

The Importance and Reality of having an Ombudsman in Bangladesh

By Mohammad Abdul Hannan*

The fundamental aim of a country like Bangladesh is to realise through the democratic process a socialist society, free from exploitation- society in which the rule of law, fundamental human rights and freedom, equality and justice, political, economic and social will be secured for all citizens. The Office of an Ombudsman is not a basic institution of a democratic government; but it is very important to keep democracy intact and effective. Article 77 of the Constitution of Bangladesh is inserted therein in conformity with this statement of the Preamble to attain the same purpose.

Keywords: Reality; Ombudsman; Constitutional Institution; Unwillingness of Bureaucrats

Introduction

A good system of administration, in the ultimate analysis, has to be responsible and responsive to the people. But history demonstrates that more frequently, the impersonal bureaucratic system advertently or inadvertently tries to overwhelm the 'little man'. The proliferation of administrative faults touches the rights of a person and personal property. This research has generated the concept of 'Ombudsman' which in terms of utility means a 'watchdog of the administration' or 'the protector of the little man'.¹ As stated in the Preamble of the Constitution of the People's Republic of Bangladesh² the fundamental aim of the state is to realise through the democratic process a socialist society, free from exploitation- society in which the rule of law, fundamental human rights and freedom, equality and justice, political, economic and social will be secured for all citizens. The Office of an Ombudsman is not a basic institution of a democratic government; but it is very important to keep democracy intact and effective. Article 77 of the Constitution is inserted therein in conformity with this statement of the Preamble to attain the same purpose. The concepts of Anti-corruption Commission, the office of an ombudsman etc. are the results of a study by political scientists and scholars.

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¹Massey (1999) at 458.

²Hereinafter referred to as *The Constitution*

Concept of Ombudsman

The figure of ombudsman, with its current characteristics, owes its origin from Sweden; however, its roots may be found '13 ancient history. For instance, during the Abbasid era, complaint management organisations known as "Diwan Al Mazalim" were founded inside the Islamic judicial system. These organisations are believed to have been run by a senior judge. A comparable role was fulfilled by the "Judge of Judges," or "Quadi al Quadat," when Turkey was in power. In fact, it has been said that the Swedish King Charles XII had the notion to create an ombudsman while he was staying with the Sultan of Turkey for a number of years in the early 1700s after being defeated by the Russian army in Poltava.³

The Swedish term "ombuds" is the source of the word "ombudsman". In Swedish language it commonly denotes a person who acts as a spokesmen or representative of another person or persons.⁴ In short, the characteristics of the institution of Ombudsman are that it is a public office, separate from Parliament and the Courts, which is responsible for monitoring the actions of public authorities and dealing with complaints and problems encountered by the citizens of the country in their contact with, and treatment by those authorities.⁵

The International Bar Association's Ombudsman Committee has proposed the statement that

*“An ombudsman is an office provided for by the Constitution or by the action of the Legislature or Parliament and headed by an independent, high level public official who is responsible to the legislature or Parliament, who receives complaints from aggrieved person against governmental agencies, officials, and employees or who acts on his own motion and who has the power to investigate, recommend, corrective action and issue reports”.*⁶

An Ombudsman's effective derives entirely from his power to focus public and parliamentary attention upon citizens, grievances and concerns. But publicity based on impartial inquiry is a powerful lever.⁷ The review of the Ombudsman Institution in most of the countries in which it operates successfully reveals that it has, in general, the following features:

Independence

Independence from the executive should be guaranteed in the Ombudsman system whether it is appointed by the legislator or the executive.

³Sultana (2007).

⁴Saxena (1987) at 41.

⁵Barnes (1998) at 107.

⁶Frank (1975) at 55.

⁷Wade & Forsyth (1994) at 81.

Power of Investigation

Ombudsman should be empowered to have access to the required information, evidence and documents to reach a decision. It should be given the power to examine both the official bills and documents for investigation.

Power of Recommendation

In general, the Ombudsman lacks enforcement powers and can only offer suggestions to the offending authority in order to correct injustices. However, it is recognised that recommendations based on a thorough investigation of all facts, meticulous evaluation of all factors, and detailed assessments of all concerns may give the organisation with perfect moral strength.

