

Quest for Parliamentary Ombudsman in Bangladesh: An Analysis

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Abstract: In an effort to entrench democracy and instil practices of good governance, Governments and administrations the world over have been pressurised to be transparent and accountable. While there have long been executive complaints procedures and the possibility to judicially review maladministration, none of these options offer the impartiality, flexibility, speed and cost-effectiveness of an Ombudsman. The effectiveness of this institution has meant that more than a 100 countries now have such an office.

The need for an Ombudsman in Bangladesh has been felt ever since Independence. When the *Constitution of the People's Republic of Bangladesh* came into force on 4 November, 1972, it provided that an Ombudsman may be established under Article 77. In pursuance of this article, the 'Jatiyo Sangshad' (National Parliament) passed the *Ombudsman Act, 1980*. However, the office of Parliamentary Ombudsman has not yet been established and the provisions of the Act have remained dormant and grown stale. This has acted as an impediment to national aspirations for transparent, accountable government.

This paper provides an overview of the nature of Ombudsmen in general, its genesis in Bangladesh and analyses the role a Parliamentary Ombudsman may play in facilitating 'good governance' in the country, if established.

Keywords: *Good Governance, Ombudsman, Parliament*

Introduction

A former Parliamentary Commissioner for Administration, Sir Cecil Clothier once mused about where Ombudsman would rank in professional priority if stranded on a desert island with a doctor, policeman, carpenter, fisherman and farmer. He was of no doubt that in such a primordial state, the Ombudsman would not rank very highly but, in the midst of a complex, modern democratic government it is hard to overrate its importance.¹

It is commonly held that the cornerstone of 'good governance' is democracy and representation of the will of the people², however, for such principles to have tangible, beneficial results it is necessary for a country's public service to be efficient, its judicial system reliable and its administration accountable to the public.³ Issues concerning administration have become increasingly prevalent as, in many countries around the world, the development of the welfare state has caused the expansion of the

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¹ Clothier, C. (1986) *The Value of an Ombudsman*, Public Law, Summer, 204-211

² Rahman, M.R. and Azizuddin, M. (1996) *Good Governance and Administrative Efficiency in Bangladesh*, SUST STUDIES 1(1):24-31

³ Sarker, Md. Masud and Md. Bayezid Alam. 2010. *Ombudsman for Good Governance: Bangladesh Perspective*. Journal of Management and Social Sciences. Vol. 6, No. 1, (Spring 2010), pp.13-23 at p.14

administration and has deepened the interaction between the public and State: it has increased people's rights to benefits; it has complicated planning procedure; government intervention in industrial matters has regulated employer and employee rights; so on. This escalation in State interaction has also often led to crises in governance, marked by “an absence of openness, lack of checks and balance with regard to exercise of power and discretion...lack of institutional opportunities for raising [the] citizen's voice against abuse of power, maladministration, violation of rights, negligence, nepotism and corruption.”⁴ To resolve the disputes that these have caused, numerous mechanisms have been adopted worldwide through which the decisions and actions of public authorities can be challenged. The four main avenues are the courts; statutory inquiries; administrative tribunals; and ombudsman. Courts are traditionally the last resort in any dispute. Statutory inquiries and tribunals have limited scope in terms of categories of complaints and cannot cover cases relating to maladministration, particularly those arising particularly out of the exercise of administrative discretion. This leaves a considerable space for a body that is impartial, has a flexible procedure, broad terms of reference and is relatively inexpensive to engage: an Ombudsman. The effectiveness of this institution over the years has meant that more than a 100 countries now have such an office, as indicated by Annex 3.

Governance in Bangladesh has also become increasingly complex and continues to be beset with allegations of maladministration, nepotism and corruption. While there are traditional avenues for tackling such irregularities - such as the judiciary, legislature and inquiry commissions and they are also present in the country - it is evident that they are not able to address all the discrepancies that arise. Litigation is costly, complicated, time consuming and not easily accessible; the Parliament is constrained by party interests and can be seen to lack impartiality and the findings of Inquiry Commissions rarely reach the public eye.⁵ Ombudsmen in contrast are less costly, flexible in procedure, widely respected and are able to make recommendations beyond the scope of ordinary courts. As Sarker and Alam attest, “the development of the concept of Ombudsman has, in many countries, helped reinforce democratic principles for good governance and restored a climate of confidence between governments and citizens”⁶, which can be invaluable in the Bangladesh context.

This paper will first provide an overview of the nature of the Office, its general scope and functions, before honing into the existing scenario in Bangladesh and considering the benefits of having an Ombudsman. This will be followed by a reflection on the possible pitfalls of doing so, particularly given the current laws regarding Ombudsman, and recommendations will be made on how to overcome them.

⁴ Iftekharuzzaman (2007) *Ombudsman for Good Governance in Bangladesh: Why Now, and How?* (The presented at the Seminar organized jointly by Manusher Jonno Foundation and Transparency International Bangladesh, Dhaka, 15 May, 2007), p.3

⁵ Bangladesh Law Commission (2000) *Report on The Ombudsman Act, 1980 (Act XV of 1980)* Available online at: <<http://www.lawcommissionbangladesh.org/reports/31.pdf>> (accessed November 22, 2012), pp. 2-3

⁶ Sarker, Md. Masud and Md. Bayezid Alam. 2010. *Ombudsman for Good Governance: Bangladesh Perspective*. Journal of Management and Social Sciences. Vol. 6, No. 1, (Spring 2010), pp.13-23 at p.17

What is an Ombudsman?

