



INTERNATIONAL
OMBUDSMAN
INSTITUTE

HYBRID CORRUPTION OMBUDSMAN

INTRODUCTION

The classical Ombudsman model, which has been predominant in most Ombudsman institutions, has over the years seen a broadening of Ombudsman mandates beyond the fight against maladministration. There has been a series of adaptations of Ombudsman institutions to suit changing trends and circumstances in the political, legal, economic and social environments which has inevitably seen the emergence of hybrid Ombudsman.

The hybridisation of the Ombudsman has given multiple mandates beyond redress of maladministration and has seen Ombudsman institutions adding human rights protection, anti-corruption, leadership code enforcement and/or environmental protection mandates to the Ombudsman function. The mandates have also been altered as a measure of resolving some of the emergent global challenges.

This paper is based on research done by the Office of the Ombudsman of Malawi and it draws on the experiences of Ombudsman institutions, which have incorporated anti-corruption functions to their core functions. It highlights some of the strategies that have been implemented and brought successful results in the fight against corruption by Ombudsman institutions.

ANTI-CORRUPTION AND NEW DEVELOPMENTS IN OMBUDSMANSHIP

Corruption, which can be defined as acts involving the misuse of entrusted power for personal or private gain (Kolstad *et al*, 2008), has emerged as a governance issue in public administration as it affects governments' operations in meeting their obligations and aspirations.

Corrupt practices in government undermine democracy, therefore distort normal decision-making processes and subvert the policy objectives of legitimate democratic government. In addition, corruption perpetuates discrimination as it results in unfair advantage or undeserved benefit. Ultimately, corruption, if unchecked, can destroy a democratic society as it can undermine the public confidence in state institutions at all levels.

Although not originally designed to combat corruption, but rather to address grievances relating to administrative issues, the institution of the Ombudsman, with its unique set of tools and competences and its focus on the quality of governance, has proven itself to be a useful ally in the struggle against this common human frailty. The hybrid corruption Ombudsman has seen an emergence of a double role: on the one hand, that of the classical Ombudsman in dealing with maladministration, on the other hand, that of having an anti-corruption mandate.

ENABLING A LEGAL BASIS FOR HYBRID CORRUPTION OMBUDSMAN

Ideally, an Ombudsman institution is enshrined in a jurisdiction's constitution. The establishing law forms the legal basis of the institution and also provides for the general framework which defines inter alia the Ombudsman's purpose, functions and powers. The principal provisions in the constitution stipulate the functions, and design key issues and competences of the institution in more detail to enhance the anti-corruption mandate.

To this effect, Ombudsman institutions derive their mandate to fight corruption on two fronts. The first front is the conventional view where the anti-corruption mandate is explicit in the constituting and/or enabling statutes. The second front is deducting from the maladministration mandate. This approach may focus on the relationship between maladministration and corruption, i.e. issues of abuse of power, injustice, human rights violations, failure to procedures or performing duties responsibly and others.

With reference to the two above approaches, for an Ombudsman institution to best employ its anti-corruption function, there are some legal framework connotations that are to be considered. Some of them include:

Wide and clear mandate

It is imperative that Ombudsman institutions lay down the corruption mandate within the legislation that guides them. For instance, in Rwanda the Ombudsman deals with anti-corruption, administrative justice and access to information, while the Ombudsperson of Namibia deals with anti-corruption, administrative justice and environmental protection.

In most cases, the Ombudsman's mandate on corruption is to investigate instances of alleged or suspected corruption, abuse of office and the misappropriation of public funds by public officials. For instance, in the Papua New Guinea model, the wide mandate in the form of far reaching competences in the field of anti-corruption activities is reflected by the fact that there is more than one individual at work and that the Institution is called "Ombudsman Commission". Here, the law prescribes that there shall be three Ombudsmen with one "Chief Ombudsman" as primus inter pares who oversees the administration.

A clear mandate enables Ombudsman institutions to duly adhere to the statutes that are laid down in the legislation. It also assists Ombudsman institutions to enforce their recommendations and directions as they make reference to the statutes.

In addition, the value of an Ombudsman institution with a corruption function also depends on the overall system of administrative and corruption regulation and how well it relates to other oversight bodies. It is therefore essential that Ombudsman institutions fit with existing institutional arrangements, relate well with other oversight agencies and complement other recourses available on similar issues.

Powers

Ombudsman institutions should have adequate powers that are clearly spelt out in the legislation as they are essential for them to perform their corruption functions effectively.

The competences of the Federal Ombudsman of Belgium, for example, were extended by law to a central point for reporting integrity breaches in public administration. The Ombudsman thus receives and investigates reports of civil servants on integrity breaches and protects the reporters (whistle-blowers) against retaliation.

