

GOOD GOVERNANCE IN BOTSWANA-FIGHTING CORRUPTION AND MALADMINISTRATION

NORTH WEST UNIVERSITY



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**DECLARATION OF GABRIEL GADZANI KOMBONI IN TERMS
OF RULE G 48**

I declare that the dissertation for the degree of Master of Laws at the North West University hereby submitted, has not previously been submitted by me for a degree at this or any other University, that it is my own work in design and execution and that all material herein has been duly acknowledged.

DATED THIS 15TH DAY OF JULY 2005

SIGNED: 

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DEDICATION

**This Dissertation is dedicated to my family and to the memory of my
late sister Chawangwa**

(IV)

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ABBREVIATIONS

ACA	Anti Corruption Agency
AU	African Union
BDP	Botswana Democratic Party
DCEC	Directorate on Economic Crime and Corruption
IMF	international Monetary Fund
NEPAD	New Partnership for Africas Development
SADC	Southern African Development Community
TL	Transparency International

CHAPTER 1: INTRODUCTION

1.0 STATEMENT OF THE PROBLEM

The topic of this dissertation is “Good Governance in Botswana- Fighting Corruption and Maladministration.”

It is intended in this dissertation to expose the legal regime in Botswana that has evolved since the early 1990s aimed at curbing corruption and maladministration which had hitherto not been deemed to be a problem in the country.

The aim is to further determine the adequacy, efficacy and achievements of the said legal regime in curbing the scourge of corruption and maladministration. Of necessity the political will and commitment of the government in achieving the goals articulated in the pieces of legislation aimed at curbing corruption and maladministration will be investigated.

1.1 RATIONALE AND JUSTIFICATION OF THE STUDY

It is hoped that this dissertation will contribute to the improvement of the existing mechanisms established by the legal regime aimed at curbing the ever-growing problem of corruption and maladministration. In other words it is hoped that this dissertation will contribute to the reforms which are necessary to improve and sharpen the anti-corruption and anti-maladministration regime established by the Government of Botswana in the period commencing in the early 1990s to date.

The pieces of legislation that fall for consideration are the Corruption and Economic Crimes Act 1994¹ and the Ombudsman Act 1995.² The former Act established the Directorate on Corruption and Economic Crime (hereinafter referred to as the "DCEC") and the latter Act introduced for the first time in Botswana the Ombudsman Institution.

The enactment by the Botswana Parliament of the two laws can be attributed largely to the pressures for reform occasioned by exposures emanating from several commissions of inquiry³ in the beginning of the 1990s. The said commissions of inquiry came out with startling revelations of corruption⁴ and influence-peddling and shocked the nation out of its slumber. The enactments can also be attributed to the need to be seen to be complying with the democratizing wave that swept the African Continent in the 1990s which was accompanied by demands by the Western World for good governance and transparency as pre-requisites for any form of donor related assistance and relief as well as Foreign Direct Investment.

1. Act No 13 of 1994

2. Act No 5 of 1995

3. These are : The Presidential Commission of Inquiry on the Supply of School Books and Materials to Primary School for the 1990 school year, Government Printer (1991); The Presidential Commission of Inquiry into Land Problems in Mogoditshane and other Peri-Urban Villages, Government Printer (1991); The Presidential Commission of Inquiry into the Operations of the Botswana Housing Corporation, Government Printer (1992)

4. The aforesaid Presidential Commissions of Inquiry found that there were acts of corruption in the award of a tender for the supply of school books which resulted in the loss of Millions of Pula to the Government, that top figures in politics and government had been involved in shady and illegal land deals resulting in lawlessness in the areas concerned in respect to land administration and that top officials of the Botswana Housing Corporation had received bribes in cash and in kind to award contracts and that an Assistant Minister had corruptly influenced the award of a tender for the building of the Corporation's headquarters respectively.

The dissertation's point of departure is that the anti-corruption and anti-administration legal regime in Botswana lacks sufficient political will to realise its full potential and further that institutions established thereby lack sufficient independence to fully and adequately discharge their mandate.

1.2 DATA COLLECTION AND METHODOLOGY

In preparing this dissertation reliance has been placed on relevant textbooks, journals and legislation. Reference has also been made to protocols and treaties to which Botswana is party to. Interviews with top officials of the DCEC and Ombudsman were conducted. Reports of the DCEC and the Ombudsman have also been consulted, as well as reports of the different Commissions of Inquiry referred to above. The internet has also been a source of useful information.

1.3 SCOPE AND LIMITATION OF THE STUDY

This dissertation is divided into six chapters. The first chapter is an introductory one. The second chapter of this dissertation basically gives a general back-ground to Botswana in the context of good governance. The chapter will seek to locate Botswana's performance in the area of good governance within the African context. It will touch on general perceptions about the existence or non-existence of good governance and corruption in Botswana. The third chapter deals with the concept of good governance in general terms. The fourth and fifth chapters deal with the anti-corruption regime and the anti-

maladministration regime in Botswana respectively. The sixth chapter shall cover conclusions.

CHAPTER 2. A BRIEF HISTORICAL PERSPECTIVE OF BOTSWANA

2.0 INTRODUCTION

This chapter is concerned with the history and structure of Botswana. It is intended to lay out to the reader, Botswana's politics and government institutions which will help in the better understanding of the dynamics influencing the problem under discussion.

2.1 THE REPUBLIC OF BOTSWANA

Botswana is a sovereign Republic ⁵ which came into existence as such on the 30 September 1966 upon attainment of independence after being a British Protectorate since 1885.

The Constitution of Botswana enshrines a Bill of Rights ⁶ which protects the fundamental rights and freedoms of the individual subject to the respect of the rights and freedoms of others and the public interest. It can be stated forthwith that this is an old style Bill of Rights conceived in the 1960s which does not compare favorably with the later Bills of Rights especially those of the 1990s exemplified by Namibia and later South Africa.

5. Sectional 1, Constitution of Botswana

6. Chapter 11, Constitution of Botswana

Botswana has an elected Parliament, a President who is not popularly elected. The President is elected by members of Parliament. There is also an independent judiciary. Parliament wields legislative power subject to the provisions of the constitution.⁷ The executive power of Botswana vests in the President and he can exercise such powers alone unless otherwise required by the constitution or any other law to consult.⁸ The President is also the commander in chief of the armed forces of the Republic.⁹ The Judiciary is made up of superior courts¹⁰ which includes the Court of Appeal and the High Court, the latter having unlimited original jurisdiction to hear and determine any civil or criminal proceedings under any law and such other jurisdiction and powers as may be conferred on it by the constitution or any other law.¹¹ The subordinate courts being the Magistrates Courts are also part of the Judiciary. The Industrial Court is also part of the judiciary although it is a specialized court, dealing with labour matters.

Another important public office created by the constitution which is directly relevant to this discourse is that of Attorney General.¹² The Attorney General is the Principal Legal Adviser to the Government of Botswana. He/she is also the Prosecuting Authority with the power to initiate or discontinue criminal proceedings against any person. The latter powers are however being shifted to a newly created Director of

7. Section 86, Constitution of Botswana

8. Section 47, Constitution of Botswana

9. Section 48, Constitution of Botswana

10. Section 97-107, Constitution of Botswana

11. Section 95, Constitution of Botswana

12. Section 51, Constitution of Botswana

time to concentrate on his/her core business of being principal legal adviser to the Government.

It is worth mentioning at this stage that the Botswana Constitution gives the President, albeit one not popularly elected, tremendous powers. This has led to increasing calls that the President should be popularly elected or else his powers be devolved to other authorities. These calls have become louder due to the recent Presidential Decree declaring a Political Science Professor in the University of Botswana, one Kenneth Good, an undesirable inhabitant of Botswana resulting in his deportation which was dramatic and unprecedented. Good, an Australian resident in Botswana for the last fifteen years, lost an application before the High Court in which he challenged his deportation order.¹⁴

13. Constitution Amendment Bill No 34 of 2004, Botswana Government Gazette No 105 dated 31/12/04. The DPP will, however, still remain under the general supervision of the Attorney General and has to consult the latter in dealing with cases of National importance.

14. See Kenneth Good vs The Attorney General (Miscellaneous Application) No 90 of 2005 (unreported). In its judgment, The High Court refused to strike down certain sections of the Immigration Act which allowed the President to declare a person an undesirable inhabitant without giving reasons and also upheld a section of the same Act which ousts the jurisdiction of the Court from challenging such Presidential decrees.

A SHINING EXAMPLE OF DEMOCRACY IN AFRICA

Botswana has been called a shining example of democracy in Africa by many commentators both in the third world and the developed world. This accolade arose on account of the fact that Botswana has observed the democratic tradition even during the dark days when almost every other African Government was a dictatorship.

Botswana holds multiparty elections after every 5 years. This has been the case since the first elections in 1965. All these elections, the last one having been in October 2004,¹⁵ were won by the Botswana Democratic Party (BDP). These elections have been generally free and fair. They have however been increasingly blotted by the un-even 'playing field' between the BDP and the opposition due to the fact that the BDP has always enjoyed generous funding from un-named domestic and foreign donors while the opposition does not get funding of such magnitude. This is worsened by the fact that there is no funding of political parties by the state despite persistent calls for such funding, which the BDP Government has steadfastly refused to heed.

15. See the Independent Electoral Commission (I.E.C) Report to the Minister of Presidential Affairs and Public Administration on the 2004, Elections, Published by the I.E.C, Private Bag 00284, Gaborone Botswana

There are also other problems associated with the 'first past the post' electoral system which has seen the Opposition getting fewer seats in Parliament despite its increasing share of the popular vote which almost equalled that of the BDP in the 2004 elections.¹⁶

Botswana has had a generally well managed economy which for many years was the fastest growing economy in the World between 1965 and 1990.¹⁷ This has been largely due to prudent management by the Government, of mineral revenue, particularly diamonds which have consistently contributed between 40% to 60% of Government revenues. The income from diamonds has been used to build infrastructure such as roads, schools, hospitals, and lately to finance anti-retroviral therapy given to large numbers of citizens suffering from HIV. The downside of the good economic management has been the dismal failure to diversify the economy from the mineral sector to other sectors as well as the phenomenon of seriously skewed income distribution which has resulted in poverty amongst increasing numbers of the lower level sections of the society.

¹⁶The opposition got 22.8% of the Parliamentary seats despite obtaining 47.25% of the popular vote whereas the BDP got 77.2% of the seats with 50.63% of the popular vote (see I.E.C Report, supra pp 27-28)

¹⁷ See Jefferis K. "Botswana and diamond dependant development", in Botswana Politics and Society, Edge and Lekorwe (ed), 1998, p 300.

LOSING THE SHINE

Until 1991, Botswana stood - fastly held its position as a shining example of democracy and good governance. It was further believed by both local and international commentators that corruption and mismanagement were non-existent, if not negligible.

Focus on incidents of corruption and maladministration came to the fore between 1991 and 1992. This was on account of three Presidential Commissions of Inquiry dealing with procurement, land allocation and management of a housing parastatal respectively which commissions came up with startling findings of fraud, graft, corruption and mismanagement in government and the parastatal organization. These Presidential Commissions of Inquiry are as follows:-

The Presidential Commission of Inquiry on the Supply of School Books and Materials to Primary Schools for 1990 school year, also known as the IPM Consultancy of 1991¹⁸ which investigated the award of tenders for the supply of primary school books. The commission of inquiry concluded that the tender was awarded fraudulently and to an in-experienced company resulting in loss to Government of P27, 000,000.00 (twenty seven million Pula). The 1991 Presidential Commission of Inquiry into Land Problems in Mogoditshane and other Peri-Urban Villages near Gaborone,¹⁹ commonly

18..See Note 3 op. cit

19. Ibid, at pp 42-49

known as the Kgabo Commission (after its chairman), which concluded that fraudulent land deals were made by officials under pressure from influential and powerful personalities.

The 1992 Presidential Commission of Inquiry into the operations of the Botswana Housing Corporation, ²⁰ a Government parastatal commonly known as the Christie Commission of Enquiry(after its Chairman) which revealed corrupt tendering practices involving collusion between some board members, top employees, a government minister on the one hand and construction companies on the other when bribes were given out.