The word ‘Ombudsman’ originates from the Swedish word ‘Ombuds’. It means ‘officer’ or ‘spokesman’ or ‘representative’. Though the office of Ombudsman was first formally conceived in Sweden by the *Swedish Constitution Act, 1809*⁷ it is evident that the idea of such an office has much older roots. Sultana notes that within the Islamic legal system, during the Abbasid era, complaint handling agencies called *Diwan Al Mazalim* were established under the aegis of a senior judge while the Turkish had a *Quadi al Quadat* (‘the judge of judges’) exercising a similar function.⁸ However, since the establishment of Scandinavian Ombudsman in Sweden, Finland and Denmark, the model has been replicated widely, from Spain and Portugal to New Zealand and Canada.

In the UK, the Parliamentary Ombudsman was established in 1967 following the *Whyatt report 1961* where it was recommended that an ombudsman system based on the Scandinavian model of trouble-shooter should be introduced in the United Kingdom, to investigate citizen's complaints concerning maladministration.

A number of countries in Eastern Europe⁹ and sub-Saharan Africa¹⁰ have begun offering Ombudsman services as part of their shift to more democratic systems of government. As Hossain observes, “Among...neighbouring countries Pakistan has successfully adopted this institution. In India Ombudsmen are known as *Lokpal* and *Lokayakta*...Sri Lanka...has one Ombudsman known as Parliamentary Commissioner for Administration, which was introduced in 1981.”¹¹

In its modern manifestation, an Ombudsman is an independent, high-level official, usually with legal training, who is authorised to (1) redress individual grievances, (2) improve the quality of administration and (3) help the legislature to supervise the bureaucracy.¹² However, it is important to note that they cannot be considered a ‘watchdog’ in the traditional sense as they do not have the ‘teeth’ to enforce their recommendations through sanctions.

Doyle & Fenn identify various types of Ombudsman and ombudsman services but the focus of this article will be on ‘Parliamentary Ombudsman’, who are empowered to investigate into maladministration by the Prime Minister, Cabinet Ministers, MPs and central bureaucracy.¹³

⁷ Rowat, R. C. 1986. *The Ombudsman, Citizen's Defender*. London: George Allen and Unwin.

⁸ Sultana, R. (2007) *The Ombudsman Question* The Daily Star. 10 July 2007

⁹ Reid, C. T. (1986) *The Ombudsman's Cousin: the Procuracy in socialist states*, Public Law, Summer, pp. 311-326

¹⁰ Hatchard, J. (1986) *The Institution of the ombudsman in Africa with special reference to Zimbabwe*, International & Comparative Law Quarterly, 35(2), pp. 255-270

¹¹ Hossain, M. A. 2002. *Ombudsman for Bangladesh: Theory and Reality*. Available online at: <<http://unpan1.un.org/intradoc/groups/public/documents/Other/UNPAN014483.pdf>> (accessed November 22, 2012), p.7; Siddiqui, K. (1996) *Towards Good Governance in Bangladesh: Fifty Unpleasant Essays*, Dhaka: The University Press Limited.

¹² Encyclopedia Britannica, *Article on Ombudsman* 15th Edition, Vol. 16, 1986, pp. 960-961

¹³ Bangladesh Law Commission (2000) *Report on The Ombudsman Act, 1980 (Act XV of 1980)* Available online at: <<http://www.lawcommissionbangladesh.org/reports/31.pdf>> (accessed November 22, 2012), pp.1-18; Hossain, M. A. 2002. *Ombudsman for Bangladesh: Theory and Reality*. Available online

Functions of a Parliamentary Ombudsman and Investigation Procedure

To understand the importance of an Ombudsman it is necessary to first learn the traditional functions of a Parliamentary Ombudsman, as evinced by the PCA:

- Investigate complaints within their Terms of Reference made by aggrieved persons regarding the actions of MPs;
- “Promote early, mutual settlement of complaints where appropriate”¹⁴;
- Assist aggrieved persons elucidate their grievance intelligibly and clearly;
- Direct the aggrieved persons to the appropriate body or person to lodge a complaint when the complaint is beyond the Parliamentary Ombudsman’s jurisdiction;
- Present regular reports to Parliament/Head of State as to the complaints the Ombudsman has received;
- Present to Parliament/Head of State a summary of the cases the Ombudsman has supervised, along with their recommendations as to corrective remedies;

The general procedure followed by most Ombudsmen is that when a complaint is received by them, they first establish whether a complaint is malicious or trivial. If it is not, they then “seek to achieve an early, mutually acceptable settlement of a complaint”¹⁵ if appropriate. If it is not resolved through such a dispute resolution mechanism, they investigate by inquiring into the matters involved.¹⁶ They can call for evidence and files on the matter and investigate the fairness and justice of the administrative action on which the complaint lies and thereby propose a remedy.¹⁷ There is no formal hearing as there would be in the court system but the body investigates whether there was any evidence of maladministration in the form of “bias, neglect, inattention, delay, incompetence, ineptitude, perversity, turpitude, arbitrariness”¹⁸. Similarly, there is also no appeals process as there would be in the court system. The only manner in which an Ombudsman’s actions can generally be challenged is through judicial review, which can only be sought on limited grounds.