Thus, to be effective in receiving, investigating and resolving complaints, Ombudsman powers should be stated in the relevant law or administrative issuance. For instance, investigative powers should include the authority to obtain documents, compel the attendance and testimony of witnesses and conduct inspections of government premises. It should also include clear and accessible remedies in the case of attempts to hinder the investigation of the Ombudsman.

Independence

The independence of the Ombudsman institution has to be spelt out in the legislature and statutes that guide these institutions. It is imperative for an Ombudsman institution to be independent from the executive power to avoid the risk of not being able to resist influence and it should also not be subordinate to the administrative bodies that it is supposed to investigate. For instance, the establishing Act of the Office of the Ombudsman for the Province of Sindh (Pakistan) says that this institution should perform its function for protecting individuals against maladministration of public authority without being influenced by the agencies under its jurisdiction in an atmosphere of confidentiality and impartiality and should not receive any direction from any public authority and function independently of public authority. Such being the case, the independence should be twofold: independence of the office holder and financial independence.

The very absence of executive authority makes it relatively easy to accord the Ombudsman real independence and a wide mandate. These, in turn, bring with them a great freedom of movement and action. Thus, for example, the Ombudsman is permitted simple and quick access to confidential documentation held by the state and individuals, coupled with the power to refuse to disclose it to any person.

The Ombudsman institution should not depend on the executive and should be accountable to parliament in the form of annual reports and in the appointment procedure. The collective appointment by parliament is generally considered a prerequisite for independence. In terms of

finances, the Ombudsman institution should also propose an annual budget directly to parliament and not to the executive arm of government as it is in other countries.

Incompatibilities

Related to the issue of independence above is the issue of incompatibilities. Though incompatibility clauses differ from jurisdiction to jurisdiction, they often bar the Ombudsman from holding a political position or from engaging in any other paid undertaking. Such being the case, the legal basis of almost all Ombudsman institutions stipulates rules on incompatibilities. The failure to adhere to incompatibility clauses could potentially undermine the Ombudsman's independence due to the risk of political influence on or partisanship in the exercise of the position. Also, economic influence by third parties could jeopardise the Ombudsman's independence.

In most jurisdictions, the Ombudsman shall not simultaneously engage in any paid occupation outside the duties of their office (formulations vary). Papua New Guinea, Taiwan and Vanuatu are three jurisdictions which explicitly stipulate that the Ombudsman position is incompatible with holding higher positions in political parties. The legislation of Queensland recognises the risk of potential conflicts of interest by requiring a new incumbent to lay open their interests and the interests of persons related to them within one month after taking office.

WAYS OF HANDLING INCIDENTS OF CORRUPTION

Most of the anti-corruption strategies that Ombudsman institutions employ fall within three main areas: investigation, prevention, public and civic education.

Investigations

Ombudsman institutions investigate complaints that could be classified as criminal acts capable of being prosecuted in a criminal court such as alleged acts of corruption, abuse of power and conflict of interest. Ombudsman institutions should make a point that when prosecuting cases of alleged corruption, everyone is equal before the law. Ombudsman institutions also need to have those diplomatic skills to be able to act as an intermediary and get their recommendations and directions adopted.

There is also a large grey area between criminal behaviour and acceptable behaviour, where the Ombudsman would be able to investigate and recommend corrective action or corrective procedures. Thus, they can investigate matters that fall into the frequently grey and ill-defined area of ethics, where a law may not have been transgressed but where the community's sense of right and wrong is offended. Because of this characteristic responsibility of an Ombudsman, the institution is able to operate as an early-warning system with the responsibility to monitor *inter alia* aberrations of the standards of ethical conduct that fall short of the narrow definition of criminal corruption.

Prevention

Related to the point above, Ombudsman institutions should develop guidelines of conflict of interests and highlight principles of accountability and integrity in public service so as to prevent the occurrence of corrupt acts.

In addition, Ombudsman institutions should bring to the fore the need to develop an all-inclusive and more sustainable and structured approach in the anti-corruption crusade. There is need for Ombudsman institutions to develop a broad-based coalition of agencies comprising membership from public sector, private and civil society organizations, as it is the case for instance with the Ghana Anti-Corruption Coalition (GACC). This enables the creation of a forum for interaction among

government, public and private sector institutions and civil society groups working in the area of anti-corruption.

The effectiveness of the Ombudsman institution also rests upon the Ombudsman's personality and the image they create among the people. Full support of the media, and the ability of the people to understand their role in holding duty bearers accountable also matters.

