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**EVALUATING THE OMBUDSMAN: A PRELIMINARY INVESTIGATION OF
SOUTH AFRICA AND BOTSWANA**

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UNIVERSITY OF CAPE TOWN

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COMPULSORY DECLARATION

This work has not been previously submitted in whole, or in part, for the award of any degree. It is my own work. Each significant contribution to, and quotation in, this dissertation from the work, or works, of other people has been attributed, and has been cited and referenced.


Signature..........**Date**.....17/02/2006.....

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ABSTRACT

By international standards, establishment of the Ombudsman institution is regarded as demonstrating government commitment to democratic consolidation, and good governance ideals such as transparency, accountability, human rights promotion, responsive and responsible public service and social justice. In essence, the Ombudsman institution supplements and performs the traditional accountability and oversight functions over the executive for and on behalf of Parliament, and the general citizenry.

In the Southern African Development Community (SADC) region, and in particular in South Africa and Botswana, the Ombudsman institution was only established in the 1995 and 1997 respectively. The institution is still at an infant stage and needs to be nurtured and protected. The study seeks to demonstrate and evaluate the extent to which this institution has been effective in delivering justice in the public service.

The comparative evaluation of the institution in the two countries seeks to find out the impact of the institution in society and the challenges that the institution encounters and hence influence strategic interventions for improved performance. The positive impact of the institution in the lives of those who know of its existence, role and functions is significant. It is however noted that the Ombudsman institution faces a plethora of challenges and problems that need attention if its effectiveness, integrity, reputation, trust and confidence from the public is to be sustained.

CHAPTER ONE

BACKGROUND

1.1 What an Ombudsman is

In simple terms, the office of the ombudsman is intended to protect the citizens from undue interference, negligence and errors of governmental officials (Kjekshus, 1971 cited in Jacomy-Millette, 1994:150).

An ombudsman is an officer of state appointed to provide an extra check on the citizens' rights against governmental activity (Robertson, 2002:357). In principle, such an office or institution enables citizens who feel that they have been victims of maladministration to make a complaint to the Ombudsman seeking some form of relief. The officer will then after ensuring that the complaint is not malicious or trivial call for evidence on the matter and investigate the fairness or justice of the administrative action complained against. Where evidence of the alleged maladministration or injustice is found convincing, a variety of remedies is provided (Robertson, 2002:357).

In its classic form, the Ombudsman is defined as "an office established by constitution or statute, headed by a high level public official who receives complaints about injustice and maladministration from aggrieved persons against government agencies, officials and employees or who acts on his own initiative" (Ayeni, 1996:32-33). According to Ayeni, "the Ombudsman has powers to investigate, criticise, recommend corrective actions and generally publicise administrative actions. In this regard, he asserts that: "the Ombudsman is

essentially a complaint-handling institution... complaints and grievances are defined as expressions of displeasure, pain and/or resentment towards services or opportunities provided by an authority” (Ayeni, 1996:33). It is headed by an experienced, high level public official, who may be appointed by the head of state or elected by parliament (Ayeni, 1996:17) to perform accountability and oversight function on executive action on behalf of the Legislature. Hence Ayeni argues that a situation should not be allowed where the executive can easily abolish the Ombudsman when they see its operations as conflicting with their interests or when they think it is a luxury to maintain.

The role of the Ombudsman is to protect the people against violation of rights, abuse of powers, error, negligence, unfair decisions and maladministration in order to improve public administration and make the government’s actions more open and the government and its servants more accountable to members of the public (IOI, 2005:1). According to the International Ombudsman Institute (IOI, 2005), to protect people’s rights, the Ombudsman has various powers, namely to: investigate whether the administration of government is being performed contrary to law or unfairly; investigate and uncover improper administration, and make recommendation to eliminate the improper administrative conduct; and report on its activities and complaints in specific cases to government and make necessary recommendations to government, or to the legislature depending on the nature of the case, and in most cases make annual reports on their work to the legislature and the public in general (IOI, 2005:1).

The Ombudsman usually does not have the power to make decisions that are binding on the government; rather the ombudsman makes recommendation for change, as supported by a thorough investigation of the complaint. According to the IOI, “a crucial foundation stone of

the Ombudsman office is the independence of the office from the Executive/administrative branch of government” (IOI, 2005:1). It is important that the Ombudsman is independent from all the other institutions or authority so that it can operate to fulfil its mission without undue pressure (Ayeni, 1996:22). Ayeni observes that “the institution must be able to make decisions in a free and fair manner without fear of reprehension from those who may be offended by its recommendations” (1996:22). However, the Ombudsman does not have the legal authority or power to enforce its decisions like other Anti-Corruption Agencies.

1.2 Historical Development of the institution

The creation of the office of the Ombudsman, in its modern form, dates back to 1713 when King Charles XI of Sweden appointed an Ombudsman called the Chancellor of Justice. In 1809, major changes in the system of government in Sweden took place and a more democratic constitution was adopted (National Democratic Institute (NDI), 2000: 6). Provision was made for a new office called “justitieombudsman” to supervise public administration (Fourie quoted in NDI, 2000:6). The term Ombudsman has become too established to be challenged because it is now generally regarded as being merely descriptive of the functions performed (Fombad, 2001:61). The term has been loosely translated as ‘citizen’s or people’s defender’, grievance man or ‘public watchdog’ (Rowat cited in Fombad 2001:61). Other descriptive titles are Tanzania’s Public Complaints Commissioner, South Africa’s Public Protector and Botswana’s Ombudsman also known as the Public Protector or ‘*Mosireletsi*’.

Meaningful development of the institution internationally dates to the 1960’s. The period between 1960 and the early 1980’s saw great institutionalisation of the Ombudsman

worldwide (NDI, 2000:6). It is worth noting that, “many countries adopted an Ombudsman after independence from colonial rulers and/or periods of autocratic domestic rule” (NDI, 2000:6). According to the National Democratic Institute (NDI, 2000:6), “during this period, human rights issues and democratic values gained centre-stage on international forums”. Thus, there is a clear connection between the international emphasis on human rights and the development of the Ombudsman. A case can be made that the international development and expansion of the Ombudsman office is consistent with transitions to democracy (NDI, 2000:7). That is to say, the creation of the Ombudsman evolved parallel to or at the same time that countries were democratising.

The International Ombudsman Institute (IOI) (cited in NDI: 7) emphasises the confluence of democracy and the Ombudsman by explaining that:

... The transition of many countries to democracy and democratic structures of government over the past two decades has led to the many Ombudsman offices during this most recent period. This transition to democracy accompanied by the reform of government, including the Ombudsman and Ombudsman-human rights complaint office, has been evident particularly in Latin America, Central and East Europe, as well as in parts of Africa and Asia-Pacific (NDI, 2000:7).

In fact the NDI posits that “ombudsman structures now exist in more than 90 countries in any number of different permutations... while in several cases, the institution exists only at a sub-national level, and the overwhelming majority of countries have national structures” (NDI, 2000:6).

The institution gained momentum and recognition in the Southern African Region following independence in the 1960’s, what Ayeni (1996) refers to as the ‘Ombudsman Movement in

Southern Africa'. According to Ayeni (1996:35), the Ombudsman as an institution, is part of a greater design to indigenise the governmental system adopted from colonial masters, and has been modified in some instances to suit prevailing political realities. Hence, Ayeni argues that, "the Ombudsman is essentially an adaptation of the Scandinavian version" (1996:35).

Tanzania and Mauritius were the first African countries to adopt the idea of Ombudsman (Ayeni, 1996:36). Ayeni (1996:37) argues that Tanzania established the Permanent Commission of Enquiry (PCE) in 1967 to effectively advance its reconstitution into a one-party socialist state. Mauritius followed as the next African country to establish the office upon its parliament's enactment of the relevant legislation in 1969 (Ayeni, 1996:37).

According to Ayeni, "there is something ironic about the fact that the early transplants of this institution were in two contrasting political arrangements". On one hand, he argues that this was possible because African countries preferred to judge the Ombudsman office essentially by its utilitarian value. He posits that Mauritius as a plural society needed the institution "to avail its diverse population some avenue to express their differences." whilst in contrast, Tanzania which is heterogeneous, "had on the principle of unifying the state under a one-party system." (sic) but still needed some measures to allow its people a voice in governance (sic) (Ayeni, 1996:37). Accordingly, the two cases are an indication of not only the willingness to use the institution but to also adapt it to constitutional realities.

Moreover, Ayeni (1996; 37) observes that Tanzania and Mauritius are former British colonies, and therefore argues that, "there is a possibility that the Ombudsman concept travelled through that route". The foregoing appropriately characterise the circumstances under which the Ombudsman institution became operative in most of the SADC countries. The fact that the world now puts a premium on liberal democratic and pluralistic values is

aptly reflected in the commitment to, and prevailing strategy of designing Ombudsman institutions world-wide (Ayeni, 1996:42). It is however important to note that the Ombudsman in Africa has been described as a “sturdy import”, having been adopted by regimes that had little resemblance to the liberal democracies with which the institution is, in its classic form, usually associated (Hatchard 1986 cited in Fombad, 2001:59). Tanzania’s Public Commission of Enquiry (PCE), like Zambia’s Commission for Investigation (CFI), operated under a one-party system, while Nigeria’s Public Complaints Commissioners (PCE) was conceived and for some time operated within a military dictatorship. Under the Apartheid system, South Africa sought to use the institution to mask the inherently anti-democratic and inhuman nature of the regime: in Victor Ayeni’s words, South Africa represented “a typical case of the Ombudsman as placebo” (Ayeni, 1996:40; Fombad, 2001:59). Judged from this (classic model) perspective, some analysts have considered Ombudsman’s performance on the continent as disappointing (Hatchard 1986 cited in Fombad, 2001:59). Nevertheless, “whatever the reasons for adopting the Ombudsman institutions, and even where they have not worked as well as envisaged in classical models, most studies of their operation on the continent shows clearly their very existence made for better conditions than those that prevailed in their absence” (Hatchard 1996 cited in Fombad 2001: 59).

According to Fombad:

The institution is now generally accepted as one of the essential components of the current democratic transition in Africa. Most recent constitutional reforms provide for it in one form or another. Some of these are a considerable improvement on the first generation of Ombudsman institution; they attempt to reflect the more open, and liberal atmosphere on the continent today (2001:60).

In this light, the institution amongst others like the Human Rights Commissions, Anti-Corruption Agencies and Independent Electoral Commissions are regarded, to borrow Diamond's concepts, as "strengthening, enhancing, deepening, and consolidating democracy" (Diamond, 1999:64-112). The 1990's Ombudsman adoptions took place against the background of the intense fear of human rights abuses in the region's newly established democracies (Ayeni, 1996:42).

One of the major consequences of the winds of change blowing through Africa since the early 1990's has been the search for more effective methods of promoting good governance (Fombad, 2001:57). In Africa, where there has been an historical record of bad governance, improving the socio-political environment has been given a central place in the New Partnership for Africa's Development (NEPAD) - an initiative that represents the latest attempt by African leaders to place the African continent on a path of sustainable development encompassing good governance and prosperity with a consolidation of peace, security, and stability (Hope, 2003:2). Consequently, the challenge for African policy-makers, under NEPAD, is to shape policies and institutional development in ways that enhance good governance and sustainable development (Hope, 2003:4).

According to Hyden (cited in Akokpari 1999: 70), "good governance is a generic term referring to the task of running a government or an organisation". As for Hope (2003),

Good governance is taken to mean a condition whereby responsibility is discharged in an effective, transparent, and accountable manner while bad governance is associated with maladministration in the discharge of responsibility. Good governance entails the existence of efficient and accountable institutions - political, judicial,

administrative, economic, corporate - and entrenched rules that promote development, protects human rights, respects the rule of law, and ensures that people are free to participate in, and be heard on, decisions that affect their lives (Hope, 2003:2-3).

As Danevad argues in 1995 (cited in Molomo 1998:200), “democracy is measured by the extent to which governments are responsive to the needs of the people and properly account for their actions”. Similarly, as Wiseman and Charlton cited in Molomo (1998:200) points out; “contribution to development is made by the operations of an efficient and essentially non-corrupt state structure and the sound policy choices made by an astute political leadership”. The former President of Botswana, Sir Ketumile Masire corroborated this view in his address to the African-American Summit in Dakar, Senegal that, “the absence of good governance is conducive to the emergence of suspicion among the governed, political instability, and the erosion of investor confidence” (Mothibi, 1995 cited in Molomo, 1998:200).

Barkan cited in Molomo (1998:201), argues that the advancement of democracy and good governance in the world at large, and Africa in particular, is a matter that has been on the agenda of bilateral assistance programmes of western democracies since the end of the Second World War, especially in countries like the United States, Canada, Germany, the Netherlands and the Scandinavian nations). In addition to these bilateral efforts, multilateral organisations including the World Bank, the United Nations, the Commonwealth as well as regional organisations such as European Union and the Organisation of African Unity (now the African Union), have a concern for political reform in their agendas (Barkan cited in Molomo (1998:201). These institutions put emphasis on good governance, which include salient features, such as guarantees of human rights, improved governmental accountability,

transparency, and zero tolerance to corruption. In this respect, "good governance involves the adoption of processes and the building of institutions that promote basic welfare, democracy, social and economic development" (Akokpari, 1999: 74). Akokpari, aptly notes, with reference to Lesotho, that the Ombudsman has a critical role to play in fostering good governance, protecting human rights, ensuring accountability on the part of public officers, and exposing corruption and inefficiency, all of which hampers development (Akokpari, 1999:74).

