BREAKOUT SESSION V: Challenges due to multiple mandates

Topic : Challenges for Ombudsman Work Resulting from Multiple Mandates

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INTRODUCTION

Historically, the Ombudsman was established as part of the Parliamentary oversight mechanism to supervise the administrative activities of the Executive. This primarily involved investigations of complaints of maladministration or administrative injustices by the bureaucrats. In this context, the Ombudsman complemented the parliamentary oversight over the Executive. Over time, the popularity of the Ombudsman as an institution of governance led to its global phenomenal growth to the current situation where it exists in over 150 countries with varying mandates and powers. Both developed and developing countries have embraced the institution in their legal systems. Indeed, the institution is now firmly embedded in the global legal system through extension beyond the public sector to the private sector and supra-national bodies such as the United Nations, the European Union and the Commonwealth.

One of the significant features of the growth of the Ombudsman was its adaptability to the circumstances of every country. In a number of countries, especially in Africa, Asia and Latin America, while the characteristics of the classical Ombudsman were retained, the institution was modified to suit their political, legal, economic and social needs, what is commonly referred to as hybridisation of the Ombudsman. The hybridisation was partly caused by the emergent global challenges such as corruption and human rights discourses that required redress. The flexibility of the Ombudsman provided an avenue of addressing these challenges. In a number of countries, the Ombudsman was thus given multiple mandates beyond redress of maladministration to include fighting corruption, protection of human rights and environmental protection among others. In addition, corresponding powers were given to the Ombudsman beyond the powers of the classical Ombudsman. Presently, there are different models of the institution from one country to another, with either single mandate or multiple mandates.

While there is no common model of the Ombudsman, the unsettled debate is what model between single mandate and multiples mandates can best address the needs of every country. In spite of the foregoing, an examination of the two models indicates that while an Ombudsman with multiple mandates may be attractive due to scarce resources in many countries, the advantages of a single mandate outweigh such considerations. In other words, an Ombudsman with multiple competencies experiences far much challenges than a stand-alone one. In countries with significant magnitude of corruption, human rights violations and maladministration, having a multiple Ombudsman is likely to take the classical Ombudsman function into the back seat; the institution simply cannot cope with the multiple functions. In such situations, fighting corruption or protection of human rights is usually seen as more urgent and attractive than addressing maladministration. Further, multiple mandates do not ensure skills development and specialisation owing to the huge and demanding responsibilities. Even considering the argument of resource utilisation, the same fails to appreciate the prioritisation that is always given to other mandates in many countries meaning that a significant percentage of resources will still be channeled to the priority areas.

In the final analysis, multiple competencies create conflictual jurisdictions which ultimately undermine the classical Ombudsman mandate. This paper seeks to examine the challenges of multiple mandates and advances a case for a stand-alone Ombudsman.

HISTORICAL DEVELOPMENT OF THE OMBUDSMAN

A. THE CONCEPT OF OMBUDSMAN

The 'Ombudsman' is derived from a Swedish word meaning agent, representative of the people or entrusted person. The part word 'man' is gender neutral and does not connote that the holder must be of the male gender. In its classical form, the Ombudsman has been defined by the International Bar Association as:[92]

An office provided for by the constitution or by action of the Legislature or Parliament and headed by an independent high-level public official who is responsible to the Legislature or Parliament, who receives complaints from aggrieved persons (alleging maladministration) against government agencies, officials and employees or who acts on his/her own motion, and who has the power to investigate, recommend corrective action and issue reports.

This definition mainly describes the traditional or classical Ombudsman as conceived in Sweden and other Western countries; it does not quite describe the hybrid or 'new' Ombudsman that presently dot the landscape of many emerging democracies in Africa, Asia and Latin America. In the first place, the definition assumes that the Ombudsman is a creature of and relies on Parliament for its existence. A number of countries have institutionalised the Ombudsman through entrenchment in Constitution. Second, unlike the classical Ombudsman, the 'new' Ombudsman can investigate Parliament for maladministration or corruption. Third, the definition takes the assumption that the Ombudsman can only recommend and not take remedial action in instances of administrative deficiencies or injustices. While this is true of the classical Ombudsman, the 'new Ombudsman' has powers of enforcement that go beyond mere recommendations.

B. EARLY DEVELOPMENT

The history of the Ombudsman is as old as mankind. It is embedded in the social contract theory whose main objective was to create societal order. In this arrangement, few individuals who exercise power on behalf of society must do so according to the established rules. Where they act in excess of their powers, the people can exercise their residual power to ensure accountability. This engendered the principle of 'oversight' which is evident in all religions and societies. In Christianity, for instance, Prophets played the role of the Ombudsman. They always advised and rebuked Kings on various matters. A notable illustration comes from Prophet Nathan who rebuked King David about his excesses against Uriah the Hittite. His brave and famous words to King David ***'It is you my Lord'*** aptly capture the role of that the Ombudsman should play in society.