The investigation and any remedies proposed are then elaborated in a draft preliminary report, this allows for the relevant parties to comment. After the parties have had an opportunity to comment, the report is finalised. A host of remedies and recommendations may be made in the report, some of which, like an apology, explanation or changes in policy or practice may be obtained only from an Ombudsman and not the court system. When a remedial action suggested by the Ombudsman is not followed through, it can publicize the incident and report it to Parliament. Crucially, however, an Ombudsman can

at:<<http://unpan1.un.org/intradoc/groups/public/documents/Other/UNPAN014483.pdf> > (accessed November 22, 2012), p.15

¹⁴ Doyle, M and Fenn, P (2003) *Ombudsman*, Arbitration, 69(4), 243-251, p. 246

¹⁵ Doyle, M and Fenn, P (2003) *Ombudsman*, Arbitration, 69(4), 243-251, p. 247

¹⁶ Raj, Gagan (1998) *Dictionary of Public Administration*. Mumbai: Himalya Publishing House.

¹⁷ Birkinshaw, P. (1994) *Grievances, Remedies and the State*. London: Sweet and Maxwell.

¹⁸ Seneviratne, M. (2000) *Ombudsman 2000*, Professional Inaugural Lecture, Nottingham Law School, April 17, 2000, *Nottingham Law Journal*, p. 18 available at www.bioa.org.uk

only make recommendations whereby he relies on censure, his prestige and “upon the reasonableness of his views to persuade the agency to alter its position”¹⁹.

This highlights that the success of any Parliamentary Ombudsman is contingent on the cooperation of both the legislature and the establishment of a country. While concerns may be raised about whether parliamentarians or civil servants will support and assist such an endeavour, given that the entity will scrutinise their actions, established examples from across the world indicate that cooperation in this regard is usually forthcoming and an Ombudsman is not required to “exercise his formal power to compel evidence and testimony”²⁰. For the same reasons, an Ombudsman does not generally require a large staff as “the bulk of investigative work is done by the agencies themselves”²¹.

Ultimately, Ombudsman must strive to ensure that their services are accessible and impartial. As Doyle & Fern posit, “Ombudsman must ensure that their services are free to complainants, accessible and user-friendly, and are adequately publicised by the bodies within their jurisdiction.”²² They also note that Ombudsman not only “have a responsibility to see that *nothing* has gone wrong as much as to see that *something* has gone wrong”

The Bangladesh Scenario

The bureaucracy in this region has had a powerful, coercive force since the colonial era and has continued to do so whether in the form of ICS offices or CSP officers. They established for themselves an impervious clique that was able to carve out a tranquil and prosperous space for itself despite the political upheavals that shook the subcontinent. It was totally resistant to accountability and change and was prone to cronyism and corruption.²³ The failure to establish political control over the bureaucracy from before 1971 and the recognition that this body had to be reformed, led to the authors of the *Constitution of the People's Republic of Bangladesh, 1972* to provide for the Office of Ombudsman in Article 77, so as to ensure accountability and transparency in the bureaucracy in Bangladesh. However, the cataclysmic events and upheavals of the 1970s and 80s meant that such an aim came to nought.

At the same time, the traditional democratic avenues of accountability through MPs and councillors became increasingly insufficient with the growth of state activity in Bangladesh.²⁴ While certain internal accountability procedures have long existed, such as “time limits for disposal of files, inspection, supervision, Annual Confidential Reports (ACRs), civil service conduct rules etc.”²⁵ They need to be strengthened. This is because

¹⁹ Obaidullah, A.T.M. *Op Cit.*, p. 34

²⁰ Obaidullah, A.T.M. *Op Cit.*, p. 34

²¹ Ibid

²² Doyle, M and Fenn, P (2003) *Ombudsman*, Arbitration, 69(4), 243-251, p. 246

²³ Obaidullah, A.T.M (2001) *Democracy and Good Governance: The Role of Ombudsman*, Bangladesh Institute of Parliamentary Studies: Dhaka, p.45

²⁴ Not only has government bureaucracy expanded, so have the points of contact between citizen and the state.

²⁵ Khan, M. M. (1995) *Governance in Bangladesh*, Journal of Administration and Diplomacy, Vol-3, Nos. 1 & 2

“time limits for disposal of files are not usually complied with. Supervision has been weak in many cases and non-existent in others. Inspections are conducted casually and at irregular intervals...and [t]he ACR is largely subjective and therefore is not of much use.”²⁶ This has meant that in spite of superficial checks and balances, the administration has continued to exert a powerful control over the governance of the country.

