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Reconciling Multiple Mandates

S.S. Mafisa, Ombudsman, Lesotho

Workshop 5: Omnipotent Ombudsmen? Reconciling Multiple Mandates
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Many countries, developing and developed, have chosen to give their ombudsmen additional duties such as overseeing human rights, freedom of information, privacy and/or whistleblower protection laws. The Lesotho Ombudsman is charged with multiple mandates, including human rights protection and promotion, and this paper reviews the institution's experiences and challenges. Among them are a lack of full control over the office's budget and staff recruitment, and confusion caused by the creation of new oversight offices with competing or overlapping mandates. The public must be able to have unqualified trust in the Ombudsman. The lesson for governments that establish ombudsman offices is that they must make efforts to preserve the credibility of these offices, or the governments themselves will not be perceived as committed to the governance and accountability agenda that the ombudsman office was set up to pursue.

Introduction

Although this conference celebrates the anniversary of the Swedish Ombudsman as it was established 200 years ago, the first ombudsman in Sweden was actually named in 1713. Following the military defeat by Russia, the King of Sweden skipped the country and sought refuge in Turkey. While in exile, the King appointed his representative back home to supervise the conduct of the administration and the judiciary during his absence – that representative was named the Ombudsman. This original Ombudsman held extensive powers, including the power to institute legal proceedings against public officers who did not perform their official functions properly.

In the year 1809, the King was overthrown and a new constitution was adopted. The constitution gave the power to appoint the Ombudsman to Parliament, and Parliament was to exercise its oversight authority over the use of executive power through the Ombudsman. This is the ombudsman institution as we know it today; many of its functions have remained intact ever since. However, over the years the institution has undergone a metamorphosis. According to Prof. Linda Reif[1], the ombudsman institution has evolved over time and changed from being a purely legislative monitor to a public complaint-driven body.

[1] Linda C. Reif, *The Ombudsman, Good Governance and the International Human Rights System* (Leiden: Martinus Nijhoff Pub., 2004), at 4-5.

The institution not only underwent a noticeable metamorphosis, it also gained popularity. It spread from Sweden into other Scandinavian countries and Europe, and from Europe into other continents. It is now well known around the world.

Name, definition and functions

Today, the institution is to be found in many states boasting democratic or constitutional governance. It has assumed different variants in different countries with regard to title, extent of jurisdiction and constitutional position within the state.

The term "ombudsman," in its original meaning in Swedish, means "representative." As we have seen above, the King appointed the Ombudsman to act as his representative during his absence. The term does not appear to have had gender connotations, but because of gender activism across the globe, the term has undergone such metamorphosis that we now hear of "ombudswomen" in some countries such as Namibia.

By the same token, not all the states with this institution in place have adopted the name "ombudsman." The title differs from country to country, sometimes depending on the role and functions of the office. Each country decides the function to be performed by the institution, and often its name is aligned with the envisaged or intended role and its relationship with other organs of the state. A few examples will suffice to demonstrate this point. In the United Kingdom and Sri Lanka, the institution is called Parliamentary Commissioner for Administration. There are Parliamentary Ombudsmen in Sweden, the Public Protector in South Africa, the Médiateur in francophone countries such as France, Senegal, Burkina Faso and Gabon. The title "citizens' aide" is used in some states of the United States of America; Tanzania has the Commission for Human Rights and Good Governance, Portugal has its "provider of justice" (*provedor de Justica*), Spain's is the "defender of the people" (*Defensor de Pueblo*) and Ghana has its Commission(er) on Human Rights and Administrative Justice.

By whatever title the institution is known, its main functions and ideals are the same across the world. Today, regardless of the variations referred to above, the institution is charged with the common oversight functions in the areas of the protection, promotion and enforcement of fundamental human rights and freedoms, good governance and the rule of law.

