METHODS FOR ENSURING SOUND PUBLIC ADMINISTRATION, RAISING STANDARDS OF INTEGRITY AND PREVENTING CORRUPTION

Introduction

Wherever there is a human community, there will be some form of public administration, as there is no community without the idea of common good.

While history has produced a wide variety of ideas of what common good can be, we need to look no further than to the present-day world around us, to find in our epoch and times, many examples of different perspectives on common good, of particular ways to define it and of strategies for achieving it.

This broad image of "common good" lays the foundation to an equally broad perspective of "Public Administration", as the collective framework of bodies, instruments, rules and activities that in any given community, are deemed adequate for its pursuit.

Some key elements, however, seem to be essential to the idea of Public Administration, one of them being the idea of soundness.

By soundness it is meant that both its rules shall be valid rules and that the facts it uses shall be real, true facts.

Public administration must at all times address real, existing needs of a public nature, and must do so according to the rule of law.

It is obvious that the vast resources made available to the public administration, along with the powers of authority that it entails, may easily be diverted and put to the service of private, illegitimate needs.

It is also clear that public administrators have many opportunities for ignoring or otherwise violating the rules set for them by society and making arbitrary decisions to the detriment of common good.

Since historical times, the focus has been on the integrity of public officials and rightly so.

The nature of their tasks demands that they meet high standards of integrity and where these are not upheld, there will be no possibility of a sound public administration.

Therefore, ensuring that those high standards are met and kept is not a lesser task of society, quite on the contrary.

Vast as public resources may appear to be, in fact, they are always scarce for the community. Loss and damages to them are often irrecoverable and will have long lasting ill effects on the life of those who most need them.

Preventing the misuse of public powers of authority, preventing the illegitimate benefit of private interests at the expense of public resources, preventing the disregard of the rule of law or, if you wish, in short, preventing corruption is a core task of society.

All this means that without a methodical approach to the prevention of corruption, there will be no real prospect of a sound public administration.

It is commonplace to say that the prevention of corruption is a multi-pronged strategy, encompassing many different instruments and their co-ordination.

One of these, as is commonly accepted, is the Ombudsman.

The role of the Ombudsman has traditionally been said, in broad terms, to be the one of a trusted intermediary between governments and citizens.

In other words, the functions of the Ombudsman have been for a long time perceived being reactive in nature.

But in our times, the prevention of corruption demands that a proactive attitude towards these issues must be adopted and, in this regard the Ombudsman faces a whole new array of problems.

One of these problems is finding an effective way to combine the traditional role with the evolving need for preventing corruption at its source.

In the Special Administrative Region of Macao, of the People's Republic of China, the Commission against Corruption combines under the same leadership, the functions of Ombudsman and those of an Anti-Corruption Agency.

This arrangement has been in place in one way or another, since 1992 and the experience of 20 years may be of some interest to other Ombudsman institutions. This occasion seems to be adequate to share with all the IOI members a summary of that experience.

1. The legal framework

Macao was under Portuguese administration until December 1999. Therefore, its legal system is derived from the matrix of Portuguese law, including the approach to the statutory regulation of the activity of the Public Administration.

In this tradition, the first comprehensive statute to encompass the general principles of that activity, as well as a systematic framework for the typical procedures of the Administration was the ***Administrative Procedure Code*** of 1994, largely inspired in the Portuguese law with the same name, dated 1991.

Taking advantage of both the local experience in its implementation and the Portuguese amendment of 1996, a new amended version of this Code entered into force in 1999 and remains so up to this day.

It provides the legal foundation for enforcement of the main principles of Administrative Law in Macao: legality, public good, respect of the citizen's rights and interests, equality and proportionality, justice and fairness, good faith, cooperation between the Public Administration and the private citizens, participation in the decision-forming process, decision, de-bureaucratization and efficiency, free procedure and access to the administrative justice.

The importance of laying down these principles in the written Law is that, regardless of the specific, concrete situations faced by the Administration, it is bound to observe them in all its activity: these are legal standards that may be used by the Courts to assess the compliance of the Administration in cases brought before them.

Then, the Code defines the legal status of the subjects in Administrative Law, lays down formal rules that shall be observed in the course of the Administrative Procedures, and establishes the main characteristics of the typical manifestations of the administrative activity: administrative acts, administrative regulations and administrative contracts.

Among and above the general principles named above, the principle of legality deserves here a short commentary.

The legal formula is that the Public Administration owes "obedience to the statutes and to the law".

The implication of this provision is that the Administration needs to do more than just to avoid contravening an existing statute, it must comply with the legal system of Macao, as a whole. In doing so, the burden of proving the legality of its behaviour lies with the Administration itself and for each one of its acts (for instance) there must be explicit legal grounds and these grounds must be stated along with the act, under penalty of rendering it void.