Annual Report

The procedure to lodge complaint with the Ombudsman office must be simple and easy. Moreover, the complaint procedure should be less time consuming to make it a credible institution.

Flexibility

The Ombudsman's office needs to be adaptable so that it can do a variety of tasks. Investigating corruption and administrative irregularities should take advantage of the much-needed administrative degradation.

Personnel

A man of integrity and outstanding merit should be appointed as an Ombudsman. He should be able to confront social injustice, wide political and bureaucratic corruption, and irregularities in public sectors.

Adequate Resource

It should have adequate funding, sufficient staffing and required facilities for its smooth functioning.

Jurisdiction

Another necessary requirement is that the Ombudsman's jurisdiction be clearly defined in order to prevent effort duplication. The basic purpose of this system is to protect the human rights of the citizens. The ombudsman offers the citizen a knowledgeable and unbiased person who responds swiftly and without the need for legal advice and suggests corrective action. Thus, ombudsman is known as 'Citizen's defender', 'Complaint Commissioner' or as an 'independent critic of the administration'.

According to Gerad E Laiden, the device is "the institutional public conscience, the essence, of what government ought to do".⁸

Importance of the Office of an Ombudsman

Government officials' misuse of authority, poor management, nepotism, and corruption have all risen along with the complexity of governance. Every contemporary democratic state offers the standard constitutional and legal frameworks necessary to combat these ills. These include the judicial system, the legislative branch, different government-established inquiry panels, etc:

A. The administration can also be sued in ordinary courts for damages in respect of acts, omissions or acts committed by it. They are also empowered to challenge administrative decisions in certain circumstances. But it is becoming more apparent that –

- (1) The court remedy is expensive, intricate, time-consuming, and difficult for regular people to access, and
- (2) There are also certain aspects of maladministration and illegal practices which are out of reach of the courts.⁹

B. Legislation is the forum for investigating the grievances of citizens and the evils of modern public administration. Parliament can also exercise control over various departments of the government through committees. But, the control by parliament frequently proves illusory in many countries, particularly where cabinet forms of government prevail. Party interests frequently work to undermine impartiality, which is the most crucial component in every investigation, as a result of the cabinet frequently regulating and being governed by the members of its own party in parliament.¹⁰

C. Every modern state government appoints various types of commissions of enquiry 'flies'. These commissions often hold enquiries into executive excesses, negligence on the part of public functionaries and government departments. The chief complaints against them are that their reports are not made public and are consigned to cold storage. Considering the drawbacks of the conventional methods of investigation into various acts and omissions of

⁸Kabir (1998) at 98.

⁹Law Commission (2000).

¹⁰Ibid.

public functionaries an institution called the Ombudsman has therefore been brought into existence in a number of countries.¹¹

The following characteristics of the Ombudsman system stand out based on literature research and actual experiences in different nations:

The Ombudsman is an independent and non-partisan institution established usually by the Parliament. It may also be established by the president, or an institutional authority (e.g., Board of Directors/Trustees if it is private or non-government organisation). The Ombudsman receives complaints from aggrieved persons against concerned institutions, departments, officials and employees. The presence of an effective and resourceful Ombudsman has a moral and psychological value for all parties. The citizens are confident as there is a watchdog that serves as deterrent to misuse of power by the bureaucracy. The officials, on the other hand, are assured that trivial and frivolous complains without proper evidence will be dropped and no undue harassment of legal and administrative procedures will be applicable.¹²

In the present scheme of Bangladesh government, the Ministers play the most vital role in shaping administrative policies and in implementing those policies. They are also ultimately responsible to the Parliament for all actions of their respective ministries and departments. As such, their actions, decisions etc. should also be subject to investigation by the Ombudsman. It has already been observed that one of the main maladies of public administration—corruption in public life—has been kept out of scrutiny by the Ombudsman in the Act.¹³

In Bangladesh, the Anti-Corruption Commission (ACC) is not an alternative to the ombudsman since only abuse of power for financial or other material gain comes under the jurisdiction of ACC. Jurisdiction of different guardian institutions needs to be distinctly identified to avoid overlapping and complementary role between the Ombudsman and other pillars of national integrity system should be explored further.

