

**INDEPENDENCE AND ACCOUNTABILITY OF THE OMBUDSMAN INSTITUTION IN
AFRICA**

**A PAPER PRESENTED AT THE AFRICAN OMBUDSMAN ASSOCIATION
CONFERENCE**

BY

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IN JOHANNESBURG, REPUBLIC OF SOUTH AFRICA

APRIL 2005

INDEPENDENCE AND ACCOUNTABILITY OF OMBUDSMAN INSTITUTIONS IN AFRICA

The Ombudsman offices in Africa are entrusted with a number of responsibilities. The roles of this institution vary from country to country and depend on several factors such as the country's political history, socio-economic standing in the international community, cultural and traditional values and therefore there is no homogeneity. For example, in Lesotho and Namibia besides handling matters of administrative justice, the Ombudsman Office also deals with matters of environmental protection and in Uganda the Inspector General of Government also focuses on corruption and enforcement of leadership code¹. Although the roles of this office vary from country to country, there are several common trends, values and ideals to which we all ascribe and these are the ones that bind us together. Some of these are the promotion and protection of human rights, respect of rule of law, good governance and fight against corruption.

In order for the office of the Ombudsman to ably fulfill its obligations, there is a set of principles that must be followed. The office must have a defined jurisdiction and adequate powers; it should be accessible, independent and accountable to the appropriate institutions and the people it serves².

The requirement of independence is very fundamental because without this factor the Ombudsman Office cannot fulfill its important function of protecting people from injustice.

In this paper, I will discuss the factor of independence of the Ombudsman Office. A number of aspects that make up this term will be looked at. Taking into account that the independence of this Office does not mean that the office should

¹ E D A Chibwana, Towards the Harmonization of the Establishment and Mandate of the Office of the Ombudsman, Paper presented at the 8th Regional Conference of the African Ombudsmen and Mediators (Ouagadougou, 23-25, July, 2003) pp2-3

² See Paris Principles

work in isolation or be completely divorced from other institutions, I will proceed to look at how this office can be accountable to appropriate authorities and to the people it serves. I will use the Office of the Ombudsman of Malawi as an example and also make reference to other Ombudsman Offices in Africa.

INDEPENDENCE OF THE OMBUDSMAN

The requirement of independence of the Ombudsman serves two major purposes: to guarantee the independent functioning of the office and to limit its vulnerability to undue pressure or coercion from outside interests, typically the government; and to ensure the capacity and effectiveness of the office³.

In case of the Office of the Ombudsman of Malawi, its independence is guaranteed by Section 121 of the Constitution. It reads: -

“In the exercise of his or her powers, functions and duties, the Ombudsman shall be completely independent of the interference or direction of any other person or authority”

In Uganda, the independence of the Inspector General of Government is guaranteed by section 227 of the Constitution, which reads: -

“The Inspector General of Government shall be independent in the performance of its functions and shall not be subject to the direction and control of any person or authority and shall only be responsible to Parliament”

³ Lindsnae B, and Lindholt, L, National Human Rights Institution; Standard Setting and Achievement in Lindsnae L and others, National Human Rights Institutions: Articles and Papers, march 2000 p10

A. Legal and Functional Independence

Independence ensures that the Office of the Ombudsman has no external influence say from the government, party functionaries and any circle that might interfere with the operations of the Office. The legal independence enables the Office to operate without any interference from any of the three arms of the government. This implies that the Ombudsman must not be part of any of the three organs of government and certainly not subject to the functional control of any of them. This enables the office to freely receive and investigate allegations of injustice perpetrated by any of the state machinery and its officials.

As seen in the provisions that guarantee independence of the Ombudsman in Malawi and the Inspector General of Uganda, there is need for the Office to be free from any pressure or interference. This means that the modes of operation should not be subject to any hierarchical instructions. Further, it should be at liberty to draft its own rules and should not be subject to external modifications⁴. Nor should recommendations, reports or decisions of the institutions be subject to review by another authority or entity, except where there is a requirement by the legislation establishing the office.

In this respect independence of the Office means that government must not give directives of any kind to the Ombudsman. Further, it must not obstruct or influence in any way the investigations or inquiries conducted by the Ombudsman. In Malawi, for instance, the Ombudsman is free to make his decisions without government interference. His decision can only be reviewed by the High Court as a legal requirement upon an application by a party that is not satisfied with the decision⁵.

⁴ Under Section 14 of the Ombudsman Act, the Ombudsman of Malawi has powers to make his/her own rules

⁵ Section 123(2) of the Constitution of Malawi

B. Financial Independence

The Ombudsman institution needs to have tools and necessities which are suited to the smooth conduct of its activities, in particular adequate funding. The Constitution requires the Government of Malawi to provide the Ombudsman with necessary resources to discharge his functions⁶

On the handling of resources, it is imperative that the Office of the Ombudsman should have control over its finances to reflect its independence. As such there have been strong recommendations that there should be no executive control over the Ombudsman's budget. If there is control over the budget by the executive, the Ombudsman can be dependent on the executive since it will be controlling his or her finances and thus can compromise the independence of the office. Some Ombudsman offices in Africa have financial autonomy while others have not. For example, in Uganda once the Legislature approves the budget of the Inspector General of Government, finances are controlled by the Office⁷. This financial autonomy strengthens the independence of the Office of the Inspector General of Government. In Malawi, once the budget is approved by Parliament, the Ombudsman is financed through the Ministry of Finance (Treasury). Similarly, in Zimbabwe the Ombudsman is financed through the Ministry of Justice. The problem with the latter arrangement is that the Ombudsman Office is at the mercy of the Executive organ of government as he/she cannot execute certain programmes since the Treasury may not have released funds or may release inadequate funds. This affects the independence and effectiveness of the Office.