Other commissions of inquiry authorized by the President have since followed. The worrying factor is that some commission reports have been kept away from the public domain, an example being the commission of inquiry on the eradication of the cattle lung disease in the North West District. The eradication of the disease entailed the killing of all the cattle in the affected area and then re-stocking and monetary compensation by Government. Lots of money and resources were used and apparently there was a lot of corruption and mismanagement in the whole exercise, hence the commission²¹

20. Ibid, at pp 53,55,82 and 88

21. The Commissions of Inquiry Act Cap 05:02 Volume 1, Laws of Botswana, does not oblige the President, who is the only one authorized by the Act to appoint commissions of inquiry, to release to the public the findings of such commission. He only releases such findings under extreme public pressure as happened with the recent. Commission of Inquiry on State Land Allocation (See Report of the Judicial Commission of Enquiry into State Land Allocations in Gaborone, Government Printer July 2004)

It would be inaccurate to say that corruption and maladministration started featuring in Botswana in the 1990s. What seems to have happened is that such incidents of corruption and maladministration were taking place but were not exposed. They were kept only within the knowledge of the powers that be. This was made worse by the dominance of one party which has always ruled Botswana. Chances of exposures were limited under such circumstances. As the levels of corruption and maladministration increased and became more brazen, civil society organizations and the general public and the private media applied pressure and demanded action. Such incidents were now in the public domain. The President was therefore left with no option but to establish commissions of inquiry. High officials of the ruling party including Ministers were implicated in these allegations. Continued inaction would have damaged the credibility of the Government, both internationally and domestically.

The aforesaid incidents of corruption and maladministration which were exposed by the Presidential commissions of inquiry resulted in the establishment of the Directorate on Corruption and Economic Crime (DCEC)²² and the Ombudsman.²³ These measures were necessary to deal with the public perception of endemic corruption in the country which tended to damage the good name of Botswana as the least corrupt country in Africa.

22. See Note 1 opcit

23. See Note 2 opcit

The measures would also allay the fears of foreign investors that their investments in the country maybe blown out by the wave of corruption and maladministration. Botswana desperately needed to diversify its economy from one commodity, diamonds, into manufacturing for import substitution. Foreign investment was deemed a panacea for economic diversification.

Apart from passing the DCEC Act and the Ombudsman Act the Government of Botswana attempted to pass a law compelling the declaration of assets and liabilities of Members of Parliament.²⁴ The Bill followed a Motion in 1996 by a Member of Parliament. The Memorandum to the Bill states, inter alia , that "On 22nd March 1996, Parliament passed a resolution to the effect that all Members of Parliament shall, in future, declare their business and financial interest including farming interest and fixed assets...[t]he object of this Bill is therefore, to give effect to that resolution passed by Parliament on 22nd March 1996. And this is done in the interest of transparency and accountability".²⁵ According to the Bill, declaration of assets was to be made by the President, all Members of Parliament and the Speaker²⁶ by way of a written declaration in a prescribed manner. Non-compliance would render the offender guilty of an offence and upon conviction, liable to a fine not exceeding P2 000.00 or imprisonment

24. Declaration of Assets and Liabilities of Members of Parliament, Bill No 16 of 1998, Botswana Government Gazette, Supplement B, 10 July 1998.

25. *Ibid* at para 1

26. *Ibid* Section 3

for a term not exceeding 12 months or to both.²⁷ Had the Bill been passed into law, the penal provision would have had no effect in respect of the President who is protected by the Constitution from any legal proceedings whilst he is in office.²⁸

The aforesaid Bill was deferred indefinitely in 1999 and has never been brought back to Parliament. Certain influential Members of Parliament and Cabinet were vehemently against the notion of declaration of assets. They came up with all sorts of excuses e.g. it invaded their privacy; why only them to the exclusion of other senior government officials and those heading parastatal organizations; the declarations would show how poor they were and therefore expose them to public ridicule etc. This was obviously a serious indictment on the Botswana Government in regard to its commitment to transparency and good governance. Failure to pass the Bill into law has served only to fuel speculation that the Countries' political leaders fear to expose their ill-gotten wealth. The implications are that they are corrupt. The law would have gone a long way to contribute to the enhancement of anti corruption and anti maladministration measures which are now recommended by the SADC Protocol Against Corruption which requires states members to develop standards of conduct for the correct, honorable and proper fulfillment of public functions as well as mechanisms to enforce those standards"²⁹.

27. Supra Section 4

28. See Section 41, Constitution of Botswana which provides that "whilst any person holds or performs the functions of the office of President, no criminal proceedings shall be instituted or continued against him in respect of anything done or omitted to be done by him either in his official capacity or in his private capacity....."

29. Article 4 (1) (a), SADC Protocol against Corruption

The perception that corruption in Botswana exists in high places of Government still persists amongst large sections of the community. When an Assistant Minister in the Office of the President reported a case of bribery against a certain expatriate optician who had given him an ill-fitting suit so that Assistant Minister could help him secure a practicing license, the majority of people who phoned in during a radio programme on the matter were of the view that the said Assistant Minister reported the corruption in the matter because the bribe was not big enough. One would have expected many people to congratulate the Assistant Minister for reporting the corrupt individual. At the trial of the said expatriate, newspaper reports portrayed the whole matter as if it was the Assistant Minister who was on trial. At the end of the day, the expatriate was convicted and sentenced to a prison term³⁰.

SUMMARY

This chapter has laid a basis and context for the better understanding of the problem under discussion by giving a historical background to Botswana and some of its institutions of governance. It has also briefly covered Botswana's politics dynamics. Most importantly, the chapter has introduced the major events that triggered the establishment of the DCEC and the Ombudsman. The next chapter shall firstly lay a theoretical perspective of the concept of good governance. Thereafter it shall test the same theories against certain incidents and events in Botswana so as to judge whether Botswana passes the test.

30. See *State vs Gupta* Gaborone Village Magistrate Court, 2004 (unreported)

CHAPTER 3. THE CONCEPT OF GOOD GOVERNANCE

3.0 INTRODUCTION

This chapter is concerned with the concept of good governance in theoretical perspective. The chapter will essentially provide the background for analyzing Botswana's public policy responses to the challenges of good governance.

3.1 GOOD GOVERNANCE : DEFINITIONS AND ORIGINS

Governance has been defined as "1.government, control, or authority 2.the action, manner, or system of governing".³¹ The usage of the adjective "good" introduces a normative component to the otherwise value-free concept of governance. The implication is therefore that you can also have "bad" or "poor" governance.

The "word governance" is of recent appearance in the language of political scientists. It has attained popular usage. It has been observed that the dictionary meaning of governance means that " In essence...governance may be taken as denoting how people are ruled, and how the affairs of a state are administered and regulated. It refers to a nations system of politics and how this functions in relation to public administration. Thus the concept of governance includes a political dimension" ³².

31. See Collins English Dictionary, Desktop edition, 1s Edition 2004, Harper Collins Publishers, p673. Other English dictionaries have an almost similar definition of "governance"

32. See Landell-Mills P and Serageldin I, "Governance and the External Factor," in Proceedings of the World Bank Annual Conference on Development Economics 1991, L. Summers and S. Shah eds 1992, p303 at p 304.

The World Bank first came with its definition of governance in 1989 and it defined it as the "exercise of political power to manage a nation's affairs".³³ Subsequently, the World Bank initiated the concept of "good governance" in the context of its lending policies. The huge debt crisis mainly in Central America and, to some extent, Africa caused the World Bank to take an increased interest in the political and institutional environment before granting credit facilities. The Berg Report of 1981 concluded that in Africa, projects failed due to politically induced situations. Subsequently the World Bank introduced Structural Adjustment Projects as a prerequisite for the granting of loans³⁴.

The World Bank formally adopted the strategy of good governance after a 1992 report. The upshot of this report was that the state institutions and structures, the decision-making processes, implementation capacities and capabilities as well as the relationship between government and the governed became the focus of attention. This implied that public institutions played a critical role in the creation of an environment conducive to economic development. The direct opposite of this was that the welfare of the community could be compromised by the phenomenon of corruption and rent seeking perpetrated by the elite.³⁵

33. Ibid

34. Theobald C. "The World Bank: Good Governance and the New Institutional Economics", in Law and State Vol 59/60 1999, Institute for Scientific Co-operation, Tübingen, Federal Republic of Germany at p.20.

35. See Theobald op.cit at p. 24

It has been observed that the features of good governance are:- an efficient public service; an independent judicial system and legal framework to enforce contracts; the accountable administration of public funds; an independent public auditor responsible to a representative legislature, respect for the law and human rights at all levels of Government; a pluralistic institutional structure and a free press. All these, it has been further observed boil down to the major characteristics of a liberal democracy although the World Bank did not put it in such explicit terms, preferring to advance these characteristics as the largely institutional and functional prerequisites of development.³⁶

To avoid to be seen to be violating its articles of Agreement, The World Bank has refined its definition of good governance to narrow essentials and according to Leftwich "...from a narrow administrative point of view, good governance means an efficient, open, accountable and audited public service which has the bureaucratic competence to help design and implement appropriate policies and manage whatever public sector there is, it also entails an independent judicial system to uphold the law and resolve disputes arising in a largely free market economy. This is the position of the World Bank." ³⁷

36. Leftwich A. "Governance, Democracy and Development", in Third World Quarterly, Vol. 14, No. 3, 1993 p. 605 at p.610

37. Op.cit at p. 611.

Apart from the World Bank, Western Governments and the IMF also employ the concept of good governance in the sphere of development assistance and donor programmes. The Western Governments emphasize the political dimension of good governance. Successive Governments of the United States equate good governance with democracy and views it as an end in itself. The United States links its foreign aid to the existence of democratic regimes. Until the advent of September 11, 2001 bombings of the Twin Towers in New York (now commonly called 9/11) and the subsequent war on terror waged by the country, the United States did not give aid to governments that had attained power through the overthrow of democratically elected governments. The IMF on the other hand equated the existence of good governance with minimum military expenditure in developing countries. It equated extensive military spending with bad governance³⁸.

The origins of the concept of good governance can be traced to the late 1980's. Until the beginning of the 1990's, Western Governments, the World Bank and the IMF, assisted non-democratic regimes even though they still had preference for liberal democracies. Non- democratic regimes that were assisted include Chile, Argentina, Iraq, Zaire, (now Democratic Republic of the Congo), Haiti and others.

38. See generally Lancaster C., "Governance and Development: The Views from Washington", IDS Bulletin, Vol 24 No 1. 1993.

The move towards the concept of good governance has been attributed to four main influences viz: the experience of structural adjustment lending, the resurgence of neo-liberalism in the West, the collapse of official communist regimes and the rise of pro-democracy movements in the Developing World and Eastern Europe.³⁹

As far as the World Bank is concerned, the failure of structural adjustment programmes to bring significant private investment in Africa was a major impetus in the coming into being of the concept of good governance. The 1989 World Bank Report on Africa had argued that "underlying the litany of Africa's development problems is a crisis of governance".⁴⁰ This crisis is epitomized by the notion of failed states, exemplified by countries such as Somalia, Zaire, Liberia and Sierra Leone.

The concept of good governance has solidified and has been included in programmes of new organizations such as the New Partnership for Africa's Development (NEPAD). The concept lies at the heart of the African Peer Review Mechanism. It was observed recently that "this conception continues to extend profound influence on the regional development agenda. It features prominently in a recent collaborative report by the

39. Leftwich op. cit at p606

40. Leftwich op.cit at p 610, see also Lancaster op.cit at p.9

World Bank and several African research bodies (World Bank 2001). Similarly the African Union's New Partnership for Africa's Development (NEPAD) endorses democracy and good governance as essential conditions for sustainable development"⁴¹

Further and above the aforesaid origins of the concept of good governance, it has to be stated that it is influenced greatly by international human rights norms. The minimum cores of characteristics that constitute good governance are based on the Universal Declaration of Human Rights adopted by the United Nations in 1948. This Declaration has been signed by many countries and it can be taken as the moral consensus of the international community. Major features of the components of good governance are directly related to the following Articles of the Universal Declaration of Human Rights: Right To Life, Liberty And Security of The Person (Article 3); Equality Before the Law (Article 7); Right to an Effective Remedy By A Competent National Tribunal (Article 8); Prohibition of Arbitrary Arrest And Detention (Article 10); Freedom of Religion, Thought and Conscience (Article 18); Freedom of Expression (Article 19); Freedom of Assembly and Association (Article 20); Right To Take Part in Public and Political Affairs (Article 21); Right to Property (Article 17) and others.⁴²

41. Alence R. "Political Institutions and Developmental Governance in Sub-Saharan Africa", in Journal of Modern African Studies, Vol. 42, No. 2, June 2004 p. 163 at p.164

42. See also Landell –Mills op.cit at p.306

A final but most important point has to be made. This is that corruption, the use of money and influence distorts good governance, it therefore has an impact in a pervasive way on good governance. The ingredients of good governance boil down to what is called a "National Integrity System" within the sphere of the discourse on corruption and maladministration, as shall be fully shown in the last two chapters which deal with the anti-corruption and anti-maladministration regime in Botswana.

It is against this background that the research now situates the discussion with reference to Botswana.

GOOD GOVERNANCE IN BOTSWANA

Botswana generally passes the salient tests for good governance. Some of the visible features of good governance in the country are: an elected parliament; an independent judiciary which; an independent public auditor who reports to the legislature; general respect for human rights (there are no political detainees and the basic fundamental rights of the individual are not trampled upon at will); and a budding and independent press.

