independent of the executive; he has the power to interfere in any sphere of administration. If gross maladministration is found, he can make order to rectify and the experience in countries which have introduced this institution, shows that his orders are promptly complied with. If, however, in any case, his order is not complied with, he may make report to parliament and debate may take place in the House; also the media can publicise it. Ultimately the administration will have to rectify it.... Cont.

The concluding part of the story will publish on January 14, 2006.

The author is Advocate, the Supreme court of Bangladesh.

HUMAN RIGHTS monitor



## Atrocities continue in Sudan's Darfur



PHOTO: PHOTOSFLICKR.COM

Despite a consistent and forceful Security Council response to the crisis in Sudan's western Darfur region, reports from there confirm a marked deterioration since September, including an increase in ethnic clashes, destabilizing elements crossing in from Chad and continuing banditry, United Nations Secretary-General Kofi Annan says in a report released on December 29, 2005.

For more than a year, the Council has sought an end to the violence, the disarming of the Janjaweed militia, a halt to impunity and a political solution. The Council has also imposed an arms embargo, assets freeze and travel bans on belligerents in Darfur, and has referred the situation there to the International Criminal Court (ICC).

Since the Secretary-General's first report in August of last year, however, the Sudanese Government has taken no major steps to bring to justice or even identify any of the militia leaders or

perpetrators of the attacks, Mr. Annan says in his latest update to the Council, pointing out that Southern Darfur experienced its highest rate of violence last month.

"I strongly urge the Government of the Sudan once again to take decisive steps to address these manifest failures," he says.

Though countless lives have been saved through a massive, UN-led humanitarian relief effort, those most exposed to violence and gross violations of human rights continue to live in fear and terror, the report states.

"Large-scale attacks against civilians continue, women and girls are being raped by armed groups, yet more villages are being burned and thousands more are being driven from their homes," Mr. Annan says.

The Security Council has extended through March the mandate of its Committee monitoring the targeted measures and designating individuals subject to sanc-

tions. "As the Security Council has stated repeatedly, ultimately only a political solution can end the violence and allow some 2 million internally displaced persons (IDPs) and refugees to return home," the Secretary-General writes.

Given these stakes, the current round of the peace talks in Abuja,

Nigeria, is "critical and must be decisive," despite serious difficulties encountered in the lead-up to the talks as a result of the division within the rebel Sudanese Liberation Movement (SLM), he says. That split came about as a result of an internal leadership struggle between two rival SLM leaders, Abdul Wahid al-Nur of the Fur people and Mini Arko Minawi of the Zaghawa people.

Mr. Annan also calls on donors to help fund efforts to meet the "massive humanitarian needs" of the people of Darfur.

Source: UN News Service.

FOR YOUR information

## Behavioral genetics and law

SHEIKH HAFIZUR RAHMAN KARZON

BEHAVIOUR genetic information could lead to a wide range of risk-averse actions. Carlsen V. Wackenhut Corp. is a good illustration of such a

case. In 1994 at a Bon Jovi rock concert a security guard attempted to rape a 16-year old patron under the stands. The security company that employed the guard was then sued by the girl for negligent hiring. She alleged that the company should have enquired into the

background of the security guard before employment. The company would then discovered that the man had four prior convictions, including one for second degree robbery. The appellate court reversed the trial court's summary judgement for the company and

held that upon discovery of a prior robbery conviction, a prospective employee had a tendency to commit criminal activities.

From the above case a number of questions emerge. Would the employees in the future be put under an obligation to review medical records or make their own medical arrangement to test whether applicants had genetic indicators of an increased risk for violent behaviour? Would it transgress Disabilities Act or other laws? A court might impose liability for failure to utilise behavioural genetic tests if they were on the market and their use by the employers was not unlawful. In an age of genetic science the people and insurer will create pressure to make use of genetic tests of school teachers, day care workers, police officers, home health care workers, or other employees. Besides employment, behavioural genetic information could be used in other fields, too. The summer camp, boarding school, college dormitory or other authorities will be pressed to review genetic information of the campers and students to ascertain who have genetic indicators of an increased risk for violent behaviour.