According to Sharma (2000:13), the desire to strengthen public ethics and accountability is an important point from which the office of the Ombudsman should be viewed. He observes that:

The declining standards of ethics and integrity in African public services have been matters of serious concern for years... in spite of growing realisation of the need to maintain high standards of ethical behaviour; there has been noticeable decline in moral values of public servants. Existing mechanisms of control and accountability are proving to be inadequate and ineffective for ensuring a just and responsible administration (2003:13).

Thus, the Ombudsman office is seen as an administrative reform or measure for promoting higher ethical standards. It is thus, argued that the office is equally reconcilable with prevailing government concerns about administrative reforms to bring about responsible, responsive and sensitive public service, enhanced productivity, improved performance, timely delivery, cost-effectiveness and value for money. It is assumed therefore that, the office helps complement other government departments towards realising agreed standards of public sector performance.

The Ombudsman concept has increasingly become a consideration in the light of attempts to establish viable democracies, and thereby ensuring that the ordinary citizen is heard and that his or her rights and interests are protected (Ayeni, 1996:35).

1.3 Problems and Challenges of the institution

Although there is good rationale and intent for the Ombudsman institution, it is not without its problems and challenges. According to Fombad:

One of the major problems that have hampered the effectiveness of the Ombudsman institution, especially in Africa, is doubt about the independence and impartiality of the office holder. This has usually centred on issues of appointment, tenure, staffing, budgeting, and other related matters (Fombad, 2001:60).

According to Fombad (2001:61):

In Africa, the Ombudsman is generally appointed either solely by the President or by him/her after some form of consultation. In either case, the President has acted as the *de facto* appointing authority. The philosophical rationalisation of this, based on the premise that the President is the embodiment of national virtue, is at odds with the practical realities of the African scene where presidents have been at the forefront of flagrant corruption and abuse of power.

The mode of appointment for the institution is consistent with the often expressed exemption of the Head of the Executive from its scrutiny (Interim Constitution of Tanzania 1965 Section 67(4) cited in Mahao, 1996:47). This however, seems to be at odds with the rule of

law and constitutional obligations that should be respected to the letter, and are supposed to be supreme to all even the Presidency. If this is not seen to be the case, it conjures images of some 'weaknesses' on the institution.

A crucial condition for the effectiveness of the Ombudsman institution is its independence from all branches of government, and especially from the Executive branch, which is usually its main oversight focus. 'Independence' is however, a contested term. It means different things to different people. Whilst it could mean independence from other government institutions, it could also mean independence from a predominant one party system and the Executive branch of government both of which owe their allegiance to party-line or discipline. This is particularly true in parliamentary systems, which are typified by a fusion of powers between the Legislative and Executive branches of government (UNDP, 2005:2).

Accordingly:

... In a parliamentary system, the constituency of the Executive and the Legislature are the same. If the ruling party is voted out of the Legislature, the Executive also changes. Continued co-operation of the Legislative and the Executive is required for the government to survive and to be effective in carrying out its programs (UNDP, 2005:2).

Cachalia (2001), on his part observes that:

Parliamentary system tends, however, also to produce an imbalance in the relationship between the executive and Parliament/Legislature and a subordination of internal workings of Parliament/Legislature to the requirements of the government. This is so because the members on whose support the government is dependent to sustain it in office, and who are subject to party discipline, are at the same time required to subject the government

to critical scrutiny. This can lead to a weakening of Parliament/Legislatures investigative and oversight roles and to less transparency, accountable and effective government” (Cachalia, 2001:1).

In a normative sense, Members’ of Parliament should be at the forefront in requiring accountability from its Executive without being biased due to political affiliation or deference. They should on this basis not fail to make government, led by their political party, account their decisions without necessarily paying homage to political party positions on matters of national interest which require them to use their conscience.

A recent empirical survey of the public perception on the Ombudsman reveals that “more than 50% of the sample believed that efficacy and independence of an Ombudsman could be enhanced if the office were made accountable to a body akin to the Parliamentary Select Committee on the British Ombudsman” (PCA) (Mireku, 1992:111 cited in Mireku, 1993:17). It has become conventional in Ombudsman practice world-wide, that a parliamentary committee would particularly ensure that Public Protector’s recommendations are implemented by all government departments (Mireku, 1993:18).

Literature regarding performance of the Ombudsman reveals that it is a difficult institution to systematically evaluate (Ayeni, 1996:47). However, Gregory (cited in Ayeni, 1996:47) has re-stated a number of popular criteria for the effectiveness of the Ombudsman as impartiality and independence; visibility and access; jurisdiction; speed; adequacy of remedial action secured and; effectiveness in obtaining compliance with recommendations. This is the criterion against which the Ombudsman institution in any given circumstance can be evaluated.

2.0 CHAPTER TWO

2.1 METHODOLOGY

The study is concerned with evaluating the performance of the Ombudsman/Public Protector institution in the two countries, namely, South Africa and Botswana. The intention is to comprehensively study and evaluate the institution's performance, and to make a critical assessment of their efficacy.

To do this it is necessary to establish what the mission, objectives and goals of the two institutions are in each case. I first establish their institutional objectives and strategic goals. And then go on to identify performance measures and indicators that allow objective assessment of the two offices.

In doing the above, the research in the South Africa Public Protector uses information contained in the annual reports, Justice and Constitutional Development Committee Reports on Chapter 9 institutions, (Public Protector falls within this committee's mandate), special reports and selected cases prepared by the Public Protector's office. As for Botswana, published articles on the Ombudsman, media articles, annual reports and special reports on the activities of the institution will be used. Effort is also made to establish how each of the institutions under study measure their own performance, and to critically find out how effective and reliable these measures, are in terms of the institution being able to process or resolve disputes, and the ability to secure compliance from government organs falling under their mandate. The study will also find whether or not the content of the Ombudsman reports from both cases demonstrate the impact of the institution on individual complaints, and also

find out from the annual reports whether the predetermined objectives of the institution are met.

The independence of the institution is evaluated on the basis of the legal framework that obtains in each of the cases; in terms of constitutionality and legal protection of the office from abuse or abolition by those who might feel uncomfortable with its existence. Functional independence is another area in which the office's performance is evaluated. This involves looking at issues such as manpower availability, financial sustainability and autonomy.

Opinion from Non-Governmental Organisations, scholarly contributions and media articles regarding the performance of the ombudsman provide another basis upon which an informed position on the institution's impact is assessed. These wide sources help to safeguard the study against a biased evaluation based only on the Public Protector's reports.

The names Ombudsman and Public Protector will be used interchangeable in the study, as they are official names in both countries. They refer to the same institution.

2.2 Limitations

A major limitation of the study is that there is not much empirical based literature on the two institutions. This therefore means that the study heavily relies on primary sources of data such as journals, public protector's annual reports, media reports and journal articles. Besides, the Ombudsman institution in the Southern African Development Community (SADC) region, including the two cases under consideration, is still relatively new. It is noteworthy for the record to state that since the institution is still at a nascent stage research

regarding its effectiveness in the two countries is currently very limited. The study is also devoid of critical voice of members of the public who are supposed to be the clientele for the institutions, and that this is mainly due to lack of the necessary resources. This could be explored in future.

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3.0 CHAPTER THREE:

THE SOUTH AFRICAN PUBLIC PROTECTOR

3.1 Rationale and Functions

With the founding of democratic rule in South Africa in 1994, it was decided that the Public Protector should also form part of the established institutions that will safeguard fundamental human rights and prevent the state from treating the public in an unfair and high handed manner (Public Protector Report, 1997; 1). The Public Protector in South Africa substituted the Ombudsman office that prevailed during the Apartheid era in homeland areas such as former Bophuthatswana.

The Public Protector is established in terms of Chapter 9 of the Constitution of South Africa of 1996, as one of the 'institutions supporting constitutional democracy'. Thus the Public Protector's office is as per section 181(1), intended to "strengthen constitutional democracy" (Pienaar, 2000:3). Hence Pienaar argues that "strictly speaking the Public Protector's office fulfils this mandate by simply protecting the public against the might of the state" (Pienaar, 2000:3).

Section 182(1) of the South African Constitution of 1996 gives the Public Protector the following functions:

- a) to investigate any conduct in state affairs, or in the public administration in any sphere of government, that is alleged or suspected to be improper or to result in any impropriety or prejudice)
- to report on that conduct; and c) to take appropriate remedial action;

- 2) The Public Protector has additional powers and functions prescribed by national legislation;
- 3) The Public Protector may not investigate court decisions;
- 4) The Public Protector must be accessible to all persons and communities;
- 5) Any report issued by the Public Protector must be open to the public unless exceptional circumstances, to be determined in terms of national legislation, require that a report be kept confidential.

The execution of functions of the Public Protector's office is provided for by the Public Protector Act of 1994 as amended by Public Service Laws Amendment Act 47 of 1997, Public Protector Act 113 of 1998, Promotion of Access to Information Act 2 of 2000, Public Protector Amendment Act 22 of 2003 and Prevention and Promotion and Combating of Corruption Act 12 of 2004

As per the Public Protector report of 1997:6, the Public Protector, is required by the constitution to ensure that Public Administration adheres to a number of principles as set out in section 195(1) of the Constitution of South Africa as quoted below:

- a) A high standard of professional ethics must be promoted and maintained.
- b) Efficient, economic, and effective use of resources must be promoted.
- c) Public Administration must be development –oriented.
- d) Services must be provided impartially, fairly, equitably and without bias.
- e) People's needs must be responded to, and the public must be encouraged to participate in policy-making.
- f) Transparency must be fostered by providing the public with timely, accessible and accurate information.
- g) Good human- resource management and career development practices, to maximise human potential, must be cultivated

- h) Public Administration must be broadly representative of the South Africa people, with employment and personnel management practices based on ability, objectivity, fairness, and the need to redress the imbalances of the past to achieve broad representation.

3.2 Independence of the Public Protector

The Public Protector and other ‘State Institutions Supporting Constitutional Democracy’ as per section 181(2) of the Constitution of South Africa of 1996, and other related sub sections are:

... Independent, and subject only to the constitution and the law, and that they must be impartial and must exercise their powers and perform their functions without fear, favour and prejudice

(3) Other organs of the state, through legislative and other measures, must assist and protect these institutions to ensure the independence, impartiality, dignity and effectiveness of these institutions

(4) No person or organ of state may interfere with functioning of these institutions

(5) These institutions are accountable to the National Assembly, and must report on their activities and the performance of their duties to the Assembly at least once a year.

3.3 Manner of Appointment

The appointment of the Public Protector is provided for by the Constitution of 1996, Section 193(3), which provides that “the President, on recommendation of the National Assembly, must appoint the Public Protector”. In addition, section 193(5) further prescribes that:

The National Assembly must recommend persons –

- (a) nominated by a committee of the Assembly proportionally composed of members of all parties represented in the National Assembly; and
- (b) approved by the Assembly by resolution adopted with a supporting vote- i) of at least 60 per cent of the members of the Assembly...

The removal from office of the Public Protector is also provided for in Section 194 of the Constitution of 1996. Accordingly, “he or she can only be removed from office on (a) grounds of misconduct, incapacity and incompetence (b) a finding to that effect by a committee of the National Assembly; and (c) the adoption by the Assembly of a resolution calling for that person’s removal from office”. Sub section 2 further provides that “a resolution of the National Assembly concerning the removal of the – (a) the Public Protector or the Auditor General must be adopted with a supporting vote of at least two-thirds of the members of the Assembly...” Sections 1A and 2A of the Public Protector Act, 1994 as amended in 1998 also provide and prescribe the same mechanism of appointing the Public Protector and Deputy Public Protector, terms and conditions of employment respectively.

3.4 Performance Measurement

In order to evaluate the performance of the Public Protector, it is first necessary to identify its mission, objectives and values. The office of the Public Protector is a relatively new one in the South African legal system whose institutional activity is developing with distinctly positive results (Public Protector, 1997:4). According to the 1997 annual report “the office of the Public Protector has consolidated the strategic perspectives which gave clarity to its institutional mission and vision” (Public Protector. 1997:7). However, the study reveals that the office started developing a Strategic Plan in March 2004 (Parliament No.98 of 2004:1093). Even then, it was still in draft form and during the study same was not available

for evaluation. Below are the mission, objectives and values against which the office's performance is assessed:

3.4.1 Mission Statement

“The office of the Public Protector is committed to assisting Parliament in strengthening constitutional democracy in the Republic of South Africa by enhancing fairness and efficiency in the provision of governmental services by combating injustice and unfairness in Public Administration, making government agents accountable for their actions and recommending corrective action” (Public Protector, 2001/02:12). It is however, difficult to assess whether or not the Public Protector is achieving its mission or not because their reports are silent on this important aspect

3.4.2 Objectives

The Public Protector Report (2001/02:12) stipulates the objectives as follows:

- To develop community awareness of the existence of the office, the services it provides and how to lodge a complaint;
- To facilitate access to the office by the entire community;
- To investigate matters on own initiative or on receipt of complaints from the community;
- To provide independent, objective and impartial investigation, and to seek equitable remedies for those affected by defective administration;
- To identify systemic deficiencies in the administration and seek solutions;
- To provide advice to government on matters relating to administrative action and practices;

- To ensure that public officials are not subjected to unfair or unjustifiable criticism or blame;
- To offer guidance to people whose complaints fall outside the jurisdiction of the office by referring them to relevant agencies;
- To foster a culture of human rights within the public service.

No attempt is ever made on the reports to show whether the objectives are being achieved or not. This is yet another grey area regarding the content of these annual reports.