In Africa, a number of traditional societies had individuals who played the role of the Ombudsman. These were respected people of high standing who could easily interact with both the citizens and the rulers. In Rwanda and South Africa, for instance, there existed an equivalent of the Ombudsman who performed the roles of advising and reprimanding the traditional rulers on matters of interest to the people. The *Makhadzi* among the Venda Community in South Africa acted as the link between the people and those in power, and always voiced their concerns with the rulers.

Elsewhere, in the Greek cities of Sparta and Athens, an equivalent of the Ombudsman, *Eflore and Euthynoi,* oversaw the activities of Government employees and Municipal activities between 700 BC and 500 BC. This was later adopted by the Roman Empire where an equivalent institution was created around 300 BC to protect and defend fundamental rights. In China, during the Han Dynasty from 3 BC to 220 AD, the Emperor assigned a civil employee, the Yan, to exercise a systematic and permanent control of the imperial administration and its civilian employees. He also received petitions from the public for administrative injustices. Similarly in India, there were special officials who performed roles in the manner of the Ombudsman, which later influenced the use of the local word *'Lokayukta'* to describe the Ombudsmen in the twelve Indian states.

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[92] IBA, August 1974 Resolution at Vancouver meeting of official delegates of member organisations, 'Ombudsman and other Complaint Handling Systems' X (1980-1)1.

The Ombudsman as we know it today can be traced to Sweden when King Charles XII signed a decree establishing the *Hogste Ombudsmannen,* the Highest Ombudsman, in October 1713. This was at a time when Sweden lay in ruins, being ruled by a king who lived far away after years of war and hardship. The Highest Ombudsman was to ensure that state officers acted in accordance with the law. This later metamorphosed into what is today known as the Chancellor of Justice. On the other hand, the Swedish Parliamentary Ombudsman, *Justitie Ombudsman*, was formally established in 1809 as a representative of Parliament to control the observance of the law by courts and government employees. He was empowered to take action against those who committed illegal acts or failed to do what was expected of them. The Ombudsman also acted as a protector of people's rights. The success of the Ombudsman in Sweden led to its adoption in Finland in 1919 and Denmark in 1953. The Ombudsman was also adopted in other regions with New Zealand being the first Commonwealth country to adopt it in 1962 before its adoption in the United Kingdom in 1967.

C. MODIFICATION OF THE CLASSICAL MODEL

The establishment of the Ombudsman in Denmark marked the beginning of adaptation and hybridization of the institution to the local circumstances. However, the Danish model retained the characteristics of the Swedish model and relied on soft power, commonly known as moralsuation, and co-operation rather than coercive or adjudicative means. The popularity of the Danish model influenced the design of the institution in Norway, New Zealand, Spain and some African countries. In Spain, the hybridization of the Ombudsman, *Defensor del Pueblo or Public Defender*, was influenced by the need to not only ensure administrative justice, but also protect the fundamental rights recognized under the new political dispensation.[93] The Spanish model was later adopted in Argentina, Bolivia, Nicaragua, Colombia and Peru among others that were transitioning to democracy due to the Spanish legal heritage in Latin America.

The Ombudsman was also adopted in other regions with New Zealand being the first Commonwealth country to adopt it in 1962 before the United Kingdom in 1967. In Africa, Tanzania was the first country to adopt it in 1966 through the establishment of the Permanent Commission of Enquiry. In Asia, the institution spread to countries such as the Philippines, Fiji, Papua New Guinea, Hong Kong, Macau, Indonesia, Malaysia and more recently East Timor with multiple competencies. It also spread to the Caribbean, Pacific and Northern American regions although in countries such as the United States and Canada, it exits at the state and provincial levels. It is instructive to note that Ombudsmen that were later created in Africa and Asia radically changed the nature and powers of the institution as known under the classical model leading to the birth of the 'New Ombudsman.'

The global surge of 'Ombudsmania' has seen its establishment in over 150 countries with 47 out of the 49 European countries creating it, 47 in Africa, 14 in Latin America, 17 in Asia, 11 in the Australasian and the Pacific region and 4 in North America, with the United States and Canada having regional (States and Provinces respectively) and private sector Ombudsmen. It is worth noting that while the Ombudsman has been christened differently in every country, it has retained the conventional mandate of public defender, albeit with some modifications, as symbolised by the official names in different countries. For example, it is known as the 'Public Protector' in South Africa, 'Comptroller of the State' in Israel, 'Supplier of Justice' in Portugal, 'Mediator' in France, 'Civic Defender' in Italy, 'Inspector-General of Government' in Uganda, and 'Defender of the People' in Spain.

The concept has now been firmly embedded in the global legal system through the extension beyond the public sector to the supra-national bodies such as the United Nations, the Commonwealth, African Development Bank, European Union, and the private sector. It is noteworthy that the Ombudsman concept has been dynamic to the extent that even the classical ones have been given additional mandates such as freedom of information, protection of privacy, child protection and health system oversight. In Sweden, the role of Ombudsman was expanded vide a legislation in 1986 to include protection of fundamental rights and freedoms of citizens in public administration.