### Genetic information and medical privacy

Almost all the constitutions of all countries have protected citizens' right to privacy as to their home and correspondence. This is a very important right in that without

which people cannot maintain normal and decent life. The development of genetics has created implications for right to privacy. If genetic information of any individual will be available that will surely violate the right to privacy. So legal mechanism should give reasonable coverage to right to privacy, which has been done in different countries. The law provides, inter alia, that no person may obtain and disclose genetic information without specific authorisation. The law was enacted subject to various exceptions. Different countries are considering making laws for safeguarding the inviolability of the right to privacy.

If genetic information of an individual is available that may operate, in some cases, prejudicially to the person concerned. An individual having normal and good genetic traits should not be apprehensive of his genetic information being available at large. But if any individual possesses genetic traits indicating his/her low brilliance or some severe diseases having those available to incumbents, that person may not get any job for which s/he may suffer throughout his/her whole life. This type of people may suffer disrepute in their social relation and personal interaction. Availability of genetic information may cripple a person's whole life if s/he possesses genetic traits of below average. So privacy of genetic information should be protected through sufficient legislation, otherwise normal human

relation will encounter a catastrophic situation.

With the development of individualism right to privacy has taken hold. The recognition of a legal right to privacy is largely a twentieth-century phenomenon. Under American Law the development has taken place along three separate lines: constitutional privacy, common law privacy, and statutory privacy. The privacy and confidentiality of medical information has not been afforded adequate protection in any of these areas. The federal constitutional right to privacy has been used to restrict the government from interfering with personal medical decisions, such as providing and withholding medical treatment, procreation, contraception and abortion. In serious problems like drug abuse or other problems related to health of the people, government can interfere. In Whalen V. Roe, 1977 the respective Supreme Court unanimously held that, "Disclosures of private medical information to doctors, to hospital personnel, to insurance companies, and to public health agencies are often an essential part of modern medical practice even when the disclosure may reflect unfavourably on the character of the patient. Requiring such disclosures to representatives of the State having responsibility for the health of the community, does not automatically amount to an impermissible invasion of privacy."

The second privacy law doctrine, common law invasion of privacy has evolved into four related torts: public disclosure of private facts, intrusion upon seclusion, false light and appropriation of name of likeness. The first two are especially relevant to medical privacy. The plaintiff must prove that private medical information has been published or disseminated to the public in order to establish a claim for invasion of privacy. The plaintiff has to show that public has no legitimate concern in that matter and it will only bring shame or humiliation to an average reasonable man. Some authorities like employers have qualified privilege to disclose certain facts which is necessary to maintain their business interest. In Young V. Jackson, 1990, in a nuclear power plant rumours spread that the reason for an employee's illness was radiation exposure. As a result work was disrupted in the power plant. A Mississippi court held that the employer had privilege to disclose the fact. Employer had the right to tell employees that the plaintiff was ill due to the effects of a hysterectomy.

The third main legal method of protecting privacy is statutory. One or more aspects of medical privacy are dealt with by various state and federal statutes, but adequate protection has not been provided by any of these laws, however. To protect the privacy of genetic information, Oregon enacted the

nation's first state law in 1995. "Subject to various exceptions, the law provides, among other things, that no person may obtain genetic information from an individual without informed consent, no person may retain genetic information without obtaining specific authorisation, and no person may disclose genetic information without specific authorisation. A similar 'procedural' law has been enacted in California." The laws only prohibit the unauthorised collection, retention, or disclosure of genetic information. There are many instances where law has nothing to do in which individuals are needed to give genetic or other medical information as a condition of employment, insurance, education, commercial transactions and other matters. Behavioural genetic information will not get better privacy protection than other types of medical or genetic information. Some overly intrusive inquiries or unnecessarily extensive disclosures may be limited by constitutional, statutory, or common law theories. To safeguard the privacy of genetic information a wide range of substantive limitations in each specific area will require to be enacted.

This is the concluding part of the story, the first part was published on December 24, 2005.

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PHOTO: UCLANAC.UK

The sins of the father will be visited on the sons

Behavioural genetics - "...estimates the extent to which observed differences among individuals are due to genetic differences of any sort and to environmental differences of any sort without specifying what the specific genes or environmental factors are." (p.61, Plomin et al, 2000)