3.4.3 Values

The guidelines in achieving the institution's mission are;

Impartiality, efficiency, objectivity, professionalism, accountability and where necessary, confidentiality. The office is committed to treating people with courtesy, consideration, openness and honesty, and respect to their privacy (Public Protector, 2001/02; 12)

Dissatisfaction on the performance of the Public Protector emanates from the extent to which the Ombudsman is perceived as impartial by members of the public and media houses. The questions regarding the manner in which investigations into high profile cases such as the oilgate scandal, investigation into the appointment of Dr Goqwana as MEC of Health by the Eastern Cape Premier and private business, and investigation on play Sarafina 2 are some of the cases which aroused doubts on the impartiality and reliability of the Public Protector's investigations. Investigations into these complaints created a perception that the Public Protector's recommendations were at variance with the institutional values as tabulated above.

3.5 HOW THE PUBLIC PROTECTOR MEASURES PERFORMANCE

3.5.1 Number of Finalised Cases

Finalised cases refers to complaints that the Public Protector makes a discretion to investigate and make a recommendation to a government department if there is need for recourse or advice the complainant that the complaint is not genuine. The determination here does not take into account whether the complainant is satisfied or the department responsible has taken corrective action.

As per the Public Protector's annual reports, the office has norms (or service delivery indicators) in place, indicating how many cases should be finalised in a given period. For instance, during the 2001/02 reporting period, the office finalised 12 202 cases as against the planned 10 869 cases, 1333 cases more than the set objective (Public Protector, 2001/02:16). Thus according to this report, the office on average performed 12% better than the predetermined objective set by the office. However, the reports do not highlight what the pre-determined objectives were.

Similarly, as per the report of 2002/03, "... 21 000 complaints were completed and settled over the period under review, leaving only 7 000 complaints to be dealt with in the ensuing year" (Public Protector, 2002/03:11). As per the above report, "... excluding the North West Provincial office (due to a correction made on their statistics during the course of the year...the office should have finalised 8 100 cases during the year under review) ... investigator's managed 10 690 cases, 2 590 cases more than the set objective" (Public Protector, 2002/03:15). Furthermore, it is reported that, the office performed 32% better than

the pre-determined objective set for it. The above is suggestive of the fact that their performance is to a large extent measured in terms of the number of cases finalised at any given time. The use of statistics as a measure of performance is primarily an efficiency measure, but one that may be significant for the institution's ability to achieve its objectives but does not show the impact that the Public Protector has on the complaints of citizens.

3.5.2 Number of cases received

The office of the Public Protector also use the increased usage and number of cases received to assess its effectiveness. Hence the assertion that, "the office has proven too much in demand by the public" (Public Protector, 1996a:2). This can be deduced from the words of the first Public Protector when he said:

...I commend the founding fathers (and mothers) and all the people of South Africa for having insisted that an office of the Public Protector be established... the past seven years have more than justified the need for its existence. With its existence the poor, the weak, the illiterate and the powerless have been enabled to obtain justice and administrative redress which they would otherwise not have obtained (sic) (Public Protector, 2001/02: 12).

3.5.3 Reduced Backlog of cases

Much of the Public Protector's annual reports are broken down into three categories of classifications namely: received, brought forward and finalised cases. The purpose of the break down as for the first and last case has already been discussed above. The cases brought forward are meant to measure how the office manages its backlog. It can also be argued that

this is another measure of the office's performance as deduced from their annual reports. Hence they regard a reduced backlog of cases or cases brought forward as improved performance. The assertion below by the Public Protector confirms this position:

A persistent problem however continues to bother me, in that the more and better we perform, the more the public utilises our services. Whilst this is a positive development in itself, and an indicator of the efficiency levels achieved by the office, the concomitant rise in backlog of old cases is not a welcome development" (Public Protector, 1998:9).

3.5.4 Compliance

Compliance by government departments against whom investigations are conducted is another measure of the office's effectiveness. A case by case analysis of the annual reports reveals that most of the specific cases included in the reports are those that the Public Protector had departments accepting and complying with their recommendations. Most of the cases captured in the reports as demonstration of the day to day cases that they get involved in are those that they successfully resolve. However, there is no section on the annual reports detailing recommendations that were complied with. The reports only reflect the findings and recommendations on a few chosen cases and does not state whether the recommendations were complied with. This is a missing link in their reporting system.

3.6 STRENGTHS OF THE PUBLIC PROTECTOR'

3.6.1 Financial Autonomy

According to the Public Protector Report of 1996, funds for the expenditure connected to the office are provided for in the vote of the Department of Justice and Constitutional Justice, under a separate programme. As per the words of the Public Protector:

It should be noted that this arrangement is an expedient one and does not imply that my funds are controlled by Justice...I, and not the Director General of Justice,(sic) I am the Accounting Officer for this programme on the budget, and that I control my own budget. This is an important aspect regarding the office of the Public Protector as his/her independence is not a theoretical matter (Public Protector 1996a:16).

Thus, the Public Protector's office claims to be financially independent in terms of having their specific budgets, and actually controlling their expenditure.

3.6.2 Manner of appointment of the Public Protector and Removal from office

The manner of appointing the Public Protector, as already indicated in section 3.3 above, secures the tenure of office of the incumbent. Hence the office could be said to enjoy some level of independence from the Executive or the Presidency. The appointment of a committee to deal with issues pertaining to the Public Protector as per section 2(2), which provides that "the remuneration and other conditions of employment of the Public Protector shall from time to time be determined by the National Assembly upon the advice of the committee," is a welcome provision. This is, to some extent, a measure that detaches the office from the Executive and links it to Parliament. Hence, the optimistic view that "the office enjoys some form of enhanced security of tenure and independence of the incumbency's office" (Public – Protector, 1998:12).

The existence of a Parliamentary Committee responsible for the Public Protector, alias, the Justice and Constitutional Development Committee, means that the Public Protector has the authority to approach it, at any time, with regard to any matter pertaining to the office of the Public Protector (Public Protector, 1998:12). Hence in the Public Protector's words, "this means that there is a 'permanent' committee and that reports, difficulties with resources, problems with the implementation of recommendations etc can be submitted to this committee" (Public Protector, 1998:12). The legal position is that this committee is responsible for monitoring the day to day activities of the Public Protector on behalf of the National Assembly.

3.6.3 Accessibility

To date the Public Protector has a national office and eight regional offices in the nine provinces. At the moment the national office of the Public Protector deals with provincial matters from Gauteng (Public Protector, 2001/02:54). The words of the Public Protector in the report's foreword, confirmed the increased accessibility and growth of size as captioned below:

We have grown in size both in terms of the number of regional offices and staff... conducted a successful public awareness campaign throughout the nine provinces. We have assisted more people than ever regarding their complaints against the public administration... more and more people are becoming aware of the services we render and are ever more grateful for the assistance which comes at no cost to all the citizens of South Africa (Public Protector, 2000/01:15).

The reports also allude to the fact that there are regional and satellite clinics where the office visits its clients, although these are not evenly distributed. This is confirmed by the Public Protector when he says that:

As for the North West province, whilst this office is presently operating a number of clinics within the province, they are mainly in the central and eastern regions, and as there is a need for the western part of the province to be more accessible. Hence consideration is being given to the logistics to do so (Public Protector, 2001/02:53).

3.6.4 Public Awareness Campaigns

The office of the Public Protector has with help and funding from the Lawyers for Human Rights, Royal Danish Embassy and the Foundation for Human Rights in South Africa conducted the first public awareness campaign throughout the nine provinces. Phase 1 of the campaign involved the development and production of training material and was conducted in 1999. Phase 2 involved the training of trainers known as National 'Train the Trainer' conducted on 16-17 February 2000 (Public Protector, 2000/01:67). Provincial Workshops were held targeting public service officials and paralegals. Phase 3 of the campaign involved the evaluation of the all the workshops by all the trainers. Following the evaluation, a user friendly publication on functions and services of the office was produced and distributed effective November 2000 (Public Protector, 2000:67).

A second three phase public education campaign was undertaken again in 2002 (Public Protector, 2002/03:53). Training targeted the management echelons of the public sector, Non Governmental Organisations (NGOs) and paralegal executives in rural areas. The first phase

funded by the Foundation for Human Rights in South Africa, involved reprinting and updating existing 1999 training material. Phase two was on training in all the provinces, and was funded by the Royal Danish Embassy. This was undertaken in April 2002. The evaluation of the workshops by trainers phase three of the campaign was conducted in November 2002 (Public Protector, 2002/03:53).

From the study it is clear that the Public Protector's public education campaigns mostly targeted government officials and has not done same for the ordinary citizens who are supposed to be the prime targets. A rigorous campaign should target rural communities if they are to be made knowledgeable of the institution and to encourage its usage.

3.6.5 Improved Reporting System

The Public Protector's reporting style has gradually been improving, in line with the Public Protector Act of 1994, the Constitution of South Africa of 1996, and the Public Financial Management Act of 1998. The report is inclusive of their management report, Auditor General's report, Financial Statement and Internal Audit Report as from 2001/02 reporting period. As per the 2001/02 report, "the office has implemented a risk identification and assessment, as well as its fraud prevention plan... outsourced the internal Audit function and the Audit Committee is well established and fully operational" (Public Protector, 2001/02:54). Accordingly, "the office has implemented activities that promote corporate governance and improve financial management such as installing an in-house financial information system for Financial Management to execute all financially related activities and Human Resources Management" (Public Protector, 2001/02:53-55). This is a welcome development taking into account the few years that the office has been in operation. It is

noteworthy to indicate that the Public Protector has a case management system that helps it to reconcile the number of cases received with the backlog of cases; cases brought forward and closed files for each year (Public Protector, 2002/03:16).

3.6.6 Cooperation

Generally, “there has been an excellent cooperation of institutions” (Public Protector, 1996a:3). The excellent cooperation of institutions has added benefit that a more informal approach to investigations could be followed. As per the 1996 annual report:

Matters could be resolved over the telephone or at a meeting, or information could be gathered by writing to the institutions as opposed to summoning witnesses and having formal hearings given under oath. This has resulted in the office being able to deal with complaints much quicker than it would have been able to do if a formal hearing had to be scheduled for every complaint (Public Protector, 1996(a):3).

The KwaZulu-Natal Province best illustrates the elicited cooperation. At its inception, it received an upsurge of cases. As per the Public Protector’s words,

The majority of complaints have been directed at the Department of Social Welfare and Population Development, National Treasury in connection with social and government pensions; Department of Education and Culture; Department of Labour and its Compensation Fund has been the subject of general complaints (Public Protector, 2001/02; 18).

Further, as per this report:

This situation has changed since the regional office has established a good working relationship with the Department of Social Welfare and Population Development, as well as Treasury. Regrettably, the problems with the departments of Labour and Education continue... Cooperation received has also improved at the Eastern Cape regional office although the number of complaints has been increasing; hence the number of letters of gratitude has also been growing steadily (Public Protector, 2001/02:17-18).

3.7 0 PUBLIC PROTECTOR'S WEAKNESSES

3.7.1 Weak Performance Measurement Indicators

There is no comprehensive set of performance measurement indicators developed by the institution to assess its own performance. It assesses its own performance by looking at the number of cases it receives and completes or finalises. Although the office's objectives are clear and well articulated, no effort has so far been made to translate them into measurable deliverables. The objectives have not been translated into clearly defined programmes or projects so that the impact of the institution could be measured. It would be expected that the office has a Strategic Plan against which its performance could be assessed. Although the Public Protector's objectives are included in all its annual reports, it is difficult to assess or determine whether or not they have been achieved in the absence of a strategic plan prior to 2004. Hence during this period, there is no way one could tell how they performed without the necessary performance indicators. This position has been confirmed by the Public Protector when he said that "the office is in the process of developing new performance instruments and performance agreements as part of its move to a service delivery driven

organisation.” (Public Protector, 2002/03:59). By his admission, the Public Protector has submitted that:

Not all set goals were achieved. Some goals were achieved after protracted delays of many form... some departments and/or parastatals took time to respond to correspondence from our offices and cooperation was always not forthcoming (Public Protector, 2002/03:11).

Although the office of the Public Protector was established in 1995, it only adopted a draft Strategic Plan in March 2004 (Parliament No. 98 – 2004: Report of the Portfolio Committee on Justice and Constitutional Development Hearings on Annual Reports and Strategic plans of Chapter 9 Institutions, 2004: 1093). According to the report, before then, it was not possible for the Portfolio Committee to assess the performance of the Office of the Public Protector. The Portfolio Committee has thus recommended that the strategic plans of these institutions “must indicate specific outputs in terms of specific projects that will be undertaken... link it to specific activities which are measurable” (Parliament No. 98, 2004:1095).

It is for the above reasons that the Portfolio Committee had generally recommended that:

The Annual Reports of Chapter 9 Institutions should in future include a report card against which the strategic plan for the financial year under review could be examined. In reference to strategic plans, each institution should indicate which objectives were met, which were not met or which were partly met or on-going. This will allow the institutions to account in a more systematic way (Parliament No. 98, 2004:1094).

From the above, it is evident that the Public Protector has lagged behind in developing performance measurement indicators except to rely solely on looking at the number of cases received, number of cases finalised, backlog of cases, without first having identified inputs, output, target, indicators and linking them to the set objectives.