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[93] M.R. Buades, 'The Internalization of Human Rights, Constitution and Ombudsman in Spain' in 'Ombudsman and Human Rights: Proceedings of Symposium' 37 42(Nat'l Ombudsman of the Neth. Ed, 1995 cited in L.C. Reif 'Transplantation and Adaptation, the Evolution of the Human Rights Ombudsman' 31 BC Third World L.J. 284.

It is noteworthy that under the classical model, the role of the Ombudsman was to supervise the administrative activities of the Executive. This primarily involved investigations of complaints of maladministration or administrative injustices by the bureaucrats. In this context, the Ombudsman was a creature of Parliament, acting on its behalf in respect of actions by administrative bodies thereby strengthening the traditional parliamentary oversight over the Executive. One of the key characteristics of this model was the Ombudsman's predominant power of investigation of acts of maladministration. In such cases, the Ombudsman could only make recommendations in cases where it found administrative deficiencies or injustices. Its decisions would be implemented as a matter of course. Moreover, the classical Ombudsman could only act upon receiving a complaint from Parliament and could not investigate Parliament.

D. THE 'NEW' OMBUDSMAN

The popularity of the concept of Ombudsman led to its phenomenal growth globally in the last five decades. In a number of regions, especially Africa, the concept was modified to suit the circumstances of the particular countries. While the 'New Ombudsman' model was inspired by the classical model, it modified the concept to give the institution broader functions and powers to accord to the country-specific circumstances. In the context of Africa, Reif states that the modification was necessitated by the fact that:[94]

> Most post-independence states in Africa were military regimes or one-party states...a number of African states continue to suffer from recurrent civil conflict...as a result...African ombudsmen did not duplicate the classical ombudsman model, and adapted the concept to fit the political, legal, economic and social peculiarities of Africa.

Of significance was the expansion of the functions of the Ombudsman beyond the traditional mandate of addressing maladministration to include aspects such as protection of human rights, anti-corruption, enforcement of leadership and ethical codes, environmental protection and access to information.[95] In addition, the powers were enhanced beyond the conventional powers of the classical Ombudsman.

As an illustration, the Tanzanian Commission for Human Rights and Good Governance deals with both human rights and administrative justice; the Ghanian Commission on Human Rights and Administrative Justice has a three-fold mandate of human rights, anti-corruption and administrative justice. In South Africa, the Public Protector deals with administrative justice and corruption as is the case with the Inspectorate of Government of Uganda who also enforces the Leadership Code. In Kenya, besides entrenching the Ombudsman in the Constitution, it has been empowered to exercise quasi-judicial power through 'adjudication' of matters relating to administrative justice.[96] This is an extra-ordinary power which was hitherto unknown in ombudsmanship. Linguistically, adjudication goes beyond the power to make recommendations; it is akin to the power of the court. Courts usually decide disputes definitively. According to Oxford Learner's Dictionary, adjudication means 'to make an official decision about who is right in a disagreement between two groups or organisations.' This invariably involves acting a judge to definitively settle or resolve a dispute. This jurisdiction is buttressed by the constitutional requirement for the Ombudsman to 'take remedial action' after investigating a complaint of maladministration.[97] This power is akin to that of the Public Protector of South Africa. The Courts in South Africa have aptly interpreted this power to mean that the Public Protector could make biding decisions with legal consequences in appropriate cases. Pointedly, the Supreme Court of South Africa stated thus:[98]

> **Our constitutional compact demands that remedial action taken by the Public Protector should not be ignored. State institutions are obliged to heed the principles of co-operative governance...any affected person or institution aggrieved by a finding, decision or action**

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[94] L.C. Reif, (2004), The Ombudsman, Good Governance, and the International Human Rights System, Leiden: Martinus Nijhoff Publishers, 218-19.
[95] Reif, (No. 2 above) 271.
[96] Section 26(c) of the Commission on Administrative Justice Act.
[97] Article 59(2)(j) of the Constitution of the Republic of Kenya and Section 8 of the Commission on Administrative Justice Act.
[98] *SABC v DA* (393/2015)[2015] ZASCA 158, para 25.

taken by the Public Protector might, in appropriate circumstances, challenge that by way of a review application. Absent of a review application, however, such person is not entitled to simply ignore the finding, decision or remedial action taken by the Public Protector. Moreover, an individual or body affected by any finding, decision or remedial action taken by the Public Protector is not entitled to embark on a parallel investigation process to that of the Public Protector, and adopt the position that the outcome of that parallel process triumphs the findings, decision or remedial action taken by the Public Protector.

This position was later affirmed by the Constitutional Court of South Africa in *Economic Freedom Fighters v Speaker of the National Assembly and Others; Democratic Alliance v Speaker of the National Assembly and Others*[99] thus:

If compliance with remedial action taken [by the Public Protector] were optional, then very few culprits, if any at all, would allow it to have any effect. And if it were, by design, never to have a binding effect, then it is incomprehensible just how the Public Protector could ever be effective in what she does and be able to contribute to the strengthening of our constitutional democracy...the obligation to assist and protect the Public Protector so as to ensure her dignity and effectiveness is relevant to the enforcement of her remedial action. The Public Protector would arguably have no dignity and be ineffective if her directives could be ignored willy-nilly...The judgment of the Supreme Court of Appeal is correct in recognising that the Public Protector's remedial action might at times have a binding effect.

