Ouster Clauses, Judicial Review and the Botswana Ombudsman: A Need Reform?

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ABSTRACT

The role of the Ombudsman is to ensure that the government fulfils its legal obligations to provide services to the citizenry as required by set laws and policies. The Ombudsman achieves this role through education, investigation of reports of violation of set laws and policies and by facilitating the implementation of recommended remedial action where injustices are found to have occurred. It is not disputable that the Ombudsman plays a pivotal role in supporting democracy in any given country. The existence of the Ombudsman institution has however brought with it issues which continue to be debated globally. One of such issues is whether the courts of law can subject Ombudsman decisions to judicial review where one of the parties to an investigated matter is aggrieved by such a decision. Some countries have legislated to bar the courts from reviewing decisions of their Ombudsman offices through ouster clauses. Some countries do not have such clauses which purport to oust the courts from reviewing ombudsman decisions and indeed they have cases in which decisions of the Ombudsman were reviewed by courts of law. This article asserts that courts of law have original inherent jurisdiction to review ombudsman decisions. There is case law to the effect that the courts will review the decision of any legally constituted body despite the existence of an ouster clause in the legislation establishing such a body. Courts have established that they will review the decisions of any statutory organ on four grounds, being: informality of procedure, ultra vires, misuse of power bona fide and misuse of power mala fide. This article concludes with a call for the amendment of the Botswana Ombudsman Act particularly to repeal the ouster clause in Section 9 (1) of the Ombudsman Act. The clause is a waste of the legislature's ink as it cannot deter the Courts from reviewing a decision of the Ombudsman.

1. INTRODUCTION

The subjection of ombudsman decisions to judicial review is a contested issue in ombudsman circles. In some countries around the world, ombudsman decisions have been exposed to judicial review. The United Kingdom (UK) and South Africa are such examples.[1] The UK and South Africa are chosen as case studies because they are commonwealth member states just as Botswana is. In the UK, the decision of the Ombudsman was challenged in *R* v *Commissioner for Local Administration, ex parte Croydon London Borough Council and Another*[2] while in South Africa, the decision of the Ombudsman was challenged in *M & G Media Limited and Others* v *Public Protector*.[3]

On the flip side, it is undoubtedly desirable to some within ombudsman circles that that court process should be excluded completely from the Ombudsman proceedings. Botswana is such an example. The Parliament of Botswana has included an ouster clause in the Ombudsman Act, to prevent judicial review of ombudsman decisions. Section 9 (1) of the Ombudsman Act[4] provides that ombudsman proceedings shall not be questioned in a court of law. Currently, there has never been a case before the Courts of Botswana in which the applicant sought judicial review of a decision taken by the Ombudsman.

This article studies the legislation which establishes the Ombudsman institutions in the UK and South Africa. The article assesses whether such statutes have provisions which deliberately allow judicial review of ombudsman decisions. If there are no such provisions, the basis upon which the mentioned cases were brought before the courts will be investigated. This article further anticipates how Botswana courts will react if a decision of the Ombudsman's was to be challenged in a court of law. The anticipation is premised on cases involving statutes which have ouster clauses which have been adjudicated before the High Court of Botswana previously.

The subjection of ombudsman decisions to judicial review has been

1 Reference may be heard to the decision of the Constitutional Court in South Africa on the legal effects of the power of the public protector and confirming reviewability of decisions of the Public Protector in *Economic Freedom Fighters* v *Speaker of the National Assembly and Others; Democratic Alliance* v *Speaker of the National Assembly and Others* [2016] ZACC 11.

2 [1989] 1 ALL ER 1033.

3 [2010] 1 All SA 32 (GNP).

4 (Cap 02:12) (Act No. 5 of 1995).

suggested as one of the ways of evaluating the performance of any ombudsman office. In that regard, this article will finally assesses whether judicial review, based on the cases that will be studied, can be endorsed as a performance tool for ombudsman offices. The findings will be used in analysing whether the statutory exclusion of judicial review of Ombudsman proceedings in Botswana is proper and if it is found not to be proper, to investigate whether there is need for legislative reform in that regard.

2. DEFINITION OF THE OMBUDSMAN

The Ombudsman has been defined as "an office provided for by the constitution or by action of the legislature or parliament and headed by an independent, high - level public official who is responsible to the legislature or parliament, who receives complaints from aggrieved persons against government agencies, officials and employees and who acts on his own motion, and who has the power to investigate, recommend corrective action and issue reports."[5]

The by – laws of the International Ombudsman define the term "ombudsman" in a way that incorporates the distinctive features of the institution. They define the Ombudsman as:

> "The office of a person whether titled Ombudsman, Parliamentary Commissioner or like designation who has been appointed or elected pursuant to an Act of a legislature and whose role includes the following characteristics:
> 1) To investigate grievances of any person or body of persons concerning any decision or recommendation made, or any act done or omitted, relating to a matter of administration, by an officer, employee or member or committee of members of any organization over which jurisdiction exists;
> 2) To investigate complaints against government and semi government departments and agencies;
> 3) A responsibility to make recommendations resulting from investigations to organizations under jurisdiction;
> 4) To discharge the role and functions of an officer of the legislature or on

5 International Bar Association Resolution, Vancouver, 1974.

behalf of the legislature in a role which is independent of the organizations over which jurisdiction is held;

5) To report to the legislature either directly or through a Minister on the results of its operations or on any specific matters resulting from an investigation."[6]

Further, according to Caiden, *et al.*:

"The Ombudsman is not a judge or a tribunal, and he has no power to make orders or to reverse administrative action. He seeks solutions to problems by a process of investigation and conciliation. His authority and influence derive from the fact that he is appointed by and reports to one of the principal organs of state, usually either parliament or the chief executive."[7]

Although the word "ombudsman" has been widely used by legislators and adopted in many countries as a title for the person who carries out the duties of ombudsman office or heads such office, numerous other titles and designations are used to express the characteristic of the institution and the role it plays.[8] For example, the Ombudsman in Spain and other Spanish speaking countries like Argentina, Columbia and Peru is called "Defensor del Pueblo (the people's defender)"; in South Africa it is the "Public Protector"; in Hungary, it is the "Parliamentary Commissioner for Human Rights"; in Russia it is the "High Commissioner for Human Rights"; in Poland it is the "Commissioner for Civil Rights Protection"; in Ghana it is the "Commissioner for Human Rights and Administrative Justice"; in France and some French speaking countries such as Mauritania, Senegal and Gabon it is "Mediateur de la Republique"; in Zambia it is the "Inspector General"; in Tanzania where it is called the "Permanent Commission of Inquiry"; in Western Australia and Queensland it is the "Parliamentary Commissioner for Administrative Investigations" and some countries have chosen names that are unique only to them, for example, in Taiwan, it is "Control Yuan"; in Pakistan it is "wafaqi Mohtsasib" and in New Zealand the

6 International Ombudsman Institute, Membership By-laws (International Ombudsman Institute), Edmonton, Alberta, 1978.

7 G. E. Caiden, *et al*., "The institution of the Ombudsman" in G. E. Caiden (ed), *International Handbook of the Ombudsman: Evolution and Present Function* (1983) , London, Greenwood Press, (1983), England, p. 13.

8 R. Gregory and P. Giddings (eds) "The Ombudsman Institution: Growth and development" in *Righting Wrongs* , Amsterdam, IOS Press, 1981), pp. 4-5.