3.7.2 Weak Annual Reporting Accountability Mechanism

In terms of Section 181(5) of the constitution, “state institutions supporting constitutional democracy are accountable to the National Assembly and must report on their activities and the performance of their functions to the National Assembly at least once a year”. To ensure accountability in the South African government, several institutional arrangements have been provided for in legislation, one of which is that Heads of Department must prepare annual reports to the Legislature that fairly presents their actual performance against predetermined objectives and financial position. Besides, the Public Financial Management Act of 1999 section 40(1) (b) and (d) provides that: “The Accounting Officer must prepare financial statements for each financial year in accordance with generally recognised accounting practice; and must submit an annual report on the activities of the department during that financial year”. Section 40(3) (a) further requires that “the annual report and audited financial statements must fairly present; the state of affairs in the department; its business; its financial results; its performance against predetermined objectives; and its financial position as at the end of the financial year concerned”.

Although South Africa is well endowed with a variety of accountability mechanisms, in the form of Acts, financial regulations and general management policies in place, it seems there is a general lack of implementation of same. The Corder Report on Parliamentary Oversight

and Accountability (1999) and the Public Service Commission (PSC) (1999) have observed that generally, South African institutions have poor annual reporting mechanisms. The Corder Report (1999) observes that:

While it would appear that written reports would seem to be a valuable vehicle to explain Executive activity to Parliamentary Committees and a useful tool for the committees in the exercise of their oversight function, this has not yet been the case. While they may provide a comprehensive overview of a department's activity for the past year, there is often too much information to be useful - at the same time fairly topical and therefore providing too little information in areas that are important for effective oversight to take place (Corder, 1999:35-36).

The Corder report further submits that:

Evidence on committee responses to written reports, as recorded by the Parliamentary Monitoring Group (PMG) or through Committee reports to Parliament ... highlight the problems many of these reports contain". While many annual reports and budget presentations can be quite lengthy, a common complaint of MPs' is that crucial information is either missing or obscured (Corder, 1999:36)

The Public Protector's reports are no exception in this regard.

Lending credence to the above observations is the Public Service Commission study of 1999, Evaluation of Annual Reports as an Accountability Mechanism. The study found that generally:

Departments largely report on their activities - what they have done during the year- and that this was mostly limited to a description of the achievements and the benefits of programmes, or progress with implementation of programmes... Many departments failed to make the link or even attempted to report on outputs in their annual reports output was not linked to inputs, departmental objectives and the targets (PSC, 1999:50).

Besides, the PSC observed that:

Increases or decreases were not explained and analysed. No quantity, quality or timeous performance indicators were reported on. This made it almost impossible to make informed judgement on the performance of a department (1999:50).

It is in this light, that the Corder report (1999) and the Public Service Commission (1999) reports recommended amongst other things, measures to improve the reporting standards, the development of performance criteria and standardised formats for reporting. The PSC has also stressed that "... performance data provided in annual reports should be useful to the person who has to assess that performance... this information should include quantified, compared and verifiable performance data" (PSC, 1999:42). As a result of the lack of clarity in the annual reporting system, the Public Service Commission "recommends that for departments to be able to report intelligently and systematically on performance instead of just on their activities, supporting, monitoring and evaluation systems and information systems are a prerequisite" (PSC, 1999:44).

It has also been noted that lack of debate on annual reports in Parliament and in the Committees were some of the impediments to accountability and oversight functions.

According to Corder (1999:37), there is no procedure for committees to address or respond to written reports. Parliamentary Committees are not required to do anything when they receive a submission. Besides, there is no obligation for Parliamentary Committees and Executive officials to hold a briefing or to arrange a response. This obviously means that reports are not subjected to internal debate (Corder, (1999:38). Hence it is difficult to follow-up committee matters or reports Corder (1999:38). As per the Corder report, in their submissions to the consultants, "many constitutional institutions have pointed out that due to the workload of these committees there is no tangible or visible follow-up of the matters raised or the recommendations which are made in reports"(Corder, 1999:59).

3.7.3 Limited independence

Contrary to a view held by the Public Protector that the office is independent, this assertion has practical limitations. The independence of these institutions must be seen in relation to their position vis-à-vis the Executive branch of government. According to Corder (1999:56):

It has two facets; in the first place, to make institutions dependent on budget allocations received from the very departments that they are required to monitor is not desirable. Secondly, these institutions must be seen by the public to be independent and free of the possibility of influence or pressure by the Executive branch of the government. Approval by the Executives of budgets, or other issues such as staffing, is thus inconsistent with independence as well as the need to be perceived as independent by the public when dealing with their cases. The Executive power could render impotent state institutions supporting constitutional democracy through potential denial of both financial and human resources (Corder, 1999:56).

Owing to the limited accountability and independence of constitutional institutions, the Corder report recommends that “their accountability and independence should be served and outlined under a separate legislation, the Accountability Standards Act and an Accountability and Independence of Constitutional Institutions Act” (Corder, 1999:61-64). The report proposes that this would achieve the required financial and administrative independence. As for financial independence, “it was proposed that either the institutions should each have its vote individually or a separate vote for all the institutions as a group” (Corder, 1999:60). Preference is however given to the first option as it enhances independence even amongst the institutions themselves.

As for administrative independence, the report recommends that a provision should be made for Parliament through its relevant committees, to exercise a supportive, supplementary and monitoring role for constitutional institutions (Corder, 1999:61). In this light, the Corder report recommends “the establishment of a Standing Committee on Constitutional Institutions” (Corder, 1999:61). It can thus be argued that should such an arrangement be made, the institution will achieve some level of independence, accountable reporting, follow-ups on matters and ensuring compliance with recommendations, hence an improvement on the institution’s performance. The report proposes further that these recommendations will “... enhance the authority of Parliament to hold the Executive accountable to the people as well as to give full effect to the independence, impartiality and credibility of constitutional institutions” (Corder, 1999:63). It should also be noted that the Ad Hoc Joint Sub- Committee on Oversight and Accountability (2002), accepted most of the recommendations of the report in principle, but that the government or Parliament has not legally acted to address or effect changes to the issues raised.

3.7.4 Resource Constraints

The Public Protector's office, just like any other government institution, has financial and human resource problems. It has become common knowledge that for organisations to achieve their goals and objectives, and hence have a meaningful impact, they need to have the necessary resources to do that. In the Public Protector's own words, "... Although Parliament and the Department of State Expenditure are continuing to assist us in accessing more resources, we are still not out of the woods in this regard" (Public Protector, 2002/03:11).

The Public Protector further submitted that this state of affairs is not always understood by the public that is served; hence it continues to be a cause for concern (Public Protector, 2002/03:11). Lack of sufficient resources prevented investigators from conducting some *in loco* investigations, hence hindering quick settlement of complaints (Public Protector, 2002/03:11). The office does not have enough personnel either. This is further compounded by the fact that "it is a lengthy process to establish a proven necessity for further posts, to consult in terms of the relevant legislation, and to advertise posts and screen applications" (Public Protector, 2002/03:11). The result is that a backlog of cases builds up. (Public Protector, 1996a:3). The Public Protector reiterates this position when he says:

A persistent problem however continues to bother me, in that the more and better we perform, the more the public utilises our services. Whilst this is a positive development in itself and an indicator of the efficiency levels achieved by the office, the concomitant rise in backlog of old cases is not a welcome development (Public Protector, 1998:9)

The lack of capacity to handle complaints, and accessibility, are key issues that need to be addressed in order to ensure not only the credibility, but also the continued effective delivery by the office (Public Protector, 1998:9). The combination of limited funds, rise in complaints, and lengthy investigations resulted in staff being under severe pressure to cope with the workload (Public Protector, 1999:11).

3.7.5 Political Party Image Serving and Protection

There have been numerous criticisms of the Public Protector's office regarding its seemingly inherent tendency to serve the ruling political party's image and politicians. The appointment of the Public Protector is seen by some as political. This seems to stem from the fact that the current Public Protector's profile (Public Protector, 2002/03:9) indicates that prior to his appointment as Public Protector he was a Member of Parliament for the ruling party and Deputy Speaker of the National Council of Provinces (NCOP), having won his seat by virtue of being a member of the African National Congress (ANC). As a matter of logic, it therefore follows that it could be argued that he is a political appointee, even if his appointment was as per a recommendation from the National Assembly, in which the ANC has majority, and also has the president of the ANC as state president. This proposition confirms the perception that the Public Protector in South Africa is a political appointee. It is this perception that made the Public Protector's report on the 'oilgate scandal' to be labelled a 'white wash' (Mail & Guardian, 4 August 2005) by ANC opponents and the media. This article has further submitted that the Public Protector's report "disregarded the most important issues, cleared government and its functionaries of remaining allegations on flimsiest of grounds." Substantively, the Public Protector "disregarded the onward payment to the ANC, saying it fell short in the public domain and that he was mandated by the Public Protector Act to

investigate public matters only.... he excised any possibility of the abuse of power” (Mail & Guardian, 4 August 2005). It therefore follows from the above observation that the Public Protector’s independence is in question, since he could do anything in his powers to protect the image of his party, which apparently is in power.

In response to a report by the Public Protector on Dr. Goqwana’s Private interests and into his appointment as Health MEC by Eastern Cape Premier Stofile, the Public Service Accountability Monitor (PSAM) an independent corruption monitoring unit, submitted that the report represents “an abrogation of the responsibilities of the Public Protector and a betrayal of his constitutionally mandate to defend democracy and the public interest, as opposed to protecting the image of the executive” (PSAM, 2002a:4). Hence PSAM declared the Public Protector’s report that cleared Dr Goqwana following revelations of his substantial business interests in the Eastern Cape Provincial Health Sector a “white wash”(Pambazuka News, 3 October 2002). The report was dismissed as a “whitewash” because it vindicated Premier Stofile and Dr Goqwana of wrongdoing as a result of a shoddy investigation by the Public Protector (PSAM, 2002b:1).

As for the oilgate scandal, Bullard (2005), called for the abolition of the office, as he believed that the Public Protector chose to ignore real issues in the investigation. Bullard further submitted that “to suggest that Mushwana is lacking in vertebrae or that he deliberately chose to ignore salient features of Imvume/PetroSA deal is to suggest that he did not understand the role of the Public Protector”. Accordingly, the writer submitted that “he understood his role too well and never had any intention of doing anything other than serving his political masters”. As a result of the above concerns, there is a growing perception that the Public Protector interpreted his jurisdiction too narrowly and therefore absolving himself from making a meaningful recommendation in the abuse of public funds by the ANC and

Invume (PTY) LTD. February (2005) observes that “an expansive interpretation of his mandate would certainly have allowed the Public Protector to follow the money trail and get to the crux of the allegations”. The Public Protector has instead, chose to pay lip service and allowed public money to be siphoned out to a political party through some unscrupulous tender obligations in the disguise of promoting Black Economic Empowerment policies without the money transfer being satisfactorily accounted for.

Similarly, investigation of the Play Sarafina II Special Report No.1 of 20 May 1996 also raises eyebrows. The manner, in which tendering procedures, regulations were handled, was in the words of the Public Protector “completely flawed and defective” (Public Protector Special Report No.1 of 1994:22). Despite these findings, the recommendations of the Public Protector did not make any one take responsibility. Besides, the investigations side-stepped the minister Dr Nkosazana Dlamini-Zuma’s responsibility but instead focused attention only on the tendering process.

President Mandela and other ministers seemed content with the issue of Dr Nkosazana Dlamini-Zuma’s mismanagement, and her lack of public and parliamentary accountability, was ignored by herself and her colleagues (Good, 2004:82). According to the Mail & Guardian (2005:2), the former Public Protector Selby Baqwa stopped short of probing too deeply the role of the then Minister of Health Nkosazana Dlamini-Zuma in promoting the flawed Aids-awareness play. The then Water Affairs Minister, Kader Asmal endorsed her cringingly as a ‘talented’ and ‘a fine and principled minister’, while the then Vice President Mbeki expressed the government’s full confidence (Business Day 1996 cited in Good, 2004:82). Hence Good has posited that ministerial responsibility was side-stepped. As for then President Mandela, “he repeated in Parliament his unequivocal support for his Health

minister, and announced firmly that the Sarafina II saga was closed forever” (Business Day 1996 cited in Good, 2004:82) despite calls that the minister should do the honourable thing, and resign from cabinet. She was supported and cushioned from within government and the ruling African National Congress (ANC).

From the above, it can be argued that perhaps serving political party image together with its leaders or members is an ‘unwritten objective’ of the Public Protector’s office whose performance indicator could equally be serving party interests and maintained grip on political power. Thus it can be argued further that, the office holders’ service is at the pleasure of the Executive that appoints him/her, and their service will always be needed and guaranteed only if they do so at the pleasure and support of the ruling party. This could perhaps be the reason why the office developed cold feet in recommending that the National Prosecuting Authority (NPA) should investigate how public funds ended up into an ANC bank account via Imvume since by implication there were some criminal activities involved, hence the party had to be exonerated or protected. Justice was not delivered as the Public Protector rested his case by saying:

The mandate of the Public Protector is by law restricted to the investigation of matters relating to government bodies, public entities, state affairs and dishonesty in respect of public money... allegations pertaining to the relationship between Imvume and the ANC, payments made by Imvume to the ANC and private entities and the involvement of the ANC... could not be investigated... (Public Protector, 2005:7).

This was further supported by statements from the cabinet, when the government spokesperson Joel Netshitenzhe was quoted as saying that “ cabinet has noted and accepted

Public Protector's Lawrence Mushwana report" (Mail & Guardian 5 August 2005:1). He further said that "while government had always understood that allegations of improper conduct on the part of state officials were unfounded, we do appreciate that this matter, as it relates to government has been laid to rest"(Mail & Guardian, 5 August 2005:1).

