THE COMMISSION ON ADMINISTRATIVE JUSTICE

"Office of the Ombudsman"

Hata Mnyonge ana Haki

Repositioning the Ombudsman

Challenges and Prospects for African Ombudsman Institutions

19th – 21st September 2013

Nairobi, Kenya

Repositioning the Ombudsman
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List of Abbreviations

AOMA	African Ombudsman and Mediators Association
AORC	African Ombudsman Research Centre
AU	African Union
CHRAGG	Commission of Human Rights and Good Governance
CHRAJ	Commission on Human Rights and Administrative Justice
EIO	Ethiopian Institution of the Ombudsman
MoU	Memorandum of Understanding
PCI	Permanent Commission of Inquiry
UN	United Nations
UNDP	United Nations Development Programme

Statement of the Chairperson

The Ombudsman is one of the key institutions supporting good governance worldwide. As one of the oldest oversight institutions established over 200 years ago, the Ombudsman has expanded exponentially in all continents. The prolific growth of the Ombudsman can be attributed to its centrality in good governance which enables citizens to realise their rights. It assures good governance by ensuring that public entities operate within the law and respect the rights of citizens. The Ombudsman brings all the elements of good governance in public administration such as transparency, objectivity, efficiency, accountability, economy and human touch.

The growing interest in the Ombudsman has also witnessed the expansion of its mandate beyond the traditional function of addressing maladministration to other areas such as auditing agency records, training of government officials, protection of witnesses and whistleblowers, facilitating access to information, legislative review, fighting corruption, and protection and promotion of human rights among others.

In Africa, the growth of the Ombudsman has been phenomenal. From its humble beginnings in Tanzania in 1967, the Ombudsman has grown in numbers to over 34 countries. One of the striking and unique features of the Ombudsman institutions in Africa is their broad jurisdiction which goes beyond the conventional mandate as previously known. Despite the unprecedented growth, the Ombudsman in Africa has been faced with a number of challenges relating to anchorage within the legal system, operational environment and resourcing, which have created the impression that their existence is merely salutary.

In cognizance of the centrality of the Ombudsman in the governance process in Africa, the Commission on Administrative Justice (Office of the Ombudsman Kenya) successfully organized the Inaugural Regional Colloquium of African Ombudsmen in Nairobi from 18th to 21st September 2013. The theme of the Colloquium, 'Repositioning the Ombudsman: Challenges and Prospects for African Ombudsman Institutions,' spoke to the contemporary issues facing

the Ombudsman in Africa and captured the main objective of enriching the quality and effectiveness of the work of the Ombudsman in Africa. The quality of the Colloquium was evident from the representation of a cross section of distinguished governance and constitutional practitioners from Africa and beyond.

The robust discussions during the Colloquium created a common understanding of the Ombudsman in Africa by generating sound and practical outputs. The key outputs included an appreciation of the centrality of the Ombudsman as a tool in governance in Africa and the desire to establish it in all African countries; the importance of constitutional entrenchment and resourcing for the Ombudsman; the need to design ingenuous ways of ensuring respect and implementation of the recommendations and decisions of the Ombudsman; the role of the African Ombudsman and Mediators Association (AOMA) and the African Ombudsman Research Centre (AORC) in the governance process in Africa; and the need to have collaborative meetings and exchange programmes among the African Ombudsman Institutions.

The Report of the Colloquium, which we are pleased to present, captures the discussions of the meeting. The insights and recommendations will form the basis of further collaboration and discourse on the role of the Ombudsman in Africa. As the Office of the Ombudsman, the Commission on Administrative Justice will continue to spearhead the organization of the Colloquium in future as a platform for meaningful and robust partnership among the Ombudsman institutions in Africa. To this end, we will continue to work closely with AOMA, AORC, Ombudsman institutions in Africa and other key stakeholders to realise the objectives good governance in Africa.

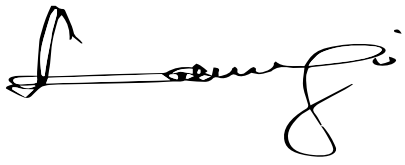
Commissioner Otiende Amollo, EBS
Chairperson of the Commission

Foreword

I am delighted to present the Report of the Inaugural Regional Colloquium of African Ombudsmen held in Nairobi from 18th to 21st September 2013. The Colloquium, which was the first of its kind in Africa, was organized by the Commission on Administrative Justice (Office of the Ombudsman, Kenya), and offered an invaluable experience and platform for collaboration among the Ombudsman institutions in Africa.

The Colloquium was yet another milestone for the Commission in its efforts towards promoting administrative justice and setting standards in public administration in Kenya and Africa. The outputs and lessons learnt will undoubtedly, if implemented, shape the future operations and intellectual discourse on the Ombudsman in Africa. The Commission intends to hold this event annually as a way of benchmarking and promoting collaboration with other Ombudsman institutions in Africa and beyond.

The accomplishments of the Colloquium would not have been possible without the support and commitment of the Commissioners and Staff of the Commission. I specifically want to thank the Director, Advocacy and Communications, Ms. Linda Ochiel, and Senior Manager, Advocacy and Communications Ms. Phoebe Nadupoi for their role in organising the Colloquium, and Director and Advisor to the Chairperson, Mr. Edward Okello, for compiling this report. In this regard, I thank them for their commitment and tireless efforts. I also thank the United Nations Development Programme for their invaluable support to the Commission. We are committed to realizing of vision of an 'effective overseer of responsiveness and servant-hood in public office at national and county levels in Kenya,' and will continuously work with other institutions in this regard.



Leonard Ngaluma, MBS
Commission Secretary/CEO

Executive Summary

The Commission on Administrative Justice organized the inaugural Regional Colloquium for Ombudsman Institutions in Africa on the theme 'Repositioning the Ombudsman: Challenges and Prospects for African Ombudsman Institutions.' The Colloquium was held in Nairobi, Kenya from 18th to 21st September 2013.

The broad objective of the Colloquium was to discuss ways of enhancing and enriching the quality and effectiveness of the Ombudsman institutions in Africa. In particular, the Colloquium aimed at achieving the following specific objectives:

- Promote a common understanding of the concept of the Ombudsman, the basic principles and strategies for redressing administrative injustice and provide a concrete framework for action and change strategies in Africa;
- Re-examine the role and relevance of the Ombudsman in the African context and their contributions to justice, governance and public services;
- Enhance the protection of the independence and development of African Ombudsman Institutions by creating a platform for information exchange and best practices for the advancement of good governance and administrative justice policies, standards and actions in Africa; and
- Provide a platform for knowledge and skills exchange programme tailor-made for African Ombudsman Institutions.

The Colloquium brought together a cross section of Ombudsmen and other distinguished governance and constitutional practitioners worldwide. A total of 32 foreign delegates from 14 countries attended the Colloquium. The wide representation also included delegates from various constitutional and statutory bodies, and the civil society in Kenya. The Colloquium employed a participant-centred approach and focused on five core sessions during which expert presentations were delivered.

During the official opening of the Colloquium, the delegates were urged to consider how to situate their analysis of the Ombudsman within the wider framework of governance and politics. While noting the necessity of an enabling political culture for the Ombudsman, the delegates were urged to consider ways of enhancing the effectiveness, credibility and confidence in the Ombudsman as an institution of governance.

In relation to the concept of the Ombudsman, it was noted that the institution had evolved both quantitatively and qualitatively from the traditional institution dealing with maladministration and making only recommendations to one with a broader mandate and coercive powers. This was noted to have taken place in Africa in the last three decades occasioned by the continent's unique circumstances. Further, it was noted that, irrespective of the model adopted by individual African countries, whether fused or un-fused, it is important to centrally position the institution in the governance structure and process, and engender respect for its recommendations and decisions. In this regard, the need for continuous engagement and collaboration with key stakeholders in the governance process was underscored as one of the success factors for the institution.

Regarding the role and relevance of the Ombudsman in the governance process, the Colloquium noted the complex and intertwined relationship between the Ombudsman and the Judiciary. Given the importance of the Ombudsman in the governance process, the Colloquium underscored the need to adopt an Ombudsman model that suits the political environment in Africa – the Danish model was seen as well suited for African countries due to the challenging political environment in many countries. In relation to the nexus with the courts, the need to develop jurisprudence on the relationship was underscored. The two institutions were noted as complementary to each other as opposed to competitors in the administrative justice sphere.

The discourse also considered case studies from three African countries – Kenya, Zambia and Botswana – to illustrate the experiences of the Ombudsman in Africa in terms of establishment, mandate and independence. While most of the key parameters were noticeably present, it was noted that a number of challenges such as insufficient legal framework, resource constraints and resistance from public agencies still abound.

In relation to complaints handling, it was noted that while it is the primary mandate of the Ombudsman worldwide, it is important for the Ombudsman to have broad strategies such as outreach and communication

strategies, capacity building, role modeling and mediation skills as a way of ensuring effectiveness and acceptance by the public. In addition, the office holder should be seen as fair-minded and objective. To this end, the Ombudsman should adopt a facilitative and positive organisational culture to improve public administration. Further, the Ombudsman needs to give the complainants the impression and assurance that it thoroughly considered their complaints, and proffer reasons on the courses of action take.

Finally, it was noted that the Ombudsman in Africa should establish networks amongst themselves and with other international Ombudsman bodies for benchmarking, information sharing and support. Such partnerships are key to setting standards in public administration and guiding the work of the Ombudsman. Further, the dearth of legal scholarship in Ombudsmanship could be remedied through renaissance of legal scholarship in the area as a way of creating a reservoir of information in Ombudsman and administrative justice matters.

Overally, the Colloquium underscored the following:

i) The role of the Ombudsman in governance and service delivery globally and the African context in particular.
ii) The need to embed the Ombudsman in the national Constitution, allocate adequate resources and engender a culture of respect for the law, including with the decisions and recommendations of the Ombudsman.
iii) The need to encourage the few African countries that have not adopted the Ombudsman to do so, and strengthen the existing Ombudsman institutions.
iv) Engender an understanding of the Ombudsman among the various publics, including initiating and nurturing partnerships with the Judiciary on the complementarity roles in administrative justice system.
v) The need to pay attention and encourage legal scholarship related to the Ombudsman.
vi) Need to have collaborative meetings and exchange programmes for the African Ombudsman institutions.
vii) The role of the African Ombudsman and Mediators Association and the African Ombudsman Research Centre as platforms for collaboration for African Ombudsman institutions.

Session 1:
Official Opening of the Colloquium

1.1 Opening Remarks by Hon. Commissioner, Otiende Amollo, the Ombudsman of Kenya

Commissioner Otiende Amollo lauded the delegates for attending the Colloquium which aimed at drawing and sharing ideas on how to make the Ombudsman more relevant and effective. He stated that the Colloquium was an auspicious moment, taking place at a time when African countries seemed keen to purge impunity and entrench proper administrative procedures and good governance.

He noted that the evolution of the Ombudsman had led to its global uptake and broadening of its jurisdiction to include issues of human rights, anti-corruption and ethics. He however noted that the broadened mandate had generated controversy on the placement of the Ombudsman in the larger institutional framework of good governance. Commissioner Amollo envisaged the scope of the Ombudsman's work as vital to developing good governance, making civil processes effective and accountable and encouraging public institutions to adhere to the law and procedures. He observed that the increasing confidence in the Ombudsman worldwide had led to its establishment in at least 150 countries, including Africa where at least two-thirds of the countries had established the institution.

Three factors, Commissioner Amollo noted, would explain the varied performance of the Ombudsman in Africa. These factors are the mode of establishment, scope of jurisdiction and political culture. The challenges facing the Ombudsman included weak legal and institutional frameworks, resource gaps, and over centralised bureaucracies. He underscored the complementary mandates of the Ombudsman and the Judiciary which called for greater co-operation between the two institutions to achieve their respective mandates. He noted that the colloquium provided an opportunity to re-examine the concept of the Ombudsman and its relevance in Africa.

1.2 Remarks by the President of the African Ombudsman and Mediators Association

Hon. Paulo Tjipilica, Ombudsman of Angola

The President of the African Ombudsman and Mediators Association (AOMA) noted the strategic importance of Kenya to Angola in particular, and Africa in general. He stated that the Colloquium was important for the African continent, given the fact that the African Union had identified 2013 as the year of re-organisation of Pan-Africanism. He noted that AOMA had a lot to do in this regard, of which the Colloquium formed an important part. He thanked the Ombudsman of Kenya for organizing the Conference.

He gave a brief history of AOMA, established on 25th July 2002 in Ouagadougou Burkina Faso which has the objective of promoting mutual support and co-operation, provide a platform for joint activities, enhance information sharing and capacity building for respective offices, promote good governance and support of human rights and, above all, the rights and respect of the African man.

He noted that it was an honour to be invited to the Colloquium adding that AOMA valued such fora which are important for information sharing on best practices on Ombudsmanship.

He observed that many African countries had taken the initiative of establishing the Ombudsman. He further stated that AOMA was at the forefront in promoting the creation of Ombudsmen in countries where the institution did not exist. The president of AOMA commended the commission on Administrative Justice for hosting the Colloquium thus providing an opportunity to promote the creation of Ombudsman institutions in countries where they did not exist, and encourage those who have them to protect the institution and requiring them to serve citizens.

He acknowledged the challenges facing the Ombudsman of Malawi and stated that AOMA had engaged with the Malawian Government on the need to protect the Ombudsman and enable her perform her duties. Her presence at the Colloquium, he noted, was important, and gave hope and reason to protect and encourage members of AOMA. He wished the delegates fruitful discussions and thanked them for supporting AOMA in its various activities.

1.3 Remarks by the Representative of Development Partners'

Ms. Marie-Threase Keating, Country Director, UNDP Kenya

Ms. Marie-Threase Keating, the Country Director for UNDP Kenya, began by thanking the Commission on Administrative Justice for organising the Colloquium which had brought together the African Ombudsmen and governance practitioners from across the world to discuss and reflect on the role of the Ombudsman in the African context.

She noted the critical place and role of the Ombudsman in Africa's governance system. The pace of development of the Ombudsman in Africa, she noted, was unprecedented; from an early beginning of the first Ombudsman in Tanzania in 1968 to the current membership of over 34 countries.

She thanked the delegates for their participation, noting that UNDP considered the South to South exchange of knowledge and best experiences within Africa to be extremely valuable. She further noted that globally, UNDP worked with Ombudsman institutions and National Human Rights Institutions in several countries to promote and strengthen democratic governance.

The Ombudsman and National Human Rights Institutions, she observed, play an important role in furthering accountability through their functions which protect and promote democracy, good governance and constitutionalism. The Ombudsmen serve as facilitators and guardians of good governance by promoting and protecting human rights, transparency and administrative justice. To this end, the Ombudsman matters to UNDP given their work which forms an integral part of UNDP's development agenda.

She called for the need to ensure that the decisions and determinations of the Ombudsman are respected, upheld and acted upon by relevant stakeholders. She also called for support to the Ombudsman to make it effective.

She applauded AOMA for their co-ordination and support for regional activities in fostering exchange of knowledge on best practices and building regional capacity. She also thanked the Governments of Finland and Sweden for their support to the Commission through UNDP.

She concluded with the words of UNDP's Administrator, Helen Clark, that "UNDP and other UN system partners salute and affirm the work done by

the world's Ombudsmen to promote more responsive governments and accountability and provide redress to citizens."

1.4 Remarks of the Chief Justice of Kenya, Dr. Willy Mutunga

The speech of the Chief Justice was read by Prof. Christine Mango, the Vice Chairperson of the Judicial Service Commission, Kenya. She began by thanking the Commission for organizing the Colloquium and inviting the Chief Justice as one of the speakers. She noted the aptness of the theme of the Colloquium, which she stated spoke to the contemporary issues facing the Ombudsman in Africa.

She noted the novelty of the concept of Ombudsman in Africa and its role in the development of the continent. She noted the role of the Ombudsman in public administration through different contexts ranging from complaints handling, provider of justice and custodian of fairness and good practices.

In Kenya, she observed, the Ombudsman idea was mooted in 1971 by the Commission of Inquiry into the Public Service Structure Remuneration Commission, commonly known as the Ndegwa Commission, that recommended that an office be established to deal with maladministration in the public service. The proposal was, however, not implemented leading to deterioration of service delivery in the public sector. It was not until 2007 that an office, the Public Complaints Standing Committee, was established through a Gazette Notice No. 5826 of June 2007 as a semi autonomous government agency under the Ministry of Justice, National Cohesion and Constitutional Affairs to deal with maladministration in the public sector.

However, the Committee was limited in scope and legal framework to effectively play the role of Ombudsman. The quest for an independent office of the Ombudsman was eventually achieved in September 2011 through the enactment of the Commission of Administrative Justice Act as part of the restructuring of the Kenya National Human Rights and Equality Commission established under Article 59 of the Constitution.

She reiterated the improvement of the Colloquium as a platform for sharing experiences on the work of the Ombudsman in the governance process. She concluded by stating that the Judiciary had established an Office of the Ombudsperson to deal with complaints against the Judiciary staff or the

establishment of the Judiciary. She noted that the Office had made remarkable achievements leading to increased confidence in the Judiciary.

1.5 Remarks by the Speaker of the Senate (Kenya), Hon. Ekwee Ethuro, EBS, MP.

The remarks were read by Hon. Senetor Amos Wako, Former Attorney General & Chairman of the Senate Legal Affairs & Human Rights Committee. He began by thanking the Commission for inviting the Speaker to the Colloquium. He noted that the history of the Ombudsman could be traced to 2016 BC in China and Korea when the monarch would send someone to go round the country incognito to establish what the complaints of the citizenry were against his officials. It thereafter expanded to its present state whereby the Office deals with so much more than just maladministration.

He stated that the idea of the Ombudsmanship in Kenya had been recommended in 1971 and nothing happened until 1996 when the President, through an Executive Order, established the Standing Committee on Human Rights with some responsibilities of the Ombudsman. In 2003, the Kenya National Commission on Human Rights was established with the mandate of dealing with maladministration. He stated that combining human rights and administrative injustice affected redress of maladministration since the focus was mainly on human rights violations, owing to their headline-catching issues. This realization finally led to the Commission on Administrative Justice in September 2011 as a separate institution to deal with maladministration.

He noted that it took long for Ombudsman to be established in Kenya because it was felt that the Ombudsman will be an opposition to the Government. This, however, changed and an independent Office was established to perform the work of the Ombudsman. He stated that the Ombudsman needs to be firmly set in the hearts and minds of the populace and governors to make it effective.

Hon. Wako emphasized the need for African Governments to appreciate the role of the Ombudsman since public service delivery is a shared interest. This can only be realized in an environment of mutual co-operation between the government and other stakeholders: and should extend to functional independence and, autonomy and adequate resource allocation.

While noting the devolved Government in Kenya, Hon Wako called upon the Commission to decentralize to each of the 47 Counties to effectively serve the public at the grassroots. He also called for support to the Ombudsman, including respect for its decisions and creation of a conducive environment to enable it deliver on its mandate. He concluded by urging AOMA to prioritize their support to countries that had not established the Ombudsman as a way of persuading them to establish it. He wished the delegates well and hoped that the deliberations would break new grounds, heralding a new beginning for the African Ombudsman; an era in which the Ombudsman repositions itself as a necessary institution in the governance process.

1.6 Keynote Address by the Attorney-General
Hon. Prof. Githu Muigai, Attorney General, Republic of Kenya

Professor Githu Muigai, the Attorney General of the Republic of Kenya began by welcoming the delegates to Kenya. While thanking the Ombudsman of Kenya and acknowledging the representation of the various countries at the Colloquium, Hon. Muigai stated that Kenya was delighted to hold such a distinguished gathering whose discourse, he hoped, would be stimulating and informative.

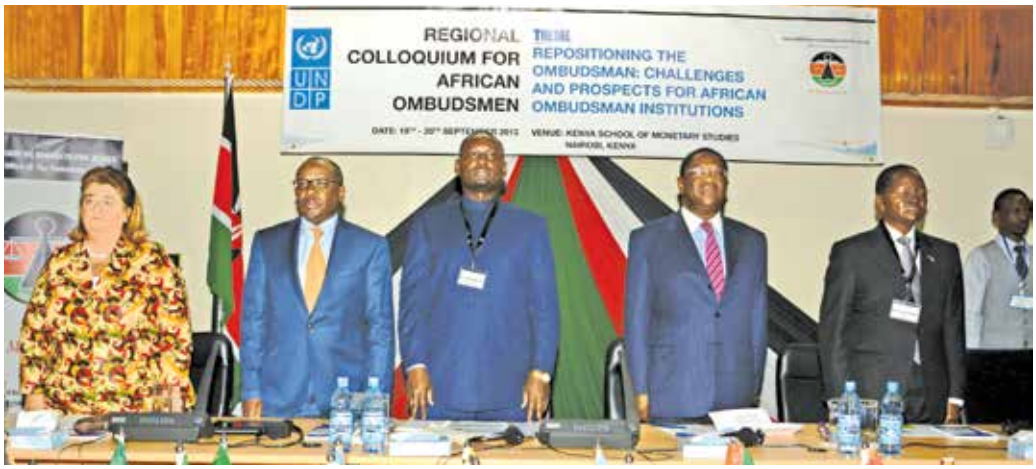
He stated that Kenya believed that administrative justice was one of the pillars of national transformation of which the Ombudsman plays an important role. He hoped that the Colloquium would be a platform for improving governance and administrative justice in Africa.

He stated that Kenya believed that Africa's problems can only be solved by Africans in Africa, with African institutions and African solutions. Kenya, he added, was proud of her membership with the United Nations and other bodies, the participation she has had therein and influence she had been able to exert on these bodies.

He further stated that Kenya believed that Africa had a special place, special problems, special historical tradition and that Kenya should work with other Africans to strengthen her democracy, economy and linkages to make Africa a continent that could speak with one voice on critical matters and a continent that looked in to assist itself to strengthen the electoral, democratic, judicial and good governance processes.

He gave an example of the vetting of Judges and Magistrates in Kenya where Kenya looked to Africa for support. Judges from Ghana, Zambia, Malawi and Tanzania were called in to help in the vetting, because, contrary to popular belief, Africa had good standards and that there was a good peer education that Kenya could benefit from by working together.

Prof. Muigai noted that the enormous task for the delegates and wished them well in the deliberations at the Colloquium, and proceeded to officially open the Colloquium.



From Left: Ms. Maria Keating – UNDP Country Director, Hon. Prof. Githu Muigai – the Attorney General of the Republic of Kenya, Commissioner Otiende Amollo – Chairperson of the Commission on Administrative Justice, Hon Senator Amos Wako – Former Attorney General and currently the Chairman of the Senate Legal Affairs and Human Rights Committee (Kenya), and Hon. Paulo Tjipilika – the President of AOMA and the Ombudsman of Angola during the opening of the Colloquium on 18th September 2013.

A photo of the delegates at the Colloquium

Session 2:
The Ombudsman: Current or Future Reality? Re-Examining the concept of the Ombudsman

***Chair**: Hon. Adv. Festinah Bakwena, Office of the Ombudsman, Botswana*

2.1 Origin and Evolution of the Ombudsman Concept

By: Prof. Victor O. Ayeni, Director, Governance and Management Services International, London

Focus of Presentation

- Where did it all start?
- Know what happened before and how we got to this
- Understand why we should be part of it and that it is the right thing to do
- How we can better do what we are doing?
- Learn lessons for our future direction
- So, what really is an Ombudsman?

Introduction

- On an annual average until about the year 2000, five new countries established an Ombudsman, and an average of 60 new institutions would be created every year.
- Over 70 percent of countries in the world, representing 142 countries globally, have established the Ombudsman at governmental level; over two-thirds of African countries have an Ombudsman.
- Over 1,000 individual offices established in domestic jurisdictions, including national offices with broad or specialized mandate, national or sub-national focus, and non-state offices
- It is popular with businesses and corporate sector
- International Institutions have an Ombudsman, such as the European Union, World Trade Organization, the World Bank, the United Nations and the African Development Bank among others.

The Ombudsman institutions have been created in every continent. The countries that have established the institution can be broken down as follows: 35 in Africa; 14 in Asia; 9 in the Pacific; 29 in the Caribbean and Latin America; 53 in Europe; and 2 in North America.

The Ombudsman has become a critical pillar and brand in governance. The Ombudsman is, therefore, a formidable institution and can or should not be taken for granted. The importance of the Ombudsman was aptly captured by a commentator thus:

> *"... undoubtedly the most valuable institution from the viewpoint of both the citizen and bureaucrat that has evolved during this century.... there has been broad public demand for the establishment of an Ombudsman to resolve problems in a very large number of countries and institutions. This astonishing growth of an institution is not and has not been emulated by any other body. Contrast the many centuries that it took Parliament and the Courts to establish their roles..."*
>
> (D Pearce, "The Ombudsman: Review and Preview - The Importance of Being Different" The Ombudsman Journal, (Canada) Number 11, 1993, pp 45;13)

The Ombudsman is no longer just a concept, neither is it an organization; it is an institution and has become increasingly looking like a club because everybody wants to be part of it and call themselves Ombudsmen. It has also grown a lot of professional networks in all regions of the world. The Ombudsman has also become a brand.

The Ombudsman cannot reverse administrative actions, but can influence change. A lot of Ombudsmen are engaged in systemic issues.

Public Sector Ombudsman

Granted, there are many others like it, but the Ombudsman is unique in its essential features and fundamental approach to solving issues in contemporary society. It is, however, worth noting that the Ombudsman is not a miracle worker, it is not set to solve all issues or problems.

Essential attributes of an Ombudsman

The Ombudsman is an independent and non-partisan officer (or committee of officers) often provided for in the Constitution, who supervises the

administration. Traditionally he deals with complaints from the public on administrative injustice and maladministration, but increasingly too with human rights and corruption related matters. In response to complaints submitted by others or on his own initiative, the Ombudsman has the power to investigate, report upon and make recommendations about individual cases, administrative procedures and relevant system-wide changes.

The Ombudsman, as an individual, is a person of prestige and influence who operates with objectivity, competence, efficiency and fairness. He is readily accessible to the public and does not ideally charge for the use of the service. He uses fast, inexpensive and informal procedures. He is not a judge or tribunal, and (ideally) has no power to make binding orders or reverse administrative actions. He seeks solutions to problems by the process of investigation and conciliation.

The authority and influence of the Ombudsman derive from the fact that he is appointed by and reports to one of the principal organs of state, usually Parliament. He can also publicise administrative actions.

Underlying Principles of an Ombudsman

All institutions should be founded on the following key principles:

- Democracy means the rule of law and all are subject to it
- Citizens have a right to good and quality governance; the Government has an obligation to provide quality governance
- Humans are intrinsically good and want to do things as best as they can, but are also prone to failure and abuse
- Public agencies must be accountable to an independent body
- The individual is entitled to impartial, independent and easy to use grievance redress mechanism
- Redress must be to restore the aggrieved to the position before the wrong was done
- Governance essentially relies on a multiplicity of institutions
- The three institutional arrangements of the modern state, namely the legislature, executive and judiciary, are foundational to positioning the public sector Ombudsman

How did all this start?

The Ombudsman was formed as a result of certain “push factors” with regards to better governance.

The push factors are as outlined below:

- Eliminating despotic and totalitarian rule – the case of Sweden
- Constitutionalism and the rule of law
- Growth of the welfare state, bureaucracy and concomitant governmental influence
- Increasing public expectations, even with declining role of the state – post 1990
- Widespread demand for democracy and performance
- The need for people-centred rule and mutual accommodation
- Vulnerability of the strong; fear of slipping behind
- Poverty, development and good governance
- Global pressures, international norms and standards
- Flexibility and non-threatening nature of the Ombudsman

Other factors that necessitated the creation of the institution included:

- Citizens' determination
- Demonstration effect of incumbents
- Historical links between countries
- Individual champions and policy advisers
- Inter-governmental bodies
- Professional associations
- International development assistance
- Human rights treaties and conventions
- Adaptability of the concept

The Evolution of the Ombudsman

Made up of five phases:

- The Ombudsman must have existed in different forms before 1809. The modern Ombudsman begun from 1809 in Sweden. Finland then adopted it in 1919. Recreating what Finland had done, Denmark adopted it in 1955 and created a model for the world (the Danish model). Norway and New Zealand took it up in 1962.
- Early Scandinavian Movement: 1809 – 1962
- Universalization of Movement: 1962 – 1990
- Era of Regime Transformation: 1990 – 2000 – This is the period when regimes begun changing around the world
- Early 21st Consolidation: 2000 till date.

A lot of the Ombudsman adaptations have used the pre 1809 setup of the Ombudsman and made adaptations to their own environment.

Country breakdown of the adoption of the Ombudsman:

- New Zealand, 1962 – The Anglo-Saxon
- Guyana – first in the developing world
- Tanzania, 1966 – Ahead of its colonial masters in a one-party environment?
- 1971 – Israel – Ombudsman works side by side with the Auditor General
- 1972 – Asia and Pacific
- 1973 – France
- 1975 – Nigeria – Strange feat for the big and military? It became the only country in the world that had the Ombudsman at all levels in the federal system
- 1975 – Papua New Guinea – Multi-purpose model – Ombudsman with anti-corruption functions
- 1978 – Portugal with human rights mandate
- Reaches every continent of the world.

There has been an emergence of women power in Ombudsmanship with women increasingly influencing the operations of the Ombudsman. About 60 percent of the Ombudsman institutions support the hybrid system. The fusion reduces confusion and scarcity of resources. The Ombudsman should focus on the circumstances in every country.

2.2 Name, Style and Categories of the Ombudsman Institutions

By: Hon. Arlene S. Brock, Ombudsman, Bermuda

Differences between the classical models of the Ombudsman and the hybrid relate to multi-functions for every Ombudsman – maladministration, human rights and anti-corruption. Approximately 60 percent of all Ombudsmen are hybrid in nature. Sometimes it is advantageous to have these multi-functions because it is less confusing for the population; it is less of a strain on resources, practical and prudent.

What is the context within which an Ombudsman operates?

The focus of the Ombudsman should be based on their specific country contexts – the context approach is where the Ombudsman meets the immediate needs of the operational environment.

In 2009/2010, the United Nations General Assembly passed a Resolution that recognized the human rights work of Ombudsman and encouraged the Ombudsman to be accredited as National Human Rights Institutions, as is the case in Namibia. As a result, a number of Ombudsmen have been designated as national preventative mechanisms - which are meant to make proactive investigations in places of detention such as prisons. In Europe, it was discovered that while there were a lot of good human rights institutions, many of them were highly academic. It was the Ombudsman who had the investigative capacity to take on those kinds of tasks. Based on the foregoing, it is important to note that it is not what an Ombudsman says he is or what his purpose is, but whether he has the capacity to perform the particular functions that are needed in society.