There have been attempts to give a definition of the institution, and in all of them there is the element of the supervision of the exercise of administrative powers by the executive arm of government. The International Bar Association has given a definition that is widely used and may well be regarded as a classic definition of the ombudsman or ombudsman-type office. It defines it as:

> An office provided for by the Constitution or by act of the Legislature or Parliament headed by an independent high level official who is responsible to the Legislature or Parliament, who receives complaints from aggrieved persons against government agencies, officials and employees or acts on his own

motion and who has power to investigate, recommend corrective action and issues reports.[2]

On the other hand, Encyclopedia Britannica, Macropaedia, has this to say about the institution:

The Ombudsman should be regarded as a part of the system of administrative law for scrutinizing the work of the executive. He is the appointee of the supreme legislative assembly and not of the executive. He enjoys a large measure of independence and personal responsibility and is primarily a guardian of the law. His function is to safeguard the interests of citizens by ensuring administration according to law, discovering instances of maladministration and eliminating defects by various methods that include bringing pressure to bear on the responsible authority, publicizing a refusal to rectify injustice or defective administrative practice, bringing the matter to the attention of the legislature, and instigating a criminal prosecution or disciplinary action.[3]

Discussing the institution in this regard, Reif states:

The Ombudsman is a public sector institution, preferably established by the legislative branch of government, to supervise the administrative activities of the executive branch. The Ombudsman receives and investigates impartially complaints from the public concerning the conduct of government administration. The general objectives of the Ombudsman are the improvement of the performance of the public administration and the enhancement of government accountability to the public.

Most ombudsman offices have been established in states with democratic forms of government. In such a government, the ombudsman operates as another check on the power of the executive administrative branch, in addition to the controls exercised by the legislature, the courts and other public sector institutions.

The ombudsman is a mechanism which enhances transparency in government and democratic accountability, with the result that it assists in building good governance in a state. [4]

Types of Ombudsman

There are two types of ombudsman as found in different states around the globe. These are determined by the nature and extent of the mandates of the respective offices. There are "classical ombudsman" offices, which largely retain the form and role of the original Swedish Ombudsman, whose function was mainly to combat maladministration in public sector agencies. There are also "hybrid human rights ombudsmen" which combine both the traditional ombudsman and human rights commission roles.

Today, purely traditional ombudsman offices are very few, because many countries, developing and developed, have chosen to give to such ombudsmen additional duties such as overseeing freedom of information, privacy and/or whistleblower protection laws and so on. On the other hand, human rights ombudsman institutions are hybrid in nature. Some resemble classical ombudsmen and others are more akin to pure human rights commissions.

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[2] Ombudsman Committee, International Bar Association Resolution, Vancouver :1974.
[3] Vol. 1 at 96.
[4] L.C. Reif op cit at 1-2.

The Lesotho Ombudsman belongs to the latter category. The institution is charged with multiple mandates, including human rights protection and promotion. Under the terms of the Ombudsman Act 1996[5], the Lesotho Ombudsman has the power to institute investigations, either upon a complaint by a person or a group of persons, or on his own motion, into acts or, decisions of administrative authorities or existence of conditions, practices or tendencies that are the cause of, or likely to result in, or conducive to injustice, maladministration, corruption, violation of fundamental human rights or freedoms, general or particular dislocation of the orderly administration in any public sector agency. He may initiate investigations in a similar manner with regard to the degradation, depletion, destruction or pollution of the natural resources, environment or the ecosystem.

The Lesotho Ombudsman has an interesting historical background. The office was born of the democratization process or drive the country experienced in the early 1990s. The Kingdom of Lesotho became independent from Britain in 1966. In 1970, the first general election in the new democratic dispensation was held. However, the ruling party pre-empted the announcement of the final outcome of that election because the opposition seemed set to win it. The then Prime Minister declared a state of emergency and suspended the constitution. Thereafter, the country was to be ruled by orders and decrees.

For the next 16 years, Lesotho was gripped by fear as the opposition and all forms of dissent were ruthlessly crushed. In early 1986, the army turned against the Prime Minister and toppled his dictatorial government. The army remained in power until 1993, when it steered the country back to democratic rule with the return of the main opposition from exile and the holding of free general election under a new constitution. The Constitution makes provision for various matters, some of which may be described as the hallmarks of democratic governance. For instance, there are provisions for the holding of periodic general elections under the principle of universal suffrage. There is a whole chapter of 18 sections dealing with the protection and promotion of fundamental human rights and freedoms, which are entrenched in the constitution and enforceable before the courts of law. The High Court, the superior court of record, is singled out as the court of competent jurisdiction to determine questions relating to the provisions of this chapter. For the first time, the Constitution also establishe the office of the Ombudsman.