⁶ Section 125(a) of the Constitution of Malawi

⁷ See Section 229 of the Constitution of Uganda

C. Independence through Appointment

The manner in which the Ombudsman is appointed has a lot of bearing on the effectiveness of the Office. If the Ombudsman's appointment is done as a reward by a particular political party in a country, then it becomes difficult for the incumbent to discharge his duties impartially. In short, the appointment procedure must leave no doubt about one's neutrality, personal integrity and independence.

In most African countries the Ombudsman is appointed by Parliament through recommendations from relevant commissions. In this case the Ombudsman is therefore accountable to Parliament but not necessarily controlled by it, since he is supposed to be independent. For example in Malawi, the Ombudsman is appointed by the Public Appointments Committee of Parliament which comprises Members of Parliament from all political parties represented in Parliament⁸. In some countries the Ombudsman is appointed by the Head of State through recommendations by Parliament or an appropriate service commission. For example the Public Protector of South Africa and the Ombudsman of Botswana are appointed by the President in consultation with the Leader of the Opposition.

At the personal level the independence of the office is enhanced by the personal integrity of the person appointed Ombudsman. The office bearer is not supposed to be easily swayed by any executive pressure or political consideration. He must be bold in dispensing justice. Personality, integrity and credibility of the office holder will reflect competence and impartiality which in turn commands respect from both the general public and authorities. In case of the Ombudsman of Malawi, it is a constitutional requirement that the person holding this office should be publicly regarded as a person who can make impartial judgements, be competent and capable of performing his duties, have sufficient knowledge of law

⁸ Section 122(1) of the Constitution of Malawi

and the workings of Government, be without criminal convictions and not have been bankrupt⁹. In Uganda, the requirements for appointment to the post of the Inspector General of Government or Deputy Inspector General of Government are that the person must be a citizen of Uganda; have high moral character and proven integrity; and possess considerable experience and demonstrated competence and be of high caliber in the conduct of public affairs¹⁰. These requirements ensure that the Ombudsman should be independent and command respect of the people he/she serves.

D. Security of Tenure

Once the Ombudsman is appointed, he/she must enjoy security of tenure. If the incumbent knows that his/her job can be terminated at the whim of the appointing authority, he/she will want to retain the job by acting in a manner uncritical to the government or appointing authority. In this way one cannot claim to have an effective Ombudsman office.

As a security of employment, the term of office and possibility of renewal must be clearly stipulated in the Constitution or enabling Act of the office of the Ombudsman. Further, authority responsible for the dismissal, the removal procedure and circumstances in which the Ombudsman can be dismissed must clearly be spelt out in the Constitution or founding legislation.

To avoid compromising the independence of the ombudsman the founding legislation should specify in much detail the circumstances under which the Ombudsman may be dismissed. These circumstances should relate to ascertainable wrongdoings of a serious nature like failure to perform duties of the office. Further, the body empowered to dismiss the Ombudsman must be specified. It is preferable that this power should vest in Parliament or at an

⁹ Section 122(2) Of the Constitution of Malawi.

¹⁰ Section 223(5) of the Constitution of Uganda

equivalently high level¹¹. In Malawi the Ombudsman may be removed from office by the Public Appointments Committee of Parliament on the grounds of gross misconduct, when he reaches the age of sixty-five years and in such circumstances where had that person not been ombudsman, he or she would have been disqualified from being appointed¹². The procedure for the removal of the Ombudsman is, however, not actually stipulated, but it should be the case that the Public Appointments Committee may remove the Ombudsman based on the said grounds after following principles of natural justice like the right to be heard.

E Power to employ own Staff

The power of the Ombudsman to employ his /her staff is very significant in the operations of the office. Where, for example, civil servants serve in the Ombudsman office, they may not discharge their duties independently since they would be afraid of displeasing their civil service masters. In Malawi the Ombudsman Act empowers the Ombudsman to appoint his/her own staff upon such terms and conditions to be agreed between him/her and the staff¹³.

F. Immunity from prosecution

Another important aspect for the effective operation of the Ombudsman office is that the Ombudsman and his/ her staff should be immuned from civil and criminal prosecution in connection with any acts done in good faith in the execution of their duties. This immunity is one way of guaranteeing the independence of the office. In other words, it becomes easy to carry out investigations without fear of repercussions should findings of investigations or inquiries be unfavourable to those in power. In Malawi the immunity of the Ombudsman and his staff is provided in Section 11 of the Ombudsman Act in the following words:

¹¹ Yigen, K Guarantees of Independence of National Human Rights Institutions: Appointment and Dismissal Procedures of Leading Members in Lindsnae B and others, National Human Rights Institutions: Articles and Working Papers p53

¹² Section 128 of the Constitution of Malawi

"The Ombudsman or any member of staff shall not be liable in respect of anything done or performed in good faith under this Act."