Furthermore, whenever the Administration acts under discretionary powers, the reasons behind the specific choice embodied in that decision must also be stated, namely the explicit mention of the concrete public interest that was served by the decision.

What this renders possible is the ulterior assessment by the Courts of the compliance of the act with the public interest it purports to serve, using standards of rationality. The Courts can't and won't replace the Administration's decision with another but, nevertheless, if the stated reasoning for the decision is not convincing, the Court will be able to nullify it.

It should also be noted that the Code includes provisions stipulating a detailed recusal system, under which no public servant shall intervene in an administrative procedure, nor in any act or contract of the Administration, either under public law or private law, whenever they have an interest in it, for themselves, acting on behalf on another person or acting for another person's interests.

This is extended to interests of the spouse, relative by kin or by affinity on the direct line, or up to the 2nd degree on the collateral line, as well as any other person living under a common economy with any of those, whenever any of these have an interest in a question similar to the one to be decided and in a few other more circumstances detailed in the Code.

This Code represented a major overhaul of the Administrative Law of Macao, insofar as for the first time ever, these principles were enshrined in the books of law and no longer was necessary to rely on the persuasive power of jurisprudence to invoke them successfully in Court.

This main pillar of the Administrative Law of Macao is complemented by a large number of other statutes and Administrative Regulations, addressing the public administrative activity but all of them either add to, or develop the main regulatory framework of the Code.

A good example of this kind of provision is included in a Law passed in 2009, "Basic stipulations concerning the statute of the bearers of public office positions of directorship and departmental chiefs", under which and pursuant to applicable laws, the bearers of public office positions of directorship and departmental chiefs of all levels are civil and criminally liable for the unlawful acts committed by them in the exercise of their official duties.

It was not a coincidence that in parallel with the reform that produced the Administrative Procedure Code, the first statute creating the "High Commission against Corruption and Administrative Illegality" was passed in 1990 and, following the appointment of the first High Commissioner in November 1991, its operations started in early 1992.

In fact, the legislative procedure that would result in the Code was already in motion and it was only too clear to the legislators that without a specialized body in charge of addressing the whole range of issues that would be brought about by the upcoming Code, there would be a tremendous gap between the law in the books and the law in action. Thus the need to create such a body, vested with enough power to bring about a real change of attitude and behaviour in the Public Administration at large.

On the other hand, Macao had a long tradition of anti-corruption law. In fact, at the time the first Portuguese landed in Macao, in the 16th century, both passive and active corruption were deemed by written law to be criminal offenses and subject to quite harsh penalties, for that matter.

Upon the establishment of the High Commission, the Portuguese Criminal Code of 1886 was in force in Macao, criminalizing a wide range of offenses committed by public servants, including corruption, embezzlement, abuse of power, among others.

It was, however an outdated legal text and it would soon be replaced by the current Penal Code of Macao, in 1995.

This Code, also largely inspired by the Portuguese Penal Code of 1982 as amended in 1995, was the result of an extensive work of revision and adaptation to the local conditions and to the local needs in the field of Criminal Policy, thus being to this day still considered as a true local Penal Code of Macao.

We may say that the provisions of this Code, regarding prevention and criminalization of corruption already met in advance, most of the requirements that would become binding to the People's Republic of China, including Macao, in February 2006, when the United Nations Convention Against Corruption entered into force in China.

While not covering the complete spectrum of criminal offenses included in the UNCAC, the provisions of the Penal Code cover all the traditional such crimes in an adequate way.

The legal framework of the prevention of corruption has benefited, since 1998, of a comprehensive system of assets and income disclosure by public servants. Pursuant to this Law, all workers of the public administration, as well as legislators and members of the judiciary, must submit a detailed statement of income and assets upon being appointed to their positions, being promoted, resigning or being dismissed from office and at least every five years.

This statement is deposited at the Commission against Corruption, except in the case of public officials at the level of head of department or above, who deposit their statements at the Court of Final Appeal.

The statement is confidential and may only be open upon a criminal procedure against the concerned public servant.

False statements subject the offender to criminal penalties, and a significant unjustified increase in wealth is also deemed to be a criminal offence.

These statements have been instrumental in the successful prosecution and conviction of offenders in cases of corruption.

In our experience, this system is a deterrent with a positive role in preventing passive corruption, that is, taking bribes.

After being in place for 14 years, this system is, at time of writing this paper, tabled for amendment by the Legislature, under a proposal of the Commissioner against Corruption, adding a significant improvement to it, namely, introducing a new summarized statement of property, income and interests, including membership to non-profit associations, to be submitted by public officials at the level of deputy director of Bureau or above, legislators and members of the judiciary.