There are however some major shortcomings in the way the country is managed some of which are discussed below. The first one is that of a domineering and powerful executive presided over by a President and given a lot of power by the constitution. This has tended to make parliament a rubber stamp. The President, who is not popularly elected, has the power to dissolve a popularly elected Parliament in the event he disagrees with it. Infact the incumbent President publicly threatened in a Botswana Television

news broadcast to dissolve a newly elected Parliament after the 2004 general elections if it did not endorse his choice of Vice President. Some ruling party members of Parliament had indicated their disquiet with the President's choice for Vice President. Another example is a statement by the Minister of Local Government towards the end of 2004, blocking a motion in Parliament seeking to challenge the executive's decision to locate the new University in an unpopular place, to the effect that Parliament had no right to challenge the decision of the executive. This statement by the Minister was contrary to provisions of the constitution that give Parliament the power to deal with national issues. The Attorney General agreed with the said Minister even though the constitution is clear on this issue. This incident shows how the doctrine of separation of powers is under constant threat in Botswana .

Another cause for concern is that while the Auditor General makes Annual Reports to Parliament which reports disclose mismanagement and misuse of public funds by various departments, such findings are ignored by the executive year after year. No action is taken against accounting officers, who are the Permanent Secretaries in the various Ministries. This breeds a culture of fruit less expenditure and impurity.

In the area of human rights, Botswana has consistently trampled upon the cultural rights of the non-Tswana speaking communities. They have been denied the right to the promotion of their language and culture as the same are not taught in schools or used by the official media. Only Setswana and English are used. The Chiefs of their communities do not have the right to automatically represent their communities in the House of Chiefs, a

legislative advisory body, while those chiefs from the so called eight principal Tswana tribes automatically qualify to sit in the House of Chiefs by virtue of being chief of their communities or tribes. This is in terms of section 77, 78 and 79 of the Constitution. These issues have remained sore points since the birth of Botswana and they are nowhere near resolution.

Although an independent press has thrived in Botswana, there have been difficulties. A newspaper that is seen to be overly critical of Government often receives threats from people in authority which threats include the withdrawal of advertisement by Government departments in such newspapers. This infact happened to one of the leading newspapers, the Botswana Guardian in 2003. Government stopped advertising in the same newspaper after it ran articles perceived to be anti-government. The newspaper successfully challenged the Government's decision in Court. The powerful publicly funded media is also under heavy and constant pressure from the Minister in charge to carry material which is palatable to Government. Incidents of stories being removed from news bulletins on radio and television do occur from time to time. This state of affairs has engendered a culture of self-regulation in both the public and private media.

The removal of the Basarwa communities from the Central Kgalagadi Game Reserve to settlements created by the Government is another blot in the human rights record of the country. The Government has persisted with this action despite pressure from vocal organizations such as Survival International which organization is threatening to ruin the country's diamond industry and further despite a court challenge which was at the time of writing still pending before the country's High Court.

SUMMARY

To sum -up Botswana's place in the sphere of good governance, The following observation is instructive : "through her achievements Botswana offers some lessons to her neighbours. The country has built a good reputation owing to its sound government, minimal corruption, economic prudence and political stability. However, in some other ways Botswana has much to learn from the newly independent states of Southern Africa in both the social and political fields. Botswana represents an old order advocating limited democracy, paternalistic control of the citizenry and an unregulated 'IMF type' free market system".⁴³ In the next chapter, an attempt will be made to discuss and analyse Botswana anti corruption strategies in the context of anti- corruption legislation. This discussion will be made within the background of international best practices in efforts to fight corruption.

43. See Molutsi P, "Elections and Electoral Experience in Botswana" in Botswana Politics and Society, Edge and Lekorwe eds, 1998 p. 372.

CHAPTER 4: BOTSWANA ANTI CORRUPTION REGIME

4.0 INTRODUCTION

In this chapter, the legal regime established to deal with corruption in Botswana is examined. The historical background to the establishment of the Directorate on Corruption and Economic Crime (hereinafter referred as the DCEC), by way of the passing of the Corruption and Economic Crime Act)⁴⁴ has already been given in chapter 2 and it is not necessary to repeat it here. Before a detailed analysis of the DCEC Act, an examination of the problem of corruption generally from an international perspective, including definitions, the idea of Anti Corruption Agencies (ACA's), International Conventions and regional protocols on corruption shall be made.

It would be appropriate at this stage to briefly locate Botswana within the global perceptions of corruption. It has already been stated that Botswana has generally been viewed within both the African and International context as a shining example of democracy and good governance in Africa. Botswana was viewed as a country with little or no corruption until the early 1990's when several scandals already

44. Op. cit Note I

detailed above emerged.⁴⁵ But even then, Botswana still managed to maintain its position as the least corrupt country in Africa. According to Transparency International's Corruption Perceptions Index (CPI) 2003,⁴⁶ Botswana has a score of 5.7 and was ranked at No 30 with Taiwan. This placed Botswana in the position of the least corrupt country in Africa. Tunisia was No 39 with a score of 4.9 and Namibia was at No 41 with a score of 4.1, Nigeria was No 132 (second from bottom) with a score of 1.4. The least corrupt country according to the Index was Finland at No. 1 with a score of 9.7. The Transparency International Corruption Perceptions Index (CPI)-2004⁴⁷ places Botswana at No.31 with a score of 6.0. The same index notes that a fall in corruption was perceived for Botswana in 2004. Transparency International (TI) was founded in 1993 and is the leading international non-governmental organization dedicated solely to curbing corruption and has 90 national chapters around the World. It is therefore an internationally recognized source of reliable information on issues of

45. For a detailed background to Botswana's reputation and an analysis of the early 1990's scandals see Good K. "Corruption and Mismanagement in Botswana: A Best-case Example" in Journal of Modern African Studies, Vol 32, 1994 p.499; see also Holm J. Botswana: A Paternalistic Democracy" in Democracy in Developing Countries, Vol.2, Africa, Diamond L. et al eds, 1988 for a background to Botswana's economic performance and good governance.

46. The Index can be found at http://www.transparency.org/cpi/2003_en.html

47. The Index can be found at [http://www. Tranparency. Org/cpi/2004_en.html](http://www.Transparency.Org/cpi/2004_en.html)

corruption. According to TI, CPI score relates to the perceptions of the degree of corruption as seen by business people and country analysts and ranges between 10 (highly clean) and 0 (highly corrupt).

4.1 THE PROBLEM OF CORRUPTION

It is now generally accepted that corruption involves the abuse of public office for private benefit. Transparency International (TI) states that "Corruption involves behaviour on the part of public officials-be they elected or appointed civil servants in which they improperly and unlawfully enrich themselves or those close to them, by the misuse of the power entrusted in them"⁴⁸.

Although developing countries are generally associated with the high incidence of corruption, it cannot be said that the problem is solely associated with such countries. In this regard TI has observed that "corruption reports unfold in the news media on a daily basis and demonstrate corruption is not exclusively, or even primarily, a problem of developing countries. Recent events in Europe and North America have shown all too clearly that corruption is a topic which the developed countries have no cause to claim the moral high ground. Developed countries play a role as "bribe givers" in international business transactions and they experience domestic corruption, particularly political corruption, as a growing phenomenon".

48. See TI Source Book 2000, chapter 2, which can be found at <http://www.transparency.org/sourcebook/04.html>. The World Bank defines corruption as the "abuse of public office for private gain" (World Bank, 1997 a:8)

An important point has to be made and this is in respect of the globalization of the problem of corruption. This globalization aspect of this problem of corruption can be traced directly to the issue of good governance which has been addressed extensively in chapter 3.

This means that an issue that had been hitherto domestic has emerged as a global political concern and is thus seen as a serious problem that requires integrated efforts on a global scale.

This approach towards the problem of corruption emerged in the last decade and is directly attributable to International Banking Organizations such as the World Bank and the IMF which have developed a common and coordinated strategy of making good governance and institutional reform a pre-condition for the disbursements of funds to client countries. An observation in this regard was made in the following terms:

“Overall, what emerges from this critical review of the policy and research literature on corruption is the extent to which the framework through which corruption has been defined, problematized, and remedied reflects the broader interests and demands of the global market system. Thus, corruption is largely conceived of as an economic distortion that is believed to require wide-ranging and highly penetrating campaigns of democratization, privatization, and free market liberalization, initiated almost exclusively by international organizations and agencies and charted within a growing context of foreign investment....clearly, this entire approach mirrors and supports the reigning Western agenda for a free and multilateral system of global trade and investment”⁴⁹

49. See Beare M. ed Critical Reflections on Transnational Organized Crime, Money Laundering, and Corruption, University of Toronto Press, 2003 pp 99-100

This globalization of the problem of corruption has been seen in some quarters as some kind of new imperialism and that it lacks a broader social, political and economic contextualization of the conditions within which corruption occurs⁵⁰. It is perhaps in the context of the globalization of the problem of corruption that the coming into being of amongst others,, the United Nations Convention against Corruption, the African Union's Convention on Preventing and Combating Corruption, the United Nations Convention Against Transnational Organized Crime, and the SADC Protocol Against Corruption in the past 5 years should be viewed. Article 5 (4) of the UN Convention against Corruption aptly captures the globalization of corruption. It states that " States Parties shall as appropriate and in accordance with the fundamental principles of their legal system, collaborate with each other and with relevant international and regional organizations in promoting and developing the measures referred to in this article. That collaboration may include participation in international programmes and projects aimed at the prevention of corruption"

Due to the nature of corruption, which is invariably practiced in secrecy with a few witnesses and between willing entities, the normal institutions established to fight crime tend to be somewhat inadequacy in dealing with corruption. This problem of the ineffectiveness of the traditional crime fighting agencies has resulted in the creation of specialized Anti-Corruption Agencies. This trend has evolved into a world wide trend resulting with the establishment of Anti Corruption Agencies (ACA's) with varying degrees of

50. Ibid

success. Hongkong and Singapore are counted amongst the success stories and as failures are one Macao and Nepal. According to Doig and Moran, “Both individual countries and donors continue their enthusiasm for independent anti-corruption agencies (ACA’s) as the lead institution to combat corruption. Such agencies are often seen as the lynchpin of the development of a country’s National Integrity System (NIS), a term used to encompass a range of institutions and processes whose collective activity and inter-relationships produce an effective anti-corruption strategy. Much attention is given to the need to allow both ACA’S and the NIS the freedom and independence to relevant agencies to work unimpeded, individually and collectively.”⁵¹

It is one thing to establish an ACA and it is yet another for the ACA to operate successfully.⁵² TI has identified what it takes to have a successful ACA and has itemized the following:

- committed political backing at the highest levels of government;
- adequate resources to undertake the mission;
- political and operational independence to investigate even the highest levels of government;
- adequate powers of access to documentation and for the questioning of witnesses;

51 Doig A and Moran J, “Anti Corruption Agencies: The Importance of Independence for the effectiveness of NNational Integrity Systems”, in *Corruption, Integrity and Law Enforcement*, Fignaut C. and Huberts L. eds, 2002 Kluwer Law International at p.229

- user friendly laws (including the criminalization of illicit enrichment);

Leadership which is seen as being of the highest integrity. Most importantly, however, TI places great importance on the appointment and removal of the head of an ACA as a determining factor for its success. The ideal appointment mechanism is one that has a consensus support through Parliament rather than government and an accountable mechanism to an all inclusive Parliamentary Select Committee rather than government. TI further notes that “A flaw in many legislative schemes involves giving a President (or any political figure) too much control over the appointment and operations of an Anti-Corruption Agency. The President is the head of the executive, and members of the executive can also succumb to temptation.”

It is important to note that an ACA operates effectively within an appropriate and functioning National Integrity System (NIS). It is equally important to briefly state what an NIS entails⁵³. The NIS is simply a component of good governance. The NIS framework is a set of components and elements which have to be delivered through key institutions or sectors called pillars. The following are components of the NIS:-

- Mechanisms that support accountability and transparency in the democratic process such as parliamentary elections;
- Reforms that eliminate conflict of interest in the public service;

53 .Heavy reliance has been placed on Doig and Moran op. cit at pp 232-233

- Adherence to administrative law by decision makers;
- Appropriate structures and channels that enable public officials to report alleged acts of corruption;
- An independent judiciary and the existence of legal procedures that are an effective deterrent to corruption;
- A public procurement system that is open, transparent and competitive;
- Private sector self-regulation against corrupt practices;
- An alert press which is free to discharge its public watch –dog.
- Independent ACA's that can collaborate with other countries to combat international corruption.