One of the best available methods of curbing this, is utilising the till now dormant office of Ombudsman. Article 77 of the Constitution of the People’s Republic of Bangladesh provides for such an office:

1. Parliament may, by law, provide for the establishment of as office of Ombudsman.
2. The Ombudsman shall exercise such powers and perform such functions as parliament may by law, determine, including the power to investigate any action taken by the ministry, a public officer or a statutory public authority.
3. The Ombudsman shall prepare an annual report concerning the discharge of function and such report shall be laid before parliament.²⁷

In 1980, at the initiative taken by the Government, the National Parliament passed the necessary act (Act No. XV of 1980) providing for the establishment of the office of ombudsman.²⁸

Hossain has helpfully summarized the salient provisions of the Ombudsman Act as such:

- “(a) There shall be an Ombudsman who shall be appointed by the president on the recommendation of the parliament.
- (b) Parliament shall recommend for appointment as Ombudsman a person if known legal or administrative ability and conspicuous integrity.
- (c) It shall come into force on such date as the Govt. may, by notification in the official Gazette, appoint.
- (d) The Ombudsman shall, subject this section, hold office for a term of three years from the date on which he enters upon his office, and shall be eligible for reappointment for one further term.
- (e) The Ombudsman shall not be removed from his office except by an order of the president passed pursuant to a resolution of parliament supported by majority of not less than two thirds of the total numbers of parliament on the ground of proved misconduct or physical incapacity.
- (f) The Ombudsman may investigate action taken by a ministry, a statutory public authority, or a public officer in case where a complaint in respect of such action is made to him by a person.

²⁶ Hossain, M. A. 2002. *Ombudsman for Bangladesh: Theory and Reality*. Available online at: <<http://unpan1.un.org/intradoc/groups/public/documents/Other/UNPAN014483.pdf>> (accessed November 22, 2012), p.1

²⁷ GOB. 2011. *The Constitution of the People's Republic of Bangladesh*. Dhaka: Government of Bangladesh.

²⁸ Ahmed, Ali. 1993. *Ombudsman For Bangladesh*. Dhaka: Academic Publishers.

- (g) Ombudsman shall have the power to punish any person who, without lawful excuse obstructs him in the performance of his functions with simple imprisonment, which may extend to three months, or with fine which may extend to two thousand taka, or with both.”²⁹

Other important provisions of the statute include there being no strict procedure for investigation³⁰, the body being given all the powers of a civil court to obtain evidence³¹ and proceedings before the Ombudsman being considered as ‘judicial proceedings’³².

However, as noted by the Bangladesh Law Commission in its report in 2000, section 6 of the Act only empowers an Ombudsman “to investigate only such action of a Ministry, a public officer or a statutory public authority as (1) has caused injustice to any person or (2) has resulted in undue favour being shown to any person or (3) has resulted in accrual of undue personal benefit or gain to any person.”³³ In addition to this, the Law Commission, which had been entrusted with the duty of examining whether the Ombudsman Act was up to date and effective by the Government and had consulted “various Bar Associations of the country, the Ministries of the Government of Bangladesh including the President’s Secretariat, the Prime Minister’s Secretariat, the Parliament Secretariat, Academics, Law Teachers, Judges, Journalists, Chambers of Commerce etc.”³⁴ to do so, ultimately concluded that numerous reforms needed to be made regarding the jurisdiction, applicability and functions of the Ombudsman. However, a glance at the Ombudsman Act, 1980 reveals that no amendment has been made to effect such necessary changes.

Despite these limitations and defects being advantageous to the administration, the office has not yet been established and the provisions of the Act have grown stale. This is not to say that discussions were not held regarding the establishment of the office. Various steps had been taken over the years to ensure that Bangladesh institutes an Ombudsman but that has borne little fruit: They have researched the legal aspects of appointing an Ombudsman³⁵, considered the financial prospects and cost of doing so³⁶ and formed potential organograms of an Ombudsman’s office.³⁷ Regardless of this, little substantive progress was made until 2002.

²⁹ Hossain, M. A. 2002. *Ombudsman for Bangladesh: Theory and Reality*. Available online at: <<http://unpan1.un.org/intradoc/groups/public/documents/Other/UNPAN014483.pdf>> (accessed November 22, 2012), p.10

³⁰ Section 7(2), The Ombudsman Act, 1980

³¹ Section 8(2), The Ombudsman Act, 1980

³² Section 8(3), The Ombudsman Act, 1980

³³ Bangladesh Law Commission (2000) *Report on The Ombudsman Act, 1980 (Act XV of 1980)* Available online at: <<http://www.lawcommissionbangladesh.org/reports/31.pdf>> (accessed November 22, 2012), p.2

³⁴ Bangladesh Law Commission (2000) *Report on The Ombudsman Act, 1980 (Act XV of 1980)* Available online at: <<http://www.lawcommissionbangladesh.org/reports/31.pdf>> (accessed November 22, 2012), p.31

³⁵ The Independent (4 March 1997) 6

³⁶ Janakantha (3 June 1998) 1

³⁷ The Independent (3 June 1998) 12

On January 6, 2002 the coalition government brought the Act into force through a Gazette Notification.³⁸ However, the Government decided that the Ombudsman would only be appointed after updating the Act further. Unfortunately, no positive action has been taken since then. In response to the emerging needs and success of other countries, Bangladesh had set up a national, sector-specific Tax Ombudsman office in July 2006 but that too was abolished soon afterwards in 2010, due to it not having “much work to do”.³⁹ With regard to the office of Ombudsman, that has brought us back to square one.