Constitutional Provisions of Ombudsman

Article 77: Ombudsman

(1) Parliament May, by Law, Provide for the Establishment of the Office of Ombudsman

With the word ‘may’ it is the discretionary power of the Parliament of Bangladesh (House of the Nation) to establish the office of the Ombudsman. This is an enabling provision that empowers the Parliament to do so and at the same time debars any other State organ to create such an office even for a very limited purpose. Clause (1) of Article 77 makes it clear that only an Act of Parliament may establish the office of the Ombudsman. Here, the word ‘law’ means only an Act of

¹¹Ibid.

¹²Iftekhharuzzaman (2007).

¹³Law Commission (2000).

Parliament. The word 'law' does not mean ordinance, order, rule regulation, bye law, notification or another legal instilment as defined in Article 152 but an Act stated therein. Reading the word 'law' with reference of the word 'Parliament' makes it crystal.

(2) The Ombudsman will exercise whatever authority and carry out whatever duties the Parliament may, by law, specify, including the authority to look into any action made by a Ministry, a public official, or a statutory public authority

Clause (2) of Article 77 of the Constitution embodies the fundamental law regarding the powers and functions of the person appointed to the office established according to complying with the provision of clause(1) of this Article. The Ombudsman so appointed can exercise such powers and has to perform such functions the Parliament determines. How the Parliament will determine that? The Parliament will communicate the same by way of an Act of parliament. The Parliament is given discretion as to what powers and functions are to be fixed for the Ombudsman. The word 'may' used in this clause again indicates the discretion of the authority. But by adding "including the power to investigate any action taken..." means that though the Parliament has discretion in granting powers to the Ombudsman it should give him the power to make investigation, because it is the principal task of an Ombudsman. Without the power to investigate the very purpose of the establishment of the office of an Ombudsman can never be attained.

(3) An annual report detailing how the ombudsman carried out his duties must be prepared and presented to Parliament

Clause (3) of Article 77 of the Constitution of the People's Republic of Bangladesh imposes two types of duty on the Ombudsman. The report will be considered by the legislature of Bangladesh and basing on the consideration so made the legislature will make further determination. Annual reports are of considerable importance because they help publicise the operations of the office to policy makers, legislator and the public. Here, the accountability of the Ombudsman is also ensured. But if the Ombudsman is appointed on political consideration (as existing law provides such an opportunity) than this mechanism of his accountability will not work properly.

Analysing and Evaluating the Provisions of the Ombudsman Act, 1980

Appointment, Qualifications and Tenure of Office of the Ombudsman

Section 3(1) of the Ombudsman Act, 1980 provides for the establishment of the Ombudsman where it is stated that there shall be an Ombudsman who shall be appointed by the president on the recommendation of parliament So it seems to me that what was an discretion of the Parliament to provide for the provision of an

office of an Ombudsman, by this time of 1980 becomes an obligation on the parliament in the sense that provision for the establishment of that office is made and section 3(1) of the Ombudsman Act makes it must that an Ombudsman must be in existent. But the 'shall' used in section 3(2) of the same Act maybe of two interpretations. First, parliament has to recommend for appointment as Ombudsman. Second, the parliament will have to recommend a person who has to be of known legal or administrative ability and conspicuous integrity. To me to mean the second interpretation the provision of section 3(2) could be as hereunder.

There are two possible interpretations, one of which is that the Parliament decides who should be appointed and the other is that they must be of known legal or administrative ability and conspicuous integrity. And as this condition must be shall be fulfilled the provision of section 3(1) of the Ombudsman Act shall be obliged. So, the obligation section 3(1) depends upon the section 3(2) is upon the fulfilment of the duty of Parliament. So, the interpretation of section 3(2) is very much sweet to the provision of section 3(1).