The elements of the NIS will be constituted by the following:-

- Unwavering commitment by leaders;
- Emphasis on corruption prevention and systems change and not witch hunts;
- Comprehensive anti-corruption laws;
- Adequate remuneration of civil servants and political leaders;
- Creation of partnerships between government and civil society;
- Making corruption a “high-risk” and “low-profit” undertaking;

The pillars of the NIS will be constituted by the following:-

- **Civil society, public awareness, public participation;**
- **Public anti-corruption strategies;**
- **Parliament;**
- **Public Service;**
- **“Watchdog” agencies;**
- **Rule of law, the judiciary;**
- **Ombudsman;**
- **Attorney General;**
- **Public procurement;**
- **The Media;**
- **The Private Sector;**
- **International actors and cooperation.**

It will be seen from the above components of the NIS that the whole system entails the existence of accountability in which a system of agencies of restraint and watchdogs are in place to check abuses of power by other agencies and branches of government. This is a system of checks and balances which would not exist in dictatorships and one party states. The concept of the NIS was developed by TI as a methodology to combat corruption. It was intended as a framework for existing institutions and practices to work together toward a just and honest government.

ANALYSIS OF THE DCEC ACT

The context within which the DCEC Act was enacted has been stated above. It needs, to be added that Botswana's problem of corruption is somewhat different from other African contexts in that Botswana has had a booming economy for many years as compared to the majority of African States. This booming economy has provided fertile breeding ground for corruption opportunities. These opportunities arose from the multibillion Pula Capital Projects such as development of roads, schools, government offices and housing as well as procurement of government goods and services. The several commissions of inquiry have also revealed that corruption in Botswana was essentially perpetrated by the elite. This is however, not to say that there is no corruption at the lower levels of society. Infact indications from the annual reports of the DCEC show that a lot of cases involving small amounts of money wherein junior officers such as police constables, clerks, teachers and the like are usually charged and convicted. This aspect of the nature of cases investigated and prosecuted by the DCEC shall be revisited below in a different context.

The DCEC Act was passed by the National Assembly on the 25 July 1994. the President assented to it on the 13 August 1994 and its date of commencement is the 19 August 1994. The Act is therefore 10 years old and there have not been any amendments to it so far. In its preamble it is stated that it is " An Act to provide for the establishment of a Directorate on Corruption and Economic Crime; to make comprehensive provision for the prevention of corruption; and confer power on the Directorate to investigate

suspected cases of corruption and economic crime and matters connected or incidental thereto”

ESTABLISHMENT OF THE DIRECTORATE ON ECONOMIC CRIME AND CORRUPTION

Section 3 establishes the Directorate on Corruption and Economic Crime and further states that it shall consist of a Director, Deputy Director and such other officers as may be appointed. The same section further provides that the Directorate shall be a public office subject to the provisions of the Public Service Act (Cap 26:01). In terms of the Section 4 (1) “The President may appoint a Director on such terms and conditions as he thinks fit”. Section 4 (2) further states that the Director of the DCEC shall be responsible for the direction and administration of the DCEC.

The purpose of the DCEC Act is clearly and adequately captured by the preamble. There are, however, weaknesses in respect of Section 3 of the Act. Section 3, by making the DCEC subject to the Public Service Act, clearly compromises the independence of the DCEC, which independence is recognized in terms of international best practices as one of the prerequisites for a successful ACA. By making the DCEC subject to the Public Service Act, it becomes just another public office which in terms of the Public Service Act, is under the general direction of the President. According to the same Public Service Act, the Permanent Secretary to the President is the head of the public service and has vested in him the administration of the public service and is further empowered to define and incorporate in General Orders, rules of conduct for public officers. This essentially means that the

Director of the DCEC and his staff are supervised by the Permanent Secretary to the President once they are appointed and the same Permanent Secretary may, as authorised by the law, make rules for the officials of the DCEC inclusive of the Director. Furthermore, the terms and conditions of service, assessment of salaries, gradings, discipline and other public service personnel matters are, in terms of the Public Service Act, the responsibility of the Director of Public Service Management.⁵⁴ This therefore means that the DCEC is subject to the Director of Public Service Management when it comes to personnel matters. This means that the Director of the DCEC is not in control of his staff fully and cannot independently determine their remuneration. This impacts negatively on the general independence of the DCEC.

APPOINTMENT OF THE DIRECTOR

Section 4 of the Act, which deals with the appointment of the Director of the DCEC has a major weakness and is not in keeping with international best practices in respect to such appointments. It is a major flaw in the legislation to give the

54. On the powers of the President, Permanent Secretary to the President and the Director of Public Service Management over the public service, see sections 3, 4, and 5 of the Public service Act, 9Cap 26:01) Vol iii Laws of Botswana.

President the power to appoint a head of an ACA as the President is the head of the executive. An appointment of this nature does not augur well for the independence of the DCEC. An anti-corruption agency, in order to operate effectively, must be operationally, politically and financially independent. One of the determinants of independence is the manner of appointment of the head of the agency, his tenure and his powers. According to section 4 of the DCEC Act, the President can appoint the Director of the DCEC on such terms and conditions as he deems fit. The Act does not state the tenure of the Director⁵⁵. The ideal appointment of a head of such agency is through some consensus mechanism through a Parliamentary Select Committee which is all-inclusive. The appointment procedure should be one that involves a broader cast of actors than those presently in power⁵⁶. There are also views that the legislation must specifically state that the head of the ACA shall not be subject to the directions of any person in the performance of his duties.

On the 26 January 2005, I conducted an oral interview with the incumbent Director of the DCEC, Mr T.M Katlholo in which I put to him a series of questions which I had written which questions he answered orally and on the spot. The following question, which relates to his appointment and independence was put as was answered as appears hereunder:

55. See generally Fombad C. "Curbing Corruption in Africa: Some lessons from Botswana's experience" in *International Social Science Journal*, No 160, 1999.

56. See generally Ti op.cit

Q. "Some commentators are of the view that the fact that you are appointed by the President and that you report to him compromises your independence and freedom to investigate all acts of corruption regardless of who is the suspect; your comment on that;"

A. "This is just a perception. In reality this is not what happens. I am aware of that perception. The Act does not clearly define the role of the Director and that in the execution of his duties he shall not be subject to the control of anyone. It is not direct but implied. By the 31st March, the report must be made and given to the President but what he says or does with it is not an issue. The report is mine. I have the operational independence. No one says what I should do or not do. Administratively I remain accountable to the appointing authority. I am funded by the public coffers. The key to combating corruption is the political will. I don't get any directions from my appointing authority on how to do my job. The argument has been that I should report to Parliament, but this is not a problem, but this could create other problems as politicians without a code of conduct for members of Parliament can abuse the system. I don't actually get feedback on the report. However in 2003 the President mentioned the tabling of the report before Parliament. It was tabled."

It is clear from the above answer that the current Director of the DCEC is very much alive to the concerns regarding his independence and the shortcomings of the Act in that regard. At the moment he is capable of operating independently. This, maybe, however, due to the

current President's goodwill and personal commitment to the agency's mission. The reality is that another president may do things differently and abridge whatever independence the DCEC may have been exercising. Such an eventuality is not far-fetched given the provisions of section 47 of the Act which empower the President, by statutory instrument, to make regulations for the purposes of giving effect to the provisions of the Act.

FUNCTIONS OF THE DCEC

Section 6 of the Act deals with the functions of the DCEC. For a better appreciation it would be best to reproduce the same provisions fully as they appear in the Act. These are:

- (a) to receive and investigate any complaints alleging corruption in any public body;⁵⁷
- (b) to investigate any alleged or suspected offences under this Act, or any other offence disclosed during such an investigation;

57. "Public body" is defined in the Act as meaning "any office, organization, establishment or body created by or under any enactment or under powers conferred by any enactment, and includes any company in which 51 percent or more of the equity shares are owned by the Government of Botswana"

- (c) to investigate any alleged or suspected contravention of any of the provisions of the fiscal and revenue laws of the country;
- (d) to investigate any conduct of any person, which in the opinion of the Director, may be connected with or conducive to corruption;
- (e) to assist any law enforcement agency of the Government in the investigation of offences involving dishonesty or cheating of the public revenue;
- (f) to examine the practices and procedures of public bodies in order to facilitate the discovery of corrupt practices and to ensure the revision of methods of work or procedures which, in the opinion of the Director, may be conducive to corrupt practices;
- (g) to instruct, advise and assist any person, on the latter's request, on ways in which corrupt practices may be eliminated by such person;
- (h) to advise heads of public bodies of changes in practices or procedures compatible with the effective discharge of the duties of such public bodies which the Director thinks necessary to reduce the likelihood of the occurrence of corrupt practices;
- (i) to educate the public about the evils of corruption; and
- (j) to enlist and foster public support in combating corruption."

Most of the above mentioned functions of the DCEC are self-explanatory. A few shall however be selected for analysis. In general terms it can be observed that the functions of the DCEC as stated in section 6 involve three aspects viz:-

Investigation of corruption, the prevention of corruption and the education of the public on the dangers of corruption. These obviously are very important and heavy functions.

Section 6 (a) restricts the DCEC to the investigation of corruption in public bodies. It therefore follows that the DCEC has no jurisdiction in matters of corruption which happen in a purely private set up. This is not good enough as the Government of Botswana has an interest in many other entities and companies which fall outside the definition of a public body. An example is Debswana Diamond Mining Company, in which the Government has a 50/50 shareholding with De Beers. This company falls short of a public body by one percent. Debswana is however the most important company in Botswana's economy. It is the only company that currently mines Botswana's rich diamond deposits. Diamonds are the main stay of Botswana's economy. Debswana is involved in procurement and construction worth millions of Pula annually. It is a well known fact that procurement and works are areas that are very much prone to corruption. No one investigates corruption that may happen in this very important company. The law therefore needs to be changed to cover corruption in the private sector. This will be in keeping with Article 12 (1) of the UN Convention against corruption which states that "Each State Party shall take measures, in accordance with the fundamental principles of its domestic law, to prevent corruption involving the private sector, enhance accounting and

auditing standards in the private sector and, where appropriate, provide effective, proportionate and dissuasive civil, administrative or criminal penalties for failure to comply with such measures”.

The SADC Protocol against Corruption, of which Botswana was the first to sign, in Articles 1 and 3 extends corruption to private entities. It would therefore be fitting for the DCEC Act to be amended accordingly to cover corruption in the private sector.

CORRUPTION PREVENTION

Sections 6 (f) (g) and (h) gives the DCEC the function of corruption prevention. This is a very important and critical function. This is also a commendable departure from the usual emphasis on law enforcement measures common in many pieces of anti-corruption legislation in Africa. The DCEC appears to take this function of corruption prevention very seriously. In the interview mentioned above, the following question was put to the Director of the DCEC:

Q. “How successful are your prevention measures?”

A. “I think they are the most successful. The issue of governance comes in. We don’t look at the political level. This is because we have interfaced our corruption prevention techniques with performance management systems. We actually have a booklet on this. Corruption thrives where management controls are weak. It also thrives where there are untrained people, bad work methods, mistrust of leadership

and outdated procedures. We explore these weaknesses and advice. The advice is generally taken. We get a lot of request to assist. We even get requests from the private sector. We offer management advisory services”.

In 2002 ⁵⁸ the DCEC completed the following corruption prevention assignments within central and local government structures:

- (a) Immigration Department- issue of residence permits, waivers and extensions;
- (b) Labour Department- issue of work permits and extensions;
- (c) Procedures on the allocation of land by Land Boards;
- (d) Procedure for weighing trucks at weighbridges;
- (e) Study on the wildlife raffle system (Department of Wildlife and National Park)
- (f) Study on the recruitment procedure of Botswana Defence Force (BDF);
- (g) Procedure on spot fines for the Botswana Police service;
- (h) Procedure to register businesses, companies, and trademarks at the Registrar of Companies;

As a demonstration of the importance of these assignments, an extract from the report in respect of the Botswana Defence Force assignment is illuminating.

The following is stated:-

58. DCEC Annual Report 2002 pp 23-26

“DCEC initiated this study following a number of reports to the effect that the BDF Officials were acting corruptly when recruiting new entrants to the army. The procedures used were unsystematic with one year of recruitment being totally different in format from the next year. There were no documented procedures used in recruiting. This study therefore looked at the procedures and practices that have been used, the procedures used in processing applications, including the criteria used in coding applications, how the applicants are invited to interviews and the ultimate selection criteria. The study recommended a systematic approach to recruitment as in the rest of the public service. It is pleasing to note that the BDF has already taken steps to rectify some of the problems identified”⁵⁹. The DCEC further conducted a total of 54 talks and presentations in 2002 in different locations in the country. In 2003⁶⁰ the DCEC completed six corruption prevention assignments while three were still ongoing. It conducted a total of 120 talks and presentations in different locations in the country.

POWERS OF THE DIRECTOR

The powers of the Director of the DCEC are stated in section 7 of the Act. in terms of the same powers, the Director may authorize any officer of the DCEC to investigate any alleged suspected offences under the Act, he may require any person in writing to produce, within a specified time, all books, records, returns, reports, data stored electronically on computer or otherwise and any other documents

59. Ibid at p..24

60. DCEC Annual Report 2003 pp 24-31 and pp 43-49

elating to the functions of any public body or private body; he may further require any person within a specified time, to provide any information or to answer any questions which he considers necessary in connection with any enquiry and any failure to comply with the preceding demands or any lawful provisions or false statements or information will render him guilty of an offence punishable by imprisonment not exceeding five years or a fine not in excess of P10,000-00 or to both.

