Developing Governmental Accountability: The Role of the Ombudsman

John Hatchard

Follow this and additional works at: http://scholar.valpo.edu/twls

Recommended Citation
Available at: http://scholar.valpo.edu/twls/vol11/iss1/9

This Article is brought to you for free and open access by the Valparaiso University Law School at ValpoScholar. It has been accepted for inclusion in Third World Legal Studies by an authorized administrator of ValpoScholar. For more information, please contact a ValpoScholar staff member at scholar@valpo.edu.
DEVELOPING GOVERNMENTAL ACCOUNTABILITY: THE ROLE OF THE OMBUDSMAN

John Hatchard*

Following the recent rapid and dramatic political changes in many countries, there are now renewed calls for efforts to encourage more open government. As a result, some western governments have adopted the principle of *conditionality*, i.e. giving rewards in the form of aid to democratic governments and in recognition of any political reforms which lead to greater accountability and democracy. The corollary is that countries which are particularly bad cases of repression and abuses of human rights are penalised.\(^1\) Accountability is a central feature of this policy because arguably it leads to more open government and makes it more difficult for governments to conceal human rights abuses.\(^2\) This means that there is a need to implement effective mechanisms of accountability. The aim of this article is to suggest that, in this respect, the office of the ombudsman has a key role to play in developing countries.\(^3\) It is argued that although there are numerous such institutions worldwide, some common features are necessary if they are to make an *effective* contribution towards governmental accountability in such countries.

The aim of the office is well-known. It is the pursuit of administrative justice for all citizens in a manner which is confidential, informal, flexible and inexpensive. Thus any person

---

* School of Law, Buckingham University.

1. See, for example, the article by the British Foreign Secretary, Douglas Hurd, "Promoting Good Government," in *Crossbow*, Autumn 1990, p. 4. The principle of linking aid to "good government" is perhaps debatable but has been recognised by the European community, the USA and the United Kingdom. For a full discussion see K. Tomasevski, "Human Rights Violations and Development Aid: From Politics Towards Policy," Commonwealth Secretariat, 1990.

2. See Hurd, *supra* note 1, at 5.

3. It should be noted that the terminology varies from country to country but for the sake of consistency, the term "ombudsman" is used throughout this article.
who claims to have suffered injustice at the hands of a government official may complain to the ombudsman and ask for an investigation into the matter. As a permanent (and often a constitutionally established) institution, the office is potentially a most effective investigatory body operating within — although not being a part of — government. This is because wide-ranging investigative powers give the office unique access to government documents and officials, including the right to compel officials to testify before it and to produce relevant documentation. In addition, the development of personal contacts with high-ranking government officials can often swiftly resolve a complaint whilst officials are frequently extremely cooperative once they realise that the office is also an important protection for them against unfounded, malicious or unfair attacks. Further, the office enables members of the public to identify with a known individual who (it is hoped) retains their confidence, is impartial and able to investigate their complaints fully.

Although originating in Sweden in 1805, the office only became of international importance in the 1960s. It has proved extremely adaptable and now operates in both developed and developing nations, in multi-party and one-party states and in states governed by military juntas. In recommending its establishment in Tanzania in 1965, the Presidential Commission on the Establishment of a One-Party State highlighted the importance of such an institution for developing countries:

In a rapidly developing country it is inevitable that many officials, both of Government and of the ruling party, [are] authorised to exercise wide discretionary powers. Decisions taken by such officials can, however, have the most serious consequences for the individual, and the Commission is aware that there is already a good deal of public concern about the danger of abuse of power. We have,

4. Thus indicating that the ombudsman can adapt to life in developing countries, see the discussion on this point in N. Abedin, "Transplantation of the Ombudsman Institution in Developed and Developing Countries" (1986) Commonwealth Journal of International Affairs 300, especially at 341 et. seq.
therefore, given careful thought to the possibility of providing some safeguards for the ordinary citizen . . .

The result was the establishment of the Permanent Commission of Enquiry in 1966.\(^5\) It should be added that the importance of the office is further enhanced in view of the failure of the "traditional" organs of governmental accountability in many developing nations to provide effective protection for the citizen.