While making an analysis and evaluation of this provision considering the political reality of Bangladesh my sense considers some amendments in the appointment precedes of an Ombudsman for Bangladesh. The appointment of an Ombudsman by the president on the recommendation of the Parliament seems to be logical and rational. But the rising political intolerance between the parties and growing tendency of political appointment in the administration makes me think that even in the office the Ombudsman a person will be appointed according to the will of the party in power .It is very much possible for the political party in power to unilaterally appoint the Ombudsman. As a result, the very purpose of the establishment of this office will be destroyed as other tools for ensuring accountability in the public administration. To avoid this consequence, the appointment should be made by a parliament committee including members of both the treasury bench and the opposition group. The Ombudsman must have legal as well as administration expertise and experience. The word 'or' in section 3(2) should be replaced by the word 'and'.¹⁴

According to sub-section (1) of section 4 of the Ombudsman Act, 1980 the tenure of office of an Ombudsman is three years. Bangladesh Parliament passed the Ombudsman Act in 2002, but an earlier decision of making the Act updated was ignored. Till date the office of the ombudsman has not come into being. Bangladesh has established a nationwide, sector-specific Tax Ombudsman office in response to developing needs and the success of other nations. In Bangladesh there is also ombudsman in the private sector: BRAC and Diabetic Association of Bangladesh are examples.¹⁵

Immunities

According to section 16 of the ombudsman Act. 1980, no suit, prosecution shall lie against the ombudsman of any member of his Staff in respect of anything

¹⁴Kabir (1998) at 104.

¹⁵Sultana (2007).

which is done or intended to be done in good faith. The only condition is that the act is intended to be done to exercise any power or to perform an)' functions under this Act. And the decision of the ombudsman shall be final. In no court shall any process, decision, or report of the Ombudsman be contested, examined, reversed, or questioned. So, he will not be sued nor will his acts be challenged. Here, if we consider again about the immunities of the Ombudsman and his, officials independent of the present provision, we will have to decide these following two questions foreseeing the consequences. First, (1) Should any suit, prosecution or other legal proceeding lie against an Ombudsman Of any member of his staff in respect of anything done by them? And (2) Should there be any provision to challenge any proceeding, decision or report of the Ombudsman? If we decide the first question in affirmative then because of the wicked bureaucrats, and their *malafide* objections and obstacles the office of the Ombudsman will be unable to work. If we decide in negative staff of the Ombudsman will be so immune that just using the term 'good faith' they will be able to do many unexpected things, then we are bound toy one more time that if human beings are wicked superb laws will not protect rights of any beings. As it is expected that an Ombudsman should be of conspicuous integrity, but to dream such a dream the appointment procedure will have to be reconsidered. In answering the next question similar type considerations will come forward.

Functions

Investigation on a Complaint. Information

The ombudsman may investigate any action taken by a ministry, statutory public authority, or a public officer on a complaint made to him by any person: The Ombudsman may also proceed *suo moto*, on information about such action, received by him from any person of source. An Ombudsman is empowered to investigate any action of any public officer. The presiding officers of courts are the exception to this general principle. There is a pre-requisite of conducting investigation - that is forwarding a copy of the complaint, or a statement setting out the grounds as the case may, to the Ministry, statutory public authority or the public officer concerned.

Preparation of the Report

The Ombudsman will make a recommendation to the competent authority concerned that the unfairness be corrected. The report may include a time limit as well as the way or strategy of fixing the problem. The Ombudsman has full discretion to recommend such legal, departmental and disciplinary action as he deems fit (section 9). So, the functions of the Ombudsman seem to be right enough to fulfil the purpose of the Act. But the functional jurisdiction of the Ombudsman is not wide enough to cover the acts of local authority or some other similar

institutions¹⁶ As stated in section 8 sub-section (5) of the Act, no person is authorised to furnish any such information to answer any such question or to produce so much of any document as might prejudice the security or defence or international relations of Bangladesh, or the investigation or detection of any crime. No one can be forced to answer any such question, or produce any such document under the terms of this Act. For the purpose stated here, a certificate issued by a Secretary to the Government, certifying that any information, answer, or portion of a document is of such a nature, shall be conclusive and binding¹⁷.