The Ombudsman of Kenya is also empowered by the recently enacted Access to Information Act, 2016 to make binding decisions, which can only be appealed to the High Court by an aggrieved person. In Rwanda, the Ombudsman deals with anti-corruption and administrative justice and access to information while that of Namibia deals with anti-corruption, administrative justice and environmental protection. In Ethiopia, the Ombudsman has an additional mandate of enforcing access to information.

An interesting point to note is the endowment of the Ombudsman with coercive powers such as powers to prosecute as is the case in Uganda, Rwanda and Namibia. In Rwanda, the Ombudsman has powers of bailiffs and can request the Supreme Court to reconsider and review judgments rendered at the last instance by ordinary, commercial and military courts, in cases of injustices. These powers were hitherto known under the classical ombudsmanship. The modification of the Ombudsman in Africa with coercive powers was necessary since, as Hatchard has noted, it sought to replace the 'first generation Ombudsman model' with a more effective 'second generation model.'[100] Unlike the classical model, the African Ombudsman is not necessarily a Parliamentary model; it does not rely on Parliament for its existence. It can also investigate all public officers, including Members of Parliament.

The strengthening of the Ombudsman in Africa was occasioned by the ineffectiveness of compliance through Parliamentary reporting due to (i) the nature of formation of Parliament in many African countries, (ii) the nature of work of the Ombudsman, especially where it also incorporates the anti-corruption mandate. In such cases, Parliamentarians would work towards making the office ineffective to their benefit. Reports would be received by Parliament and never be discussed or contents revealed, (iii) the politicisation of the Ombudsman decisions as the office checks public offices and the Government. The recommendations are, therefore, swept to the back burner.

[99] *Economic Freedom Fighters v Speaker of the National Assembly and Others; Democratic Alliance v Speaker of the National Assembly and Others* [2016] ZACC 11.

[100] J. Hatchard, The Institution of the Ombudsman in Africa Revisited' 40(4) I*nternational and Comparative Law Quarterly* 939.

THE GLOBAL RISE OF THE OMBUDSMAN

One of the pertinent questions that arise is why did the Ombudsman grow exponentially in the last five decades? A number of factors fueled the unprecedented growth of the Ombudsman in world from 1960s. First and foremost, the growth of the welfare state after the Second World War resulted in the proliferation of administrative agencies within the state characterised by complex relationships that needed protection of citizens against the exercise of discretionary powers by the bureaucracy. This led to the rise of complaints of maladministration by the public as aptly noted by Professor Rowat thus:

> **It is quite possible nowadays for a citizen's right to accidentally crushed by the vast juggernaut of the government's administrative machine. In this age of the welfare state, thousands of administrative decisions are made each year by government or their agencies, many of them by lowly ranked officials; and if some of these decisions are arbitrary or unjustified, there is no way for the ordinary citizen to get redress.**[101]

The existing accountability mechanisms, the Legislature and the Judiciary, could not adequately provide protection hence the establishment of the Ombudsman to complement the existing mechanisms.

Second, the emphasis on fundamental rights and freedoms after the Second World War required a specialised protection mechanism. The Ombudsman fitted in this new paradigm shift explaining the reason for the adoption of the Danish model in many countries. Third, the increasing work of the legislature diminished its capacity to legislate, represent the electorate, provide oversight and at the same time deal with grievances against an expanding and complex bureaucracy. Worse still, the legislature was not well suited to deal with minor incidences of maladministration, and even in parliamentary systems, the parliamentary question time was always inadequate. A mechanism had to be created to supplement legislative oversight. The Ombudsman fitted well in its design and formulation in Sweden hence the model of Parliamentary Ombudsman.

Fourth, in many emerging or transitioning democracies Africa, Asia, Eastern Europe and Latin America, there were challenges of corruption, maladministration, impunity and human rights violations that needed multi-faceted approaches. The Ombudsman, being an independent office, provided an avenue for addressing such issues and strengthening good governance. Fifth, litigation as a mechanism for addressing administrative injustices was expensive, slow and complicated and could not adequately respond to the changing needs of society. Moreover, an increasing nature of administrative injustices such as discourtesy was deemed non-justiciable and could, therefore, not be handled through litigation. The Ombudsman provided the alternative platform for addressing such grievances expeditiously, fairly and cheaply. Sixth, the end of the Cold War, collapse of the Soviet Union and the subsequent wave of democratisation in the late 1980s created the impetus for the creation of the institution in many developing countries to protect administrative justice and the rights of citizens.

