

The Ombudsman of Botswana: The Strengths, Limitations and Proposed Solutions

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Abstract

The Office of the Ombudsman is one of the offices which has been described by many as toothless in its functions. The purpose of this article is to look at some of the limitations that the Botswana Ombudsman faces and come up with some proposals which can strengthen the Office.

Keywords

Ombudsman, Strengths, Proposed Solutions, Toothless Functions, Governance

1. Introduction

The Ombudsman in Botswana is a relatively new development. Previously people suffered injustices in consequence of maladministration and had no remedy. The courts sometimes could not do what the Ombudsman was meant to do. When maladministration, malpractices, abuse of power and human rights violations occurred, courts were to a certain extent limited in their intervention. In the light of that an institution specifically meant to deal with grievances in central government and private entities was created. It took the form of the Scandinavian ombudsman to address the situation or the British Parliamentary Commissioner for Administration (British Ombudsman) to deal with the matter.

The Ombudsman of Botswana has for several years been defined as an institution which is not fruitful and effective, with some people defining it as a prize champion fighting with hands tied behind its back (Fombad, 2001)¹. This article

¹See id. At 76-77 for the history and context of the role of the Ombudsman in Botswana.

will look at the Act which governs this institution and look at some of the strengths and limitations of the Act. The paper will also take a comparative journey and propose some of the possible solutions to the Act.

2. The Appointment of the Ombudsman

The Ombudsman Act stipulates that the Ombudsman and Deputy Ombudsman shall be appointed by the President, after consultation with the leader of Opposition in the National Assembly and the Speaker of the National Assembly (Fombad, 2001: Section 5 (1)). The Act stipulates that a person shall not be qualified to be an Ombudsman or Deputy Ombudsman unless he/she is qualified to be appointed as a Judge of the High Court (Fombad, 2001: Section 5 (2)). The Act indicates that there are some people who may not be eligible for appointment. It is stipulated that a person shall not be qualified to be appointed as an Ombudsman if he or she is a (a) holder of an office of a political party; (b) candidate for election as a member of the National Assembly; (c) Member of the National Assembly; (d) Member of any local authority; (e) member of Ntlo ya Dikgosi or (f) holder of any public office (Fombad, 2001: Section 6).

3. Functions and Powers of the Ombudsman

The powers and responsibilities of the Ombudsman are set forth in the Ombudsman Act. The Ombudsman may investigate any action taken by or on behalf of a department of government in the exercise of administrative functions of that department—in any case where a complaint is made to the Ombudsman by a person who claims to, or on his own motion where he or she considers it necessary to investigate the action, on the ground that the person may have sustained injustice or unfair treatment in consequence of maladministration in connection with the action so taken. The Ombudsman may also investigate the department or private entity in any case where a complainant is made to the Ombudsman by a person who claims to, or on his or her own motion where he or she considers it necessary to investigate the action on the ground that a person has or may have sustained violation of his or her human rights in consequence of the action so taken (Fombad, 2001: Section 10). The Ombudsman of Botswana functions and powers are greatly stipulated in the Act and they meet the International Standards.

As indicated above, the ombudsman in Botswana is to be found in the ombudsman act. It is not entrenched in the constitution of Botswana. The President in consultation with the leader of the opposition and speaker of parliament are involved in its appointment. It lacks constitutional protection. The power of appointment is weak as opposed to situations of the appointment of judges where the president appoints on the recommendation of the Judicial Service Commission. In other countries the appointment of the ombudsman is entrenched in the constitution. While in other countries the tenure of office of ombudsman is not limited or is a prolonged term of seven (7) years non-renewable, Botswana's

ombudsman position could be influenced by government.

4. Comparative Analysis

4.1. Namibia

Establishment, Independence and the Appointment

In Namibia, the Office of the Ombudsman is entrenched in the Constitution. The constitution of Namibia indicates that there shall be an Ombudsman, who shall have the powers and functions set out in the Constitution and that the Ombudsman shall be independent and subject to the Constitution (*Constitution of Namibia, 1998*: Article 89 (1)). It is also stipulated that no member of the Cabinet, or the Legislature, or any other person shall interfere with the Ombudsman in the exercise of his or her functions and all organs of the State shall accord such assistance as may be needed for the protection of the independence, dignity and effectiveness of the Ombudsman (*Constitution of Namibia, 1998*: Article 89 (3)). It is stipulated that the Ombudsman shall be appointed by the President on the Recommendation of the Judicial Service Commission. The Ombudsman shall hold office until the age of sixty-five but the President may extend the retiring age of any Ombudsman to seventy (*Constitution of Namibia, 1998*: Article 90).