Reasons why a Parliamentary Ombudsman is needed in Bangladesh

*“...the right to complain, the right to be heard, the right to have corrective action taken if one has suffered harm from government are human rights.”*⁴⁰

- Bernard Frank

To address entrenched maladministration and paper over the substantial defects and hindrances in the judicial, legislative and executive complaints processes highlighted above, there is an ‘urgent need’ to “evolve an adequate and effective mechanism for controlling the administration in exercising its powers, safeguarding individual rights and creating procedures for redress of individual grievances against the administration.” Such a mechanism can be manifested by establishing an impartial, independent Ombudsman service. Some of the reasons are outlined below:

Firstly, an effective Ombudsman Service can improve the general climate of public opinion towards Government. Clothier, who was Parliamentary Commissioner for Administration for 6 years, elaborated that many an aggrieved citizen could be easily pacified if laws, regulations and practices were adequately and considerately explained to them.⁴¹ However, if an investigation is needed nonetheless, an Ombudsman’s recommendations will compel agencies to explain their actions, thus lifting the veil of administrative secrecy, draped by laws such as the *Officials Secrets Act, 1923* and the *Government Servants (Conduct) Rules, 1979* in Bangladesh. Under the current statute, it is possible for the Ombudsman to investigate complaints sent to him MPs, by an individual or undertaken through their own initiative⁴² and this will help citizens to obtain redress for abuse or improper use of powers and will act as a bridge between different tiers of government, as it will expose irregularities in departments or committees that may have been overlooked or unidentified. Additionally, it will also have the effect of making MPs and other officials more circumspect as they will know that their actions are being overseen by a statutory watchdog.⁴³ Frank opines that ultimately, the “presence of the

³⁸ Rahman, M. Matiur. 2002. *Ombudsman: An Aid to Transparent and Accountable Government*. Dhaka: Lokprasadana Samayiki.

³⁹ BD News 24, 2010, *Cabinet dissolves Tax Ombudsman Post*, Available online at: <bdnews24.com/mk/kms/adk/bd/1535h> Accessed on 22 November, 2012

⁴⁰ (Bernard Frank is a Pennsylvanian lawyer who is also Chairman, Ombudsman Committee, International Bar Association.) See Frank, B. (1976) *The Ombudsman and Human Rights Revisited*, 6 Israel Yearbook on Human Rights 122.

⁴¹ Clothier, C. (1986) *The Value of an Ombudsman*, Public Law, Summer, 204-211 at p. 206

⁴² Halim, M.A. (1998) *Constitution, Constitutional Law and Politics: Bangladesh Perspective*, Dhaka

⁴³ Obaidullah, op cit. pp.34-35

Ombudsman has psychological value. The citizens become confident as there is a...deterrent to the bureaucracy.”⁴⁴

Secondly, a sound Ombudsman will be able to complement and assist the legislature in its functions. It will help ensure that MPs respond to the entreaties of their constituents by providing reports to the legislature on the actions of MPs, while also being able to call to attention laws producing “unreasonableness, unjust, oppressive or improperly discriminatory results”⁴⁵. Furthermore, as a statutory body acting outside of the Government’s control, an Ombudsman can be more objective in assessing complaints regarding maladministration than the internal complaints procedures of public institutions and organs.⁴⁶

Thirdly, A Parliamentary Ombudsman can play a key role in the national integrity system⁴⁷, complementing other bodies such as the Anti-corruption Commission (ACC) and can assist and support the effective functioning of other pillars of the State, such as the Judiciary, Parliament, and the Auditor General. An Ombudsman can play a catalytic role in ensuring social accountability of these public institutions and functionaries.

Fourthly, an Ombudsman can play a key role in providing substantial, rather than ‘technical’ justice.⁴⁸ Ombudsman can cut through the delays often faced in the legal system, thus mitigating harm, as they have a relatively less rigid procedure, backlog, etc. This characteristic flexibility also means that they have more avenues of investigation than the courts.

Fifthly, while an Ombudsman does not have the ‘teeth’ to enforce awards or impose sanctions, it is able to utilise other mechanisms to ensure bodies are compelled to follow their recommendations. Indeed, given that the traditional avenues for redress are sometimes rendered ineffective when confronted with Executive powers, an Ombudsman offers alternate paths and remedies. An Ombudsman can censure those guilty of

⁴⁴ Bernard Frank quoted in Jinnah, Mohammad Ali and Mohamad, E. (1999) *Ombudsman in Bangladesh: A Review*, Social Science Review, vol. XVI, No. 1

⁴⁵ Obaidullah, op. cit. p. 35. Also see Article 19 of the *New Zealand Parliamentary Commissioner (Ombudsman) Act, 1962*.