Maori term is "the *Kaitiaki Mana Tangana*".[9]

The functions of the Ombudsman remain the same despite the use of different titles to denote the office. Article 3 of International Ombudsman Institution (IOI) Constitution provides that:

> "A public institution whether titled Ombudsman, Mediator, Parliamentary Commissioner, People's Defender, Human Rights Commission, Public Complaints Commission, Inspector General of Government, Public Protector or like designation, shall be eligible to become an Institutional member provided it exercises fully the following functions and meets the following criteria: it is created by enactment of a legislative body whether or not it is also provided for in a Constitution; its role is to protect any person or body of persons against maladministration, violation of rights, unfairness, abuse, corruption, or any injustice caused by a public authority; it does not receive any direction from any public authority which would compromise its independence and performs its functions independently of any public authority over which jurisdiction is held; it has the necessary powers to investigate complaints by any person or body of persons who considers that an act done or omitted, or any decision, advice or recommendation made by any public authority within its jurisdiction has resulted in maladministration and violation of rights; it has the power to make recommendations in order to remedy or to prevent maladministration and violation of rights ; and, where appropriate, to propose administrative or legislative reforms for better governance; it is held accountable by reporting publicly to the legislature or other appropriate authority; its jurisdiction is national, regional or local; its jurisdiction applies to public authorities generally or is limited to one or several public authorities, or to one or several public sectors; and its incumbent or incumbents are appointed or elected, according to the relevant legislative enactment, for a defined period and can only be dismissed, for cause, by the legitimate and competent authorities."[10]

9 *Ibid.*

10 Article 6: Membership, Sub-section b) Institutional member. Available at http://www.law.ualberta.ca/centres/ioi/docs/IOI_Bylaws.pdf.

3. THE ROLE OF THE OMBUDSMAN INSTITUTION

The Ombudsman has a twofold function, a dichotomy that has been referred to as redress and control.[11]

3.1 Redress function

The Ombudsman process is a form of alternative dispute resolution (ADR) for conflicts between government administration and the public.[12] After a complaint has been made, an impartial investigation takes place and the Ombudsman does not uphold a complaint or dismiss it for lack of merit- until the investigation process has been completed.[13] After conclusion of an investigation, if the Ombudsman has taken the position that improper administration has occurred and has made recommendations for changes in law or practice to the government, the Ombudsman may enter into informal negotiations or mediation with the government department concerned to persuade the government to accept and implement his negotiations.[14]

It should be understood that the Ombudsman has a broader mandate and stronger powers than those of simple ADR providers in that the special distinctive ADR technique employed by the Ombudsman is not only investigation but a unique combination of investigation, judgment and recommendation, coupled sometimes with mediation and negotiation.[15]

The Ombudsman mechanism is distinctive from formal ADR in that ombudsmen can initiate own motion investigations. Such power is usually legislated and it rests on the discretion of the Ombudsman. For example, through information gleaned from the media, the Ombudsman may decide to launch an own motion investigation. This unique feature of the Ombudsman institution allows protection of members of the society who, despite being wronged, would never have used the office due to unawareness of its existence or due

11 M. Seneviratne, *Ombudsmen: Public Services and Administrative Justice,* London, Butterworths, (2002), pp. 17.

12 L. C. Reif, *The Ombudsman, Good Governance and International Human Rights System* Leiden, Martinus Nijhoff Publishers, (2004), p. 16.

13 *Ibid.*

14 *Op Cit* note 12.

15 *Ibid.*

to special circumstances, for example, children, minorities, the illiterate, and other underprivileged people. Other administrative justice mechanisms depend on people to lodge complaints or cases, without which they cannot address any injustice.

Another distinctive feature of the Ombudsman is the use of systemic investigations. Through information gleaned from investigation of numerous complaints, all alleging the same administrative problem, the Ombudsman may see a pattern of government conduct indicating that there is a malfunction in government administration.[16] In response, the Ombudsman may launch a systemic investigation. At the end of the investigation, if systemic break down or weakness is found, recommendations to terminate the wider dysfunction are made.[17] If the recommendations are implemented, numerous future individual complaints about the dysfunction are avoided. Thus systemic investigations are a form of preventative medicine for the public administrative system and are of collective benefit for many users of the system. Other administrative justice mechanisms can only resolve individual complaints or cases lodged before them.[18]

The Ombudsman usually succeeds in producing results reasonably quicker than the courts.[19] An ombudsman scheme is essentially informal and non-adversarial in its mode of operation, and therefore is readily accessible to complainants, easy to understand, easy for them to set in motion.[20] It operates relatively cheap so far as agencies subject to investigations are concerned and its services are free to complainants.[21] Courts on the other hand, are expensive, time consuming and have complicated procedures. Remedies are not granted in many court cases because courts are concerned with questions of legality but the fact that public officials have not acted contrary to the law does not mean that they have adhered to the widely accepted principles of good administration and ad administration is not always unlawful.[22]

Ombudsman decisions are not binding. Paradoxically, the non-binding

16 *Op Cit* note 12, p. 17.
17 *Ibid.*
18 Op Cit note, p. 15.
19 *Op Cit* note 7, p. 16.
20 *Ibid.*
21 *Op Cit* note 19.
22 *Ibid.*

nature of decisions is strength rather than a weakness.[23] Stephen Owen states that:

"It may be that this inability to force change represents the central strength of the office and not its weakness. It requires that recommendations must be based on a thorough investigation of facts, scrupulous consideration of all perspectives and vigorous analysis of all issues. Through this application of reason, the results are infinitely more powerful than through the application of coercion. While a coercive process may cause reluctant change in a single decision or action, by definition it creates a loser who will be unlikely to embrace the recommendations in future actions. By contrast, where change results from a reasoning process, it changes a way of thinking and the result endures to the benefit of potential complaints in the future. If genuine change is to take place as a result of ombudsman action, the office must earn and maintain the respect of government through its reasonableness. Without this, it will be at best ignored, and, at worst, ridiculed."[24]

Buttressing this point, Gregory and Giddings state that sometimes administrators do not understand the legalese used by judges in their judgments.[25] It is argued therefore that practical improvements in administration are best achieved by the unthreatening, non-confrontational, cooperative approach adopted by ombudsmen who tend to rely as much as possible on conciliation and persuasion, with the aim of achieving friendly solutions and settlements. [26]

Gregory and Giddings further argue that the political channel for dealing with the redress of grievances is becoming less attractive to many societies because in many parts of the world politicians are often accused and convicted of corruption.[27] The Ombudsman has therefore become a trusted alternative. Gregory and Giddings make reference to countries where courts have never been the principal mechanism for dealing with maladministration grievances, where the main channel through which complainants pursue such grievances has

23 P. Nikiforos Diamandouros, *International Seminar on Ombudsman Institutions*, Ankara, European Ombudsman, 2013.

24 S. Owen, "The Ombudsman, Essential Elements and Common Challenges" in *The Ombudsman: Diversity and Development,* Edmonton, International Ombudsman Institute, (2003).

25 *Op Cit* note 6, p. 16.