What is similar?

This employs four key principles:

- *Principle of Resolution*: Each office seeks to get a resolution to the particular complaint and also look for ways to improve procedure and being practical and approachable to the citizenry.

- *Principle of Fairness*: The Ombudsman has to be fair, not only to the complainant, but also to the Government. This is one way of obtaining Government compliance and co-operation. As was stated by the Ombudsman of Northern Ireland, 'the Ombudsman is neither an advocate for the complainant nor for the authority, he is a critical friend to both.'

- *Principle of Justice*: The Ombudsman's office tries to restore people to the place that they would have been if there had not been maladministration in the first instance. Most offices do not have enforcement powers and hence the need to convince people on the merits of a case.

- *Principle of Dignity*: The office of the Ombudsman needs to show, through its work, that it treats people as if they matter. The work of the office of the Ombudsman centres on three critical questions:
    - √ What are the facts?
    - √ What is the right thing to do?
    - √ Are people treated as if they matter?

Conclusion

As human rights, so is the urge for justice. These are not confined to any culture or tradition. As a modern mechanism to ensure justice, the Ombudsman is part of this journey and should be adaptable to any legal or political permutation. The office of the Ombudsman should be in the business of promoting trust, accountability, transparency and integrity. Its work must not only be informed by, but also predicated on the essential and shared human dignity with all the fundamental rights whether substantive or procedural.

2.3 The Early Beginnings of the African Ombudsman: The Case of Tanzania

By: Hon. Justice Manento, Chairperson, Commission for Human Rights and Good Governance, Tanzania

The Honourable Justice Manento narrated the history and development of the Ombudsman in Tanzania. The Permanent Commission of Enquiry (PCE) was established in 1965 under the Constitution (Chapter VI: 67-69) and Statute (Act 25) as an independent institution. PCE was created to deal with complaints from the public relating to abuse and misuse of power by state officials and to ensure citizens enjoyed their rights, administrative injustice and maladministration. Before 1984, the fundamental rights of the people were not recognized in law and the bureaucracy was immensely powerful and the Judiciary lethargic and inaccessible. Even worse, the National Assembly was subordinate to the ruling party. As such, it was ill prepared to address the grievances of the people. PCE was the first Ombudsman in Africa and second in the Commonwealth countries.

Reasons for the Commission

- The Commission provided an opportunity for checks on abuse of enormous powers entrusted to public officers. It, therefore, became a system of protection of individuals against the Executive and administrative misuse and abuse of power, particularly, for the rural poor.
- The Commission provided an opportunity for checks on abuse of powers entrusted to public officers. It, therefore, became a system of protection of individuals against the Executive and administrative misuse and abuse of power, particularly, for the rural poor.
- It was necessary to establish fairness and balance in relation to

administrative decisions that affected the public. In other words, PCE ensured that public officers discharged their duties according to the law.

- The need to preserve and respect positive traditional values to guarantee individual rights.
- Weak, lethargic and inaccessible Judiciary that could not adequately ensure administrative justice.
- There was need to have a different administrative justice mechanism from the Courts. In addition, the court procedures were not known by many people, the majority of whom could not afford to hire lawyers to represent them.
- Inadequate protection from the National Assembly. The National Assembly was subordinate to the ruling party, had few sittings and was ill-suited to deal with individual complaints, a position that PCE fitted in well.
- The practice of holding two positions at a time, in Government and the ruling party, created the possibility of abuse of power.
- Inherited laws were not compatible with the Government policies which provided the need for an institution to highlight and lead the reform process.

Membership of PCE

In terms of the composition, PCE consisted of a Chairman, assisted by two Deputies appointed by the President. The term of office for the officers was two years, which was renewable once. The law provided for the Commission to have a Secretary and staff.

Functions and Powers of PCE

The functions of the Commission were not clearly defined in the interim Constitution of 1965 or 1967. However, PCE made Regulations to assist in its operations. It is, however, instructive to note that PCE had the mandate to conduct civic education which it used to advance human rights protection in Tanzania.

The Commission had broad powers of investigation and could investigate any public servant including those in the ruling party (Sec 67:4). However, it could not institute an inquiry against the President of the Union or the President of Zanzibar, judicial officers, private companies, or People's Defense Force. The scope of the investigations included arbitrary decisions or arrests, omissions, improper use of discretionary powers, decisions made with bad or malicious motive or decisions influenced by irrelevant considerations, unnecessary or unexpected delays, obvious wrong decisions, misapplication

and misinterpretation of laws, by-laws or regulations. However, the Union President could bar PCE from gathering evidence in some offices to preserve national security.

Achievements of PCE

Notable achievements of PCE included aggressive outreach efforts in rural areas to create awareness about its work, highlighted laws that needed reforms, protection of human rights, satisfactory resolution of public complaints, deterrence of abuse of power and compliance with recommendations.

Challenges faced by PCE

Some of the challenges encountered by PEC included the following:

- Could not institute inquiries against the Union President, the President of Zanzibar, East African Community, private companies, missions, churches and the People's Defence Force.
- Could not inquire into or review any decision of any judicial officer where such decision related to judicial functions.
- The President could stop it from entering any premises to conduct an inquiry.
- The President could stop the production of evidence to PCE if he considered that it would be prejudicial to the security, defence or international relations of Tanzania or secrecy of Cabinet business.
- Was purely an advisory organ – Only made recommendations to the President.
- Depended on the President for its operations
- Could not provide adequate oversight since it was part of the Executive.
- The Report to the President was confidential unless the President directed otherwise.
- Understaffing

Conclusion

In 2000, the PCE transformed into the Commission of Human Rights and Good governance (CHRAGG), following a constitutional amendment. Further legislative changes broadened the mandate of CHRAGG to provide it with the dual mandate of human rights and maladministration.

2.4 Plenary Discussion

Question:

On the issue of the distinction between the office of the Ombudsman, anti-corruption and human rights, Ethiopia has separate institutions. When can an issue be of human rights and not administrative injustice? How best can this distinction be made?

Response:

This distinction is unnecessarily problematic, is wasteful and does not do the citizenry any good. One of the things pushing the creation of separate institutions is vested interests. It is possible that in the next 15 years, the separation will eventually go away. Indeed, enough work has been done to show that the distinction is just artificial and creates duplication. What is important is to determine how best to manage the process where there are separate institutions on human rights and administrative justice.

Comment:

Bermuda has a separate Anti-Discrimination Commission. It is vital for these two institutions to come together so that they do not confuse the public. This issue deserves more discussion.

Comment:

The whole aspect of the office of the Ombudsman is quickly spreading. However, the availability of scholarships to study Ombudsmanship is dying. This in itself is a major concern.

Comment:

The office of the Ombudsman needs to be efficient and exercise fairness. Does this include the Ombudsman or other institutions engaged in such services setting up standards benchmarked in international best processes and practices?

Question:

Some critics have always questioned the reasons for establishment of the Ombudsman in Africa, stating that it is donor driven. How true is the statement?

Response:

Although donors have played a role in the establishment of oversight institutions in Africa, their role has been overplayed.

Question:

Is there any truth in the preposition by some scholars that the Ombudsman started in Qatar in the 17th Century; between 1634 – 1644, to redress the abuse of power and disaffection of the people with the rulers.

Response:

The Ombudsman has always existed in different forms in all societies, including the African communities. However, the Ombudsman, as known today, can be traced to Sweden.

Question:

The Ombudsman has been accepted as one of the oversight institutions worldwide. However, there been debate on the name to an extent that some call it Ombudsman, Ombuds, Ombudsperson among others. Has the debate settled on the name?

Response:

The debate is unnecessary. The use of the word Ombudsman has been universally accepted in all situations.

Question:

The Ombudsman is an evolving institution. There are some institutions that have binding or enforceable mandates. Does this take them out of the jurisdiction of the Ombudsman? If so, where can they be placed?

Response:

A lot depends on the powers bestowed upon every Ombudsman in any country. The binding nature of decisions of other institutions should not exempt them from oversight by other bodies such as the Ombudsman. What is important is to indigenize the concept in every country.

2.5 The African Ombudsman: Framework, Jurisdiction and Operations

By: Prof. Victor Ayeni, Director Governance and Management Services International, London

The Ombudsmanship has developed to the point where one can essentially say that there are certain things that logically go with it. These broad issues are as below:

The central question to be asked is, '*how do African offices organize and deliver their Ombudsman roles?*'

This can be built along the following lines

- The institutional infrastructure that African offices have put in place.
- The essential design that these offices have adopted
- The criteria for effectiveness – Ombudsman literature has now effectively articulated certain basic criteria that are essential to the success of any institution.
- Outline of Africa's approach
- Operations and challenges

In Africa, there is no common model or approach of Ombudsmanship. There are, however, different strands, which are embellished by different local adaptability factors. For example, Ghana has adopted a fused system based on their political and constitutional history.

Every office has adopted an approach where they have tried to indigenize the office. All four main language groups in Africa are represented in Ombudsmanship. There is, however, more internal consistency in Francophone and Lusophone Africa while the Arab and Anglophone are more diverse.

The Francophone and Lusophone countries tend to be mainly single member, no-deputy offices – French style Mediateur without 'filter'.

The Arab and Anglophone countries are more varied, comprising:

- Single member, no deputy, e.g. Lesotho
- Single member plus 1 deputy, e.g. Botswana and South Africa
- Dispersed collegial-style, e.g. Nigeria that has several Ombudsmen who are dispersed geographically

- Specialty offices more common than elsewhere in Anglophone countries, e.g. South Africa. Specialty areas include private sector, businesses and private sector among others.
- Fused collegial-type single or multi-purpose offices – e.g. Ghana, Gambia, Tanzania and Zambia. This is where the Ombudsmen are all in one point and at the same time they are either having discrete functions – multipurpose
- Africa's contribution to Ombudsmanship is under-appreciated. Africa has, however, proved more than any other continent that the Ombudsman is a very flexible and adaptable institution, that is, proof of flexibility and pliability to diverse regime types (Tanzania – one-party and socialist experience, Nigeria-military regime at the time, Apartheid South Africa); all these have adapted Ombudsmanship

Criteria for effectiveness – essentials that go into the design of Ombudsmanship:

- Legal foundation – It is better to be entrenched in the Constitution
- Name of the office - All Ombudsman offices need to take this seriously – to indigenize and locally adopt it – administratively
- Structure and organization of the office – who is in charge?
- Stature and immunity
- Employee and staffing – The Ombudsman should be an independent institution and have its own staff
- Qualification for Office – most legislations do not specify what qualities and qualifications one needs to have to be an Ombudsman
- Appointment, tenure and removal – This is key to the independence of the Ombudsman office. There are different patterns in Africa, some being appointed by the legislature, while others are appointed by open application, as is the case in Malawi
- Impartiality and independence is key
- Visibility and access – how much needs to be put into legislation to make the Ombudsman be visible and accessible?
- Jurisdiction is critical, that is, the scope and extent of the Ombudsman's powers and limitations
- Powers of investigation – the idea is that the Ombudsman must have extensive powers
- Have own motion powers – be able to raise complaints on its own
- Competence to make decisions – the basis it takes on what to say
- Recommendations, remedy and compliance
- Periodic reporting
- Ability to do special reports

- Penalties for breach of authority or non co-operation
- Having a Board of External Advisers – not present in Africa. This body acts as an advisor to the Ombudsman
- The success of any Ombudsman is ultimately determined by the personality (should not be timid) of the Ombudsman and the way he handles the non-statutory practices.

2.6 Plenary Discussion

Comment:

Some of the classical Ombudsman institutions deal also with human rights. In Bermuda, for instance, the Ombudsman deals with human rights issues except discrimination that is being dealt with by a separate human rights body. It is important to have one body dealing with human rights and administrative justice as opposed to creating separate bodies.

Comment:

In 2005, Jamaica changed the name of the Ombudsman to Public Defender to make it more effective. Granting the Ombudsman powers to make binding decisions and enforce its own decisions should only be considered where the recommendations are within the four corners of the law.

Question:

There are some institutions, such as the Retirement Benefits Authority in Kenya, that carry out work that is similar to the Ombudsman in some respects despite the existence of the national Ombudsman. Are there standards or best practices to be followed by the Ombudsman and similar institutions?

Response:

It is important for the Ombudsman to set standards to guide them. For example, the Lesotho Ombudsman has developed a mechanism of complaining against the Ombudsman. In addition, some regulatory bodies in the pension sector call themselves Ombudsman and have set standards for their operations. There is no harm in this approach.

2.7 Case Presentations in Panel Format

Chair: Hon. Dr. Regina Mwatha, Vice Chairperson, Commission on Administrative Justice, Kenya

2.7.1 Ombudsman in Anglophone Africa

By: Ms. Epiphania Mfundo, Documentation and Research Director, Commission for Human Rights and Good Governance, Tanzania

Anglophone Africa is rich with characteristics inherited from the British. The following are some examples:

- The Public Service – The Ombudsman has to deal with maladministration and, in particular traditionally within the Public Service. It usually stands between the citizenry and bureaucracy.

  Example: In Tanzania, Members of Parliament have been debating on whether contracts with big time investors are confidential or not. Currently these contracts still remain confidential which creates a distance between the public service and the citizens. In the Public Service, a lot of the information (public records) remains confidential with the assumption that the citizenry cannot master them. This has created a symbolic distance between the government officials and the citizenry.

- The Common Law - Application of judicial laws and judicial due processes in the supervision of administrative decision making is minimal within the common law. Many of the Anglophone countries do not have separate administrative courts.

- Parliament is also limited in its oversight role on the administration as the majority in Parliament supports the Government of the day. Issues of maladministration may be adequately addressed because of this solidarity in Parliament.

In Anglophone Africa, the Ombudsman stands tall in the governance structure in that, he can provide a high caliber justice to a bureaucratic state where simplified procedures are applicable.

Two Anglophone countries have Ombudsmen with the dual mandate- good governance and the human rights.

The Role of the Ombudsman in Africa

The role of the Ombudsman in Anglophone Africa is changing towards the multifunctional role. The key question remains on whether the original Ombudsman functions still work well? Are there still gaps? Where can the Ombudsman stand when ethical standards in the public sector go down?

The effectiveness of the Ombudsman is associated with the power to make binding decisions. It is also about fluctuation in relation to influence, that is, how much influence does the Ombudsman have?

Challenges facing the African Ombudsman

- Inherent problems affecting the African Ombudsman have not been properly tackled.
- The Ombudsman in Africa anchors itself in investigations and seeking redress. However, it is still not clear whether administrative justice is considered a pillar for development and the democratic process.
- Over centralization of government – bureaucracy. Africa is not quite there yet.
- There are different ways of solving problems and receiving complaints from the citizenry. However, the issue remains the perception of the state and whether it is hostile to its own citizens or not, and whether the country's leadership respects the rule of law.
- Complaint handling mechanisms – there is need to have in place meaningful mechanisms to seek redress against maladministration and whether the citizenry are really free to complain about poor governance and service delivery.
- Declining academic interest and scholarships in the Ombudsman.
- In his decisions or recommendations there is the risk of being seen as supporting the opposition or the ruling side of the government
- Maintaining the office's independence and its integrity at all times.
- Investigations taking too long because of lack of compliance by the government and other public institutions leading to the loss of public confidence by the citizenry on the Ombudsman
- Lack of recourse by the Ombudsman

What needs to be done?

- The Office should maintain continuous dialogue with government officials and balance between winning their confidence and that of the public for effectiveness of their recommendations
- Investigations should be carried out thoroughly to make the public and

government more conscious on criticism for lack of co-operation
- Carry out dialogue on the positive obligations and making them known to all
- Putting emphasis on the principles of good governance
- Associating the effectiveness of the Ombudsman on discipline, tolerance, patience and compromise in building a solid political system.
- • Linking with regional and international mechanisms of assessing good governance, such as the African Peer Review Mechanism, New Partnership for Africa's Development, Millennium Development Goals and the treaty bodies of the United Nations.

2.7.2 Ombudsman in Francophone Africa

By: Hon. Souleiman Miyir Ali, Mediatuer de la Republic, Djibouti

In this presentation, the Honourable Souleiman Miyir traced the historical origin of the Ombudsman to the 'Office of Grievances' in Arabia in the 7th Century, an event that was seminal to shaping the thinking about the Ombudsman in the western world. Differentiated were the main genres of the Ombudsman—Parliamentary and Administrative. In the former, Parliament hires the Ombudsman to assist in its oversight role and in the latter the Executive would appoint the Ombudsman to improve citizen-state links by striving to improve service delivery and deepen accountability of state agencies. Differentiated too were legislative and regulatory frameworks for the office. Most of the countries have their Ombudsmen brought into being by ordinary legislation and executive decrees. Only in Cote D'Ivoire, Djibouti and Senegal are the Ombudsmen creatures of national constitutions.

In Djibouti, the Ombudsman is an independent body that handles grievances of citizens relating to injustices and poor administration by state organs. He has operational autonomy and stable tenure. The office is meant to fortify the link between the administration and citizens and tone up good governance. The Mediator cannot be directly seized by an individual, except through the intermediary of a Member of Parliament.

In Francophone countries, the Ombudsmen would handle complaints of malpractices and seek to promote institutional health and performance of public agencies. The Mediator in Cote D'Ivoire has the power to enforce his decisions by way of sanctions. The Mediator in Senegal has a broad mandate that includes improving the institutional environment to enable commerce. The Ombudsman in Burkina Faso is appointed through a consultative

process that involves the concurrence of Executive and Legislature, including the Opposition Chief. The officer has robust powers of investigation and can access classified information and mete out sanctions for non-compliance. It is important to note that a number of Ombudsmen in Francophone countries have powers to make proposals for improvement of public administration especially for impugned public bodies. They are also required to submit their Annual Reports of their activities to the President and the National Assembly.

2.7.3 Ombudsman in the Lusophone Africa

By: Hon. Custodio Duma, Chairperson of the Mozambique Human Rights Commission

There are five Lusophone countries in Africa namely, Mozambique, Angola, Guinea Bissau, Sao Tome and Cape Verde.

The Lusophone countries have two Ombudsmen, one in Angola and the other in Mozambique[1]. These countries have inherited a lot from Portugal, which was the first country to have an Ombudsman in the Portuguese speaking countries. In Mozambique, the office of the Ombudsman is separate from the office of the National Human Rights Commission.

The office of the Ombudsman in Portugal was established in 1975, followed by Angola. The office in Mozambique was established in 2012.

Office of the Ombudsman - Angola

- Established by the Constitution and regulated by two laws from 2006 (Law No. 4 and 5)
- The Office is elected by two-thirds majority of Members of Parliament for a term of four years
- The Office is mandated to deal with maladministration and human rights violations.
- There is also the Office of the Deputy Ombudsman and an Ombudsman Council
- Its decisions come as recommendations to Parliament and the sovereign institutions
- It provides an annual report on cases handled and recommendations made.
- The Office has the power to investigate related violations

1 The time is now ripe for the establishment of the Ombudsman in the remaining three countries.

Office of the Ombudsman – Mozambique

- The Office was established by the Constitution in 2004 and regulated by the law from 2006, but operationalized in 2012
- The Office is elected by two-thirds majority of Members of Parliament for a term of five years
- According to the law, there is no deputy Ombudsman and no Ombudsman Council
- The Office makes recommendations to Parliament, Courts, Attorney General and the Chief Justice
- The Office has the power to investigate related violations.

Other Countries

Other Lusophone countries in Africa are yet to have an Ombudsman. In Cape Verde, for instance, the Ombudsman is established by the Constitution, but is yet to be operationalized.

Challenges facing the Office of the Ombudsman (Mozambique & Angola)

- Strengthening the office of the Ombudsman.
- The offices of Human Rights and Ombudsman are both new to the population. They need to be educated on the objectives of these offices and their functions
- Clarity of mandates where there is a separate body on human rights. In Mozambique, there is the office of the Ombudsman and the Human Rights Commission. This has brought about confusion in the understanding of their functions. There is need for the populace to be educated on their specific functions and which matters each of the Commissions are supposed to handle.
- Legitimacy of these two offices to enable them obtain credibility.
- Language barrier between the Lusophone, Anglophone, Anglo-Saxophone and Francophone countries in Africa.
- Legitimacy since the ruling parties in Mozambique and Angola can command two-thirds majority in Parliament on the appointment of the Ombudsman.
- Independence
- Poor governance

There is need to lobby for the remaining three countries in Lusophone Africa to have the office of the Ombudsman, interpretation of Human Rights in these countries and promotion of good governance - especially in Guinea Bissau and Sao Tome.

2.7.4 Presentation by the Ombudsman of Sudan

By: Hon. Dr. Farah Mustafa, Ombudsman, Sudan

The Ombudsman of Sudan, Commission for the Federal Public Accountability and Grievances is established under Article 130 of the Constitution of the Republic of Sudan of 1998. However, the Commission existed before the constitutional entrenchment in other forms and asserted administrative control over the performance of duties by the Executive. The Commission operates at the Federal level of Government and is charged with the responsibility of looking into national injustices and enhancing efficiency and transparency in the functions of the State, including administration of justice. In particular, the Commission considers the following issues:

- Complaints relating to State machinery
- Unjust application of the law
- Any pending complaint that has taken long to be addressed
- Monitoring service delivery
- Inspection and review of performance by State agencies and making recommendations for reforms

In conducting its work, the Commission is mandated to examine acts of maladministration by Organs of the State and take remedial action, including preventive action. The Report of the Commission is submitted to the President and the National Council.

2.7.5 The South African Ombudsman: Jurisdiction and Accountability – An Overview of Legal and Legislative Framework and Operational Environment – Topic as per the Programme?

By: Ms. Ponatshego Mogaladi, Office of the Public Prosecutor, South Africa

When the Ombudsman was conceived and eventually established in South Africa under the name Public Protector, the vision was aimed at:

- providing a mechanism for swift justice for ordinary people that would assist them to exact accountability for administrative wrongs in state affairs;

- there was also a conscious understanding that the office would play a central role in promoting ethical behaviour and principles.

The Public Protector is established under Section 181 of the Constitution of the Republic of South Africa (the Constitution), with powers defined under Section 182 of the Constitution. Section 182 provides the following:

> *" The Public Protector has the power, as regulated by national legislation-*
> - *to investigate any conduct in state affairs, or in the public administration in any sphere of government, that is alleged or suspected to be improper or to result in any impropriety or prejudice;*
> - *to report on that conduct; and*
> - *to take appropriate remedial action[2]."*

In a provision that has been interpreted as entrenching the right to access to the services of the Public Protector, Section 182(4) of the Constitution provides for the Office to be accessible to all persons and communities.
These words inform the Office's pursuit of its constitutional mandate of strengthening constitutional democracy by investigating and redressing improper conduct in state affairs and public administration. The essence of these words is a commitment not only to accountability, but also to the rule of law.

The Constitution anticipates expansion of the mandate of the Public Protector through legislation, with Section 182(5) providing for possibility of additional powers. There are sixteen statutes that have since been passed to give effect to this provision. The statutes either recognise the inherent constitutional jurisdiction of the Public Protector or expressly accord it additional powers.

Key Mandate Areas

These are summarised into the following 6 key mandate areas:

1. *Maladministration mandate conferred by the Public Protector Act of 1994*
   - The Public Protector Act primarily casts the Public Protector's role as being that of *investigating* and *redressing maladministration,* incorporating *abuse of power*, *abuse of state resources* and *corruption.*

2 *"to take remedial action", this is one of the key features that distinguishes the Ombudsman office. In most instances it does refer to recommendation. However, as an organization it is currently focusing on repositioning operations to ensure appropriate remedial action is taken and not only recommendations.*

- The Act expands the oversight powers to include resolving administrative disputes through *Appropriate Dispute Resolution* measures such as conciliation, mediation, negotiation and any other means deemed appropriate by the Public Protector.[3]

2. Executive Ethics Enforcement conferred by the Executive Members Ethics Act of 1994

- The Executive Members Ethics Act on the other hand gives the Public Protector the powers to look into the conduct of the *Executive, including the cabinet members at both national and provincial levels.*[4]
- *Enforcement of the promotion and combating of corrupt activities conferred by the Prevention and Combating of Corrupt Activities Act of 2004*
- The Activities Act recognises the inherent jurisdiction of the Public Protector as incorporating investigating allegations of *corrupt activities.*

4. Enforcement of promotion of access to information as conferred by the Promotion of Access to Information Act of 2000

- The Promotion of Access to Information Act recognises the Public Protector as one of current information regulators responsible for resolving disputes regarding access to information within organs of state.

5. Protection of whistle blowers as conferred by the Protected Disclosures Act

- The Protected Disclosures Act assigns the Public Protector and the Auditor General as safe harbours for whistle-blowers wishing to report suspected wrongdoing

6. The power to review the decisions of the Home Builders Registration Council as conferred by the Housing Consumers Protection Measures Act of 1998

- The Housing Consumers Protection Measures Act specifically authorises the Public Protector to review decisions of the Home Builders Registration Council, a statutory body established to regulate
- the building industry, including the resolution of construction disputes.

3 Due to the number of cases the Office is receiving, it is focusing on resolving most of the cases through mediation and conciliation whereby the parties are brought together and settlement agreements signed.

4 In this case, a member of a provincial legislature or national legislature can only lodge a complaint. Members of the public cannot lodge a complaint in terms of this particular Act

- The work of the Public Protector is further informed by various laws including the Promotion of Administrative Justice Act 3 of 2000

The most distinctive feature of the Office is the fact that the *mandate is not restricted* **to** *recommendations,* as the Constitution specifically mandates the *taking of appropriate remedial action*. For this reason, the remedial action often involves tangible remedies such as money and reversal of decisions such as dismissals.

Like judges, the Public Protector may hold someone liable for contempt of the Public Protector. Section 9 of the Public Protector Act provides that

> *"No person shall insult the Public Protector or the Deputy Public Protector in connection with an investigation or do anything which, if the said investigation had been proceedings in a court of law, would have constituted contempt of court."*

Key Mandate areas conferred by additional Legislation
The mandate covers the entire public service and is not restricted to public servants; it includes also the President and Speaker of Parliament. It also includes private sector actors such as state contractors or former public servants if such actions occurred in state affairs

Independence
S.181 of the Constitution, which has the same wording as Section 165(4) spelling out the independence of the courts, requires the Public Protector to be *independent, subject only to the Constitution* and the law and *impartial* and exercise his powers and perform his *functions without fear, favour or prejudice.*

S.181(3) of the Constitution goes further to compel other organs of state to *assist and protect* the Public Protector and other institutions supporting democracy, to ensure the independence, impartiality, dignity and effectiveness of these institutions. S.181(4) of the Constitution further prohibits any person or organ of state *from interfering with the functioning* of the Public Protector and other institutions supporting democracy

Accountability
Section 181(5) of the Constitution provides that the Public Protector is accountable to the *National Assembly.* The Public Protector must report to

Parliament on all activities annually and a strategic plan which covers the operational activities is also submitted annually.[5]

The Public Protector produces investigative reports which are submitted to the National Assembly and may contain findings and remedial action aimed at correcting specific administrative wrongs or improper conduct of the state.

The reports may be submitted to the National Assembly on the finding of a particular investigation if:

- Public Protector deems it necessary or in the public interest;
- It requires the attention of or intervention by the National Assembly;
- The Public Protector is requested to do so by the Speaker of the National Assembly; or Chairperson of the National Council of Provinces

Operational Environment: Systemic Problems

- The Public Protector is currently experiencing a high level of confidence and trust from members of the public. Over the past 2 years, the complaints investigated by the Public Protector has increased by over 30 percent.
- The success of the Public Protector, to a very large degree, depends on her ability to gain and retain the confidence of the complainants, which is clearly a part of the whole idea of an Ombudsman office.
- On the other hand, great success might lead to more cases being lodged and the risk of a loss of confidence that threatens the Public Protector's operations if it turns out that the institution is not able to process and complete the incoming cases swiftly and effectively
- The Public Protector *has adopted the approach of* countries such as Denmark in an attempt to deal with the increasing complaints;
- Instead of taking up individual cases for investigation on his own initiative, the Public Protector has from time to time decided to take up a whole sector for investigation (on own initiative). The current systemic interventions on own initiative include:
  - √ Investigation into systemic deficiencies in the Government's Subsidised Housing Programme.
  - √ Investigation into systemic deficiencies on the provision of Health services

5 It is accountable to the National Assembly by issuing a report in the form of its Annual Report. The Office is also required to table a Strategic Plan annually and to report on its performance.

- Whilst these investigations are much more resource intensive than individual complaints, the outcome of an investigation **can resolve the problems** affecting an agency and also **address systemic challenges** and consequently save agencies financial resources that can be better used to deliver government programmes.
- Furthermore by addressing the systemic deficiencies, the the number of individual complaints can be reduced
- The levels of awareness of the role and functions of the Public Protector and the profile of the Public Protector amongst government institutions and public bodies has increased significantly over the last years,
- Some of the challenges that the Public Protector experience relate to the fact that State Institutions –
  - √ Do not show willingness to take responsibility for findings of maladministration and to reverse the consequences as indicated in the remedial action;
  - √ Try their best to provide justification and use experts and legal advisors, to avoid compliance with the findings and remedial action of the Public Protector.
  - √ Confuse lawfulness and fairness. Fairness involves considering both legal and non-legal issues
  - √ Do not live up to the principles and values contained in Constitution and the ethical principles for public sector agencies (Batho Pele principles)

The Public Protector's Directive for Remedial Action

One of the distinct features of the Public Protector is that its mandate *is not restricted to recommendations,* but the Constitution specifically mandates the *taking of appropriate remedial action.* For this reason, the remedial action often involves tangible remedies such as money and reversal of decisions such as dismissals

"Appropriate remedial action" has been further defined by the provisions of the Public Protector Act that provides in that:

> "Public Protector shall be competent, at a time prior to, during or after an investigation, if he or she deems it advisable, to refer any matter which has a bearing on an investigation, to the appropriate public body or authority affected by it or to make an appropriate recommendation *regarding the redress of the prejudice resulting there from or to make any other appropriate recommendation he or she deems expedient to the affected body or authority.*

Compliance with remedial action is supported through:

- The issuing and discussion of provisional reports before a final report is issued;
- Specifying timelines for each compliance action in each report and requiring action plans for compliance action;
- Public release of virtually all reports using a media conference;
- Follow up communication with "red carded" institutions, including summoning those that are not co-operative to offer explanations;
- Taking advantage of media dialogue on compliance deadlines and other compliance requirements following the public release of a report;
- Requesting a Parliamentary debate, for example, the r*ecent investigation against the Independent Electoral Commission*;
- On-going stakeholder dialogues on a bilateral basis and an omnibus process that takes place annually and includes focussed dialogue with:
    - √ Cabinet,
    - √ Members of the various Provincial Legislatures, and
    - √ Senior Government officials

Accessibility

Section 182(4) of the Constitution specifically requires that the Public Protector **must** be accessible to all persons and communities. The Public Protector serves over 50 million members of the public and the size, function and location of the organs of state and public institutions falling within the oversight of the Public Protector makes it impossible for the Public Protector to provide the service required in terms of her Constitutional mandate remotely at limited centralised locations

The Office has 20 offices mainly located at the main cities and about 400 staff members. The Public Protector has been innovative in fulfilling her constitutional mandate to be accessible to all communities.