PLACEMENT OF THE OMBUDSMAN IN THE GOVERNANCE STRUCTURE

One of the unsettled debates is the placement of independent oversight bodies in a country's governance structure. Three schools of thoughts have emerged. The first school of thought opines that such bodies are part of the Executive while the second school argues that they are institutions of the state outside government. The third school of thought, however, argues that they form the 'fourth' arm of government. This debate is mainly predominant in countries with 'modern' and 'progressive' constitutions that provide for such oversight bodies. In South Africa, for instance, the debate has been along the first two schools of thought. The first school of thought has been of the viewpoint that there are only three branches of government, and the State Institutions Supporting Constitutional Democracy, as they are commonly known, fall within these branches.[102]

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[101] D. Rowat 'An Ombudsman Scheme for Canada' (1962) 28 *Canadian Journal of Economic and Political Science 253.*

[102] See Goldstone J in *President of the Republic of South Africa v Hugo, 1*997 (4) SA 1 (CC); 1997 (6) BCLR 708 (CC) at para 11. The State Institutions Supporting Constitutional Democracy or Chapter 9 Institutions are the Public Protector, the Auditor General, the South African Human Rights Commission, the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities, and the Commission for Gender Equality.

The second school of thought, however, opines that they are state institutions outside government; they are neither within any of the three branches of government nor form another branch of government. In this category is Murray who asserts that:

> Under the traditional framework of separation of powers, government is divided into three branches within which all government institutions fall. *However, the Chapter 9 institutions are not legislative, judicial or executive – they are not a branch of government. And they do not exercise power in the same way as the executive, legislature or judiciary do. Although they all have some form of investigatory powers and certain administrative powers, they do not govern.* (emphasis added).[103]

She goes further to state that:

> The traditional checks and balances intended to control government and the use of power have... not always been effective. In particular, in parliamentary systems, the relationship between the executive and legislature often leaves the majority in parliament disinclined to exert control over the executive. Instead, it interprets its role as supporting the government. This problem is exacerbated in systems like that in South Africa in which one party dominates and under an electoral system in which accountability to citizens is easily perceived as less important than accountability to part structures. Institutions like Chapter 9s are intended to supplement the traditional methods of securing accountable government...But the checking role of the Chapter 9s is different from that that one branch of government exercises over another in a system of separation of powers with checks and balances.

This position has now been affirmed by the Supreme Court of South Africa in the earlier cited *SABC* Case where it held that although Chapter Nine institutions execute their mandates in terms of national legislation, they are neither organs of the state within the national sphere of government nor are subject to control or direction by the Executive.[104]

Drawing from the South African experience, it is safe to state that the independent oversight institutions, such as the Ombudsman, are institutions of the State which are outside government, but which are *sui generis.* This position finds support in the primary objective of these bodies of protecting the sovereignty of the people, which Murray aptly notes 'relates to the power to monitor government and cannot, therefore, be through the exercise of power.' Moreover, in terms of the specific mandates, some of these institutions perform functions that make it impossible to place them within any of the arms of government. For instance, the Ombudsman of Kenya has a quasi-judicial mandate to deal with maladministration,[105] which can be taken to fall within the Judiciary; handles complaints from the public against public agencies (investigations), a traditional function of the Executive, Legislature and Judiciary; and participates in the review of legislation affecting public administration, a traditional role of the Legislature. The foregoing further finds support from McMillan who examines the situation in Australia by stating that:[106]

> It is misleading to classify many of these agencies as Executive; both their independence and the watchdog role they play in government differentiate them from other agencies in the Executive branch. The alternative...is to re-think their classification by taking stock of the enormous change that has occurred in the framework of government.

This position does not derogate from the famous preposition by Montesquieu on the principle of separation of powers.[107] Instead it supplements it. In any event, Montesquieu's theory was not static; it reflected the position of a small and uncomplicated government at the time.

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[103] C. Murray, 2006, 'The Human Rights Commission et al: What is the Role of South Africa's Chapter 9 Institutions?' *PER*, 9(2), p. 126.
[104] *SABC v DA*, (No. 7 above) para 25.
[105] Sections 8 and 26 of the Commission on Administrative Justice Act, 2011.
[106] J. McMillan, 'The Ombudsman and the Rule of Law,' Address to the Commonwealth Ombudsman, Canberra, 5-6 November 2004.
[107] B. Montesquieu, 1949, *The Spirit of the Law*. Thomas Niget with an Introduction by Franz Neuman Hinton Press Trans. New York: Hatner.

OMBUDSMAN AND THE COURTS

As an institution in the system of administrative justice, the Ombudsman provides the public with a platform for redress of their grievances. Administrative justice refers to the overall system by which decisions are made and action taken by public institutions and covers decision making by public institutions, procedures used by public institutions for making decisions, the law that regulates decision-making, and the systems (such as the various tribunals, ombudsmen and courts) that enable people to challenge these decisions. As stated by Ranjan, a sound system of administrative justice is an indicator of democratic governance and cornerstone of administrative reforms.[108] This is because, it ensures a sound administrative framework, accountable and fair administrative action and procedures and complaints resolution bodies and procedures.[109] The role of the Ombudsman in redress of grievances has been noted by a commentator thus:

> In Latin America, the Ombudsman is often more effective than the courts in protecting human rights and also has an important complementary role in the resolution of conflicts. The Office of the Ombudsman is able to do this because of its particular characteristics, such as not being subject to formalities or legal restrictions for the handling of cases; being an organization that does not charge fee; and being independent of other state bodies.[110]

The review jurisdiction of the Ombudsman has now been fully developed globally to complement the judicial dispute resolution system as noted by Sir Morgan, the Lord Chief Justice of Northern Ireland that:[111]

> the real distinction between the work of the courts and the Ombudsman lies in the differing objectives which each seeks to fulfill. The court is often well placed to identify individual or systemic failure constituting unlawfulness and to quash the decision or direct in relation to the individual case. The scope of the Ombudsman's inquiry is much broader because it is concerned not just to identify individual or systemic failure but to engage with the systems of government to secure systemic redress in order to prevent repeated administrative failure. It seems to me, therefore, that each of us has a complementary role in ensuring an accountable and effective system of administrative law.