This summarized statement has been designed to be made available to the public at large with no restrictions to access. However, reproduction of this information will be subject to simple administrative formalities and falsifying its contents in such a reproduction will be a criminal offence.

It is expected that this new tool will add one more pillar to the building of a transparent government and further reinforce the prevention of corruption in Macao.

Let it be said that an earlier version of this law, covering only the principal public officials, had been in force since 1992.

So, almost from its inception, the High Commission against Corruption had the task to enforce a clear set of legal provisions, both on the Administrative activity and in the anti-corruption fronts.

2. The organizational framework

To this effect, the first organization model of the High Commission didn't provide a clear structural basis for the assignment of roles in the daily operations of the agency.

Thus, it was in the High Commissioner's powers to decide, on a case by case basis, which resources would be allocated to investigation and development of each process. Moreover, the nature of the process, either administrative or criminal, might not be totally clear from the beginning, creating opportunities for procedural mistakes that sometimes, could no longer be corrected by the time they were spotted.

In the eyes of the public it was not also very clear at all times whether the High Commission was acting in its capacity of anti-corruption agency or in its role of supervision of the administrative legality of the Administration's activity.

The return of Macao to the full sovereignty of the People's Republic of China provided a new legal basis for the organization of the Commission.

In the first place, as from 20 December 1999, the Basic Law of the Special Administrative Region of Macao, embodying the principle of "One Country Two Systems" became the local constitutional basis for the political organization of Macao and it includes, in article 59, the institution of a Commission against Corruption.

As every other law of Macao must comply with the Basic Law, the status of the Commission is now different, in that it is an integral part of the political structure of the Region, no longer dependent of ordinary legislation for its existence. What is more, the Basic Law stipulates that the Commission functions independently. The same provision makes the Commissioner against Corruption accountable towards the Chief Executive of the Special Administrative Region of Macao, who in turn is the sole representative of the SAR next to the Central People's Government.

Building on this foundation, the Organic Law of the Commission against Corruption and its complementary Administrative Regulation, established in 2000 a new organizational model, which with minor adaptations prevails to this day.

In this model there are, under the single leadership of the Commissioner, two separate agencies: the anti-corruption bureau and the ombudsman bureau, with their

own sets of powers clearly defined in the law, their own internal departmental structure and their own staff.

This clear separation of roles allowed for a more effective independence of the Ombudsman in its operation, as the cases are classified, from the very beginning, as criminal or administrative in nature and then follow their proper due process, without any interference from external or internal sources.

This model is completed by a third department, not specifically assigned to neither Ombudsman or anti-corruption functions but, rather, committed to promoting the values of integrity and honesty in the community, conducting training for the public servants and for the private corporations, assisting public departments and private corporations in designing and enforcing their integrity codes, liaising with the mass media, organizing and implementing educational activities next to the younger generations, from primary school to university, and editing and distributing publications and diverse materials.

This department is not related to investigative tasks and therefore works under the direct supervision of the Chief of Cabinet of the Commissioner.

Differently, both the Ombudsman and the anti-corruption agency work under the direction of a Director of Bureau, who, in turn, report to the Commissioner himself.

3. Operational arrangements

As the focus of this paper is not the anti-corruption agency, only a brief description will follow.

By law, this agency has the status of a criminal police force with full investigative powers and also the powers of the Prosecutor to conduct the criminal inquiry up to, but excluding, the act of prosecution itself.

The crimes falling under the scope if these powers are those of corruption and related fraud crimes, either committed by public servants or within the private sector, extending to the activity of credit institutions and those such crimes committed in relation to electoral legislation and to the elections of members of the institutions of the Macao Special Administrative Region.

The Ombudsman activities include promoting the protection of rights, freedoms, safeguards and legitimate interests of the individuals, and ensuring that the exercise of public powers abides by criteria of justice, legality and efficiency.

The legal means entrusted to the Ombudsman for pursuing these objectives include, among others:

– conduct or request to conduct inquiries, comprehensive investigations, investigation measures or any other measures aimed at examining the legality of administrative acts and proceedings with regard to relations between public entities and individuals;

– examine the legality and the administrative correctness of acts which involve property entitlements;

– report any findings of illegal acts after the completion of investigation to the authorities with disciplinary powers;

– report the results of its main inquiries to the Chief Executive and inform him of any acts carried out by principal officials and of other posts and which may be subsumed in its scope of activity;

– with regard to any shortcomings it finds in any legal provisions, specially those which may affect rights, freedoms, safeguards or any legitimate interests of the individuals, formulate recommendations or suggestions concerning their interpretation, amendment or repeal, or make suggestions for new legislation;

– propose to the Chief Executive the enacting of normative acts which may improve the work of the public institutions and enhance the respect for legality in the administration, particularly by eliminating factors which may facilitate corruption and illicit practice or ethically reproachable practice;

– propose to the Chief Executive the adoption of administrative measures for the purpose of improvement of public services;

– address recommendations directly to the competent authorities for the purpose of rectifying illegal or unfair administrative acts or procedures;

– publicize, through mass media or announcement, its points of view arising from the carrying out of the aims stated above, but in conformity with its duty of secrecy.