Some of the key programmes include the following:

- Visiting points that are serviced monthly to obtain complaints and give feedback on existing complaints;
- Mobile Office of the Public Protector;
- Collaboration with other state agencies such as the Post Office and utilising them as a drop-off point for new complaints;
- Using both print and electronic media to raise awareness about the Public Protector;

Recently the Public Protector commissioned a study with a view to ascertaining the levels of awareness, access, trust, confidence and faith in the Public Protector among members of the public and stakeholders. With a sample of nearly a thousand people coming from different Public Protector stakeholder groupings and detailed demographics as spread across the country, the survey was conducted by the University of Pretoria's Business Enterprise and it's Department of Psychology.

Among other things, the survey revealed the following:

- Across the board, levels of awareness of the Public Protector stand at 77%;
- 80% were aware that the Office exists to promote good governance
- 79% were aware that the Office fights corruption and misconduct in state affairs;
- 78% were aware that the Office helps protect people's rights against the state;
- 78% said that the Public Protector existed to promote accountability in Government;
- 79% said the Office has integrity,
- 79% said the Office is professional,
- 77% said Office is accountable, 75% said it is fair, 74% said it is transparent and a further 76 percent said it is trustworthy;
- 76% percent have confidence in the Public Protector;
- 76% said the Office lives up to its vision and mission statements while 73% said it lives up to its service promise
- 63% of the sampled persons were satisfied with the manner in which their complaints were handled;

2.7.6 Plenary Discussion

Question: Relative to the observations made on the subject of the need to give the Ombudsman more powers beyond the traditional mandate, *"the wider the jurisdiction of the Ombudsman, the better..."* for the non binding decisions of the office. The presentation from Tanzania also brought out the example of a Government that is hostile to the Office. This is indicative of the over centralization of power in public administrative institutions and what they can do – becoming so powerful to the point where they do not take recommendations seriously. Should the office of the Ombudsman, therefore, be given the powers to enable it evolve and be more effective and have firmer enforcement mechanisms?

Response: Binding authority - this is a very fundamental concept. The moment this is ingrained into an institution, it completely changes the character of the institution – it now becomes more like a tribunal, or a court of law. This kills off the institution of the Ombudsman. The institution of the Ombudsman would never have spread if it had these powers.

Comment:

Consideration should be given to the office of the Ombudsman to have the power to act – as a commissioner to access of information, so that the Ombudsman can then facilitate the access of the citizenry to information held by the state.

Comment:

The African Ombudsman Research Centre is currently conducting a research to do a comparative analysis of the frameworks of Ombudsman be it legislative or any other regulatory aspect governing the Ombudsman offices within Africa. The objective of this study is to, (i) try and develop normative standards, to examine the differences and challenges amongst the various bodies within Africa, and (ii) to try and come up with the quintessential African Ombudsman institution. Related information to strengthen this research from the Ombudsman institutions in Africa will be highly appreciated.

Comment:

Swaziland did have the office of the Ombudsman and in the late 1980s it was abolished. It was re-established in 2005, upon the adoption of a new Constitution.

Question:

In the African context, to what extent has there been political will to allow the Ombudsmen to operate independently to enable them enhance a more beneficial experience to the citizenry.

Response:

The bulk of the problems faced by Ombudsmen is by the institution of the Ombudsmen themselves, and not by the government or other institutions. We need to self-analyze, understand what needs to be done, evaluate our personal attributes and ensure all are in the right place.

Comment:

The Ombudsman of Burundi was created after the agreement of Arusha. It was elected by 2/3 majority of the county's Parliament. It, therefore, has great legitimacy.

Question:

The presentation on the Public Protector of South Africa stated, "taking appropriate action in terms of the recommendation of the Ombudsman". In what form is this action carried out?

Response:

It is a requirement in South Africa for the Public Protector to take appropriate remedial action. The manner in which this is dealt with is that in its investigative reports, the Office does not go to court, instead it takes remedial action in its investigation reports where steps to be taken are drawn out to correct or address the maladministration.

Question:

In Uganda, the oath of secrecy is taken before the Ombudsman assumes office, including all the staff members. How far does this oath of secrecy go in terms of interfering with making public certain information, including reports. This oath of secrecy limits the freedom to make public certain information.

Response:

This has been a problem in many offices. The oath is in some cases, implied. The general approach is that the Ombudsman can be creative about it as there are overriding provisions in legislation that allow the Ombudsman to deal with it. On one hand, it talks about secrecy, and on the other, it talks about having total freedom to determine the best way to conduct the work of the office. The general approach is that the office of the Ombudsman is not at its best when keeping things secret, hence the need for the Office to have a creative approach to make public what needs to be seen.

Question:

Has anybody complained to the Tanzanian Commission about the confidential contracts with foreigners? If so, what action has been taken by the Commission? Does the Commission have the mandate and powers to access such information?

Response:

Nobody has complained to the Commission. The draft Constitution of Tanzania has incorporated all these aspects.

Comment:

The Ombudsman of Angola submits Annual and Bi-Annual Reports to Parliament.

A section of the delegates follow the proceedings during one of the presentations at the Colloquium.

Joe Whittal of CHRAJ makes a point during the proceedings

Hon. Adv. Festinah Bakwena, the Ombudsman of Botswana, makes a point during the Colloquium. Looking on is Hon. Arlene S. Brock, the Ombudsman of Bermuda.

Delegates chat with AOMA President

DAY 2

Session 3: In Public Interest: Re-Examining the Role and Relevance of Ombudsman Institutions and their contribution to Justice, Governance and Public Service

Chair: Hon. Cmmr. Sabelo Masuku, Acting Chairperson, National Human Rights Commission, Swaziland

3.1 Ombudsman, Courts and the Common Law

By: Hon. Commissioner Otiende Amollo, Ombudsman, Kenya

In his presentation, Commissioner Otiende sought to persuade the delegates on the following:

- It is preferable to adopt the Danish model of the Ombudsman in Africa as opposed to the Swedish model. The Swedish model describes the Ombudsman as the supreme overseer of legality, who even oversees the courts. This model is not ideal for the African context, especially the common law context.[6] In considering the models to be used, it is better to consider the Danish model. It was re-evaluated in the 1950's.

- While the Ombudsman must have the jurisdiction to make decisions and recommendations on matters of maladministration, administrative injustices and related matters, in the context of the common law, the Ombudsman still remains amenable to judicial review – even when determinations are made, those who are aggrieved have the opportunity to challenge the decision in a court of law. If it is challenged in court, the court will have a restrictive view on how to look at it within the confines of the judicial review. In this context, the

6 Common Law in this case is that body of law that applies largely to those who are equated with an Anglophone experience.

court could return the decision to the Ombudsman to reconsider and not change the decision.

- The traditional Ombudsman, whatever the model, still proceeds on the basis that:

  √ The Ombudsman makes recommendations
  √ Does not make binding determinations
  √ Investigations and recommendations are respected on the basis of moralsuations – the moral authority of the recommendations.

From the perspective of a practitioner, Commissioner Amollo stated that there is need to give the Ombudsman authority, more than merely to make recommendations. He further clarified that in some situations or countries where there is a culture of lack of respect for the courts' decision, then making mere recommendations is meaningless. In the unique circumstances, the Ombudsman should have jurisdiction to do more than merely make recommendations. The Ombudsman's office should have the capacity to 'bite'.

The model that expects that the Ombudsman to make recommendations only, and if those recommendations are not adopted then Parliament will pick them up, is a model that will not always work in Africa, because of: (i) the nature of the formation of Parliament, (ii) the nature of work of the Ombudsman, especially where it also incorporates anti-corruption mandate. In this case the Parliamentarians will work towards making the office ineffective to their benefit. Reports will be received by the Parliament and never be discussed or contents revealed, (iii) the politicization of the Ombudsman decisions as the office checks public offices and the Government. Recommendations are, therefore, swept to the back burner.

Recommendations

The Ombudsmen in Africa have not adopted the Swedish model that gives them power over the courts. Many Ombudsman institutions in Africa are Parliamentary Ombudsmen. They report to Parliament on their operations at specific intervals. The new Ombudsman ideally should be established constitutionally and not by an Executive decree. The ideal situation is, therefore, for the Office to be entrenched in the Constitution.

The Ombudsman in Europe, North America, Australia and other parts of the western world tends to focus more on social and economic rights, since most of the other areas are clearly defined and well accepted. However, the

Ombudsman in Africa still has to deal with a large chunk of civil as well as political rights issues. The scope of maladministration in this case includes political issues that can as well be defined to the extent of questioning the president's personal financial dealings (Case of South Africa).

The definition of the Ombudsman will, therefore, be different, based on the local context. In Kenya, the debate to maintain a fused or disaggregated Office was so intense that there was no time to finalize the debate at the making of the Constitution. Therefore in Article 59 of the Kenyan Constitution, the Kenya National Human Rights and Equality Commission which constituted all three competencies was established. In Article 59(4), Parliament was given the opportunity to have the debate further whereby they eventually created three other separate agencies: (i) the Kenya National Commission on Human Rights (ii) the Commission on Administrative Justice - Office of the Ombudsman, and (iii) the National Gender and Equality Commission.

Right of Access to Information

A number of Constitutions have the right for their citizenry to access information held by the state. One important question in relation to access to information is who is to facilitate such access? The Ombudsman is increasingly being given the mandate to do so. For instance, in Rwanda, the Ombudsman has been empowered to facilitate access to information to the citizenry. In Kenya, it is on the way – a Bill has been drafted towards this end and which has identified the office of the Ombudsman as the agency to facilitate this – with plenty of opposition. The office of the Ombudsman is the right entity to facilitate this because the Executive cannot facilitate itself; it must be an entity outside the Executive to carry out this facilitation.

Courts and the Ombudsman

These two are not in competition; they are complementary to each other with regards to administering justice. They must work in a relationship of mutual respect. If a matter is actively in court, the Ombudsman ought not to assume jurisdiction over the matter and vice versa if before the Ombudsman. There is need for clear jurisprudence on this. The Ombudsman cannot deal with substantive matters before the court, but only deals with malfeasance such as delays and inefficiency in handling files among others.

Using the office of the Ombudsman has a number of advantages compared to the courts, examples of which include cheaper costs, expeditious, adoption of an inquisitorial approach, wide range of remedies and systemic investigations that address the underlying problems among others.

The Future of the Ombudsman

The challenge that often arises where the office of the Ombudsman has the mandate to adjudicate is the danger of the Office being the complainant, investigator, prosecutor and the judge all at the same time. Creating the so called 'Chinese Wall' in the adjudicatory mandate of the Ombudsman remains a challenge in the common law experience. The Courts have, however, stated that a body can very well carry out these functions as long as the Chinese Wall is kept in all the processes.

All these processes can, however, be made to work in unison, without necessarily offending the rules of law, provided each stage is handled by different agencies or personnel, even if it is within the same office.

Advisories in the Kenyan context have been found to be useful. They enable the Ombudsman to carry out what it considers is right even if they do not involve an investigation. It is strictly less than a recommendation. In Kenya, the experience is that what is contained in the advisory that is given by the office of the Ombudsman is followed without anybody saying that they have followed it, or taken up the recommendations.

Judicial Review and the Ombudsman

In common law, it was thought that there would be tension between judicial review and the work of the Ombudsman, because judicial review is what gave the courts the ability to look at administrative action by public officers, primarily, and to essentially apply the same principles applied by the Ombudsman. Judicial review by the courts is not inconsistent with the work of the office of the Ombudsman. The two can work together. However, the office of the Ombudsman must be insulated from liability arising out of its operations.

Enforcing the Ombudsman Determinations

Unless there is a clear mechanism for enforcing the Ombudsman decisions and recommendations, no headway will be made in ensuring administrative justice in Africa. Unless the Office is in an environment where respect for the law and the culture allows the recommendations to be adopted, no headway will be made.

While it is important to note the conventional work of the Ombudsman of making recommendations, it is critical to note that where the office is in an environment where the convention does not facilitate this, then it is critical for the office of the Ombudsman to make binding determinations.

Conclusion
The office of the Ombudsman and the courts are necessary and complement each other. In some countries, the jurisdiction of the Ombudsman is yet to be appreciated. It is up to each country to determine whether to have a fused (with human rights, anti corruption commissions) or un-fused Ombudsman office.

Based on the Kenyan experience, it is better to have a stand-alone Ombudsman office that deals with maladministration, a stand-alone human rights commission that deals with myriad issues of human rights and a stand-alone anti-corruption commission that focuses on prosecuting corruption.

All Ombudsman offices should, however, continue educating the public, government and to stand tall despite the challenges being experienced.

3.2 Administrative Law and Governance in East Africa
Prof. Migai Akech, School of Law, University of Nairobi

Prof. Akech's presentation was on a Project he is currently working on 'Administration Law and Governance in East Africa.' The Project is talking place in Kenya, Malawi and Uganda. The Project is about showing that even the poor, marginalized and helpless have rights.

From a democracy viewpoint, administrative law introduced democratization initiatives, which then led to a number of achievements such as political liberalization and constitutional reforms in many African countries. This initiatives helped re-introduce, (i) multi-party politics, (ii) presidential term limits, (iii) institution of regular and competitive elections for legislative and presidential offices, (iv) restored legislative and oversight functions to legislatures, (v) guaranteed judicial independence, (vi) saw the emergence and growth of an assertive private media and civil society.

A key drawback has, however, been the fact that African democracy has tended to be attached to the ballot box. In reality, democracy must be a day to day practice and not a periodic event as it is about the right of citizens to be consulted when political decisions or choices are being made, hence the need to have in place mechanisms that will enable citizens to meaningfully participate in the day to day practices of governance.

Prof. Akech questioned the sufficiency of periodic elections because it does not offer citizens, particularly the marginalized, an adequate degree of control over government. Hence the need for auxiliary political or legal mechanisms that will ensure that there is, (i) day-to-day participation of citizens in governance and, (ii) accountability of the governance institutions. This is critical as bureaucrats carry much of the work of government – typically in the Executive, Legislature and Judiciary.

These desirable auxiliary mechanisms of accountability are, however, absent in many African countries. Because of their absence, the interactions the citizenry have with public administrators are often delayed, having broken promises, extortion and abuses of power.

How then can these problems be addressed? Administrative law comes in at this point.
The arguments that the Project makes is that the rampant abuse of power in the context of the various bureaucracies can be prevented or at any rate considerably reduced if there is a credible regime of administrative law.

What then is the promise of Administrative Law?
Administrative law regulates the exercise of power by requiring that administrative action should meet certain requirements of legality, reasonableness and procedural fairness. It performs this function by establishing general principles and procedures that all administrators and the various bureaucrats ought to follow. It also provides remedies when these principles and procedures are not followed.

What are these principles and procedures?
Principles:

- Requirements that decisions should be reasonable or justifiable
- Administrators must consult those that are likely to be affected by their decisions prior to making them
- Decision making processes should be free from any real or apparent bias
- Administrators must give satisfactory and written explanations for their decisions

Procedures:

- Requirements that administrators must give adequate notice or proposed actions to those most likely to be affected by their decisions
- Give the affected and likely affected communities reasonable

opportunities to make representations, for example, through public inquiries, notice and commence procedures in which the affected people are given enough time prior to the taking of the decision.

In this regard, administrative law contributes to (i) good administration, (ii) the rule of law, (iii) democracy, (iv) fairness and impartiality in decision-making, and (v) promotes public trust in government and its officials.

How then are the principles of administrative law realized? What systems or mechanisms could facilitate the attainment of good administration from the perspective of administrative law?

This can be realized using two approaches:

- Getting it right from the onset which entails:
  - √ Ensuring that the administrators get it right the first time by making decisions that adhere to the principles of good administration. This can be achieved by, for instance, enacting laws and training administrators on these laws to ensure procedural compliance.

- Looking at correcting the wrongs through:
  - √ Judicial reviews and the Ombudsmen to review compliance with the principles.

What then is the link between administrative law and governance?
Administrative law can contribute to the attainment of rule based governance and public accountability. This belief stems from the fact that governance is about public participation and accountability of the exercise of power. Administrative law also contributes to rule based governance like mandating public participation and accountability in public decision making processes.

Why this Project?
The Project was necessitated by the following reasons:

- There has been little if any empirical research around this subject area
- Need to analyze how can public administrators make decisions and whether they adhere to the principles of administrative law.

The Project takes off on the premise that administrative law can address regulatory gaps by providing practical legal standards and procedures that citizens can deploy to confront the abuse of power. Despite the potential of administrative law to enhance the quality of governance, it has unfortunately

not been given serious attention in East Africa, and Africa in general.
The Project seeks to achieve the following objectives:

- To compare the rule making, rule application and adjudication practices of administrative agencies with a view to contributing to the development of uniform procedures and practices that then adhere to the principles of administrative law
- To understand and document the day to day interactions that ordinary citizens have with public administration with a view to contributing to public policy and legislative initiatives that seek to empower citizens to participate more effectively in public decision making processes and hold the government and its agencies to account.
- To evaluate the adjudication processes of administrative agencies.
- To assess the impact of judicial reviews on public administration. There is need for a discourse between the Judiciary and public administrators.
- To produce a book on the Principles of Good Administration which can be embraced by the students of law or in public administration.

Why then is this Project important to the Ombudsman Institutions?

- It demonstrates to policy makers, administrators and public actors to participate in the proceedings of administrative agencies and how the principles and procedures of administrative law can contribute to good administration
- It will develop an appropriate set of procedures that concerned agencies can use to enhance fairness and accountability of their decision-making processes. These sets of procedures can serve as a basis for developing modules for relevant policy makers, administrators and public actors so that they can be effectively used.
- It will also engage the institutions of accountability such as the Ombudsman and legislative committees with a view to contributing to the establishment of codes of good administration and establishing practicing guidelines to facilitate the mainstreaming of the principles of administrative law
- At the regional level, the Project seeks to engage policy makers with a view to contributing to the adoption of uniform sets of procedures to facilitate fairness and accountability in the exercise of power by administrative agencies.

3.3 Fused or Un-fused? Examining the implication of the combined role of Human Rights, Anti-Corruption and Administrative Justice in One Body

By: Cmmr. Joseph Whittal, Deputy Commissioner, Commission on Human Rights and Administrative Justice , Ghana

The Presentation focused on the Commission on Human Rights and Administrative Justice (CHRAJ) of Ghana and covered the following areas:

- History of CHRAJ
- CHRAJ Performance
- Implications of a Fused Mandates

Historical Context

There is need to begin by re-examining the Ombudsman in the African context. It is important to note that administrative justice is a human rights issue. Indeed, there are a number of case laws in Ghana that have stated that citizen's rights to administrative justice is a fundamental right; not just rule based. For CHRAJ, administrative injustices are not just wrongs *per se*, they are also human rights violations.

The origin of an Ombudsman in Ghana can be traced to 1969 when the Second Constitution of Ghana was adopted. Article 112 of the Constitution provided for the establishment of a classical Ombudsman to, among others, receive and investigate public complaints about injustice and maladministration against government agencies and officials. The Office was, however, not operationalized due to a coup d'état despite an Act of Parliament being passed.

The Office was subsequently re-enacted in the 1979 Constitution and operationalized through an Ombudsman Act of 1980. However, the Office was weak and received a lot of criticisms for its performance and relevance. The establishment of CHRAJ was, therefore, a response to the weaknesses of the first Ombudsman Office.

CHRAJ was established in 1993 as an independent Constitutional Commission with three distinct functions: human rights, administrative justice and anti-corruption. The Constitution of Ghana elevates the concept of administrative justice to a constitutional right and makes it one of the fundamental human rights (A23). The fused system accords with reason and financial prudence

since unfair administrative practices by public officials would invariably lead to violations of the fundamental rights and freedoms.

The anti-corruption mandate focuses more on integrity and less on the criminal aspects. The fused mandate has made the Commission to be very effective and provided the necessary latitude to undertake its work and deal with all situations that may arise in the course of their operations. This links well with the fact that the future of the Ombudsman in Africa which will be based on the relevance or effective oversight over other public institutions.

Performance of CHRAJ

CHRAJ has a staff complement of about 800 people with national spread. CHRAJ has performed really well to an extent that a commentator once referred to it as 'the conscience of the nation' and 'the most trusted institution' – (Geoffrey Cameron, 2008). Some of the key achievements of CHRAJ include:

- undertaken investigations of key state officials including a sitting President
- created awareness about human rights
- assisted public institutions to develop service charters
- developed the National Anti-Corruption and Human Rights Action Plans
- developed Conflict of Interest Guidelines and Code of Conduct for Public Officers
- contributed to jurisprudence through its decisions and arguments in court
- produced state of Human Rights Reports on 10th of December every year
- developed a draft Human Rights Baseline to measure the performance of the Government in human rights for the following five years.

The Commission has done well to an extent that researches have shown that the level of human rights knowledge in Ghana to be about 90 percent. The fused mandate has worked well in Ghana leading to the pre-eminence of CHRAJ in Ghana's development to an extent that some of Ghana's Development Partners through the Multi Donor Budget Support have conditioned the release of budgetary support on certain targets being met. The pre-eminence of CHRAJ has been achieved through firm leadership and bold stance on human rights, administrative justice and anti-corruption.

Implications of the Fused Mandate

- *Budgetary constraints:* Even though CHRAJ is three in one, the Government

considers them as one institution. It has been recommended that a Democracy Fund be established for all independent constitutional bodies. In this system, the Fund is allocated directly to the Fund Administrator who would work closely with the constitutional bodies.

- *Binding nature of the decisions:* For now, CHRAJ enforces its decisions through the court. A proposal has been made to enforce the decisions by way of registration in court and enforced as decisions of the court.

- *Goodwill factor:* Maintenance of the goodwill is a challenge.

- *Mandate over private persons:* CHRAJ mandate covers situations which may involve private persons in the context of human rights and anti-corruption mandates.

3.4 The Challenge of Enforcing Ombudsman Decisions, Ethiopia

By: Mekdes Mezgebu Medhane, Programme Officer, Democratic Institutions Programme

Establishment of the Ethiopian Institution of the Ombudsman

The Ombudsman is increasingly becoming an indispensable institution for safeguarding the rights of citizens and holding the governments to account. This has become more evident when considering the expanded role of the State in contemporary world coupled with the corresponding demand for open, fair and accountable government. The situation in Ethiopia has not been different. The Ethiopian Institution of the Ombudsman (EIO) was established under Article 55 of the 1995 Constitution as part of the restructuring of the State brought about by the New Constitution. The other institution created under Article 55 is the Human Rights Commission. The Ethiopian Institution of the Ombudsman was operationalized in 2005 through the enactment of the enabling legislation and the subsequent appointment of the first Chief Ombudsman. It is primarily entrusted with the mandate to investigate and redress issues of maladministration, governance and public service delivery. The mandate was expanded in 2008 through the Freedom of Mass Media and Access to Information legislation which empowered the Office to oversee its national implementation. Currently, the Office has Six Offices in six regions with the main office in Addis Ababa.

Mandate of EIO

The broad areas of EIO mandates are the following:

- Supervision of the constitutionality of administrative decisions and directives and providing recommendations for change.
- Complaints handling from the public. The Office can initiate investigations on its own motion on suspected cases of maladministration.
- Law and policy reform – recommendations for better governance
- Implementation of access to information legislation

Enforcement Mechanisms

Upon conducting investigations, the Ombudsman can take any of the following measures:

- Make recommendations based on the findings of the investigations. The Ombudsman usually makes follow-ups to the respondent administrative agency for compliance with its recommendations.
- Parliamentary reporting through the submission of Annual Report on its activities. The Ombudsman also issues a Special Report to Parliament on specific pressing issues of government administration.
- Official Reports made through the media or other means to expose the Executive and its wrong doing agencies (A.39)

Challenges of Enforcing Ombudsman Decisions

The challenges include:

- *Gaps in the legal regime:* These include absence of an administrative procedural law, legal ambiguities and lack of specificity of the enabling legislation which have affected investigations and enforcement of decisions. The absence of an administrative procedural law has resulted in arbitrary and inconsistent procedures of decision making. In addition, it has affected the work of the Ombudsman in setting uniform standards of administrative procedures for administrative bodies. A Study commissioned by the Ombudsman found that the absence of the procedural law was one of the main causes of administrative injustices in Ethiopia (Justice & Legal Systems Research Institute, Addis Ababa, June 2013).

  Secondly, the Ombudsman does not have powers to take its decisions to court for enforcement. This has been restricted to recommendations and using soft powers of persuasion and mediation. Further, the law does not expressly impose a duty on public agencies to comply with the decisions

of the Ombudsman. In addition, the weakness in the law has made public agencies to interpret their duty to co-operate with the Ombudsman to mean co-operation during investigations, but not in the enforcement of its decisions. This is made worse by the lack of clear strategy to enforce decisions of the Ombudsman, making it to only rely on informal arrangements for enforcement.

- *Issues of Federalism and Regional Autonomy:* The Ombudsman is a federally established Office whose mandate stretches to federal agencies. This has presented both theoretical and practical challenges as to whether the Ombudsman has jurisdiction over regional states.

- *Weak Capacity and Low Public Awareness:* This includes weak capacity of the Ombudsman and weak collaboration with stakeholders. While the capacity has improved over the years, it is still inadequate. The weak capacity has been evident in certain complex areas such as land administration that require specialized skills. Similarly, the collaboration between the Ombudsman, Anti-Corruption Commission and the Human Rights Commission has been weak thereby hampering their effectiveness.

- *Weak Parliamentary Oversight*: Parliamentary oversight has been weak since they are not able to adequately supervise the Executive – Parliamentary Committees are unable to adequately consider Special Reports of the Ombudsman.

- Weak capacity (Awareness) of the public agencies

Despite the challenges, the Ombudsman in Ethiopia has made strides and has a promising future.

3.5 Personal Attacks on the Ombudsman (Testimonies)

Grenada

The following account was given by the Ombudsman of Bahamas, who was present at the Colloquium. The Ombudsman for the office of Grenada was in office for three and a half years, was summoned this year to the office of the Governor General and asked to resign. This appears to be politically motivated.

Malawi

The Ombudsman of Malawi present at the Colloquium gave the following account of the experience she has had to live with as a result of her position as the Ombudsman of her country.

The Ombudsman of Malawi, Hon. Justice Tujilane Chizumila (Rtd) was summoned to the office of the Chief Justice and accused of misappropriation of funds and asked to resign with immediate effect. Being a lawyer, she refused and asked to be shown the evidence, which was not forthcoming. As a result of not resigning, she has been subjected to numerous threats, lack of support from the Government, in terms of her personal security and even at one time attacked by armed thugs in her house where she was with her family. They threatened her and her family – they addressed her as Madam Ombudsman, meaning they knew who she was. Her pleas and discussion with the President of Malawi about her situation had not borne any fruits.

3.6 Plenary Discussion

Comment:

The relation between the Ombudsman and the Courts. The Kenyan Ombudsman says that these two offices should be complementary. Practically speaking, this may present a problem, things may be more complicated – there is the principle of separation of workers and each institution is very jealous of its powers vis-à-vis the Executive. Therefore, the institution of the Ombudsman will come in and complicate the situation even though they are supposed to be complimentary. Why can't the Ombudsman be allowed to intervene in matters that are in court?

Response:

The office of the Ombudsman can intervene in the enforcement of decisions. In Kenya, on matters of court where people sue the government and want to be paid, it was discovered that the quickest way to get paid when suing the government is through the Ombudsman. The Office has now developed mechanisms to determine what matters to can intervene for enforcement. It should be a matter that is within its jurisdiction.

Comment:

As we develop the office of the Ombudsman, we must encourage courts to recognize the complimentary role of the Ombudsman, otherwise the courts can kill the work of the Ombudsman. In this regard, the Courts and the Ombudsmen should engage constantly on their complementary mandates.

Comment:

The advantages of having a fused institution on human rights, anti corruption and public administration. The action of the Ombudsman particularly in the Francophone countries follow the French model. France reviewed its Constitution some years back and this allowed for the modification of the institution of the Ombudsman – its is now called the "*defender of law."* Limitation of resources is one of the factors for the establishment institutions with fused mandates.

Comment:

The office of the Ombudsman in Ghana appears to have a lot of public and political goodwill. Lack of political goodwill is what kills independent oversight institutions like the office of the Ombudsman. How did CHRAJ manage to attain such a high degree of political goodwill to the extent that they can hold MPs and Ministers to account? What lessons can the rest of us learn?

Response:

Public goodwill has existed due to the good work of the Commission in Ghana. This has stemmed from good leadership of the institution which engendered support from the civil society, the public and the media. The Commission has also worked closely with these stakeholders.

The Ghanaian Chief Justice and CHRAJ Commissioner begun working together – that has been the practice. The fusion has been practiced for the last 20 years and has worked well in Ghana. The enforcement of the decisions of the Commission has been done through an application to court for any available remedy. However, there is a proposal in the review of the Constitution to have the decisions registered directly in court for enforcement.

Question:

How visible is the Ombudsman in Kenya? What steps are being taken to make it more visible?

Response:

The office of the Ombudsman is two years old. The work of the Ombudsman is measured by how many people come to complain to you. In the last two years the office of the Ombudsman has managed to build a complaint base and the rate of resolution of 60%. In 2012, the Office received over 4,100 complaints. In 2013, the complaints are estimated to top 8,000. The rate of resolution has also increased from 20% to 60%.

