



PAPER PRESENTED BY

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**“The Internal Mechanisms Ombudsman Offices can adopt to improve the
Follow-Up and Implementation of their Recommendations.”**

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The simple description of an Ombudsman's role is simply to promote justice, transparency and accountability in the day to day operations of the public service delivery system, to the people. This important function is intended to enhance the performance of the public service, in a given jurisdiction, for the benefit of the ordinary man in the street. That understanding has permeated to governments who give the institution the required statutory and constitutional mandate to investigate complaints against them.

By design the Ombudsman office is meant to carry out its investigations independently of the executive, because it investigates the government in its implementation of delivery of social services to the people. Depending on which side of the economic divide you are speaking from, the type of compliance levels by state institutions in some countries may seem higher because of the very different set of problems that a complainant presents to the office of the Ombudsman.

In order for any well organised system which provides services to the people to run properly, it must be able to solve problems for the people. The government provides basic services such as policing, provision of health facilities, security, agricultural support and all other services which make it possible for people to live a decent life and enjoy access to basic services. The government offers service to the people in order to ensure uniformity of access to solutions. Where a public office fails to deliver a service, an individual who has exhausted all the internal appeal mechanisms may then refer his grievance against the public office either to the courts of law, or to the office of the Ombudsman.

The Ombudsman shall take on the investigation free of charge until the conclusion of the investigation, whereas the court process may prove expensive and too time consuming for the complainant. The Ombudsman is a creature of statute. The political will to create the office must exist. In order to resolve the dichotomy where the Executive creates an office whose sole and core mandate is to investigate the quality-of-service it delivers to the public, the Ombudsman, at the end of an investigation, issues reports of a non-binding effect. These reports amount to recommendations which do not have to be implemented unless the government department under investigation voluntarily complies.

Proceeding by way of issuing recommends actually grants protection from persecution or retributive action of any sort against the Ombudsman for making a decision which does not favour the Executive. Thus, for the same reason, the report of the Ombudsman is not subject to challenge in the courts of law, because the reports issued are of persuasive effect rather than of binding effect. Although the reports of the Ombudsman are not subject to judicial scrutiny, the Ombudsman also cannot have recourse to the courts of law to enforce the implementation of its decisions on the same grounds that the office cannot be challenged in the courts of law. That is because the reports of the Ombudsman are non-binding and you cannot challenge what is not binding and therefore unenforceable.

Having stated that the reports of the Ombudsman are not equivalent to a court decision which is binding and must be obeyed and implemented by all parties by force of law, the Ombudsman concept is not without means of enforcing the recommendations contained in its reports.

In general, ombudsman offices the world over face similar challenges in the enforcement of their recommendations, because the two terms, recommendation and enforcement seem to be at odds with each other. A recommendation is just that, merely an opinion containing findings after an inquiry or investigation has been carried out, and suggestions on how best the matter may be resolved. Where an inquiry has been carried out regarding a specific subject matter, it means there was problem which had to be resolved. The Ombudsman is an independent problem solver, specifically created to resolve governance issues within a jurisdiction. However, a difference must be drawn between other problem solving bodies within government and the role of the Ombudsman. The problem solving functions of government departments is subject to constant review in the bureaucratic hierarchy of the organisation. Upon exhausting these internal appeal mechanisms, an aggrieved person may then appeal to the courts of law or to the Ombudsman. Both avenues present finality as court decision are binding, and there is no appeal from the recommendation of an Ombudsman, to any other authority or body.

The means of enforcing the recommendations contained in the report of the Ombudsman has been, and still is, the legislature. In almost all jurisdictions where the classical Ombudsman concept has been enshrined into the law, the appointment, removal from office and general oversight of the office is a function of the legislative branch of government. In a parliamentary Ombudsman system, the legislature acts as an independent, and it is to be expected, impartial enforcement mechanism for the recommendations of the Ombudsman which will be contained in its non-binding report.

On the other hand, an Executive Ombudsman is appointed by the Executive and reports to the Executive. Without the protection provided by the doctrine of separation of powers, implementation of an Executive Ombudsman's decisions is only possible with the consent and cooperation of the government. It is difficult for the Ombudsman office to obtain compliance from state institutions on its own.