As to those cases that fall simultaneously within the scope of both the anti-corruption agency and of the Ombudsman, the question of priority in dealing with the facts must be solved.

Under the Criminal Procedure Law of Macao, those facts pertaining to the criminal investigation are covered by secrecy of justice, during the inquiry phase of the process and shall not be disclosed to nobody who is not a judge nor performing in the capacity of criminal police authority, in that same process.

This means that special care must be taken not to breach this legally imposed secrecy, even if the case was brought originally to the attention of the Ombudsman.

The solution to this difficult problem has been, since the year 2000, to empower both Directors of the anti-corruption and the ombudsman Bureaus, to co-ordinate between them the needed arrangements.

However, at the time of writing this paper, an amendment has been tabled to the related Administrative Regulation, adding an exception clause, which will empower the Commissioner against Corruption to decide otherwise, if the circumstances of the case so warrant.

Experience has shown that this is a very sensitive field, in which it is not easy to establish a definite and fixed priority to be observed in all cases.

Therefore, this becomes a good example of an advantage of having both agencies established and working under a single leadership, because it is precisely this fact that safeguards the independence of the Ombudsman even on such occasions.

4. In Practice

The cases processed by the Ombudsman have been mostly originated by requests from citizens and, taking the last 3 years as a reference, there are some interesting aspects regarding the nature of those requests.

The largest single share of those requests pertains to the legal system governing the public service, either in matters of discipline, personnel rights and interests, recruitment procedures or internal management.

Other than these, there are significant numbers of cases dealing with illegal constructions, irregularities in administrative procedures, municipal affairs and labour issues, including labour disputes and illegal labour.

All of these occur in areas that we deem to be risk areas presenting opportunities for corruption, even if the facts of the cases themselves don't include such a criminal element.

As it might be expected, the vast majority of them have a solution and that solution is, of course, the enforcement of the applicable laws.

When we look at the legal statutory framework of our Public Administration, we find it to be mostly adequate. Obviously, there is room for improvement and every now and then we conclude that some amendment, update or even revision would best be used to plug the regulatory gap. But, for the most part, we find that the rules in place are adequate.

Our criteria, however are not limited to tests of legality: the actual procedures that cause the individual cases reported to the Ombudsman are subject to careful processing both applying tests of legality and of governance.

The conclusions we draw enable us to issue recommendations to the Bureau or Department involved, advising on the corrections they should consider adopting in their procedures.

Traditionally that would be the closing act of the case. But since 2010 we have been publishing some of those reports and recommendations that we find to be more significant.

Our Annual Report includes a significant sample of those, selected on the basis of how important they are for the society and how exemplary we think the lessons they provide might prove.

In a few cases of major relevance, we publish the description of the case and the Recommendation at once and these usually get high-profile coverage by the press and the media.

All this material is also available at the Commission's website.

The focus of these Recommendations is often on the need for transparency and accountability of the Public Administration, not only by formally obeying the legal prescriptions but also by establishing a clear connection between the public interest and the chosen course of action.

This connects with our basic assumption that when administrative procedures, like licensing of inspection for instance, are executed according to a streamlined, preset and well defined sequence of operations, the citizens will know what to expect and the chances for a corrupt official to illegally benefit from his or her position will be significantly cut down.

So, as transparency in government is one of the key elements of prevention of corruption, we find the public disclosure of these documents is instrumental to that effect.

The feedback we are getting is very encouraging: private citizens have been quoting those reports as sources of education into "the way things should be done in practice" and all concerned public officials have been on record stating that they accept our recommendations and will endeavour to implement them.

5. The way forward

The quest for ensuring a sound Public Administration is a permanent and ongoing task of every society.

The ever-changing circumstances surrounding and conditioning the performance of Public Services create new challenges, new problems, new needs and, of course, new sources of corruption.

But they also create new tools for the trade of the Ombudsman. Of these, the availability of fast means for exchanging information and experiences among different jurisdictions is probably the single most important and at the same time most overlooked resource at our disposal.

We see cooperation, international and regional training and research conducted under the auspices of the IOI as a clear avenue to follow.

As a first example of this belief, Macao's CCAC and Hong Kong's Ombudsman have jointly organized a Regional Training Course in May 2012, on the subject of dealing with unreasonable complains, inaugurating what we hope to be a trend of decentralizing such training actions, bringing them closer to the concerned institutions.

I am sure that more such projects will be organized in the future, as well as joint studies and research on the operations and role of the Ombudsman.

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