Ombudsman of Kenya, Cmmr Otiende Amollo, and Ombudsman of Malawi, Hon. Justice Tujilane Chizumila (RTD), consult during the Colloquium

Hon. Adv. Soleman M. Hatteea, the Ombudsman of Mauritius and AOMA Regional Co-ordinator, Indian Ocean, and Professor Victor Ayeni, the Director – Governance and Management Services International (London) during one of the Thematic Sessions at the Colloquium.

Session 4:
Emerging Frontiers

Chair: Hon. Adv. Matsoana N.A. Fanana, Ombudsman, Lesotho

4.1 Panel Discussion: The Evolving Ombudsman: Emerging Frontiers

4.1.1 The Case of Bermuda

By: Hon: Arlene S. Brock, Ombudsman of Bermuda

The Ombudsman's Office

- Established through a Constitutional amendment in 2001
- The Ombudsman Act was enacted in 2004 and the Office operationalized in 2005
- It has operational independence and reports annually to the Legislature
- The Office is audited independently by the Auditor General
- The Ombudsman has total control of its budget. Its budget is taken to the Cabinet for information purposes only.
- It reaches out directly to the public using various avenues such as Facebook.
- It prioritizes its activities by focusing on senior citizens, children and vulnerable persons
- To ensure credibility, the Office exercises ultimate due diligence, due process and practices empathy.
- It receives on overage, 250 complaints annually with three frivolous complaints received since its doors opened
- The Office has the power to mediate

4.1.2 The Case of Kenya

By: Hon. Commissioner Otiende Amollo, Ombudsman of Kenya

- Article 59 of the Kenyan Constitution, the catch phrase being "investigate matters in any sphere of government." This includes both the national and devolved governments.

- The Commission is required "to report on complaints investigated under paragraphs 1 and 2 and take remedial action." Section 8 of the Commission on Administrative Justice Act, 2011, requires the Ombudsman office to report to Parliament.
- The process of appointment to the Ombudsman office is through a public advertisement for the positions, with a minimum experience requirement of at least 15 years in Law, Public Administration and other requirements listed out in the Act. The Commissioners have tenure in office of a fixed term of six years.
- There has been debate in Kenya on the constitutional placement of offices such as that of the Ombudsman. The office cannot be part of the Executive as it cannot be part of that over which it provides oversight. Offices such as that of the Ombudsman should be independent offices of state – independent of the traditional arms of government, but remain part of the State.

The Ombudsman's Execution of Mandate

- In order to increase the performance of public institutions in Kenya, the Government established performance contracting system for all public institutions – whereby each government institution (over 500) is ranked according to their performance every year, including how they deal with public complaints. The Ombudsman office has embedded itself into this process and used it to hold public institutions into account
- The Office also trains Government officials on the whole aspect of maladministration
- The Office also promotes alternative dispute resolution, that is, mediation, conciliation and negotiation to enhance public administration.
- Persons held in custody. The enabling Act empowers the Commission to receive complaints confidentially from anybody held in prison or custody. The Office has the power to act on these complaints.
- Section 26 of the Act gives the Office the power to adjudicate on matters of administrative injustice – the Office has a quasi-judicial mandate to deal with maladministration and administrative injustice.
- The Office also has some complimentary mandates such as:
    - √ Enhancing cohesion within the country
    - √ Participating in the process of vetting of all Judges and Magistrates by providing any existing complaints against them to the Judges and Magistrates Vetting Board

- Some of the emerging mandates include the implementation of decisions of international tribunals – ***(Endorois Case)*** and overseeing the implementation of the Freedom of Information and Data Protection law (once passed).
- The Office also litigates or acts as Amicus Curiae. The Office has found this approach very useful.

Challenges

- Acceptance – public offices and officials will always resist oversight
- Lack of awareness especially when the Office is a new one – public education is used
- Lack of resources – the Office has overcome this partly by coming up with an integrated complaints handling mechanism involving other independent institutions with offices in other regions of the country. These complaints are then forwarded to the Ombudsman office for action.

4.1.3 The Case of Zambia

By: Cmmr. Alfred Kaweza, Commission for Investigations, Zambia

- The Commission for Investigations in Zambia constitutes the Ombudsman Institution
- The Ombudsman is the Investigator General – The Office is entrenched in the country's Constitution. The mandate and powers of the Office are enshrined in the appropriate legislation known as the Commission for Investigations Act.
- In the Office, the Investigator General is the Chairperson, while the other three Commissioners are members of the Commission. These four seats constitute the Commission.
- The Commission has the mandate to investigate complaints against every Government institution, all ministries including the Bank of Zambia and the Army.
- If no response is received by the Commission when investigating a public body such as a Government Ministry, the Commission would summon the responsible Permanent Secretary to appear before the Commission failure to which the Commission has the power to have him arrested to appear before the Commission or may be arrested and arraigned in court.
- The Commission has the mandate to receive all the country's confidential or secret information

- One of the main challenges faced by the Commission is inadequate staffing (about 30 staff), logistics for movement between the various provinces
- The country has separate Commissions that handle the human rights aspect and anti corruption. The Commission for Investigations works hand-in-hand with these two Commissions
- On average, the Commission receives at least 1,000 cases per year, with another 500 to 1,000 cases brought forward, giving a total of 1,500 to 2,000 cases per year. Inadequate staffing and long investigations results into these delays.
- The Commission is not a Parliamentary Ombudsman, but an Executive Ombudsman, meaning it reports directly to the President with its recommendations (It does not have the power to go beyond recommendations for its determination).
- On appointment, the Chairperson who is the Investigator General must be a Lawyer of standing equal to a Judge of the Supreme or High Court. The members of the Commission must be vastly experienced in public administration – at least 20 years experience. The appointment process is rigorous, involving Parliament before being appointed by the President
- The Chairperson of the Commission retires at the age of 65 and can only be removed from the position on account of gross misconduct. The Commissioners stay in office for a period of 5 years, although a proposal of six years has been made.

4.1.4 The Case of Botswana

By: Hon. Adv. Festinah Bakwena, Ombudsman of Botswana

Despite its good rating, Botswana still faces some governance challenges. The Ombudsman was created as part of the redress mechanisms to improving good governance in Botswana.

The Ombudsman is a statutory body founded on the classical model of investigating maladministration in the public sector. It can also investigate human rights violations by administrative agencies. It has the power of *subpoena* and interview witnesses as the High Court.

The Ombudsman has had relative success. Most of the complaints have been resolved in the course of investigations or after investigations.

Challenges faced by the Ombudsman

The challenges faced by the Ombudsman include:

- Lack of constitutional entrenchment
- Security of tenure for the holder of office
- Unresponsiveness – Responses from Government Ministries are not timely
- Limited jurisdiction – Lacks jurisdiction on security matters
- Limited resources – Overreliance on the Executive
- Does not enforce own decisions – Relies on Parliament and administrative agencies to enforce decisions

4.1.5 Plenary Discussion

Comment:

The emerging frontiers require the Ombudsman to be more proactive. AOMA should begin the process of looking at all the issues that make the Ombudsman ineffective in Africa and put up their position, through their Ambassador who has access to the African Union so that these fundamental constraints can be presented to African Presidents so that solutions can be devised on how to overcome them.

Comment:

The African Ombudsman Research Centre should come up with research that would identify the factors for an effective Ombudsman in Africa. This will ensure that Africa goes beyond tokenism for the collegial manner for an effective system. For example, the Ombudsman office in Zambia reports to the Executive. How can one report to the person or office they have investigated? This approach is not effective.

Comment:

We need to have concerted efforts in Africa by AOMA to begin talking directly to the leadership of the continent especially in countries where the Ombudsman office or person is being abused and where there are outright administrative injustices. This is a suggestion worth being adopted by countries where internal Ombudsman can be used on a pilot basis before being spread out to other agencies.

Response by AOMA President:

At the Third General Assembly in Rwanda, AOMA worked on ensuring all

African Ombudsmen are accorded dignity. This is why AOMA was credited at the AU. The AOMA President also spoke at the African Union on the occasion of the Jubilee in Addis Ababa. The African Union and all African governments must be brought to the full understanding and accept the independence of the African Ombudsman in the same way the AU has given AOMA the observer status. Countries must be given the opportunity to harmonize their institutions so that the dignity of the Ombudsman can be defended and protected.

Question:

Is there co-operation between the institutions of Ombudsmen and other entities in the respective African countries to ensure piloting of peer evaluation?

Question:

What is the role of the Ombudsmen in the various African countries vis-à-vis their proactive role in ensuring that public agencies have their own internal 'Ombudsmen.' The way to ensure that all public servants become accountable is by encouraging individual institutions to have very strong internal oversight bodies or internal Ombudsmen.

Question:

Is there a success story in Africa where the office of the Ombudsman has been able to oversee and correct the offices of the security agents of an African country?

Comment on Malawi success story:

On its engagement with the security forces in the country, the office of the Ombudsman has an oversight mandate over them. After a rocky start, they were given civic education on the roles and functions of the Ombudsman office and relations are now much better. There are now desk officers for the police and the army on Ombudsman matters. On their approach to solving issues, alternative dispute resolution such as mediation is being used and general good will.

Comment:

The Zambian Ombudsman can also investigate and summon all public officers, including the security personnel, judicial officers and regulatory bodies. Only the President cannot be investigated or summoned by the Ombudsman.

Question:

Is there co-operation between the Ombudsman and other agencies in Kenya to ensure piloting of peer evaluation? What is the role of the Ombudsman in establishing and strengthening internal Ombudsman within administrative bodies?

Response:

The Kenyan Ombudsman works closely with other agencies and has been assisting public institutions in Kenya to establish or strengthen their complaints handling capacity and processes. This is even part of the performance contracting system for public institutions in Kenya.

Comment:

In Botswana, the Ombudsman has appointed a team to provide guidelines for the establishment of Ministerial Ombudsmen. This is still at the piloting stage.

Ms Betty Achieng', former FIDA Kenya Council Member, makes a comment during one of the sessions

Session 5:
Thematic Issues

Chair: Hon. Justice Mrs. Tujilane Chizumila (Rtd), Ombudsman of Malawi

5.1 Complaints Handling: Lessons from Africa

By: Hon. Dr. Paulo Tjipilica, Ombudsman of Angola & President of the African Ombudsman & Mediators Association

The institution of the Ombudsman is known by different names in different countries. In South Africa they have used Public Protector, in France, the Mediator of the Republic. The international term is Ombudsman which has a variety of origins. There is a characteristic commonality in that all receive complaints from ordinary citizens.

Most of the complaints come from ordinary citizens, diverse organizations and political formations and public agencies, including prisoners agency. In Angola, many complaints originate from prisons.

The approach to handling complaints is through jurisdiction of the Ombudsman. The Ombudsman is confronted with matters which are not of his jurisdiction such as frustrations from the citizenry whereby they do not know where to direct their complaints. Complaints within jurisdiction are admitted, processed and referred to relevant agencies. The complainant can also be advised on the action taken on the complaint or what needs to be done.

The Ombudsman needs to come up with a communication strategy to educate and bring awareness of the public on its key role. The Ombudsman has a significant role to play with the traditional authorities as it handles communications with ordinary citizens.

A communication section needs to be setup in the Ombudsman office – this will help determine the success of cases (social communication). The

Ombudsman has to use the communication means available in society – identify what needs to be done to provide appropriate recommendations.

Institutional capacity in the office of the Ombudsman is critical. Technical capacity is needed for qualified investigators, and enough data required. There is also need for training to be carried out on comparative law to enable people or its staff know what is happening in different countries. What has been done has brought out the challenges faced by the office of the Ombudsman.

On the financial aspect, proper funding is needed. The Ombudsman needs autonomy and technical capacity for success and account for its funding. Every 6 months, the Angolan Ombudsman prepares a financial report accounting for its budget.

The Ombudsman must be an expert in diplomacy. The Ombudsman must be recognized in society. In handling complaints, the Ombudsman needs to find the best ways and means of how to deal with complaints. The key areas needed to strengthen the Ombudsman include:

- The Ombudsman has to be entrenched in the Constitution for purposes of permanency and integrity.
- Have the art of diplomacy in order to mediate the role of justice keepers
- Networking

5.2 Complaints Handling: Lessons from Africa

By: Hon. Adv. Soleman M. Hatteea, Ombudsman, Mauritius & AOMA, Regional Coordinator, Indian Ocean (V38)

It is worse to have an Ombudsman that nobody knows about than to have none. It is, therefore, important to create awareness about the Ombudsman, what it stands for and what it does. In this regard, there is need to devise ways and means of making the Ombudsman known and relevant depending on the prevailing circumstances and peculiarities.

The Ombudsman of Mauritius is well known since it has been in existence since 1970 following its creation in 1968. The Ombudsman uses means such as the media, Public Service Magazine and annual reporting for awareness creation and re-enforcement of public confidence. The Annual Reports are widely circulated to all stakeholders including public organizations.

One of the components of democracy is good governance whose corollary is good administration. Democracy goes beyond elections. It includes the day to day practices in the governance process. There can be no good governance when the administration does not respect people's rights. The right to good administration now forms part of citizens' rights.

The Ombudsman receives complaints from the public and determines their admissibility in relation to its mandate. Complaints within the mandate are investigated. The Ombudsman adopts a non adversarial approach based on discussion and persuasion as opposed to confrontation.

On the independence of the Ombudsman, it is not sufficient to say that an Ombudsman is independent; the incumbent must in fact be independent and be seen as independent. He must maintain high professional standards and integrity. The Ombudsman must not be in 'anybody's pockets' as this can undermine its independence and effectiveness. He must have 'his own pocket and that pocket must be in his own coat.' In Mauritius, attempts to influence a decision of the Ombudsman in relation to a complaint it is investigating is an offence punishable by a jail term of 5 years. The independence of the Ombudsman is assured though an inclusive and transparent process as well as a difficult and participatory removal process which involves hearing by a Special Tribunal appointed by the President.

It is important to note that not every complaint lodged with the Ombudsman amounts to bad administration. An investigation ought to be conducted to ascertain whether there is bad administration or not. Indeed, in some cases the Ombudsman has found no maladministration and has had to explain to the complainant the reason for so finding.

The Ombudsman should be able to act in equity and make public administration more sensitive to public opinion and more responsive to demands of fairness and justice. In other words, the Ombudsman must strive, with the co-operation of public officers, to bring an administration with a human face.

As in other jurisdictions, it is an offence for any person to willfully fail to furnish any information or document requested by the Ombudsman, and also to willfully give false or misleading information. The administrative expenses of the Ombudsman's office are charged on the Consolidated Fund with the approval of Parliament.
It is important for the Ombudsman to understand that they hold no

magic wand to make things happen. The Ombudsman's goal should be a continuous quest for justice. The Ombudsman must adapt in the changing environment to become more relevant and respond to the challenges and provide appropriate services to the people. In addition, the Ombudsman should jealously guard his independence since it determines its credibility and survival.

5.3 The Future of the African Ombudsman

By: Prof. Victor Ayeni, Director, Governance and Management Services International, London

Approach and Scope

- At the global level, the Ombudsmanship is here to stay in Africa
- The time range projection is in the next 30 to 40 years - thus 2050
- It is critical to have strategies that can leverage into the future

The Givens

- Governance and service delivery issues will remain serious concerns regardless of how good things get (good for us!). The issues of our institutions will not go away soon.
- Politicians will remain politicians – the challenges in dealing with them will remain
- The Ombudsman cannot be loved by every one, some will want them out of the way – no matter how well one performs
- Competition from elsewhere will remain, after all the world was not created for Ombudsmen alone. We need to learn how to deal with it going forward
- Resource constraints will remain a challenge
- Our job will remain challenging, that is the name of the game. If not prepared for the challenges of Ombudsmanship, move on if you are not up to it!
- Unco-operative, difficult, skeptical, cynical, conservative, unfriendly, anti-change people will always remain – ever imagined how boring the world will be without them?
- The office of the Ombudsman will remain *highly* dependent on the personality of the incumbent
- The Office will not always be the centre of attention – this is not what should make the office of the Ombudsman

How should the African Ombudsman respond to these issues?

Three perspectives can be employed:

1) Concept and institution, including global movement, institutional terrain and intellectual orientation

- This involves looking at the Ombudsmanship from a global perspective, the interest of donors and development partners – with varying levels of emphasis, the growing importance of education and increasing awareness. Jurisprudence recognizes that Ombudsmanship plays an important part in a contemporary society. It will remain and continue to grow with more institutions being formed at the national level – including those institutions outside of the public sector. There will also be increased discussion on Ombudsmanship in law

2) The African region, including all four language groups are not independent of what happens in a globalized world

- The Ombudsman will continue to survive and remain important in the region
- More Ombudsman offices will emerge, perhaps in all of Africa by the end of next two decades.
- More specialty offices – they will become more prominent at the national level. As the continental umbrella body for Ombudsmen, AOMA should get ready for this.
- Increased professionalism, including the role of AOMA and networks. Ombudsman functionaries are increasingly a significant interest group
- But growth could create internal threat or tension and competition if not properly managed. Tension can also occur between the Ombudsman and specialty offices.
- Manage leadership succession. Poor management threatens sustainability
- Take more advantage of role of 'women power' in the movement. Women have significant perspectives on Ombudsmanship that the African continent needs to leverage on.
- Abolition of the office of the Ombudsman is not completely ruled out – this can happen
- The Ombudsman will be susceptible to what happens at the national level but, growth will dilute effect

3) Individual office and national context

- Better to focus on tools required for shaping the future as we would like. The Office needs to appreciate and use such tools and avoid just living for the moment.

- Considerable opportunities offered by global and Africa-wide development this can be leveraged upon
- Unfinished business in every country

Towards the Future

The following can be proposed:

- The individual and national office must be the focus or centre of interest for the future, since what happens here determines what happens in the bigger picture.

- 5 key principles are, therefore, critical for the incumbent:
    - √ Adopt a motto: Whatever happens to the Ombudsman's office '*all depend on me*'
    - √ Focus on maximizing 'clientele value – many offices are not meeting the clientele value. They need to recognize the clientele value and maximize it. This is key to surviving into the future
    - √ Watch your personal ego, do not blow your own personal ego.
    - √ You must not be indifferent to realities around you and think that you can or deserve to be excluded. Ombudsmen need to recognize the fact that their offices can be excluded from funding by the central government. They need, therefore, to plan and prepare for it.
    - √ The Ombudsman should not give up too easily in the face of opposition.

- Deliver: The office of the Ombudsman should focus on its core business and deliver it with objective proof of continuous improvement. Delivery – there is need for evidence and being able to demonstrate it.
- We must maintain the uniqueness of the Ombudsman and institutional advantage to society. Becoming *like* everybody else makes credibility and survival more difficult. The following principles can, therefore, be adopted: accessibility, visibility, informality, speed, inexpensive, competence, adequacy of remedy, approach to providing value and wide clientele.
- Be more strategic
- Leverage on technology
- Embrace and better manage multi-functionality
- The Office should continuously build credibility and public respect. Not the same as being a rabble rouser

- Enhance capability to manage and leverage forces around you
- Facilitate institutional adaptability
- Focus on competent of self and staff = office
- Keep up with the professional network

Big issues to watch

- There is a serious unfinished business at the national level, especially with visibility and performance of several Ombudsman offices
- Institutional competition
- Inherent contradiction in the emerging trend towards multi-functionality, for example, taking on human rights functions
- Reviving genuine academic scholarship, there is not another area for practitioners to take over.
- The future of the Ombudsman institution in Nigeria currently is problematic; this may have a negative effect on the rest of Africa. This is a major issue that should be dealt with going forward.

5.4 The Ombudsman World: Associations, Linkages and Networking

By: Adv. Ishara Bodasing, African Ombudsman Research Centre

Introduction to AOMA & African Ombudsman Research Centre

The African Ombudsman Research Centre (AORC) was launched at a high profile event on 15th March 2011 at the University of Kwa Zulu, Natal pursuant to an AOMA Resolution. Its key functions are as follows:

- Serve as a focal point for Ombudsmen offices in Africa, by coordinating their activities and supporting them with the provision of information and training.
- Act as a point of liaison with all participants who are involved in enhancing governance in Africa.

AORC's vision is to provide timely and appropriate support to AOMA so as to achieve its vision of being the leading international association of Ombudsmen offices, practitioners and scholars, dedicated to the promotion of open, accountable and people centered democratic governance in Africa.

Forming Associations

A common need prompts people to work together, to pursue goals and interests for their mutual protection and for the advancement of their members. This is how AOMA came about. It was founded on the principles of democracy, good governance and administrative justice.

Sustaining a multi lateral association such as AOMA requires dedication, commitment and careful planning by not only its leaders, but also by its officials. African countries differ in many respects, including size, population, economy, traditions and legal system (common vs. civil) among others. However, matters such as corruption, violation of human rights, maladministration are all common features in the political systems despite whatever differences that may exist in the governing philosophies.

African nations are aware that these problems present a serious threat to their core principles and values, and hinder social and economic development. In this regard, there is a common acceptance of the need to address these problems in a co-ordinated and sustainable way. The decisions of various regional and international bodies to establish Ombudsman associations show that the international community is serious about developing workable solutions and implementing them at the multilateral level. In our global village, it is critical that countries have a point of reference when combining, for instance, the elements of an effective and good governance management system that is in line with their own political, administrative and cultural circumstances. Therefore, globalization has brought with it a more common governance agenda as an instrument of democracy and development. A high standard of conduct in the public service has become a critical issue for governance in Africa.

Platforms for sharing of information on developments and initiatives taken by countries, international organisations and other governance bodies can be an effective tool towards developing normative standards for Ombudsman institutions.

Ouagadougou Resolutions

The following are some of the Resolutions of the Executive Committee Meeting of AOMA that was held on 18th and 19th June 2013 in Ouagadougou, Burkina Faso.

- Co-operation with other international organizations. A Memorandum

of Understanding between AOMA and the International Ombudsman Institute was adopted.
- The Executive Committee authorized the delegation to approach organizations such as the Commonwealth Secretariat, Francophone Association, the UN and the European Union to explore the possibilities of co-operation.
- Take appropriate measures to co-operate with the International Co-ordinating Committee of National Institutions for the Promotion and Protection of Human Rights in Geneva and the Network of African National Human Rights Institutions.
- A co-operation framework between the AU and AOMA had been drafted for implementing the MOU.
- Collaboration between AOMA and the African Peer Review Mechanism would be developed in order to monitor AU Agreements pertaining to governance and for the realization of the Millennium Development Goals.

The Importance of Networking

Networking allows for the meeting and establishment of relationships. It is essential for strong development of Ombudsman organizations or offices. It also allows the Ombudsman to hone their networking skills. There is need to have other countries buy-in into the Ombudsman concept in order to progress in this field.

Towards this end, it is vital to have regular scheduled, regional and national meetings and also have reciprocal visits among member states. A key aspect of this is communication.

The Ombudsman office or Association needs to design and operate a communication system that provides proactive communication with the following objectives:
- A strategy needs to enhance and expand the current communication mechanisms to be able to reach all development stakeholders.
- It needs to demonstrate and support the work and progress of the office.
- Protect and enhance the office's image and that of its stakeholders.

Such communication strategy should also be a management tool that can be used to facilitate effective communication between the Ombudsman office and its stakeholders. Some of the key features of such communication

strategy could be:

- An effective line of communication
- A schedule for engagements with other Ombudsmen
- Develop a communication action plan based on the office's set objectives
- Support the awareness and understanding of the Ombudsman concept, goals and ensure relevant and current information is constantly being exchanged.
- To increase the level of interaction and communication with comparable good governance and human rights bodies.

Conclusion

An Ombudsman institution's greatest challenge is its inability to grow, which is created by complacency on its part. It must, therefore, hold itself accountable at all times to its associate members and its citizenry.

Hon. Adv. Ishara Bodasing, Director of AORC, makes a Presentation on the importance of Associations, Linkages and Networking among the Ombudsman Institutions.

Session 6:
Closing Ceremony

6.1 Reflection and Important Action Points

By: Commissioner Otiende Amollo, Chairperson of the Commission on Administrative Justice, Kenya

The following are the key discussion and action points (based on the four broad areas) that arose from the Colloquium:

- The centrality of the Ombudsman institution as a tool in governance. It was resolved to encourage the few countries in Africa that had not yet established the Office to do so. A prediction by Prof. Victor Ayeni was that in the next one or two decades all countries in Africa would have established the office of the Ombudsman.
- Noted the variety in name, style and competencies of the Ombudsman institutions in various African countries.
- Appreciated the desirability of individual states to adopt formulations that best serve their circumstances. It was, however, noted that it is preferable to entrench the Ombudsman in the Constitution as an independent institution.
- Beyond establishment, the Ombudsman should individually and collectively sensitize the public, government officials and other stakeholders on its role in respect to governance, maladministration and administrative justice.
- With regards to the effectiveness of the office of the Ombudsman, there is need to continue designing and revising ways of ensuring the Ombudsman decisions are respected and implemented.
- It was agreed on the need to continue engaging with other stakeholders, including the courts, on the need to understand and respect the complementarity between the Courts and the Ombudsman institutions.
- Recognized, were new frontiers in the Ombudsman work, and it was agreed that where applicable, similar schemes would be devised.

- The ever dwindling resources was also noted and it was agreed that as

the Ombudsman engages with the Government to understand its role and seek more funding, the Ombudsman should, at the same time, be prepared to seek alternative funding beyond public resources.

- The role of the African Ombudsman and Mediators Association and the complimentary role of AORC was well noted and appreciated.
- Beyond this, the idea of having collaborative meetings or exchange programmes including Colloquia was well appreciated.
- The efforts for further collaboration beyond the continent were noted and encouragement was given to move in that direction much more.
- It was agreed that the Ombudsmen should individually and collectively encourage scholarships of Ombudsman work, particularly the unique aspects of the African Ombudsman.
- Discussion in the Colloquium also focused on threats faced by the Ombudsmen in their work. Specifically, the threats against the Ombudsman of Malawi were noted and condemned. To this end, the AOMA President stated that he would do the following:
  - √ Lead a further delegation to the AU General Assembly to meet the President of Malawi on that specific issue.
  - √ Lead a delegation to Malawi to follow up on the issue
- It was agreed that there would be need to continue engaging and sharing experiences through similar Colloquia.
- The concerns raised around the working languages in such meetings and the need to ensure that all AU working languages are incorporated was also noted.

6.2 Closing Remarks

By: Hon. Justin Muturi, Speaker of the National Assembly of Kenya

Hon. Justin Muturi, the Speaker of the National Assembly of Kenya, began by thanking the Commission on Administrative Justice for inviting him to close the Colloquium. He noted the critical role played by the Ombudsman worldwide in ensuring accountability in public administration. This, he said, had led to enhanced governance and curbed maladministration and injustices to the citizenry

While quoting the inspirational statement by Prof. Neil Mellium of the University of Hawaii that *"an Ombudsman has an obligation when it sports trouble; when it sports patents basically they speak the truth,"* Hon. Muturi noted the centrality of administrative justice in public administration

worldwide. Accordingly, administrative justice enables citizens to realize their rights, which may be enshrined in the national Constitution or other statutes. He noted the need for the Ombudsman to ensure good governance as a way of realizing accountability, national prosperity and responsiveness.

While noting the primary objective of the Colloquium of enhancing the capacity of oversight institutions to respond to administrative and political challenges, the Speaker stated that it was a milestone in the efforts to remedy administrative hiccups, particularly, in Kenya.

He noted the rich topics of the Colloquium and hoped that the delegates had learnt a lot and shared experiences, including best practices on the framework and operations of the Ombudsman. To this end, he stated that the topic "Re-examining the concept of the Ombudsman, current and future reality," must have revealed that the roles of the Ombudsman had evolved from the traditional ones, expressed exclusively in terms of administrative justice to encompass its current role that expressively addresses the protection and promotion of human rights, including issues that touch on ethics and corruption.

He concluded by predicting that the future of the Ombudsman in Africa lies in their entrenchment in the national Constitutions and empowerment to undertake their work. He urged the Ombudsmen to work closely with other stakeholders and continuously keep benchmarking on best practices. He then proceeded to officially close the Colloquium.

6.3 Vote of Thanks

By: Hon. Commissioner Saadia Mohamed, Member, Commission on Administrative Justice, Kenya

Commissioner Saadia Mohamed of the Commission on Administrative Justice gave the vote of thanks by appreciating the delegates for their commitment to the cause of administrative justice and attending the *Regional Colloquium of African Ombudsmen* under the theme *Repositioning the Ombudsman*: *Challenges & Prospects for African Ombudsman Institutions.*

While appreciating the lessons learnt from the exhilarating presentations and intellectual discourse, she noted that the Colloquium had provided a platform for sharing experiences, exchanging ideas, benchmarking and unity of purpose. In light of the discussion, she hoped that the Ombudsmen would move a notch higher to reposition themselves to better execute their

mandates and tackle the challenges facing them.

Specifically, Commissioner Saadia thanked the following people for their invaluable contribution and support for the Colloquium:

- The Chief Guest Hon. Justin Muturi, Speaker of the National Assembly, Kenya
- The President of AOMA and Ombudsman of Angola, Hon. Dr. Paulo Tjipilica
- Development Partners, specifically UNDP who were the co-funders of the Colloquium
- All presenters and guests
- The Management and Staff of the Kenya School of Monetary Studies

From Left: Hon. Justin Muturi – Speaker of the National Assembly of Kenya, Hon. Dr. Paulo Tjipilica, AOMA President and Ombudsman of Angola, Hon. Dr. Regina Mwatha – Vice-Chairperson of the Commission on Administrate Justice, and Mr. Leonard Ngaluma – Commission Secretary and Chief Executive Officer of the Commission on Administrative Justice during the closing ceremony of the Colloquium.

Appendix I
Presentations

Origin and Evolution of the Ombudsman Concept

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Origin and Evolution of the Ombudsman Concept

Prof Victor O. Ayeni
Director
Governance & Management Services International, UK

Why this discussion?

- Where did it all start
- Know what happened before and how we got to this
- Understand why we should be part of this at all, and that it's right thing to do
- How we can better do what we are doing
- Learn lessons for our future direction
- So, what really is an ombudsman

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A feel of the phenomenon

3

- Annual Average until about Yr 2000: 5 new countries join plus average of 60 new institutions
- Not less than 142 countries have established the office at governmental level globally; Over two-third of African countries
- Over 1000 individual offices established in domestic jurisdictions, including national offices with broad or specialized mandate, national or sub-national focus, and non-state offices
- Popular with businesses and the corporate sector
- International Institutions have it - EU, WTO, World Bank, United Nations, etc

4

The countries that have established the institution can be broken down as follows: 35 in Africa; 14 in Asia; 9 in the Pacific; 29 in the Caribbean and Latin America; 53 in Europe; and 2 in North America....