Section 8 further gives the Director of the DCEC more powers to obtain information that would assist or expedite an investigation. He is empowered to require in writing a suspected person to enumerate all his movable and immovable property wherever situate specifying all the details of how it was acquired and also requiring the suspect to specify all his moneys wherever situate or money sent out of Botswana by him or on his behalf and all the aforesaid information can also be required from any other person whom the Director believes he might have had any financial dealings with the suspect. The Director of the DCEC can further obtain all information from a bank manager pertaining to the accounts of a suspect. Such information should be supplied notwithstanding any oath of secrecy. Any person who does not comply with the Director's aforesaid demands without any reasonable excuse shall be guilty of an offence and liable to imprisonment for a term not exceeding 5 years and a fine not exceeding P10,000-00 or to both.

It can be clearly seen that the powers of the DCEC under sections 7 and 8 of the Act are extensive, and to some extent draconian. These powers override well established principles of law such as the right to remain silent, the right

confidentiality and even other statutes, such as the Official Secrets Act, are made subservient to the DCEC Act. As if this is not enough, section 8 further provide that any refusal by a suspect to provide a statement on his assets and money without a reasonable cause, shall be treated as supporting any evidence given on behalf of the prosecution or as rebutting any evidence given on behalf of the defence as regards the manner of acquisition of the properties.

Commentators in the sphere of fighting corruption are of the view that anti-corruption agencies must be given extensive powers if they are to fight corruption effectively. This is because the investigation and prosecution of corruption offences is difficult due to the secrecy under which acts of corruption are perpetrated. As long as such powers are not abused, there may not be sufficient grounds to complain about them. In this regard, it is encouraging that in the aforesaid interview, the Director of the DCEC appreciates the extent of the powers he has but is equally happy that the Attorney General provides a check and balance on his functions.

The following statement from him is interesting and encouraging:-

“Combating corruption is about putting some checks and balances in place. Corruption can take place where there is a lot of power involved. Let somebody out there check what I have done and take an independent decision otherwise I might abuse my powers”

The Director made the above statement in the context of the legal requirements to the effect that he must refer a matter to the Attorney General

and obtain a written consent to prosecute. This is in terms of section 39 of the Act.

Before leaving the issue of the powers of the DCEC, it would be appropriate to state that the Act gives the Director and his officials extensive powers of search and seizure including searches without a warrant. There are also extensive powers of arrest including arrest without a warrant. These are contained in sections 10 to 15 of the Act. Perhaps it is also worth mentioning that the DCEC is given immunity by section 21 of the Act in the following terms:

“No action shall be brought against the Director or any other officer of the Directorate (or any other person authorized by the Director to perform any act under this Act), in respect of any act or thing done or omitted to be done in good faith in the exercise of his duties under this Act”. Such immunity is necessary if the DCEC is to perform its difficult task without fear of legal suits, as long as the actions are in good faith.

OFFENCES

Offences under the DCEC Act are created under Part IV of the Act which consists of Sections 23 to 38. Included under this part are also the penalties and consequences of corruption. At the centre of the offence of corruption, is a concept called “valuable consideration”. Section 23 defines the concept. For the sake of clarity it is reproduced fully hereunder:

“23. For the purposes of this Part,” valuable consideration” means-

- (a) any gift, benefit, loan, fee, reward, or commission consisting of money or of any valuable security or of other property or interest in property of any description;
- (b) any office, employment or contract;
- (c) any payment, release, discharge or liquidation of any loan, obligation or other liability, whether in whole or in part;
- (d) any other service, or favour including protection from any penalty or disability incurred or apprehended or from any action or proceedings of a disciplinary, civil or criminal nature, whether or not already instituted;
- (e) the exercise or forbearance from the exercise of any right or any power or duty, and
- (f) any offer, undertaking or promise whether conditional or unconditional, of any valuable consideration within the meaning of the provisions of the preceding paragraph”

The definition of valuable consideration has essentially captured all possible scenarios that will amount to corruption if valuable consideration is offered, promised, or accepted in return of doing, not doing or forbearing to do something. Specific offences are then created by various sections e.g. corruption by or a public officer; corruption in respect of official transaction; acceptance of bribe by public officer after doing act; promise of bribe to public officer after doing act; corrupt transactions by or with agents; bribery for giving assistance in regard to contracts; bribery for procuring withdrawal of tender, conflict of interest; and bribery in relation to auctions. The only offences that do not invoke the concept of valuable consideration are cheating of the public revenue and possession of unexplained property.

One of the offences that merit some further consideration is created by section 34 which deals with possession of unexplained property, given the way such an offence is proved. In terms of the said section, the DCEC may investigate any person where there are reasonable grounds to suspect that the person maintains a standard of living above that which is commensurate with his present or past known sources of income or assets or the person is in control or possession of pecuniary resources or property disproportionate to his present or past known sources of income or assets. The suspected person then has the burden to prove his innocence in the event that he is charged. This is terms of by section 34 (2) which reads "A person is guilty of corruption if he fails to give a satisfactory explanation to the Director or the officer conducting the investigation under subsection (1) as to how he was able to maintain such a standard of living or how such pecuniary resources of property came under his control or possession". This kind of offence is also found only in HongKong and Singapore.

The penalty for corruption and cheating the revenue is imprisonment for a term not exceeding 10 years and to a fine not exceeding P500,000-00 or to both. This is a comparatively stiff penalty. Over and above prison and fines, a person convicted is liable to confiscation of the proceeds of crime upon application by the Attorney General in a proper case. It would appear, however, that the Courts do not pass tough enough sentences. The imprisonment and fine are indicated in the statute as maximum sentences that can be passed. The Courts therefore have latitude to exercise their discretion in the cases they deal with. The Director of the DCEC expressed his dissatisfaction with the sentences in his 2002 Annual Report as follows,

"-----there is still a genuine concern that the Courts are being too lenient when it comes to sentencing people convicted of corruption offences. Most imprisonment terms are wholly suspended, and actual imprisonment terms are the exception rather than the rule".⁶¹

A solution to these concerns of the DCEC will be an amendment of the Act to prescribe minimum sentences. This has been done in respect of offences such as stock theft and rape as well as drunken driving.

PROSECUTION OF OFFENCES

In terms of section 39 of the DCEC Act if after investigating any person under the Act, the Director of the DCEC is of the view that an offence has been committed by the person under investigation, he/she shall refer the matter to the Attorney- General for his/her decision. The section further provides that no prosecution of an offence under Part IV shall be instituted except with the prior written consent of the Attorney General.

It is very important for the well being of an anti-corruption agency that there is an efficient legal system that will ensure that cases are brought for prosecution within a reasonable time and then tried within a reasonable time. It is in this context that I take the view that anti-corruption agencies should be empowered to initiate prosecutions.

61. DCEC 2002 op. cit at p.13

The referral of cases to the Attorney General is unavoidable in Botswana as in terms of the constitution, he/she is the one vested with the power to initiate or discontinue criminal proceedings. The referral of cases to the Attorney General has not been without problems. The main bone of contention is the delay in the processing of the cases by the Attorney General's office. This can be gleaned from the DCEC 2002 Annual Report where the following is stated:-

"there are another 55 cases at the Attorney General's Chambers awaiting their advice or consent to prosecute, as required by section 39 of the Corruption and Economic Crime Act 1994. Again I am sorry to report that some of these cases have been there for several years, and their delays are worrying to the interest of justice"⁶² This was a repeat of an exactly similar statement made in the DCEC 2001 Annual Report⁶³.

A solution to this problem would be to second experienced prosecutors from the Attorney General's Chambers so that they can run the DCEC's prosecution office, then amend the Act to do away with the requirement for the Attorney General's consent to a prosecution. The Attorney General would then delegate his powers of prosecution to the DCEC just like he has done with the Botswana Police Service. This would go a long way in solving the problem of delays.

62. Ibid

63. DCEC Annual Report 2001 p15-16

Added to the delay in processing cases for prosecution by the Attorney General is the time it takes to complete cases by the Courts. The Director of the DCEC has stated that

“the average time for a DCEC case in which the accused has pleaded ‘not guilty’ to be completed is currently one year nine months from the date it is registered. Add this to the time matters have taken to be investigated and considered by the Attorney Generals’ Chambers and the picture is very gloomy”⁶⁴. This problem of delay of cases in the Courts of Botswana has not escaped outside observers on the operations of the DCEC, as evidenced by the following observation. “Thus the work of the DCEC in Botswana has often been held up due to problems in the court system because of, for example, the length of hearing where the absence of court clerks requires Magistrates to take notes in longhand while confessions are only admissible if made before a judicial officer, usually a magistrate, who must complete the statement verbatim in long hand and then offer that evidence as a witness for the prosecution.” ⁶⁵

64. Op. cit

65. See Doig and Moran op.cit at p. 240

In spite of the prosecution problems stated above, the DCEC's conviction rate has been above 50% since inception except for the year 1998. The summary of the conviction rate is as follows":- ⁶⁶

Year	% Rate
1995	85
1996	79
1997	68
1998	48
1999	81
2000	61
2001	58
2002	67
2003	82

Given the provisions of the Act that relate to evidence being sections 40 to 42, the conviction rate should be sustained at high levels. These provisions generally shift the burden from the Prosecution to the accused by the creation of presumptions to be rebutted by the accused. Section 42 states that "where in any proceedings for an offence under Part IV, it is proved that the accused offered or accepted a valuable consideration, the valuable consideration shall be presumed to have been offered and accepted as such inducement or reward, as is alleged in the particulars of offence unless the contrary is proved"

66. DCEC 2003 op. cit at p.12

An interesting point to be made about prosecution of offences under the DCEC Act is that such are not only limited to offences committed within geographical Botswana. The Act extends to citizens of Botswana who may be outside the country. Section 46 states that ".....where an offence under Part IV is committed by a citizen of Botswana in any place outside Botswana, he may be dealt with in respect of such offence as if it had been committed within Botswana" I am not aware of any prosecution under section 46. The provision is however very forward- looking in view of transnational trade and globalization. It is very easy for a citizen to commit acts of corruption outside the country but which will end up affecting the country e.g. getting bribed by an outside company to assist to get a contract in Botswana.

INFORMERS AND WHISTLE BLOWERS

Another issue needs to be mentioned. This is in respect of protection of informers and whistleblowers. Section 45 offers some limited protection. Limited, because the same section further states that if in any other proceedings a court is of the opinion that justice cannot be fully done between the parties thereto without disclosure of the name of an informer or a person who has assisted the Director, the court may permit inquiry and require full disclosure concerning the informer or such person. This is in spite of the earlier provisions of the same section to the effect that in any trial under Part IV a witness shall not be obliged to disclose the name and address of any informer or state any matter which might lead to his discovery. The protection of the informer would seem to be only in respect of criminal proceedings and not civil proceedings. The Director of the

DCEC had this to say about this matter. "Many people making reports to the DCEC fear reprisals against them if it became known that they had made a report to the DCEC, even though DCEC officers always attempt to conceal the source of information they are working on, and section 45 of the Corruption and Economic Crime Act 1994 gives protection to informers in any proceeding before a court. However until whistle-blowing legislation is in place in Botswana to protect informers, especially in their workplace, this reprisal will always remain a possibility, which is difficult to guard against"⁶⁷.

One last issue on the DCEC is in respect of a perception, strongly held by members of society. This is that the DCEC has not investigated and prosecuted many 'big fish' since its inception. The argument goes further to say that this is indicative of the control of the DCEC from the office of the President as the so called 'big fish' are people of power and influence and as such are close to the ruling party of the President. One commentator put it this way ".....critics and cynics have pointed out that mostly fiddlers are caught and prosecuted, while the big fish swim undisturbed. This is a criticism that cannot be easily pushed aside. Botswana is peculiar in Africa, not only on account of the overall low incidence of corruption but the fact that this corruption is essentially elitist in nature.

67. DCEC 2003 op. cit at pp 15-16

It is a paradox that although the spate of high level corruption that provoked the enactment of the DCEC Act may have diminished, hardly any big fish have been caught in the DCEC's nets".⁶⁸ Indeed, a perusal of the DCEC's annual reports does not disclose cases that involve prominent personalities or very large quantities of bribes or cheating of the public revenues. It may be very well that there are no such cases for the DCEC to investigate as the big fish may not be involved in any corruption. In the interview mentioned above, I put the following question to the Director of the DCEC which was answered as appears below:-

- Q. "There is a perception that the DCEC is just a public relations exercise, aimed at the international community as evidenced by the fact that you have not investigated and prosecuted any high profile individuals but concentrated on non-entities."
- A. "What is the definition of big fish? We have prosecuted a Permanent Secretary and a Director, we are prosecuting lawyers. This is a wrong perception. People have their own agendas. The proportion to the population of big fish is small".