26 *Ibid.*

27 *Op Cit* note 6, p 17.

traditionally been the political process, where the elected representatives act as complaint handling mechanisms.[28] It is noted that the drawback of this method is that not all elected representatives are equally adept or intersected in work of this kind.[29] Some will care deeply about the problems of their constituents, others will find dealing with such matters the least attractive aspect of their role.[30] In addition, elected representatives may be denied access to internal files and be unable to question officers.[31] Moreover, if there is a conflict of judgments not about the facts of a case but about construction to be placed on them, the views of a back bench elected representatives may count for little against those of the executive.[32]

Finally, the partisan structure and orientation of so many legislative assemblies, functioning as they do on a party political basis, may detract from their effectiveness as mechanisms through which elected representatives can hope to secure administrative justice for aggrieved constituents.[33]

3.2 Control function

The Ombudsman has been listed among the numerous ways of controlling administrative power. These are: judicial review, reliance on administrative or political processes, establishing independent, impartial institutions such as an ombudsman to investigate maladministration, allowing for public participation and guaranteeing access to information.[34]

Ombudsmen exercise a control function by serving as a mechanism for horizontal and vertical accountability.[35] Horizontal accountability has been defined as capacity of state institutions to check abuses by other public agencies and branches of government.[36] Ombudsmen can be considered to be institutions of horizontal accountability as they improve legal, constitutional and administrative accountability of government by impartially investigating

28 *Ibid.*
29 *Ibid.*
30 *Ibid.*
31 *Ibid.*
32 *Ibid.*
33 *Ibid.*
34 C. Hoexter '*Administrative Law in South Africa*, (2nd ed) Cape Town, Juta, (2012), p. 58.
35 *Op Cit* note 10, pp. 17-18, 60-62.
36 *Ibid.*

the conduct of public administration; recommending changes to law, policy or practice when illegal or improper administration is uncovered; reporting to the legislature and the public and in some institutions, exercising stronger powers like court action.[37]

Regarding the Ombudsman function as a mechanism for vertical accountability, it has been stated that ombudsmen permit members of the public to lodge complaints that the government has acted illegally or unfairly, with the result that the government is subjected to an impartial investigation of its conduct and may be faced with criticism of its actions or, depending on the Ombudsman institution, stronger consequences.[38]

4. OUSTER CLAUSES

The subjection of ombudsman decisions to judicial review is a contested issue in ombudsman circles. In some countries around the world, ombudsman decisions have been exposed to judicial review. UK and South Africa are examples. Botswana is an example of countries which hold a view that courts should not review the decisions of the Ombudsman. The Parliament of Botswana has included an ouster clause in the Ombudsman Act, to prevent judicial review of ombudsman decisions. Section 9 (1) of that Act provides that:

> "In the discharge of his functions, the Ombudsman shall not be subject to the direction or control of any other person or authority and no proceedings of the Ombudsman shall be called in question in any court of law."

The section of the above provision which states that "no proceedings of the Ombudsman shall be called in question in any court of law" is undoubtedly an ouster clause. An ouster clause is a provision in an Act of Parliament which purports to make the decision of a body final by purporting to eliminate the jurisdiction of a competent court to review such a decision. Parliament uses these clauses to bring finality to decisions that they wish to be determined in the way

37 *Ibid.*
38 *Ibid.*

they have laid down.

Ouster clauses exist primarily for practical and procedural reasons. Ouster clauses protect the integrity of tribunals by separating tribunals from legal processes; they ensure that courts do not decide on specialised matters; they ensure finality in that decisions of tribunals ought not to be appealed and reviewed; they prevent unnecessary litigation and interventionist courts; they ensure efficiency; and finally, they ensure separation of executive and judicial functions.[39]

On the other hand, the existence of clauses in legislation raises complex interpretation issues. These are issues of: inconsistent Parliamentary intention, Parliamentary sovereignty, constitutionally conferred jurisdiction, representative democracy, separation of judicial power and rights of the citizen to access the courts. [40]

The concept of inconsistent Parliamentary intention presupposes that ouster clauses create an inconsistency between one statute provision which seems to limit the powers of the tribunal and another provision (the ouster clause) which seems to contemplate that the tribunal's decision shall operate free from restriction.[41] To elaborate this concept, an example of the Botswana Ombudsman Act will be used.[42] Section 9 (1) of this Act suggests that the Ombudsman shall operate free from restriction. On the other hand there is section 4 which limits the powers of the Ombudsman to investigate certain matters. The reality is that Parliament would never have intended that that the Ombudsman should operate free from restriction but rather that the Ombudsman should operate within set limitations. Thus the ouster clause in section 9 (1) brings an unnecessary issue of inconsistent Parliamentary intention in the Ombudsman Act.

With regard to Parliamentary sovereignty, the issue which is created by ouster clauses is as to what extent courts ought to relinquish their jurisdiction and to what extent they should give effect to legislative intentions of Parliament.[43] In a lecture in 1994, Lord Woolf, in the context of a discussion about

39 D. Mullan, , Toronto, Carswell Publishers, (1979), p. 1. Available at *www.jaani.net/resources/law_notes/...law/13_Privative_clauses.pdf.*

40 *Ibid,* Chapter 13, pp. 2-3.

41 *Op Cit* note 39, p. 2.

42 *Op Cit* note 4.

43 *Op Cit* note 41.

ouster clauses, said there may be situations in which the courts, in upholding the rule of law, may have to "take a stand." [44] In those circumstances, he said, there were some "advantages in making it clear that ultimately there are even limits on the supremacy of Parliament which it is the courts' inalienable responsibility to identify and uphold." [45]

The issue that arises with regard to constitutionally conferred jurisdiction is as to how the courts should reconcile a provision which purports to oust their jurisdiction to review a decision with their constitutionally enshrined original jurisdiction to review decisions of legally constituted tribunals? This issue arose in the Australasian case of *Plaintiff S 157 of 2002* v *Commonwealth.*[46] The plaintiff had applied for a protection visa which was refused by the Minister. The Minister's decision was affirmed by the Refugee Review Tribunal ("RRT") but set aside by the Federal Court. Another RRT was constituted and it again affirmed the Minister's decision. Plaintiff challenged this affirmation through judicial review. The issue was whether section 474 of the Migration Act was invalid in respect of an application by the plaintiff to the High Court of Australia for relief under section 75(v) of the Constitution?[47]

Their Honours affirmed the central significance of the Court's constitutionally inferred jurisdiction over a provision which purports to oust its jurisdiction to review decisions of any legally constituted tribunal. They held that:

> "The reservation to this court by the Constitution of the jurisdiction in all matters in which the named constitutional writs or an injunction are sought against an officer of the Commonwealth is a means of assuring to all people affected that officers of the Commonwealth obey the law and neither exceed nor neglect any jurisdiction which The law confers on them. The centrality, and protective purpose, of the jurisdiction of this court in that regard places significant barriers in the way of legislative attempts (by privative clauses or otherwise) to impair judicial review of administrative action. Such jurisdiction exists to maintain the federal compact by ensuring that propounded laws are constitutional-

44 *http://www.theguardian.com/world/2004/mar/02/law.immigration.*
45 *Ibid.*
46 (2003) 195 ALR 24; [2003] HCA 2.
47 *Ibid*, para 52.

> ly valid and ministerial or other official action lawful and within jurisdiction. In any written constitution, where there are disputes over such matters, there must be an authoritative decision-maker. Under the Constitution of the Commonwealth the ultimate decision-maker in all matters where there is a contest, is this court. The court must be obedient to its constitutional function. In the end, pursuant to s 75 of the Constitution, this limits the powers of the parliament or of the executive to avoid, or confine, judicial review."[48]

The concept of representative democracy suggests that parliament, being democratically elected, is in more legitimate position to create legal constraints than courts are to review decisions. Thus some judges have been accused of "playing politics" by refusing to uphold ouster clauses.[49] Courts are usually provoked to question parliament's paramount rule based on their own constitutional duty to hear out people's claims of injustice.

