



Ombudsman

Historical Background

Transparency and accountability are critical elements of good governance, and Botswana's Ombudsman office is a key institution established to promote these principles within the government and public sector, for the improvement of service delivery. In 1982 a Presidential Commission on Economic Opportunities recommended the establishment of a Public Commissioner to address maladministration in the public sector. In the 1990s the emergence of three Presidential Commissions that implicated high ranking public officials and members of Parliament in grand corruption scandals, necessitated mechanisms to be put in place to combat corruption (Tonwe 2013) ¹. Consequently this led to the enactment of the Corruption and Economic Crime Act, 1994, under which the anti-corruption agency the Directorate on Corruption and Economic Crime (DCEC), was established (Tonwe, 2013). The following years saw the promulgation of the Ombudsman Act in 1995 to make provision for the appointment and functions of an ombudsman for the investigation of administrative action taken on behalf of the Government, and for purposes connected therewith, the Act commenced on the 1st December 1997.

Nature of the Ombudsman

The Ombudsman is established by the Ombudsman act of 1995 herein "the Act" mandated to investigate administrative actions taken by the government in respect of complaints of injustice or unfair treatment in consequence of mal-administration. It is paramount that In discharging his/her functions the Ombudsman shall not be subject to external controls, this notion of independence of the Ombudsman is emphasised under Section 9 of the Act it further states that no proceedings of the Ombudsman shall be called in question in any court of law.

For years there has been a call for the establishment of a Human Rights Commission mandated to address complaints for violations of human rights as a consequence of an action or omission. As put by Dinokopila & Rantao (2019)² It is surprising that Botswana, a country known to be in good standing in the protection of human rights in Africa, would not have a human rights commission. However its good record could have been interpreted as not requiring a human rights commission. In an effort to be compliant to the international standards, the Ombudsman Bill of 2021 herein "the Bill" was drafted, it seeks to expand the functions and powers of the Ombudsman with the role of protection and promotion of human rights, the investigation of human rights and matters incidental therewith.

¹ Tonwe, D.A. 2013. A review of the powers and jurisdictional remit of the Ombudsman institution in Botswana. *Mediterranean Journal of Social Sciences*. 4(13):11–18.

² Dinokopila, Bonolo R., and Tshiamo Rantao. "THE OFFICE OF THE OMBUDSMAN IN BOTSWANA." *Compendium of documents on National Human Rights Institutions in eastern and southern Africa.*, vol. Chapter 4, 2019, pp. 36-54.



Appointment and Tenure

According to Section 2 of the Act, the Ombudsman shall be appointed by the President after consultation with the Leader of Opposition in the National Assembly. This provision has been criticised to the extent that "consultation" means the President is not compelled to comply with the suggestions, concerns or preferences of the LOO, which essentially kills the watchdog mechanism that was being attempted by bringing in another person into the process. Section 5 of the Bill provides that the consultation should as well be done with the Speaker of the National Assembly in addition to the Leader of the Opposition, and that the two should also be consulted regarding the removal of a sitting Ombudsman. An opportunity was missed to change the wording of the Act to reflect a more democratic process to compel compliance by the President, because the 2021 bill does not change anything in regards to "consultation".

The Act has another gap in that it does not provide for any qualifications required for the position of the Ombudsman. Rightfully so, Section 5(2) of the amendment Bill corrects this and stipulates that the Ombudsman must carry qualifications of the Office of High Court to be appointed as per Section 96 of the Constitution . The Act had only provided for instances which disqualifies a person from appointment, including if one is a member of the national assembly, member of a local authority, a candidate for election as a member of NA or local authority or nominated as such with their consent or if they held public office. The amendment Bill further expands the list to cover office holders of political parties and members of Ntlo ya Dikgosi, which is a welcome development in the broader conversation of good governance.

The tenure of the Ombudsman as per the Act is 4 years; the Bill seeks to amend it to 5 years and eligibility for re-appointment for only one further term of 5 years. In terms of removal, the position still remains that the provisions of subsections (2) to (5) of section 97 of the Constitution (which relate to removal of High Court Judges from office) shall, with such modifications as may be considered necessary, apply to the office of Ombudsman.

Functions and Powers of the Ombudsman

The functions of the Ombudsman are stipulated under section 3 of the Act, it provides that, the Ombudsman may investigate any action done exercising the administrative functions taken by or on behalf of a government department or other authority to which this Act applies. Thus the Act only applies to acts of mala-administration done by the Government excluding the private sector. Notably, the Bill extends the jurisdiction of the Ombudsman to not only apply to a department of government but also to a private entity, this is very commendable, considering that the private sector is part of the nation service delivery, avenues for remedy mala-administration should also be made available.