Given the unique advantages of the ombudsman concept the possibility of developing an effective model is extremely attractive. Its premise is that the office of the ombudsman can help "to ensure that the citizen receives just treatment from Government by guaranteeing democracy, the rule of law and [by] fostering human rights."\(^6\) Ideally it should form an integral part of a constitutional framework designed to promote effective government accountability and should fulfill the following four key requirements.

I. An Adequate Jurisdiction

Traditionally, the ombudsman concept is limited to assisting complainants in cases of alleged "maladministration." These cover matters such as favouritism, tribalism, harshness, misleading a member of the public as to his rights, failing to give reasons when under a duty to do so, using powers for the wrong purposes, failing to reply to correspondence or causing unreasonable delay in doing desired public acts.\(^7\) However, as an integral part of the effort to protect citizens from all governmental abuses of power, it is necessary to expand the jurisdiction to include investigations across a wider range of issues.

---


7. See, for example, the definition of the then-Investigator-General in Zambia in J. Hatchard, "The Institution of the Ombudsman in Africa with Special Reference to Zimbabwe" (1986) 35 International & Comparative Law Quarterly 255 at p. 266.
A. Alleged Human Rights Violations

The scope of the investigative power envisaged here is well illustrated by the case of Uganda. There the Inspector-General of Government may conduct an inquiry or order an investigation into any allegation of a violation of human rights, and this includes the power to investigate cases of detention or torture. Similarly in Namibia the ombudsman has the duty to investigate complaints from any inhabitant of Namibia concerning violations of fundamental rights by government officials (both national and local). It is significant that both offices may investigate the very evils and abuses which have plagued the countries for so long. Such a jurisdiction is crucial because the investigation of human rights violations is notoriously difficult given the penchant for governments to keep such matters veiled in secrecy. The point is neatly illustrated by the Zimbabwean case of Tshuma. Here relatives sought information concerning the whereabouts of nine men who were allegedly abducted by members of the security forces in Matabeleland three years earlier and never seen again. The High Court was unable to assist when the police denied all knowledge of the incident. The relatives were thus unable to discover the fate of the men. An investigation by the ombudsman into the activities of the security forces on that occasion, including interviews with officers and access to relevant documentation, might have assisted the relatives by, at the very least, determining whether security personnel were involved in the incident. In practice, the effectiveness of this jurisdiction depends upon the power to investigate the activities of all government officials and, in particular, members of the defence and police forces. Such forces are frequently responsible for some of the worst human rights violations and are often not within the jurisdiction of the ombudsman for “security reasons.”

8. The only “officials” specifically excluded are judges and judicial officers. Does this mean the ombudsman can investigate a complaint against the President or Prime Minister?
9. High Court of Zimbabwe, 1987 (Unreported).
Of course, the expansion of the office into this field does not (and must not) exclude or diminish the operation of non-governmental human rights agencies. Both bodies can undertake meaningful investigations into alleged human rights abuses using their different *modus operandi*, although there is no doubt that the access of the ombudsman to government documentation and personnel can play a decisive role in determining the truth of the matter. The perceived need for an “independent” body to investigate such matters is perhaps overstated.\textsuperscript{10} Certainly the ombudsman must fulfill certain criteria if the office is to be credible (see below). If this is done, then impartial and effective investigations can result.

**B. Investigating Corrupt Practices**

Many developing countries face serious problems of corruption on the part of government officials, particularly bribery and misuse of office to serve personal interests.\textsuperscript{11} In practice such activities hinder development and victimize persons both individually and collectively. The seriousness of the problem has also led the United Nations Economic and Social Council to seek administrative and regulatory mechanisms designed to eliminate such practices.\textsuperscript{12} One such mechanism is to make use of the ombudsman. The advantage of using the office of the ombudsman here is that as a high profile national institution it is potentially better able to resist improper pressure from the executive than other bodies and is thus better equipped to undertake meaningful investigations. Operationally, it can perform an auditing function thereby stimulating and making use of the flow of information that


\textsuperscript{11} See, for example, the National Resistance Movement 10-Point Plan: Point No. 7 (Uganda).

is essential to identifying and combatting dishonesty in government. In addition, as well as being a screening point for complaints, its prestige and reputation for objectivity make it an obvious point of contact for the reporting of wrongdoing by government officials. The confidentiality of its procedures gives the office an added advantage, particularly as this assists in countering possible intimidation of informants and complainants. In terms of cost effectiveness it is also preferable to have a single office rather than a separate anti-corruption body. In addition, some investigations are inevitably interrelated so that a unified investigatory procedure is arguably more convenient, efficient and time-saving.  