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"... undoubtedly the most valuable institution from the viewpoint of both citizen and bureaucrat that has evolved during this century....there has been broad public demand for the establishment of an Ombudsman to resolve problems in a very large number of countries and institutions. This astonishing growth of an institution is not and has not been emulated by any other body. Contrast the many centuries that it took parliament and the courts to establish their roles..." (D Pearce, "The Ombudsman: Review and Preview - the Importance of Being Different" The Ombudsman Journal, (Canada) Number 11, 1993, pp 45; 13)

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Dimensions

- Concept/idea
- Organisation
- Institution
- Club
- Professional network
- Brand
- Non-state instrument
- Public sector organ*

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True, there are many others like it. But the ombudsman is unique in its essential features and fundamental approach to solving a natural feature of contemporary society….

….However, not a miracle worker!

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Still, a real challenge to consistently define but the following is now standard…..

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An independent and non-partisan officer (or committee of officers) often provided for in the Constitution, who supervises the administration. Traditionally he/she deals with complaints from the public on administrative injustice and mal-administration but increasingly too with human rights and corruption related matters. In response to complaints submitted by others or on his/her own initiative, the ombudsman has the power to investigate, report upon, and make recommendations about individual cases, administrative procedures and relevant system-wide changes. The ombudsman, as an individual, is a person of prestige and….

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influence who operates with objectivity, competence, efficiency and fairness. He/she is readily accessible to the public and does not ideally charge for the use of the service. He/she uses fast, inexpensive and informal procedures. Not a judge or tribunal, and (ideally) has no power to make binding orders or to reverse administrative action. He/she seeks solutions to problems by process of investigation and conciliation. The authority and influence derive from the fact that he/she is appointed by and reports to one of the principal organs of state, usually either the parliament or the chief executive. He/she can also publicise administrative actions.

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Eight Underlying Principles

- Democracy means rule of law and all are subject to it
- Citizens have a right to good and quality governance; government has an obligation to provide
- Humans are intrinsically good and want to do things as best as we can but also prone to failure and abuse
- Public agencies must be accountable to a body in an independent position

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.....Principles Cont'd

- The individual is entitled to impartial, independent and easy to use grievance redress mechanism
- Redress must be to restore the aggrieved to the position before wrong was done
- Governance necessarily relies on a multiplicity of institutions
- The three institutional arrangements of the modern state, namely the legislature, executive and judiciary, are foundational to positioning the public sector ombudsman

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So, *how* did it all start?

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Better Governance Push factors

- Eliminating despotic and totalitarian rule
- Constitutionalism and rule of law
- Growth of the welfare state, bureaucracy and concomitant governmental influence
- Increasing public expectations, even with declining role of the state
- Widespread demand for democracy and performance
- People-centred rule and mutual accommodation
- Vulnerability of the strong; fear of slipping behind
- Poverty, development and good governance
- Global pressures, international norms and standards
- Flexibility and non-threatening nature of ombudsman

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And History *has* Legs

- Citizens' determination
- Demonstration effect of incumbents
- Historical links between countries
- Individual champions and policy advisers
- Intergovernmental bodies
- Professional associations
- International development assistance
- Human rights treaties and conventions
- Adaptability of the concept

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The Ombudsman's Journey to Nairobi….

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Five Phases

I. Before 1809
II. Early Scandinavian Movement: 1809 – 1962
III. Universalisation of Movement: 1962 – 1990
IV. Era of Regime Transformation: 1990 – 2000
V. Early 21st Consolidation: 2000 till date

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Phases I & II

- What happened before? Did other countries/societies not have ombudsmen too? Foundation for transference?
- Sweden, *Justitie Ombudsman*,1809 – no more autocratic rule
- Finland, 1919
- Denmark, 1955 - the model for the world?
- Norway, 1962
- Early days of welfare state

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Phase III

- Era of the welfare state
- New Zealand, 1962 – The Anglo-Saxon
- Guyana – first in the developing world
- Tanzania, 1966 – ahead of the masters; one-party?
- 1971 – Israel – Ombudsman with State Comptroller c
- !972 – Asia and Pacific join
- 1973 – France – oh! Administrative Court System
- 1975 – Nigeria – strange feat for big and military?
- 19975 – PNG – multi-purpose model
- 1978 – enter Portugal with human rights mandate
- Reaches every continent of the world.

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Phase IV

- Demise of USSR. Enter NPM. Threat to welfare state
- Democratisation movement; End of Apartheid
- The Human Rights Ombudsman in East and Central Europe - New states are born
- Welcome Latin America
- Standard constitutional item
- Spread hit 60% mark
- Younger and more professional ombudsmen emerge
- Name declared gender neutral
- Ombudsman as Representative less prominent
- International organisations (EU) join in; Growing non-state ombudsmen

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Phase V

- New millennium – consolidating achievements
- Bicentennial celebration
- End of 'Hybrids' – multifunctional ombudsman every where. Organisational (compared to earlier institutional) diversification
- Growing consensus that administrative justice includes human rights
- Systemic investigation gets big – Ontario's SORT?
- Arab and Middle East interest?
- Welcome late adopters (Angola? Kenya? Thailand? Indonesia?)

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Phase V …Cont'd

- Renewed strategy for failed and post-conflict states
- Paris Principles revisited to accommodate ombudsman
- Dismantling the welfare state and attendant financial crisis, hence more prominent private sector offices (banks and financial services ombudsmen)
- Growing professionalisation of ombudsman role; expanding networks
- Growing 'pluralisation' of oversight bodies and ombudsman as complementary institution
- Declining ombudsman academic scholarship
- Emergence of 'women power' in ombudsmanship

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…. All told

'The ombudsman is not Swede any more. The word itself has left home, like a dear child, to live a life of its own' (Hans-Gunnar Axberger, Parliamentary Ombudsman, Sweden at the Celebration of Bicentennial, 2009)

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Matters Arising?

- Every part of early 21st Century still to fully unravel
- Several unfinished business – advocacy continued
- Recognition for Chinese Control Yuan
- Unreliable performance record
- Continuing issue about binding authority
- Challenge of ombudsman multi-functional role
- Dealing with institutional competition
- Professional development
- Blossoming of the non-state sector

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Thank you for your attention

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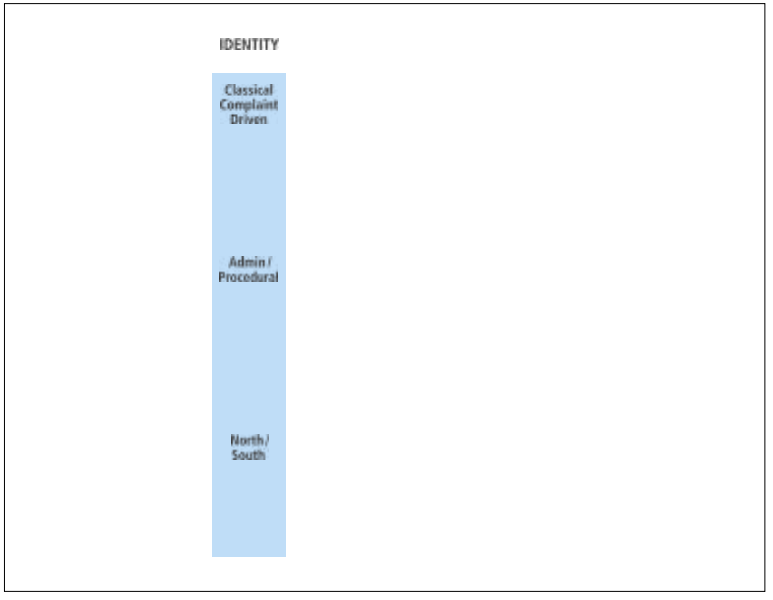
Name, Style and Categories of Ombudsman Institutions

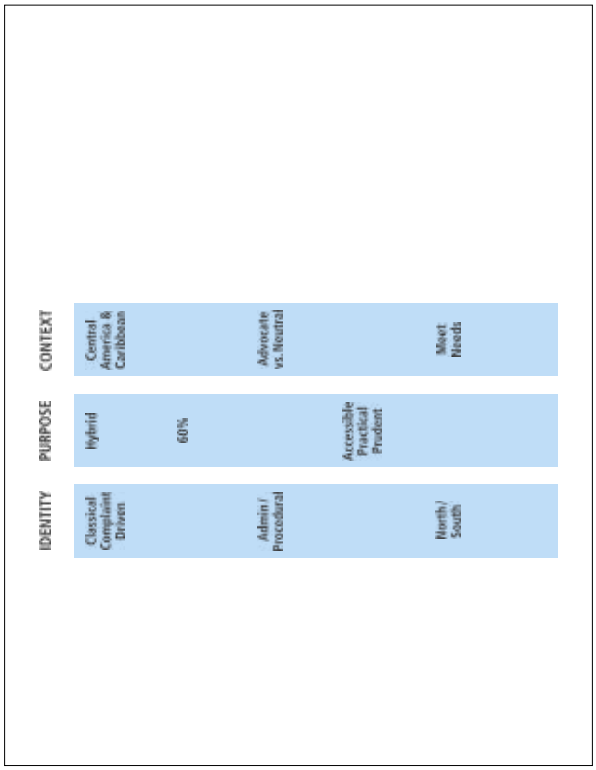
African Ombudsman & Mediators Association

Regional Colloquium
Kenya September 2013

"Weaving Together Categories of Ombudsman"

Presentation by Arlene Brock
Ombudsman for Bermuda

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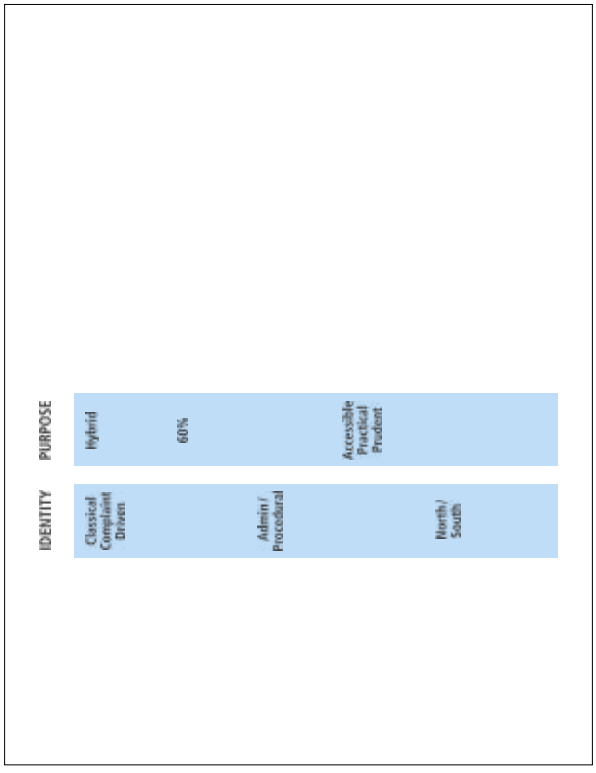
Admin / Procedural
North / South
Hybrid
60%
Accessible Practical Prudent
Central America & Caribbean
Advocate vs. Neutral
Meet Needs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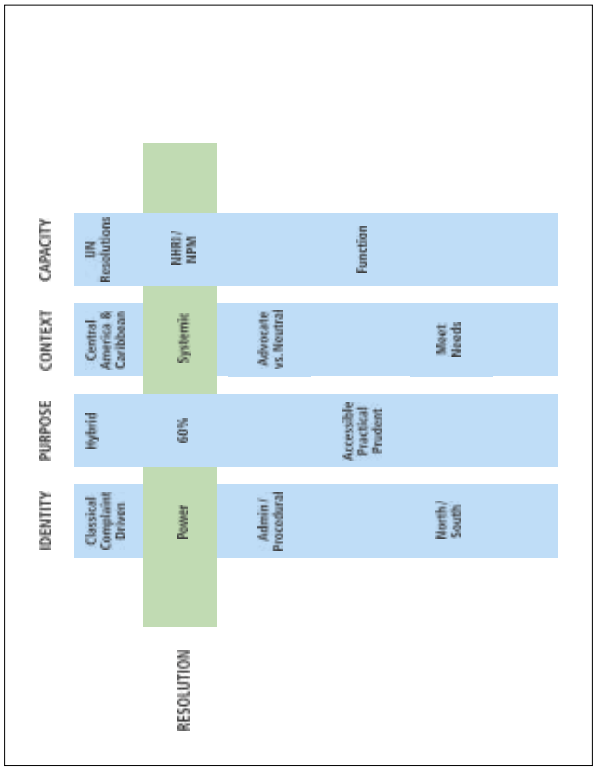
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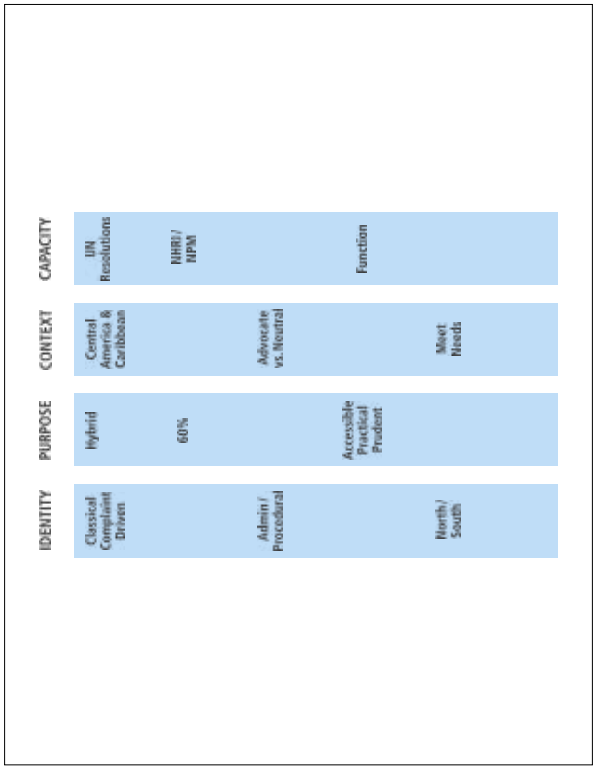
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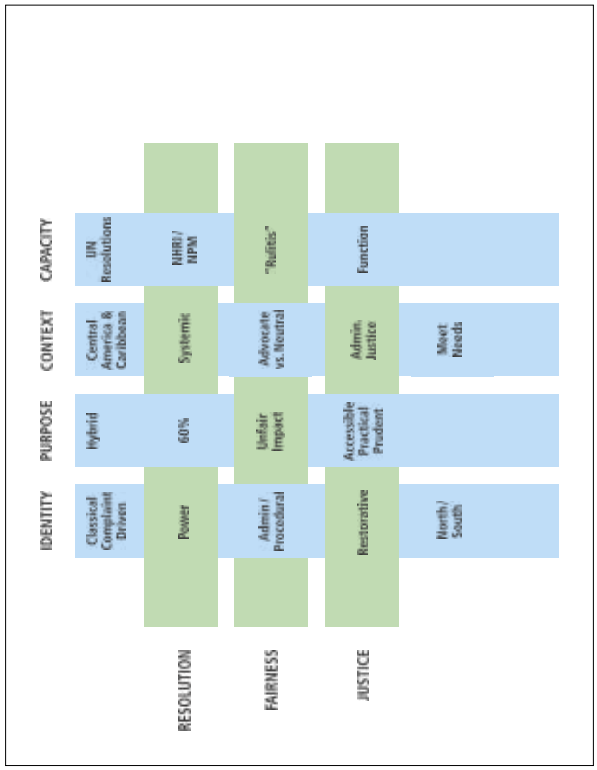
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Advocate vs. Neutral
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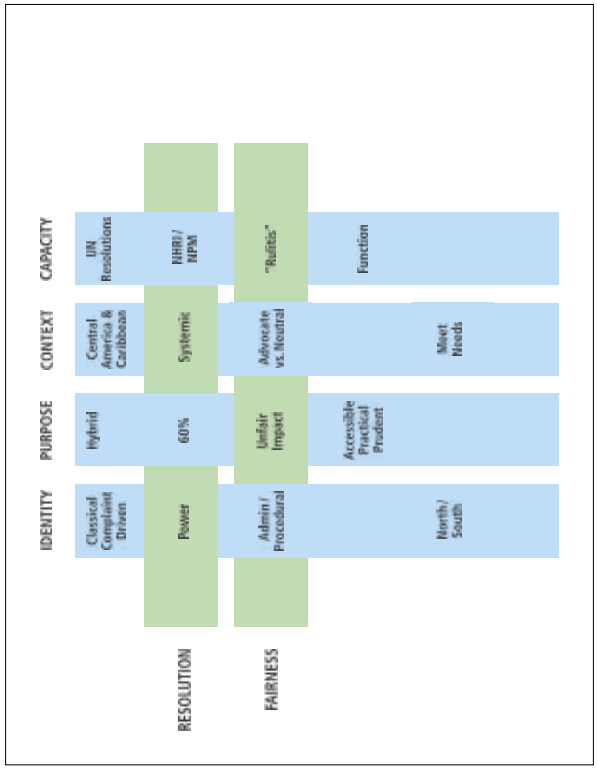
Restorative
Accessible Practical Prudent
Admin. Justice
Function
North / South
Meet Needs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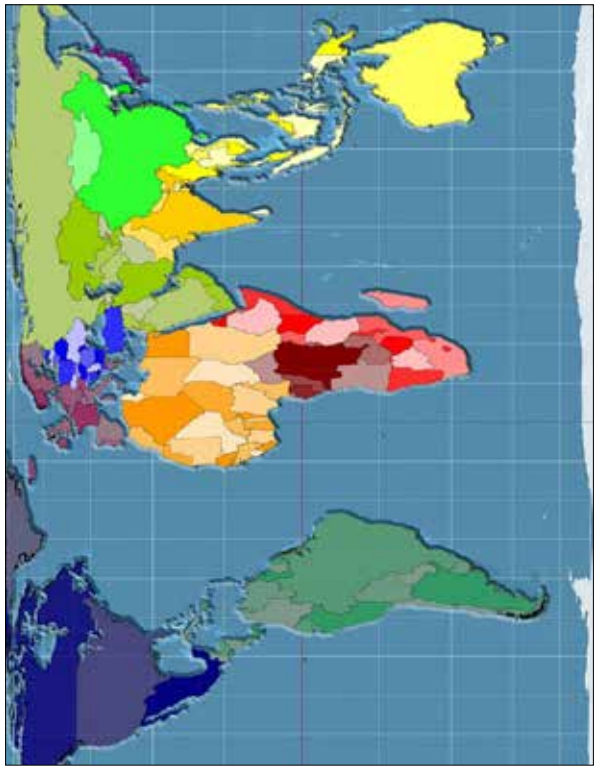
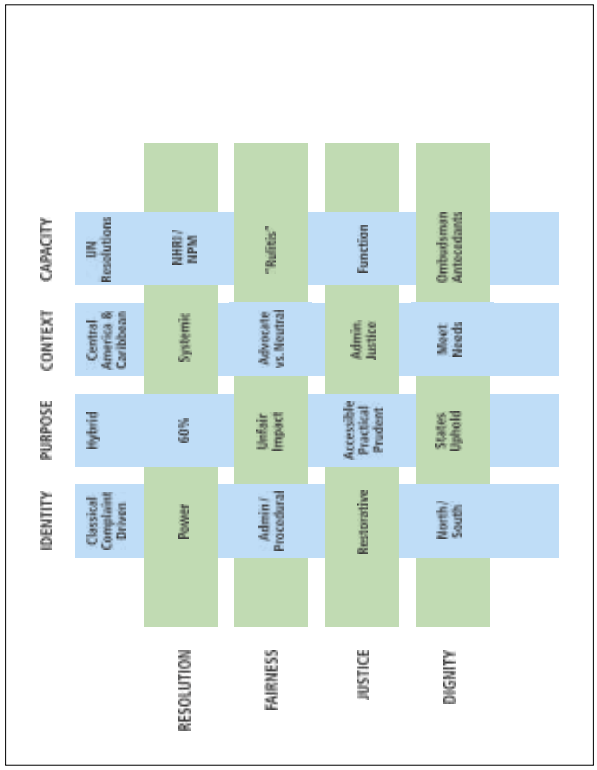
Meet Needs

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Unfair Impact
Advocate vs. Neutral
"Rulitis"
Restorative
Accessible Practical Prudent
Admin. Justice
Function
North / South
States Uphold
Mixed Needs
Ombudsman Antecedents

The African Ombudsman: Framework, Jurisdiction& Operations

Highlights of Africa's Experience

- No African ombudsman model
- Different strands and local adaptability
- All 4 main language groups represented
- Francophone and Lusophone Africa show more internal consistencies while Arab and Anglophone more diversified
- No correlation with Size (geograhic and population)
- 'Hybrid' characterisation generally no longer valid

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Highlights…. Cont'd

- Broadly Anglophone and Lusophone are: single member, no deputy offices - French-style Mediateur without 'filter'
- Arab and Anglophone are more varied, comprising:
  - Single member, no deputy
  - Single member plus 1 deputy
  - Dispersed collegial-style
  - Specialty offices more common than elsewhere
  - Fused collegial-type single or multi-purpose offices

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Highlights… Cont'd

- All told, Africa's contributions to ombudsmanship under-appreciated, re:
- Proof of flexibility and pliability to diverse regime types (Tanzania, Nigeria, Apartheid South Africa?)
- Botswana's paradox
- Tanzania pioneering experience ahead of UK
- Nigeria's model for federal systems
- Placebo effect (South Africa, military rule)
- Vibrant spread: two-third of the continent covered

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Criteria for Effectiveness

- Legal Foundation
- Name of Office
- Structure and Organisation of Office
- Stature and Immunity
- Employees and Staffing
- Qualifications for Office
- Appointment, Tenure and Removal
- Impartiality and Independence
- Visibility and Access
- Jurisdiction
- Powers of Investigation

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Criteria…. Cont'd

- Own motion powers
- Competence to make decision
- Recommendations, Remedy and Compliance
- Periodic Reporting
- Special Reports
- Penalties of breach of authority or non-c-operation
- Board of External Advisers
- Personality of ombudsman and Non-statutory practices

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So, how do African offices approach these different areas?

How have they adapted the institution to their local realities and circumstances?

What does that say about the performance and credibility of the offices?

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Final Thoughts

'Waiting for ideal conditions is rarely an option…. In an unpredictable environment, great ability doesn't always equal high performance. Unless it's matched by great adaptability' (Accenture in The Economist, 12-18 March 2005)

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Thank you for your attention

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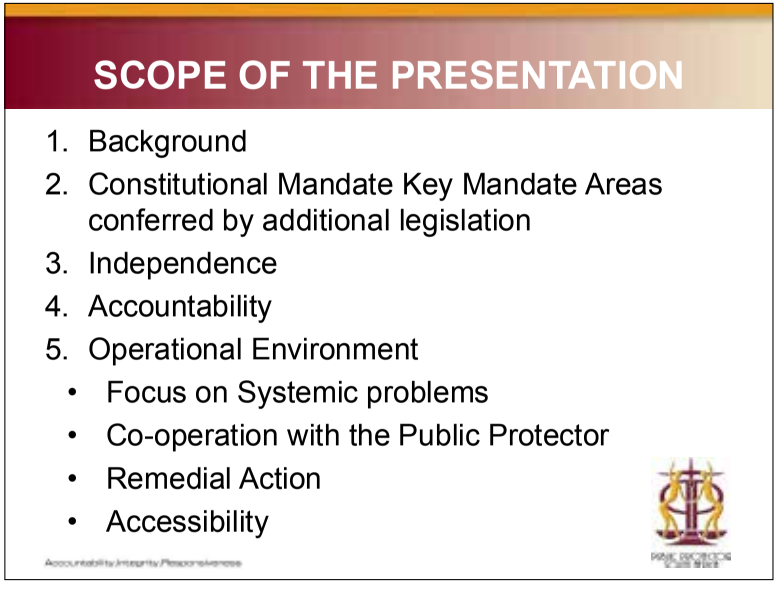
The South African Ombudsman: Jurisdiction and accountability



BACKGROUND

- When the Ombudsman was conceived and eventually established in South Africa under the name Public Protector, the vision was aimed at:

➢ providing a mechanism for swift justice for ordinary people that would assist them to exact accountability for administrative wrongs in state affairs;

➢ there was also a conscious understanding that the office would play a central role in promoting ethical governance and combating corruption

Accountability Integrity Responsiveness

CONSTITUTIONAL MANDATE

- The Public Protector is established under section 181 of the Constitution of the Republic of South Africa (the Constitution), with powers defined under section 182 of the Constitution. Section 182 provides the following:

" The Public Protector has the power, as regulated by national legislation-

(a) to investigate any conduct in state affairs, or in the public administration in any sphere of government, that is alleged or suspected to be improper or to result in any impropriety or prejudice;

(b) to report on that conduct; and

(c) to take appropriate remedial action."

Accountability Integrity Responsiveness

CONSTITUTIONAL MANDATE

- In a provision that has been interpreted as entrenching the right to access to the services of the Public Protector, section 182(4) of the Constitution provides that:
- ***"The Public Protector must be accessible to all persons and communities."***
- These words inform the office's pursuit of its constitutional mandate of strengthening constitutional democracy by investigating and redressing improper conduct in state affairs and the public administration. The essence of these words is a commitment not only to accountability but also to the rule of law.

CONSTITUTIONAL MANDATE

- The Constitution anticipates expansion of the mandate of the Public Protector through legislation, with section 182(5) stating that:
- ***"The Public Protector has additional power as regulated by legislation."***
- There are sixteen statutes that have since been passed to give effect to this provision. The statutes either recognise the inherent constitutional jurisdiction of the Public Protector or expressly accord additional power to it.
- These are summarised into 6 key mandate areas

KEY MANDATE AREASCONFERRED BY ADDITIONAL LEGISLATION

1. Maladministration mandate conferred by the Public Protector Act of 1994

- The Public Protector Act primarily casts the Public Protector's role as being that of **investigating** and **redressing maladministration**, incorporating **abuse of power**, **abuse of state resources** and **corruption**.
- The Act expands the oversight powers to include resolving administrative disputes through **Appropriate Dispute Resolution (ADR)** measures such as conciliation, mediation, negotiation and any other means deemed appropriate by the Public Protector.

Accountability/Integrity/Responsiveness

KEY MANDATE AREAS CONFERRED BY ADDITIONAL LEGISLATION

2. Executive Ethics Enforcement conferred by the Executive Members Ethics Act of 1994

- The Executive Members Ethics Act on the other hand gives the Public Protector the powers to look into the conduct of the **executive, including the cabinet members at both national and provincial level**.
- ***Enforcement of the Promotion and Combating of corrupt activities conferred by the Prevention and Combating of Corrupt Activities Act of 2004***
- The Prevention and Combating of Corrupt Activities Act recognises the inherent jurisdiction of the Public Protector as incorporating investigating allegations of **corrupt activities**.

Accountability/Integrity/Responsiveness

KEY MANDATE AREAS CONFERRED BY ADDITIONAL LEGISLATION

4. ***Enforcement of Promotion of Access to Information as conferred by the Promotion of Access to Information of 2000***

- The Promotion of Access to Information Act recognises the Public Protector as one of current information regulators responsible for resolving disputes regarding access to information within organs of state

5. ***Protection of Whistle blowers as conferred by the Protected Disclosures Act***

- The Protected Disclosures Act assigns the Public Protector and the Auditor General as safe harbours for whistle-blowers wishing to report suspected wrongdoing

Accountability/Integrity/Responsiveness

KEY MANDATE AREAS

6. ***The power to review the decisions of the Home Builders Registration Council as conferred by the Housing Consumers Protection Measures Act of 1998***

- The Housing Consumers Protection Measures Act specifically authorises the Public Protector to review decisions of the Home Builders Registration Council, a statutory body established to regulate the building industry, including the resolution of construction disputes.

- The work of the Public Protector is further informed by various laws including the Promotion of Administrative Justice Act 3 of 2000

Accountability/Integrity/Responsiveness

KEY MANDATE AREAS

- Most distinct feature of the PPSA is the fact that the **mandate is not restricted to recommendations,** as the Constitution specifically mandates the **taking of appropriate remedial action**. For this reason, the remedial action often involves tangible remedies such as money and reversal of decisions such as dismissals

- Like judges, the Public Protector may hold someone liable for contempt of the Public Protector. Section 9 of the Public Protector Act provides that
  "No person shall insult the Public Protector or the Deputy Public Protector in connection with an investigation do anything which, if the said investigation had been proceedings in a court of law, would have constituted contempt of court."

Accountability Integrity Responsiveness

KEY MANDATE AREAS CONFERRED BY ADDITIONAL LEGISLATION

- The mandate covers the entire public service and is not restricted to public servants, it includes also the President and Speaker of Parliament.

- Also includes private sector actors such as state contractors or former public servants if such actions occurred in state affairs

Accountability Integrity Responsiveness

INDEPENDENCE

- S181 of the Constitution, which has the same wording as Section 165(4) spelling out the independence of the courts, requires the Public Protector to be **independent** , **subject only to the Constitution** and the law and **impartial** and exercise his/her powers as well as perform his/her **functions without fear, favour or prejudice**.
- S 181(3) of the Constitution goes further to compel other organs of state **to assist and protect** the Public Protector and other institutions supporting democracy, to ensure the independence, impartiality, dignity and effectiveness of these institutions.
- S181(4)The Constitution further prohibits any person or organ of state **from interfering with the functioning** of the Public Protector and other institutions supporting democracy

Accountability/Integrity/Responsiveness

ACCOUNTABILITY

- Section 181(5) of the Constitution provides that the Public Protector is accountable to the **National Assembly**
- The Public Protector must report to Parliament on all activities annually and a strategic plan which covers the operational activities is also submitted annually.