⁴⁶ Iftekharuzzaman (2007) *Ombudsman for Good Governance in Bangladesh: Why Now, and How?* (The presented at the Seminar organized jointly by Manusher Jonno Foundation and Transparency International Bangladesh, Dhaka, 15 May, 2007), p.4

⁴⁷ According to Iftekharuzzaman, “NIS is the sum total of the institutions and practices that have key roles in maintaining the honesty and integrity of the government, and thereby promoting good governance. It is through a holistic approach, involving each of the pillars of the NIS that accountable and transparent governance can be established and sustained.” Iftekharuzzaman (2007) *Ombudsman for Good Governance in Bangladesh: Why Now, and How?* (The presented at the Seminar organized jointly by Manusher Jonno Foundation and Transparency International Bangladesh, Dhaka, 15 May, 2007), p.2. Available online at: <www.tibangladesh.org/Ombudsman150507.pdf> (accessed November 21, 2012) (Note: Though he posits a clear definition of what the NIS is, there is disagreement over what would be considered its constituent pillars. His argument effectively construes civil society, the media, the private sector and international cooperation to be on equal footing with the legislature, executive, judiciary, auditor general, election commission and public watchdogs, however, as a State entity they enjoy a higher status. Instead, the former group of bodies is empowered to help ensure that values of independence, democracy, justice and equality are upheld by the State machinery – within their terms of reference.)

⁴⁸ Halim, M. A. (2006) *Office of ombudsman: Why the delay?* The Daily Star: Dhaka, 21 January 2006

maladministration and this will have great resonance, given their Constitutional and statutory authority. It is evident that such persuasion has been effective in other jurisdictions as expressed by Clothier, when sharing his personal experience as PCA: “In my six years of office, I was never finally denied the remedy I asked for, although occasionally I had to press a little to get it.”⁴⁹ Furthermore, under section 9(5) of the Act, if the Ombudsman is not satisfied with the action taken by the accused body upon receiving their report, they can make a special report to the President of the Republic. It is highly likely that such a special report will be damaging to the career of a professional administrator and so fear of such may act as a substantial deterrent.

Some bodies in the private sector such as Transparency International-Bangladesh (TIB) have *de facto* assumed the role of Parliamentary Ombudsman and Anti-Corruption Commission, despite such functions and powers not being within its terms of reference. While advocating a noble cause, their actions are supposed to be circumscribed by the objectives of their Trust Deed and further constrained by the laws of Bangladesh. The Preamble to the Trust Deed of TIB states: “the promotion and development of institutions, laws and [sic] rules for the establishment of an efficient system ensuring transparency in governance, politics and business and for combating corruption...in Bangladesh.” More specifically, 5(A) of the main text states “The main objects of the Trust shall be to promote and provide for the development of institutions, laws and rules for the establishment of an efficient system for ensuring transparency in governance, politics and business transactions and combating corruption.” However, there are restrictions on how this objective can be achieved, given that TIB accepts foreign donation from DFID, DANIDA, NORAD, SIDA, UNDP and the SDC. The Act concerning foreign donations for voluntary activities such as those conducted by TIB, *The Foreign Donations (Voluntary Activities) Regulation Ordinance, 1978* states in 2(d) that a “voluntary activity” means an activity undertaken or carried on by any person or organisation of his or its own free will to render agricultural, relief, missionary, educational, cultural, vocational, social welfare and development services and shall include any such activity as the Government may, from time to time, specify to be a voluntary activity.” Within this comprehensive definition, there is no mention that voluntary activities can include rendering ‘governance’ or ‘supervisory’ services. To be consonant with the law they need to circumscribe themselves within the activities specified above and cannot adopt a capacity to supervise and criticise Parliament. Other private organisations would face similar constraints. A Parliamentary Ombudsman in contrast would be empowered to investigate issues of maladministration but would be limited largely to cases of corruption, given the terms of The Ombudsman Act, 1980.

Sixthly, the establishment of an Ombudsman by the current Government could be seen to complement their vision of a ‘Digital Bangladesh’, where governance is modern, accountable and transparent. Even if the Ombudsman publishes a few negative reports, the fact that a body has been established to identify and investigate irregularities would enhance the State’s reputation. To foster a transparent image, information on all of the Ombudsman’s activities should be available online and in print and regularly updated. The entity should also fully comply with Bangladesh’s Freedom of Information legislation.

⁴⁹ Clothier, C. (1986) *The Value of an Ombudsman*, Public Law, Summer, 204-211 at p. 210

Seventhly, abstractly speaking, the establishment of an Ombudsman would help address the inequities in governance and thereby reduce the ‘structural violence’⁵⁰ inherent in many societies.

Potential Pitfalls

*“An Ombudsman cannot be bought off the peg: he must be made to measure”*⁵¹

- Professor de Smith

Even if it is accepted that an Ombudsman is needed in Bangladesh and the Ombudsman Act needs to come into force, issues will arise as the governing statute is in urgent need of reform. Though there is much to be garnered from the experience of other countries in providing Ombudsman services, it is pivotal that any such body is created to fit the current context in Bangladesh.

