

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

**A paper Presented by:**

**(Judge): Mohammed Abuzeid Ahmed  
President, Public Grievances and Corrections Board,  
Republic of The Sudan  
Vice President, African Ombudsman Association**

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## 1. INTRODUCTION

Contemporary times are witnessing an increasing demand for effective governance. Good governance is seen as a necessity for reducing poverty, sustaining development, achieving democracy, reforming civil service and combating corruption. The issues and problems raised are global in nature and are not limited or confined to one country or one nation. Collaborative effort that goes beyond the capability of government is needed and calls for effective governance that incorporates the work of government and civil society's institutions.

The description of "good governance", including that of the UN, is referred to it as: transparent, accountable, participatory, effective, equitable, and an institution that promotes the rule of law. If this is the sort of governance required, then the ombudsman institution has an important role to play in enhancing it, because it is one of those institutions that aim to bring about improvements in accountability and transparency.

Within the context of responsive administration and reform in general, the ombudsman institution was established in a number of countries in the world, and in modern history, Sweden being the first among them, the tradition extended gradually until it reached the African countries, as well as other countries, specially after their independence during the last three decades of the Twentieth Century. It is worth mentioning in this respect that not all African countries, for some reason or another, established this institution, as in the case of the North African countries with the exception of the very few.

Where it had been instituted, the ombudsman achieved varying degrees of success due to various contextual reasons. Important variables among those included of independence, accountability, trust and commitment.

The wind of change, characterizing the present time, raised to the forefront an intellectual debate regarding the role of the State, and touching the main premises, rationale and scope of government. Contributing to this dialogue, this paper analyzes the ombudsman institution, as an independent organ of the State, arguing that for the purposes of good governance, democracy and development in the Twenty First Century the ombudsman's independence and accountability need to be enhanced in order to perform its functions well in the African countries.

The discussion and analysis that is going to be presented in this paper, though brief, will pay special attention to the Sudanese experience, bearing in heart some of the arguments which may be applicable to the ombudsman institution in some of the African countries.

The position taken by me calls for independence and accountability of the ombudsman institution in order to serve the public interest in an effective proper manner. While independence and accountability are deemed necessary for the proper functioning of the ombudsman institution, they are not contradictory, and the presence of one does not necessarily exclude the other.

Whether one agrees with the line of thinking brought up in this paper or not, it is hoped that the paper will stimulate more discussion and interest in the topic, the thing that will contribute to our knowledge through revisiting the issues raised and shedding more light on them, mainly: is there a need for an independent and accountable ombudsman institution in Africa?, what does the African experience with this institution tell us up to now?, what are the future prospects for the ombudsman institution in Africa?.

## 2. **THE NEED FOR AN INDEPENDENT OMBUDSMAN INSTITUTION**

The new revised edition of Webster's Dictionary defines "independent" as:

- (1) Not under the control or rule of others; self-governing.
- (2) Not part of or connected to another group.
- (3) Not identified with any other political party or faction.
- (4) Not under the influence or guidance of others; self-reliant.
- (5) Of, possessing, or indicating an income that permits one to live without labor or dependence on others (Webster, 1998, p 254).

Most of the meanings of the term "independent" (whether used as an adjective in the English language, or as a noun in the same sense as "independence") indicate a quality or a condition that is desired in the ombudsman institution everywhere, and with a special reference to the African countries.

Most of the African countries, if not all, won their independence from their colonizers (whether French, British, Spanish, Belgians or others) after a hard courageous strife and struggle, thus independence to them represents a dividing line between an undesired state and a desired one. It also represents the beginning of a long march towards development, and brings with it hopes and aspirations for better future. But, due to various reasons, these hopes and aspirations have not been achieved. Still there is determination to overcome difficulties and pave the way towards sustained development, and good governance.

Endeavours towards that desired end (i.e. good governance) included “measures to provide for good politics with constitutional checks and balances, to prevent misuse of power, attempts to implement sound economic policies, which lead to a fair and just distribution of wealth and power amongst citizens, just social policies, effective administration and active civil society, where autonomous institutions had helpful interactions with each other and with government” Osborne, (1999, p 61).

In a nutshell, what is required is compiled in the definition of Professor Mc Dougal and Professor Laswell of Yale University that says:

“Human dignity may be succinctly defined as the widest sharing and shaping of human values and choice of persuasion, rather than coercion, as a modality of power”.

So, we can generally state that within their efforts towards State and nation building, the African countries established the ombudsman institution to contribute to realizing their hopes to being about good governance. Though not one single model of the ombudsman institution

has been established, an independent ombudsman institution was thought to be in a better position to achieve its objectives. Where they have been established, the ombudsman institutions were linked to the higher organs of the State; i.e. Parliament or Head of the State, or both. Moreover, we find some countries are having a single ombudsman, while others are having a Board or a Commission consisting of more than one incumbent. Also one can find centralized systems and decentralized systems of ombudsman, the Sudan and South Africa being examples of the second.