Accountability/Integrity/Responsiveness

ACCOUNTABILITY

- The Public Protector produces reports which are submitted to the National Assembly and may contain findings and remedial action aimed at correcting specific administrative wrongs or improper conduct of the state.
- Reports may be submitted to the National Assembly on the finding of a particular investigation if -
  - PP deems it necessary or in the public interest;
  - It requires the attention of or intervention by the National Assembly;
  - PP is requested to do so by the Speaker of the National Assembly; or Chairperson of the National Council of Provinces

Accountability Integrity Responsiveness

OPERATIONAL ENVIRONMENT: FOCUS ON SYSTEMIC PROBLEMS

- PPSA is currently experiencing a high level of confidence and trust from members of the Public. Over the past 2 years the complaints investigated by the Public Protector has increased by over 30%
- The success of the Public Protector to a very large degree depends on her ability to gain and retain the confidence of the complainants, which is clearly a part of the whole idea of an Ombudsman office.
- On the other hand, great success might lead to more cases being lodged and the risk of a loss of confidence that threatens the Public Protector's operations if it turns out that the institution is not able to process and complete the incoming cases swiftly and effectively

Accountability Integrity Responsiveness

OPERATIONAL ENVIRONMENT: FOCUS ON SYSTEMIC PROBLEMS

- Public Protector *has adopted the approach of* countries such as Denmark in an attempt to deal with the increasing complaints;
- Instead of taking up individual cases for investigation on his own initiative, Public Protector has from time to time decided to take up a whole sector for investigation (on own initiative).
- Current Systemic interventions on own initiative include:
  - Investigation into systemic deficiencies in the Government's Subsidised Housing Programme.
  - Investigation into systemic deficiencies on the provision of Health services

Accountability Integrity Responsiveness

OPERATIONAL ENVIRONMENT: FOCUS ON SYSTEMIC PROBLEMS

- Whilst these investigations are much more resource intensive than individual complaints, the outcome of an investigation **can resolve the problems** affecting an agency and also **address systemic challenges** and consequently save agencies financial resources that can be better used to deliver government programmes.
- Furthermore by addressing the systemic deficiencies, the the number of individual complaints can be reduced

Accountability Integrity Responsiveness

OPERATIONAL ENVIRONMENT: CO-OPERATION BY ORGANS OF STATE

- The levels of awareness of the role and functions of the Public Protector and the profile of the Public Protector amongst government institutions and public bodies has increased significantly over the last years,

- Some of the challenges that PP experience relate to the fact that State Institutions –
  - Do not show willingness to take responsibility for findings of maladministration and to reverse the consequences as indicated in the remedial action;
  - Try their best to provide justification and use experts and legal advisors, to avoid compliance with the findings and remedial action of the Public Protector.
  - Confuse lawfulness and fairness. Fairness involves considering both legal and non-legal issues
  - Do not live up to the principles and values contained in Constitution and the ethical principles for public sector agencies (*Batho Pele principles)*

THE PUBLIC PROTECTOR'S DIRECTIVES FOR REMEDIAL ACTION

- One of the distinct features of the mandate of the Public Protector is that the mandate of the Public Protector **is not restricted to recommendations,** but the Constitution specifically mandates the **taking of appropriate remedial action**.

- For this reason, the remedial action often involves tangible remedies such as money and reversal of decisions such as dismissals

THE PUBLIC PROTECTOR'S DIRECTIVES FOR REMEDIAL ACTION

- *"**Appropriate remedial action**"* has been further defined by the provisions of the Public Protector Act that provides in that:

  "Public Protector shall be competent, at a time prior to, during or after an investigation, if he or she deems it advisable, to refer any matter which has a bearing on an investigation, to the appropriate public body or authority affected by it or to make an appropriate recommendation ***regarding the redress of the prejudice resulting there from or to make any other appropriate recommendation he or she deems expedient to the affected body or authority***.

THE PUBLIC PROTECTOR'S FINDINGS AND DIRECTIVES FOR REMEDIAL ACTION

Compliance with remedial action is supported through:

- The issuing and discussion of provisional reports before a final report is issued;
- Specifying time lines for each compliance action in each report and requiring action plans for compliance action;
- Public release of virtually all reports using a media conference;
- Follow up communication with "red carded" institutions, including summoning those that are not cooperative to offer explanations;

THE PUBLIC PROTECTOR'S FINDINGS AND DIRECTIVES FOR REMEDIAL ACTION

Compliance with remedial action is supported through:

- Taking advantage of media dialogue on compliance deadlines and other compliance requirements following the public release of a report;
- Requesting a Parliamentary debate *e.g. Recent Investigation against the Independent Electoral Commission* ;
- On-going stakeholder dialogues on a bilateral basis and an omnibus process that takes place annually and includes focussed dialogue with:
  - Cabinet,
  - Members of the various Provincial Legislatures and
  - Senior Government officials

Accountability Integrity Responsiveness

ACCESSIBILITY

- Section 182(4) of the Constitution specifically requires that the Public Protector **must** be accessible to all persons and communities.
- Public Protector serves over 50 million members of the public and the size, function and location of the organs of state and public institutions falling within the oversight of the Public Protector makes it impossible for the Public Protector to provide the service required in terms of her Constitutional mandate remotely at limited centralised locations
- PPSA has 20 offices mainly located at the main cities and about 400 staff members

Accountability Integrity Responsiveness

ACCESSIBILITY

- The Public Protector has been innovative in fulfilling her constitutional mandate to be accessible to all communities.
- Some of the key programmes include the following:
  - Visiting points that are serviced monthly to obtain complaints and give feedback on existing complaints;
  - Mobile Office of the Public Protector;
  - Collaboration with other state agencies such as the Post office and utilising them as a drop-off point for new complaints;
  - Using both print and electronic media to raise awareness about the Public Protector;

ACCESSIBILITY

- Recently the Public Protector commissioned a study with a view to ascertaining the levels of awareness, access, trust, confidence and faith in the Public Protector among members of the public and stakeholders.
- With a sample of nearly a thousand people coming from different Public Protector stakeholder groupings and detailed demographics as spread across the country, the survey was conducted by the University of Pretoria's Business Enterprise and it's Department of Psychology

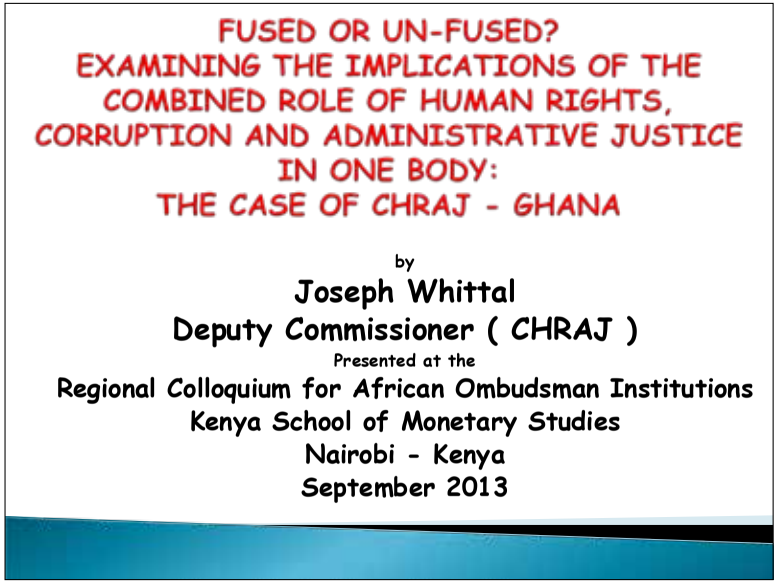
ACCESSIBILITY

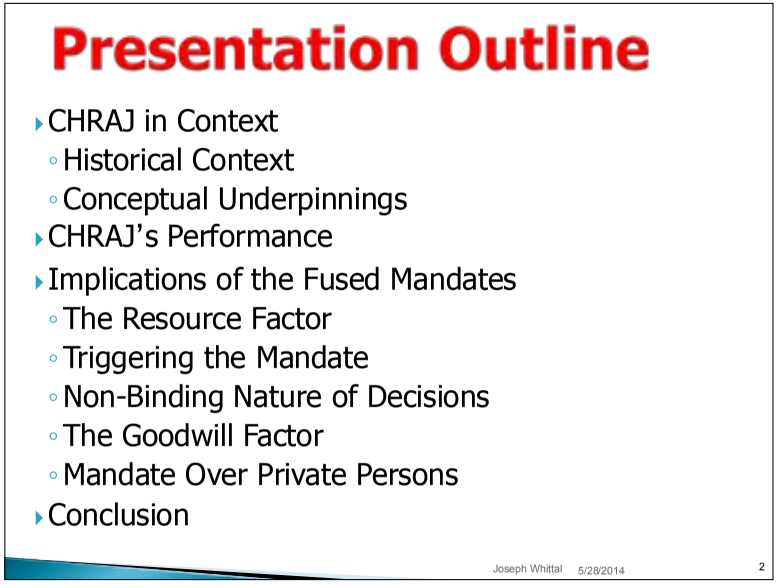
Among other things, the survey revealed the following:

- Across the board, levels of awareness of the PP stand at 77%;
- 80% were aware that the PP exists to promote good governance
- 79% were aware that the PP fights corruption and misconduct in state affairs;
- 78% were aware that the PP helps protect people's rights against the state;
- 78% said that the Public Protector existed to promote accountability in government;
- 79% said the PP has integrity,
- 79% said the PPSA is professional,
- 77% said PPSA IS accountable, 75% said it is fair, 74% said it is transparent and a further 76 percent said it is trustworthy;
- 76% percent have confidence in the Public Protector;
- 76% said the office lives up to its vision and mission statements respectively while 73% said it lives up to its service promise
- **63% of the sampled persons were satisfied with the manner in which their complaints were handled;**

THANK YOU

Fused or Un-fused?
Examining the Implications of the Combined Role of Human Rights, Corruption and Administrative Justice in One Body





CHRAJ IN CONTEXT - Historical Context

- The establishment of CHRAJ in 1993 is the first time in the constitutional history of Ghana that an oversight Institution combines the functions of 3 distinct institutions: a human rights institution; an ombudsman and an anti-corruption agency.
- In terms of its constitutional evolution, the origins of CHRAJ could be traced to the Office of the Ombudsman under Ghana's 1969 Constitution.
  - The Administrative State of independent Ghana was not any different from post World War II trends in the growth of the Welfare State and the attendant proliferation of administrative agencies.
  - Ghana's newly independent Government under President Nkrumah for instance, committed itself to a State-led modernization through industrialization.
  - This was achieved principally by means of the establishment of many State-owned enterprises

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CHRAJ IN CONTEXT - Historical Context

- The logical consequence of Nkrumah's rapid industrialization through State enterprises was the expansion of government and the corresponding powers of the administrative State.
- The exercise of these increased powers and the interactions between Ghanaians and the administrate State would logically lead to complaints of injustice, unreasonable delay in services, arbitrariness, abuse of discretion, maladministration, inefficiency, and corruption and misappropriation of moneys by officials of the administration.
- The aftermath of the overthrow of Nkrumah in 1966, for instance, witnessed the setting up of many Commissions of Inquiry and similar investigative committees to probe into the operations of the administration for – corruption and maladministration.
  - E.g. The Expediting Committee under the National Liberation Council (Expediting Committee) (Appointment) Decree, 1966 (N.L.C.D. 99) to perform ombudsman-like functions.

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CHRAJ IN CONTEXT - Historical Context

- When Ghana returned to constitutional rule in 1969, the people decided to adopt (under the 1969 Constitution), a number of accountability mechanisms in addition to the conventional Montesquieun tripartite model of separation of powers.
- One of these accountability mechanisms was the provision to set up a classical Ombudsman to, among others, receive and investigate complaints about injustice and maladministration against government agencies and officials from aggrieved persons. [2nd Republican Constitution (1969), Article 112].
- An Act was passed by Parliament for the establishment of the Ombudsman but no one was appointed to the office before the coup d'état overthrowing the 2nd Republican Constitutional Government.

CHRAJ IN CONTEXT - Historical Context

- The 1979 Constitution re-enacted essentially the same provision of the 1969 Constitution on the Ombudsman.
- The Office was setup and appointment was made under the Ombudsman Act of 1980.
- It was one of the few institutions from the 1979 Constitution that was retained when the military regime led by Jerry John Rawlings took over government in 1981.

- The establishment of CHRAJ was as a result of the weaknesses of the institutional model of this Ombudsman .
  - The Ombudsman was criticised throughout its tenure as an irrelevant institution and a toothless bulldog.
  - Human rights abuses and maladministration persisted in spite of the existence of the Ombudsman.

CHRAJ IN CONTEXT – Conceptual Underpinnings

- The framers of the 1992 Constitution envisaged CHRAJ as an independent Constititutional body with tenured office for its members and a strong human rights and ombudsman mandates to address the weaknesses of its predecessor.
- The fusion of the human rights and ombudsman mandates into CHRAJ as one institution makes sense and accords with the constitutional architecture adopted for 1992 Constitution.
  - Entitlement to administrative justice ceases to be a simple common law principle under the Constitution.
  - The Constitution uniquely elevates the concept of administrative justice to a constitutional right and makes it one of the fundamental human rights. (Article 23).
  - The right entails the duties constitutionally imposed on public institutions and public officials to act fairly and reasonably and to comply with the requirements imposed on them by law. (*Awuni v. West African Examinations Council* [2004] SCGRL 471.

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CHRAJ IN CONTEXT – Conceptual Underpinnings

- Arguably, the human rights and ombudsman mandates of CHRAJ are inseparable because of the provision of article 23 of the Ghanaian Constitution and its elevation of the concept of administrative justice into a fundamental human right.
- This inseparability of the human rights and ombudsman functions of CHRAJ in Ghana seems to accord with reason and financial prudence because unfair administrative practices, decisions and actions by public officials would invariably lead to violations of the fundamental rights and freedoms that the CHRAJ and the courts have been charged to protect and promote.
  - In practice, it is very common for complaints of administrative injustice against public agencies and officials to also have human rights implications.
  - Besides investigative and conflict resolution devices in relation to both mandates are essentially the same.
    - Mediation – Negotiation – Reliance on soft and persuasive

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CHRAJ IN CONTEXT – Conceptual Underpinnings

- The more debatable issue is the third aspect of CHRAJ three-prong mandate – the anti-corruption mandate.
  - Corruption is criminal in nature.
  - Not surprisingly, it has been strongly argued that the separation of the anti-corruption mandate of CHRAJ into a different and independent anti-corruption body with strong prosecutorial powers and powers of arrest would be a much more effective enforcement and deterrent institutional anti-corruption device.
- As with other Ombudsmen with anti-corruption mandates, however, CHRAJ's anti-corruption mandate is a recognition of the complexity of corruption as a developmental issue and the need for a multiplicity of mechanisms to fight it.
  - CHRAJ as an institutional anti-corruption device may lack prosecutorial powers and powers of arrest but provides a very effective administrative mechanism to maintain the highest standards of integrity in the administrative machinery of State.

CHRAJ IN CONTEXT – Conceptual Underpinnings

- CHRAJ is, accordingly, a constitutional device to serve as one-stop shop address to all wrongs relating to the conduct of public officers: human rights violation in the exercise of official duties, maladministration and lack of transparency and integrity in the public sector.
- CHRAJ, therefore, serve to provide the means by which ordinary persons in Ghana could exact legal and constitutional accountability, administrative accountability, and financial accountability and transparency from public officers and agencies
- There are good reasons why some countries may choose to fuse the ombudsman and anti-corruption mandates in one body.
  - Very often, "Ombudsmen come upon instances of corruption in the course of their investigations into administrative malpractices" (Charles Maino Aoae - Chief Ombudsman, Papua New, 1988)
    - This is very true of the Ghanaian case – complaints of maladministration and abuse of power are very interrelated

CHRAJ IN CONTEXT – Conceptual Underpinnings

- The high profile status and independence of Ombudsmen is potentially better able to resist improper pressure from the executive than other bodies especially under the Executive and is thus better equipped to undertake meaningful investigations. (John Hatchard, 1992).
  - The prestige and reputation for objectivity make Ombudsmen the obvious point of contact for the reporting of wrongdoing by government officials. (John Hatchard, 1992).
  - CHRAJ in this regard has been previously described as the "conscience of the nation" and "most trusted institution" (Geoffrey Cameron, 2008).

CHRAJ's Performance

- The more critical question is whether CHRAJ has been able to live up to its fused and multiple tasks.
  - With all its minuses, the answer is **YES**.
- Few highlights:
  - Investigations involving key officials and institutions including a sitting President, Ministers of State, and Members of Parliament for breaches of code of conduct, corruption and misappropriation of public funds
  - Proactive approach to exercising its multiple functions e.g
    - Human rights education nation-wide and the issuance of annual state of human rights reports.
    - Training on principles of good administration to public services to improve service delivery in the administrative State – assisting institutions to develop service charters.
    - Facilitating the development of National Anti-Corruption and Human Rights Action Plans as major pillars to drive good governance in these thematic areas
    - Conflict of Interest Guidelines and Code of Conduct for Public

CHRAJ's Performance

- Geoffrey Cameron's description of how the CHRAJ exercises its mandate best captures the relevance of the Commission to governance in Ghana.
- Cameron argues that CHRAJ exercises political accountability through its participation in the public sphere in the following terms.
  - Social actors, such as NGOs and the media, research an issue and introduce it to the public to demand answerability from the state.
  - The issue is investigated and framed as an abuse of authority by the state using the language of human rights or corruption.
  - A coalition of social actors forms to publicly advocate on the issue through the use of media, litigation and/or isolated protest.
  - The State provides a limited and unsatisfactory response to the concerns publicized by the coalition.

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CHRAJ's Performance

- Failing to obtain a satisfactory outcome from the available channels of the media, the matter is presented to the Commission with supporting evidence to request a formal investigation.
- Following the formal complaint, the Commission carries out a public investigation into the matter.
- In the course of investigations or hearings, public answerability is required from government officials in response to the complaints leveled by social actors.
- Relevant stakeholders, including government representatives, may be subpoenaed for hearings or interviewed, and developments in the case are publicized in the media.
- The Commission releases a report, which compiles observations from the testimonies received and documents submitted, and issues recommendations, often to the State, for reforms or reprisals.

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CHRAJ's Performance

- The report serves to validate or dismiss the allegations of social actors.
- Where the allegations are validated, the CHRAJ findings enjoy a high level of legitimacy and credibility.
- Public pressure on the State is amplified in response to the Commission's findings, and civil society is mobilized to demand accountability.
- The coalition of social actors is featured in media reports lauding the findings of the Commission, echoing their calls for reform and calling for the rapid enforcement of their decisions.

[Geoffrey Cameron, 2008]

- When the Commission takes the lead on an issue, public opinion surges in that direction and government is forced to respond to criticisms that emerge in the course of the investigation. [Geoffrey Cameron, 2008]

CHRAJ's Performance

- In this regard, it is fair to say that CHRAJ has gained pre-eminence on issues of good governance in Ghana.
- This has been achieved through firm leadership and bold stance on human rights, administrative justice and anti-corruption.
- This is highlighted by current situation in Ghana, where the country's development partners through the Multi Donor Budget Support (MDBS)mechanism have conditioned the release of budgetary support on certain targets and/or triggers being met including in recent years the development of NACAP; systemic investigations into corruption prone public agencies etc

IMPLICATIONS OF THE FUSED MANDATES – the Resource Factor

- CHRAJ is obviously 3 institutions combined into one body.
- It is, however, funded as if it were one institution.
- This has serious implications for the efficient exercise of its mandates.
- For instance, CHRAJ is currently unable to complete its systemic investigations of a number of public institutions because of lack of funds; freezing the release of budgetary support by donor partners.
- The argument has, therefore, been strongly made that the separation of CHRAJ into at lease two separate institutions – one to combine the human rights and ombudsman mandates and the other for anti-corruption – will ensure that both institutions are adequately funded.
- The recommendation of the Constitution Review Commission is to set up a Democracy fund to cater for all the constitutional independent institutions. Government white paper has accepted it

IMPLICATIONS OF THE FUSED MANDATES – Triggering the Mandate

- The fused human rights, ombudsman, and anti-corruption mandates of CHRAJ imply different means of triggering the investigation machinery of the Commission.
- Ghana's Supreme Court has interpreted Constitution to the effect that CHRAJ cannot initiate investigations into allegations of abuse of office, conflict of interest by public officers, and human rights violations unless a formal complaint has been lodged with the Commission by a specific person. [*The Republic v. Fast Track High Court Ex Parte Commission on Human Rights and Administrative Justice, Dr. Richard Anane (Interested Party)* [2007-08] SCGLR 213.]
- The effect of this decision is that CHRAJ cannot investigate human rights violations, maladministration, and conflict of interest situations on its own motion .
- Only allegations of corruption and misappropriation of public funds may be investigated by CHRAJ based on media reports.

IMPLICATIONS OF THE FUSED MANDATES – Non-Binding Nature of Decisions

- The ombudsman roots of CHRAJ also imply that its decisions/recommendations are not self- enforcing.
- In effect, CHRAJ decisions are enforced by the courts.
- Ordinarily, the courts would not allow the subject-matter of CHRAJ decisions to be re-opened or re-litigated. (*Ghana Commercial Bank v. CHRAJ [2003-2004] SCGLR 91*)
- The Constitution Review Commission (CRC) has recommended that CHRAJ decisions should simply be registered in the courts and be directly enforced as decisions of the relevant court.
- When the CRC's recommendations are implemented, CHRAJ's investigations and decisions may only be challenged by way of judicial review. In addition there will no longer be the requirement for any complaint to trigger any of the mandates. Own motion investigation in all mandates to be allowed

IMPLICATIONS OF THE FUSED MANDATES – The Goodwill Factor

- Closely related to the non-binding nature of its decisions is the reliance by CHRAJ on the goodwill of the people to garner public support for its decisions.
  - On the CHRAJ's *Corruption Probe 1995: Obeng, Osei-Owusu, Adam, and Adjei-Maafo* (all key government officials) for instance Cameron wrote:
    - The findings of the CHRAJ generated a surge of public pressure on the ministers to resign, and despite the counter-pressure of the government white paper, they were forced to leave office.
  - *Goodwill, however, can wane if CHRAJ does not maintain the strong leadership and standards it set in its formative years. [Geoffrey Cameron, 2008]*

IMPLICATIONS OF THE FUSED MANDATES – The Goodwill Factor

- A classical public service ombudsman with no additional human rights and anti-corruption functions may not investigate private persons and enterprises
- The fused mandates of CHRAJ extends the scope of CHRAJ investigating powers to private persons and enterprises or companies in as far as the injustices can be couched in terms of human rights violations
- CHRAJ anti-corruption mandate also covers situations in which an individual, entity and/or person though not a "public official" is alleged to be involved or implicated in an act or alleged bribery or corruption involving public officials and which is under investigation by the Commission. (*CHRAJ v. Attorney-General and Baba Kamara*, Unreported decision of the Supreme Court, April 6, 2011, Suit No. J1/3/2010).
- This is very significant in the light of privatization of many public institutions and PPP in Ghana

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IMPLICATIONS OF THE FUSED MANDATES – Mandate over Private Persons

- As has been the case in virtually all corruption cases investigated by CHRAJ, public goodwill has not been enough to trigger prosecution of persons against whom adverse findings have been made.
- It is also not clear whether the findings of CHRAJ decisions can form the dossier evidence on which the Attorney-General may mount prosecution or whether the Attorney-General must build her own dossier of evidence for prosecution. [*The Republic v. Charles Wereko- Brobbey and Kwadwo Okyere Mpiani* (*Ghana @ 50*), Unreported Decision of the High Court, Suit No. ACC 39/2010, August 10, 2010]gggg
- What is clear however is that on code of conduct of public officers, specifically conflict of interest and contravention or non-compliance of assets declarations the Supreme Court has declared that it is only the CHRAJ that can investigate and take appropriate action

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Conclusion

- The decision to fuse or to adopt an Ombudsman mechanism combining different mandates or to "unfuse" by having separate entities for each mandate is one that can only be taken having regards to the unique conditions in each country. There is no "one-size fits all"
- The overriding consideration should be whether the vehicle adopted- fused or unfused is **relevant** in the delivery of good governance to the people and can justify value for money
- In the case of Ghana's CHRAJ the fused institutional model after 20 years in operation has scored more on the positive side. The people have endorsed through the Constitutional review process the continuation of the fused mandate while accepting to tighten the weaknesses identified so far.

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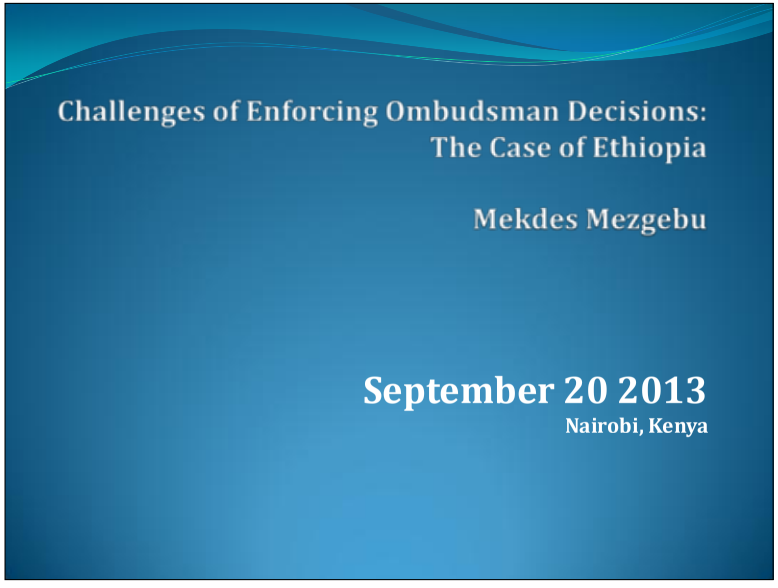
- Geoffrey Cameron, *National Human Rights and Government Accountability: A Comparative Study of Ghana and Nigeria*, an MPhil thesis submitted to the Department of Politics and the International Relations, University of Oxford (April 2008)
- John Hatchard (Chief Ombudsman, Papua New Guinea), *Developing Governmental Accountability: the Role of the Ombudsman*, 1992 Third World Legal Stud. 215, 1992.

The Challenge of Enforcing Ombudsman Decisions, Ethiopia



Ethiopia

- Ancient Civilization
- Close to 85 million people (2nd most populated country). One in every four African, is either a Nigerian or an Ethiopian. (account for 25%)
- Diverse (ethnicity, religion, class, gender)
- Absolute monarchy until 1974
- State Socialism – 1991
- Democratic Transition – 4 years and then a constitution

New Constitution

- New Constitution in Ethiopia – 1995
- Introduction democracy, Separation of Powers, Protection and promotion of Human rights.
- State restructuring – Federalism and regional autonomy introduced
- Sought the establishment of Human Rights Commission and the Ombudsman, via parliament. (Art. 55)
- Government Policy – from mixed economy to a 'developmental democratic state'.
- The role of government has significantly increased.

The Institution of the Ombudsman

- Enabling law was enacted in 2001, federal Ombudsman established
- First Ombudsman appointed in 2005, and formal operations began in 2006.
- Parliamentary Ombudsman, appointed and accountable to Federal Parliament.
- Now three women Ombudsman at the helm of the institution
- Six offices, one in AA and five branch offices

Mandate

- Complaint Investigation and Redress (both federal and regional).
  1) Individual complaint investigations
  2) Own-Motion Investigation
  3) Systemic Investigations
- Supervision of administrative laws and decisions
- Law and Policy Reform – reform of existing laws, recommendations for new laws
- Access to Information Legislation – introduced in 2008

Scope

- The scope of jurisdiction for the Ombudsman extends to all the three branches of government. Under art 2(13)-an executive body are defined as those offices including administrative staff of the Judiciary and the legislature).
- Jurisdiction over regional administration.
- But the exceptions to the this rule are, "decisions given legislative councils, the defense and security forces and those pending before a court of law."

Enforcement Mechanisms

1) Recommendations: to the complainant the respondent agency
2) Parliamentary reporting: on annual activities and state of public administration
3) Special Reports: On agencies requiring special attention
4) Official reports: via the media

Challenges

- External and Internal

External: Gaps in legislative Regime

1) Absence of Administrative Procedure Act

   -- gives discretion for adminstrative agencies on rule and decision making. Exposes agencies for lack of uniform system, and abuse

   -- creates challenges for the Ombudsman in complaint investigation due to lack of substantiated standards of good governance.

Challenges – Cont.

2) Gaps in Legislation

- No clear enforcement mechanism specified in the law, not least a provision strictly calling for enforcement
- Soft powers of persuasion – which oftentimes is problematic
- 'Duty to cooperate" only during investigation and not enforcement.;
- Failing cooperation, criminal prosecution via the MoJ

Challenges – Cont.

3) Federalism and Regional Autonomy

-- Federal Ombudsman allowed to work in the regions.

-- Anti-corruption Commission with different model

-- State administrative agencies question the legitimacy of ombudsman investigation and recommendations

-- Study was conducted in 2011. Called for amendment of the law.

-- Two schools of thoughts for and against federal Ombudsman.

Challenges

- Internal

Issues of Capacity

-- No clear strategy at the ombudsman for enforcing decisions

-- Weak Capacity to issue quality recommendations)egs. Land issues)

-- Low public awareness

-- Weak cooperation among stakeholders

Opportunities

- Constitutional foundation
- Recognition by the Ombudsman as challenges that need to be addressed immediately. (eg., draft APA, draft amendment to the legislation)
- Promising political will and long term commitment to good governance (as pre-condition to development)
- Good donor interest for capacity building.

Ombudsman, Court and Common Law

OMBUDSMAN, COURTS AND THE COMMON LAW

By Mr. Otiende Amollo, Chairperson of the Commission on Administrative Justice

A Presentation to the Colloquium of African Ombudsman under the theme 'Repositioning the Ombudsman: Challenges and Prospects for African Ombudsman

Held in Nairobi – Kenya

19th – 20th September 2013

1. Early Development

- The Swedish Ombudsman, 1809
- The spread of the office
  - Finland- 1919
  - Norway- 1952
  - New Zealand, the 1st Commonwealth Country to adopt, 1962
- Powers & ***Modus Operandi***
- The irony: Role over Courts

2. Functioning of the Ombudsman

- ''Moralsuation''
- Parliamentary Reporting
- Shortcomings
  - not effective in Africa
  - Impracticable for parliament to enforce decisions
  - politicization of Ombudsman decisions.

3. The "New" Ombudsman

- Constitutional, Statutory or by Executive Decree
  - Placement
  - Realization
- Maladministration redefined
- Natural justice norms
- Multiple competencies
  - Human rights
  - Anti-Corruption
  - Access to information
  - Kenya, Tanzania, Zambia, Lesotho, Ghana &Rwanda

4. Ombudsman & the Courts

- Complementarity
- Advantages over Courts
  - Cost and Costs
  - Expeditious
  - Inquisitorial
  - Range of remedies
  - On systemic investigation
- **Future of the Ombudsman**

cont

- Enabling Investigations.
  - Summonses
  - Obtaining information & document obstructing or misleading
  - Prosecution on default
- Adjudicatory
  - Beyond Recommendations: instances
  - The Chinese wall
- Administrative malfeasance by Courts
- Advisories
- *Suo motu* jurisdiction.