Like most ombudsman institutions of the world, the Lesotho Ombudsman has not been given any enforcement mechanism or coercive powers. When the Ombudsman encounters recalcitrance in the form of non-compliance with his recommendations, he resorts to Parliament (the National Assembly) by way of special reports. Nonetheless, the intention behind the establishment of the office is clear. The intention was for the institution to supervise government administration and the protection and promotion of human rights and freedoms in the new constitutional order as guaranteed in Chapter 2 of the Constitution.

[5] Act 9 of 1996.

Another aspect of the position of the Lesotho Ombudsman, shared with a good number of similar institutions in the world, relates to encroachment on its original mandate. The institution also has a corruption-fighting mandate. When the Ombudsman Act was passed in 1996, the Ombudsman office was the only office entrusted with the function of fighting corruption and other societal ills. However, three years later, a new body was created and charged specifically and solely with the mandate of combating corruption, It is called the Directorate on Corruption and Economic Offences. The Act that establishes this body does not repeal any section of the Ombudsman Act in any manner, and the Ombudsman Act has not been amended as a result of the birth of the directorate. Consequently the Ombudsman retains this area of its mandate.

Since most ombudsman institutions with anti-corruption mandates are not backed up by coercive powers with enforceable sanctions, they have been severely criticized by some institutions and writers. The United Nations Development Programme (UNDP) is one such critic. It argues that "they are seldom a way to uncover large scale systemic corruption, and most have no authority to initiate lawsuits."[6]

However, this is not true of all offices with such a mandate. Some ombudsmen, such as those in the Philippines, Uganda, and Ghana, do have coercive powers and may institute criminal proceedings for actions involving corruption.

Advantages of the Ombudsman Institution

Despite the criticisms leveled against the ombudsman institution, its value to the public should not be underestimated. It should always be borne in mind that the ombudsman institution is an alternative dispute-resolution mechanism. There are conventional dispute-resolution mechanisms such as the courts of law, and statutory tribunals that have dispute-resolution as their mandate, but the ombudsman may be resorted to for economic, expediency and other reasons.

Some of the matters that are considered when a choice of a forum is made by a complainant are the simplicity of proceedings before the ombudsman. Complainants may lodge their complaints in a simple, straightforward manner without having to observe any formalities. Rules of evidence are not always strictly adhered to. In both the lodging of complaints and appearance before the ombudsman, complainants require no legal representation (which can be prohibitively expensive); they prosecute their complaints themselves. Apart from that, complainants pay absolutely no fees for the services of the ombudsman. This position is not usually the case in courts or statutory tribunals with dispute-resolution mandates.

[6] United Nations Development Programme, Corruption and Good Governance, MDG Discussion Paper 3 (July 1997) at 85 as quoted by L.C. Reif op cit at 10.

A further advantage is the speed with which matters are resolved by the ombudsman. Delays may occur in the ombudsman's office, but not nearly as long as in conventional dispute-resolution forums. In her book, Reif picks this point up and puts it thus:

There are various barriers to court proceedings – such as financial expense, long time periods before decisions are handed down and the problem of non-justiciability of certain disputes – that make judicial settlement an unrealistic option for many individuals. As Stephen Owen, British Columbia Ombudsman, recognized: 'court proceedings are inappropriate for the resolution of the high proportion of concerns that arise from simple misunderstandings and errors that invite quick resolution by an independent party acting informally but with authority. Further, there is often no legal remedy for the unfair impact of the legitimate exercise of discretion by public administrators.'

Accordingly, classical and hybrid ombudsmen provide a valuable alternative for situations where judicial proceedings are unavailable or unrealistic. Further, in some countries there are more serious problems with the judiciary, such as insufficient funding, politicization and corruption. In these states, the Ombudsman may be even more important as a venue for complaints against the public administration.[7]

On the other hand, Encylopaedia Britannica discusses the advantages of the institution and points out that the underlying cause for the concept of the ombudsman institution has been the need to control public administration by some other methods than those which are regarded as orthodox such as popular elections, legislative control of the executive, pressure groups, and so on. It goes on to state that:

The justification for this emphasis (control of public administration) is that, as the powers of the administrative state increase, the need to safeguard the rights and interests of the citizens both individually and collectively becomes greater also. The safeguards concern both the rights of the individual in his dealings with the powerful machinery of the contemporary state and the interest of the community in ensuring that administration is carried on according to law. None of the methods of legal scrutiny, control and prescription described above is intended to undermine the strength, effectiveness and vigor of the administrative state. They are designed rather to reveal its shortcomings and to find remedies for its defects.