Just like in Namibia, the Ombudsman shall either be a Judge of Namibia, or a person possessing the legal qualifications which would entitle him or her to practice in all courts of Namibia. The differences between the Ombudsman of Botswana and that of Namibia are that in Namibia the Ombudsman is created by the Constitution and the independence of the Ombudsman is declared in the Constitution. In Botswana its independence is found in the Ombudsman Act specifically in Section 19 where it is stated the Ombudsman shall perform his or her functions without fear, favor or prejudice, and no person in authority shall interfere with or exert undue influence on such officer in the exercise of his or her powers or in the performance of his or her functions (*The Ombudsman Act Botswana, 1980*: Section 19). The other major difference is that the appointment of an Ombudsman in Botswana is done by the President in consultation with leader of the Opposition in the National Assembly and Speaker of the National Assembly, while in Namibia the Appointment is done by the President following a recommendation by the Judicial Service Commission. In addition, the appointment of the Ombudsman in Botswana has two terms of 5 years while in Namibia there are no terms. This article will later deal with the legal implications which arise in the manner in which the Ombudsman's appointment is done in Botswana.

4.2. South Africa

In South Africa the Office of the Ombudsman is known as the Public Protector. It is declared in the Constitution that the Public Protector has the power, as regulated by national legislation to investigate any conduct in State affairs, or in any sphere of government, that is alleged or suspected to be improper or to re-

sult in any impropriety or prejudice; to report on that conduct and to take appropriate remedial action (*South Africa Constitution, 1996*). It is indicated that the Public Protector has the additional powers and functions prescribed by national legislation. The public protector may not investigate court decisions and must be accessible to all persons and communities (*South Africa Constitution, 1996*). It is stated that the public tenure of the Public Protector is for a non-renewable period of seven years (*South Africa Constitution, 1996*).

The differences between the Ombudsman of Botswana and a Public Protector in South Africa is that in Botswana the Ombudsman is appointed on 2 terms of 5 years while in South Africa it is a 7 year's term which cannot be renewed. In addition, the Ombudsman in Botswana is not entrenched in the Constitution while the Public Protector in South Africa is entrenched. The legal implications in the manner in which Botswana's Ombudsman is designed will be discussed later in this article.

4.3. Kenya

In Kenya, the Office of the Ombudsman is known as the Commission of Administrative Justice. The Constitution of Kenya stipulates that parliament shall enact legislation to give full effect to this Part, and any such legislation may restructure the Commission into two or more separate commissions (*Kenya Constitution, 1969: Article 5(4)*).

The difference between the Ombudsman of Botswana and that of Kenya is the entrenchment in the country's Constitution.

4.4. Canada

In Canada, the Office of the Ombudsman has three main functions which are; to investigate complaints and allegations; to secure redress in cases where the complaint is found justified; and to help bring about improvements in administrative systems and procedures generally. The appointment in Canada was done by the legislature rather than the executive branch of the government.

In Alberta, the Lieutenant Governor in Council appoints the Ombudsman on recommendation of the Legislative Assembly. In Quebec, the National Assembly makes the appointment and two thirds of its members must approve the appointment for effectiveness purposes (*Public Protector Act, R.S.Q, 1977*). Other developed countries which have an ombudsman include Britain, New Zealand, Australia and Scandinavian countries.

5. Loopholes in the Botswana Ombudsman and How They Can Be Closed

5.1. Non Entrenchment in the Constitution and Appointment by the President in Consultation with Leader of the Opposition and Speaker of the National Assembly

The most visible weakness with the institution of the Ombudsman in Botswana

is that the institution is established by statute instead of the constitution. There is lack of executive power on the Ombudsman to enforce his decisions. The investigations of the Ombudsman are extensive and he has no power to enforce his findings. Generally, the mandate of the Ombudsman is narrow, it being confined to investigating instances of maladministration in government departments, and often without power to enforce their findings (Oagile Bethule Key, 2008).

The South African and the Namibian Ombudsman stand out in the region as having wider powers to investigate maladministration. They enjoy the same status as the courts and are constitutionally entrenched (Oagile Bethule Key, 2008). The South African office of the Public Protector (Ombudsman) has its own budget which it controls independently (Oagile Bethule Key, 2008). The other visible deficiency in Botswana is that the Ombudsman is appointed by the President in consultation with the Leader of the Opposition and Speaker of the National Assembly. However, this consultation is less effective because consultation does not mean concurrence. The President is only bound to consult with the leader of the opposition and Speaker of the National Assembly; the three need not agree, if the leader of the opposition or the Speaker of the National Assembly is not in agreement as to who should be appointed, the president may proceed to appoint the person he or she considers most well suited for the post, in this case, the president would have met the consultation requirement (Dingake, 2011).