In relation to the competencies over each other, it is worth noting that the Ombudsman can investigate administrative malfeasance in the courts. This would not be an affront to judicial independence since administrative malfeasance is an administrative matter that falls within the ambit of the Ombudsman.[112] In this case, the Ombudsman's role is confined to ensuring procedural efficiency and administrative propriety of the judicial system.[113] On the other hand, the Ombudsman is amenable to the judicial review jurisdiction of the courts in respect of its recommendations and decisions.[114] It may also apply in situations where the Ombudsman fails to act. However, even in such cases, the court's jurisdiction is limited to judicial review; the court cannot sit on appeal or re-open the matter. This position was enunciated by the Supreme Court of Ghana in a case for enforcement of the recommendations of the Commission on Human Rights and Administrative Justice thus:

> **It is not open to the Court before which the application was made to reopen the matter as it were, by calling evidence afresh. The court as stated is not sitting on appeal on the case either. It is when the court finds that in hearing the case, the Commission on Human Rights and Administrative Justice did not observe the rules of natural justice or exceeded jurisdiction of...that the application must fail.**[115]

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[108] R. Ranjan, Concept and Role of the Ombudsman Institution in Asia in Improving and Maintaining Public Service Delivery.
[109] Administrative Justice and Tribunals Council. (2010). Principles for Administrative Justice.
[110] G.V. Lorena, 'The Institution of the Ombudsman: The Latin American Experience,' (2003) *Revista IIDH*, Vol. 37, 220.
[111] D. Morgan, 'The Ombudsman and the Judge: Redressing Grievance and Holding to Account,' Address to Northern Ireland Ombudsman's 40th Anniversary Event, 25th November 2009.
[112] O. Amollo, 'Ombudsman, Courts and the Common Law,' A presentation made at the Regional Colloquium of African Ombudsman Institutions held at the Kenya School of Monetary Studies, 18 – 20 September 2013.
[113] G. Kucsko-Stadlmayer, 'Relations Between the Ombudsmen and the Courts: The Viewpoint of the Vanice Commission,' Roundtable with the Russian Commissioners for Human Rights, 22 – 23 November 2011.
[114] In isolated jurisdictions such as Fiji, the Ombudsman is not subject to judicial review. Under section 139(1) of the Constitution of Fiji, the Ombudsman enjoys immunity from review by any court of law.
[115] *Commission on Human Rights and Administrative Justice v Norver* (2000-2002) 1 GLR 78.

Similarly, in the case of *Bradley & Others v Secretary of State for Work and Pensions*, the English Court held that the finding of fact by the Ombudsman could only be impugned where it was objectively shown to be flawed or irrational, or peripheral or there is genuine fresh evidence to be considered.[116] The Court further observed that the purpose of judicial review was simply to require the decision maker to consider the Ombudsman's recommendation as a proper basis.

In the earlier cited *SABC Case*,[117] the Supreme Court of South Africa aptly applied the law by holding that cases from developed countries such as *Bradley* could not be used in the context of South Africa since they reflected a jurisdiction different from the Public Protector's. Accordingly, it held that the mandate of the Public Protector 'to take remedial action' meant that the Office could make binding decisions with legal consequences.

SINGLE MANDATE VIS-À-VIS MULTIPLE MANDATES

As has been aforestated, the adaptation of the Ombudsman in different countries was occasioned by its flexibility to fit in different circumstances. Currently, the institution exists in over 150 countries with different competencies. While a number of countries have adopted Ombudsmen with a single mandate, others have established them with multiple mandates. Globally, the unsettled debate has been on the best model that can effectively address the needs of every country. This debate is unlikely to end soon. In Kenya, there was a debate in 2011 on to whether the country needed a standalone Ombudsman or a national human rights institution performing both human rights and ombudsman functions. Eventually, the proponents for standalone Ombudsman triumphed when the Commission on Administrative Justice was created in September 2011 as a separate and distinct institution to solely enforce maladministration.[118] In Ghana, the debate arose during the proceedings of the Constitution Review Commission in 2011 where submissions were made on whether to maintain or split the three competencies of the Commission on Human Rights and Administrative Justice.[119] Similar debates have been experienced Mozambique and Morocco culminating into the creation of standalone Ombudsman offices.