Administrative law (within which the institution of ombudsman operates) can make the activities of the modern administrative state more acceptable to the citizens by preventing or correcting maladministration by laying down standards of behaviour for ministers and officials, by insisting on just procedures, by refusing to permit discretionary power to be used for unauthorized purposes, by ensuring that equality of treatment is a condition of legality, and in various other ways. By becoming more acceptable to the citizens, public administration can also become more efficient.[8]

Curbing maladministration is the core function of the ombudsman. We have seen that the original idea behind the establishment of the office was to keep public administration in check. Therein lies the value of the ombudsman institution. Another value provided by the Ombudsman is his ability to reassure citizens who believe that they have been unjustly treated that his careful in-

[7] L.C. Reif op cit at 15.
[8] Encyclopaedia Britannica op cit at 96.

quiry into their complaints shows that their suspicions have been without basis.

Yet another advantage of the institution lies in the fact that a good number of ombudsmen are endowed with the power to institute investigations of their own accord, commonly referred to as "own-motion" investigations. The ombudsmen use this power, which they derive from their enabling legislations, in situations where the public interest demands it. An example of such a situation would be the case where it has come to the notice of the ombudsman, either through investigations or from his own observation, that there exists a pattern of conduct by public sector agencies indicating a general or particular dislocation of orderly administration, or broad systemic malfunction in the public sector administration.

Own-motion investigations are conducted in cases where the public interest warrants them. The test for the invocation of the power to initiate such investigations is not terribly difficult to satisfy. The criterion for the institution of own-motion inquiries or investigations is the existence of indicators that the public interest is under a threat.

For instance, it would certainly be in the public interest to initiate own-motion investigations where certain conditions, practices or tendencies are the cause of, or likely to result in a general or particular dislocation of orderly administration in government administration. Similarly, unchecked air or water pollution in a given part of a state would constitute a threat to the public interest, and the initiation of an own-motion investigation would be perfectly justified. The ombudsman would not wait for one person or a group of persons to lodge a complaint in such conditions.

The Lesotho Ombudsman's office, for example in the late 1990s, instituted this type of investigation where it appeared to the then Ombudsman that there were unprecedented delays in the payment of the terminal benefits to persons leaving or retiring from the public service. He had also discovered, during the course of his inquiries into various matters, that government ministries were in the habit of effecting deductions from the benefits of retiring public servants to recover what were considered to be overpayments or otherwise erroneous payments made to the officers concerned during their service. The disturbing aspect of this habit was that the officers whose terminal benefits were interfered with were never given notice of the intended deductions.

This practice would, in some cases, result in officers getting nothing after a long wait of up to three years for payment of terminal benefits. There would be no explanation at all as to why they were receiving zero cheques or cheques for much less than expected. Another feature of this practice or tendency was that the officer concerned was never afforded the opportunity to make an offer as to how to settle the "debt." These practices or tendencies caused the Ombudsman's office concern, as, in all fairness, it was incumbent upon the employer to inform the employee about his or her indebtedness as soon as it was discovered. The employer should also find out from the employee as to how the employee intends to pay the debt.

The Ombudsman decided, therefore, to dig deeper into this practice by way of an investigation. It was his position that in a case of overpayment,

both the employer and the employee played a role, and each party had its own share of the blame. The employer would have made an error in paying the employee his or her appropriate salary, and the employee would have made the mistake of either not checking the pay slip or of keeping quiet on realizing that payment was more than what was due. Therefore, the blame for the loss to the employer should be apportioned between the parties, so that at the end of the day the loss would not be made good by only one party, the employee. The fault would have been committed by both, with varying degrees of participation.

