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The Ombudsman and the enhancement of good governance in Lesotho

N.L. Mahao

Introduction

Incorporated in the 1993 Lesotho Constitution, which re-introduced liberal multi-party democracy, is a part providing for the establishment of an Ombudsman. The government has embarked on setting up the office with the appointment of the Ombudsman and his staff in October 1993. For the Kingdom of Lesotho, it is the first time the concept and institution of Ombudsman becomes an integral part of the specialised organs of the state - long after many African countries have experimented with this concept in one form or another. It is precisely because this concept, while novel in Lesotho's body-politic, has been around for some time since decolonisation in several countries which share with Lesotho several constitutional and political experiences, that we should ask ourselves whether it will contribute significantly to the improvement of governance.

This paper attempts to grapple with this issue. In critiquing the importance of the Ombudsman, it seems necessary that an analysis of the problem bedeviling governance in Lesotho is highlighted. The first part of the paper renders a brief excursion of this problem which it locates in the manner the modern state emerged and was consolidated and defines the framework of its interaction with society. In the second part, attention is focused specifically on the manner in which the concept is institutionalised with the object of posing the important question: What are the pitfalls which must be avoided if the Ombudsman should make a positive difference to governance in Lesotho? From this tangent, a critical analysis of the mode of appointment of the Ombudsman, the powers and functions and the environment in which (s)he has to function is attempted.

The state and governance in perspective

Critical to the crisis of good governance in Lesotho, as in most other African countries, is the disproportionately enormous powers of the state relative to civil society and the individual. Arguably, this is a function of the way the modern state was historically constructed and the dynamics of the relationship between social reproduction and state power. Inevitably colonialism had to nurture institutions which were powerful enough to maintain the subjugation of the colonised people on a sustainable basis. These institutions were ensconced in institutional and cultural insulation which suited them to respond to colonial interests and whims and not to the sensibilities of the colonised peoples. The manner in which colonial rule was practised in Lesotho is typical of all British colonial Africa.

For a long time the Basutoland colonial state was not an oversized phenomenon that has come to characterise its post-colonial type. But in many respects there are characteristics which, despite being indigenised, the colonial state passed on to its post-colonial successor. To highlight the similarities which have a bearing on the quality of governance in these distinct phases in the evolution of the state it is necessary to recapture the essential features of governance under colonial rule. Firstly, colonial rule was characterised by the capricious orientation of the entire state apparatus. Administrative functionaries made policies and decisions and enforced compliance with them in the absence of political and legal safeguards of whatever nature. The system was predicated on a twin vice of concentration of powers and the absence of checks and balances. Thus by law the High Commissioner was both the country’s executive and legislative authority. At levels below him the Resident and District Commissioners dabbled with administrative and judicial powers with the former also presiding over the highest court in the country. The natural tension between a colonised people and the institutions which symbolised their subjugation and the extractive and exploitative mission of the state dictated that coercion and repression became the dominant mode through which these institutions discharged their authority.

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2 This arrangement was provided in terms of Proclamation No. 2 B of 1984 and reaffirmed by Basutoland Court of Resident Commissioner Proclamation No. 10, 1928.
Because of their historical links with executive authority and their ideological and cultural affinity with the objectives of colonialism, individuals who manned the courts of law could hardly be expected to check the excesses of their counter-parts in the executive even when they had been functionally divorced from the latter. More poignantly, colonial jurisprudence had achieved its apogee of refinement in the landmark case, *The King v The Earl of Crewe, Ex Parte Sekgome.* In brief a dispute between one Mathibe and one Sekgome over the chieftainship of the Batawana Tribe of the Bechuanaland Protectorate was the ultimate cause of the case. As the dispute boiled over and the High Commissioner had been of the opinion that it could threaten peace he issued a proclamation which, *inter alia,* authorised the detention or deportation of Sekgome and barred any process which would question the legality of that detention or deportation. The King’s Bench had to decide the legality of the proclamation itself particularly its import on the Magna Carta and the *Habeas Corpus Acts.* The court ruled that the proclamation was an act of state and therefore could not be questioned by court of law. This ruling was ostensibly based on the interpretation of the Foreign Jurisdiction Act 1890. The rationale was expounded in the judgment of Farwell L.J. thus:

The truth is that in countries inhabited by native tribes who largely outnumber the white population, such acts, although bulwarks of liberty in the United Kingdom, might, if applied there, well prove the death warrant of the whites. When the state takes the responsibility of Protectorates over such territories, its first duty is to secure the safety of the white population by whom it occupies the land, and such duty can best be performed by a responsible officer on the spot. There are many objections to the government of such countries from Downing Street, but the governor’s position would be impossible if he were to be controlled by the Courts here, acting on principles admirable when applied to an ancient well ordered State, but ruinous when applied to semi-savage tribes.

Thus the court laid down the foundation for blank cheque despotism. As Morris has observed "[c]ase law ... came to the aid of the foreign and colonial offices, and gave judicial sanction to a policy which it

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3 1910 K.B.D. p.576
4 Ibid pp.615-616
was, in any case, by then too late to reserve". The decision was clearly a bonus for a colonial judiciary in Africa which yearned for an authoritative statement to lend judicial sanction to colonial authoritarianism. Referring to this decision the Basutoland High Court posed:

If the Governor has power to legislate for the detention of an individual without trial, it can hardly be suggested that he has not the power to create or replace Courts of Appeal.

In this context, therefore, the doctrine of separation of powers, to the limited extent that it was adhered to, was of peripheral value. The community of interests, ideology and historical mission which existed among the personnel who manned the various arms of government rendered checks and balances least to control state excesses. This explained the cynicism of the colonised population towards these institutions and in return the patronising attitudes of all state functionaries from judicial officers, the police and administrators towards the governed.

The decolonisation process did little to change the ethos of the state and to tame its powers. By-and-large this was a top-down process which sought to induct the African elite into the technical-administrative and value system of the colonial state. In Basutoland, for example, Weisfelder has correctly observed that in spite of the introduction of elements of elective democracy, the administrative structures of the chieftainship, the district officer, and the central government departments continued to act independently and even capriciously. He notes further that the supreme irony of the process was that least progress occurred in key areas like internal security, the judiciary and economic planning where sensitivity to democratic norms was most crucial. The Basotho who were promoted to top positions in the civil service, and politicians who received sympathetic hearing from colonial officials were those who had already been fully integrated into the colonial culture. Thus, Weisfelder concludes that "(C)olonial 'preparation' of the Basotho for self-government probably

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6 Chief Letsie Mots’onen v The Government Secretary and others 1926-53 HCLTR p.116 at p.119
created as much cynicism as enthusiasm about the effectuality of an impartial civil service, an independent judiciary, or other elements of Westminster parliamentarism.\textsuperscript{7}

In the post-colonial era, the Africa elite has set on a course of building the state to awesome proportions both in terms of its size, its expansion into all facets of life and the powers it wields. Bayart puts it mildly when he says that "[t]he eminence of bureaucratic power that was instituted during the colonial years has in no way been eroded by independence."\textsuperscript{8} A range of political and constitutional forms were improvised to cloak over this development. These have included the one-party, no-party and military-bureaucratic forms of state which swept away the otherwise incongruous liberal constitutions bequeathed to most African countries at independence. What has emerged as the final product is centralised and crude power which has found its ideology and legitimacy in the not entirely unjustifiable need to hasten development. Governance has been characterised by concentration of power in the executive arm of government. The other arms - the legislative and judicial - are allowed only limited space to function. Arbitrariness, overt coercion, unaccountability, corruption and ineptitude are common as a result. It is common place knowledge that this malaise of governance has been the hallmark for a good part of Lesotho's post-colonial history. The inception of the concept and institution of Ombudsman in Lesotho must be contextualised in this background.