The arguments for an independent ombudsman institution are many. Both constitutions and enabling laws, realizing the merits of the autonomy of such an institution, they provided for its protection from political and administrative influences in order to give impartial justice, and bring about improvements in accountability and transparency. The desired position of the ombudsman institution is similar to that of an independent judiciary able to deliver impartial and speedy justice, without costs or fees, or formalities, and avoiding cumbersome courts' procedures.

Seen against the background of the volume of maladministration, which are variable, not limited or confined, the case for an independent ombudsman institution becomes crystal clear. Similarly the case against corruption is clear. It is becoming very vivid in Africa as well as in other places of the world, that "corruption damages the economy, diverts resources from their development and service goals, and distorts policy decisions. Corruption undermines society, causing discontent and political unrest. Corruption hurts people, putting lives at risk if it is used to evade health or safety or environmental regulations, or when it enables criminals to escape punishment". In this case good governance becomes a

necessary condition to combat corruption, sustain development and provide constitutional protection from the abuse of power. In this context support for an independent ombudsman institution turns to be a support for good governance as it works towards promoting the rule of law.

In the case of the Sudan, the present National Salvation Government, faced with many challenges worked to establish an independent ombudsman institution (The Public Grievances and Corrections Board). The 1998 Constitution of the Republic of the Sudan provided for an independent Ombudsman Institution. According to Article 130 of the said Constitution it was ordained that, "There shall be established an independent body to be known as The Public Grievances and Corrections Board. Its president and members shall be appointed by the President of the Republic with the approval of the National Assembly (Parliament). The Board shall be responsible to the President of the Republic and to the National Assembly".

The Law further stressed on this independence, as the Public Grievances and Corrections Board Act, 1998, referred to the independence of the institution in several sections, (e.g.: sections 4, 5, 7 etc...). Independence of the Sudanese Ombudsman Institution is not seen only in terms of the establishment and position of the institution, but it is also seen in terms of the appointment of the incumbents of the office and the manner in which the Ombudsman practises the duties and responsibilities. The functions and responsibilities of the Ombudsman are broad and important. Those functions and responsibilities include, inter alia, alleviation of injustice, investigating grievances, assuring efficiency, purity and integrity of the executive agencies of the State, verify the most ideal utilization of the



available material and human capabilities, consider any such law as the application of which may lead to patent injustice and submit a memorandum of the same to the competent bodies (Section 7 of the Public Grievances and Corrections Board, Act, 1998).

In performing those duties, in an effective manner, Section 8 of the said Act provides that the Board has the power to summon any person to appear for questioning him before it, call for any information, deeds and documents, and direct the State Organ concerned to take the necessary administrative measures etc.

The independence of the Sudanese Ombudsman Institution granted by the Constitution and the enabling Act embodied other aspects of this important feature, mainly: financial and organizational aspects. The Board is entitled to prepare its own budget, propose the terms of service for its employees, its organizational and functional structure and submit them to the President of the Republic.

In sum, the independence granted to this institution aimed at providing the necessary protection to enable the office to achieve its objectives effectively.

It is not only that independence is required for the effective functioning of the institution but also accountability. And it naturally goes without saying, that the good functioning of the ombudsman institution is to a very far extent connected with the character, and personality in addition to the knowledge, wisdom and shrewdness of the office holder.

### 3. THE NEED FOR AN ACCOUNTABLE OMBUDSMAN INSTITUTION

Kevin Murphy defines Administrative Accountability by saying,:

“I define administrative accountability as the process of ensuring that public service activities and, in particular, the exercise of decision-making powers, whether discretionary or otherwise, are carried out not only in a proper legal manner but in a manner consistent with fairness and good administrative practice. (7 November, 1997)”.

For any discussion of accountability to be meaningful it should be placed in a defined context. The delineation of the context requires posing and answering significant questions such as:-

- who is accountable?
- to whom?
- for what?
- how can we ensure and/or enhance accountability?

So reference to those questions should be made in relation to the ombudsman institution in Africa, the focus of this paper, and theme of this Conference.

Reform initiatives identified accountability as a strategic element in the transformation towards democratic systems. According to the doctrine of “ministerial responsibility”, holders of political positions and public sector managers are held to be responsible and accountable for their actions. Today the practice of accountability is extended to refer to the process by which those who have decision-making powers to be held accountable to

the beneficiaries of the services. Accountability "requires answerability for actions taken, delegated authority, tasks carried out according to certain criteria of performance. For the answer given needs to be evaluated by a superior body and measured against a standard or an expectation. Then praise or blame or sanction can be applied. The coupling of information with its evaluation and application, as Dunsire, (1978 p 41) pointed, is what gives accountability or "answerability or "responsibility" their full sense in ordinary usage".