In attempting to find a redress for the prevailing practices, the Ombudsman wrote to the Auditor General. He sent a copy of that letter to the Attorney General as the legal advisor to the government with a request that he made his own input into the matter by way of giving his advice or legal opinion and guidance to the administrative authorities involved in the practices. In the letter, the Ombudsman pointed out, among other things, that:

> The officers are never afforded the opportunity of making a proposal as to how they may wish to repay the "debt." The Treasury and/or Audit unilaterally instructs Pensions to access terminal benefits and to effect deduction of the total sum owing. In some cases after the deduction the officer gets absolutely nothing or remains with a balance to clear because the alleged overpayment is larger than the benefits due. What surprises me further is that no other persons are held liable for the alleged overpayment. In fact, only the innocent face the music.
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> When an overpayment is discovered, the Human Resources Officers are never called upon to account for the same, let alone make good the loss suffered by Government at their instance. In other words, the people who have caused the loss or overpayment (as they calculate salaries) always go scot-free and the innocent, who have not featured in the equation, shoulder the responsibility alone; they are made to suffer or are punished for the mistakes of others, the mistakes they never committed or authorized.
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> I do appreciate that the salary earner cannot be allowed to be unjustly enriched by taking away that which is not contractually due. But I have never been made to know the reasons those who committed the wrong are not held accountable for their wrong. This practice is inherently unjust.

In his advice to the Auditor General, the Attorney General reacted to the Ombudsman's observations in these terms:

> A public officer who leaves service by way of retirement is entitled to payment of terminal benefits unless there is a valid reason in law for not doing so. Such terminal benefits have to be paid in full to such a retiring officer unless again there is a valid reason not to do so. A decision cannot be taken unilaterally to pay an officer part of his / her terminal benefits or nothing at all without first informing the officer and inviting him or her to make some representations on the intended action.

He further quoted from a judgment of the High Court of Lesotho, which backs up his opinion. The quotation reads:

> Whenever a statute empowers a public official or body to do an act or give a decision prejudicially affecting an individual in her liberty or property or existing rights, unless the statute expressly or by implication indicates the

contrary that person is entitled to the application of the *audi alterem partem* principle.[9]

Challenges faced by the Institution

I wish to wind up by making mention of a few matters which are cause for concern to most, if not all, ombudsman offices. These matters affect the effectiveness of these offices and impact negatively on the confidence that publics they serve should have in them.

In order for these institutions to succeed in their oversight function, they must be sufficiently resourced. Lack of sufficient financial and manpower resources can be real constraints on the efficiency and effectiveness of an ombudsman office. Similarly, these offices must enjoy a fair measure of independence, functionally, financially and in matters of manpower recruitment, control, reward for excellence and discipline.

Some ombudsmen, such as that of Lesotho, do not have full control over their budget and staff recruitment, although they enjoy functional independence and report to Parliament directly. Our budget is maintained and controlled by the Ministry of Finance and Development Planning. The office cannot utilize the budget as it sees fit and cannot use it without the approval of that Ministry. As a result, it cannot reward any officer for excellence on top of or in addition to his or her fixed salary. The recruitment and promotion of staff is done by a government agency set up to employ all government or public servants. The furthest the office goes is the short-listing of candidates, but the final selection is done by the said agency. Promotions of staff, like recruitment, are effected by that agency and are not based on merit or ability, but on other considerations such as seniority. This scheme of things means that the Ombudsman has no way of selecting the caliber of personnel that the office needs for the job, nor does he have the leverage to motivate the staff as he sees fit, since these matters are regulated by the set civil service terms and conditions.

It is desirable for a body discharging oversight functions to be not only competent but to be seen to be financially, operationally and administratively independent of the government it is called upon to supervise. Unless the ombudsman's office is seen to be non-reliant upon the very authorities it oversees for financial, human and logistical resources, its independence and credibility are likely to always be called into question. That situation is unacceptable in a democratic state. The public must be able to have unqualified trust in oversight bodies such as the ombudsman. If efforts are not made by governments that have ombudsman offices to preserve the credibility of these offices, undoubtedly those governments will not be perceived as demonstrating commitment to the governance and accountability agenda that ombudsman institutions are established to pursue.