The Secretary to the Government should not be the final authority on the matter of secrecy of information to be given to the Ombudsman. Terms like 'security of the state' etc. should be precisely defined so that no one can take advantage of such vagueness. Such inconsistent provision of the Ombudsman act, 1920 must be repealed before establishing the office of the Ombudsman.

Powers of an Ombudsman

In order to hold an investigation, the Ombudsman can require any public officer or any other person to furnish information or produce any document or to answer any document. It is already stated. And for the purposes of any such investigation, he shall have all the powers of a Civil Court while trying a case in accordance with the Code of Civil Procedure, 1908, in respect to the following matters, namely:

- (a) summoning and enforcing the attendance of any person and questioning him under oath;
- (b) mandating the search for and production of any document;
- (c) requires affidavit-based evidence;
- (d) requesting a copy of any public record from a court or office;
- (e) appointing commissions to look over documents or witnesses;
- (f) such additional items as may be required.¹⁸

Sub-section 3 of section 8 has been a good provision in the sense that it will deter misleading the Ombudsman by any servant of the republic or any other person by providing false documents, information and answers. This provision says that any proceeding before the Ombudsman shall be deemed to be a judicial proceeding within the meaning of section 193 of the penal code (XLV of 1860). So, for providing false evidence the Ombudsman has been empowered to punish the offender with imprisonment of either description which may extent to seven years and to fine him indefinitely.¹⁹

For the purpose of investigation, the Ombudsman has discretionary power to enter upon and inspect any premises and search and seize such books or documents

¹⁶Kabir (1998) at 102.

¹⁷Ibid, at 103.

¹⁸The Ombudsman Act, 1980, section 8.

¹⁹The Penal Code, 1860, section 193.

as he deems necessary, the provisions of sections 102 and 103 of the Code of Criminal Procedure, 1898 shall, so far as may be, apply to regulate it.

According any person being in charge of any such place is bound to allow him free ingress and to afford all reasonable facilities for a search therein.²⁰ If the Ombudsman does not have free ingress, he has got the power to break open any outer or inner door or window of any house or place. And he has got the power to search subject to the conditions stated in section 103 of the Code of Criminal Procedure of 1898. The Ombudsman has got another provision to under section 13 of the Ombudsman Act to convict any person who obstructs him in the performance of his functions without lawful excuse. To clean the path of the Ombudsman so that he may work without disturbance this provision has been included.

Staff of Ombudsman

Officers and other employees are to be appointed by the Ombudsman himself. The Ombudsman can define the categories of the officers and employers. With the consent of the Government the Ombudsman may utilise the service of any officer, employee or agency of the Government.

Jurisdiction

Under this act the Ombudsman may investigate any action of a ministry, a statutory public authority or a public officer. Here, the provision is good enough to be understood by expert's jurisdiction of the Ombudsman but for the understanding of the general public specific schedule is needed which will include the list of agencies or departments over which the Ombudsman will have jurisdiction to investigate.

Empirical Study

A Questionnaire Survey on Knowledge of Professionals on Legal Standpoint of the Office of an Ombudsman and Mental Urgency to Have an Ombudsman for Bangladesh

This Questionnaire Survey I conducted was designed to recollect the knowledge of our country's highly educated class on the current legal status of the office of an ombudsman, to determine whether they have very common information in their knowledge, and to comprehend their urgency in having an ombudsman for Bangladesh. The investigation was carried out using field research and the questionnaire survey method. The following section presents the findings. It may be emphasised that the presentation here is based entirely on interviews with the respondents (100 respondents) in the sample and does not question the correctness of their views.

²⁰The Code of Criminal Code, 1898, section 102.