Another complexity which is created by ouster clauses is with regard to the separation of judicial power. Judicial power means the power of the courts to authoritatively decide legal rights and interests.[50] Ouster clauses effectively give tribunals the power to authoritatively decide the legal limits of their power. To elaborate this point the Botswana Ombudsman Act[51] will once again be used. Section 3 (4) of this Act provides that the Ombudsman shall act in accordance with his own discretion in determining whether to initiate, continue or discontinue an investigation; and any question as to whether a complaint is duly made under this Act shall be determined by the Ombudsman. Complaints which can be made to the Ombudsman include matters in which aggrieved persons have "a right of appeal, reference, or review to or before a tribunal constituted by or under any law in force in Botswana."[52] The jurisdiction of the Ombudsman extends to matters in which aggrieved persons have "a remedy by way of proceedings in any court of law." The Ombudsman may also investigate matters in which aggrieved persons are seeking redress under section 18 of the Con-

48 *Op Cit* note 44, para 104.
49 J. B. Thomas "Judges who Play Politics", 77 *Australian Law Journal* (2003), p. 278.
50 *R* v *Kirby*; Ex parte *Boilermakers*' Society of Australia [1956] HCA 10; (1956) 94 CLR 254.
51 *Op Cit* note 3.
52 *Ibid,* section 3 (2) (a).

stitution (which relates to redress for contraventions of the provisions for the protection of fundamental rights and freedoms).[53] The Ombudsman has been given a wide range of powers to decide on the rights and interest of the citizenry. However, the same citizenry is barred by section 9 (1) of the Ombudsman Act from challenging the decisions of the Ombudsman in Court if they are of the view that their rights and interests have not been properly decided upon by the Ombudsman. The effect of the ouster clause in section 9 (1) is that it confers judicial power upon the Ombudsman which is a body that is not a court.

Finally, administrative tribunals can indeed make final determinations on questions of law which cannot be reviewed if the legislation establishing these tribunals contains an ouster clause. In other words if such tribunal arrives at an erroneous decision on a point of law in legislation which makes that decision final and conclusive, this is said to be a *damnum sine injuria*. One can ask, "what about the overriding consideration that the constitution creates judicial bodies and provides for their use by individuals to enforce their rights and expectations?" Justice Hill, lamenting the impact that ouster clauses have on the liberty of the citizen, told graduates on his graduation address that:

> "When I became judge, I took an oath that I would do justice. Yet the results of the legislation to prevent asylum seekers applying to any court to have judicial review of decisions of Ministers or Migration Review Tribunals is that I can do no justice at all. In one case, for example, I had to listen to a barrister paid by the Government say that the Tribunal has made a decision which is clearly wrong in law. The Tribunal member appeared not to have read the section under which he was supposed to be acting. He completely addressed the wrong question. The barrister then, no doubt instructed by the Government, told me that this decision, wrong in law although it was, must stand and neither I nor any other judge in any other court, could do anything about it. That is not justice. This time it is a refugee decision that while wrong, cannot be challenged. Next time it might be some other decision that could personally affect you and your rights." [54]

53 *Op Cit* note 4, section 3 (3) (b).

54 On the occasion of Justice Hill being awarded a Doctorate of Laws (*Honoris Causa)* by the University of Sidney (2003) 77 ALJ 275.

5. JUDICIAL REVIEW, OUSTER CLAUSES AND THE OMBUDSMAN INSTITUTION

Kirkham asserts that it is no longer necessary for the role of the Ombudsman to be explained and justified as the intellectual argument for the model has long been won.[55] He states that instead, there is a more pressing need to prove the claims made on behalf of the Ombudsman.[56] It has been claimed both by Ombudsman practitioners and academics that the Ombudsman promotes accountability, trust and justice.[57] However, these claims have not been verified by either the practitioner or the academic community.[58] Thus finding ways to verify and test the impact of the Ombudsman is one of the most important challenges facing current ombudsman schemes. [59]

Kirkham states further that it is important to verify and test the impact of the Ombudsman in any given country. This is so because the world is experiencing global economic pressures. In response to these global economic pressures, all public bodies (including the Ombudsman) will be required to work under tighter budgets and work hard to justify their continued existence.[60] The topic as to what kind of evidence the Ombudsman should be providing to prove its impact is hotly debated. However, there are many suggested approaches that can be taken towards the evaluation of the impact of the Ombudsman. These are: questioning of the Ombudsman publicly by a select committee in Parliament; legislation that requires a periodic independent strategic review and submission of results to Parliament; subjection of ombudsman decisions to judicial review; independent investigation process undertaken by a specialist from another ombudsman scheme and cooperation with other watchdog groups.[61]

The next segment of this article explores the subjection of ombudsman decisions to judicial review as a tool of evaluating the performance of an om-

55 *Richard Kirkham* "The 21st Century Ombudsman Enterprise" Paper presented to the IOI biennial conference,
November 2012, Wellington, New Zealand. Available online at*: tp://www.theioi.org/publications/wellington-2012-conference-papers,* p. 7.
56 *Ibid.*
57 Op Cit note 55, p. 1.
58 *Ibid.*
59 *Ibid.*
60 *Op Cit* note 55.
61 *Ibid*.

budsman office. This is with reference to the UK and South Africa ombudsman statutes. Those countries are chosen because they are commonwealth members like Botswana and have cases where decisions of the Ombudsman were judicially challenged. The objective is to assess whether these countries have statutory provisions that allow judicial review of decisions of the Ombudsman. If they do not have such provisions, the basis on which the cases were brought before the courts will be established. Another objective is to find out whether on the basis of the cases studied, judicial review can be endorsed as a performance tool for the Ombudsman. The findings will be used in analysing whether the statutory exclusion of the judicial review of decisions of the Ombudsman in Botswana is proper. If it is found not to be proper, it will be investigated whether there is need for legislative reform in that regard.

5.1 The United Kingdom

This article focuses on the Commission for Local Administration, usually known as the Local Government Ombudsman (LGO) which was established by the Local Government Act (LGA), 1974. The preamble of the LGA states that the Act exists to make provision *inter alia* for the establishment of Commissions for the investigation of administrative action taken by or on behalf of local and other specific public authorities. The mandate of the LGO as provided for in the preamble is similar to the mandate of the Office of the Ombudsman in Botswana. The preamble of the Ombudsman Act[62] states that the Act makes provision for the appointment and functions of an Ombudsman for the investigation of administrative action taken on behalf of government. A study of the case in which a decision of the LGO was challenged in court is relevant for this article as Both Botswana and the UK are Commonwealth member states and the mandate of their Ombudsman institutions is similar.

There is no provision in the LGA which states that proceedings of the LGO shall not be questioned in any court of law. The only provision that talks about appearance of the LGO in court is Section 32 (2) of the LGA which provides that a Local Commissioner and persons discharging or assisting him shall not be called upon to give evidence in any proceedings of matters coming to

62 *Op Cit* note 4.

his or their knowledge in the course of an investigation. This clause purports to protect the Commissioner and his staff from defamation suits arising from investigation reports that they might have published and from being caused to disclose information which is not subject to disclosure. The provision is not an ouster clause. Ouster clauses usually provide that a decision taken shall be final, not appealable or not be questionable in any legal proceedings. On this basis, one can safely conclude that the LGA does not have a provision that purports to oust the jurisdiction of the courts from reviewing its decisions.