In addition to this, the Malawi Ombudsman, with respect to his/her functions, enjoys similar protection and privileges as are enjoyed by members of Parliament¹⁴.

The independence of the Ombudsman as has been discussed above is quite essential, if the office is to operate effectively and gain the confidence of the general public and those that are being investigated. Further, both the aggrieved party and the party under investigation will respect the decision of the Ombudsman if he is seen to be independent.

For the Ombudsman's independence to be effective and respected, it should be guaranteed in the founding legislation. It may be the Constitution or the enabling Act. The inclusion of independence of the office in the Constitution or the enabling Act is important as it guarantees its observance since it will have a legal basis

ACCOUNTABILITY

As said above, the fact that the Ombudsman is independent does not mean that he should work in isolation or be completely divorced from the general public and relevant authorities. He/ she has to be accountable to the people he/ she serves.

There are several ways in which the Ombudsman can show that he is accountable in the way he performs his functions. These are;

¹³ Section 4 of the Ombudsman Act

¹⁴ Section 125(c) of the Constitution of Malawi

A. Production of Annual Reports of Activities

The Ombudsman office is accountable by producing annual reports of its activities to the appointing authority. In most cases these reports are submitted to Parliament. These reports should be submitted to Parliament because apart from being an appointing authority, it is also an important eye and protector of the interests of the public¹⁵. For the reports to carry meaning, it is important that Parliament should take time to discuss them. The use of a parliamentary committee responsible for the office of the Ombudsman may provide an in-depth consideration of the reports and should be encouraged. Once a report has been submitted to Parliament, it is important that it should be released to the media and the general public for further consideration. The Malawi Ombudsman submits Annual Reports to the National Assembly¹⁶ and Special Reports to the Legal Affairs Committee of Parliament and Cabinet¹⁷

Apart from submitting annual reports of activities, the Ombudsman of Malawi also submits monthly expenditure returns to the Ministry of Finance (Treasury). These returns indicate how the finances given to the Ombudsman in a month have been utilized. In addition to financial returns, the office is also subject to financial audit by government officials (The Department of the Auditor General) and if there are financial irregularities, the Ombudsman can be questioned by the Public Accounts Committee and disciplinary action may follow if there is abuse of funds. This does not however mean that there is interference with the independence of the office but shows that the office is accountable and transparent in its operations

¹⁵ Commonwealth Secretariat, National Human Rights Institution: Best Practice, 2001 p28

¹⁶ Section 127 of the Constitution of Malawi

¹⁷ Section 9 of the Ombudsman Act

B Relationship with the media

An independent media plays an important role in enforcing Ombudsman's accountability. In Malawi the media has been instrumental in informing the public about the role of the Ombudsman in promoting and protecting human rights and administrative justice. They attend the Ombudsman's public inquiries and publish his decisions. In some instances the media has pointed out some weaknesses in the operations of the office. This has in a great way assisted the office to work on those weaknesses and change for the better.

The media can also play a role in enforcing the independence of the Ombudsman. For example, there was a time in Malawi when the Executive wanted to initiate a bill to reduce the powers of the Ombudsman. The media wrote a number of articles against the idea and finally the matter was dropped

D Relationship with the general public

The Ombudsman may also be accountable by involving the public in its operations. In Malawi the inquiries conducted by the Ombudsman are open to the public. Members of the general public are allowed to attend these inquiries and see for themselves how the office performs its functions and make their own assessments

E. Relationship with the Judiciary

In Malawi the decisions or recommendations of the office of the Ombudsman are not final. Any party that is not satisfied with his decision or recommendation can apply to the High Court for review¹⁸. The High Court can uphold or reverse the decisions or recommendations of the Ombudsman. This makes the Ombudsman to exercise his functions with prudence since he bears in mind the fact that he will be accountable to justify his decision or recommendation if it is challenged in the High Court. It is, however, pleasing that a number of decisions that have gone for review have been upheld by the High Court

CONCLUSION

In order for the Ombudsman to perform his/her functions effectively and efficiently, it is significant that he/she should be independent. No one should interfere in his/her operations. Tenure of office should be secured. He/she should control his/her finances. He/she should be in a position to employ his/her own staff and his/her members of staff should be free from civil and criminal prosecution for acts done in good faith in the course of his/her employment. However, independence of the office does not mean that the office holder should be divorced from the general public and government authorities. The Ombudsman has the obligation to be accountable in its operations to the general public and appropriate government authorities. Annual reports have to be produced to the appointing authority, such as Parliament. He/she must account for finances and be open to scrutiny by the media and the general public. By being accountable does not mean the concept of independence of the office is undermined. Failure to follow the principle of accountability defeats the concept of democracy which requires public officials to be answerable to the public and to be transparent in their operations

¹⁸ Section 123(2) Of the Constitution of Malawi

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