In interrogating the subject whether the Ombudsman institution can and how it should play a role in the national challenge of enhancing good governance, we do not counterpose it to other institutions and processes that are necessary to the re-vitalising good governance in our society. Needless to say that the list of such institutions and processes whose critical essence is to redress the gross imbalance between state power and the power of society and humanise the former by infusing into it relevant values and practices is inexhaustive. The rebirth of constitutional rule in 1993 should create


\textsuperscript{8} Jean-Francois Bayart, \textit{The State in Africa: The Politics of the Belly} (London, 1989) p.169
an enabling environment for the consolidation of the rule of law and
democratic rule. The checks and balance mechanisms availed by the
Constitution in the form of judicial review, parliamentary control over
the executive and the supremacy of the constitution need to be
enhanced and jealously guarded.

From a constitutional point of view if there is any serious objection to
the role of a supervisor of public administration of the Ombudsman
type, it is that its operations are in conflict with the hallowed
Westminster doctrine of ministerial responsibility. Lesotho, as it is true
also of many countries which base their form of rule on parliament
government, adheres to this doctrine in principle. Its essence is that
ministers of government as political supervisors, are held accountable
to parliament for wrongs which happen in their ministries. They, and
no one else, must crag the whip of discipline on errant civil servants
who must always remain anonymous to both parliament and the
general public. It is often argued by exponents of the doctrine that the
access which the Ombudsman gains to documents, offices and officials
in terms of his powers as well as his powers to dictate forms of redress
in certain circumstances, ousts the rationale behind ministerial
responsibility. There is a degree of substance in this argument. The
basic assumption of ministerial responsibility is that a minister’s
exclusive supervisory authority within his department is a necessary
corelate of his accountability to parliament.

But on the other hand there are doctrines which may be working at
Westminster but which elsewhere do not. And yet even at
Westminster these days it is doubtful whether ministerial
responsibility is any more than a fetish. A learned Professor of the
British constitution has had this to say on the doctrine:

There is a simple explanation why the myth of the effectiveness of this
device has persisted; it suits Ministers because it appears to be
subjecting them to the control of Parliament, although the reality is
different, it flatters the ego of back-bench M.P.’s who wish to feel they
are more than rubber stamps for their party.9

9 I am indebted for this quotation to G.K. Rukwaro’s article entitled ‘Redress
of Grievances: “The Case for an Ombudsman in Kenya” in the East Africa
In Lesotho's short post-1993 parliamentary experience not once has a minister been censured for any serious maladministration in his department by back-benchers, who incidentally are all from the same party, for any serious maladministration in his department. This neither means that cases of gross maladministration have not existed; there have been numerous. But back-benchers are as keen as the ministers to connive at concealment of wrongdoing because they do not want the name of their party to be tarnished. On the contrary whenever a serious wrong spills into the public domain the public is often treated by M.P.s to a ritual of tongue-bashing of civil servants who are indecently branded agents of opposition parties intend on sabotaging the government. In these circumstances the claim that the work of the Ombudsman undermines the operation of a sacred doctrine is hollow.

Equally important for a country undergoing transition from an authoritarian culture is that democracy itself can be infected by the vile practices of the past which negate its intrinsic value while extolling its outward forms. This reality, therefore, calls for the creativity that goes beyond the traditional forms of checks and balances. The introduction of a general supervisor of the sort of an Ombudsman is against this background a welcome development. But the danger of the Ombudsman institution being enmeshed in cynical perceptions as has happened with some governmental institutions, cannot be overemphasised. In order to overcome this problem the belated entry of Lesotho into the Ombudsman culture must be utilised to the country's advantage by critically reflecting on the experiences of others while also moulding the institution to meet our needs, challenges, national character and vision.