Satisfaction with The Present State Of Transparency And Accountability Of The Ministry, Public officers and all other Statutory Public Authorities

The respondents' level of satisfaction with the present state of transparency and accountability of the Ministry, public officers and all other statutory public authorities is tested and findings are given below:

Respondents who express satisfaction: 21%
Respondents who express dissatisfaction: 79%

Knowledge about the Existence of Constitutional Provision regarding the Establishment of the Office of an Ombudsman

The respondents' knowledge about the existence of constitutional provision regarding the establishment of the office of an Ombudsman is tested and findings are given below:

Respondents, aware of the provision: 100%
Respondents not aware of the provision: 0%

Knowledge about the Existence Binding Law Upon the State to Appoint an Ombudsman

Respondents' knowledge about the existence binding law upon the State to appoint an Ombudsman has been tested asking them that whether they know the Ombudsman Act, 1980 makes it binding for the President to appoint an Ombudsman for Bangladesh. The findings are shown hereunder:

Respondents, aware of the imperative provision: 43%
Respondents, not aware of the Imperative provision: 57%

Knowledge that until Today the Office of Ombudsman has not been established

Inquiry on how many of the respondents know that till today there has been no Ombudsman for Bangladesh. The results are as below:

Respondents, aware of not having an Ombudsman: 100%
Respondents, not aware of not having an Ombudsman: 0%

Inquiry on whether the Government should take Immediate Step to Appoint an Ombudsman

Inquiry on whether the Government should take immediate step to appoint an Ombudsman has led me to the result stated hereunder:

Respondents, willing to have an Ombudsman immediately: 79%

Respondents, not willing to have an Ombudsman immediately: 21%

Opinion on Reasons that denied the Appointment of an Ombudsman in Bangladesh for long Thirty-eight Years

Some of the respondents opine that one factor is there for the denial of the appointment of an Ombudsman in Bangladesh for long thirty-eight years, while some votes two or three reasons. Some of the respondents debarred themselves from making any opinion in this regard. However, the results are:

Respondents, having opinion that political party in power have lack of intention: 77%

Respondents, having opinion that Government officer have strong opposition in this regard: 43%

Respondents, having opinion that civil society does not create enough pressure on Government: 17%

Respondents, having opinion that we do not need an Ombudsman: 23%

Opinion on whether the Establishment of the Office of an Ombudsman will Ensure Accountability and Transparency in Public Administration

We know that there is some dissenting opinion regarding the establishment of the office of an ombudsman All does not support that the establishment of the office of an ombudsman will ensure accountability and transparency in public administration The opinions resulted into the following findings:

Respondents, in favour of effectiveness: 38%

Respondents, not in favour of effectiveness: 62%

An Interesting Finding

While comparing opinions and answer of the respondents I find it very interesting that 100% of the non-government professionals opine in favour of immediate establishment of the office of an Ombudsman while only 58% of the government professionals votes in favour of the same. And 46% of the government officers are of the view that we do not need the office of an Ombudsman while 86% non-government professionals are of the view that because the unwillingness of the bureaucrats till today there is no Ombudsman for Bangladesh. Considering all these findings it is come to a conclusion that in spite of having lacuna and irrationalities in the existing laws, unwillingness of the bureaucrats and political parties in power are the main factors of non-presence of an Ombudsman.

Concluding Remarks

The Ombudsman Act was passed by a Presidential form of Government. Subsequently, the Presidential form of Government was replaced by a Westminster type of Parliamentary form of Government. As such, it appears to us that the effectiveness of the Act should be judged in the present context. One crucial point is that the Ombudsman should be independent and separate from government. One more time it is to be remembered that all through my research I tried to evaluate the laws existing in Bangladesh regarding the office of an Ombudsman by way of analysing the provisions therein. In doing so I tried to cultivate the existing law in the field present socio- political situation of Bangladesh and tried to suggest all the alteration to adapt the condition prevails so that this mechanism of accountability does not dishearten the people like some others. In short, it can be said that the appointment procedure of an Ombudsman, Qualifications to be appointed as an Ombudsman, the term of office of an Ombudsman, Jurisdictions etc. are to be reconsidered. The survey conducted also express that we, the nation is in an eager wait for an Ombudsman. We have kept our hope alive and have to run to the end.

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Legislation

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 The Code of Civil Procedure, 1898
 The Penal Code, 1860
 The Ombudsman Act, 1980