The proponents of multiple mandates have argued that such model is cost-effective, enhances efficiency and effectiveness due to inter-dependence of functions and clarity of functions. However, such arguments fail to appreciate the general advantages and disadvantages of each model to determine which model is better than the other. Such analysis would bring out the challenges associated with institutions with multiple mandates some of which are discussed hereinafter.

a) In some countries, especially developing countries, challenges of maladministration, corruption and human rights violations are prevalent and significant. Putting all these issues under one institution is simply biting more too much since the institution will be overburdened with too many responsibilities. This leads to underperformance in some areas since the focus is on other areas. Indeed, there is evidence that the Ombudsman function usually suffers in such situations since fighting corruption and redress of human rights violations are considered more urgent and attractive that redress of maladministration. This is well illustrated by the case of Uganda whose Ombudsman (Inspectorate of Government) is endowed with administrative justice and anti-corruption functions as per the Constitution of 1995. While the anti-corruption mandate was operationalised immediately upon the establishment of the institution, the Ombudsman function was only operationalised in 2010. Even then, the Ombudsman mandate is yet to be accorded its rightful place in the operations of the institution since a lot of focus has been placed on the anti-corruption mandate yet many of the issues that lead to corruption are those of maladministration.

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[116] *Bradley & Others v Secretary for Work & Pensions* [2007] EWHC 242 (Admin), [2008] All ER (D) 98.

[117] No. 7 Above

[118] However, section 55 of the Commission on Administrative Justice Act, 2011 provides for review after five years by Parliament as to whether the Commission should exist as a separate institution or be merged with the Kenya National Commission on Human Rights.

[119] Republic of Ghana, 'From a Political to a Developmental Constitution,' Report of the Constitution Review Commission, December 2011.

b) While corruption, maladministration and human rights violations are interrelated, they are special types of emergent social vices that require specialization and training. Institutions with multiple mandates are likely to face acute shortage of staff and developing their technical competence that usually comes with specialization. In contrast, a standalone Ombudsman institution is likely to develop strong technical competence since they are uniquely positioned to identify and address structural problems within public administration.

c) While one of the reasons advanced for institutions with multiple mandates is cost effectiveness, it is important to note that a standalone Ombudsman has the advantage of enabling the institution to get adequate resources for the Ombudsman work. Such arguments also fail to appreciate the need for resources in promoting good governance. Resources given to a standalone Ombudsman addresses under-resourcing and is likely to facilitate not only acquisition of the right infrastructure, but also the employment of competent staff for the Ombudsman work. In multiple mandates model, the Ombudsman function is likely to suffer since more resources may be channeled to other priority areas.

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

e) The so-important and symbolic concept of a single "people's tribune" or "public watchdog" is impaired and diminished in a hybrid system. The effectiveness of the Ombudsman rests upon highly significant intangibles:- his personality; the image he creates among the people; full support of the media; and upon the ability of the people to understand and support the institution.[120] These attributes may be diluted in a multiple competencies model.

ENFORCING DECISIONS OF THE OMBUDSMAN

Moralsuation

As has been earlier stated, one of the main characteristics of the Ombudsman is the power to make recommendations to redress administrative injustices. In the context of classical Ombudsman, implementation of the recommendations is based on moralsuation; the reliance on the moral authority of the recommendations. In such situations, implementation occurs naturally since it is deemed morally inappropriate to fail to implement the recommendations. Even in situations where a coercive judicial remedy may be more appropriate, there is preparedness by agencies to accede to a request by the Ombudsman that implementation of a decision be deferred pending investigation of a complaint. For instance, McMillan has documented a number of instances where the Defence Force of Australia had accepted the request by the Ombudsman to suspend impending executive action to discharge a member of the Defence Force until completion of an investigation, or the maritime authority accepting to defer the demolition of a structure that was the subject of a heritage dispute until a fuller investigation could be conducted.[121] This position still holds sway in a number of jurisdictions in developed countries.

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

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[120] L. Tribbles 'The Ombudsman: Who Needs Him?' 47 J. Urb. L. 1 1969-1970

[121] McMillan, (No. 15 above).

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

Parliamentary Reporting

In a number of jurisdictions, the Ombudsman is required to report to Parliament as part of the accountability mechanism.[122] The recommendations are included in the reports to enable Parliament enforce those that have not been implemented. In such instances, Parliament acts as an oversight institution over the Ombudsman. It is, however, instructive to distinguish parliamentary oversight over the Ombudsman from that over the decisions of the Ombudsman. In this regard, Parliament should not be encouraged to trespass and start acting as though it possesses oversight over the decisions of the Ombudsman. This also poses the risk of politicisation of the decisions of the Ombudsman once they are thrown into the political arena for consideration. In addition, in most cases, the Ombudsman reports to Parliament on an annual basis which makes it impractical for decisions to be enforced regularly and expeditiously. Further, most parliaments are overwhelmed with other crucial parliamentary business and would, therefore, not set aside adequate time to consider the reports of the Ombudsman.