So, in the context of the African ombudsman institution, the accountability concept applies in the manner of answerability to a higher authority and responsibility for actions related to the ombudsman's exercise of powers. This briefly answers the questions of accountability to whom? and for what? In practice, experience shows that the African ombudsman may be accountable to the Legislative Assembly (Parliament), or the Head of the State (President), or both, and also to the citizen as it will be stated later.

As a guiding principle, and value, accountability needs to be enhanced. The accountability of all organs of the State (including the ombudsman and the organs accountable to him) needs to be enhanced and strengthened, because a high level of accountability will enable them to achieve their objectives.

The need for promoting accountability was stressed by many scholars in Africa and elsewhere. Adamolekun (1998) referred to the need for paying more attention to enhancing accountability in the public service in sub-Saharan Africa as indicated by the mounting volume of corruption. He rightly considered "corruption as a critical barometer of weak accountability. Enforcing accountability could be achieved through several

methods including the use of parliamentary institutions, judicial institutions and specialized institutions like the ombudsman. Enforcement of accountability can also be maintained through the oversight role of the mass-media and public opinion. Furthermore, there are internal control measures within governmental bureaucracies usually involving checks on the conduct of the permanent appointed officials, that are enforced directly by the temporary elected officials, and through the rules and the core personnel and finance functions. However, the practice of any of those measures or a combination of them varies from one country to another, depending on the historical, social, economic and political realities in each country”.

The need for an accountable ombudsman institution in Africa, as well as other governmental institutions was further stressed by Reynolds, (1993) noticing what was generally happening in the African scene as “the African continent is characterized today by political disorder, economic upheavals, starvation, malnutrition, human and animal diseases, illiteracy and poverty”.

The view advocated by Reynolds found, to a large extent, support in the opinion of Marten Oosting (2001), former President of the International Ombudsman Institute, who opined that, “in developing countries, the socio-economic dimension can generate numerous specific problems that directly impact on the ombudsman’s task. For instance, these countries will often have a government apparatus that is unwieldy and of poor quality. Then there is the problem of corruption, which arises when regular incomes are very low and there has been no development of an ethos that not only condemns the abuse of government power for personal

motives but also actively and widely opposes it and punishes it with harsh sanctions. When the country concerned is also a new democracy, the ombudsman certainly faces a huge challenge”.

I cannot concur more to the conclusion, which Marten Oosting arrived at.

Those problems affect most individuals, present challenges that require solutions. Governments, private sector and the civil society are all required to participate in finding solutions to them in a participatory and democratic way. An independent and an accountable ombudsman institution is therefore needed to help in contributing to solve those problems; address the challenges and lay down the foundation for good governance.

Measures to enhance accountability included setting forth some principles for the provision of services as reflected by the experience of South Africa. Such principles included: service standards, access, ensuring courtesy, providing more and better information, remedying mistakes and failures, getting the best possible value for money. Those were hoped to increase openness, transparency and accountability.

Kroukamp (1999). The extent of success in achieving those principles in order to provide for equity, efficiency and welfare remains to be evaluated.

Complainants and aggrieved persons expect from the Ombudsman in the Sudan, as well as in other countries, when dealing with their cases, to be independent, impartial, transparent, accessible to them with/without formalities, that their grievances be entertained without costs or fees.

Moreover, they expect to find speedy and effective justice that secures their rights by providing effective dispute resolutions based on objective reasons. This is what I may refer to as "Accountability of the Ombudsman to the Citizen".

In the case of the Sudan, the Ombudsman Institution (the Public Grievances and Corrections Board) is an accountable institution. It is accountable to the President of the Republic as well as to the Parliament (the National Assembly) and to the citizens. It is accountable for the proper functioning and exercise of its powers. The Law requires that the Ombudsman should submit an annual performance report and an annual action plan to both, Parliament and the President. In turn, both of them discuss the details of the report and plan with him. The Ombudsman is also required by Law to submit his annual budget to Parliament for approval. The accountability of the Ombudsman institution to the highest organs of the State acts as a safeguard against the executive branch of government interference in the budgetary allocations to the institution.

**4. INDEPENDENCE AND ACCOUNTABILITY OF THE OMBUDSMAN INSTITUTION: CONTRADICTIONARY OR COMPLEMENTARY FEATURES?**

The previous discussion threw some light on the need for an independent and an accountable ombudsman institution in Africa. A corollary of that discussion is that if both independence and accountability are needed, then they are not contradictory. The features of independence and accountability, in my view, are complimentary characteristics and they are both indispensable for an ombudsman institution, not only in Africa, but everywhere.

Though the Sudanese Ombudsman Institution is an independent body, it is still accountable to the President and to Parliament for the performance of his duties and responsibilities as specified by the Constitution and by the enabling Act of 1998. Experience shows that during the past six years since the office was established, there was no effort to lessen or interfere in this independence. Governmental organizations remained accountable to him, and in turn he remained accountable to the President and Parliament in the manner indicated above.

