

ANALYSEN UND BERICHTE

The Ombudsman Experiment in the Kingdom of Swaziland: A Comment

By *Joseph R. A. Ayee*

Introduction

»It is part of the good man's well-being and peace of mind to know that the society to which he belongs does justice to his fellow man also . . . Therefore, the existence of an institution which helps citizens to obtain justice in their dealings with the powerful authorities has a value for us, even while we do not need it ourselves . . . We Ombudsmen have been given a chance to have a deep impact on the quality of life in our communities. The affairs of human society are hardly anywhere in such a good shape that the potential of a blessing can be permitted to be redundant . . . God gave Man the task of conducting an everlasting struggle for moral advancement, not only in his individual soul but also in his society. In this a meaningful role is assigned to us.« (Izhak Nebenzahl, »The Direct and Indirect Impact of the Ombudsman«, International Ombudsman Conference, Edmonton, Alberta, September 1976, pp 13–14)

With the rapid expansion of services and regulatory functions of governments everywhere, it has generally been accepted that the bureaucrat exercises considerable power. Many statutes and laws have their origin in the bureaucracy; the advice of the bureaucrat typically shapes legislative proposals of politicians; bureaucrats actively influence policy – makers and the public with their ideas; and they usually have substantial discretion about what importance to attach to, and how to implement, quite a number of statutes. In addition, a bureaucracy in a developing country typically has its area of power further enlarged by the inadequacy of external controls, and influences exerted upon it. Representative assemblies, where they exist, seldom assert themselves adequately as far as legislative control over the executive is concerned; the influence of external interest groups is generally hardly felt; judicial control by the courts is infrequent and at the same time inadequate; and in the absence of an effective structure for interest aggregation the bureaucracy tends to be regarded virtually as the sole instrument and agent for bringing about socio-economic development.

In order to maintain and promote responsible administrative conduct, therefore, it is not only essential that a means be found to guard against abuse of this immense administra-

tive discretion; but also there is the need for the creation of an inexpensive, speedy and largely informal as well as a socially effective means whereby the individual can ventilate his legitimate grievances resulting from official maladministration. Without proper democratic controls, the concentration of power in the administration might not only give rise to venality, inefficiency and mistrust of the government but also increase the risk of subverting the government itself. The quest for a solution to the problem has led to the global search and resort to the institution of the Ombudsman, to control, at least, the incidence of abuse of power.

This article examines the Ombudsman experiment in the Kingdom of Swaziland and the factors that led to the abolition and subsequent demise of this time-honoured »quasi-judicial« institution.

The Ombudsman Institution: A Historical Perspective

The word »Ombudsman« is derived from the Swedish word »Ombud« meaning a spokesman or representative of another.¹ The International Bar Association, defines the Ombudsman Institution as follows:

An office provided for by the Constitution or by action of the Legislative body and headed by an independent, high-level public officer who is responsible to the legislature, who receives complaints from government agencies and officials and who has the power to investigate, recommend corrective action and issues reports.²

Succinctly put in the words of Rowat, »a legislative ombudsman is an officer of the legislature who has the power to investigate complaints from the public against administrative action and, when a complaint is justified, to seek a remedy.«³ These definitions, it should be noted are in accord with many Ombudsman institutions spread across the globe.

There have been several responses to the question of who shall control those who govern. Sweden was the first country to devise an institutional answer to the question. In Sweden, where the Ombudsman institution originated, there had been a prototype of the office starting in 1713 with King Charles II, who appointed one of his councillors to the post of the King's Highest Chancellor of Justice: Konungens Högsta Ombudsman.⁴ In 1719, the post was renamed Justitiekåser (Attorney General), with the same functions

¹ Republic of Ghana, *Annual Report of the Ombudsman 1981*, Ghana Publishing Corporation, Tema, 1982, p. 1.

² *Ibid.* p. 1.

³ Donald C. Rowat, »The Suitability of the Ombudsman Plan for Developing Countries«, *International Review of Administrative Sciences*, Vol. L. No. 3, 1984 p. 207.