The transparency would indeed be enhanced if the Leader of the Opposition and Speaker of the National Assembly were given an opportunity to comment on the suitability of the applications for the post after it is advertised and to indicate his preference (Nsereko, 2004). Nsereko further suggests that it would however defeat the whole purpose of consultation if the President were merely to inform the Leader of the Opposition and Speaker of the National Assembly that he intends to appoint so and so, meaning that he has already made up his mind (Nsereko, 2004).

5.2. Solution

Considering that countries such as Kenya, South Africa and Namibia have entrenched the Office of the Ombudsman in their constitutions, it is suggested that Botswana should follow the route taken by the above mentioned countries. If the Office can be entrenched it is likely to be better effective than it is currently.

In addition, as the Ombudsman was established by an Act of parliament this means that parliament has power at any time to abolish the office or to diminish its independence by simple repealing or amending the Act (Nsereko, 2004). It will however be different if this Office is entrenched in the Constitution because the Constitution is the Supreme law of the country. The Constitution cannot be easily changed like an ordinary Act of Parliament. Furthermore, some provisions in the Constitution cannot be changed without a referendum. Entrenching the Office in the Constitution will not just boost the public confidence but it will also secure the safety of the Office from issues such as easy amendments and re-

peals.

Namibia has the best appointment criteria. It is stipulated in the Namibian Constitution that the Ombudsman shall be appointed by the President on the Recommendation of the Judicial Service Commission. Appointing the Ombudsman in this manner is good because in some countries the Ombudsman is paid on the same scale as the Judges as a way of fostering independence (*Ombudsman Act R.S.B.C, 1979*)².

The Judicial Service Commission will also be in a good position to know who is most qualified, as Section 5 of the Ombudsman Act indicates that a person shall not be qualified to be an Ombudsman or Deputy Ombudsman unless he/she is qualified to be appointed as a Judge of the High Court.

5.3. The Two Term Appointment Is Perilous

The Ombudsman of Botswana stipulates that a person holding the Office of Ombudsman shall vacate the Office at the expiry of 5 years from the date of his or her appointment, and shall be eligible for re-appointment for only one further term of five years (*Ombudsman Act of Botswana, 2021*). The appointment of the Ombudsman in fixed contract style is not quite good because the person appointed may not do his or her job properly by not taking action against the government as a way of seeking another 5 year term. However, this may affect the members of the public with grievances.

In South Africa the founders of the Constitution were able to note that and they decided to give the Ombudsman or Public Protector a tenure of seven years which is non-renewable. This makes the Ombudsman to act accordingly without having to think about the second term.

In Namibia it is stipulated that the Ombudsman shall hold office until the age of sixty-five but the president may extend the retiring age of any Ombudsman to seventy. This means that the Ombudsman works well without fearing that his or her contract with expire therefore if he becomes strict on the government his or her contract may not be renewed.

5.4. Inability to Prosecute

In the Ombudsman Act of Botswana there is nothing that seems to suggest that the Ombudsman may prosecute on his own. It is only stated that the Ombudsman may take appropriate action to call for remedying, correction and reversal through fair, proper and effective means including mediation, arbitration, negotiation, conciliation and compromise between the parties concerned (*Ombudsman Act of Botswana, 2021*: Section 10 (2)).

The Ombudsman in Namibia can call for corrective measures to be taken against the defaulting body. He or she can bring proceedings in court for appropriate remedy or even seek an interdict to stop the enforcement of legislation

²Ombudsman Act, RS.NB, 1973, c 0-5, s. section 2(4), Benefits are usually tied to that of an equivalent-level civil servant.

whose validity is being contested. In Botswana the Ombudsman has no executive powers and cannot enforce his or her recommendations. If the body that is guilty of maladministration cannot remedy the injustice caused, the Ombudsman can only lay a special report before the National Assembly and hope that something will be done (Dingake, 2011).

6. Conclusion

Independence is an essential element of the Ombudsman's role just as it is with Judges of the High Court and Court of Appeal. In order for the Ombudsman to do his or her job properly he or she must be seen to be independent from the administration he or she reviews. The Office should be entrenched in the Constitution so that it is properly cushioned. The Office has occasionally complained about lack of resources and lack of staff members in order to carry out its functions. Botswana should learn from other countries stated in this article in order for the Office to be more functional.

Conflicts of Interest

The authors declare no conflicts of interest regarding the publication of this paper.

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