In a classical system, the Ombudsman uses Parliamentary oversight, to compel the Executive to implement the recommendations contained in the Ombudsman's report. The Legislature is the single most important enforcement mechanism available to a governmental ombudsman operating under a classical parliamentary ombudsman system. In other jurisdictions such as Zambia and South Africa, the Ombudsman's enabling legislation accords the office the power to issue binding decisions in contrast to a classical ombudsman system, which entrenches its authority on Parliament's constitutional role of providing scrutiny over the excess use of executive powers.

There are some who argue that even the parliamentary enforcement mechanism may not be quite hard enough on the executive, especially if the Executive uses the Parliamentary whip system to vote against the adoption or implementation of an Ombudsman's report. Lack of enforcement mechanisms does much to hamper the effectiveness of the office of the Ombudsman, both in a parliamentary and executive Ombudsman system. Even where the available statutory enforcement mechanisms are in place, it is still difficult for the office to ensure compliance to its recommendations. In some countries, policy reforms and legislative frameworks have been introduced, yet there is still a high level of non-compliance to the recommendations of the Ombudsman.

It maybe that perhaps the problem is not an external problem, but an internal problem of absence of dedicated compliance units within the offices of the Ombudsman. It is possible for the Ombudsman to find a way to ensure effective execution and enforcement of the recommendations made by the office. As we have already stated, examining the legal, procedural and operational tools that promote compliance with the Ombudsman's recommendations is one way. A leaf can be taken from the example of Zambia, where legal and policy reforms were successfully introduced and compliance levels have since improved.

Another more effective method would be to create uniformity in the way of formulation and application of the Ombudsman concept across jurisdictions. This would include agreeing on the operational models, the method of establishment of the office, and standardising the legislative and institutional frameworks. Inroads have already been made by organizations like AOMA and the IOI as well as the United Nations. What remains is to enforce the international standards adopted by these organizations by way of treaty. These international Ombudsman standards include the OR Tambo Declaration, the Venice Principles and the resolutions of the General Assembly on the institution of the Ombudsman. The international standards should enshrine a common understanding of what an Ombudsman institution is, the functions, powers, protections, privileges, immunities and enforcement powers of both the office and the office holder. Zambia used some of these international standards to good effect when lobbying for the revision of the outdated Ombudsman legislation at the time.

Although the office of the Public Protector Zambia is now answerable to Parliament, it plays a negligible role since the Public Protector exercises

binding powers, thus making it amenable to scrutiny of its decisions by the courts of law. Making the Ombudsman answerable to parliament ensures that public service officials cannot use government bureaucracy or officialdom in order to negate the investigations of the Ombudsman. The power to make binding decisions has superseded the oversight protection given by parliament which is an external enforcement mechanism. The Zambian Ombudsman now relies completely on internal enforcement mechanisms to obtain compliance from government.

Currently, the Ombudsman in Zambia is empowered by law to investigate, monitor, and evaluate administrative activities and advises the government on good administrative practices. The Office of the Public Protector as an Ombudsman provides a check on government activities in the interests of the citizen, and acts as an independent mediator of disputes between the government and the citizenry. The institution uses the inquisitorial or non-adversarial approach which is aimed at working together both with the complainant and the respondent institution, in order to arrive at the best resolution for everyone. This inquisitorial method involves gathering information during the investigation process. It encompasses the Public Protector analysing the materials presented by the parties, usually including interviews with each party, and then incorporating both research and expertise in determining what additional information needs to be properly assessed and what the final outcome of the investigative process should be.

The Public Protector initiates the collection of the additional information which might be deemed necessary by directly asking the parties to provide

it with evidence. It also conducts independent investigations in matters of public interest, and may require assessing the impact of the application of the law, regulations and guidelines in a particular inquiry. Thereafter, a determination is made. The Public Protector (Ombudsman) presents each party with the evidence, findings and recommendations, and further analyses the responses from the parties concerned, before issuing the final report. The Public Protector may raise the arguments of one party against the other, and may independently challenge the parties on the evidence they have provided.

The non-adversarial fact-finding processes used by the Public Protector as an Ombudsman, is consistent with administrative fairness. The complaint and dispute resolution procedures generally involve an investigation of a complaint, followed by an attempt at settlement and ultimately, a decision or recommendation in each case. This method used by the Public Protector is opposite to what the courts use in common law jurisdictions, which is the adversarial procedure.