A genuine claim can thus be made that the Public Protector in South Africa is not only an adjunct of the Executive but also by extension serving political party interests due to the political connections inherent between the office holder and the political party in power.

3.7.6 Non-Compliant and Uncooperative State Institutions

Although the office has generally received cooperation and compliance from most state institutions, cooperation from some of these institutions has not been forthcoming. As per the Public Protector's words:

It should be mentioned here that certain problems were experienced in certain provinces, no doubt due to the amalgamation of the various former governments into new provincial governments. Notably in Eastern Cape, we had most unsatisfactory responses to certain of my queries and only received cooperation after threatening to issue summonses (Public Protector, 1996a:3).

The Public Protector's report on an investigation of a complaint by the Vice President Jacob Zuma against the National Director of Public Prosecutions and the National Prosecuting Authority (NPA) in connection with a criminal investigation conducted against him is an important case involving serious breach of corporate governance. This case is an important one in that it reflects the inherent tendency by some authorities not to cooperate with others.

and thus hindering the fulfilment of their obligations. It transpired during the investigations following Arms deal corruption allegations against Zuma that the National Director of Public Prosecutions and the National Prosecuting Authority were not willing to assist the Public Protector to objectively address the complaint from Mr Zuma.

As the Public Protector indicated in his report:

The investigation on the complaint by the Deputy President could only be conducted with the assistance of the National Director and the Minister of Justice and Constitutional Development (minister)... in compliance with the provisions of section 41(1) (g) of the constitution which provides that all spheres of government and all organs of state within each sphere must cooperate with one another in mutual trust and good faith by assisting and supporting one another (Public Protector, 2004:50).

Despite these guarantees and obligations, cooperation with the NPA and the minister responsible could not be obtained in this matter despite numerous requests by correspondences and verbal meetings. The investigation reached a stalemate that stalled further determination of the case, until intervention was sought from the State President. However, the response received after this intervention has been described by the Public Protector as:

Phrased in an aggressive and defensive manner and providing no assistance to the Public Protector, as is required by law; insulted the Public Protector by insinuating that he is a liar and incompetent; and created the impression that the Prosecuting Authority regards itself as beyond question and criticism (Public Protector, 2004:65-66).

The lack of cooperation by high profile institutions such as the NPA that are similarly constituted in terms of independence and reporting mechanisms is unhealthy and does not enhance constitutional democracy as enshrined in the constitution's bill of rights. The conduct of the NPA and its officials, and the minister in particular, has to a large extent created and supported the perception that certain institutions and individuals are beyond reproach, hence by implication the application of double standards. The reluctance and failure by the minister and the National Director to cooperate with the Public Protector in the investigation was improper and unconstitutional. It resulted in the Public Protector having to conclude the investigation without the benefit of proper responses by those implicated by the complaints of the Deputy President (Public Protector, 2004:91-92).

In such circumstances, the Public Protector's office finds itself helpless and unable to deliver on its mandate as prescribed by the constitution and the Public Protector Act, 1994. Hence this has a debilitating effect on the performance of the institution. As submitted in the report, "the NPA felt that the investigation by the Public Protector was as an illegal attempt to review the decision not to prosecute the Deputy President" (Public Protector, 2004:64) on allegations of involvement in the Arms Deal corruption charges. The case also confirms the conflicting and confusing jurisdiction of government institutions that sometimes hinder the attainment of noble objectives. The Public Protector has equally noted this observation when he submitted that "the response from the National Director and minister clearly indicated a lack of understanding of constitutional mandate and the role and function of the Public Protector" (Public Protector, 2004:65).

4.0 CHAPTER FOUR

THE BOTSWANA OMBUDSMAN

4.1.1 Background and Rationale for the institution

In 1981, the Botswana government as a result of pressure from politicians from across the political divide and private media reports on corruption by government officials “saw the need to examine the role that could be played by an Ombudsman in her set-up” (Ngwako, 1996:87). According to Ngwako:

The Botswana constitution, like those of most countries in the Commonwealth, contains what may be termed a justifiable bill of human rights, which are centre stage in any democratic dispensation. In addition, common law and other statutes provide further and concurrent protection of the rights of individuals. These constitutional and other protections notwithstanding, the office or institution of the Ombudsman was thought to be relevant and playing a significant part in the quest for good governance and transparency (1996:87).

The desire for having an Ombudsman in Botswana was thus goaded by the need to promote democracy and good governance. The establishment of this office, as viewed by Ngwako was “to make institutions more transparent and accountable” (Ngwako, 1996:87). It should be noted that although the commissions of inquiries did a good job in investigating instances of corruption and/or maladministration before establishment of the Ombudsman, they were *ad hoc* and were also not an efficient tool for good governance. The most viable option, it could be inferred was to establish a permanent structure like the Ombudsman to complement, as an alternative, the already existing traditional grievance handling mechanisms such as the

normal courts and departmental appeal committees, and supplement the traditional parliamentary accountability and oversight roles.

Various studies were undertaken by the government culminating in an international seminar in Botswana in 1993 on 'The feasibility of the Ombudsman institution in Botswana' (Hansard No. 116 of 1995 cited in Fombad (2001:58). As mentioned earlier, the corruption scandals of the 1990's provided fertile ground for the government to embrace the Ombudsman concept and establish this institution.

The Ombudsman office in Botswana was established through an Act of Parliament, the Ombudsman Act of 1995, and started operating in September 1997. Promulgation of the Act was precipitated by a series of corruption and mismanagement scandals in the 1990's (Good, 1994:500; Modisi, 1996:10; Fombad, 2001:59). Most notably as Modisi (1996:10) puts it, "were the commissions of inquiry into the supply of books by a company called IPM, operations of the Botswana Housing Corporation and plot allocations in Mogoditshane". These revelations "led to court cases against the culprits, forced retirements, dismissals and resignation of senior civil servants, parastatal executives and ministers (Modisi 1996:10).

These acts invariably, tarnished the efficient and corruption-free image of the civil service in Botswana. It became apparent that, "the country's economic growth provided innumerable opportunities for corruption and influence peddling" (Fombad, 2001:58). According to Fombad:

The scandals revealed the limitations of the existing institutions. The liberal multi-party system, dominated as it is by a single party did not provide sufficient scope for openness and accountability and the

relative independent and efficient judicial system was unable to check the abuses (2001:58).

As a result, the government was “pressured to follow the examples of other states in the region and introduce institutions such as the Ombudsman, which could counter these abuses” (Hansard No. 116 of 1995 cited in Fombad, 2001: 58).

It is worth noting that over the past years, “Botswana made strides to promote the institutionalisation of good governance and democracy” (Molomo, 1998:200). Molomo argues that, “with other democracies, including developed ones: the project of democracy in Botswana can best be informed by the assertion that democracy is not absolute but rather an ever-evolving process that needs to be nurtured and constantly refined”. Hence Post-independent Botswana has been characterised by the establishment of independent quasi-judicial oversight institutions to provide oversight, ‘checks and balances’ mechanisms on the use of Executive authority and power. These institutions were put in place mainly to create permanent oversight on activities and/or conduct of government institutions’ use of power. These institutions include the Directorate on Corruption and Economic Crime (DCEC), the Industrial Court, Land Tribunal, Independent Electoral Commission (IEC), Auditor General, Parliamentary Accounts Committee and the Ombudsman. These institutions, the Commonwealth Business Council observes:

Play an important role in conducting independent audits and studies that provide objective information, advice, and assurance to Parliament, government, and ordinary citizens on how effectively government is functioning. The Ombudsman, in particular as a protector of public interest, is an appropriate authority to receive/respond to reports of maladministration (Commonwealth Business Council, 2003:10).

4.1.2 Functions

The main functions of the Ombudsman are set out in Section 3(1) of the Ombudsman Act, 1994 and are as follows:

The Ombudsman may investigate any action taken by or on behalf of a government department or other authority to which this act applies, being action taken in the exercise of administrative functions of that department or authority in any case where – a) a complaint is made to the Ombudsman by a member of the public who claims to have sustained injustice in consequence of maladministration in connection with action so taken; b) the complaint is referred to the Ombudsman, with the consent of the person who made it, by the President, a minister or any member of the National Assembly with a request to conduct an investigation thereon; c) in any of the circumstances in which the Ombudsman on his own motion considers it necessary to investigate the action on the ground that some person has or may have sustained some injustice.

In terms of Section 3(3) of the Ombudsman Act, “the Ombudsman also has jurisdiction to investigate matters relating to contravention of the provisions for the protection of the fundamental rights and freedoms”.

4.1.3 Manner of appointment

As per Section 2(2) of the Ombudsman Act, “the Ombudsman shall be appointed by the President in consultation with the leader of the Opposition in the National Assembly”. Section 2(3), however precludes appointment of certain people to the office, and expressly states that, “a person shall not qualify to be appointed as

Ombudsman if he is a member of the National Assembly, a member of any local authority, a candidate for election as a member of the National Assembly or a local authority nominated as such with his consent". During his/her tenure of office, as per Section 2(4), "the Ombudsman shall not perform the functions of any other public office, and shall not, without approval of the President in each particular case, hold any other emolument other than the office of the Ombudsman or engage in any occupation for reward outside of his office". This, it is believed, is to ensure that there are no chances of conflict of interest in the discharge of his/her personal vis-à-vis his official duties.

As per Section 2(5) of the Ombudsman Act "a person holding such office shall vacate that office at the expiration of four years from the date of his employment". The removal of the incumbent from office as stipulated in Section 2(6) of the above Act is similar to that obtaining for High Court Judges under Section 97(5) of the Constitution of Botswana. As per Section 97(5) of the Constitution of Botswana, "if the President feels that a high court judge ought to be removed from office, he can institute a tribunal to investigate the matter and act on the basis of their recommendation". As per Section 97(2) of the Constitution, "a judge of the High Court may be removed from office only for inability to perform the functions of his office (whether arising from infirmity of body or mind or from any other cause) for misbehaviour, and shall not be removed except in accordance with the above provisions)."

All in all, it is the President who has authority on suspending or removing the Ombudsman from office based on advice from the tribunal, hence the removal from office of the incumbent has to be judicially sanctioned but not politically sanctioned by

the leader of the Opposition in the National Assembly as the process of appointment does.

4.1.4 Independence of the Ombudsman

The Ombudsman is an independent and autonomous institution. In accordance with Section 9(1) of the Ombudsman Act, “in the discharge of his functions, the Ombudsman shall not be subject to the direction or control of any other person or authority and no proceedings of the Ombudsman shall be called into question in any court of law.” The institution submits its reports to the President and not to the National Assembly, as it is normally the case in other parliamentary democracies. As per Section 9(2). “The Ombudsman shall make an annual report to the President concerning the discharge of his functions, which shall be laid before the National Assembly”.

4.1.5 Mission Statement

As per the Ombudsman report of 1997/98 the office of the Ombudsman pledges to:

- Investigate all matters of complaints within our jurisdiction irrespective of complainant’s colour, creed, tribe, origin or sexual orientation;
- Investigate independently, impartially, objectively and without fear and favour;
- Make ourselves accessible to resolve complaints speedily, and to increase public awareness of our duties;

-Ensure the highest levels of professionalism and contribute to promoting good governance, accountability and transparency in the public sector;

-Serve all communities to the best of ability:

-Remain acutely aware that the ombudsman is neither an agent of government or its agencies nor an agent of the complainant (Ombudsman, 1997/98:1).

The office's latest mission states that the "office of the Ombudsman aims to protect members of the public against acts of maladministration in the public sector, promote and advocate for the upliftment of human rights in an independent and impartial manner" (Ombudsman, 2003/04:2).

4.2 How the Ombudsman Measures its Performance

At this point in time the office does not have objective and comprehensive performance measurement indicators, although it has a clear vision, mission statement and values. The Performance Management System (PMS) a public service initiative or reform was only started in 2001/02. Specifically, as per the words of the Ombudsman:

The office recently kick-started (sic) PMS internal awareness workshop with the aim of establishing a strategic plan.... The office is possibly one of the last public institutions to initiate this programme (Ombudsman, 2001/02:3).

In justifying this position, the Ombudsman in this report explained, that:

This process is only being initiated presently for the reason that it was necessary that ample opportunity was created for us to learn how the public service operates and how against that background we can

effectively place strategies that complement and enhance our ability to deal with it... it would have been an exercise in futility, to put in place a strategic plan without familiarising the office with how the public service operates (Ombudsman, 2002/03:3).

The institution is still to have a strategic plan. This is confirmed in the Ombudsman report of 2003/04, which says:

In this reporting year, my staff and I together with Botswana National Productivity Centre consultants spent countless man-hours in retreats for the preparation of our Strategic Plan (Ombudsman,2003/04:5).

However, it is discernible from the reports that the ratio of investigators to cases, caseload or the number of cases received and number of those that are closed or finalised are used to gauge the performance of the institution.

4.2.1 Number of cases or complaints received

This is captured in the words of the Ombudsman when he submits that:

The reporting year has seen the office of the Ombudsman being greeted with even greater enthusiasm from the two previous years. Testimony to this is borne from the fact that complaints received have increased by almost a hundred per cent (100%) from the previous year. It is indeed a proud moment for this office that services thereby offered are being utilised

increasingly. It is in the light of that position that we have submitted a request to appropriate authorities for a substantial increase of staff. (Ombudsman, 2000: 3).