Public awareness and education

Ombudsman institutions should pursue anti-corruption educational activities to raise public awareness of the evils of corruption and its negative impacts on development. Public awareness is critical to OIs as their work depends on the complaints they receive. Such being the case, the public must be aware of and understand the Ombudsman and its functions.

The abuse or unjustifiable exercise of power could be an indication of the deterioration of ethical standards or the perversion of integrity as would unfair, capricious, discourteous or other improper conduct on the part of an official. Even undue delay by an official could indicate such deterioration. These forms of improper conduct could also be a manifestation of the deterioration of ethical standards or the perversion of integrity within the public service and thus corruption in the broad sense.

Public awareness therefore is essential to Ombudsman's work as it enables them to pinpoint the deterioration of moral or ethical standards in the public service, the perversion of the integrity of its officials and the inevitable result this would lead to, namely, the destruction of an efficient state administration. This could all be classified under the heading of corruption.

The Ombudsman is therefore required to analyse trends in these behavioural areas in government and to recommend specific or systemic corrective action in order to remove the cause of repetitive aberrations of corrupt behaviour. The fact that crime or corruption does occur within the public administration could be an indication of a systemic or structural deficit. It is indeed the Ombudsman's business to identify instances of systemic maladministration and it is their responsibility to rectify the situation.

Ombudsman institutions should also promote the integrity and decency of public life by devising noble and more effective tools and strategies for the implementation of their decisions and

recommendations. For instance, in Kenya, these include the issuance of a ‘Notice to Show Cause’ in relation to complaints handling, monitoring of a ‘Resolution of Public Complaints through Performance Contracting System, Public Interest Litigation, Citation Register, Spot Checks and the Huduma Ombudsman Award’.¹

In addition, Ombudsman institutions should produce publication of annual reports or magazines, which should be widely disseminated to relevant authorities and the public. This enables stakeholders to appreciate the work being done by Ombudsman institutions and raises public awareness of their anti-corruption work.

ENFORCEMENT OF DECISIONS AGAINST CORRUPT ACTS

Effective enforcement of the decisions and recommendations of the Ombudsman is critical to the effectiveness of the Ombudsman institutions in the fight against corruption. There are three main ways Ombudsman institutions can utilize to enforce the decisions and recommendations against corrupt acts, which are:

Parliamentary reporting

In a number of jurisdictions, the Ombudsman is required to report to Parliament as part of the accountability mechanism. The recommendations are included in the reports to enable Parliament to enforce those that have not been implemented. In such instances, Parliament acts as an oversight institution over the Ombudsman.

It is, however, instructive to distinguish parliamentary oversight over the Ombudsman from that over the decisions of the Ombudsman. In this regard, Parliament should not be encouraged to trespass and start acting as if it possessed oversight over the decisions of the Ombudsman. This also poses the risk of politicisation of the decisions of the Ombudsman once they are thrown into the political arena for consideration.

¹ For more information, kindly consult Dr. Otiende Amollo, Challenges for Ombudsman Work Resulting from Multiple Mandates, p. 215-216, fn 124-129, available online [here](#).

In addition, in most cases, the Ombudsman reports to Parliament on an annual basis which makes it impractical for decisions to be enforced regularly and expeditiously. Further, most parliaments are overwhelmed with other crucial parliamentary business and would therefore not set aside adequate time to consider the reports of the Ombudsman.

Judicial enforcement

Enforcement of the decisions of Ombudsman institutions through the court has been adopted in few jurisdictions. For example, in Northern Ireland, the decisions of the Office of the Ombudsman may be enforced in court in instances of unsatisfactory outcome. However, this can only be used in cases of non-compliance with the decisions of the Ombudsman. Similarly, in Ghana, the recommendations of the Commission on Human Rights and Administrative Justice can be enforced through the courts.

Accordingly, the failure to implement the decisions would amount to contempt and attract penal action. Court enforcement has worked well in these countries and ensured satisfactory outcomes. However, it should be noted that the judicial enforcement negates the existence of the Ombudsman and the need for swift justice to the complainants. It entrenches the culture of lack of respect for the Ombudsman and the rule of law since public agencies will not act unless there is a court order.

Moralisation

In the context of classical Ombudsman institutions, implementation of the recommendations is based on moralisation and the reliance on the moral authority of the recommendations. In such situations, implementation occurs naturally since it is deemed morally inappropriate to fail to implement the recommendations. Even in situations where a coercive judicial remedy may be more appropriate, there is preparedness by agencies to accede to a request by the Ombudsman that the implementation of a decision is deferred pending investigation of a complaint.

While moralisation has worked in developed countries, it has not been effective in a number of jurisdictions, especially in Africa. This is especially so considering the political, economic and cultural environment in which the Ombudsman operates in Africa. A number of countries are still faced with the challenge of impunity. In some cases, where the Ombudsman makes recommendations, the relevant bodies ask for 'court orders' for implementation.