The biggest pitfall on the road towards establishing a Parliamentary Ombudsman in the country is that only a limited number of public functionaries are held responsible by the Act. They include the: “Chairman, Mayor, Director, Member, Trustee, Officer or other employee of a statutory public authority or any other authority, corporation, body or organization established, managed or controlled by the Government.”⁵² Crucially, MPs & Ministers do not fall within the purview of the Act. As the Law Commission correctly identifies, this is due to the fact that the law was passed when Bangladesh was ruled by a Presidential form of Government and administrative decisions were not made by Ministers. However, as that has changed and Ministers are “increasingly being associated with decision-making, actions, development work, implementation of various projects, etc.”⁵³ there is a need for them to be exposed to greater scrutiny⁵⁴ so as to tackle maladministration. There are lessons to be learned in this regard from the experience of establishing Ombudsman in other developing countries. In Tanzania, the first African country to establish the office, the challenges of balancing an ‘effective’ government with having an ‘accountable’ government was recognised as early as 1965, but was instituted nonetheless.⁵⁵ A wider jurisdiction is also needed for greater public confidence in the Ombudsman as well, so as not to give the impression that it is merely a ‘mouthpiece’ or a ‘hollow organ’.

⁵⁰ For more on what constitutes structural violence, see Galtung, J. (1967) *Violence, Peace and Peace Research*, Journal of Peace Research

⁵¹ Mauritius Legislative Assembly Sessional Paper No. 2 of 1965, para. 39

⁵² Section 2(1), *The Ombudsman Act, 1980*

⁵³ Bangladesh Law Commission (2000) *Report on The Ombudsman Act, 1980 (Act XV of 1980)* Available online at: <<http://www.lawcommissionbangladesh.org/reports/31.pdf>> (accessed November 22, 2012), p.10

⁵⁴ This has been recommended by the Law Commission, Bangladesh Law Commission (2000) *Report on The Ombudsman Act, 1980 (Act XV of 1980)* Available online at: <<http://www.lawcommissionbangladesh.org/reports/31.pdf>> (accessed November 22, 2012), pp.13-15

⁵⁵ The Report of the (Tanzanian) Presidential Commission stated: “...there is already a good deal of public concern about the abuse of power. We have, therefore, given careful thought to the possibility of providing some safeguards for the ordinary citizen which will not have the effect of limiting the actions of Government or Party in a way which could hinder the task of nation building.” See Hatchard, J. (1986) *The Institution of the ombudsman in Africa with special reference to Zimbabwe*, International & Comparative Law Quarterly, 35(2), pp. 255-270 at p. 256

Since the passage of the Ombudsman Act in 1980 and the Law Commission Report in 2000, the Anti-Corruption Commission (ACC) has come into force through the *Anti-Corruption Commission Act, 2004* which serves many of the same functions as outlined in the Ombudsman Act. Therefore, if a Parliamentary Ombudsman is created as per the current statute, then not only would it be faced by a strictly curtailed terms of reference but also by conflicting jurisdictions. To maintain the credibility and effective functioning of both entities, it will be necessary for the Ombudsman Act to be amended and schedules drafted to exhaustively list the agencies and departments the Ombudsman will oversee. One option that can be considered is that the Parliamentary Ombudsman will be responsible for maladministration in the form of inefficient, delay, etc. while the ACC will have consider all issues tied to nepotism, fraud, etc. If there are complaints that touch upon both maladministration and corruption, as they will in many cases, then an inter-body committee can be set up to investigate. Ensuring that such terms of reference are made clear to the general public will help prevent them from lodging complaints beyond the Ombudsman's jurisdiction and causing consequent delays.

From the English experience, it is clear that Ombudsman may build a considerable backlog of casework which in turn may lead to delays in processing and investigating complaints. However, this has often been due to a lack of resources and manpower. These budget, staffing and transport problems are particularly acute in developing countries as has been evidenced in Zimbabwe, Ghana, Nigeria, Tanzania etc.⁵⁶

To ensure that such an issue does not arise in the Bangladesh context it will be necessary to ensure that any Ombudsman is adequately equipped and its efficiency, annually reviewed. At the same time it is necessary to avert the risk of creating a 'mini-bureaucracy' in the guise of an Ombudsman as it will create the very encumbrances it is intended to alleviate. There is a real possibility of this occurring as Bangladesh is a densely populated country of approximately 160 million people but the size of the office must be contained within reasonable limits, perhaps along the lines recommended by the Public Administration Reform Commission (PARC).⁵⁷

They also "cannot accept complaints that are...too old"⁵⁸. This again raises the accessibility issue: if an Ombudsman is truly accessible, then this problem would not arise in the first place as the process of lodging a complaint would be straight-forward and clear and it would not take an undue amount of time to do so.

Another criticism that has been posited in other countries about ombudsman is that it anaemic to forthright criticism, sustains government actions⁵⁹ and "potentially serves to limit public protest and outrage by maintaining the status quo, and inherent inequities, by

⁵⁶ Hatchard, J. (1986) *The Institution of the ombudsman in Africa with special reference to Zimbabwe*, International & Comparative Law Quarterly, 35(2), pp. 255-270 at p. 260

⁵⁷ *Public Administration for the 21st Century*, Report of the Public Administration Reform Commission (PARC) vol-2, June 2000. The report contained an organogram which provided for an Ombudsman office containing 35 personnel.