The appointment of the Ombudsman

For the Ombudsman to meet its mammoth challenge of being an effective watchdog over administrative conduct, its autonomy from those it must police is arguably one of its key pre-conditions. This is a question which relates to its mode of appointment, tenure of office and operations. The Constitutions of Lesotho, 1993 provides that the Ombudsman shall be appointed by the King acting on the advice of the Prime Minister for a period not exceeding four years.10 In other

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10 Section 134
words the Prime Minister is the de facto appointing authority. The notion that the head of the Executive shall be the appointing authority is not novel to Lesotho. Under the Interim Constitution of Tanzania, 1965 the appointment of the Permanent Commission of Enquiry (PCE), the Tanzanian Ombudsman, was equally vested in the President. Similarly the Ugandan Inspector General of Government (I.G.G.) and his assistants are appointed by the President. Indeed many other African countries have followed this pattern.

In following this trend, the Lesotho Constitution framers seem to have taken the view that the mode of appointment is not essential to the autonomy of the institution. It must be born in mind that many of the countries which opted to vest the authority of appointment in the Head of the Executive were either one-party or no-party states. This was true of Tanzania in 1965 and of Uganda in 1988. Thus the perception that the President was the embodiment of national virtue informed the philosophic outlook underlying the manner of constituting the institution. Indeed the mode of appointment of the institution was consistent with the often expressed exemption of the Head of the Executive from its scrutiny. It needs not be overemphasised that plural democracy envisaged in the Lesotho Constitution, 1993 is at odds with philosophical inspirations underpinning a one-party or no-party state.

An interesting study on the Ugandan IGG has observed instructively that:

In the first instance, the manner of appointment of the IGG plays an extremely influential role in determining both the investigative character and the subjects of investigation of the office. The IGG has Cabinet rank and while ostensibly standing above everybody else it is important to query, and not simply to assume, whether he can seriously and objectively investigate any member of the Executive.  

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11 Section 68 The Interim Constitution of Tanzania 1965  
12 Inspector General of Government Statute, 1988 Section 3(1) (a), (b) and (c).  
13 Interim Constitution of Tanzania 1965 section 67 (4)  
14 See unpublished research paper by J. Olaka-Onyango "Novel Forms of Governance in East Africa: The case of Uganda’s Inspector General of Government" p.10
The observation continues:

This problem is especially apparent in the light of the fact that in Uganda's historical experience, it is the Executive (the President and his Cabinet Colleagues) that has been the instrument of government most responsible for the perpetuation of human rights violations, corruption and abuse of office.  

These are arguments which can hardly be ignored if there is any seriousness about curbing administrative abuses because they apply *mutatis mutandis* to the Lesotho situation.

Equally important for consideration is the perceptions which the public at large have about the Ombudsman. These perceptions are the final arbiters of legitimacy and public esteem of all institutions of government. A sore legacy of Basotho's recent past history is the deep-seated national disunity which continues to fan the embers of suspicions, mistrusts and cynicism towards these institutions. To shore up universal confidence in institutions of government, therefore, there is a desperate and urgent need to place beyond question the independence of those of them that are by their character non-partisan and apolitical. Arguably, therefore, the mode of appointment of the Ombudsman prescribed in the Constitution does not facilitate and nurture the right perceptions among members of the public. Considering also that the Ombudsman is appointed for a period of four years, which corresponds too closely with the five year tenure of government, an impression is created that every incoming Prime Minister is granted an opportunity to appoint "his own" Ombudsman. The imperative to delink both the necessarily non-political and non-partisan character of the Ombudsman from the necessarily political and partisan office of the Prime Minister and the tenure of these two offices can not be overstressed.

These arguments are not intended to give the impression that the Constitution framers were not insensitive to the independence of the institution. They were, and this is born out by section 135(4) which states that "in the exercise of his functions the Ombudsman shall not be subject to the directions or control of any other person or authority". The question is whether this stipulation suffices to provide