4.2.2 Ratio of investigators to number of cases handled

The Ombudsman report of 2001/02:6 indicates that its ratio is 1:300 as opposed to 1:16 for the Directorate of Corruption and Economic Crime (DCEC) in 2001. This therefore was meant to draw attention to the fact that the office is thin on the ground as compared to similar institutions, and therefore considerable increase in the workload presently in excess of 300 per investigator. In his words, the Ombudsman submitted that “this increase has unfortunately not been met by a proportionate increase in our staff despite requests for additional manpower” (Ombudsman, 2001/02:6).

In substantiating high ratio as a measure of performance in relation to manpower constraints, the report further captures the following words by the Ombudsman:

I have as a result suspended the establishment of branch offices at Palapye and Kanye as previously proposed... the Francistown office remains albeit under serious manpower and other related constraints. (Ombudsman, 2001/02:6).

4.2.3 Compliance Rate

The ability of the office to secure compliance with its recommendations is another indicator that continues to be used to measure the office's performance. This is confirmed in the Ombudsman's words when he says:

Happily, compliance rate by the public service with our recommendations is exceptional and indeed is not only a measure of our success but also a reflection of our increased acceptability to the public service (Ombudsman, 2003/04:5).

A case-by-case analysis of the annual reports reveals that most of the specific cases included in the reports are those that they had departments accepting and complying with their recommendations. There are of course few exceptions to this rule. Most of the cases captured in the reports as demonstration of the day-to-day cases that they get involved in, are those that they successfully resolved. There is however no demonstrative evidence from the reports to indicate whether or not recommendations for specific cases as captured in the reports were complied with. Hence compliance as a measure of performance is not substantively qualified and adequately reported on.

4.3.0 OMBUDSMAN STRENGTHS

4.3.1 Re-structuring Exercise

A promising development however, is the restructuring exercise that the office is currently undergoing. As per the 2003/04 report, "the Directorate of Public Service Management has been involved in a restructuring analysis of the office, the report of which is still being discussed with the Ministry of Presidential Affairs and Public Administration before submitting it for final approval by government" (Ombudsman, 2003/04:5). This, it is hoped,

would help streamline and rationalise its activities so as to reflect its manpower needs and priorities. The report, does not however, briefly describe what the re-structuring exercise entails. Hence this is a shortfall in the reporting style.

4.3.2 Installation of Case Management System

This involves a shift from the traditional and manual system of data management to a computerised system. The computerisation of cases as per the words of the Ombudsman “enhances efficiency levels”, (Ombudsman, 2003/04:6) in terms of making the management of statistics reliable, and, making the status of individually cases accessible through the touch or click of a button. The Gaborone-based national office has installed the system. The Ombudsman has submitted that:

Given that our core business is investigation, it is paramount that our data base should not only be stored effectively for utilisation but should also be available at the touch of a button (Ombudsman2003/04; 6).

4.3.3 Public Awareness Campaigns

Public campaign awareness have taken the form of several radio talk show programmes, appearances on national television as well as distribution and mounting of posters on public offices’ notice boards on core business activities of the office (Ombudsman, 2003/04:6).

4.3.4 Compliance Rate

As per the words of the Ombudsman, "... compliance rate by the public service with our recommendations is exceptional, and indeed is not only a measure of our success but also a reflection of our increased acceptability to the public service (Ombudsman, 2003/04:5).

4.4.0 OMBUDSMAN'S WEAKNESSES

4.4.1 Weak Performance Indicators/Measures

There are no comprehensive performance measurement indicators developed by the institution to assess its own performance except for gauging themselves by looking at the number of cases they receive and complete or finalise. Although the office's objectives are clear and well articulated, no effort has so far been made to translate them into measurable deliverables. The objectives have not been translated into programmes or projects. It would be expected that the office has a Strategic Plan against which its performance could be assessed. Although the Ombudsman objectives are included in all its annual reports, it is difficult to assess or determine whether or not they have been achieved in the absence of a Strategic Plan. Hence, during this period there is no way one could objectively tell how they have performed without the necessary Strategic Plan linked to performance indicators. The reports do not indicate whether or not its objectives have been achieved or not. It appears the Ombudsman is greatly challenged in coming up with an objective criteria of evaluating its actual performance against pre-determined objectives

The lack of comprehensive performance measures and indicators leaves people with nothing but to speculate on the office's performance. This is further complicated by the quality of reporting that has so far been in use. Although the reporting reflects the number of cases received and the number of cases closed or finalised, it fails to give an account of their

financial management system, audit reports, auditing risk management policies, financial statements and human resources management systems. Their finances need to be audited by independent auditors as required by Section 124 of the Constitution of Botswana. It is in this light that the Ombudsman in his words, has submitted that “the institutions’s books of accounts should be audited by certified public accountants and be subject to inspection by the Auditor General” (Ombudsman, 1997/98:7). The reports do not give a reasoned account of which objectives they have achieved and the ones not achieved and why.

The use of statistics has its own limitations. For instance it is not very informative to know the number of cases received without indicating the impact of the institution on individuals’ complaints. The use of compliance as a measure of performance is also problematic because it is not succinctly defined nor is there a brief of how it is objectively measured to those who are outside the Ombudsman institution.

4.4.2 Limited independence

Many scholars (Lebotse, 1999; Ayeni & Sharma, 2000; Fombad, 2001) and the first Ombudsman have questioned the independence of the Ombudsman office. The independence of the office in the two main aspects namely; operational and financial independence, is questionable. As for financial independence, it does not have the authority to determine its financial needs in line with its priorities without submitting a request to Parliament through the Ministry of Presidential Affairs and Public Administration. Experience has shown that although the institution prepares its annual estimates, it does not have a stand-alone budget like other government ministries. Instead, it competes for funding with other departments that

fall within the ministry of Presidential Affairs and Public Administration for the limited funds that government can allocate each time depending on the annual financial ceilings.

It is also apparent that the office lacks the much-needed functional or operational independence from the Executive and government departments because it does not employ its own staff but instead relies on public officials from other government departments. Besides, these officers are governed by the same Public Service Act like any other government employee with same conditions of work and remuneration. Hence there is call to amend the Act to make the office a juristic person. This will give the Ombudsman authority to employ its own staff separate from the general public officers. It will also have autonomy in terms of recruitment criteria, terms of work and remuneration. The making of this office, a “legal person employing its staff, preparing the necessary structures for promotions and progression can only serve, as it must, to enhance the independence of the office” (Ombudsman, 1999:4). Currently the office relies on staff seconded from other departments through the Department of Public Service Management, the government-employing agency. This office needs to be established outside of the public service to make it independent of any other government ministry (Ombudsman 1999:3). The report further reiterates that, “neither the Ombudsman nor any member of staff should be in competition for a higher post in the normal government promotional hierarchy” (Ombudsman, 1999:3). It is in light of the above experiences that the Ombudsman has submitted that:

There is indeed in my respectful submission, a manifest conflict of interest where either the Ombudsman or investigator investigates an officer or department when he/she may aspire for a higher post in that department (Ombudsman 1999:3-4).

It has since been suggested that the act be amended with the view of making the office independent in the true sense of the word. In this regard, the Ombudsman has thus submitted that:

In order to put this independence into a correct perspective, the Ombudsman Act must be amended to make the institution a *juristic person*. It is important in my view that the independence of the office be clearly demonstrated in the statutory basis on which it is established (Ombudsman, 1997/98:7).

The proposed amendment, it is submitted, will be in-keeping with the spirit and the intention of Section 9(1) of the Ombudsman Act, which provides that, “in the discharge of his functions the Ombudsman shall not be subject to the direction or control of any person or authority...”

The independence of the institution and its functional efficacy would be ensured by “providing it with financial autonomy” (Fombad, 20-01:63). In this regard, Fombad posits that this should clearly be spelt out either in the constitution or an Act of Parliament rather than through ministerial regulations, which may be used to interfere with the functioning of the office.

4.4.3 Reservations on Manner of Appointment and Tenure of Office

The appointment of the Ombudsman by the President makes his independence not only doubtful but raises suspicion that the appointment was informed more by political consideration than merit (Lebotse, 1999:67-68). As already alluded to, the incumbent is appointed by the President in consultation with the Leader of the opposition in the National Assembly as per section 2(2) of the Ombudsman Act. The precise mechanism for such

consultation is not defined by the Act, an omission that often simply facilitates a presidential appointment (Fombad, 2001:62). This is open to abuse since it could facilitate an appointment based on political patronage.

As Fombad (2001:62) and Lebotse (1999:67-68) have observed, the independence of the office is further compromised by Section 2(4), which states that:

The Ombudsman shall not perform the functions of any public office, and shall not, without approval of the President in each case, hold any office of emolument other the office of the Ombudsman or engage in any occupation for reward outside of his office.

Such a state of affairs makes it difficult for the Ombudsman to deal objectively with the Executive, particularly in handling matters relating to office of the State Presidency. It is very likely that he cannot bite the hand that feeds him/her. Hence this could negatively affect the quality of judgement in such cases. At another level, it can be argued that once appointed the Ombudsman may engage in other lucrative activities as long as he/she has the approval of the President. Fombad (2001:62), is of the view that, "there is a danger that, in exchange for being allowed to increase his income by taking up other engagements, the Ombudsman may be tempted to relinquish his independence". The major argument emanating from this assertion is that such clauses may be open for abuse if not carefully monitored.

Although the tenure of the Ombudsman is reasonable and well spelt out in the Act, a recent development is worth mentioning. The first Ombudsman has had his tenure extended although the Act does not provide for an extension. The Act is however silent on this matter. Hence it is also open for abuse.

It is on the basis of the above observations that it has been suggested that “in order to enhance the independence of the office of the Ombudsman, he must be appointed by and be answerable to Parliament and not the Executive” (Lebotse, 1999:67). To Lebotse, as it stands, “the Ombudsman is answerable to the President because Section 9(2) of the Act requires him to submit an annual report to the president who shall put it before parliament” (1999:67. In this way, there is no way the office of the Ombudsman can objectively investigate the office of the President and make enforceable recommendations since the President can decide not to take or hijack any report implicating his/her office from reaching Parliament.

4.4.4 Lack of a Parliamentary Committee for Ombudsman

The apparent limited independence of the office of the Ombudsman is due in part to the fact that there is no Parliamentary Committee to either oversee its operations and activities or consider its reports. This position has been alluded to by the Ombudsman himself when he submitted that:

The amendment of the Ombudsman Act should include provision for a Parliamentary Select Committee, the composition of which to be solely determined by the National Assembly. The Ombudsman will then from time to time approach the committee with regard to any matters in respect to functions of the institution; such matters will include estimates of the expenses and allowances for each financial year to be presented to Parliament for approval (Ombudsman, 1997/98:7).

Such an arrangement would give impetus to more political will to empower and support the office financially, operationally and jurisdictionally, which are necessary for the institution to

maintain a high reputation and integrity to other institutions and the society at large. It should also be stated for the record that the issue of having oversight institutions in Botswana directly reporting to the President and not to Parliament is an undesirable phenomenon. Currently, the Directorate of Corruption and Economic Crime (DCEC) and the Independent Electoral Commission (IEC) also directly report to the President. This trend greatly undermines the impartiality and independence of these institutions.

4.4.5 Limited Jurisdiction and Powers

Another concern on the Ombudsman in Botswana is with regard to the Act that establishes the institution – legislative failures. There is a general concern that the Ombudsman Act does not define what maladministration and/or injustice is, and has left this to be decided upon discretionally by the Ombudsman. Similarly, the Act gives the Ombudsman limited jurisdiction as stipulated by Section 4 of the Ombudsman Act, 1995. As per Section 4, 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, 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 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 the law.

It is clear that “matters not to be investigated by the Ombudsman are many and significant” (Good, 2004:119). This leaves the office of the Ombudsman with little to do, although it can safely be argued that a lot of injustices and malpractices are going undetected or unresolved on these “no-go zones” as defended by the legislation. This could augur well with the argument that the design of the Ombudsman with limited powers and jurisdiction is a reflection of the object of the legislature when it passed the legislation; hence the status quo is regarded as normal. From the foregoing, it is quite clear that the exclusions and the selective application of the Act is unjustified and counter-productive in the sense that it is at loggerheads with tenets or principal values of the institution which are to ensure fairness, inclusiveness, objectivity, transparency and accountability; the important features of good governance that it seeks to promote. This has also been confirmed by the Ombudsman himself, when he reported that:

I have felt a keen sense of helplessness and frustration in not being able to investigate complaints of maladministration relating to public service personnel matters, presently excluded from jurisdiction in terms of Section 4(d) of the Act (Ombudsman 1997/98:8).

Further to this, the report submits that:

The ratio of reports emanating from the public service concerning employment and appointment as compared with others with which the office has jurisdiction is too disproportionate. Since however, these falls outside of the Ombudsman jurisdictional remit, they must necessarily be turned away much to the chagrin of those concerned. (Ombudsman 1997/98:8).

Consequent to Section 4(g), the Ombudsman is also precluded from investigating action in matters relating to contractual or other commercial dealings between government and members of the public. This has become too much a limiting factor to individuals when they are to demand better service and value for money from private providers of public services. In my opinion, in as much as government is accountable to deliver services to the public or its citizens, the private sector companies contracted to provide public goods and services should equally be accountable to the people.

Flowing from the above, it goes without saying that somehow the Act, and in particular section 4(g), should be amended such that it reflects current government reforms towards privatisation or contracting out of the provision of public services as well as provision of same thorough Public- Private –Partnerships. For the Act to stand the test of time, it has to ensure that the office is empowered to investigate the provision of services by private companies if there are complaints from citizens regarding a service provided.