While independence guarded against the interference from the executive organs of the State, accountability guarded against the ills of the bureaucracy, the thing which Victor Ayeni (1987) had feared to happen a long time ago in some of the African ombudsman institutions.

Some of the arguments have been presented in the literature in comparing the Legislative and Executive ombudsman institutions in Africa in terms of their independence and accountability. It has been said that "the Legislative institutions provide more guarantees for independence and accountability, whereas the administrative institution that functions under the rule of a one-party system is subject to governmental maneuvers; i.e. subject to influence that deprives the institution from its independence". In his research, Ayeni (1997) did not find any evidence to support this argument at least in the case of the ombudsman institution in some of the South African countries. Similarly those offices have been successful in dealing effectively with complaints raised by ordinary members of the public. The ombudsman proved to be an effective mechanism for enhancing accountability.

Though the general trend indicates that the ombudsman institution functions without the power of issuing binding decisions, this is not the case in the Sudan, where decisions of the ombudsman are binding vide Section 14 of the Public Grievances and Corrections Board, which reads in the following manner:-

“There shall be deemed, to have committed a contravention, every person who refuses or tardies, without reasonable ground, as to the execution of the decisions of the Board, and in this case, the matter shall be submitted to the President of the Republic, to take such action as he may deem fit, in order to execute the passed decision, without prejudice to any such other measures as may be provided for in any other law”.

It is worth noticing that the Ombudsman in the Sudan is not endowed with the power of protecting human rights; simply because there are other institutions vested with that power, viz., The Human Rights Commission and others.

## 5. **SOME CONCLUDING REMARKS**

A brief discussion about the independence and accountability of the ombudsman institution in Africa was presented in the previous few pages. The need for both independence and accountability with regard to this institution was highlighted with special reference to the Sudan. The independence and accountability of the African ombudsman need to be enhanced and to empower this vital institution to contribute effectively to good governance, democracy and development.



It was also noted that for any discussion of the independence of the ombudsman institution in Africa to be meaningful, it should point to the multi-dimensional aspects of that independence, eg. the constitutional and legal aspects, the organizational, financial and administrative aspects, that is, the establishment of the office as an autonomous entity, exercising power away from political or administrative influence.

The independence of the ombudsman does not negate its accountability. Both characteristics are considered important and necessary features of this institution. For the enhancement of the practice of good governance in future, an independent and accountable ombudsman institution needs to be established, supported and empowered. Current reform trends need to consider alternative strategies for developing the ombudsman institution in Africa.

**The Ombudsman and the exercise of discretionary power (i.e. objective and subjective tests):**

A very important aspect (concerning accountability) which ought to be highlighted, viz., the discretionary powers an ombudsman has, and how he ought to go about them. Needless to say that the main objective of the ombudsman is to achieve and maintain Equity and Justice. In so doing the ombudsman has used his discretionary powers in many cases. The authorities seem to hold different views as to the exercise of these discretionary powers. For instance, George Bernard Shaw is reported to have ironically said:-

“The reasonable man adapts himself to the world, the unreasonable one persists in trying to adapt the world to himself. Therefore, all progress depends on the unreasonable man”. (Kevin Murphy, 7 November 1997).

On the other hand, Kevin Murphy advocated the view that the reasonable man’s objective test, as apposed to the subjective test, is the legal litmus paper for exercising this discretion. The learned scholar says:-

“One of our great strengths as a people is our pragmatism and practicality and the public service has shown it has these strengths in abundance. Public servants in other European countries tend to be more rule bound, legalistic and rigid. A most important feature of the Rule of Law, however, is the absence of arbitrariness on the part of government when determining or disposing of the rights of the individuals. In a modern society it is neither possible nor desirable to define administrative powers so strictly and so rigidly by precise rules that there would be no room for the exercise of discretion. As Professor Kenneth Culp Davis, Professor of Law at the University of Chicago put it in his book Discretionary Justice.

Discretion is a tool, indispensable for individualization of justice ..... Rules cope with the complexities of modern government and of modern justice.

Professor Davis goes on to argue that, while recognizing the need for and the benefits from discretion, we must guard against the dangers or harms from discretion.

Let me quote him again.

**“Let us not oppose discretionary justice that is properly confined, structured and checked, let us oppose discretionary justice that is improperly unconfined, unstructured and unchecked” (April 2003).**

I have it that, an ombudsman, a court of law, or an executive **body**, **when exercising discretionary** power, it should, if seeking to attain justice and equity, **be objective**, and that by bringing the reasonable man’s test into play. In this manner, cases, complaints and grievances will be securely entertained and properly dealt with, legally and equitably, to the satisfaction of all.

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