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15 *Ibid*
for an independent Ombudsman. Suppose a party functionary is appointed to be the Ombudsman, would this provision secure his autonomy and ensure that he censors the actions of his party leaders in government? While this is not impossible, because all would depend on the integrity of the holder of the office, this is a defective basis for providing for an effective check mechanism for all times. The Papua New Guinea model is obviously superior because it ensures that the Ombudsman does not feel obliged to any one person for his appointment. In that country, the Ombudsman is appointed by an Ombudsman Commission which consists of the Prime Minister, the Chief Justice, the leader of the Opposition, a chairman of a relevant Permanent Parliamentary Committee and the chairman of the Public Service Commission.\(^{16}\) It may well be that this model is not \textit{holus bolus} appropriate for the circumstances of Lesotho. But it gives a good idea of how in some developing countries the issue of the appointment of the Ombudsman is deemed to be critical to the discharge of its mandate in an unencumbered way. This model parallels the mode of appointment of our own judges of the High Court through the Judicial Service Commission which has so far commanded respect.\(^{17}\)

**Functions and powers**

The framework for the functions and powers of the Ombudsman is laid in section 135 of the Constitution. Judging by section (1)(a) the principal concern of the Constitution - framers was to provide for a complaints Ombudsman. A reading of this clause runs thus:

(\textit{May} investigate action taken by any officer or authority referred to in subsection (2) in the exercise of the administrative functions of that officer or authority in cases where it is alleged that a person has suffered injustice in consequence of that action.

Clearly this clause provides for very limited functions. In the first place it would seem that it precludes the power of the Ombudsman to investigate on his own accord. This is a logical reading from the requirement that investigations will evolve from an allegation. It means that if the Ombudsman has reason to suspect an abuse of power he can not initiate an investigation because no aggrieved party

\(^{16}\) See Section 217 Constitution of Papua New Guinea.

\(^{17}\) See Part 6, Chapter XI, Constitution of Lesotho, 1993.
has come forward to lodge a complaint. In practice this requirement would exclude investigation on numerous instances of bureaucratic abuse of office where no particular person claims to have suffered injustice. However, subsection (1)(b) adds that the Ombudsman may perform such other duties and exercise such other powers as may be conferred on him by an Act of Parliament. The Ombudsman Act No 9, 1996 has indeed widened his functions and powers so as to empower him to make *moro motu* investigations. This is implicit in Section 7 (1) (a) which states, inter alia, that the Ombudsman may initiate an investigation or inquiry where, inter alia, it has come to his notice that a person or group of persons has suffered or is likely to suffer injustice or infringement of a fundamental right. Sub-section (1) (b) confers upon him similar powers with regard to an instance or threat of degradation, depletion, destruction or pollution of the natural resources, environment or ecosystem. This is indeed a welcome broad mandate which is an indication that there is a sense of seriousness about dealing effectively with the accumulated legacy of bureaucratic excesses.

Unlike in most other African states, the Lesotho Ombudsman has jurisdiction over most authorities of the state with the exception of His Majesty the King, the parliament, the cabinet, the courts of law, statutory tribunals and the public service.\(^\text{18}\) The relevant clause in the Constitution provides that subject to such exceptions and conditions as may be prescribed by Parliament, the Ombudsman may investigate action taken by any department of government or any member thereof, any local government authority and members and officers thereof, and any statutory corporation and the members and persons in the service of a statutory corporation.\(^\text{19}\) This covers a wide spectrum of power-holders which *prima facie* also include cabinet ministers in their capacities as heads of government departments. Thus, it seems parliament has been consistent with the preliminary objective of the Constitution framers which was to place every officer and authority within his investigatory purview, save for those exempted above for obvious reasons. This is necessary because the usual African attitude of exempting the actions of powerful authorities from supervision has arguably not been of much help in curbing abuses of power.

\(^\text{18}\) Section 19 of the Ombudsman Act, No 9, 1996.

\(^\text{19}\) Section 135(2)
Another positive development in the Lesotho Constitution is that the Ombudsman is required to submit his annual reports to parliament rather than to the Head of Government as happens in some African countries.\footnote{Section 135(3).} This lays a good basis for reports to be available to the public via parliamentary debates which is in itself an important check mechanism. It would be regrettable, however, if this is seen as the only way that the investigations of the Ombudsman can exercise pressure on the State and its agents. In the course of his investigations the Ombudsman should naturally uncover some very serious violations of the law. There is no reason why in such circumstances he should not refer his findings to the Director of Public Prosecutions (DPP) for further action. This added power would not only be a useful supplementary pressure to parliamentary exposures, but is likely to be the most effective means of dealing with excesses. Unfortunately, the power to refer findings to the DPP has not been incorporated in the Act.