A decision of the LGO was reviewed in *R* v *Commissioner for Local Administration, ex parte Croydon London Borough Council and Another.*[63] The facts are that the parents of a child who was due to start her secondary education indicated to Croydon London Borough Council (CLBC) their preference for three particular schools. The child was allocated to none of the schools for which the parents had expressed preference and instead she was allocated to a fourth school. The parents appealed the decision of CLBC and the appeal was heard by the committee which decided that the child's allocation to the fourth school must stand. The parents lodged a complaint with the Commissioner for Local Administration who conducted an inquiry into the complaint and concluded that there had been maladministration in the way that the committee had dealt with the appeal. The Commissioner ordered that the appeal be reheard by a new committee. CLBC applied for judicial review seeking an order to quash the report of the Commissioner. CLBC also sought a declaration that the findings of maladministration made in the Commissioner's report are void and of non-effect.

The first issue to be decided was whether the Commissioner had jurisdiction to deal with the issue at hand.[64] CLBC contended that the Commissioner had no jurisdiction to investigate the complaint because the committee was exercising quasi-judicial or judicial and not administrative function hence its decision was not subject to the scrutiny of the Commissioner.[65] The Commissioner on the other hand submitted that when the education authority deals with admissions, it is clearly exercising an administrative function, and this being so, the Commissioner is entitled to conduct investigations on its decisions.[66]

63 [1989] 1 ALL ER 1033.
64 *Ibid*, p. 1042, paragraph j.
65 *Ibid.*
66 *Op Cit* note 63, p. 1043, para f.

Woolf LJ defined "maladministration" and "administrative" functions.[67] He referred to the definition given by Lord Donaldson MR, in the *Eastleigh* case[68] who, having referred to the *Bradford* case[69] said:

> "Administration and maladministration, in the context of the work of a local authority, is concerned with the *manner* in which decisions by the authority are reached and the *manner* in which they are or in which they are not implemented. Administration and maladministration have nothing to do with the nature, quality or reasonableness of the decision itself."

Woolf LJ further cited a passage from the judgment of Eveleigh LJ in the *Bradford* case[70] in which Eveleigh LJ said:

> "If the local commissioner carries out his investigation and in the course of it comes to the conclusion that a decision was wrongly taken, but is unable to point to any maladministration other than the decision itself, he is prevented from quashing it."

Woolf LJ concluded that the Commissioner had jurisdiction to consider the two complaints brought before him. He held that these complaints related to the manner in which the decision was reached and touched on the quality of the decision as well.[71]

The second issue to be determined was whether the jurisdiction of the Commissioner was excluded by the fact that the parents as persons aggrieved had a remedy by way of legal proceedings in that they could have applied for judicial review of the committee's decision.[72] In deciding this issue, Woolf LJ first determined the meaning of the words "remedy by way of proceedings in a court of law".[73] The Commissioner submitted that what the words mean is that if pro-

67 *Op Cit* note 63, page 1043, para b.
68 [1988] 3 ALL ER 151 at 155, [1988] QB 855 at 863.
69 [1979] 2 ALL ER 881, [1979] QB 287.
70 [1979] 2 ALL ER 881 at 902, [1979] QB 287 at 316.
71 *Op Cit* note 63, p. 1043, para h-j.
72 *Op Cit* note 63, p. 1044, para a-d.
73 *Op Cit* note 63, p. 1044, para e.

ceedings are brought, they will succeed and result in a remedy being granted.[74]

CLBC on the other hand submitted that all that is required is that the issue is one which could be the subject of proceedings in a court of law irrespective of whether or not those proceedings would succeed.[75] Woolf LJ was of the view that the words mean that if the complaint was justified, the person concerned might entitled to obtain some form of remedy in respect of the subject matter of complaint if he had commenced proceedings within the appropriate time limits. He added that the Commissioner must not be concerned whether in fact the proceedings would succeed but he merely had to be satisfied that the court of law is the appropriate forum for investigating the subject matter of the complaint.[76]

Woolf LJ went on to state that it is not clear whether the limitation placed on the Commissioner not to investigate matters where persons aggrieved had a remedy by way of legal proceedings is only a threshold requirement or whether it applies at any stage of an investigation. The Commissioner submitted that it only applies at the stage when he is deciding whether or not to conduct an investigation and once he has embarked on an investigation, it does not apply. Woolf LJ agreed that it is a threshold requirement. However, he did not regard this issue as significant because the Commissioner has a continuing discretion to decide whether to continue or discontinue an investigation.[77]

It was held that even if the requirement does not deal with the subsequent stages after the commencement of an investigation, in exercising his discretion whether to discontinue an investigation, the Commissioner must approach the matter very much in the same way as he would if the requirement applied.[78] If it becomes apparent during investigations that the issues being investigated are appropriate to be resolved in a court of law, the Commissioner is required to consider whether, notwithstanding this, it is appropriate to continue with the investigation broadly. When performing this exercise, the extent to which the investigation has proceeded is a relevant consideration for the Commissioner to take into account in deciding whether or not to discontinue the investigation.[79]

74 *Ibid.*
75 Op Cit note 73.
76 *Op Cit* note 63, p. 1044, para i.
77 *Op Cit* note 63, p. 1044, para g.
78 *Op Cit* note 63, p. 1044, para h.
79 *Op Cit* note 63, p. 1044, para j.

Having regard to the Commissioner's evidence, Woolf LJ concluded that he cannot make a finding that the Commissioner should have appreciated at the outset that the investigation was one in relation to which the complainant had a remedy by way of judicial review. However, he found that in the course of the investigation, it should have been appreciated that the complaint had had such a remedy.[80] Woolf LJ clarified that this does not, in practice, prevent the Commissioner from investigating the activities of the appeals committee (in relation to which he has express statutory jurisdiction) as the Commissioner retains his discretion in deciding whether to initiate or discontinue an investigation and unless that discretion is unlawfully exercised, the courts will not and cannot interfere with his decision.[81]

In addition, Woolf LJ held that where there is a remedy, inter alia, in a court of law, the courts do not have sole jurisdiction and the Commissioner may still intervene.[82] He held further that if there is a tribunal (whether it be an appeal tribunal or a Minister of the crown or a court of law which is specially designed to deal with the issue), that is the body to which the complaint should normally resort. He stated that this approach is important in the case of issues which are capable of being resolved on judicial review.[83] He asserted that Parliament, by Section 31 (6) of the Supreme Court Act made it clear that there should be protection for public bodies and if, as in the present case, the Commissioner is going to recommend the very same relief as could be provided on judicial review, he should take account before doing so the fact that his jurisdiction is not subject to the safe guards.[84] He emphasized that the Commissioner should also have in mind, even when the holder of the office is a distinguished lawyer as the case here, that his expertise is not the same as that of a court of law. He added that issues whether an administrative tribunal has properly understood the relevant law and legal obligations which it is under when conducting an inquiry are more appropriate for resolution by the High Court than by a commissioner, however eminent.[85]

Woolf LJ noted that in this case, there was a conflict between the Com-

80 *Op Cit* note 63, p. 1045 para d.
81 *Op Cit* note 63, p. 1045, para e.
82 *Op Cit* note 63, p. 1045, para a.
83 *Ibid.*
84 *Op Cit* note 62, p. 1045, para b.
85 *Op Cit* note 63, p. 1045, para c.