One argument against the operation of the ombudsman in this field is that the scope and complexity of such investigations require the establishment of a special body which has the sole task of investigating and prosecuting corrupt practices. Indeed in some countries, such as Zambia and Nigeria, anti-corruption commissions operate independently of the office of the ombudsman. Even so, it is essential that the terrible scourge of corruption is tackled using every possible mechanism and in this respect the contribution of the ombudsman is potentially highly significant. Indeed, several countries, including Papua New Guinea, India and Nigeria already provide for jurisdiction for the office in this area. All have reported some success in relevant investigations and this should encourage other countries to follow suit.  

A further argument against this jurisdiction is that allegations of corrupt practices (and human rights abuses) are better investigated by *ad hoc* commissions of enquiry which are set up by the head of state. Certainly, on some occasions, such commissions

13. Of course the office is not involved in bringing criminal prosecutions, unlike many anti-corruption commissions.

14. In Uganda the Inspector-General of Government has regularly investigated and reported on instances of corruption by government officials, including members of the National Resistance Army. The President has acted on such reports by disciplining members of the NRA and, on one occasion, by radically reshuffling the NRA leadership. See *Africa Confidential*, Vol. 30, No. 25 and Vol. 31, No. 19.
have performed a useful function. For example, in 1989 in Zimbabwe, President Mugabe appointed the highly publicised Sandura Commission. Its investigations exposed instances of corrupt practices on the part of several senior government figures and led to some Ministers resigning and others being fired by the President. However, in general such commissions achieve little, frequently suffering from delays, political interference and the like. Indeed it is asserted that often "the importance of enquiries is lessened by the fact that recommendations can be and are easily ignored... Indeed such enquiries are launched only when the administration so desires and ordains."\(^5\) Certainly the impact of the Sandura Commission in Zimbabwe was greatly undermined when a senior minister, imprisoned as a result of the enquiry, was immediately granted a free pardon by the President. As a result, the Attorney-General decided not to pursue criminal prosecutions against other ministers implicated in the scandal.\(^6\) A further handicap for such commissions is that the normal rules of evidence are often invoked, thus making a judicial determination of the matter more difficult. In the circumstances, such commissions are not a realistic alternative to investigations by the ombudsman.

\[C. \text{ Independent Investigations and a Legal Advice Function}\]

In many developing countries the majority of the population remain generally ignorant of their legal rights and consequently extremely susceptible to governmental abuses of power.\(^7\) One potentially effective means of protecting such individuals is to provide the ombudsman with a power to undertake independent


\(^{16}\) See also the Miller Commission in Kenya which found that a senior government minister, Charles Njonjo, had misused his position as a public officer. However a pardon was later granted and no prosecution ever took place. See the discussion in J.B. Ojwang, Constitutional Development in Kenya, ACTS Press, 1990, p. 187.

investigations on his or her own initiative. As the Inspector-General of Government (IGG) in Uganda has noted, “the Inspectorate does not just wait for complaints to be brought to it, but it also goes out to unearth corruption and maladministration whether the public complains or not.” Such a jurisdiction is especially important in cases where urgent action is required, for it is clearly unacceptable to predicate action solely upon the receiving of a complaint from a citizen. This is particularly so when transportation and communication problems often make it impossible for a citizen to contact the office in order to lodge an urgent complaint.