[9] 1997–1998 LLR at 455.

The last matter that is worthy of mention is the threat that the institution sometimes finds itself faced with in some countries. Ombudsman offices with multiple mandates are created with responsibility for such things as injustice, maladministration, infringement of fundamental human rights and freedoms, corruption, and so on. Over time, new bodies may be created and given oversight responsibilities in some of these mandate areas originally entrusted to the ombudsman. When this happens, the newly created institution becomes the "specialist institution" in the area concerned. That particular mandate area is essentially removed from the jurisdiction of the ombudsman. The extent of the power and influence of the ombudsman gets reduced in this fashion. Thus the proliferation of oversight institutions poses a threat to the authority and influence of the ombudsman.

A further dimension that emerges with the birth of "specialist" bodies is the confusion that is caused among the clients of both the ombudsman and the other bodies. It often happens that when an Act of Parliament creating a specialist body is enacted, it does not repeal or amend the Act establishing the ombudsman institution with respect to its mandate. With both institutions entrusted with the same mandate, the public gets confused as to which of the two is the proper forum to receive complaints. Clients may find themselves shuttling between the two institutions. Worse still, they may find themselves being sent from either institution to another with either institution claiming that the matter complained about should be handled by the other.

Such has been the experience of the Lesotho Ombudsman. The Ombudsman Act was enacted in 1996 and includes a wide range of areas in the Ombudsman's mandate. They include the combating of corruption and infringement of human rights and freedoms. In 1999, a new Act was passed establishing a Directorate on Corruption and Economic Offences[10] with a mandate to fight corruption and economic offences. Neither Act takes corruption away from the Ombudsman. In 1998, the new Police Service Act[11] was enacted to remove complaints by members of the public against the police from the jurisdiction of the Ombudsman and to create bodies like the Police Authority and Police Complaints Authority.

Most complaints by the public against the police revolve around violations of human rights, and it has always been the function of the Ombudsman to protect human rights. Neither the Ombudsman Act nor the new Police Service Act have been amended to take this mandate area away from the Ombudsman. Members of the public and the two institutions are not quite clear as to how far each should go in the area of the infringement of human rights. People are made to shuttle between these institutions in their search for a proper forum.

The next threat relates to competition for resources between the ombudsman institution and the emerging body. Poor countries have meager resources of their own and these are often supplemented by donations from their development partners. Naturally, when a new body is created and appears to be

[10] Act 5 of 1999.
[11] Act 7 of 1998.

intended to strengthen efforts to build good governance, development partners or donors tend to turn their attention to it. The older ombudsman office might lose the financial and technical support it has been enjoying because donors wish to see the new body become firmly established. The ombudsman institution has to double its efforts to make an impression and to prove that it is still relevant and effective. It competes against the new institution for resources from government and donors.

Conclusion

Ombudsman institutions, be they classical or hybrid, single-mandate or multiple-mandate offices, have a few things in common. They are alternative dispute resolution mechanisms for conflicts arising between the government administration and members of the public.

It is submitted that, on the whole, the ombudsman institution, whatever its type or title, is designed to help members of the public have a say in matters that concern them – matters of governance. Citizens exercise their right to have their say by way of complaints lodged with the institution against the actions and decisions of the administrative authorities. In this way, members of the public are afforded an avenue that allows them to take part in government administration. This is the route that the electors take when they seek to question the manner in which they are ruled or served by those they have voted into office.

Put in other terms, the existence of the ombudsman institution, especially in a democratic state, is a permanent reminder to the rulers that, having been elected to serve the citizen, they are liable to be placed under scrutiny and held accountable to the electorate for any actions and decisions that impact adversely upon the lives and rights of the electorate or the ruled.

Regardless of the characteristics of an individual ombudsman office, these offices are created to control or act as a check against the misuse of power by public sector agencies. They are intended to safeguard the rights or interests of citizens, both individually and collectively, especially where the executive power is immense. Significantly, the institutions' oversight function prevents maladministration and promotes transparency and accountability in government, building good governance. Absence of maladministration is indicative of good governance and respect for the rule of law. The rule of law, transparency and accountability are the bedrock of good governance, and good governance is the main, if not the sole, objective for ombudsman offices in most countries.