missioner's jurisdiction and that of the court which the Commissioner never appreciated but should have before concluding his investigation, and he should have discontinued his investigations on this basis. However, since the Commissioner indicated that if he had considered the question of discretion, he would have undoubtedly decided to proceed, Woolf LJ did not grant relief solely on this ground.[86]

Relief was granted on the basis that the two grounds upon which the Commissioner found maladministration on the part of CLBC were unjustified. Firstly, the Commissioner was of the view that the committee was not entitled, on the basis that the child's admission would result in an increase above the 210 figure which was the planned admission limit for the school, to conclude that to allow the parents' appeal would result in prejudice. However, the limit was part of CLBC's transitional arrangement to establish a sixth form entry, the committee had explained the circumstances under which that number was determined, it was CLBC's policy that all paces at the school had to be offered to children who, unlike the child in question, were resident in Croydon and 97 parents from Croydon still had their names on the waiting list. Woof LJ held that these factors were ample material upon which the committee concluded that admission of then daughter would be prejudicial.[87]

Secondly, the Commissioner criticised CLBC for concluding the parents appeal on policy considerations alone. Woolf LJ observed that members of the committee took different views of the policy, as they were entitled to, but in no case did any member decide the case on policy considerations alone. He held therefore that the Commissioner's criticism is unjustified as there is no foundation for the Commissioner's findings of maladministration. He granted CLBC a declaratory order that the Commissioner's report was void and of no effect.[88] Hutchison J concurred.

Concluding on the UK case study, it is worth noting that in the UK, as far back as 1932, although nothing was done by Parliament, it was recommended that ouster clauses in statutes "should be abandoned in all but the exceptional cases."[89] As far back as 1956, the courts have indicated that they would, as Lord

86 *Op Cit* note 63, p. 1045, para f.
87 *Op Cit* note 63, para g-j.
88 *Op Cit* note 63, p. 1046, para a.
89 Report of the Committee on Ministers Powers, 1932.

Viscount Simonds said in *Smith* v *East Elloe RDC*[90], "Regard with little sympathy legislative provisions for ousting the jurisdiction of the courts." In this case, the court set four grounds upon which relief would be given being: informality of procedure, *ultra vire*s, misuse of power bona fide and misuse of power *mala fide*[91].

In addition, it has long been believed in the UK, as Browne J put it in *Anismic* v *Foreign Compensation Commissioner:* [92]

> "Whenever Parliament creates a new inferior tribunal, the High Court has inherent jurisdiction to supervise and control it, and any person aggrieved by a decision of the tribunal has an inherent right to ask the court to exercise those powers."[93]

With such legal history, the Parliament in the UK could not expend effort in enacting Ombudsman statutes with ouster clauses. As to whether it can be said that judicial review served to evaluate the performance of the Ombudsman in the UK case study, it can be answered in the affirmative. The court has established in the *R* v *Commissioner for Local Administration, ex parte Croydon London Borough Council and Another*[94] that the Ombudsman will always be checked, whether in the performance of his functions, he reached his decision in a correct manner, and whether he did not usurp court functions.

5.2 South Africa

The Ombudsman is called the "Public Protector" in South Africa. Section 181 of the Constitution of the Republic of South Africa[95] makes provision for the establishment of the office of the Public Protector. The function of the Public Protector is to investigate any conduct that is alleged or suspected to be improper or to have resulted in any impropriety or prejudice in state affairs or in the public

90]1956] 1 ALL ER 855 at 858.
91 *Ibid* at 866.
92 [1969] 2 AC 147.
93 *Ibid* at 234.
94 *Op Cit* note 63.
95 Act No. 108 of 1996.

administration.[96] The Ombudsman is also mandated to report on that conduct[97] and to take appropriate remedial action.[98]

There is no provision in the Public Protector Act[99] which ousts review of the Public Protector's decisions by the courts. The only provision that mentions appearance of the Public Protector before courts is Section 6 (8) of the Public Protector Act which provides that the Public Protector or any member of his or her staff shall be competent but not compellable to answer questions in any proceedings in or before a court of law or anybody or institution established by or under any law, in connection with any information relating to the investigation which in the course of his or her investigation has come to his or her knowledge.

The Public Protector's decision was subjected to judicial review in *M & G Media Limited and Others* v *Public Protector*.[100] The facts are that, a national weekly newspaper known as the Mail & Guardian (M&G) published articles relating to what became known as "oilgate". These articles raised allegations regarding the dealings between a private company, Imvume Management (Pty) Ltd ("Imvume") and officials within the African National Congress ("the ANC"), the Department of Minerals and Energy ("DME"), the Strategic Fuel Fund Association ("the SFF") and the Petroleum, oil and Gas Corporation of South Africa ("PetroSA"). Both the SFF and PetroSA are state-owned corporations. The allegations are that Imvume and its chief executive officer, Sandi Majali ("Majali"), obtained lucrative contracts for Iraqi oil with the support of ANC and government officials, on the understanding that the proceeds would benefit the ANC, and that the ANC would use its position as the ruling party in Government to oppose sanctions against Iraq on the international plane.

In the course of this, the SFF irregularly awarded a contract to Imvume for the supply of Iraqi oil. PetroSA irregularly advanced R 15-million to Imvume. Rather than using the money for its intended purpose, which was to pay a supplier for a cargo of oil condensate destined for PetroSA, Imvume channelled

96 *Ibid*, section 182 (1) (a).
97 *Op Cit* note 73, section 182 (1) (b).
98 *Op Cit* note 73, section 182 (1) (c).
99 Act No. 23 of 1994.
100 [2010] 1 All SA 32 (GNP)

the bulk of this to the ANC (which received R 11 million) and others. When Imvume was unable as a result to pay the supplier of the oil condensate, PetroSA paid the same amount (and more) again. The effect was that PetroSA was R 18 *million out of pocket and that public money had been transferred to, amongst others, the ANC.*

A member of the National Assembly, Mr Willie Spies, lodged a complaint with the Public Protector accusing PetroSA of improper conduct and maladministration, in that it used Imvume as a conduit to transfer public money to the ANC. In addition, the Public Protector was requested to conduct an investigation into the exact nature of business relationships between close relatives of the Minister of Minerals and Energy and the Minister of Social Development and Imvume. As the story unfolded, the leader of the official opposition in parliament, Mr. A. J. Leon, asked the Public Protector on two occasions to expand his investigation by determining the extent to which the state was involved in funding and supporting Imvume's Iraqi oil ventures and travel related thereto.

The Public Protector (Advocate M. Mushwana, assisted in his investigation by Advocate C. Fourie) acceded to the requests, conducted investigations and produced a report. He recommended that the Board of PetroSA, in consultation with the CEO and PetroSA's legal advisors, should "take urgent steps to ensure that the outstanding amount due to PetroSA by Imvume is recovered without delay and in compliance with the provisions of sections 50(1)(d) and 51(1)(b)(i) of the Public Finance Management Act, 1999; and regularly report to the Minister of Minerals and Energy on the progress made in regard to the recovery of the outstanding amount. In addition, he recommended that the Minister of Minerals and Energy must report to the Cabinet and to Parliament on the steps taken and the progress made to recover the outstanding amount due by Imvume." [101]

M & G and two journalists brought review proceedings against the Public Protector in the North Gauteng High Court. They asked for orders setting aside the report and ordering the Public Protector to investigate and report afresh. The orders were granted by Poswa J who concluded that the Public Protector ought to have investigated the complaints that he did not investigate and to have investigated more fully the ones he did investigate. He noted however

101 *Ibid* at para 10.

that, that does not automatically render the Public Protector's report liable to be set aside. Poswa J asserted that a combination of the principle of legality and judicial deference ensures that a Court can, without usurping the powers or functions of a public official, determine whether or not the conduct of such public official is rational in accordance with the powers and duties conferred upon him by statute.