Equally pressing is the problem of lack of access to justice for the many indigent people in developing countries. Despite knowledge about a legal right, the complexity of the legal process, the absence of effective legal aid schemes and/or the non-availability of lawyers invariably prevents the majority of citizens from enforcing their legal rights. This is particularly serious as regards the protection of human rights, for it is clear that these are only of any real value if they are enforceable in practice. It is recognised in both Namibia and Uganda, for example, that the ombudsman has a key role to play here. In the former, the ombudsman may provide legal assistance or advice to those seeking to enforce or protect a fundamental right through the courts. In the latter, it is considered that because legal procedures are frequently lengthy, complex and expensive, the law courts are not always a suitable venue for many complainants to bring their cases. Accordingly, the IGG may investigate complaints despite the availability of a judicial remedy. To give the ombudsman a responsibility in this field is both imaginative and appealing. A legal assistance and advice function is certainly not a substitute for a more formal legal aid scheme, but it does represent a practical interim solution for dealing with the problems of access to justice.

19. Article 25(2) Namibian Constitution.


D. Environmental Issues

Developing nations continue to face severe environmental problems caused by the dumping of hazardous waste, over-exploitation of land, deforestation and the like. In Namibia, there was particular concern over the over-exploitation of natural resources during the colonial period. In an attempt to prevent this recurring, the ombudsman has the duty to investigate complaints concerning environmental issues, including “the over-utilization of living natural resources, the irrational exploitation of non-renewable resources, the destruction of ecosystems and the failure to protect the beauty and character of Namibia.”

Investigations apparently are not limited to government activities and this gives the ombudsman wide-ranging investigative powers into an area of growing importance. Coupled with the enhanced remedial procedures enjoyed by the ombudsman (see below), this represents an important extension of the work of the office and is one which is worthy of consideration in other jurisdictions.

E. Who May Complain?

In view of the scope of the jurisdiction, the question of who may complain to the ombudsman becomes relevant because, at present, it is generally assumed that the aggrieved citizen must be the actual complainant. However, this is not always appropriate because some cases may involve a particular group of people or even a whole community — for example, as regards environmental issues. In addition, it may not be possible to establish damage or prejudice to any particular individual. Similarly, in detention cases, it may be impossible for the detainee to contact the ombudsman. Thus a flexible approach to the issue of who may complain is clearly needed.

20. Article 91(d) Namibian Constitution.
F. Overview

The precise scope of the jurisdiction will inevitably vary from country to country. However, the real significance of the enhanced jurisdiction is that it emphasises that the ombudsman is not necessarily limited to the traditional functions. In addition, the office is not restricted to investigating residual matters, i.e. only cases where no other appropriate remedies are available. It is a highly flexible institution with unique advantages over other organs of government accountability. Thus it offers a practical means of offering protection for citizens at all levels.

The proposed model will continue to benefit those who are victims of incompetent and thoughtless officials. However, it will also permit investigations into deliberate abuses of power and the like by officials, including those at the highest echelons of government. This could well lead to government attempts to control the office by political means such as refusing to implement recommendations, pressurising the ombudsman into complying with presidential wishes, or simply appointing a pro-executive individual. Continuing reports of harassment of lawyers indicate how difficult it is to undertake investigations into sensitive human rights issues. This means that any enhanced jurisdiction requires the implementation of effective safeguards for the operation of the office. These are now examined.

II. Effective Remedial Procedures

Traditionally, the ombudsman concept does not involve the exercise of any judicial or quasi-judicial function, for the incumbent has no enforcement powers and can only make