It is under Section 10 of the Bill that the functions of the Ombudsman are expanded to include the function of addressing human rights violations, mandate to do public education, collaborate with the civil society organisations, research work; and make recommendations to law and policy work. The question that arises is whether the Ombudsman is suited to take on the mandate of addressing complaints of human rights violations. In cases where a mandate is added to an existing institution, the failure to back that additional mandate with resources inevitably results in the incapacity to carry it out, which in this particular instance would be detrimental to human rights protection in Botswana. Therefore, these areas should be adequately resourced, these include financial resources, human resource, and the technical capacity training to carry out the mandate. Public education and collaborating with the civil society is paramount to the Ombudsman's ability to carry out its two mandates of tackling maladministration and human rights violation, as social accountability and cooperation are building blocks to successfully combating maladministration and human rights violation, working in unison not silos.

The Act under Section 3(2) provides that the Ombudsman shall not conduct investigation into any action in respect of which the person aggrieved has a right of appeal, reference of review to a tribunal or under any law, or where they have a remedy by the ways of proceedings in any court of law. Commendably Section 3(3) provides that the Ombudsman may conduct investigations if he/she is satisfied that in the particular circumstances it is not reasonable to expect an aggrieved person to resort or to have resorted to the alternative remedy, this provision allows the Ombudsman to use their own discretion. The Act continues to grant the Ombudsman discretion to initiate, continue or discontinue an investigation, the Act requires the Ombudsman to inform the complainant that they will not investigate.

According to Section 3(5) of the Act the Ombudsman may refuse to initiate, or may discontinue, any investigation if it appears to him that-(a) the complaint is frivolous or vexatious or is not made in good faith; (b) the subject matter of the complaint is trivial; (c) the person aggrieved has no sufficient interest in the subject matter of the complaint; or (d) the making of the complaint has, without reasonable cause, been delayed for more than 12 months. The notable changes in the Bill to this provision is that the period has been extended from 12 months to 36 months and the provision that if complaints are trivial has been removed entirely. Section 3(7) of the Act which purported to remove the Judicial Service Commission And Public Service Commission from the Jurisdiction of the Ombudsman has been removed entirely in the Bill.

Matters not to be investigated by Ombudsman

The Ombudsman shall not investigate any action or action taken in respect to any of the following-

(a) matters certified by the President or a Minister to affect relations or dealings between the Government of Botswana and any other Government or any international organisation;



- (b) action taken for the purposes of protecting the security of the State or of investigating crime, including action taken with respect to passports for either of those purposes;
- (c) the commencement or conduct of civil or criminal proceedings in any court;
- (d) action taken in respect of appointments to offices or other employment in the service of the Government of Botswana or appointments made by or with the approval of the President or any Minister, and action taken in relation to any person as the holder or former holder of such office, employment or appointment;
- (e) action taken with respect to orders or directions to the Botswana Police Force or Botswana Defence Force or member thereof;
- (f) the grant of honours, awards or privileges within the gift of the President;
- (g) action taken in matters relating to contractual or other commercial dealings with members of the public other than action by an authority mentioned in section 3(6);
- (h) action taken in any country outside Botswana by or on behalf of any officer representing the Government of Botswana or any officer of that Government; (i) any action which by virtue of any provision of this Act or any other enactment may be enquired into by a court of law.

The Launch of the Human Rights Mandate

In July 2023, the Ombudsman office launched its new Human Rights mandate, as per the bill of 2021, which finally became effective in 2023. According to the government, represented by the Minister of Justice in this regard, "the addition of the human rights mandate as a core function of the Ombudsman is reaffirmation of the government's pledge to safeguard democracy, good governance and equal rights for all."³ To the delight of many in civil society and academia, the government admitted that they were following recommendations, to say that "even though the constitution had always pronounced fundamental rights and freedoms of individuals, there was an outcry from the public, media and advocacy groups that the country did not have a national rights institution protecting all human rights." From informal conversation around the launch, some people in media and academia believe that the human rights mandate is likely to fail, based on the above stated functional deficiencies of the Ombudsman. There is generally optimism though, with the overall changes effected by the bill, now officially the Ombudsman Act, 2021.

Conclusion

Botswana's Ombudsman office is the institution charged with ensuring clean and proper discharge of the duties allocated to different government departments in the civil service. The work of the Ombudsman is not unfamiliar in democratic practice and is in fact expected as an extension of good governance, as shown by the existence of the office in other democratic countries, albeit with different names and overall different legislative frameworks in some instances. While differences in framework are expected and justified, the creation of an oversight institution such as the Ombudsman should always ultimately result in an efficient, independent and impartial entity with integrity in the discharge of its duties. Botswana's Ombudsman passes these tests but for two, which are independence and efficiency. Academia and civil society have carried the conversation around the

³ <https://dailynews.gov.bw/news-detail/73935>



Botswana Centre for Public Integrity

"integrity in action"

independence of Botswana's oversight institutions; one can only hope that at some point, some if not all the recommendations will be implemented.