68. see Fombad C. op. cit at p. 250

SUMMARY

Corruption is no small matter. It can ruin a country's economy and reputation. Any efforts made with the aim of curbing corruption are commendable. The passing of the DCEC Act in 1995 was therefore a laudable exercise. Although the law has made serious encroachments on certain rights and liberties of the individual, there is no evidence that the DCEC has abused its many powers under the Act. There have not been any constitutional challenges to the provisions of the Act, although it has been in place for ten years now. In order to remove strongly held perceptions, the law needs to be amended in order to make the DCEC independent as well as effective. In this regard the following are recommended:

- (a) The appointment of the Director of the DCEC must be made more non-partisan preferably the Judicial Service Commission or a Parliamentary Select Committee should do the appointment.
- (b) The tenure of the Director of the DCEC must be fixed to a specific period and his removal during that tenure should be made similar to that of judges of the High Court i.e. only for serious misconduct and only upon an impartial and creditable investigation of such misconduct.
- (c) The DCEC must report to Parliament through a Parliamentary Select Committee dedicated to structures of integrity.
- (d) The DCEC must get its funding directly from Parliament.
- (e) The DCEC Act must be amended to make elaborate provision for the protection of informants, which amendments should include permanent protection of such informants and witnesses.

- (f) The DCEC should be adequately staffed to enable it to expeditiously investigate and prosecute cases.

It would appear, however that the DCEC is doing relatively well in its mandate of corruption prevention and public education. This can be further improved by provision of additional resources to enable more seminars and assignments to be held, especially in the area of local government procurement and works where apparently reported cases of corruption are rising using.⁶⁹ In the next and final chapter, an attempt will be made to discuss and analyse the Ombudsman Institution in Botswana. The Ombudsman Act shall be analysed and compared with similar legislation elsewhere. In the process, strength and weaknesses of the Act shall be discussed.

⁶⁹..see DCEC op. cit p.9. It is stated that the Local Government (Councils) accounted for the highest number of investigations in respect of Government Departments

CHAPTER 5: BOTSWANA'S ANTI-MALADMINISTRATION REGIME

5.0 INTRODUCTION

In this chapter, the legal regime established to deal with maladministration in Botswana shall be examined. Firstly a brief historical background of the Botswana Ombudsman Institution which is the office created for the purposes of fighting maladministration will be given. Then some major concepts and theories pertaining to Ombudsman institutions at the international level as well as within the African context shall be examined. Thereafter an analysis of the Ombudsman Act 70 shall be made, with some comparison against generally accepted best practices for Ombudsman institutions . The chapter shall end with a conclusion.

5.1 HISTORICAL BACKGROUND TO THE ESTABLISHMENT OF THE OMBUDSMAN IN BOTSWANA

As already pointed out above, the Ombudsman is one of the institutions of good governance and one of the pillars of the National Integrity System (NIS). It is therefore a given that any efforts made towards establishing an Ombudsman office are meant to associate a

70. Op. cit Note 2

country with the principles of good governance. It is in this context that Botswana became a late entrant to the Ombudsman club.

The reason for the establishment of the Ombudsman in Botswana is traceable to the corruption scandals of the early 1990s which I have already discussed in chapter two above. These scandals showed how the existing institutions were unable to deal with incidents of corruption and maladministration. These scandals were well documented by the media and as a result became generally known at international level. This resulted in pressure on the government to follow the lead of the other countries in the region who had institutions such as the Ombudsman. It is therefore within this background that the creation of the DCEC first and then the Ombudsman in 1994 and 1995 respectively should be seen.

It is a paradox that although Botswana was always known for its good governance, it did not have institutions such as the Ombudsman which support good governance. This is despite the fact that calls for the establishment of the Ombudsman had been there since the 1970s as indicated by the ruling party's (Botswana Democratic Party) manifesto for

the 1974 elections,⁷¹ but then nothing happened. The 1982 Presidential Commission on Economic Opportunities⁷² also recommended the establishment of an office of a "Public Commissioner" to address complaints of inefficiency, delay, malpractices or government officialdom, still nothing happened. Botswana was surpassed by many African Countries to the establishment of the Ombudsman. Tanzania was the first African Country to establish the office in 1966, followed by Ghana, Mauritius and Zambia.⁷³ Some of these governments were not known for upholding the principles good governance. Botswana was even beaten to it by newly independent states, starting with Zimbabwe, then Namibia and finally South Africa.

The heightened clamouring for the Ombudsman institution in Botswana culminated in the holding of an International Seminar on the Feasibility of the Ombudsman Institution in Botswana on the 2nd and 3rd November 1993.⁷⁴ The seminar was organized by the Department of Political and Administrative Studies of the University of Botswana in Gaborone. The seminar was fittingly sponsored by the Norwegion Agency for Development Co-operation (NORAD) and the Swedish International Development Agency (SIDA). International and African scholars and practitioners, political parties, government representatives, non-governmental institutions and various interest groups attended.

71. See Official Report Hansard No 116, (part 3) weekly Parliamentary debates, meeting: 3-11 March 1995, where the Minister of Presidential Affairs and Public Administration stated this fact during the second reading of the Ombudsman Bill

72. Ibid

73. See Hatchard J, "The Institution of the Ombudsman in Africa with special reference to Zimbabwe", in International and Comparative Law Quarterly, Vol 35, 1986, p 255 at p256

74. See Ayeni V. and Sharma K. eds, Ombudsman in Botswana, Selected Papers Cases and Materials, Commonwealth Secretariat 2000 pp 134-137 and generally for some of the papers delivered at the seminar

In the opening session the Minister of Presidential Affairs and Public Administration made several observations including the fact that Botswana's rapid economic growth in the recent past had brought new challenges, new problems and increased demand on the governance process and that the democratic institutions have over the years proved resilient and generally effective. He stated as follows: "Nevertheless, it is probable that we now also need to devise new institutional strategies to complement existing ones. The wide acceptance of the Ombudsman institution and the fact that it has been incorporated in recent constitutional reforms in other countries requires that we in Botswana give serious consideration to it at this time."⁷⁵

After two days of deliberations, the seminar concluded, amongst other things, that the Government of Botswana should give urgent consideration to the establishment of an Ombudsman. One of the many recommendations of the seminar was couched as follows:

"while recognizing that different forms of the institution exist around the world, participants, nevertheless, recommended that Botswana gives strong consideration to:

75. Ibid at p.130

- (a) an independent Parliamentary Ombudsman supported by a Select Committee of Parliament;
- (b) establishing the independence of the office on arrangements identical to that of the judiciary;
- (c) a guaranteed tenure for the Ombudsman;
- (d) ensuring that whoever is appointed is a competent person who is non-partisan and has high integrity;
- (e) ensuring that the Ombudsman's jurisdiction is as wide as possible; and a guarantee of adequate resources for the office"⁷⁶

It was not long after the seminar that the Ombudsman Bill No 14 of 1994 was published and passed into law on the 6 April 1995. Its date of assent is the 18 April 1995. The Ombudsman Act No. 5 of 1995, as it shall be shown below, did not take on board the key recommendations of the seminar mentioned above. A golden opportunity to establish a superb institution was thus missed.

76. Ibid at pp 136-137

5.2 THE CONCEPT OF THE OMBUDSMAN INSTITUTION

The rationale for the Ombudsman institution was succinctly put by Professor Dirk Brynard ⁷⁷ in a paper he presented at the International Seminar on the Feasibility of Establishing an Ombudsman in Botswana referred to above.

He stated as follows:

"As a result of the rise of the administrative state in many countries, most administrative systems world wide have the authority to purposively give guidance, intervene in, and arrange the lives of citizens to the most minute detail. The phenomenon of the administrative state, therefore, creates a situation in which citizens are born and live in subordination to the authority of the administrative system which both serves and controls them at the same time. To add to this, citizens of different countries are often shocked by allegations in the media of alleged corruption and malpractice in the administrative system while on the other hand, public officials complain about the unfounded criticism that accompany such allegations. From this clearly stems the need for an independent and impartial third party intervention. It is argued that the office of Ombudsman can play a significant role in unraveling this public encounter." ⁷⁸

77. Op cit note 74 pp 44-51 at p.53, Professor Dirk Brynard is cited therein as Professor, Department of Public Administrative, University of South African, Pretoria, South Africa.

78. Ibid

DEFINITIONS AND ORIGINS

Ombudsman means officer or Commissioner in Scandinavian, “In its special sense it means a Commissioner who has the duty of investigating and reporting to Parliament on citizens complaints against the government”⁷⁹

Generally it is often thought that the origins of the Ombudsman institution are in Scandinavia. This association of the Ombudsman with Scandinavia is, however, due to its establishment in 1713 by the Swedish King Charles XI and its subsequent moulding into its modern form by the Scandinavians. Otherwise the first Ombudsman was seen in China over 2000 years back during the Ts'in Dynasty (221BC). The Koreans and the Romans also dabbled with it. The Swedish King aforesaid was however influenced by the Muslim form of the Ombudsman upon his return from exile in Turkey.⁸⁰ The Ombudsman institution in its modern form was uniquely Scandinavian until the 1960s when New Zealand introduced its first Ombudsman.

AN INTEGRITY PILLAR

The classical Ombudsman is concerned with the elimination of maladministration. To a certain degree, maladministration starts from corruption in public administration. To this extent, the Ombudsman will be involved with fighting corruption.

79. Wade H. and Forsyth C, Administrative Law, 8th edition 2000, Oxford University Press p88

80. See TI op.cit note 48 chapter 2

The Ombudsman is part of the national integrity system as it checks the abuse of power by agencies and branches of government. It has been observed that the office of the Ombudsman has to have certain attributes if it is to be seen as an effective integrity pillar. These are: ⁸¹

- (a) Sufficient awareness of the existence of the office by the public;
- (b) Adequate budget and staffing;
- (c) Non-partisan manner of appointment of the Ombudsman;
- (d) Protection from arbitrary removal of the office holder by the government;
- (e) Respect of the office by the executive and action on its reports;
- (f) Ease of access by complainants;
- (g) Provision for anonymous complaint mechanisms where there is fear of reprisals.

81. Ibid

KEY FEATURES

There are certain key features of the ombudsman institution that need to be highlighted. These are appointment, tenure, jurisdiction operational linkages and enforceability of recommendations.

APPOINTMENT OF THE OMBUDSMAN

The original concept of the institution was that the Ombudsman has a link with the legislature. In Scandinavian countries, the Ombudsman is elected by Parliament. In the United Kingdom, the Ombudsman, who is called the Parliamentary Commissioner for Administration is appointed upon the recommendation of Parliament.⁸²

African countries have generally departed from this tradition in that it is the executive in the form of the President who appoints the ombudsman. In most African countries, the appointment is the sole responsibility of the President whilst in others it is the President after consultation, as it is the case in Botswana as shall be fully shown below. In Namibia, the Ombudsman is appointed by the President on the recommendation of the Judicial Service Commission.⁸³ In South Africa the Public Protector is appointed by the President on the recommendations of the National Assembly after nomination by a committee of the National Assembly proportionately composed by all parties represented in the Assembly and such resolution must be

82. See Hatchard *op.cit* at p. 257

83. See Article 90 (1) constitution of the Republic of Namibia

approved by at least sixty percent of the members of the National Assembly.⁸⁴ South Africa therefore complies with the original concept.

The reasons for this departure by African Government from the standard manner of appointment ombudsman are several. Some of these are the fact that the position of the ombudsman is by its very nature politically sensitive because of its wide powers to investigate the workings of government and as such some executive control of the office is such a safety mechanism, another reason maybe the reluctance of the executive to allow the distribution of power to other bodies, which might undermine the position of head of state. This approach by African states ignores the fact that presidents may also be guilty of abuse of power and corruption.

TENURE

The term of office for the Ombudsman should be long enough to guarantee the independence of the office. It has been observed that “the personal prestige of an Ombudsman is most important to the success of the organization and this can only be developed over a long period. Accordingly the possibility of extending the term of office (subject to the right to resign and to removal for cause) should be seriously considered”⁸⁵

84. See Section 193, South African Constitution 1996, which can be found at www.info.gov.za/documents/constitution/1996

85. See Hatchard op.cit at p 269

Generally, a minimum of five years which can be renewed has been seen to be reasonable. On the other, hand a non-renewable longer term of e.g seven years as is the case in South Africa has been found to be appropriate. Periods of three years and four years are considered to be too short ⁸⁶. The removal of the ombudsman from office must not be a simple matter. It should be only on grounds such as misconduct, incapacity and incompetence and only after a credible finding to that effect. In South Africa, the Public Protector (Ombudsman) can only be removed after a committee of the National Assembly has found on the grounds of removal being misconduct, incapacity or incompetence and even then only after at least two thirds of the members of the National Assembly adopt the resolution of removal. ⁸⁷ In Botswana tenure of the Ombudsman is four years and the Ombudsman Act does not refer to any renewal of such term.⁸⁸ The Ombudsman in Botswana can only be removed on the same grounds as those of a High Court judge which are incapacity, incompetence or misbehavior and only upon investigation by a tribunal consisting of persons who have held high judicial office. ⁸⁹

86. See Fombad C. The Enhancement of Good Governance in Botswana: A Critical Assessment of the Ombudsman Act, 1995, in *Journal of Southern African Studies* volume 27, Number 1, March 2001 p.57 at p.62.