4.4.6 Shortage of resources

The Ombudsman like other government departments and agencies is faced with capacity constraints. Most of the capacity constraints emanate from shortage of funds to finance its activities, needs and programmes. According to the Ombudsman report of 2003/04:

Shortage of staff continues to pose a major challenge. By way of example, all investigators double on additional duties such as Coordinating Performance Improvement, HIV/AIDS, Gender and Equality, Public Relations Unit, Information Communication Technology, Disaster Management etc. This necessarily results in a great deal of strain on these officers. An audit carried out by management consultants from the Department of Public Service Management confirmed that the resultant workload on the investigators is in excess of 30% of their expected workload (Ombudsman, 2003/04:7).

From the above assertion, one can rightly deduce that the office is less specialised in terms of personnel for its varying internal programmes. As per the report, the shortage of staff is compounded by the fact that “due to budgetary constraints, attempts to beef up strength in terms of more investigators have not been successful” (Ombudsman, 2003/04:7). Hence this has further debilitating effects on decentralising functions of the office to other areas. In his own words, the Public Protector submitted that:

As a further result of the national budget deficit, I have abandoned the early decision to open additional branch offices in strategic areas across the country. Circuit investigations remain an alternative. This alternative has however been placed on hold on account of resource constraints (Ombudsman 2003/04:7).

As a result of the above, the Ombudsman, office operates only two offices; one national at the City of Gaborone, and a decentralised office at the City of Francistown, which is inadequate given the country's sparsely, distributed population. Hence it is difficult and costly for people from elsewhere in the country to physically visit the two service centres.

4.4.7 Delayed Response to Correspondence

Most of the annual reports express concern on the slow pace at which the government bureaucracy responds to correspondence. Government ministries, departments, and local authorities have been pointed and accused of being less responsive not only to the needs and aspirations of the people but even to general correspondence. In the words of the Ombudsman:

I remain concerned about the serious delays in the public service timeous attendance of correspondence. Business of government throughout the world is primarily transacted through correspondence. Failure to attend to correspondence is necessarily disastrous (Ombudsman, 2003/04: 7).

From the 2003/04 Ombudsman report, it is quite clear that there is laxity in government offices. This is confirmed by the report when it says "new mail is left for days in incoming trays of officers that are on leave... the advent of electronic mail has had little impact to date and remains relatively unused"(Ombudsman, 2003/04:7). This particular report observes that "long delays to attend to correspondence and resolve even simple complaints encourage an environment that is conducive to illegal transactions between citizens and officials in order to 'speed up' processes" (Ombudsman, 2003/04:7). Besides,

it prolongs the time that is taken to resolve or determine whether a claim is genuine or not, and further delays dispute resolution.

4.4.8 Delays in Finalisation of criminal matters

As the words of the Ombudsman, "... delays in the finalisation of criminal matters in all the courts remain another serious concern in the dispensation of justice" (Ombudsman, 2003/04:8). This assertion is in contradiction of section 5 and related provisions on the protection of right to personal liberty as prescribed by the Constitution of Botswana. It is against this background that convicted prisoners at the magistrate court entitled to an automatic right of appeal to the High Court experience long delays in the execution of their appeals.

From a humanitarian and human rights perspective, this state of affairs should not at any point be condoned. It deprives prison inmates of the right to: fair trial within a reasonable time and equal justice as enshrined in Chapter 2 of the Constitution of Botswana. The observation by the Ombudsman, in this regard, is a strength that needs to be nurtured and applauded. It demonstrates that, although the Ombudsman does not have jurisdiction on the courts with regard to judicial decisions, he can scrutinise their administrative functions.

4.4.9 Poor Grievance Handling Systems

A study of the specific cases as captured in the annual reports, demonstrates that some of the complaints reaching the office were due to them having not been given deserved attention by

the respective departments. This is suggestive of the fact that either there is no organisational complaints' handling systems or that the public service lacks dispute handling skills. This is confirmed by the report of 2003/04 where it recommends that "individual ministries and departments should establish more formalised internal complaints handling mechanisms" (Ombudsman, 2003/04:8). Internal dispute resolution mechanisms will not in any way duplicate or conflict with the role of the Ombudsman, they would at best ensure that the available meagre resources are used on deserving cases.

4.5.0 Disregard of the Ombudsman's Recommendations by the Office of the President

A specific example in point is the impending case regarding a complaint lodged by the Botswana Congress Party (BCP), the then official Opposition party in Botswana's 'shining multi-party democracy'. The allegations concerns "public officers accompanying the Vice President Lt. General Seretse Khama Ian Khama, and ... the Vice President piloting Botswana Defence Force aircraft following his departure from the force" (Ombudsman Report, 2001/02; 3). A report following the Ombudsman's discretion to investigate the matter together with recommendations was compiled and sent to the Office of the President as per procedure for action. The investigation revealed that the accompanying of the Vice President by the District Commissioner, Mr Nono Macheke and Kgosi Sediegeng Kgamane Regent Bammangwato on party political activities was irregular as per Public Service Act CAP:20:01 General Order number 38. The then Permanent Secretary to the President's view regarding same was that "the two public officers and all other public officers other than security personnel should limit their role to only (own emphasis) receiving dignitaries at their point of arrival and bidding them farewell at their point of departure whenever they are on party political missions" (Ombudsman, 2001:8). Invariably, no one can argue against this

arrangement more so that protocol dictates as such. According to the Ombudsman, “the presence of public officers accompanying the Vice President on party political meetings is not only against the spirit of General Order 38 but gives the perception that such public officers are furthering the interests of such political party”(Ombudsman, 2003/04:8). On the basis of the above observation, the Ombudsman recommended that:

His Excellency the President directs the Permanent Secretary to the President or the Director of Public Service Management to issue a new directive to all public officers in the light of the concerns and conclusions I have reached sustaining the BCP’s complaint (Ombudsman, 2001:8).

Regarding the second complaint on the Vice President flying Botswana Defence (BDF) aircrafts, the Ombudsman found that the Commander of the BDF had the following concerns regarding the matter, that:

The Vice President was no longer a member of the force... could no longer be authorised nor disciplined in the event of contravening the relevant regulations of the Botswana Defence Force Act as regards offences relating to property. His Honour the Vice President could no longer be called upon by the commander to answer any disciplinary hearing in the event that Army property was used in contravention of BDF Act, the regulations hereunder and/or other standing orders that the Commander may legitimately publish for observation by officers from time to time (Ombudsman, 2001:9).

Interestingly, the Vice President confirmed during the investigations that “he was given permission by His Excellency the President to continue flying the aircraft even as he was no longer in the army” (Ombudsman, 2003/04:9). The Ombudsman had thus found that “in fact it is not so much a question of whether His Honour the Vice President was authorised by His

Excellency the President but whether it is due compliance with the BDF Act, and specifically whether the Act allows persons outside of the BDF to use service property”(Ombudsman, 2001:10). He concluded that only persons subject to the Act can properly be authorised to use service property, and thus recommended that:

His Excellency the President brings to the attention of His Honour the Vice President of the inadmissibility of personally flying BDF Aircraft in the light of provisions of the BDF Act CAP:21:05 (Ombudsman, 2001:10).

Despite the above findings and recommendations, the official position regarding the matters from the President is not yet known. Besides, even the National Assembly has never been given the opportunity to discuss the special report as dictated by Section 8(2) of the Ombudsman Act that, “where corrective action is not taken within reasonable time, the special report has to be tabled before Parliament”. The opposition has hitherto requested the President to comply with the Ombudsman’s recommendation, to no avail.

The fact that there is no Standing Parliamentary Committee for the Ombudsman has worsened the matter since there is virtually no one to follow-up the matter although the abuse still continues. This has far reaching consequences in that it shows how leaders are at times not committed to the values of good governance, which they publicly espouse to, and their lack of political will to lead by example. The President has failed to officially account for his decision to allow his Vice President to continue flying BDF planes even though he is no longer a member. This comes as a second action of favouritism towards the Vice President by the President. In 1998, Seretse Khama Ian Khama was appointed Vice President and subsequently given sabbatical leave although it was called off following mounting criticism from within the ruling party, the opposition and members of

the civic society. The chronology of these events: the award of unsatisfactorily qualified sabbatical leave (a specialized type of leave for academics), and the subsequent authorisation to fly BDF aircraft after leaving the army to assume political office dents the country's democratic credentials. Generally, there is a lot of public outcry concerning Khama's conduct in public office (Molomo, 2000:102). Hence an observation made by Molomo that "Khama is said to be contemptuous to established norms of governance". (2000:102).

To date, nothing has been heard in the form of official response from Office of the Presidency. Instead, the President was quoted in the media as having said that "as the Commander-in-Chief of the Armed Forces, I have authorised His Honour the Vice President to pilot government aircraft when occasion warrants, and this he does" (Tutwane, 2004:1). The President was further quoted as saying that "he and Khama are entitled to official transport at all times, and that this includes government aircraft" (Tutwane, 2004:1). Despite the above remarks, the public and the Ombudsman are still awaiting official response in the form of compliance or otherwise. Such statements make and render the office of the Ombudsman nugatory (Tutwane, 2004:1). The concern therefore is that this may send a wrong signal or precedent for similar instances in future, in that other government departments and/or public officials may decide to emulate the Office of the President, and disregard recommendations for corrective action from the Ombudsman's office. An editorial aptly captured this matter well when it said that:

It is an accepted norm that leaders must lead by example. This implies that they have to set the right morals. This expectation places a heavy responsibility on elected leaders to be exemplary at all times. They must respect the values, traditions and institutions of the land before they expect anybody else to do so (Mmegi, 2 September 2004).

This has somehow lent credibility to the perception that oversight bodies and other ‘check and balances’ mechanisms on governmental action, cannot say anything to the Office of the President since it is the highest office in the country. There is a general feeling, to borrow Good’s (1997:547) expression, that “the Presidency and the Executive are accountable to themselves”. This has the potential of signalling a wrong message or perception that the Executive branch is capable of properly monitoring its own use of power or is free from abuse of power; hence it need not be subjected to scrutiny by independent institutions like the Ombudsman. It is on such rare high profile cases that people tend to assess the effectiveness of the Ombudsman, and if a stalemate like this occurs, the institution’s independence, credibility and integrity becomes more questionable.

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5.0 CHAPTER FIVE

COMPARATIVE ASPECTS

This chapter develops the comparative aspects of the study and subsequently sets out recommendations.

5.1.1 Jurisdiction and Functions

The Public Protector in South Africa has a wide jurisdiction covering the three spheres of government and organs of the state as provided for by Section 181 of the Constitution, and the Public Protector Act of 1994. The two pieces of legislation do not make express exclusion of any institution of the state from scrutiny or investigation by the office. In contrast, the Ombudsman in Botswana has jurisdiction on investigation of issues of maladministration by government ministries, departments and parastatals as provided for by the Ombudsman Act of 1994. However, there are instances whereby certain activities are expressly excluded from investigation as per Section 4 (a) to (i) of the Act as already indicated elsewhere on this paper. This is a serious concern that hinders and curtails the effective performance of the institution. Hence the South African jurisdiction can be emulated or used as a benchmark as it appears to enjoy a wide jurisdiction. It is however worth mentioning that although the Public Protector seems to be enjoying unlimited jurisdiction as provided for by the Constitution of South Africa of 1996 and the Public Protector Act of 1994, it has been observed with regard to high profile cases such as the Oilgate Scandal: Sarafina 2 and the Arms Deal that there is a tendency by the Public Protector to narrowly interpret his jurisdiction. The general feeling seems to be that although

the Public Protector has vast powers, there is a tendency to underutilise them, resulting in decisions not being adequately accounted for by the government to the people to serve narrow political party interests.

5.1.2 Manner of Appointment and Tenure of office

The two cases have different provisions on the appointment of the Public Protector/Ombudsman and the respective tenure of office. In South Africa as per Section 2A of the Public Protector Act, the incumbent is appointed by the President on the recommendation of a Parliamentary Committee, and subsequent approval by the National Assembly. In this manner, appointment of the Public Protector clearly demonstrates the involvement of the National Assembly, the institution that the Public Protector is performing the accountability and oversight function on behalf of. Besides, because all political parties in the National Assembly are represented in the Parliamentary Committee, the process of appointing the Public Protector is more democratic, although it does not escape the likelihood of political manipulation by those who form the majority in Parliament.

As for Botswana, the Ombudsman as per Section 2 (2) of the Ombudsman Act “is appointed by the President in consultation with the Leader of the Opposition in the National Assembly”. The exact nature of this consultation is however not specified. An observation can be made that if consultation by the President means suggesting a nominee who is a card-carrying member of his party to the leader, then there is a greater chance of appointing the incumbent on the basis of political patronage rather than merit or any other criteria. Since the current situation creates a greater potential of presidential political appointment, it is

suggested that Botswana should better adopt the South African mode of appointment to avoid creating a perception that the Ombudsman is a presidential political appointee.

With regards to tenure of office, provisions of the two Acts categorically state the required time period. In South Africa, as per Section 2A (1), "the length of tenure does not exceed seven years". In Botswana, as per Section 2 (5) of the Ombudsman Act, "the Ombudsman's tenure of office is limited to four years". Surprisingly, the first Ombudsman had his tenure extended for another term despite the express provision captioned above. Whether the Leader of the Opposition in the National Assembly had input in the extension can only be speculated. It has however, emerged that he will be retiring at the end of October 2005 (Botswana Daily News, 21 October 2005).