Bearing these two principles in mind, Poswa J came to the conclusion that the Public Protector acted irrationally in respect of complaints that he did not investigate because he considered them to be beyond his jurisdiction and complaints which he investigated with the aid of inadequate evidence, i.e., without obtaining further relevant evidence. Consequently, he set aside the Public Protector's report and ordered the latter to investigate complaints that were not investigated, re-investigate all complaints that were investigated and write a report on the outcome of his investigation.

The Public Protector appealed the decision of the North Gauteng High Court.[102] Nugent JA observed that the Public Protector is not a passive adjudicator between citizens and the state. Further that the mandate of the Public Protector is an investigatory one, requiring the initiative to commence an enquiry relying on evidence before him, and on no more than information that has come to his knowledge of maladministration, malfeasance or impropriety in public life.[103] Nugent JA observed in addition that the court is not called upon to make findings on the matters that were placed before the Public Protector for investigation, or on the veracity or authenticity of material that might have been relevant to his enquiry. Rather it was concerned only with the extent to which that material casts light upon the adequacy or otherwise of the investigation. Moreover, he noted that the court is not called upon to direct the Public Protector as to the manner in which an investigation is to be conducted - it is for the Public Protector to decide what is appropriate to each case. The court would only to assess what might be expected in the proper performance of the functions of the Public Protector so as to determine the adequacy or otherwise of his investigation.

Nugent JA found that there is no dispute in this case that an investi-

102 *Public Protector* V *M & G* 2011 (4) SA (420) (SCA).
103 *Ibid,* para 9.

gation and report of the Public Protector is subject to review by a court. He established a test: that the investigation must have been conducted with an open and enquiring mind. He stated that an investigation that is not conducted with an open and enquiring mind is no investigation at all. He explained an open and enquiring mind as:

> "A state of mind that is open to all possibilities and reflects upon whether the truth has been told. It is not one that is unduly suspicious but it is also not one that unduly believes. It asks whether the pieces that have been presented fit into place. If at first they do not then it asks questions and seeks out information until they do. It is also not a state of mind that remains static. If the pieces remain out of place after further enquiry then it might progress to being a suspicious mind. And if the pieces still do not fit then it might progress to conviction that there is deceit. How it progresses will vary with the exigencies of the particular case. One question might lead to another and that question to yet another, and so it might go on. But whatever the state of mind that is finally reached, it must always start out as one that is open and enquiring."[104]

Applying this test to this case, Nugent JA held that it is clear that there was no investigation of the primary complaint as the Public Protector's purported investigation and report was so scant as not to have been an investigation and there was no proper basis for any of the findings that were made. Concerning the second complaint, it was held that it is manifest that the substance of the request was not investigated at all. On the third complaint, it was held that it is manifest that this was no investigation at all and that there was no proper basis for that finding. Nugent JA attributed the outcome of the purported investigation to the state of mind in which it was conducted pointing out to the fact that responses were sought from people in high office and recited without question as if they were fact. He summed up that;

> "An investigation that is conducted in that state of mind might just as well not be conducted at all. The investigator is then no more than a spokesman, who adds his or her imprimatur to what has been said,

104 *Op Cit* note 80, para 21.

> which is all that really occurred in this case. I have said before that an investigation calls for an open and enquiring mind. There is no evidence of that state of mind in this investigation."[105]

Nugent JA confirmed the finding of the court *a quo* that there was no proper investigation and consequently set aside the report and ordered re- investigation. He emphasized once again that it is not open to the court to supplant the Public Protector by directing with precision what is required for a proper investigation hence he set aside the court *a quo*'s order which sought to direct how the re-investigation must be done. Ponnan, Snyders and Tshiqi JJA and Plasket AJA concurred.

It must be noted that the Public Protector Act was enacted pursuant to provisions of a Constitution whose drafters, following the injustices that occurred due to enactment of draconian laws during the apartheid era, were determined to achieve some measure of separation of powers and checks and balances as mechanisms to circumscribe parliamentary power and ensure respect for limited government. In addition, South Africa is a new democracy which had an opportunity to benchmark its Constitution and Public Protector Act from older democracies. It can safely be argued that South Africa emulated the UK and other old democracies by not statutorily ousting the jurisdiction of the courts to review the Ombudsman's decisions. In exercising its inherent original jurisdiction, the Supreme Court of South Africa has made it clear that Ombudsman decisions are reviewable to determine whether they were reached at through an open and enquiring mind failing which they will be quashed and a reinvestigation ordered. By reviewing the Ombudsman's decision in this case, the court was essentially reviewing the performance of the Ombudsman thus confirming Khirkham's assertion that judicial review "retains in the system the potential for mistakes, errors to be rectified and a degree of external pressure to foster care and attention within ombudsman schemes."[106] As Kirkham has stated, the Ombudsman like all public bodies should be checked whether it serves its purpose which is to promote accountability, trust and justice.[107]

105 *Op Cit* note 80, para 141.
106 *Op Cit* note 55, p. 10.
107 *Op Cit* note 57.

6. BOTSWANA: A NEED FOR REFORM?

The office of the Ombudsman in Botswana was established through the Ombudsman Act.[108] and its mandate is to investigate any action taken by or on behalf of a government department, being action taken in the exercise of administrative functions of that department or authority, to make recommendations for remedying the injustice caused and to make an annual report to the President concerning the discharge of his functions, which shall be laid before the National Assembly.

Unlike in the UK and South Africa case studies, decisions of the Ombudsman office in Botswana have never been subjected to judicial review. The major contributing factor is the inclusion of an ouster clause in the Ombudsman Act which provides that ombudsman proceedings shall not be questioned in a court of law. The question as to "who checks the Ombudsman" is a frequently asked question which is always posed to ombudsman officials during educational and awareness campaigns. This clause continues to cause concern to customers of the Ombudsman office who find themselves aggrieved with decisions of the Ombudsman and they are advised that according to the ouster clause in Section 9 (1) of the Ombudsman Act, they cannot make an application for judicial review of ombudsman decisions. Section 9 (1) of the Ombudsman Act provides that "in the discharge of his functions, the Ombudsman shall not be subject to the direction or control of any other person and no proceedings of the Ombudsman shall be called in question in any court of law."

As stated above, the objective of this article is to anticipate how Botswana courts will react if it can happen that they receive an application for judicial review of a decision of the Ombudsman. The anticipation is premised on cases which involve statutes which have ouster clauses and have been adjudicated before the High Court of Botswana.

In Botswana, legislative attempts to exclude judicial review through ouster clauses were interpreted by the High Court as "contrary to the Spirit of the Constitution which allows individuals aggrieved by administrative decisions to approach the courts for remedies."[109] There are decisions of respectable lineage

108 *Op Cit* note 4.