Ironically, in some extreme cases, even court orders are ignored, thereby undermining the judicial authority. In such jurisdictions, the classical model of making recommendations cannot be effective. In addition, the nature of work of the Ombudsman in Africa is such that they still have to largely deal with issues of civil and political rights, the redress of which would face resistance from the bureaucrats. In such cases, they require sufficient enforcement powers beyond merely making recommendations and counting on moralisation.

CHALLENGES

It is imperative that we specify some of the challenges that an Ombudsman institution with a corruption function faces in the course of exercising its mandate.

Lack of specialized personnel

Corruption is a special type of social vice and prevention work in this field requires special skills and training. Ombudsman institutions with multiple mandates such as maladministration and corruption are likely to face acute shortage of skilled staff and also challenges in developing the technical competence that usually comes with this specialization. The problem is further exacerbated by the exodus of qualified staff, especially the lawyers, due to poor conditions of service of most Ombudsman institutions. In contrast, a standalone Ombudsman institution is likely to develop strong technical competence since they are uniquely positioned to identify and address structural problems within public administration.

However, some Ombudsman institutions have been building technical capacities for their officers in-house and externally through training officers on short term courses, temporary secondments to another organisation and visits to anti-corruption agencies in countries where the fight against corruption is advanced such as Malaysia, Singapore and Hong Kong.

Lack of resources

Ombudsman institutions face the challenge of inadequate resources and lack of financial independence to fully execute their mandate. While one of the advantages of institutions with

multiple mandates is cost effectiveness, it is important to note that a standalone Ombudsman has the advantage of enabling the institution to get adequate resources for the Ombudsman's work. Providing a standalone Ombudsman with resources addresses under-resourcing and is likely to facilitate not only acquisition of the right infrastructure but also the employment of competent staff for the Ombudsman's work. In multi-mandate institutions, the Ombudsman function is likely to suffer since more resources may be channelled to other priority areas.

Limitations in the legal and institutional framework

Ombudsman institutions also have reported limitations in the legal and institutional framework as one of the impediments in the fight against corruption. They have postulated that the criminal laws on corruption are scattered in a number of other laws and most of the legislations that guide them on corruption do not provide the necessary deterrence for achieving zero tolerance for corruption.

In addition, it has been observed that multiple mandates have the potential of creating conflictual jurisdictions, which ultimately undermine the Ombudsman's function. This stems from the fact that whereas the mandates may be interrelated, the approaches and strategies may not be in congruence with each other, thereby creating conflicting jurisdictions. For instance, the nature of the Ombudsman's work is usually conciliatory and non-confrontational. Human rights and anti-corruption mandates often place the government on the receiving end, which may not augur well for an institution performing the Ombudsman function.

In some countries, especially developing countries, challenges of maladministration, corruption and human rights violations are prevalent and significant. Putting all these issues under one institution means that this institution will have to bite off more than it can chew since the institution will be overburdened with too many responsibilities. This leads to underperformance in some areas since the focus is elsewhere.

There is also evidence that the classical Ombudsman function usually suffers in such situations since fighting corruption and redress of human rights violations are considered more urgent and attractive than redress of maladministration. This is well illustrated by the case of Uganda, where the Ombudsman (Inspectorate of Government) is endowed with administrative justice and anti-corruption functions as per the Constitution of 1995. While the anti-corruption mandate was operationalised immediately upon the establishment of the institution, the Ombudsman function was only operationalised in 2010. Even then, the Ombudsman mandate is yet to be accorded its

rightful place in the operations of the institution since a lot of focus has been placed on the anti-corruption mandate, yet many of the issues that lead to corruption are those of maladministration.

Lack of political will and government commitment

There exists a perception of a lack of commitment by some political leaders and officials to justice, equity and fairness and to fighting corruption. Ombudsman institutions have encountered instances of reluctance and even failure to co-operate or to implement recommendations. The executive arm of government must demonstrate the political will and commitment to fight corruption by adequately resourcing Ombudsman institutions, supporting the necessary legal framework reforms and taking a zero tolerance to corruption.

CONCLUSION

It is worth noting that while the Ombudsman has been founded differently in every country, the success or failure of Ombudsman institutions depends on the institutional design, administrative capacity and professional expertise of staff. In a jurisdiction where the government is committed to the idea of eradicating corrupt practices, the Ombudsman institution can be a valuable tool as its key function is to recommend changes in administrative practices and rules following an investigation. The Ombudsman institution must therefore be relevant and give hope to the citizens by tackling the crucial issues such as corruption, otherwise its existence and relevance may be brought to question.

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