Regarding security of tenure, in South Africa because of the mode of appointment, there tends to be protection of the incumbent since he/she cannot be removed from office without the involvement of, and final approval by the National Assembly. To some extent, it can be argued that the Public Protector's tenure in South Africa is more secure than in Botswana since the removal of an Ombudsman from office is more of a legislative process than a judicial one. In Botswana, the Ombudsman can be removed from office by the President on a recommendation of a Judicial Tribunal as per Section 2 (6) of the Ombudsman Act, which provides thus:

The provisions of subsections (2) and (5) of Section 97 of the constitution (which relate to removal of High Court Judges from office) shall, with modifications as may be considered necessary, apply to the office of the Ombudsman.

Such a provision cannot be taken for granted since it could be manipulated to frustrate the office as and when the President feels it politically threatens the operation of his office. The

reservation on the Judicial Tribunal emanates from the fact that High Court judges who are supposed to decide on the fate of the Ombudsman if the need arise, could make decisions that they feel are acceptable to the President since they are also appointed by the President. Hence they cannot bite the hand that feeds them. This could compromise their independence. Conversely, this could make the Ombudsman feel less motivated and reluctant to investigate administrative issues involving the office of the President

5.1.3 Role of the Parliamentary Committee

From the literature survey, the existence of a Parliamentary Committee on the Ombudsman is good in that it tends to support the institution operationally and politically. The committee is responsible for overseeing the operations, activities and monitor the performance of the office. It helps to nurture, tap and solicit the political will that is necessary for acceptance, trust, integrity and confidence needed by members of the public for the effective performance of the institution.

In South Africa, the existence of this committee is an important ingredient and is indicative of political commitment to the effective and efficient operation of the Public Protector. In contrast, there is no Parliamentary Committee to oversee activities, operations, monitor and evaluate the performance of the Ombudsman in Botswana. In a nutshell, there is no committee to report to like it is the case in South Africa. This aspect puts the Ombudsman in a precarious position. Thus the institution lacks the necessary political support to persuade compliance with its recommendations or even follow up implementation of same.

This is further exacerbated by the fact that the Ombudsman does not report directly to Parliament but rather to the President, who can if he/she feels implicated by specific reports decide to hijack them before they reach Parliament. By extension, it can be argued that the case of the Vice President flying BDF airplanes and being accompanied by public office-holders on party political activities has suffered from this type of arrangement. Perhaps if there was a Parliamentary Committee responsible for this committee, the matter could have been easily followed up. Hence it has been hanging in the balance since April 2001 when recommendations were made regarding the complaint.

5.1.4 Independence

Constitutionally and legally, the Public Protector is supposed to be an independent institution. In practice, this is not the case. Independence can only be realized when the Public Protector has financial autonomy as well administrative/functional independence. Regarding financial independence, the Public Protector receives its money through the Department of Justice and Constitutional Development in the form of a vote. Although this may seem attractive, Corder (1999:56) notes that "it is not desirable to have the institution and similar ones to depend on budget allocations received through the very department they are required to monitor". Hence he recommends "a direct vote for the institution or a joint vote for all institutions supporting constitutional democracy" (Corder, 1999:56). The Botswana Ombudsman suffers the same problem of limited financial independence as its South African counterpart. The Ombudsman receives its annual budget allocations through the Ministry of Presidential Affairs and Public Administration in the form of a vote. The undesirability of such an arrangement is that it has to compete for the limited resources with all the departments under this ministry.

Administratively, the Public Protector in South Africa enjoys some independence in that the Public Protector Act provides that the office hires its own staff and engages specialised personnel in the execution of its duties at remuneration, terms and conditions determined by the Public Protector. This is a welcome development although it can be compromised by budget limitations. As for Botswana, the Ombudsman does not hire its own staff; instead it relies on staff seconded from other government departments through the government central employing agency, the Department of Public Service Management (DPSM). As indicated earlier on, this has potential for conflict of interest during investigations involving departments that officers might want to join in future, or departments that they originally belong. Conversely, DPSM could use manpower allocation ceilings to deny the Ombudsman office the required personnel for its effective functioning.

5.1.5 Annual Accountability Reporting Systems

Both countries have deficient annual accountability reporting mechanisms. This is indicated by the lack of standard performance criteria as indicated by the lack of comprehensive performance measurement, strategic plans, performance indicators, monitoring and evaluation systems. Due to the weak performance criteria and indicators, it is very difficult if not impossible to objectively measure the performance of this institution. As for South Africa, the general observation is that although legislation exists such as the Public Service Regulations and the Public Financial Management Act of 1999 to guide the reporting process, this has to a large extent not been implemented. This goes hand in glove with a general observation made by the South Africa Human Development Report (2003:56-57) that:

It is widely known - and indeed acknowledged by government – that there is a major gap between policy and its implementation: in respect both of broad policy intent and the implementation.

Moreover, the institutions in the two countries have poor follow up on recommendations and general committee matters as there is no provision or clear-cut procedure for doing that. Hence in most cases, issues just vanish into thin air without having been adequately addressed. Besides, the lack of debate at the committee level and in Parliament further constrains the effectiveness of the institution. It should however be acknowledged that it is common knowledge that Parliaments worldwide, and in South Africa and Botswana in particular, are under resourced. They lack the necessary expertise and competency to perform accountability and oversight functions.

5.1.6 High Profile Political Issues

There is a widespread perception that the Public Protector/Ombudsman in both countries has not adequately addressed complaints relating to party political matters. In essence, there is a feeling or opinion that the institution is failing in most politically charged matters involving members of the ruling party.

As for South Africa, examples of such cases are the infamous Oilgate scandal; the appointment of Dr. Goqwana as Health MEC by the Eastern Cape Premier and his private business interests; the Play Sarafina 2. Like Good (2004:78-79) has observed, “the attitudes of party leadership are... highly influential over the accountability of many ministers and parliamentarians.” Due to the political patronage involving top ANC members and ruling party, these cases were not addressed to the satisfaction of some quarters of the civic society.

There is a perception that the political executives manipulate existing circumstances and make it possible for their members to evade genuine calls for them to account for their actions.

On the other hand, in Botswana, for example, the complaint regarding the Vice President flying BDF airplanes and being accompanied by public officials on political party activities is high on the agenda. Despite the Ombudsman recommendation and the corrective advice given, the Executive has not found it necessary to account for this apparent abuse of public resources not on government business but clearly on ruling political party activities. The Vice President continues to fly BDF planes against the good advice of the Ombudsman (Mmegi, 3 October 2005). The general laxity that the Executive has demonstrated on the above mentioned cases boils down to justify the growing perception that there is lack of political commitment to this institution. This, it can be argued, is exacerbated by the fact that the parliamentary system in both countries has produced a weak legislature. As observed by Camay & Gordon (2004) and Corder (1999), for South Africa the close links between the Executive and the Legislature renders it difficult for the Legislature to hold the Executive to account on its actions mainly due to party discipline and upward accountability. There is a general belief that the difference between the ruling party and the government is a blurred one. More often than not, Legislative members of the majority party in government are hesitant to call members of their own party and 'government' to account because they fear the risk of losing political protection. An article by February (2005), observes that:

Members of the majority party more often than not find it hard to separate their political role from their parliamentary role. The arms deal and now the oilgate are cases in point.

Another interesting case in Botswana is with regard to a motion on the location of the second University of Botswana. The motion sponsored by the opposition Botswana Congress Party (BCP) Gaborone Central MP, Dumelang Saleshando, “requested the Executive to review its decision to locate the second University in the Serowe-Palapye area in favour of areas recommended by the Task Force” (Molaodi, 2005a). Initially, the majority of the parliamentarians were in support of this motion on the basis that cabinet cannot forgo a recommendation made by technical experts for theirs, which was less informed. Parliament adjourned and upon its resumption the majority of MPs from the ruling party backbench, who had initially supported the motion, reneged from their earlier position following from what transpired at a Botswana Democratic Party (BDP) caucus. Apparently, members who supported the motion were admonished for attacking their own, and reminded of party discipline. A party position was adopted that the motion should be rejected and this is what happened when the debate resumed. The matter was finally put to a vote whereupon the BDP, using its numerical strength, defeated the motion. 15 members voted for the motion, 31 against, and 12 abstained (Molaodi, 2005b). This shows the limited extent to which the executive can be asked to account, and how they can turn to their political home for rescue. MP Saleshando made it clear after the motion calling the executive to account was defeated that, “the BDP MP’s could not support the motion because... BDP backbench was one thing with cabinet hence the caucus position to oppose the motion” (Botswana Daily News: 14 March 2005). Given the circumstances, and the opposition’s numerical weakness, it could not successfully require the executive to account for an unreasonable decision.

5.1.7 Accessibility

Comparatively, the South African Public Protector is more accessible than its Botswana counterpart in that it operates at a national level, has regional offices within the provinces and runs satellite mobile clinics for the rural communities. As for Botswana, there is a national office at the capital city (Gaborone) and the only decentralised office at City of Francistown. These offices are concentrated on the eastern part of the country leaving the western region isolated. Although the office had planned to open offices in other places and conducting satellite clinics to service its rural clients this has not been possible due to human and financial constraints (Ombudsman, 2003/04:7). The office in Botswana therefore finds it difficult to permeate the rural areas. There is need for the Ombudsman to step-up its public education campaign on its role and functions in the rural areas. It needs to increase regular contact with rural communities where it does not have offices.

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5.2 Conclusion and Recommendations

It is apparent that the institution of the Ombudsman/Public Protector plays a significant role in making government ministries, departments and other agencies accountable. It is one of the institutions that clearly demonstrate the commitment of a government to democratic ideals of good governance: accountability, openness, promotion of human rights, and transparency. However, requirements for achieving these noble objectives are not quite often met. The challenges range from the complex nature of financial and functional independence, from political manipulation of the office, and from a lack of political commitment and will to support the institution.

The systematic study of the Ombudsman in the two countries has shown that although its existence has potential towards ensuring transparency and accountability on Executive action, a function they perform for and on behalf of Parliament, it is to a large extent handicapped by a number of inherent 'weaknesses'. The weaknesses range from restrained independence from the Executive owing to a fusion of powers between the Legislature and the Executive branches of government (Parliamentary System Relations); ruling political party patronage or manipulation; and the general lack of comprehensive performance evaluation and monitoring systems. The way forward therefore is to address these myriad challenges head-on. Governments that are seriously committed to issues of good governance should always strive to derive the best from the institution. Hence they need to gradually work on improving the functioning of this institution through legislation and other change management approaches. It should however be noted that change is not an event but a process. Hence, the sooner the process is started the better.

It is recommended, that the two countries should as a matter of urgency put in place strategic plans and develop comprehensive, objective performance programmes and related programme performance measures or indicators. This would enable them to easily monitor and evaluate their own performance. Consequently, this would make their annual reporting easy as they would be able to state whether or not their predetermined objectives have been achieved, and if not, the reasons could be advanced and necessary adjustments made. The development of performance indicators will not only institutionalise the ombudsman's performance, it would also ensure relative ease for outside or independent evaluation of the institution's performance. Hence this would help reduce the unsavoury perception questions regarding the institution's relevance and efficacy.

It should however be noted and acknowledged that the mere existence and establishment of the Ombudsman institution is not an end in itself, but a means to an end. The establishment of the institution for symbolic value, to borrow Ayeni's (1996:51) phrase, as a demonstration of adherence to democratic ideals on its own is inadequate. In essence, it is the utilitarian value or ability of the institution to ensure executive accountability and oversight or compliance with its recommendations that matters most. In my opinion, the symbolic value of the institution in the two countries has long been achieved. Hence it is recommended that they should strive to achieve the utilitarian value. This is the inevitable challenge that needs gradual transformation so that the accountability and oversight functions can be achieved, otherwise they will remain a pipe dream. Hence the perception that the institution serves ruling party political objectives would eventual suffice for a fact unless otherwise demonstrated to the contrary.

The Ombudsman institutions the world-over should network amongst themselves and with other institutions through avenues such as the African Ombudsman Association, African Union, International Ombudsman Institute and the African Peer Review Mechanism. These institutional networking forums are a platform for assisting one another, sharing of ideas and experiences on common problem areas.

It is also recommended that South Africa and Botswana should continually evaluate the relevance of the institution so that it is in-keeping with dynamic demands. As for Botswana in particular, the legislature should seriously consider amending the current Ombudsman Act as it contains inconsistencies and ambiguities such as Section 4 of the Act which exempts certain institutions from scrutiny. The selective application of the Act is undesirable for a country that prides itself with respecting the rule of law, and one of the longest and vibrant democracies in Africa

It is further recommended that all government institutions should change their attitude towards the Ombudsman institution, and see it not as an enemy but as complementing the whole public service's grievance handling system. The office of the Presidency is equally bound in this regard for providing exemplary leadership. The success of this institution heavily relies on the political support it gets from the government and all the political parties. This support will ensure that the Ombudsman is allocated enough resources to execute its mandate, and a clear demonstrative culture of complying with recommendations, which is critical for building the desired integrity, trust and confidence in the institution.

The Ombudsman institution should be seen as an institution that is close to Parliament particularly in the case of Botswana where it currently reports to the President and not directly

to Parliament. To make this relationship strong the setting up of a Standing Parliamentary Committee on the Ombudsman is long overdue. All parliamentarians should receive formal training in the form of short courses on parliamentary role and procedures, operation of the legislature in relation to the executive, the need for accountability and oversight functions, and the relationship between government and ruling political parties. This could in the long run bring about, and sustain the desired political commitment for effective functioning of oversight bodies.

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