87. South African Constitution op.cit, section 194

88. See Ombudsman Act, op.cit section 2 (5)

89. See Ombudsman Act, op.cit section 2 (6) as read with Constitution of Botswana op.cit section 97.

JURISDICTION

The classical Ombudsman has a wide jurisdiction which empowers him/her to investigate decisions and actions that are unreasonable, oppressive or unjust. These powers go further to cover investigations of violations of fundamental human rights. Almost all the countries give the Ombudsman these wide powers. The Polish Ombudsman has extensive jurisdiction and is empowered to investigate, over and above administrative bodies, whether the actions of public bodies, organizations and institutions have contravened basic principles of justice. He can request the commencement of civil proceedings and join any proceedings already commenced; can request the initiation of criminal proceedings; appeal against administrative decisions; enter extra-ordinary appeals against any judgment; apply to the legislature to change legal provisions that impinge on the rights and freedoms of citizens. He has many more other powers.⁹⁰

Amongst the developed countries, Britain is the only one that confines the Ombudsman jurisdiction to investigation of complaints of maladministration. The Botswana Ombudsman Act, as it shall be shown below, blindly followed the British Parliamentary Commissioner Act of 1967 which Act came out the way it did due to certain political reasons which resulted in a compromise.

90. Ssee Letowska E. The Polish Ombudsman, in *International and Comparative Law Quarterly*, volume 39, 1990, part 1 p.206

It came at a time when there was a change of government from the Conservative Party which had been very much against establishing the Ombudsman institution, to the Labour Party which had promised the Ombudsman Institution in its electoral campaign but then encountered some internal resistance.⁹¹ Botswana therefore ended up with a piece of law which was unsuitable for its own circumstances, in spite of the international workshop discussed above.

OPERATIONAL LINKAGES

Ombudsman institutions are generally established to operate within a system of checks and balances. In most cases Ombudsman institutions are established to deal with abuse of administrative power by the executive arm of government. International best practice therefore sees the Ombudsman as a Parliamentary Officer who reports his/her functions to Parliament, generally on an annual basis. The Ombudsman therefore has to be linked to parliament and in most countries this linkage is through a select committee of Parliament. This select committee also serves as the Ombudsman's supervisor. Infact the British Ombudsman acts only on complaints received from members of the House of Commons and does not therefore receive complaints directly from the public. The Ombudsman then reports to the member who made the complaint and also to the Parliamentary Select Committee on the Parliamentary Commissioner (Ombudsman).

91. See Lewis N. and Borkinsaw P. When Citizens Complain, Reforming Justice and Administration 1993

In Botswana the Ombudsman reports to Parliament through the President but the whole arrangement seems not to be working properly as none of his reports are ever debated in Parliament. This shall be discussed in more detail below when an analysis of the Botswana Ombudsman Act is made.

ENFORCEABILITY OF RECOMMENDATIONS

Generally the Ombudsman does not have executive powers. This however differs from country to country. Speaking of the British Ombudsman, it has been observed that his "effectiveness derives entirely from his power to focus public and parliamentary attention upon citizen's grievances. But publicity based on impartial inquiry is a powerful lever"⁹². It has also been said that the Ombudsman's influence is based upon his objectivity, competence, superior knowledge and prestige and that when these are un-persuasive, his main weapon to secure remedial action is publicity including the use of the press⁹³.

In Countries like Namibia, Poland, and Malawi, the Ombudsman can seek interdicts through the Courts for the termination of offending action. Where criminal activity comes out during investigation, the Namibian and Malawian Ombudsmen can recommend prosecution of the offenders.⁹⁴ On the other hand the enforcement procedures in the Botswana Act are weak and inadequate. This shall be fully demonstrated below.

92. See Wade and Fosyth *opcit* at p. 87

93. See Ayeni and Sharma *opcit* at p.47

94. See Fombad C. *op cit* at p.74

5.4 ANALYSIS OF THE OMBUDSMAN ACT

The background to the enactment of the Ombudsman Act has already been given above. The Act was passed by the National Assembly on the 6 April 1995 and assented to on the 18 April 1995. The date of commencement was, however, the 1 December 1997.⁹⁵ The Act has therefore been in operation for a period of eight years only. In its Preamble, it is stated that it is “ An Act to make provision for the appointment and functions of an Ombudsman for the investigation of administrative action taken on behalf of the Government, and for purposes connected therewith”. The Act is fairly short, being 7 pages and consisting of 15 sections.

ESTABLISHMENT AND APPOINTMENT OF THE OMBUDSMAN

The Ombudsman is created by section 2 (1) which states that “For the purpose of conducting investigations in accordance with the provisions of this Act there shall be appointed an officer, to be known as the Ombudsman”. Section 2 (2) states that “The Ombudsman shall be appointed by the President after consultation with the Leader of the Opposition in the National Assembly.”

95. For the date of commencement see the Ombudsman Act Cap 02:12, volume 1, Laws of Botswana, 2002 edition

There is no specified qualification for appointment to the office of Ombudsman, however members of Parliament and local authorities or those who are candidates for election to the said two bodies are disqualified. This latter provision means that anyone can be appointed to the office of Ombudsman. Minimum qualifications, in terms of education or work experience has to be stated, otherwise there is a risk of unsuitable appointments being made. It is hoped, however, that the standard set by the first appointee, being a lawyer of some seniority who once was an Acting Judge, will be maintained.

There are several issues and concerns that arise from the provisions of the Act that deal with the appointment of the Ombudsman. These are as follows:-

Although the process and procedure of appointing an Ombudsman differ from country to country, the underlying feature of the institution is that it carries out functions on behalf of Parliament or the legislature. It is therefore inappropriate to have the President appoint the Ombudsman. It goes without saying that in situations like Botswana, the Ombudsman can easily identify himself with his appointing authority, the President, and not Parliament, and yet his mandate is to investigate administrative action taken on behalf of Government.

It is necessary for Parliament to have a significant role in the appointment of the Ombudsman. It is suggested that the law should be amended so that Parliament should be the one to recommend to the President for appointment a suitable person after an appropriate Parliamentary select committee has gone through the selection process. I conducted an oral interview with the

first and current Ombudsman, Mr. L.A. Maine, on the 26 January 2005 and I put to him the following question:

Q. "The practice in Africa of having the President appoint the Ombudsman is frowned upon as compromising the Ombudsman's independence. Your comment?"

A. "The method of appointing the Ombudsman should be a Parliamentary process like in South Africa, even though the President eventually rubber stamps the process. It is a Parliamentary office. An appointment which is at the behest of the executive is open to all kinds of shortcomings."

The Current Ombudsman has stated in various fora that his office should be clearly made a Parliamentary office and that Parliament should be the one to appoint the Ombudsman with the President rubber stamping such an appointment ⁹⁶.

The Act states that the President shall appoint the Ombudsman after consultation with the Leader of the Opposition in the National Assembly. This provision is unclear in that the nature of such consultation is not stated.

96. See Anyeni and Sharma *op cit* at p. 58

The role of the Leader of the Opposition in such consultation is unclear e.g. what happens if the Leader of the Opposition does not agree with the President's intended appointee; does he have the power of veto? The likelihood is that in the event of disagreement between the President and the Leader of the Opposition on the appointee to the office of Ombudsman, the President's wishes would prevail in view of the constitutional powers he has. The constitution states that in exercising his powers, the President is not obliged to follow advice tendered by any person or authority.⁹⁷

TENURE OF THE OMBUDSMAN

Section 2 (5) states that "subject to the provisions of subsection (6), a person holding the office of Ombudsman shall vacate office at the expiration of four years from the date of his appointment".

Subsection 6 of section 2 states that "the provisions of subsections (2) to (5) of section 97 of the constitution (which relate to removal of High Court Judges from office) shall, with such modifications as may be necessary, apply to the office of Ombudsman".

What emerges from the above is that the Ombudsman is appointed for a period of 4 years and shall vacate his office after the expiration of such period. It is not stated whether the appointment can be renewed and if so for what further period. It would appear that the intention of the legislature is

97. Section 47 (2) of the Constitution of Botswana states that "in the exercise of any function conferred upon him by the consideration or any other law, the President shall unless otherwise provided, act in his own deliberate judgment and shall not be obliged to follow the advice tendered by any other person or authority."

that there should be no renewal of the appointment after 4 years, otherwise such renewal should have been clearly stated. The incumbent Ombudsman had his appointment renewed for another four year period. An interpretation of the Act shows that the second appointment is unlawful. Although some commentators, including the incumbent Ombudsman in the aforementioned interview, say that the Act is not clear on renewal, the correct position is that the Act does not provide for renewal.

One further observation that can be made on the tenure is that if the law is to be strictly applied, the Ombudsman must hold office for only four years. Four years is rather a short period and for an Ombudsman to get to grips with his job and further build his profile and reputation sufficiently so that the government machinery can feel his weight and authority a longer period is suggested. Furthermore, given the slowness of the wheels of the bureaucracy, which is characterized by low productivity, the four years may end before he can finalize some of the cases he started to investigate at the beginning of his appointment. Maybe six to seven years, non renewable, would be much better. The South African Public Protector (Ombudsman) serves for a non-renewable seven year period.

Section 2 (6) as read with section 97 of the constitution gives the Ombudsman security of tenure during his period of appointment. The Ombudsman can be removed from office under the same procedures as apply to High Court Judges as set out in section 97 of the constitution. The procedure makes it difficult and cumbersome to remove a High Court Judge. Section 97 (2) of the constitution states that a Judge of the High Court can 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) or for misbehavior”.

The compulsory procedure that has to be followed before the removal of Judge of the High Court is set out in section 97 (3) of the Constitution. This provides that an investigation of the Judge to be removed has to be done by a tribunal appointed by the President made up by a chairman, and not less than two other members, who hold or have held high judicial office. Only after the said tribunal recommends removal, will the President remove the Judge. All these procedures are the ones that apply to the removal of the Ombudsman. It therefore follows that the President cannot just decide on the spur of the moment and remove the Ombudsman. This is a good provision that will ensure that the Ombudsman can perform his/her functions fully without fearing for his/her job.

JURISDICTION OF THE OMBUDSMAN

Matters that are subject to investigation by the Ombudsman are set out in section 3 of the Act. Those that are excluded are set out in section 4 of the Act. In order for a full appreciation of the powers and restrictions of and on the Botswana Ombudsman, the two sections shall be fully set out. They read as follows:-

“ 3 (1) subject to the provisions of this section, the Ombudsman may investigate any action taken by or other authority to which this Act applies, being 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 the 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; and**
 - (c) in any other 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 such injustice.**
- (2) Except as provided in this Act, the Ombudsman shall not conduct an investigation into any action in respect of which the person aggrieved has or had:-**
- (a) a right of appeal, reference, or review to or before a tribunal constituted by or under any law in force in Botswana; or**
 - (b) a remedy by way of proceedings in any Court of law.**
- (3) Notwithstanding the provisions of subsection (2), the Ombudsman-**
- (a) may conduct an investigation notwithstanding that the person aggrieved has or had such a right or remedy if he is satisfied**

that in the particular circumstances it is not reasonable to expect him to resort or to have resorted to it;

- (b) shall not in any case be precluded from conducting and investigation in respect of any matter by reason only that it is open to the aggrieved person to apply to the High Court for redress under section 18 of the Constitution (which relates to redress for contraventions of the provisions for the protection of fundamental rights and freedoms)”

- “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 organization;
 - b. action taken for the purposes of protecting the security of the state or of investigating crime, including action taken with respect to passports for either of those purposes:-
 - c. the commencement or conduct of civil or criminal proceedings in any Court;
 - d. action taken in respect of appointments to offices or other employment in the service of the Government of Botswana or appointments made by or with the approval of the President or any Minister, and action taken in relation to any person as the holder or former holder of such office, employment or appointment;

- e. action taken in respect to orders or directions to the Botswana Police Force or Botswana Defence Force or member thereof;
- f. the grant of honors, awards or privileges within the gift of the President;
- g. action taken in matters relating to contractual or other commercial dealings with members of the public other than action by an authority mentioned in section 3 (6);
- h. action taken in any country outside Botswana by or on behalf of any officer representing the Government of Botswana or any other officer of that Government;
- i any action which by virtue of any provision of the Act or any other enactment may be enquired into by a court of law”.