recommendations to rectify an injustice. Typically, in developing countries, if a complaint is not informally resolved after an investigation, any recommendation by the ombudsman for action is passed to the head of state who determines the appropriate action. This is frequently a time-consuming, cumbersome and unsatisfactory process.\(^\text{23}\) A true guardian of citizens' rights needs adequate powers in order to seek an appropriate and speedy remedy for breaches of those rights. In other words, the ability to take "effective" action is the key to the success of the new model. This is recognised, for instance, in Namibia where the ombudsman has the "duty and power to take appropriate action to call for the remedying, correction and reversal of instances specified in the preceding sub-articles ['maladministration," abuse of power, etc.] through such means as are fair, proper and effective."\(^\text{24}\) This means that as well as the usual power to make recommendations for action, the Namibian ombudsman may also take direct action by bringing proceedings for an interdict or other suitable remedy "to secure the termination of the offending action or conduct or the abandonment or alteration of the offending procedures."\(^\text{25}\) This means, for instance, that the ombudsman can afford citizens direct, speedy and effective protection from abuses of power by intransigent government officials. This is especially significant in cases requiring urgent action and complements the independent investigatory power. In addition the ombudsman may challenge the validity of any statutory provision if the offending action or conduct "is sought to be justified by subordinate legislation or regulation which is grossly unreasonable or otherwise ultra vires."\(^\text{26}\) This power represents another major advance as it means that subordinate legislation becomes subject to critical review. In view of the limited scrutinising role played by the legislatures in many developing nations and the proliferation of subordinate legislation, such a jurisdiction could well transform the

---

\(^{23}\) See Hatchard \textit{supra} note 7, at 258.

\(^{24}\) Article 91(e) Namibian Constitution.

\(^{25}\) Article 91(e)(dd) Namibian Constitution.

\(^{26}\) Article 91(e)(ee) Namibian Constitution.
manner in which such regulations are used or abused. The wide-ranging investigations of the ombudsman may also uncover criminal conduct on the part of some government officials. In such circumstances the Namibian ombudsman may refer the matter to the Prosecutor-General with a view to prosecuting the offender(s). This is an unusual power and is significant because, in theory at least, officials, including senior government figures, could face criminal proceedings without the need to obtain presidential approval. Such a power is welcome in that it gives the office an important new weapon when tackling abuses of power. It remains unclear as to whether such a reference will be made public. Although confidentiality of proceedings and anonymity of the parties is traditionally one of the strengths of the office, the value of the reference procedure is certainly enhanced by an announcement of the fact accompanied by full details. This also has the benefit of making a presidential intervention in the matter politically more difficult.

These remedial procedures go well beyond those available to the "traditional" ombudsman. They are perhaps controversial in that they circumvent the role of the president (or the legislature) who has, hitherto, normally controlled the outcome of cases. However, the new procedures are a necessary corollary to the enhanced jurisdiction of the ombudsman. The aim is not the replacement of the presidential role — for this will remain relevant and appropriate in many cases — but the provision of realistic alternative procedures aimed at the more effective and efficient

27. In Nigeria the Public Complaints Commissioner may refer cases to the Supreme Military Council for action where it is felt that the existing laws or administrative regulations are inadequate. See Decree No. 31 of 1975 as amended by Decree No. 21 of 1979.

28. In Nigeria the Public Complaints Commissioner may recommend that a person be prosecuted if it is discovered that a crime has been committed or where the conduct of a person should be subject to disciplinary action. Decree No. 31 of 1975 as amended by Decree No. 21 of 1979.

29. Remarkably, the Namibian Ombudsman also incorporates a quasi-law reform commission role function in that he or she may review pre-independence laws in order to determine whether they violate the letter or spirit of the Constitution and to make consequential recommendations to the President, the Cabinet or Attorney-General for appropriate action following thereupon. Article 91(e)(f) Namibian Constitution.
protection of the rights of citizens. In this respect, they deserve adoption. Even in those jurisdictions where only the "traditional" jurisdiction is retained, the development of new remedial procedures will also enhance the effectiveness of the ombudsman.

III. An Independent Appointment System

In many developing countries the ombudsman is a purely presidential appointee. While the endorsement of the head of state is important, there is a danger that the work of the office will be undermined by the appointment of a pro-executive incumbent (or one perceived as such). Thus there is a need to establish an independent appointment system. Two possible approaches merit attention. The first is to establish an independent Ombudsman Appointments Committee or the like which would include, for example, representatives from human rights organisations and consumer bodies, opposition political parties (if any) and senior civil servants. This is the practice in, for example, Papua New Guinea. An alternative approach is to base the appointment on the recommendation of a Judicial Service Commission consisting of, among others, senior judges and legal practitioners. Whichever choice is made, the presence of a formal appointment body with a membership which includes "independent" persons represents the best hope of obtaining a demonstrably impartial appointee.