5. Judicial Review and the Ombudsman

- The rise of Judicial Review (wade)
- Basis of amenability to J.R.
  - Constitutions (statutes)
  - Rationale
- The limits of Court intervention
  - The Principles
  - Insulation from liability for acts

6. Enforcing Ombudsman Determinations

- Beyond moralsuation: the African experiences
- By aggrieved party
- By ombudsman – adoption
- Defiance as "contempt of Ombudsman"
- Through parliamentary accountability
- An embedded Judicial "Registrar"?
- As an act of "obstruction" – Prosecution

Cont.

- Alternative Pressure
  - Performance contracting
  - Register of unresponsive Officers
  - Name & shame list
  - Ineligibility to hold public office

7. Conclusion

- Ombudsman & Court necessary & compliment each other
- Ombudsman jurisdiction yet to be fully appreciated
- Ideal to have stand alone Ombudsman
- All must educate the public & governments as well.

The Evolving Ombudsman: Emerging Frontiers

The Case of Bermuda

African Ombudsman & Mediators Association

Regional Colloquium
Kenya September 2013

"The Evolving Ombudsman:
The Case of Bermuda"

Presentation by Arlene Brock
Ombudsman for Bermuda

Department cut down a tree on private property without consent at the request of a neighbor (who believed that the tree was unstable after a branch had fallen).

Law allows Department to

- inspect properties without contacting owners (a courtesy rather than a requirement)
- cut down potentially hazardous trees if owners do not comply with orders to do so.

Ombudsman found

- inadequate communication with the property owner
- lack of processes to deal with seniors with dementia

Toronto

Complainant aggrieved because she had been waiting for years for repairs and refurbishment works to be carried out in her Government rented apartment

- 1st complaint – Department agreed to fix problems
- 2nd complaint – one year later repairs still outstanding

She explained that due to neglect and disrepair that the apartment was in she wanted to be moved

- It took more than a year for the Department to relocate her.

Gibraltar

The Ombudsman found procedural errors and delay in the Commission's handling of a complaint of sexual harassment.

Result: complaint was time-barred from prosecution in court

As there was no remedy to restore Complainant's legal rights, Ombudsman recommended

- "without prejudice apology" and
- an "ex-gratia payment" for the frustration.

Bermuda

Complainant obtained a court Judgment against a debtor. She requested that the debt order be served on the bank at a specific date in order to freeze debtor's account on the 1st of the month when funds are most likely to be available.

- Court argued it cannot control date an account is frozen.

The Ombudsman found

- Court does control the date that debt orders are served
- could have done so at the time requested by Complainant
- If not possible, Court should have
  - notified complainant
  - advised her to serve 3rd party debt order on bank herself.

United Kingdom

QUICK FACTS

- 20 square miles
- In the middle of the Atlantic Ocean
- 2 hours by air southeast of New York
- Strategic hub for transatlantic shipping and aviation
- Economic hub for reinsurance, trust and investment services

BERMUDA

- 1609 settled by English Adventurers that were shipwrecked
- No native population
- Today: population of 67,000 (8,000 work permits)
- Approximately 60% black and 40% white
- There is a enduring legacy of slavery and racism
- Maritime, not plantation based slavery

OMBUDSMAN'S OFFICE

- Established by a 2001 amendment to the Constitution of 1968
- The Ombudsman Act 2004
- Office opened September 2005
- First Ombudsman; 8 year term
- Report annually to Legislature
- Audited independently by Auditor General
- Constitution: Ombudsman not under the control or direction of any other person

INDEPENDENCE OF OPERATIONS

- Budget Control
  - Cabinet: "For Information" (not Discussion or Approval)
  - Prudent
- Office Hours
  - 9am – 5:30 pm
- Single Term of 8 years
  - Beyond election cycle
- Direct outreach to public
  - Brochure
  - Periodic presentations
  - Facebook Page
- Civil Service outreach
  - Orientations
  - Presentations
  - Complaints handling course

FEATURES OF SMALL JURISDICTIONS

- Complaints can be made by:
  - Telephone
  - Email
  - In person
- See each complaint personally
- Interlocking relationships
  - High tolerance for bad behaviors
- Without fear or favour
  - Occupational hazard

PRINCIPALS

1. We always say 'yes' before we say 'no'
2. Prioritize and expedite seniors, children and vulnerable persons
3. Due diligence and due process
4. Practice empathy; try to put ourselves in the shoes of the complainants and the authorities

INVESTIGATIONS

- Between 200-250 complaints annually
- 25-40% are declined or referred
- Mediate about 25% of complaints
- Full power of investigation: summons; enter premises
- Contempt of court

TENANT IN PUBLIC HOUSING

- A storm ripped of 1/3 of her roof
- Relocated to a difficult neighborhood
- 2nd place was decrepit, outlets did not work; leaks
- Complained; stopped paying
- Branded her as delinquent; "removed herself" from the tenant application list
- Not rehoused in her renovated unit; one year later

RESPONSE OF AUTHORITY

- Refused to give us information
- Challenged jurisdiction
- Insurance company had actually indemnified and paid
- I recommended that:
  - Repaid the rent
  - Creditable apology
  - Restored to and prioritized on the tenant application list
- One of other tenants moved out, was given keys
- UK case exactly on point
  - Ombudsman can get information
  - People in modest housing no means to pursue judicial remedies

TRADESMAN

- Almost a year to collect $54,000
- Quick fix / permanent fix
- One repair other request
- Payment requisitions only for original request
- Could not process the payments
- Reality-check
- Reconstruct their collective memories
  - Corroborate 70% of his bills - balance of probabilities that he was accurate about the remaining 30%
- Paid the bill in full

MEDIATION

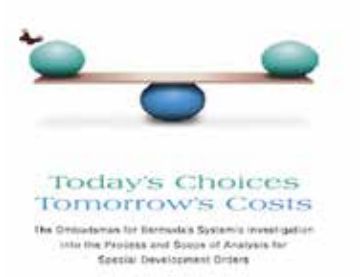
- Voluntary mediation
- Bermuda trauma patient bought back to our hospital
- Stridently anxious and hostile re: equipment, training and attitude
- Demanding, interfering, imperious and unappreciative of their efforts
- Hospital in US (role models for other families)
- Hyper-vigilant and extremely anxious typical for this population of patient
- Engages family in every aspect of daily care (use of equipment)

- No experience with this population of patient
- Bring two of the US specialist to Bermuda
- Multi-party mediation for four months

Systemic Investigation of Institutional Discrimination

REPORT KEMH HOSPITAL

- 120 interviews
- 22 illustrated examples of differential treatment of white and black doctors
- Black doctors didn't enjoy the benefit of the doubt
- Disparities by governance and competition rather than race alone
- 15 recommendations; 2 dealt with diversity 13 with governance and processes for example transparent allocations
- 13 were fully accepted



3RD SYSTEMIC INVESTIGATION SPECIAL DEVELOPMENT ORDERS

SDO

- Allowed the development on conservation protection land
- National importance
- Rejuvenate tourism and create much needed jobs
- Risk destruction of species of scientific significance
- Investigate extent of due diligence by civil service
- Not requiring an EIA
- Environmental Charter UK 2001 will require EIA; will abide by the Rio declaration
- The Government insist that the charter is merely aspirational and is not binding
- Still refuses to require an EIA for environmentally sensitive development proposals.

INTERNATIONAL NETWORK

- Bermudian married Christian missionary from South Sudan
- Murdered
- Handle her affairs needed his death certificate
- Tried for eight months to get it:
  - Church mission
  - Governor of Bermuda
  - British Embassy here in Kenya
- Colleague in Eastern Africa
- Investigations Officer attended PAI
- Befriended senior investigations officer with the Inspector General in Uganda
- Four months later received death certificate (fax)
- Widow was ecstatic/ forever grateful
- Secure passport for her daughter and get her affairs settled

OVERSIGHT
Nelson Mandela
"It was to me never reason for irritation but rather a source of comfort when these bodies were asked to adjudicate on actions of my government and Office and judged against it. One of the first judgments of our Constitutional Court, for example, found that I, as President, administratively acted in a manner they would not condone. From that judgment my government and I drew reassurance that the ordinary citizens of our country would be protected against abuse, no matter from which quarters it would emanate. Similarly, the Public Protector had on more than one occasion been required to adjudicate in such matters."
(2000 International Ombudsman Institute conference, Durban, South Africa)

The Evolving Ombudsman: Emerging Frontiers

The Case of Kenya

THE EVOLVING OMBUDSMAN: EMERGING FRONTIERS – THE CASE OF KENYA

By Mr. Otiende Amollo, Chairperson of the Commission on Administrative Justice

A Presentation to the Colloquium of African Ombudsman under the theme 'Repositioning the Ombudsman: Challenges and Prospects for African Ombudsman

Held in Nairobi – Kenya

19th September 2013

Design of Kenyan Ombudsman Office

- An Ombudsman Institution
- Parliamentary Model
- Constitutional Entrenchment
  - Investigate any conduct in state affairs, or any act or omission in public administration in any sphere of government, that is alleged or suspected to be prejudicial or improper or to result in any impropriety or prejudice
  - Investigate complaints of abuse of power, unfair treatment, manifest injustice or unlawful, oppressive, unfair or unresponsive official conduct
  - To report on complaints investigated under paragraphs (h) and (i) and take remedial action

Context & Constitutional Placement

- Constitutional Commission
- Appointment and Removal of Commissioners
- Independence
  - Legal Entrenchment
  - Operational
  - Financial
- Fairness
- Impartiality
- Neutrality
- Confidentiality

Statutory Provisions

- Commission on Administrative Justice Act, 2011
- Other Related Acts
  - Kenya National Commission on Human Rights Act, 2011
  - National Gender and Equality Commission Act, 2011
  - National Cohesion and Integration Commission Act, 2008
  - Judges and Magistrates Vetting Act, 2011

Distinctiveness

- Existence of institutions dealing related matters:
  - Kenya National Commission on Human Rights
  - National Gender and Equality Commission
  - Ethics and Anti-Corruption Commission

Conventional Mandate

a) Maladministration

b) Definition of Administrative Action: any action relating to matters of administration and includes:-
  - a decision made or an act carried out in the public service;
  - a failure to act in discharge of a public duty required of an officer in public service;
  - the making of a recommendation to a Cabinet Secretary; or
  - an action taken pursuant to a recommendation made to a Cabinet Secretary

Beyond Conventional Mandate

2. Jurisdiction Beyond Maladministration

- Advisories on Public Administration
- Advisory on Legislation and Codes of Conduct
- Performance Contracting
- Training of Government Officials
- Alternative Dispute Resolution – Inter-Governmental Conflicts
- Jurisdiction over County Governments
- Jurisdiction over Persons held in Custody
- Fair Administrative Action/Administrative Injustice
- Awareness Creation on Administrative Justice

Beyond Conventional Mandate

3. Complimentary Mandate

- Promotion of Constitutionalism and Human Rights
- Protection of the Minorities and Marginalized Groups
- Compliance with Leadership, Integrity and Ethical Requirements
- Enhancing Cohesion
- Vetting of Judges and Magistrates
- Implementation of Reports of Commissions of Inquiry or Task Forces

4. Emerging Mandate

- Access to Information and Data Protection
- Implementation of Decisions of International Tribunals (Endorois Case)

Execution of Mandate

- Correspondences
- Quasi-Judicial/Adjudicatory
- Inquiries and Investigations
- Mediation and Negotiation
- Litigation and Amicus Curiae
- Advisories
- Powers of a Court

Post Investigations

- Remedial Action
- Adjudication on Administrative Justice
- Hearings
- Compensation or other Remedy
- Reporting to Parliament on Remedial Action Taken

Challenges and Redress

1. Acceptance
   - Education and Engagement
2. Lack of Awareness
   - Public Education
3. Resources
   - Alternative Funding
4. Enforcement
   - Legal Reforms, Performance Contracting, Engagement and Gazettement of Prosecutors
5. Clawing Back
   - Engagement with MPs and Concerned Parties

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The Future of the African Ombudsman

Prof Victor O. Ayeni
Director
Governance and Management
Services International, UK

Approach and Scope

- Draw on strategic planning tools
- Time range – Projection only realistic for the next 30 to 40 years, which takes to 2050
- Link with the theme of this Colloquium: *'Repositioning'*
- Not academic but practical, hands-on issues
- All said, we can never cover all issues because the world is always full of surprises!

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2

The Givens

- Governance and service delivery issues will remain regardless of how good things get (good for us!)
- Politicians will remain politicians
- Ombudsman can not be loved by every one, some will always want it out of the way
- Competition from elsewhere, after all the world was not created for us alone
- Resources will remain a challenge

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3

Givens… Cont'd

- Our job will remain challenging, that is the name of the game. Move on if you are not up to it!
- Uncooperative, difficult, skeptical, cynical, conservative, unfriendly, anti-change people will remain – ever imagined how boring the world will be without them
- Office will remain *highly* dependent on the personality of the incumbent
- Office not always be centre of attention – not what makes us

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4

How, then, will the African Ombudsman respond to these issues?

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5

3 Perspectives

- Concept and institution, including global movement , institutional terrain and intellectual orientation
- African region, including all four language groups and not independent of what happens in a globalised world
- Individual office and national context

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6

Global

- Here to stay
- Further growth of institutions
- Interest to donours and development partners, although with varying level of emphasis
- Integrated into intellectual discussions
- Growing importance in education and increasing awareness
- Healthy interest in the brand and professional networks that support it

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7

Africa

- Will continue to survive region-wide
- More offices will emerge, perhaps all of Africa by end of 2 decades
- More specialty offices – they will become more prominent at national level. Start reaching out to them
- Increased professionalism, including role of AOMA and networks. Ombudsman functionaries increasingly a significant interest group

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Africa…. Cont'd

- But growth could create internal threat and competition if not better managed
- Manage leadership succession. Poor management threatens sustainability
- Take more advantage of role of 'women power' in the movement
- Abolition of offices not completely ruled out
- Will be susceptible to what happens at national level but growth will dilute effect

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9

National and Individual Office

- Not good to over-generalise as subject to peculiar realities and circumstances
- Better to focus on tools required for shaping the future as we would like
- Considerable opportunities offered by global and Africa-wide development that can be leveraged
- Unfinished business in every country

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Towards the Future

Must be centre of interest for the future, hence 5 things critical for incumbent

- Adopt motto: 'it *all* depend on me'
- Focus on maximizing 'clientele value
- Watch personal ego
- Must not be indifferent to realities around you and think that you can or deserve to be excluded
- Not giving up

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Towards…. Cont'd

- Deliver: focus core business and deliver it with objective proof of continuous improvement
- Maintain uniqueness and institutional advantage to society. Becoming *like* everybody else makes credibility and survival more difficult, re: accessibility, visibility, informality, speed, inexpensive, competence, adequacy of remedy, approach to providing value, wide clientele
- Be more strategic
- Leverage technology

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Clientele Value…. Cont'd

- Embrace and better management of multi-functionality
- Continuously build credibility and public respect. Not same as being a rabble rousers
- Enhance capability to manage and leverage forces around you
- Facilitate institutional adaptability
- Focus competent of self and staff = office
- Keep up with the professional network

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13

Big Issues to Watch

- Serious unfinished business at national level, especially with visibility and performance of several offices
- Institutional competition
- Inherent contradiction in emerging trend towards multi-functionality
- Reviving genuine academic scholarship, not another area for practitioners to take over??
- Future of the Ombudsman in Nigeria

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14

Thank you for your attention.

And gratitude again to the Kenyan Commission on Administrative Justice for the opportunity to participate in this Colloquium

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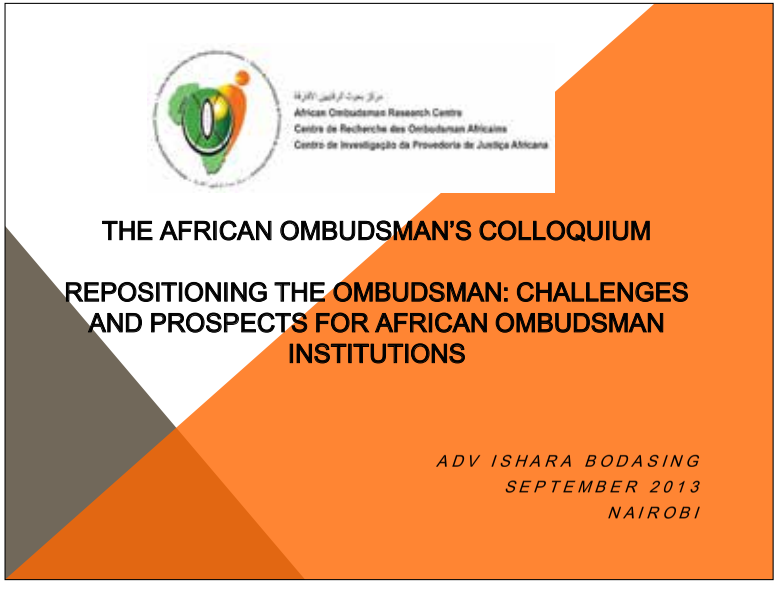
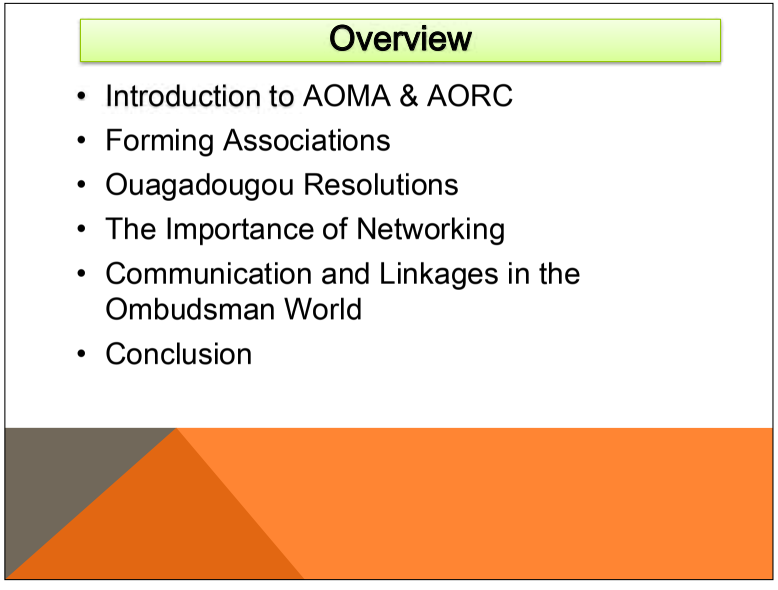
15

The Ombudsman World: Associations, Linkages and Networking





Introduction to AORC

- AOMA resolution to establish the African Ombudsman Research Centre (AORC) at a South African university.
- launched at a high profile event on 15 March 2011 at UKZN

President Jacob Zuma opening the African Ombudsman Research Centre at the University of KwaZulu-Natal, Durban on 15 March 2011.
(Source: GCIS)

Public Protector of South Africa Advocate Thuli Madonsela, Vice Chancellor of the University of KwaZulu-Natal Professor William Makgoba, President Jacob Zuma, President of the African Ombudsman and Mediators Association Dr Paolo Tjipilica.
(Source: GCIS)

AOMA & AORC

•African Ombudsman and Mediators Association (AOMA) is a 39 members body of African Ombudsman Institutions, accredited with Observer Status in the Africa Union. An agreement of cooperation between AOMA and the AU was signed in October 2011 and a Joint Operational Implementation Framework concluded in June 2012.

•AORC located at the Howard College Campus of the UKZN

•It is a coordinating, facilitating, capacity buidling, advocacy and research arm of the AOMA whose Secretariat is based in Durban, South Africa.

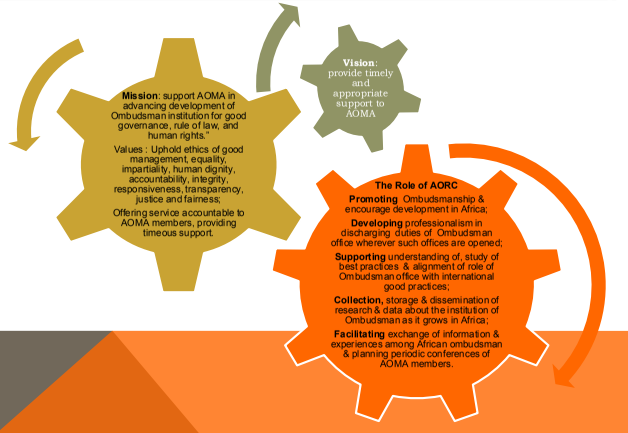
•AORC was established to drive the consolidation of AOMA as a cohesive and representative body, building the capacity of its members, and advancing the concept and practice of ombudsmanship in Africa.

Mandate of AORC

- Positioning AORC as an academic center of excellence on ombudsman studies (Research & Training);
- Design and implement research programmes to advance ombudsman institutions in Africa and contribute to the development of the institution of ombudsman;
- To facilitate the consolidation of governance systems and business processes in Africa, in conjunction with international partners;
- To facilitate the exchange of information and experience among ombudsman in Africa
- To plan periodic conferences on ombudsmanship; and
- To develop course material for the development of ombudsman scholarship.

MANDATE OF AORC

AORC'S VISION & MISSION



RESOLUTIONS OF THE 5TH MEETING OF THE EXECUTIVE COMMITTEE OF AOMA, HELD FROM 18 – 19 JUNE 2013 IN OUAGADOUGOU

Forming Associations

- Common purpose and strength in numbers;
- Ensuring sustainability;
- Despite manifold differences among countries, there is a common acceptance of the need to address the problem in a co-ordinated and sustainable way.
- How can we do this together?

CO-OPERATION WITH OTHER INTERNATIONAL ORGANISATIONS

- IOI / AOMA MOU
- Commonwealth Secretariat, the International Organisation of the *Francophonie* (OIF), the Community of the Portuguese Language Countries (CPLP), the United Nations and the European Union
- International Coordinating Committee of National Institutions for the protection and promotion of Human Rights (ICC) in Geneva as well as the Network of African National Human Rights Institutions (NANHRI)
- Collaboration between AOMA and the African Peer Review Mechanism

MOU between AMOA & AUC

•Stakeholders: AU, ACHPR, AOMA, AORC, Member States and partners
•Joint Operational Implementation Framework

Objective	Deliverables
The establishment and strengthening of Ombudsman Institutions in all Member States of the AU	• Ombudsman/mediator institutions and office enhanced at the national and regional levels • Capacities of national ombudsman/mediator institutions built
The popularisation of the AU Shared Values Legal Instruments within the African Union Member States and the Public;	• AU shared values instruments are accessible to all sectors of society • Shared values instruments are widely understood and owned
The ratification of the AU Shared Values Legal Instruments;	Shared values instruments are ratified by all member states

Joint Operational Implementation Framework (cont'd)

Objective	Deliverables
The domestication and implementation of the AU Shared Values Legal Instruments;	• Shared values instruments are domesticated by all member states • Credible elections are organized in Africa • A corruption free public service encouraged • Public service delivery in member states improved • Political and democratic governance strengthened • Human rights and administrative justice promoted and protected • Peace and security enhanced
Monitoring the implementation of the AU Shared Values Legal Instruments including through the peer review mechanism at the level of the African Governance Platform;	• Monitoring framework developed • Reports generated and disseminated
The creation of synergy between AOMA and other African Institutions; and	• Collaboration enhanced
Efficient management of the cooperation between the two parties	• Cooperation operationalized

The Importance of Networking

- Why do people network?
- Essential for strong development of our core business.
- Regular, scheduled regional and national meetings must be held

Communication & Linkages in the Ombudsman World

Design and operate a communication strategy, with the following features:

- effective line of communication with stakeholders;
- schedule for engagement with other Ombudsman, especially through the regional coordinators;
- identify the best communication methods;
- communication action plan with monitoring and reviewing arrangements;
- support awareness, understanding and achievement of the AOMA's goals;
- increase the level of interaction and communication with other comparable good governance and human rights bodies and multilateral organisations.

Conclusion

- Avoid complacency
- Commitment and dedication of leaders, members and staff

Address by the Mediator for the Republic of Djibouti at the Regional Colloquium on Ombudsmen in Africa 18-21 September, 2013 Nairobi (Kenya)

Contents

Your Excellency, the President of the Republic of Kenya, Honourable Members of Government, Distinguished Members of the Diplomatic Corps and Representatives of Consular Services, Ladies and gentlemen, Mediators and Ombudsmen, Distinguished Guests, Ladies and Gentlemen, I am delighted to be able to join you all here and effectively participate in this Regional Colloquium on Ombudsmen in Africa.

The paper I intend to share with you, as part of the on-going Colloquium focuses on Ombudsmen in Francophone Africa. Much as I lay no claim to exhausting the subject, I am persuaded it is a general overview on the office of ombudsman or mediator in French-speaking countries.

COLLOQUE REGIONAL DES INSTISTUTIONS D'OMBUDSMANS EN AFRIQUE
18 -21 SEPTEMBRE 2013 NAIROBI (KENYA)

II- BRIEF HISTORICAL BACKGROUND

The Office of Ombudsman saw the light of day, way back in the 7th Century during the era of the Caliph of Islam, Omar Ibn Khattab (634-644), under the appellation "**Diwan Al Madhalim**" that is translated as "Office of grievances". This concept was a source of inspiration for the creation of a similar office in the West.

Historically speaking, there are two types of Ombudsmen: "**The Parliamentary Ombudsman**" which was discovered at the beginning of the 19th Century, and "**The Administrative Mediators**", which came along more recently, as from the 70s.

The first Ombudsman was appointed in the **Swedish** parliament, in 1809 In Sweden at the time, there was no real parliamentary system as in a representative assembly meeting on a regular basis, and endowed with real power to check government action. Contrary to popular opinion, the term **Ombudsman**, is not an English but a Swedish word, meaning "**an external mediator appointed to settle a conflict**" or "**one who acts on behalf of another**".

Related to the change in ideas as a result of enlightenment from opposition to the former regime, and conceived with the aim of curtailing royal absolutism and guarantee the rights of citizens, **the Ombudsman** came across as a sort of permanent representative of parliament. The "administrative ones", created after the British and French models appeared in a different context.

Present in more than 120 countries, there are equivalents of ombudsmen and mediators, such as: "Supporter of the people", "Prosecutor of justice", "Citizens' Protector", and "the People's lawyer".

III – DEFINITION

The Ombudsman or Mediator of the Republic is an independent administrative authority who fulfils his duties by handling citizens' grievances that have to do with injustice suffered or cases of poor administration by state organs. After an impartial and in-depth study of a case, he determines whether such complaint is valid and files recommendations to the organ concerned so that the case is settled.

The non- renewable nature of the Mediator's mandate is a condition underpinning his independence, which is also characterized by his removal from hierarchy; he does not take orders from anyone and can only be relieved of his duties in case duly certified inability.

The mediator cannot be directly seized by an individual, except through the intermediary of a member of parliament. In fact, he can be directly seized of a matter. The office is meant to be a bridge between the administration and the citizens, in order to restore confidence between the governors and those being governed, through mediation.

The Mediator or Ombudsman defends good governance, which has equidistance as one of its main characteristics. Indeed, he is "neither the administration's prosecutor nor the citizen's lawyer".

III – DIFFERENT TYPES OF OFFICES

1/PARLIAMENTARY OMBUDSMAN

The Ombudsman is a permanent representative of Parliament, in charge of supervising how government carries out its mission and abides by the law, during parliamentary recess. By this token and the fact that it is stipulated in the Constitution per se as elected by Parliament and drawing his legitimacy from this election, he can directly be seized by any citizen. In his powers and prerogatives, particular emphasis is laid on the protection of freedoms and fundamental rights.

2/ADMINISTRATIVE MEDIATOR

The administrative mediator is an institution created by a law whose holder is appointed by the executive, in order to improve daily relations between the administration and the public, to improve the performance of public administration and lastly to improve Government responsibility towards its citizens.

IV – MONOGRAPHS OF DIFFERENT MEDIATION OFFICES IN AFRICA

- **LEGISLATIVE AND REGULATORY FRAMEWORK**

*1/Mediator for the Republic of Cote d'Ivoire

The Office of the Mediator for the Republic was created by Law no. 2000-513 of 1 August 2000: The Constitution of the 2nd Republic of Cote d'Ivoire. It was an off shoot of the Presidential Organ for Mediation (OPREM) created by Decree No. 95-816 of 29 September 1995.

This regulatory document which did not confer full powers to this structure, was abrogated since the Office of mediator of the Republic has been promulgated by law. Its mission, organization and functioning were laid down by Organic law No. 2007-540 of 1 August 2007.

*2/Mediator for the Republic of Mali

If the office of the Mediator of the Republic was created by a law in March 1997, the decree implementing this law was only signed in December 1999, notably with the appointment of the first Mediator of the Republic, known as Maitre Demba DIALLO.

*3/Mediator for the Republic of Niger

Created by Law no. 2011-18 of 8 August 2011 the Mediator for the Republic is an independent administrative authority, chosen at the discretion of the President of the Republic from among persons reputed for their moral integrity and competence in economic, political and social matters.

*4/Administrative Mediator for the Republic of Tunisia

Created by Law no. 2011-18 of 8 August 2011 the Mediator for the Republic is an independent administrative authority, chosen at the discretion of the President of the

Republic from among persons reputed for their moral integrity and competence in economic, political and social matters.

*5/Mediator for the Kingdom of Morocco

The Mediator is an independent and specialized national office, created by the Dahir (Royal Decree) No1 – 11-25 of 17 March 2011. The services of the Mediator can be sought free of charge and at no cost. Resort to the Office of the Mediator shall by no means disrupt or suspend any deadlines or decisions provided for by the law.

*6/ Mediator for the Republic of Senegal

The Mediator of the Republic is an independent office created by Law No. 99 -04 of 29 January 1999 abrogating and replacing Law no. 91-14 of 11 February, 1991. The office was created in 1968, when the nation gained its independence. The office is enshrined in the Constitution.

*8/Mediator for the Republic of Djibouti

The Office of Mediator for the Republic is a recent institution, created by Law no. 51 of 21 August 1999. It was included in the Constitution in …..