In Zambia, the mandate of the Public Protector was strengthened by making the recommendations issued in the final reports binding. The Constitution of Zambia under Article 244 (5), states as follows: -

“The Public Protector has the same powers as those of the High Court in –

- a) Enforcing the attendance of witnesses and examining them on oath
- b) Examining witnesses outside Zambia
- c) Compelling the production of document

- d) Enforcing decisions issued by the Public Protector
- e) Citing a person or an authority for contempt for failure to carry out a decision
- f) A person summoned to give evidence or to produce a document before the Public Protector is entitled in respect of that evidence or the production of the document, to the same privileges and protection as those that a person would be entitled to before a court.”

Furthermore, the Zambian constitution states that one must be qualified to be a judge in order to be eligible to be appointed to the office of Public Protector as an Ombudsman and it further states that removal of the Ombudsman from office shall be the same as removal of a Judge from office. It is commendable that this is one standard which is universal and is contained in many other legislations the world over. This standard is also contained in various international Ombudsman standards like the IOI By-Laws, the OR Tambo Declaration, the Venice Principles and the American Bar Association Ombudsman Standards. This is an important internal enforcement mechanism which must be recognised and strictly observed by all government. You cannot have an Ombudsman operating on the Civil service ranks, or with conditions of service that rank the Ombudsman lower in status than the offices the Ombudsman is mandated to investigate. In South Africa for example, all Ombudspersons, whether governmental or organisational, are placed on conditions of service of a Judge of the Supreme Court. All these measures are put in place in order to ensure the integrity of the investigative process as well as to strengthen the enforcement mechanisms of the reports of the Ombudsman.

2. Strategic Objectives in Developing Effective Internal Enforcement Mechanisms for the Office of the Ombudsman in Zambia

The Office of the Public Protector as an Ombudsman of Zambia investigates acts of maladministration and recommends remedial actions to foster good administrative actions, practices and procedures. This entails that the Public Protector receives complaints of acts of maladministration, alleged to have been committed by public officers during their course of official duties. The affected members of the public seek redress services from the Office of the Public Protector for injustices they may have suffered at the hands of the servants of the state.

To strengthen the Ombudsman in Zambia and ensure that it continues to play its role in defending the fundamental rights of citizens, the Office of the Public Protector has continued to devise strategies to ensure accountable governance in public administration and to enhance the performance of Public Institutions. These strategies include;

- Decentralising the Ombudsman to the provinces as provided for by the constitution, which has greatly increased service coverage and accessibility of the services of the ombudsman.
- The Office is also creating capacity in the investigation officers by training them in specialised trainings and necessary investigative tactics to enable them conduct their work in an effective manner and in turn strengthen the institutional oversight role while enhancing investigations processes.

- Zambia has a single Ombudsman Institution with no sectoral Ombudsmen. To deliver on the institutional mandate and the protection function, the Office of the Public Protector has among other interventions established and actualized desks to look at the welfare and protection of vulnerable persons. The establishment of the various desks is also in line with the Public Protector Act which mandates the Public Protector to provide added protection to vulnerable persons, including children, the aged, women and persons with disabilities. Where a state institution engages in, or is about to engage in an act of maladministration, which may result in a significant or substantial infringement of the rights of an individual, the Office of the Public Protector is required to intervene and provide the needed protection.
- In this regard, the Office of the Public Protector has signed some Memorandums of Understanding with civil society organizations such as Transparency International and Disability Right Watch. These MOUs are intended to foster and enhance collaboration among the two institutions in the promotion and protection of the rights of vulnerable persons. This initiative is helping to strengthen the case referral systems and collaboration on capacity building, joint community sensitizations/awareness on the many forms of maladministration affecting vulnerable people in accessing Public Services. This method acts like a class action as the civil society organisation represent the interests of a myriad of persons with similar complaints and government has to comply.