30. This is also done by creating a multi-member body: see Hatchard, supra note, 6 at 259.
31. Here the committee consists of the Prime Minister; Chief Justice; Leader of the Opposition; Chairman of the appropriate Permanent Parliamentary Committee and the Chairman of the Public Services Commission. The head of state must act in accordance with the advice of the committee: See Section 217, Constitution of the Independent State of Papua New Guinea. I am indebted to Mrs. P.S. Kibikibi of the Ombudsman Commission of Papua New Guinea for this information.
32. This would mean the revamping or reintroduction of such a body in many countries for Judicial Service Commissions, which were frequently introduced at independence, having either been abolished or turned into purely executive-controlled bodies.
A related issue concerns qualifications for appointment to the office. Many states require the incumbent to hold legal qualifications. In reality, this is unnecessary for so long as the necessary expertise is readily available, the crucial issue is not what the ombudsman is but who he or she is. This view is reflected in, for example, Papua New Guinea where the Chief Ombudsman must be a person of integrity, independence of mind, resolution and high standing in the community.33

IV. Satisfactory Conditions of Service

An ombudsman may remain prone to executive pressure unless his or her appointment is accompanied by satisfactory conditions of service. Ideally, these should be similar to those of members of the judiciary with the incumbent enjoying security of tenure and the like. In practice most ombudsmen are short-term appointees. This constant change of office-holder potentially undermines the effectiveness of the office by ensuring that the incumbent never becomes too "effective" or popular.34 There is thus a need to establish a more permanent position such that an able individual can pursue a career in this field and develop a meaningful institution. The mechanism may vary from country to country although the approach in Papua New Guinea and Namibia, where the conditions of service are virtually identical to those of judges, is probably the most satisfactory.35

It follows that the removal from office of the ombudsman is not a matter for the exercise of independent presidential action. Ideally, the recommendation should come from the same body

33. See section 4(1) Organic Law on the Ombudsman Commission. Provision is also made for one of his immediate subordinates to have professional accountancy qualifications and the other to have appropriate legal or administrative experience.

34. Perhaps there is also a fear that the ombudsman might pose a political threat to the government. His or her knowledge of the working of government through access to officials and sensitive official documents would be of considerable use to political opponents.

35. This includes the provision that the ombudsman shall hold office until the age of sixty-five years. Indeed, the President may extend the retirement age to seventy: Article 90(2) Namibian Constitution.
which recommended the appointment after a full enquiry. As in the case of members of the judiciary, the only grounds for recommending removal should be either mental incapacity or gross misconduct.

Conclusion

Pressure of space prevents a fuller analysis of the issues here. However, the ombudsman model propounded here holds out the promise of an institution which will be in the forefront of efforts to effect meaningful government accountability in developing nations. The acid test is whether citizens, either individually or collectively, are afforded effective protection in practice. There is no doubt that many countries view the ombudsman concept with considerable suspicion both because of the sensitive nature of the investigations and the potentially politically damaging repercussions of the findings. Often this has led to governments paying mere “lip-service” to the concept, while others have simply declined to introduce it. This is regrettable. It is hoped that the fact that countries such as Uganda and Namibia — both with previously very poor human rights records — have moved toward the new model will encourage and persuade others to establish the ombudsman along these lines.

The resource implications of the model are formidable, for it is essential that the office is provided with a well-trained and experienced staff backed up by adequate resources. Regrettably, in many countries, the effectiveness of the present office is severely hampered by limited resources. Thus, it will take both considerable time and effort and clear government support to implement the model. Thus, in the short term it is perhaps unrealistic to expect spectacular results. However, its advantages are so considerable that the operation of even a limited model at
the outset should lead to the office of ombudsman making an immediate contribution to effective government accountability.\(^{36}\)

---

36. For example, in Uganda the IGG has been effective in dealing with cases of unlawful detention in Kampala. However, he has failed to investigate alleged political killings by the army upcountry. It is not clear as to whether this is due to lack of resources or lack of will. See Carver supra note 10, at 404-405.