*9/Mediator for the Republic of Congo

The Office of Mediator for the Republic was created by Law no. 9-98 of 31 October 1998: - Appointment of the First Mediator on 2 August 2001 by Decree no. 2001/391

- Renewal of the mandate of the Mediator for the Republic by Decree no. 2004/473 of 18 November 2004
- - Renewal of the mandate of the Mediator of the Republic by Decree No. 2010/247 of 16 March, 2010.

*10/ Mediator for the Republic of Chad

The Office stems from a recommendation by the Sovereign National Conference (CNS) of March, 1993 urging Government to provide the nation with an independent organ that will negotiate with the armed rebels for peace. The organ was created by Decree no. 340 of 12 August 1997. It took ten years to transform the decree into a Law creating the Office of Mediator for the Republic.

*11/Mediator for the Republic of Mauritania

The Mediator for the Republic is an office created by decree signed by the President of the Republic. According to rules laid down by law, it receives complaints from citizens concerning unsettled conflicts; in their dealings with state administration, local governments, public institutions and all other organs responsible for providing public service.

*12/Mediator for the Republic of Gabon

The mediator for the Republic is a Gabonese institution that has remained confidential over the past twenty years of its existence. The Mediator for Gabon draws his legitimacy from the President of the Republic who appoints him by a Decree signed in a cabinet meeting.

The Mediator for the Republic was created by Decree no. 1337/PR of 16 July 1992. Paradoxically, institutional mediation is a relatively recent concept in Gabon. The paradox springs from the fact that the Gabonese traditional system, is in fact based on mediation and conciliation.

*15/Mediator for Faso

The First Annual Conference of Public Administration (CAAP) which held from 27 to 30 September 1993, acknowledged the need to create the office of Mediator for Faso. On 2 February 1994, the Ministerial Council adopted the bill crating the office of Mediator for Faso. On 17 May of the same year, the NATIONAL House of Representatives of People adopted the organic law creating the office of Mediator for Faso.

*16/mediator for the Republic of Benin

The institutionalization of the Office of Mediator of the Republic in Benin has witnessed many politico-legal changes for many years. In fact, since the conference of the vital forces of the Nation that took place from 19 to 28 February 2006, Benin has endowed itself with democratic institutions running the nation politically.

Among the institutions charged with managing the social and political life of the country, there was an Office of Mediator as in many countries. Unfortunately, as the country was rising from an unprecedented political, economic and social crisis, the office of Mediator for the Republic was simply sacrificed as a result of economic and budgetary difficulties.

MISSION AND PREROGATIVES

- Mediator for the Republic of Cote d'Ivoire

The mediator for the Republic is in charge of seeking and finding peaceful settlements of disputes between administrators and those administered by the state, local governments, state-owned corporations and all other organs destined to provide line services (social organs, public companies, ets…) Disputes could arise from omissions by Public administration which either violate or jeopardize citizens' interests that are protected by law. He does not interfere in the unfolding of any judicial process. He does not question or impugn the validity of any decision by a court of justice.

It is very clear that the pathway of peaceful opposition, be it individual or collective, which was launched in other countries by the original system of institutional

mediation, has now been laid out and offered in Cote d'Ivoire, to whoever wants to exercise his rights that are threatened or withheld by any so-called administrative authority. However, all that is left to be done, is to entrench and perpetuate the achievements of this democratic asset.

- Mediator for the Republic of Mali

The Mediator may make proposals to improve the performance of organs accused before it or suggest amendments it deems worthy of being incorporated in the legislative and regulatory instruments in force, to the competent authorities.

Furthermore, in case of failure in the execution of a court decision at the detriment of a complainant, he is empowered to instruct the indicted public organ to comply within a determined dateline.

According to the law, the Mediator shall present an annual report to the president of the Republic and the President of the National Assembly. The said report shall be published. The Mediator for the Republic is an independent authority who takes orders from no organ whatsoever in the execution of his functions.

- Mediator for Faso

According to the law of 17 May 1994, the Mediator for Faso is an independent office and institution (he takes no orders from any authority in the execution of his duties) and a gracious intercessory organ between the Public Administration and the administered. The holder of the office shall be at least 45 years at the time of his appointment and have at least 20 years of professional experience. He must display a very high sense of responsibility, good conduct, and a sharp conscience when it comes to the management of public property and granting priority to national interest. He is appointed by decree signed by the President of Faso, (after consultation with the Prime Minister, the presidents of the National Assembly and the Constitutional council) for a 5 year non-renewable and non-revocable term.

The general mission entrusted to the Mediator for Faso, is as follows:

- assist citizens in ensuring that they enjoy their rights as well as fulfil their responsibilities;
- receive and address complaints from individuals and moral persons
- table recommendations for the peaceful settlement of disputes between the administration and the administered.
- file proposals of draft amendments to be taken into consideration for legislative, regulatory and administrative instruments that are in the general interest;
- participate in any action that is likely to improve public service delivery;
- Participate in any activity likely to enhance conciliation between the administration and social guilds or professional associations.

The Mediator for Faso is endowed with diverse powers he can wield: power to impugn an inquiry, power to access classified information, virtual power to mete out sanctions, power to order parties (whenever there is a complaint about the failure to execute a court decision) and power to propose reforms. In the absence of a satisfactory response within a dateline he has determined, the Mediator submits a special report to the Head of State.

- Mediator for the Kingdom of Morocco

He contributes in strengthening the primacy of the law and in propagating principles of justice and equity; He engages in the dissemination of values such as good morals and transparency in public management services; He promotes efficient communication between citizens and the administration.

His duties are to instruct, either at the behest of the Mediator, or on account of complaints it has received, cases that may be prejudicial to any physical or moral persons be they of Moroccan or foreign descent, either by a complaint or a grievance it receives, on account of an administrative decision, be it implicitly or explicitly, especially when such carries stains of abuse of power or any behavior that goes against the basic tenets of justice and equity.

He acts either on his own initiative as mediator or following a complaint about a dispute submitted by the administration or the complainant, by mediating and conciliating in order to find fair and equitable solutions to whatever is in dispute by the parties concerned;

- Mediator for the Republic of Senegal

The Mediator for the Republic is entrusted with the overall mission of improving the institutional environment and enhancing economic entrepreneurial initiatives so that they play their role as interface in facilitating relations between the administration in its broadest definition, and the private sector (enterprises). Ministers and all other public authorities should facilitate the work of the Mediator of the Republic. Under conditions laid down by law, he receives complaints concerning the functioning of State organs, local governments, public companies and any other organ engaged in serving the public.

The Mediator for the Republic may request the competent authority to take disciplinary measures, or file proceedings within the competent jurisdiction if need be, against staff guilty of any serious shortcoming in the execution of his professional duties.

The Mediator of the Republic is constantly informed of any action taken in the wake of his intervention. In the event of an unsatisfactory response, he can submit an advised opinion in writing to the President of the Republic, who after an appraisal, will determine the appropriate instructions to issue to the authorities concerned.

On this score, the Mediator of the Republic has the option of including in the annual report which he has to submit to the President of the Republic, any case he deems worth mentioning. The Mediator for the Republic cannot on any grounds, give instructions to the administration or take decisions in its stead.

- The Mediator for the Republic of Djibouti

This Office strives to improve relations between the administration and citizens. The mediator of the Republic is an independent authority;
-he takes no orders from any authority
- he cannot be relieved of his office prior to the end of his mandate except in case of inability certified and validated by the Supreme Council of magistracy
- appointed for a 6 year term, his mandate is non-renewable
-the amended Constitution reduced his single term to 5 years
- the Mediator of the Republic is not liable to any legal proceedings, being wanted, arrested, detained or tried on account of opinions expressed or acts carried out in the acquittal of his duties.

- The Mediator for the Republic of Benin

The Mediator for the Republic receives administrative complaints about the functioning of Central State organs, decentralized communities and public institutions and studies them to find equitable solutions to all such. He tables proposals towards the normal and effective functioning of public services before the Head of State. On the whole, he contributes in improving the rule of law and good administrative governance' (Article 8 of Law No. 2009 -22 of 11 August 2009).

According to Article 11 of Law No. 2009-22 of 11 August 009, "Any physical or moral person who feels that in a matter concerning him, one of the organs cited in Article 8 did not perform pursuant to its mission as a public service, may, by a written statement seize the Mediator of the Republic". The Mediator may equally seize itself or be seized by a member of any State institution. Resort to the services of the Mediator is free of charge. In clearer terms, the Mediator may be seized with a complaint either by a letter dropped at his Administrative secretariat or his Divisional departments, by the postal services, facsimile, or by email.

To conclude, in the world of today, the culture of mediation has imposed itself as a necessity in the practice of governance among people. Even among states, regional and continental entities, political leaders over the years have approved a return to the custom whereby people had a Mediator for the settlement of conflicts, as spokespersons and facilitators at the service of the weakest in society.
Thank you for your kind attention.

Complaint Handling: Lessons from Africa

(Presented by Mr Soleman M. Hatteea, Ombudsman of Mauritius)

Although the topic of my presentation is "Complaints Handling: Lessons from Africa" you can rest assured that I am not here to give any lesson to anybody but rather to speak on lessons I have myself learned as Ombudsman of Mauritius, a tiny island in the Indian Ocean with a population of 1.3 million, and share the experience acquired during my tenure of office.

First of all, I would like to say that worse than not having an Ombudsman institution is to have one but nobody knows about it. Therefore, the first lesson I have learned concerns awareness of the Ombudsman institution, what it stands for and what its mission is. Various ways are open to us to make ourselves known but each and every country has its own circumstances and peculiarities and therefore it is up to each one of us, according to our position, constitutional or otherwise, to devise ways and means on how to make ourselves known to the citizens of our respective countries.

In Mauritius, as we are an old institution created in 1968 and functional as from 1970, the Ombudsman institution is, by now, pretty well known. But all the same, we deem it fit to address this issue ever now and then through the media, by way of interviews or a contribution to the public service magazine called "Update" and of course through our annual reports. This is done to constantly inform the public about the Ombudsman institution and how to access it, what its powers are, et cetera et cetera, so as to reinforce citizen's confidence in the institution. You may wish to know that every year we distribute our Annual Report to all manner of institutions throughout the island, be they ministries or other departments of government, Members of the National Assembly, the press, parastatal organizations, local authorities, schools, universities, university students whenever they make a request for same, libraries, etc. and all this free of charge.

As a rule and as we are all fully aware, nobody likes other people to poke their nose in one's own affairs. Government and its officials are no exception to that rule.

Therefore, the setting up by any government of an ombudsman or similar institution to do just that, i.e., to inquire into complaints about its own decisions or omissions, is a sign of openness. However, government should not stop there. It must also be prepared to listen, acknowledge its mistake and take remedial measures to correct any injustice or prejudice caused whenever an inquiry has revealed maladministration and a recommendation is made by the ombudsman to that effect. Only then can we say that our country is committed to good governance and respect for the rights of its citizens.

It is of universal acceptance that one of the components of democracy is good governance. And a corollary of good governance is good administration as I am of the view that democracy does not just mean holding elections every so many years but democracy in the true sense of the word, i.e., in the day to day life of our citizens – "dé*mocratie au quotidien*" for the French speaking. Indeed how can good governance function if the administration fails to deliver? The right to good administration now forms very much part of the ever-increasing panoply of citizens' rights.

This is why over the years I have been encouraging our administrators to adopt values such as fairness, objectivity, impartiality, transparency and above all, integrity.

I need to add that in the course of investigations into complaints I have always adopted a non-adversarial approach. Indeed mine has been to use discussion and persuasion instead of confrontation. I keep reminding public officials that we are here to serve the public, to be part of solutions and not of problems and therefore citizens' complaints should be dealt with in a fair manner. Moreover, complaints should not be taken negatively by public officials. Sometimes they have the advantage of helping to identify faults and other causes of poor service delivery, which, at the end of the day, prove to be useful for improving the efficiency of the service. Indeed if we were all to consider our respective duties as a mission towards nation-building then we would have won the trust the public need to have in our various offices.

I hasten to add that it would not be fair or right to assume that every time a complaint is received by the Ombudsman it means that something has gone a miss at the administration. The matter must be fully investigated and only thereafter can we reach a conclusion. It is not uncommon, however, that at the end of the day we find that there has been no maladministration. In such cases, we need to explain to the complainant the reason for the decision he is contesting. Indeed many a time we discover that the person who has lodged a complaint has not been sufficiently or

at all informed by the administration about the decision taken. And that is why he would address his complaint to the ombudsman. In such cases when we explain to that person the whys and wherefores of a decision that we have found to be correct, he is inclined to accept the explanation. But at least he has the satisfaction that his problem has been addressed by an independent body. At the same time we act as a shield for the administration against unfounded complaints and sometimes unfair criticisms.

Let me now turn to the other point I would like to make, and that is the independence of the ombudsman, which goes to the very core of the institution.
We probably all have in our legislation provisions to the effect that the Ombudsman shall be an independent institution or that if shall not be under the order or control of any authority or other words to that effect. Again, I must say that it is not sufficient to say that the institution is independent. The incumbent must in actual fact be independent, i.e., free from any outside interference and also be very much perceived to be independent. As we say in French, he needs to have "un esprit independent et une independence de l'esprit". He must furthermore maintain the highest standard of professionalism and integrity.

It is interesting to know that the Mauritian Constitution enjoins the appointing authority, i.e., the President of the Republic, to consult the Prime Minister, the Leader of the Opposition as well as leaders of other parties represented in Parliament before he appoints the Ombudsman. One can easily conclude that this provision tries to ensure that the person to be chosen as ombudsman is credible and acceptable to all political parties represented in Parliament. In other words, what is being looked for is a broad consensus to appoint a truly independent and reliable person who is, and can stay above the fray of the political arena. Let me hasten to add that even though the Ombudsman is appointed by the President, he does not become the latter's or Government's subordinate. To quote one of our colleagues, the Ombudsman must not be in anybody's pocket. He must have his own pocket and that pocket must be in his own coat.

Therefore, to conclude on this, I would say that the independence of the Ombudsman is absolutely vital for its credibility and I would even add, for its survival. Interference with an Ombudsman's independence undermines the very essence of the institution. Our own law even makes it a criminal offence for any person who directly or indirectly, in any manner, attempts to influence the decision of the Ombudsman with regard to any complaint before or investigation by the Ombudsman. Such an offence is punishable by a fine and/or imprisonment.

It may also be remembered that it is one of the essential characteristics of the Ombudsman institution as recognized by the International Ombudsman Institute, others being accessibility, flexibility and credibility.

Another feature of the independence of the Ombudsman is the question relating to his removal from office. In Mauritius, this can only be done on grounds specifically spelt out in the Constitution, e.g., inability to discharge the functions of his office or for misbehavior and further following the procedure laid down, i.e., a hearing by a special tribunal appointed by the President of the Republic. This clearly does away with the possibility of his removal from office according to the political will of those in power.

The next point I would like to pass on to is the question of equity. In a world which is fraught with so many uncertainties and so much hardship, it is becoming more and more imperative that the ombudsman should be in a strong position to defend the citizens of his country with force and without fear in the face of adversity.

The law cannot foresee every situation. It is even desirable that the law should not have such a pretension. It is often in the application of the law by administrators that we come to discover some inequitable or sometimes perverse consequences.

Indeed certain complaints received at our office throw in the open a deep feeling of frustration, victimization, exclusion, etc., by aggrieved citizens whenever they are confronted with an administration which is reticent to rid itself of its rigidity when dealing with them, with the result that sometimes a too strict application of the law/ policy gives rise to unfair results. Whenever the Ombudsman is seized of such cases it is for him to parry, as it were, such results by taking the right step.

I shall therefore say a few words about equity and the power of the ombudsman to act/make recommendations in equity. The notion of equity is not always easy to discern. Being equitable does not mean, as some people may tend to believe, treating everyone equally. It is being fair to a person according to the nature of that person's problem and the surrounding circumstances, in other words giving to every complainant his due.

Equity is defined in the oxford dictionary as a branch of law that has developed alongside common law in order to remedy some of its defects in fairness and justice. The French Dictionary Larousse defines it as "justice naturelle ou morale

décor considérée indépendamment du droit en vigueur". As one of our francophone colleagues has aptly put it, "l'équité est un correctif du droit écrit".

Apart from overseeing the actions/decisions of the administration in law, the Ombudsman is also empowered to and indeed often does intervene in equity. Such power is given to the Ombudsman of Mauritius by section 100 (1) (d) of our Constitution, whenever he considers that a decision is unjust or manifestly unreasonable. This provision, therefore, opens the door for the Ombudsman to act in equity and makes it possible for the Ombudsman to tamper the full rigour of the law by "humanizing" it.

The vigilance of the Ombudsman has a healthy and salutary effect on the public administration, making it more sensitive to public opinion and more responsive to demands of fairness and justice. Indeed public officers themselves will find it gratifying to carry out their duties, not only in compliance with legal or administrative provisions but also with due regard to the plight of the individual.

In other words, the Ombudsman strives, with the cooperation of public officers, to bring about an administration with a human face.
This notion of equity is closely linked to the particular situation in which a complainant finds himself or herself. Therefore, an intervention in equity must be properly balanced. It must be made on the merits of the particular case and it must not affect the rights of third parties. At the same time it must not create any precedent. Each case must be treated on its own merits.

Before ending my presentation, a few words about certain provisions of our law which we may also find in other jurisdictions, for example, it is an offence for any person to willfully fail to furnish any information or document requested by the Ombudsman, and also to willfully give false or misleading information.

Perhaps you may also wish to know that the administrative expenses of the Ombudsman's Office are charged on the Consolidated Fund with the approval of Parliament and as you know the Consolidated Fund comprises all revenues or other money raised or received for the purposes of the Government.

I wish to conclude by saying the following: as Ombudsman I do not hold a magic wand. I do not think any Ombudsman in the world does. It does therefore happen that sometimes I am unable to obtain from an administration a reply favourable to a complainant even on humanitarian grounds. Nor is it my intention to ask any

administration to do anything contrary to law or to go against well-established practices, although I believe that sometimes the administration may show some more common sense and flexibility. All efforts are not lost though, as these are opportunities for us all to learn and draw lessons that are helpful in improving one's approach and performance.

As we to-day witness developments and changes in our different societies whereby our citizens are becoming more inquisitive and demanding, we need to adapt ourselves in order to become more and more relevant and try to respond to the challenges and provide appropriate service to complainants. An opaque or arrogant administration is not acceptable any more.

Finally, the saying "ignorance of the law is no excuse" does not in my view hold anymore as we very often witness laws being voted with a certificate of urgency or under pressure. In such circumstances the citizens finds it more and more difficult to follow, as it were. The force of the law is not enough as its strict application may result in injustice. Therefore, the relation between the citizen and the State should be more and more humanized. It is thus that we will be able to reconcile those who govern with those who are governed.

The success and effectiveness of an Ombudsman Office therefore depends on government's continuous commitment to uphold the independence of the institutional and give it the support it needs in fulfilling its mandate and mission.

Ours must be an on-going quest for justice. And "justice", according to St. Thomas of Aquinas the great Italian theologian and philosopher of the 13th century, is a constant and perpetual will to yield to each one his right.

S. M. HATTEEA
(Ombudsman)

THE COMMISSION FOR HUMAN RIGHTS AND GOOD GOVERNANCE

The Early Beginnings of African Ombudsman: The Case of Tanzania

A paper presented by
Hon. Amiri Ramadhani Manento (Retired Principal Judge)
Chairman, Commission for Human Rights and Good Governance
in the African Ombudsman

REPOSITIONING THE OMBUDSMAN:
CHALLENGES AND PROSPECTS FOR AFRICAN OMBUDSMAN INSTITUTIONS

18TH - 21ST SEPTEMBER 2013

VENUE: KENYA SCHOOL OF MONETARY STUDIES

BACKGROUND AND ESTABLISHMENT OF THE PERMANENT COMMISSION OF ENQUIRY

1.0 INTRODUCTION

The Permanent Commission of Enquiry in Tanzania was an independent government institution established under the Constitution of the United Republic of Tanzania (URT) of 1965 Chapter VI Section 67-69 and by the Act No. 25 of Parliament enacted in March 7, 1966. Its principal responsibility was to deal with complaints from the public against administrative injustice and maladministration within the government, the ruling party of which government ell under, and parastatal organisations.

The establishment of the Permanent Commission of Enquiry (PCE) of Tanzania made history by being the first Ombudsman Institution in Africa, South and Sahara, and second in the Commonwealth countries. The first

President of Tanzania, Mwalimu Julius Nyerere, was the founder of the Commission and it was culminated in the Presidential Commission Report of March 22, 1965 which considered that the rights of individuals in a one-party state should be adequately safeguarded.

It paved the way the way to a system that worked in all one-party states of Africa, and it helped protect citizens from all forms of injustices and maladministration and redressed grievances. Thus, Tanzania became unique from other countries which have Ombudsman.

2.0 Why the Permanent Commission of Enquiry

a. After its independence in 1961, Tanzania as a new state assumed multitude functions resulting from social and welfare legislation that affected lives and properties of Tanzanians. Inexperienced and power hungry officials were given extensive powers and discretions breeding frictions between them and the citizens. PCE became the system of protection of individuals against executive and administrative misuse and abuse of powers, and bureaucracies, particularly in cases of poor and illiterate people living in the rural areas. PCE won and shone when President Nyerere as the head of the Executive said (and I quote):

> "The nature of our economic problems in Tanzania demands that many officers of the Government, the Party, and the Law itself, should be entrusted with great powers over other individuals. At the same time, our recent history, and the educational backwardness of the majority of our people means that automatic checks on abuse of power are almost non-existent. To the people in the villages and scattered homesteads of our wide country, it is the policeman, the magistrates, the TANU officials or the Government office, who represents Government in their everyday life. And in the District and Regional Headquarters, it is the Commissioner who wields direct and effective power in a manner which affect the life of our fellow citizens. This is inevitable and necessary. Only by entrusting real responsibility to such people can our nation be transformed. But we have to recognise that these powers can be…and have been…abused. And the sufferers are the people on whose behalf Government is, and should be, conducted."

b. The Ombudsman Office in Tanzania was necessary in order to establish fairness and balance between administrative decisions that might not be fair. The PCE also was to control matter sand make sure that pubic officers discharge their duties in the correct manner and should not contribute to the frustration of government and the public.

c. There was need to preserve and respect positive traditional values in order to guarantee the rights of individuals. Until 1984, in Tanzania, the rights

of individuals were not formerly guaranteed in the Constitution, even in the Bill of Rights. Therefore, the activities of public administration were comprehensive and the posers of the bureaucracy were so great that they required legal status to put them under control.

d. The inherited judicial system that was supposed to be independent was crowded, overworked, moved slowly, bogged down by technicalities, formalities, and litigation could not afford to control the administration.
e. The Ombudsman Office was also necessary to address administrative acts and omissions without following court procedures. Most of Tanzanians did not know the Anglo-Saxon procedures and laws and could not afford lawyers.
f. PCE played a major role in redressing complaints from the public. The National Assembly which was regarded as an organ of airing people's grievances comprised inexperienced members who were ineffective and most of the time hesitated to take up individual cases. The sittings of the National Assembly at the time were so few in a calendar year making it impossible to address matters as required. Being a one-party state, Parliament was subordinate to the ruling party TANU, and as such, was not suitable to play this role on behalf of the people. The introduction of the Ombudsman was timely and it was the perfect organ to see that justice prevailed.
g. The practice of one having two posts at a time (i.e., in the party and the government), led to the possibility of such a person to act in different capacities and to pass legislation while defending oneself against complaints. PCE curbed such powers.
h. The laws that Tanzania inherited from the colonial era were not compatible to its policies and therefore the need for an institution to highlight and lead to reforms of the anomalies and injustices of such inherited legal systems was necessary.

In January 14, 1963, necessary changes in the Constitution of Tanganyika and the Constitution of the ruling party, TANU were made.

3.0 The Establishment of PCE

PCE was established in the Interim Constitution of the United Republic of Tanzania in 1965, in Articles 67 – 69, and became operational in March 7, 1966 after the enactment of Act No. 25 of 1966 as amended in 1968 (Act No. 2). The Commission's functions, procedures, powers and privileges were drawn.

Among the changes proposed by the Presidential Commission was a move to protect individual freedom by ensuring the individual rights of the citizens were prudent and effective. The Commission also recognised that government and party officials exercised wide discretional powers, and that

their decisions could have dire and serious consequences for the individuals. It was also aware of the public concern about the dangers of abuse of power. The Commission had therefore given careful thought to the possibility of providing some safeguards for the ordinary citizen that would not have had the effect of limiting the actions of government and party in a way that could hinder the task of nation building. Following that thought, it had in mind the Ombudsman institution and recommended the establishment by law of a Permanent Commission of Enquiry.

4.0 Membership

The Interim Constitution {Sec 68 (1)} provided for a PCE membership consisting of a Chairman and two other members appointed and removable by the President of Tanzania. They serve the office for a term of two years and could be reappointed for a final term of two years (Act No. 36).

A member of the PCE was not to be a Minister, Juniour Minister, hold any office prescribed by an Act of Parliament, or hold office n party, Commission's secretary and other staff governed by the laws relating to the civil service. The PCE Act Sections 6 and 22 required any person appointed to a Commission office to take and subscribe an oath of secrecy administered by a Commissioner.

5.0 Powers

Section 67(1) of the Interim Constitution provided for investigative powers that, the PCE should have jurisdiction to enquire into the conduct of any person to whom this section applied in the exercise of his office or authority. The scope of investigative jurisdiction included arbitrary decisions or arrests, omissions, improper use of discretionary powers, decisions made with bad or malicious motive, or unnecessary or unexpected delays, obvious wrong decisions, misapplication and misinterpretation of laws, by-laws or regulations. PCE had jurisdictions *[powers, mandate and limitations]* on both sides of the Republic of Tanzania *[Tanzania mainland and Zanzibar]*. Therefore, the Commission was conferred powers to investigate any person in the service of the United Republic of Tanzania, party office holders, and persons in the service of the Commission, statutory corporate bodies, public authorities, and public boards according to Section 67(4) of the Interim Constitution.

In Section 12(1) of its Act, the Commission had powers to enter any premises and to carry out any investigation for the purpose of an inquiry after giving the authority the appropriate notice. Enquiry proceedings could be initiated in two ways:

i. To carry out an enquiry under the directive of the President, or

ii. When the Commission itself deemed it desirable that an enquiry should be made into the conduct of any person in respect of whom an allegation or complaint has been made.

The decisions of the PCE were not final, notwithstanding any legal provision that an act or omission shall be final or non-appealable or that no proceeding or decision or decision were to be challenged, reviewed, quashed or questioned (Act, Sec. 8).

6.0 Functions

The functions of the PCE were not clearly defined in the Interim Constitution of 1965 or that of 1977 for it to discharge its functions. Although not empowered by statute, the Commission drafted regulations for its purposes. They included procedures of receiving complaints, office routine, decision whether there should be an enquiry or not, how to conduct an enquiry, reporting to the President, miscellaneous, and how to conduct enquiries outside Dar es Salaam.

One of the most significant functions of the Commission was the educative role by travels to rural areas and holding public meetings to publicly define and explain to the people, civil servants, party officials and scheduled organisation employees of their individual rights, context that human rights issues and civil liberties were raised as well and taken into board for investigations.

7.0 Achievements of PCE

The public became aware of PCE and thus made full use to safeguard their rights.

Relevant authorities were careful not to misuse their powers for fear of being put to task by the Commission.

They normally complied with the recommendations of the Commission.

Tanzania was put in the limelight for being the first country in Africa, South of Sahara and the second one in the Commonwealth countries, to have a commission acting as a watchdog of its officials.

PCE managed to receive and resolve a number of complaints to the satisfaction of the public.

Other countries, especially in Africa emulated Tanzania and established similar institutions in their countries.

7.1 Limitations

PCE, in discharging its functions however, faced restrictions that included the following.

- PCE was prohibited from instituting inquiry proceedings against the Union President or the President of Zanzibar,

East African Community, private companies, churches and the People's Defence Forces {Sec. 6794)}.

- PCE was barred from inquiring into or review any decision of any judge, magistrate or any judicial officer where that decision was made by him in exercise of the functions of his judicial office {Sec. 67 (5)}.
- President could stop the Commission from entering any premises for purposes of conducting an enquiry.
- President could as well stop production of evidence to the Commission if he considered that it would be prejudicial to the security, defence or international relations of Tanzania or to the secrecy of cabinet business.
- President could prevent the Commission from conducting an inquiry if he felt that the inquiry would be against public interest.

7.2 Challenges in which PCE operated

- It was purely an advisory organ, i.e., it simply made recommendations to the President who had the option to implement or disregard them.
- Dependence on the President who controlled the entire civil service and public institutions to which the President had direct or remote control.
- Being an arm of the Executive, the Commission could not provide an effective control on the activities of its counterpart.
- The report to the President was confidential unless the President directed otherwise. Its mode of operation was not transparent whereby the results of an investigation were not disclosed to the person complained upon, which was unfair to him as he was sometimes punished without being told of his offence, thus the rule of natural justice was overlooked.
- The President was to cause and to be prepared and laid before the National Assembly a report of the Commission's operations and activities during the twelve months preceding the 1st July of such year, no disclosure of identity of a person inquired into or is being inquired by the Commission.
- In the two years of its establishment, the Commission was understaffed.

8.0 Conclusion

The demise of the PCE was the establishment of the Commission of Human Rights and Good Governance (CHRAGG). The establishment of CHRAGG

came in 2000 after the passage of the 13th Constitutional Amendment, vide Act No. 3 of 2000. This amendment had the effect of repealing Part 1 of Chapter 6 of the 1977 Constitution which provided for establishment of PCE and replaced it with Part 1 which creates CHRAGG. These constitutional changes were later reinforced with the passage of the Commission of Human Rights and Good Governance Act, 2001 No. 7. This law was enacted pursuant to Section 131 of the 1977Constitution to provide for the functions, powers, privileges and other matters of CHRAGG. Moreover, the Commission Act also repealed the PCE Act, 1966, and transferred its functions to the Commission for Human Rights and Good Governance Act, 2001 No. 7. Making the CHRAGG Act to have due mandate, i.e., Human Rights and Good Governance as its name reads, CHRAGG inherited all the functions that were performed by the Permanent Commission of Enquiry and thus has the dual mandate both as the National Human Rights Body and as the Ombudsman.

Thank you very much for listening.

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Appendix II
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