

Falling between stools and treading on toes

The Ombudsman, a Human Rights Commission and an Independent Anti-Corruption Commission

ZIA HAIDER RAHMAN

ON January 21, Law, Justice and Parliamentary Affairs Minister Moudud Ahmed announced that the government would set up an independent anti-corruption commission as promised during the run-up to the general election. Long committed to seeing the constitution of such a commission, at the turn of the year Transparency International Bangladesh published to widespread acclaim, it is fair to say, a report into the present Bureau of Anti-Corruption along with a proposal for a new Independent Anti-Corruption Commission (IACC).

Word now has it that a bill may be tabled in the current Parliamentary session to constitute a Human Rights Commission and there is a faintly more credible rumour of an Office of the Ombudsman in the offing, an organ contemplated by the constitution, established in law by The Ombudsman Act 1980 but never actually brought into being. Indeed at this stage the proposal appears to be merely to enact amendments to belatedly reflect the transformation of Bangladesh from a presidential state to a parliamentary democracy; substantive reform is not envisaged. The prospect of the establishment of such institutions as a Human Rights Commission and an Office of the Ombudsman raises the real danger that the IACC may be sidelined. Indeed it was reported in this paper on January 1 this year that following a Cabinet Committee meeting, "the government [took] initiatives to constitute a National Human Rights Commission expeditiously to ensure good governance as well as transparency and accountability in society."

There are of course strong links between the promotion of respect for human rights and the campaign for good governance. Corruption and breaches of human rights are often found in the same dismal circumstances. Consider, for example, the employer's bribery of a

public official who turns a blind eye to egregious breaches of health and safety regulations (see the forthcoming Human Rights in Bangladesh 2001, Ain O Salish Kendro). But the belief that a Human Rights Commission or an Office of the Ombudsman (if they be properly so called) or that the two in concert would adequately address systemic, pervasive and large-scale corruption in Bangladesh is naïve, ill-judged or worse still intellectually dishonest. If one is frank, as vital as such an organ surely is, quite how anyone might imagine a Human Rights Commission could make anything more than a dent on corruption is hard to comprehend and so this article does not dwell on the matter of a Human Rights Commission. But an IACC is essential if a great swathe of corruption is not to go unchallenged. The argument is rather simple. Without an IACC, a great many cases of corruption would fall between the two stools of a Human Rights Commission and an Ombudsman. The combined jurisdictions of a Human Rights Commission and an Ombudsman would not exhaustively cover the broad range of activities all described as corruption. In addition to this jurisdictional point, in advancing the case for an IACC, a major institutional issue also needs to be addressed. Problems arise, in the absence of careful planning, when institutions are granted overlapping jurisdictions: they tread on each other's toes, exert territorial protectionism or, on the contrary, each uses the existence of the other to abdicate responsibility. The two issues correspond, then, to jurisdictional gaps and overlaps respectively. I take up the second point later but first we mind the gaps.

Falling between two stools

Consider two particular forms of bribery. The first kind involves a citizen bribing a public official in order to secure a benefit to which he or she is entitled anyway (where the

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Violating human rights?

official is arbitrarily and illegally creating a sphere of discretion). The second kind involves bribes which convey to the payer something to which he or she is not entitled, such as a procurement contract or effective

immunity to engage in illegal activities.

Where the bribery is the condition for securing a legal benefit, as in the first kind, individuals may challenge the corrupt official's demands if recourse be open to an appropriate body such as an Ombudsman or an IACC. The experience in other countries is that such an individual is rather likely to do so; after all, in the scheme of things the citizen has done little or - if acting preemptively - nothing wrong. Such was the experience in Hong Kong after the introduction of its Independent Commission Against Corruption. This last kind of corruption is often seen at local levels or generally speaking where the public official holds no significant discretionary powers and is sometimes referred to as 'petty corruption' (rather unfortunately so, since to its victims and to the economy as a whole it is far from petty). But as for the second kind, such as 'grand corruption' in procurement or government tendering, far from calling attention to the corruption, the bribe-payer has a strong incentive to cover his or her tracks, which incentive obviously militates against the discovery of such corruption.

Acute shortcomings in the Ombudsman Act 1980 would render the Office useless against major corruption, particularly of the second 'grand' kind. Firstly, the Act requires that there be an identifiable action on the part of a public official. Secondly, it requires that there be a complainant in order to agitate the Ombudsman into action. Thirdly, the said complainant must himself or herself have suffered in consequence of that subject action. Fourthly, there must be an 'undue personal benefit' as a result of the action. And fifthly, the Ombudsman can merely submit reports and its recommendations would have no binding effect whatsoever. In this last regard, the fact that to date none of the many recommendations of the relatively well-respected Public Accounts Committee have been implemented ought to sound the alarm.