109 O. B. K. Dingake, *Administrative Law in Botswana: Cases, Materials and Commentaries* (2nd Ed) (2008) Mmegi Publishing House, Gaborone at 320.

which say that ouster clauses must be jealously guarded by the courts and that they do not take away the jurisdiction of the courts where action complained of was taken *mala fide*, or where there is fraud or the action was *ultra vires.*[110]

In *Chief Seepapito Gaseitsewe* v *Attorney General,*[111] the High Court considered section 25 of the Chieftainship Act[112] which purported to oust the jurisdiction of the courts. Section 25 of the Chieftainship Act states that "notwithstanding any provision of any enactment to the contrary, no court shall have jurisdiction to hear and determine any cause or matter affecting Bogosi." In this case, Chief Seepapitso of Bangwaketse challenged his suspension from holding the office of Chief by the Minister of Local Government and Lands. In the course of his judgment, Justice Nganunu said:

> "...However it is well known that the jurisdiction of the High Court is not ousted by a clause such as the present one where the litigant claims that the person or authority given power by a statute to suspend has exceeded that power, i.e. That the suspension is *ultra vires* or where the claim is that the power was used for a wrong purpose, i.e. the use was tainted by some illegality...In these circumstances, this court will have jurisdiction to hear the application notwithstanding the provisions of s 25."

Another case concerning judicial review of a decision of a lawfully constituted body despite the existence of an ouster clause is *Legodimo Kgotlafela Leipego* v *Attorney General and other.*[113] This was a case concerning the nomination of a candidate to succeed the Sub- Chief of Hukuntsi, who had retired. Two names were proposed: the applicant and one Anthony Moapare. Elections were held and applicant lost. He complained alleging that the election were flawed in that young people below the age required for participation in chieftainship matters and women born in Hukuntsi but married in neighbouring villages voted. Fresh elections were arranged and he lost again. Decrying the same irregularities, he applied to the High Court, which ruled that on the basis of

110 *Ibid.*
111 Civil Case No 5 of 1995 (Unreported).
112 (Cap. 41:01) (Act No. 19 of 1987.
113 1993 BLR 229.

s 25 of the Chieftainship Act which ousted the court's jurisdiction, it could not entertain the matter. He appealed to the Court of Appeal which when reversing the decision of the High Court said:

> "There are decisions of respectable lineage which say that ouster clauses must be jealously guarded by the courts and that they do not take away the jurisdiction of the courts where action complained of was taken *mala fide*, or where there is fraud or the action was *ultra vires*."

It is submitted on the basis of the two cases discussed above that decisions of the Ombudsman in Botswana are reviewable despite the ouster clause in the Ombudsman Act. As long as the Ombudsman exceeds his/her power (acts *ultra vires),* uses his/her power for wrong purposes (illegally) and acts mala fide or fraudulently, the courts will definitely review such decisions upon receipt of an application of review made by applicants who have the right of legal standing to bring such an application.

There is also judicial precedent from South Africa and the UK which are Commonwealth countries like Botswana. Although these two countries have not included ouster clauses in the legislation which establishes their Ombudsman offices, the courts in those countries have asserted that decisions of the Ombudsman are reviewable. The courts in those countries have even laid down factors upon which Ombudsman decisions are reviewable. This leads to a safe submission that should the courts in Botswana receive an application to review a decision of the Ombudsman, they will not be barred by a point *in limine* that proceedings of the Ombudsman shall not be questioned in a court of law. The courts will follow their own precedent on cases which involved statutes with ouster clauses. The courts will also follow judicial precedents from cases involving the review of ombudsman decisions which have been set by the Commonwealth member states' courts.

In light of the submission that the courts of Botswana will not be deterred by an ouster clause from hearing an application for the review of a decision of the Ombudsman, this article calls for the ouster clause in section 9 (1) of the Ombudsman Act to be repealed. The Public Protector Act in South Africa and the Local Government Act in the UK do not have such an ouster

clause as already discussed above.

South Africa represents a new democracy and the fact that it does not have an ouster clause in their Ombudsman Act proves that the drafters were thorough to do what is the norm in Ombudsman circles. The UK represents an old democracy from which new democracies can benchmark trends including those of democracy supporting institutions such as the Ombudsman. Botswana ought not to have included such an ouster clause when drafting its Ombudsman Act in 1995.

The ouster clause in section 9 (1) of the Ombudsman Act is a mere waste of the legislature's ink. It is a scare crow which prevents people from duly accessing their right to have their rights and interests decided by the courts of law. The ouster clause also prevents the performance of the Ombudsman office to be reviewed. The effectiveness of the Botswana Ombudsman in promoting accountability, trust and justice will not be widely known unless it is publicly tested and verified by the courts of law through judicial review as and when need arises.

7. CONCLUSION

It has been established that both the UK and South Africa do not statutorily oust jurisdiction of the courts to review their decisions. This is a wise legislative endeavour because courts retain an inherent right to supervise and control the manner in which the Ombudsman performs its mandate. Ouster clauses are therefore rendered ineffective by the constitutionally conferred jurisdiction of the courts to hear anyone who lodges an application with them, exercising of his/her constitutional right to access the courts. The courts of Botswana have also taken a stand and made it clear that they will review a decision of any statutory body created by parliament provided that the manner in which the power of the body concerned was used *ultra vires, mala fide* or fraudulently. It is therefore anticipated that should anyone apply for review of the Ombudsman decision in Botswana, the courts would disregard part of section 9 (1) of the Ombudsman Act which states that Ombudsman proceedings shall not be questioned in a case of law. The courts would review the decision of the Ombudsman. The ouster clause in section 9 (1) of the Ombudsman Act was therefore a

waste of the legislature's ink and should be repealed.

It has also been established that he subjection of ombudsman decisions to judicial review is one of the ways of evaluating the performance of any ombudsman office. Judicial review retains the potential for mistakes and errors to be rectified and a degree of external pressure to foster care and attention within ombudsman scheme.[114] That has been proved correct in the UK and South African court cases studied, where the courts found that the manner in which the ombudsmen reached their decisions was not proper. The Courts established tests for ombudsmen to use to determine whether they are exercising their powers correctly. In *Public Protector* v *M & G*[115] the court established that the test as to whether the Ombudsman has exercised his powers correctly is to check whether the investigation in question was conducted with an open and enquiring mind. Courts have also laid down grounds upon which decisions of any statutory body will be reviewed. In *R* v *Commissioner for Local Administration, ex parte Croydon London Borough Council and Another*[116] the court set four grounds upon which relief would be given being: informality of procedure, ultra vires, misuse of power bona fide and misuse of power mala fide.[117]

These cases undoubtedly identified errors and caused the same to be rectified by the concerned ombudsmen. They have also fostered care in complaint handling within the Ombudsman scheme, not only within their jurisdictions but within the commonwealth jurisdiction. Thus judicial review has been endorsed as a performance tool for the Ombudsman institution. Statutory exclusion of judicial review of decisions of the Ombudsman of Botswana is therefore improper as it purports to prevent the courts from evaluating the performance of the office. There is therefore need for legislative reform to repeal the part of

114 *Op Cit* note 55, p. 10.
115 *Op Cit* note 80.
116 *Op Cit* note 63.
117 *Ibid* at 866.

section 9 (1) of the Ombudsman Act which states that Ombudsman proceedings shall not be questioned in a case of law. In *Chief Seepapito Gaseitsewe* v *Attorney General,* [118] it was held that notwithstanding the existence of an ouster clause, courts will have jurisdiction to hear a review application where the litigant claims that the exercise of the power by a person or authority given the power by a statute is *ultra vires* or where the claim is that the use of the power was tainted by some illegality.

118 *Op Cit* note 89.