Before a discussion of some of the above quoted provisions, it has to be said that the Botswana Act was framed along the much criticized British Parliamentary Commissioner for Administration Act, 1967. It has therefore replicated some of the shortcoming of the British Act, such as the many restrictions on the Ombudsman and the unclear language, which renders the jurisdiction of the Ombudsman unclear and uncertain. Section 3 of the Botswana Act is an exact replica of the British Act aforesaid, save that the Botswana Act allows for direct reporting to the Ombudsman over and above reference of matters to the Ombudsman by the President, Minister or Members of Parliament with the complainant's consent.

A close reading of sections 3 and 4 of the Act reveals several shortcomings that render the jurisdiction of the Ombudsman uncertain and cumbersome. Some of these are as follows:-

(a) section 3 (1) states that the Ombudsman can investigate action taken on behalf of a government department or "other authorities." This has resulted in instances where some organizations which the Ombudsman tried to investigate have questioned his powers to investigate them. In my aforementioned interview with the Ombudsman he informed me that when he tried to look into the workings of the National Development Bank, which is a government parastatal created in terms of an Act of Parliament and is wholly owned by Government, the same bank said that he had no jurisdiction over it. He believes that such a problem can be resolved by making regulations which will list bodies or authorities that are within his jurisdiction. In terms of section 15, the Minister responsible can make regulations for the purpose of carrying into effect the provisions of the Act. So far no regulations have been promulgated.

(b) Section 3 (1) (a) states that the Ombudsman investigates complaints where a member of the public claims to have suffered injustice as a result of maladministration. This provision emanates from the British Act. Maladministration is not defined in the Botswana Act, neither is it defined in the British Act. It follows that should there be maladministration but no injustice, the Ombudsman has no jurisdiction. The use of the term 'maladministration' has caused in lot of frustration in Britain and is seen as restrictive. This led to the British Justice Committee to state as follows in 1977: "we propose that the Parliamentary Commissioner should no longer be limited to investigating complaints about maladministration". He is more restricted than any other Ombudsman in this respect The

Scandinavian Ombudsman are not limited to maladministration.
Neither is the French Mediateur”⁹⁸

There is, however, a view that by not defining maladministration the legislature was intent on allowing the Ombudsman to develop the meaning of the concept over several cases. In Britain, a certain Mr Crossman, who was an official of the Government spoke in Parliament in respect of what amounts to ‘maladministration’, he is reported to have said that it covers “bias, neglect, inattention, delay, incompetence, ineptitude, perversity, turpitude, arbitrariness and so on”⁹⁹

Lord Denning M.R, as he then was, also had this to say about the matter: “But Parliament did not define “maladministration”. It deliberately left it to the Ombudsman himself to interpret the word as best he could: and to do it by building a body of case law on the subject”¹⁰⁰

98. Lewis and Birkinshaw op .cit at p.126

99. Wade and Forsyth op. cit at p.93

100. R v Local Commissioner for Administration for the North and East Area of England, Exparte Bradford Metropolitan City Council [1979] QB 287- Court of Appeal, at p.311

(c) A reading of sections 2 (a) and (b) together with section 4 (i) shows that the Ombudsman cannot investigate a complaint wherein in the aggrieved person has the right to be heard by a tribunal or a court of law or a complaint which may be enquired into by a court of law. The High Court of Botswana has an unlimited jurisdiction to hear any matter regardless of the jurisdiction of other courts or tribunals. A straight interpretation of those provisions would leave the Ombudsman with nothing to investigate. This is obviously an absurdity which cannot have been intended by the legislature. The Act therefore needs to be amended to remove these absurdities.

(d) Section 3 (3) (b) is a roundabout way of giving the Ombudsman jurisdiction on issues of human rights violations. It would appear that this subsection, read with section 3 (1) suggests that the Ombudsman can investigate human rights violations so far as they relate to maladministration. There is no clear provisions that empower the Ombudsman to investigate abuses and violations of human rights. In terms of section 18 of the Constitution, any person who claims violation or abuse of his human rights can approach the High Court for redress. Litigation before the High Court is expensive and subject to technical procedures associated with court processes. It is therefore not affordable to a great majority of people who do not have financial resources to engage lawyers. It is therefore suggested that the Act must be amended to give the Ombudsman a clear human rights mandate. The Namibian Ombudsman is specifically empowered by section 91 (a) of the Namibian Constitution to investigate violations of fundamental rights and freedoms.

- (e) In terms of section 4 (d) of the Act, the Ombudsman is excluded from investigating complaints of maladministration relating to personnel matters in the public service. This exclusion has not stopped aggrieved civil servants from making such complaints. Infact complaints of this nature are very many. In his first report, which was for the period 1997/98, the Ombudsman had this to say on the exclusion.

“ 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 my jurisdiction in terms of section 4 (4) of the Act. Indeed certain members of Parliament have expressed surprise directly to me about such jurisdictional exclusion. The ratio of complaints emanating from the Public Service concerning employment and appointments as compared with others with which the office of the Ombudsman has jurisdiction is far too disproportionate”.¹⁰¹

101. The Annual Report By the Ombudsman Public Protector Mosireletsu in respect of the Period 1997/98, Government Printer, Gaborone , p8

4. **Section 4 (g) excludes from the Ombudsman's jurisdiction contractual or commercial matters between Government and members of the public. In Botswana, Government is the main consumer of goods and services. Government procurement of these goes into millions of Pula in value. Maladministration can arise out of contracts between government and individuals or companies. The Ombudsman, in his aforementioned report, alludes to this exclusion, and laments the fact that parties are denied mediation, which is one of the recognized procedures employed by the Ombudsman which would be at no cost to the parties.**¹⁰²

RESULT OF INVESTIGATION

Section 8 of the Act states as follows:-

“8.(1) After conducting an investigation under this Act, the Ombudsman shall send a report of the results of the investigation to the principal officer of the department or authority concerned and if he is of opinion that injustice has been caused to the person aggrieved in consequence of maladministration, he shall make such recommendations as he thinks fit for remedying the injustice caused.

- (2) Where the Ombudsman has made a recommendation under subsection (1) and within a reasonable time thereafter no action has been taken which appears to him adequately to remedy the injustice, he may lay before the National Assembly a special report”

102.

See 1997/98 Annual Report, op. cit p.9

The above section clearly shows that the Ombudsman has no executive powers. He only makes recommendations for the remedying of an injustice if such has occurred. If nothing is done about his recommendations, then he may lay a special report before the National Assembly. The political application of this provision is discussed below

In the interview of the 26 January 2005 mentioned above, I put the following question to the Ombudsman:-

“ Q. What has been the level of compliance with your recommendations?”

“A. Exceptionally high. The few that are outstanding are being pursued. The exception is the one relating to the Vice President. This involves the only special report I have made”

The above reply shows that there is in general good compliance with the Ombudsman’s recommendations. However, the issue of the report relating to the Vice-President, which shall be discussed below, has brought into sharp focus, the weakness of the Act regarding the Ombudsman’s linkage with Parliament. This shall also be shown below.

THE ISSUE OF THE VICE –PRESIDENT

During 2000, the Ombudsman investigated complaints from the Botswana Congress Party on alleged irregularities of public officers accompanying the Vice President on political party activities of his party. He investigated this together with the public concerns on the Vice President flying military

aircraft when he was no longer a member of the Defence Force. At the end of his investigation, he recommended that public servants should not accompany the Vice- President to his political rallies and that it was also inappropriate for the Vice President to fly military aircraft. These recommendations were in order that the relevant laws and regulations governing the two issues were not violated.¹⁰³

The Ombudsman's recommendations on the two issues seem not to have been complied with. In his annual report for 2001/2002 dated 3 July 2003, the Ombudsman states as follows:-

“The Report (which is a public document) and the recommendations therein were submitted in April 2001 to His Excellency President Festus Mogae. Apart from hearsay evidence from a private radio station, I have so far not received any response. Twenty Six (26) months has gone by following submission of the Report. I have in the result, invoked section 8.2 of the Ombudsman Act, which reads thus:-

“Where the Ombudsman has made a recommendation under section (1) and within a reasonable time thereafter no action has been taken which appears to him adequate to remedy the injustice, he may lay before the National Assembly a Special Report.”

103. See Ombudsman, Republic of Botswana, Report In terms of Section 8 (1) of the Ombudsman Act of 1995 dated 4 April 2001.

The Special Report was thus sent to the Minister of Presidential Affairs on 27 June 2002 for the purpose of acting in accordance with the above provision. It was sent to the Minister for he is charged with the responsibility of tabbling all reports from extra Ministerial Departments including my office. At the time of writing this Annual Report, the Special Report had not been submitted by the Minister to Parliament. My statutory duties are exhausted.”¹⁰⁴

In the interview of the 26 January 2005, I put the following question to the Ombudsman which he answered as appears hereunder:-

“Q. Your recommendations in respect of the Vice President flying military air craft has not been complied with, how do you feel about this and why has it not been complied with?”

“A. My own personal comment is that it is a very poor reflection on good governance because if our leadership does not lead by example particularly in that the Ombudsman does not have executive powers, it can send a poor signal to the rest of the civil service that the Ombudsman is a non-entity. It touches at the very heart of the institution. We were not even engaged in this matter. I cannot even say I was wrong.”

104. See Ombudsman, Mosireletsu, Public Protector Annual Report 2001/2002, pp 5-6

What the above answer shows is that the Ombudsman has been frustrated in the performance of his duties due to the weaknesses in the Act. The Special Report has to be laid before Parliament by the Minister. The Minister has failed or refused to do so. The law is silent on what has to be done if the Minister fails to do what the Act says. As it is, there can only be speculation as to why the Special Report has not been laid before Parliament. It would appear that the only plausible reason is that the President and the Vice President as well as the cabinet do not want the Special Report to be debated by Parliament as it may embarrass the executive. There appears to be a conflict of interest as far as the Minister is concerned.

This issue more than amply demonstrates the need to have a clear relationship between the Ombudsman and Parliament and the need to de-link the Ombudsman from the President. It shows that there is a need to have a Parliamentary select committee to which the Ombudsman can refer matters to for appropriate action. This episode is indeed a serious indictment on Botswana's aspirations on good governance.

SUMMARY

It is very odd that Botswana should have passed an Ombudsman Act based on an old fashioned and restrictive British Act at the time and age when more progressive pieces of legislation on the subject were the order of the day, the example being Namibia, and South Africa. The Ombudsman Act therefore needs major amendments which should include the following:-

- (a) Removing the unnecessarily many exclusions to the Ombudsman's jurisdiction;**
- (b) Giving the Ombudsman power to investigate human rights violations and abuses;**
- (c) Making Parliament the Ombudsman's appointing authority;**
- (d) A Parliamentary Select Committee be set up to serve as a link between the Ombudsman and Parliament and also to ensure that his recommendations are implemented.**
- (e) Making the procedure of placing the Ombudsman's reports before Parliament very clear and unambiguous .**
- (f) Making the Ombudsman's tenure longer and non-renewable.**

CHAPTER 6: CONCLUSION

The challenges posed by the demands of good governance are immense. Such demands increase in tandem with the ever changing global standards of good governance. Botswana cannot therefore afford to be content with the old accolades that it is a shining example of democracy in Africa. Botswana actually now needs to catch-up with newer democracies such as South Africa and Namibia. These democracies have more transparent institutions and structures of good governance which make Botswana appear backward and conservative.

Botswana, however, remains a good performer in Africa when it comes to perceptions about corruption. This is shown by the good ratings that Botswana receives from Transparency International. The challenge for the Botswana Government is that it should stop singing its own praises, as it often does, as the country should be content only with a clean record such as has been achieved by countries like Finland.

It is therefore important that major reforms of the Corruption And Economic Crime Act and the Ombudsman Act have to be made. The most important of these amendments will be those geared towards making the appointment of the Director of the DCEC and the Ombudsman independent from the executive in line with international best practice. Also in line with international best practice, the two institutions should report to Parliament instead of the executive so that there will be no suspicion of cover-ups where top members of the executive are involved in corruption and

maladministration. Such suspicious only serve to undermine the integrity of the same institutions.

It is most important that the integrity and stature of the Ombudsman office be enhanced by removing the many restrictions on his jurisdiction, in particular in respect of personnel matters in the public service which he continues to receive in large numbers only to advise the complainants that he has no jurisdiction. The procedures of laying the Ombudsman's reports before Parliament should be made clear and straightforward by an appropriate amendment. After all the only power that the Ombudsman has is public pressure which can be brought to bear on guilty parties when Parliament and the press discuss acts of maladministration.

Should the aforementioned reforms not be made sooner, the perceptions that the DCEC and the Ombudsman office were only established as a public relations exercise aimed at appeasing the Western World and institutions such as the IMF and the World Bank, and not as a genuine effort to fight corruption and maladministration, will persist. The result will be further erosion of the public confidence in the DCEC and the Ombudsman despite some good work that may have been done and continue to be done by the two organizations.

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