Little if any grand corruption would be caught, as a matter of law and in practice, by this legislation. Each limb of the Act's test sets a dispiritingly high standard and their combined effect is to pitch a practically insurmountable hurdle. For one thing, there are issues of standing or, in legal jargon, locus standi; who would be the complainant in a case of major procurement corruption? Public officials may well argue in defence - and not without legal merit - that the action, such as the award of a procurement contract, was not an action bearing sufficient nexus with the complainant and that a 'concerned citizen' or even an NGO is no more than a random punter trying it on. For another thing, demonstrating that a prospective complainant, who was not a party to the corrupt transaction, was in fact adversely affected by the public official's action is likely to prove fiendishly tricky. And then of course there is the enormous evidential burden in establishing undue benefit; living beyond his purported means is sure enough a clue to something suspect but can that be enough and, if it is, must more be shown to link undue gain to the official's action in question?

Incidentally though not lesser,

there is another major deficiency in the 1980 Act unconnected to corruption. Throughout the world, the institution of the Ombudsman has come to be regarded as the champion of the individual citizen, the little guy, against the Goliath state and the incompetence of its officials. The Ombudsman is the bulwark against maladministration, malfeasance and many other forms of state abuse and incompetence, wilful or otherwise, corrupt or not. The 1980 Act requires, as already stated, that there be an 'undue personal benefit' to some or other person. So what of the various, multitudinous instances of harm wrought upon the little guy by virtue solely of incompetence, arrogance or neglect on the part of a public official where no one has gained anything at all? Astonishingly, the 1980 Act would fail to capture even those cases which one would reasonably expect to lie with the province of an Ombudsman, namely maladministration without corruption.

Treading on each other's toes

This takes us to the second theme: the perils of institutional overlap. It is not only each institution that needs careful thought but also how institutions fit together, or not, if potentially serious inter-institutional difficulties are to be mitigated if not averted.

No Ombudsman can know at the outset of an investigation that the matter, of which he or she has taken conduct, is really at bottom a case that ought properly to be handled by the IACC, a case of grand or political corruption. Take a bribe of the first kind; the bribery of a public official in order to secure, say, a licence of some description. It emerges in the course of the Ombudsman's investigations that the public official has been induced by the promise of promotion from a third party, a major political figure, to restrict the supply of such licences. It further transpires that the brother of the third party, a businessman, has much to gain from the reduced supply of licences because the restriction would reinforce the dominant position in the marketplace the brother will enjoy once he has secured a certain government procurement contract. Behind the bribes of the first kind, within the Ombudsman's remit, are bribes of the second kind, outside his or her brief. There appears to be a web of bribes. Should the web be parsed and pieces apportioned between the Ombudsman and IACC or would the interests of efficiency, economy and justice be better served by transferring the whole investigation to the IACC? What if the IACC, coming at the matter from the other end, has launched an investigation into grand corruption and meets the Ombudsman halfway? Who has jurisdiction?

These questions highlight the difficulties which could arise in practice, if not properly addressed in advance. Institutions develop territorialism. Just as private corporations seek to guard and grow their market shares, public institutions protect their spheres of influence. They justify their existence by reference to the powers they have and the extent of the 'obligations' bestowed upon them. In the worst-case scenario, the two institutions will be treading on each other's toes, clawing at each other's jurisdictions and

refusing to relinquish any of what they believe to be their own. And if the law is written so that there can be no ambiguity, perverse incentives

creep into the picture; it may act in the Ombudsman's own interest if any given case were to disclose no grounds for suspecting grand corruption.

Aside from this danger, it might be said that there is the greater danger of the exact opposite happening. Both the Ombudsman and the IACC may shirk responsibility in relation to any given allegation of corruption and seek refuge in the excuse that the subject-matter falls within the other's jurisdiction. This is not without precedent. In entering into production-sharing contracts, GOB-owned Petrobangla is required to seek clearance from various government departments, each of which dillies and dallies because to be the first to take a decision is to invite upon the relevant politician, rightly or wrongly, the lion's share of responsibility for any outcome. Such perverse political incentives act as brakes even on sensible and timely decision-making made in good faith.