CLARITY AND SIMPLICITY OF THE REPORTS

Reports are written for the complainants, state institutions and sector stakeholders. The language used in the reports can also be used as a helpful enforcement mechanism. Knowledge is a powerful tool for the work of the Ombudsman. The language of the report must be simple, and direct to speak to. It must be understood by both the service provider and the consumer of the service. Amongst other functions, the Public Protector is mandated to disseminate information or sensitise both Public Institutions and members of the general public on issues of maladministration and its dangers. Where people cannot read, they must still be brought up to date regarding the mandate of the office. Radio and television programs have been of much help, in a country where access to the internet is not guaranteed in rural areas. We find that people suffer most from the effects of maladministration where they have little or no knowledge about the operations of the office. Where they are vaguely aware of the concept of the ombudsman, sometimes they fear retributive action from state officials.

This therefore entails that the institution has to provide information in relation to maladministration by targeting both members of the public and public service officials. Thus, in its continued effort to enhance the visibility of the Institution, the Ombudsman in Zambia carries out community engagements in the country side to sensitise members of the public on their rights to good administration and quality public service delivery. Knowledge empowers people and is an excellent internal enforcement tool.

UNDERSTANDING THE ROLE OF THE OMBUDSMAN AS AN INTERNAL ENFORCEMENT MECHANISM

Government in general treat the Ombudsman office as a necessary evil. They can't live with them, yet they definitely cannot live without them either. The general understanding of what the exact role of the ombudsman in governance is not properly understood by most governments, to the extent that some ombudsman offices in Africa have been legislated out of existence. Lack of understanding of the mandate is the main reason why the majority of Ombudsman offices face difficulties in having their decisions enforced.

The institution of the Ombudsman needs to strengthen stakeholder linkages and mechanisms, and engagements. Without partnering with other institutions both locally and abroad, the Ombudsman becomes isolated and unable to effectively lobby for the enforcement of its report. Partnerships with civil society organisations, international ombudsman bodies and the United Nations are a good case in point. Several Ombudsman offices have been known to appeal to the African Ombudsman and Mediators Association and the International Ombudsman Institute when they fear persecution from agents of the state. These organisations have in turn offered assistance to Ombudsman offices under threat.

Thus these partnerships may at the end of the day, be of great benefit to the Ombudsman in improving the visibility of the office and strengthening the case handling and management mechanisms in the institution. Cross pollination of ideas, best practices, bench marking, training and attending of conferences as well as membership to international ombudsman bodies

helps to safeguard the integrity of the reports of the Ombudsman because the office and the office holder are not isolated.

International Ombudsman organisations must seek to broaden their influence at international level, by nestling under an international instrument which member countries have already adopted and signed up to, in order to lobby for, and garner the required recognition and validation of a one size fits all standards and regulatory framework. The one size fits all refers to the different classifications of Ombudsman, such as the classical and hybrid ombudsman institutions, executive and parliamentary institutions as well as organisational and governmental ombudsman offices. The incorporation of Ombudsman standards into a treaty arrangement will greatly help in the further development enforcement mechanism which will have the force and backing of international law.

A case in point is the International Covenant on Economic, Social and Cultural Rights, (ICESCR). There is need to encapsulate oversight of the implementation of the Sustainable Development Goals within the core mandate of an Ombudsman office. The United Nations has a joint commitment with most governments in low income and middle-income countries to work in a partnership to achieve national priorities guided by the Sustainable Development Goals (SDGs). It is none other than the office of an Ombudsman which should play the most active role in this collaboration by actively policing the implementation of the Sustainable Development Goals (SDGs). By the act of the ombudsman being allowed to absorb the function of monitoring the implementation of all of the

sustainable development goals into its core mandate, governments and the international community at large may develop a natural understanding and acceptance that the oversight body for social and economic rights in any jurisdiction is the office of the Ombudsman.

Just as there is international understanding that the work of National Human Rights Institutions, (NHRIs) is closely linked to the United Nations Human Rights Committee or the United Nations Human Rights Council and the office of the Human Rights Commissioner, similarly the office of the Ombudsman must be attached to the United Nations Economic and Social Council. There is need to attach an international and unified understanding of the purpose and functions of the Ombudsman. All members of the United Nations need to agree and understand that the linkage between the institution of the Ombudsman and a UN Treaty system is necessary for the establishment of the office. Under a treaty system, it is to be hoped that all state parties will consent to respect and support the enforcement and implementation of the reports of the Ombudsman.