**The enabling environment**

The notion of an enabling environment in this context refers to several factors which would enhance the capacity of the Ombudsman to impact on governance. These range from the political climate in which the institution functions, its logistical competence, financial autonomy, accessibility to the public, etc. It is obvious that even if the legal framework does provide for the fullest possible autonomy, its capacity would be hampered if these factors which constitute the minimum requirements of an enabling environment are not in place.

Although the Ombudsman is provided for by the Constitution and the Act affirms its necessity, as governments come and go some of them may perceive its activities to be inimical to their authority. They may strive to control it not by resorting to the manipulation of the legal framework but through starving it of funds and other logistical support. Consequently the institution would be reduced to a lame duck or a dog which may bare its teeth but is incapable of biting. It is imperative therefore that there should be a political will to support the Ombudsman so that she is efficient and effective. However, it is still more necessary that this political will is translated into a law that secures the financial and logistically autonomy of the institution. Not
only must the Ombudsman be independent, but so also he must have an independent staff and a pool of investigators, vehicles, etc. His functionaries must owe no allegiance to any other department of government. Both the Constitution and the Act are regretably silent on this very important question of logistical and financial autonomy.

Decentralisation in the office of the Ombudsman is also imperative. Evidence in Lesotho indicates that a substantial degree of rot in public service occurs in the districts where it is hidden away from senior officials and the media. In the same vein, it is clear that it is the public who are supposed to be serviced in these outlaying places who incur the wrath of bureaucracy because of their vulnerability and limited bargaining power compared to those in the major centres such as Maseru. If the Ombudsman is to be the protector of particularly the least powerful man and woman in society, apart from being a guardian of collective public ethos, his/her services must be accessible through decentralisation.

According to his Annual Report covering the period from April, 1994 to March, 1995, the Ombudsman visited several districts of Lesotho where he conferred with chiefs, heads of government departments, representatives of Village Development Committees (VDC) and religious and political groupings with the view to publicising the institution. Campaigns of this nature can be useful especially for purposes of introducing a new institution. A major draw back with them is that information disseminated at these kind of fora may not filter to the grassroots. This is an important defect especially when the bulk of those the Ombudsman spoke to, chiefs, administrators and the VDCs, are often the perpetrators of abuses upon the ordinary citizen.

Although during the period dealt with in the Report a relatively impressive record of one hundred and twenty cases were reported - which fact indicates a good public response to the work of the Ombudsman - it cannot be deciphered from the Report if the complaints included people outside Maseru. The institution will only be national in character if it is genuinely decentralised not only in terms of its existence being known, but it should be located reasonably closer to those who should be the consumers of its good

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work.

**Conclusion**

In view of the dire need to render the state and its institutions tamed, humanised and reconciled with the aspirations of the people, the establishment of the Ombudsman under the Lesotho Constitution, 1993 is a welcome development. It has to be seen as part and parcel of the larger process of democratising society and inculcating the ethos of transparency, accountability and above all of addressing the culture of bureaucratic corruption and untoward discretion which harm the citizens' interests. But it is critical that the institutionalisation of the Ombudsman in Lesotho goes beyond a mere window-dressing, which one suspects is often the case in most developing countries. Of vital importance in addressing this likely scenario, is the need to insulate the process of the appointment of the Ombudsman from possible manipulations by stake-holders so that the autonomy of the office-holders is well entrenched in the public perceptions. The powers and functions of the institution also need to be expanded to encompass as wide as possible the malaise in the public sector. Similarly, the accessibility, financial and logistical needs of the institution deserve to be given good consideration and, where possible, legal backing.