Things, laws and institutions, need to be examined at this level of detail because the reasons policy initiatives go awry are often to be found there. In the detail. The above analysis should demonstrate that an Ombudsman alone will do scant little to address grand or political corruption. Why then, it might be asked as some do, do we not simply start again with a blank canvas, do away with the 1980 Act and draft legislation for a new super-Ombudsman with wider powers capable of meeting the challenges of grand and political corruption? The answer is that we have to adopt a pragmatic approach to institution-building in Bangladesh, an approach that recognises (a) the great political courage, woefully inconspicuous, necessary to carry through even a modicum of change and (b) the importance of building on the accrued legitimacy, authority and momentum of existing institutions and laws. Given the enormous

inertia in the legislative and executive processes, the pragmatic approach would be to use the existing 1980 Act as a basis for a new Office of the Ombudsman and to use the existing Bureau of Anti-Corruption (at least insofar as it provides a ready well of resources) as the basis for a new constitutionally-grounded IACC.

Away ahead

After the TIB fashion, this article does not rest simply with pointing out the difficulties but offers for discussion a roadmap for the way ahead.

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* **Constitute an IACC and at the same time bring the Office of the Ombudsman under the aegis of the IACC, taking special care to ensure that staffing arrangements of the combined institutions are unified, so that the welfare and future of each part is linked to those of the others.**

What will remain is one institution: inter-institutional strife would be minimized and the claim that jurisdiction lies with another would ring hollow.

As for the minister's announcement, we may be entitled to take some cheer from his promise but vigilance is ever the watchword lest complacency gain a purchase. To paraphrase the movie mogul Samuel Goldwyn, a politician's verbal promise is not worth the paper it's written on. Granted, words are the starting point. But civil society and the public at large must make it their business to see that mere words are not however the end of the matter.

Rahman is Director of Transparency International Bangladesh and works in various advocacy capacities.

Thoughts on December 2

Awami League met its Waterloo on the issue of crime. Now with a change of guard the situation did not change. BNP riding on the huge expectation of people must deliver so that Nazrul does not face the same question from his colleagues.

SHEHAB AHMED

HOW many today-Jora or Hali (double or quartet). That was the typical question at newsroom The Daily Star crime reporter Shaikh Nazrul Islam faced from his colleagues at the waning days of the Awami League government. The number of murders were so much on the rise that not a day passed without double, triple or quartet or more murders. Another typical question Nazrul faced was, how many pieces the murders had made of the bodies of their victims.

Routinely Nazrul had to write a monthly figure of crimes. Now with the change of government he is

facing the same old question in the late evening when he tallies the days total.

It is on the rise. The murders, mugging and extortion. A look at the newspaper reports would reveal that crimes are on the rise.

But it was expected that BNP led four-party alliance government would put a tight leash on the criminals that led to people voting massively for the alliance.

Awami League met its Waterloo on the issue of crime. Now with a change of guard the situation did not change. BNP riding on the huge expectation of people must deliver so that Nazrul does not face the same question from his colleagues. Rather he should face a query what

had happened to the criminals that there is no news on the crime beat. That may be an ideal dream like situation. That may not happen. But people expect a minimum level of crime. A relief from the muggers, robbers and toll collectors. So that they can go ahead with their normal life, trying to scoop out a living from their occupation and business when the economy is not showing signs of growth, squeezed by the world wide recession. Premier Khaleida Zia faces a massive expectation from the people who want that relief. If she cannot deliver she faces the anger and frustration of the people that could be the undoing of her new government.

আপনি কি কখনো ভেবেছেন, অবসর জীবনে সীমিত সঞ্চয়ে মুদ্রাস্ফীতিজনিত বাড়তি খরচ সামালানো কতটা কঠিন।

কর্মজীবনে পূর্ণ নিরাপত্তা ও অবসর জীবনে শ্রমবর্ধমান নিষ্কিন্দ আয় সংস্থানের লক্ষ্যে আমাদের নতুন উদ্ভাবন

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বৈশিষ্ট্যঃ

- পেনশন শুরু হওয়ার পূর্বে অকল মুকুতে বীমার টাকা বা কোন কারণে মৃত্যু হলে প্রিমিয়াম নগরকালের সুবিধা।
- পেনশন শুরু হওয়ার পর প্রতি দুই বছর অল্প অল্প ১০% করে ক্রমবর্ধমান পেনশন বৃদ্ধি ফলে, মুদ্রাস্ফীতিজনিত বাড়তি ব্যয়ের সফল মোকাবেলা।
- ন্যূনতম ৫ ম বছরের জন্য পেনশন প্রদানের গ্যারান্টি সহ অজীবন পেনশনের ব্যবস্থা।
- এককালীন আর্থিক প্রয়োজন মেটাতে পেনশন শুরুতে সর্বোচ্চ ৫০% পেনশন সম্পর্কিত সুবিধা।

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