⁵⁸ Doyle, M and Fenn, P (2003) *Ombudsman*, Arbitration, 69(4), 243-251, p. 247

⁵⁹ For instance, Hossain, M. A. 2002. *Ombudsman for Bangladesh: Theory and Reality*. Available online at: <<http://unpan1.un.org/intradoc/groups/public/documents/Other/UNPAN014483.pdf>> (accessed November 22, 2012), p.9

merely tweaking the edges rather than overhauling an entire system”⁶⁰. However, as correctly identified by Doyle & Fenn, an effective Ombudsman service can help effect substantial changes in long-term and broad policies and practices, which courts would not be able to ordinarily do as they have to treat each case individually.

Finally, the independence of the Ombudsman is also an issue that will inevitably rise. At present, the role of the opposition in appointing an Ombudsman is unclear. As Parliament has to advise the President on such an appointment, it would be beneficial to the independent image of the post, if the entire Parliament, including the MPs of the opposition parties, were consulted. A general consensus in the parliament regarding the appointment of Ombudsman candidate can greatly contribute towards establishing a credible and acceptable institution.⁶¹ When coming to a decision, the Parliament could also consider consulting the Chief Justice, senior civil servants, the Chairman of the Anti-Corruption Commission, eminent citizens, etc. The Act is also not specific regarding the qualifications required to be an office holder and importantly, does not specify that the office holder should not be holding any other lucrative post or posts of the Republic.⁶² Additionally, it has been opined by many commentators that tenure of three years is too short for the post of Ombudsman and should be extended.⁶³ A seven year tenure, like the one the Parliamentary Commissioner for Administration in the UK⁶⁴ enjoys may be more suitable as it would help distance the State entity from the Government. Such provisions are imperative for the independent functioning of the Office.

Conclusion

Over the course of this paper, it has been established how, to establish democracy and good governance, it is necessary for the administration to be accountable. It has been mentioned how, in Bangladesh in particular, the bureaucracy has long played a powerful role with little in the way of checks and balances. At the same time, it has been observed that the traditional avenues of redress for maladministration have not always been successful. It is in such a milieu that the need for an Ombudsman arises.

If the Ombudsman is established with a truly independent, impartial nature and vested with appropriate powers and jurisdiction, then it is hoped that it will be a strong voice against administrative malpractice and will be able to provide innovative recommendations to combat such. Simultaneously, the provision of adequate and appropriate resources and concrete steps towards ensuring the independence of the body

⁶⁰ Doyle, M and Fenn, P (2003) *Ombudsman*, Arbitration, 69(4), 243-251, p. 251

⁶¹ Kamal, Touhid Md. Faisal. 2007. *We Want Ombudsman For Bangladesh*. Available online at: <<http://www.americanchronicle.com/articles/view/25109>> (accessed November 20, 2012).

⁶² See Bangladesh Law Commission (2000) *Report on The Ombudsman Act, 1980 (Act XV of 1980)* Available online at: <<http://www.lawcommissionbangladesh.org/reports/31.pdf>> (accessed November 22, 2012), p.15

⁶³ For instance, Hossain, M. A. 2002. *Ombudsman for Bangladesh: Theory and Reality*. Available online at: <<http://unpan1.un.org/intradoc/groups/public/documents/Other/UNPAN014483.pdf>> (accessed November 22, 2012), p.12; the short duration of the tenure of Ombudsman has also been commented upon in other jurisdictions such as in Zimbabwe. See Hatchard, J. (1986) *The Institution of the ombudsman in Africa with special reference to Zimbabwe*, International & Comparative Law Quarterly, 35(2), pp. 255-270 at pp.268-269

⁶⁴ Section 1, *Parliamentary Commissioner Act 1967* c. 13

may assist in reducing entrenched practices of obtaining illegal gratification, deliberately misplacing records, removing and destroying documents, etc. To achieve these objectives and to avoid the pitfalls indicated above, it is necessary to reform the Ombudsman Act, 1980 through a suitable Parliamentary Amendment.

However, it is likely, that just as in many other developing countries, a Parliamentary Ombudsman in Bangladesh will face endemic shortages of staffing and finances, especially as Bangladesh is a densely populated country. They will also have to cope with the daunting challenges incumbent in developing such a service in a country where many citizens are illiterate and/or highly suspicious of authority. Unfortunately, as Clothier posits, “the best administration in a complex society is too costly: and the depressing conclusion therefore is that it will always be so and there will always be a steady volume of complaints about maladministration. And of course an Ombudsman will be needed to hear and determine them”⁶⁵ But as Hossain comments, such an initiative can only be beneficial in the long term as it “will undoubtedly go a long way in helping to establish a real democratic social order and polity based on parliamentary system of government for the well-being of the people at large.”⁶⁶

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⁶⁵ Clothier, C. (1986) *The Value of an Ombudsman*, Public Law, Summer, 204-211 at p. 208

⁶⁶ Hossain, M. A. 2002. *Ombudsman for Bangladesh: Theory and Reality*. Available online at: <http://unpan1.un.org/intradoc/groups/public/documents/Other/UNPAN014483.pdf> > (accessed November 22, 2012), p.18

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