The reason why implementation of the Ombudsman's recommendation is so hard, is because the proper role of the Ombudsman is not well understood. Linking the role of the Ombudsman to the need to realize the achievement of the sustainable development goals through the oversight role which the Ombudsman provides, is the tie-breaker that has been needed all along as the long sought after solution for both an internal and external enforcement mechanism. Hand in hand with these very necessary innovations, additional standards concentrated on further

improving the required internal compliance and enforcement mechanisms may be refined such as: -

- Children first. Child friendly procedures must be put in place. Matters to do with children must always be prioritized and 100% compliance in reports to do with children must be the standard.
- Other vulnerable categories of the population must be prioritised in the legislation of the Ombudsman as well
- Improving systemic investigations in order to reduce recurring maladministration. Clustering similar cases together also may assist in obtaining compliance from public service institution as they shall identify a systemic issue which they certainly need to resolve.
- In the Common Law system, following precedence is an important legal principle. Similarly for the Ombudsman, having investigated a specific subject matter before, any recurring matters of a similar nature must be brought to the particular department under investigation to obtain immediate compliance.
- Promoting adherence to justice and fair process internally within the office of the Ombudsman.
- Insisting on the highest standards of fair play during the process of an investigation, and when putting in place corrective measures. This process must be supported by standard operating procedures.
- Monitoring the performance of an institution at intervals to assess the impact of the recommendations of the Ombudsman both for the short and long term.
- Raising and insisting on the highest standard of integrity in all transactions i.e. administrative and financial dealings.

- Service delivery and respect for the rights of the people they were employed to serve.
- Encouraging respect for the integrity of the environment, both immediate and pertaining to the government service provider and the members of the public, and using it as bench mark for the quality of service delivery that institution is delivering.

It must be stated that the point of departure for Ombudsman offices in high income countries and low and middle income countries is because the enjoyment of social and economic rights may not really an issue in high income countries. Compliance with the reports of the Ombudsman in high income countries maybe much higher than the compliance levels in low and middle income countries because the problems the Ombudsman offices are faced with maybe so different. Ombudsman offices are basically grappling daily with complaints of people facing difficulty to access basic services. This is why we come back to the earlier statement in this paper that when trying to resolve the problems of non-compliance to the reports of the Ombudsman, one also has to look at the economic divide as well.

A report from an Ombudsman pointing out that a there is need to provide water, a school, a health centre, maybe seen as an attack on the performance of the government because that is what governance is all about. That is a challenge in low income and middle income countries. It is not a problem that an Ombudsman in the High Income country may encounter.

CONCLUSION

In developing internal enforcement mechanisms an ombudsman office must guard against elements of maladministration being replicated even in its own institution: -

- Laid down administrative procedures must not infringe on the rights of the people in their implementation.
- Practices and procedural guidelines must not choke up the system by making it more difficult for people to be able to access basic services.
- Ethics have to be adhered to in order to enhance effective administration and ensure that every citizen has access to public services without any hindrance.

The trite question that must be resolved is as to what is preventing developing countries from being unable to attain even the minimum threshold requirements for the majority of their populations to be able to enjoy the realization of their social economic and cultural rights. The softer, gentler diplomatic approach of enshrining these rights as sustainable development goals has been a perfect conduit of having them implemented. It has been done indirectly, without actually making it legally mandatory to provide for the services that are required in order for every person to enjoy these rights.

Promoting good administrative practices in state institutions in order to reduce maladministration cases in Public Institutions is not reason enough for state institutions to be compelled to implement the reports of an ombudsman office. Promoting effectiveness of state institutions

responsible for the protection of vulnerable persons is not enough. It is too piecemeal.

However, if we identify the rights which have been breached and link them to the acts of administrative injustice leading to the non-realization of government programs, and that the oversight mechanism above all others needed to monitor the upholding of these rights and implementation of the accompanying programs is the office of the ombudsman, then we may obtain maximum compliance from state institutions. The incorporation into international and domestic law, of the oversight and enforcement functions of the Ombudsman for the realization and enjoyment of social and economic rights, by the people, even where these rights are not yet justiciable in any jurisdiction, is the best possible solution for ombudspersons who are operating in low income to middle income countries, because frankly, the playing field is not level.