Judicial Enforcement

In some few jurisdictions, enforcement of the decision of the Ombudsman through the court has been adopted. For example, in Northern Ireland, the decision of the Office of the Ombudsman may be enforced in court in instances of unsatisfactory outcomes.[123] However, this can only be used in cases of non-compliance with the decisions of the Ombudsman. Similarly, in Ghana, the recommendations of the Commission on Human Rights and Administrative Justice can be enforced thought the courts. Accordingly, failure to implement the decisions would amount to contempt and attract penal action. Court enforcement has worked well in these countries and ensured satisfactory outcomes. However, it should be noted that the judicial enforcement negates the existence of the Ombudsman and the need for swift justice to the complainants. It entrenches the culture of lack of respect for the Ombudsman and the rule of law since public agencies will not act unless there is a court order.

As aforestated, an effective enforcement of the decisions and recommendations of the Ombudsman is critical to the effectiveness of the Ombudsman in Africa. Soft power of recommendations and moralsuation is not sufficient. The Ombudsman must be relevant and give hope to the citizens otherwise its existence and relevance may be brought to question. In Kenya, being alive to the need for effectiveness, the Ombudsman had devised noble and more effective tools and strategies for implementation of its decisions and recommendations. These include issuance of a 'Notice to Show Cause' in relation to complaints handling,[124] monitoring of 'Resolution of Public Complaints through

[122] J. Hatchard at al. Comparative Constitutionalism and Good Governance in the Commonwealth: An Eastern and Southern African Perspective, (2004) Cambridge University Press, London, 225

[123] C. White, 'Enforcing the Decisions of Ombudsmen – The Northern Ireland Local Government Ombudsman's Experience' 45 *N. Ir. Legal* Q. 1994, 396.

[124] This is issued just before summonses pursuant to sections 2 and 26 of the Commission on Administrative Justice Act and Regulations 17 and 18 of the Commission on Administrative Justice Regulations, 2013 in cases where the respondent public agency or officer has failed to respond to an inquiry or investigation by the Ombudsman and 28 days have passed since the initial communication. It may also be issued where they have failed to provide information on the action taken regarding a report of the Ombudsman. The Notice has proved to be very effective, with a compliance rate of approximately 98 percent.

Performance Contracting System,[125] Public Interest Litigation,[126] Citation Register,[127] Spot Checks,[128] and Huduma Ombudsman Award.[129]

CONCLUDING REMARKS

The role of the Ombudsman in governance in contemporary society cannot be gainsaid. It is one of the institutions that promote good governance and constitutionalism. As noted by the Human Development Report of 2002, 'Deepening Democracy in a Fragmented World,' there is a direct relationship between the Ombudsman and living standards of the public. It provides an easy access for redress of grievances by the public against public offices. According to Frank, the Ombudsman is a flexible institution that can best be engrafted upon the political and legal systems of any country. Due to this, the Ombudsman has been established in many countries with varied mandates and powers.[130]

In spite of the foregoing, there is no one-size-fits-all model; different countries have adopted different models. Irrespective of the model chosen, it is important to consider a model which meets the circumstances and needs of the specific country. In the final analysis, multiple mandates model undermines the very justification for the concept of Ombudsman of providing an accessible and expeditious avenue for redress of citizens' grievances against the government. Simply put, the Ombudsman operates to its full potential when not fused with other competencies.

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[125] The Ombudsman is the lead agency in the 'Resolution of Public Complaints Indicator' in Performance Contracting System in Kenya and rates public institutions annually on compliance with the set guidelines. The Indicator requires all public institutions to promptly address and resolve public complaints lodged with and against them. In this respect, public institutions are obligated to establish mechanisms of working with the Ombudsman to address complaints they have received, including matters handled by the Ombudsman against them. Under this system, public institutions are required to submit quarterly reports detailing complaints received and action taken. The Ombudsman thereafter rates each institution and issues a certificate showing performance in percentage, which guides the overall national rating of the institution. One of the key parameters for rating is the status report on the implementation of any recommendations or decisions of the Ombudsman, the default of which attracts sanctions against the defaulting public institution.

[126] These include matters relating to broad public interest, matters raising substantial policy implications, matters affecting public administration, matters relating to administrative justice and matters concerning leadership and integrity.

[127] The concept of a 'Citation Register' borrows from the 'Black Book' concept. Names of unresponsive and malfeasant public agencies and officers are entered in the Register, and are blacklisted. One of the parameters for determining unresponsiveness and malfeasance is the failure to implement any decisions or recommendations of the Ombudsman. Once the names are entered in the Register, the particular public institutions are sanctioned under the performance contracting system, while public officers may face the possibility of being declared unfit to hold public office.

[128] The Ombudsman conducts regular and impromptu inspections (spot checks) on selected public institutions to ascertain the veracity of the reports submitted under performance contracting and assess standards of service delivery.

[129] Huduma Ombudsman Award is a scheme where outstanding and exemplary public agencies and officers are recognised. One of the parameters for determining the winners is responsiveness to inquiries and compliance with the recommendations and decisions of the Ombudsman. The Scheme has the effect of positively influencing actions by public agencies and officers thereby promoting good administration.

[130] B Frank, 'The Ombudsman – Revisited' *INT'L B.J.* 48 – 60 (May 1975)