⁴ T. M. Ocran, *Law in Aid of Development*, Ghana Publishing Corporation, Tema, 1978, p. 92.

as before. This officer was charged with the duties of keeping an eye on the royal officials and of prosecuting those of them who contravened the law. Thus he was primarily the incumbent of an institution that enabled the Swedish monarch to insure himself against his own employees, in particular against embezzlement by his tax-gathers.⁵ The excessive dependence of the institution on the executive came to be resented by the legislature; and as the fortunes of the monarchy began to wane during the eighteenth century, the Swedish parliament sought its own overseer of the administration. Subsequently, the Constitution of 1809 established the office of Justitieombudsman (JO) to supervise the universal observance of the laws in his capacity as appointee and representative of parliament.⁶ In 1915, the supervision of military administration was taken away from the JO and given to a special Ombudsman, the Militieombudsman (MO). In 1968, however, the Swedens dissolved the two offices and introduced a body three Ombudsmen to take up both military and civilian complaints.⁷

The Swedish Ombudsman institutional example proved extremely exportable and the other Scandinavian countries followed suit. When Finland accepted a republican constitution in 1919, the Ombudsman was one of the first institutions to be adopted. Denmark adopted the institution under its 1953 Constitution, appointing its first Ombudsman in 1955. Norway created the offices of Ombudsman for Military Affairs in 1952 as well as the Ombudsman for Civil Affairs in 1962.⁸ From its Nordic birthplace, the Ombudsman institution has spread to other parts of the world, with local adaptations in power and structure and sometimes in title. Thus, West Germany established a Military Ombudsman in 1956, while New Zealand introduced a Parliamentary Commissioner of Investigation in 1962. Israel has a State Controller, while Britain has had a Parliamentary Commissioner for Administration since 1967, and the Soviet Union a Procurator General. Guyana, Mauritius and Fiji are the developing countries which first adopted the institution in 1966, 1970 and 1972 respectively.⁹

The Main Features of the Ombudsman Institution

There have been variations in the characteristics of the Ombudsman institution in different places where it has been adopted, but in essence the basic features are the same. These are as follows:

(1) The institution concerns itself intimately with relating legal norms and processes affecting the powers and functions of the administration to more comprehensive social

5 Walter Gellhorn, *Ombudsmen and Others*, Harvard University Press, Cambridge, 1967 p. 2.

6 K. B. Jain and J. Pillai, »Transplanting Ombudsman in India«, *Indian Journal of Public Administration*, Vol. xxx1 No. 3. July–September 1985, p. 856.

7 Ocran, *op. cit.* p. 92.

8 *Ibid.* p. 93.

9 Rowat, *op. cit.* p. 207.

and political values and demands, by providing remedies for the abuse of those legal processes by officers.¹⁰

(2) The institution's appeal is usually either to parliament or to the government rather than to the courts of law, for the basic aim of the institution is to promote social justice rather than the rule of law.

(3) It provides an inexpensive procedure for the individual to ventilate his grievances. In some cases a verbal report to the office of the Ombudsman is enough and at worst all that may be required is a signed statement from the aggrieved individual to the Ombudsman's office.

(4) The working of the institution always entails an investigatory function. This means that the Ombudsman investigates complaints against official maladministration.

(5) Usually the ombudsman has power to compel the appearance of witness and these may be required to produce relevant documents. Indeed many complaints are dismissed with reasons after the examination of such documents. In short, there is usually a hearing organized by the Ombudsman.

(6) In some cases the Ombudsman is also given the power to initiate proceedings before the courts of law.

(7) The institution is characterized by publicity, which is through the Ombudsman annual report usually required to be made to the legislature.¹¹

Swaziland's Experimentation of the Ombudsman idea: Functions and jurisdiction

Unlike most developing countries whose constitutions contain entrenched provisions for the establishment of the office of the Ombudsman, Swaziland's Ombudsman office was created by the Queen's Regent Decree No. 2 of 1983, paragraph 16 (1) which provided that:

The King may appoint a person to be known as an Ombudsman who, subject to any law, shall have jurisdiction to inquire into the conduct of any person (except the King, Indlovukazi, the Authorised Person acting as such and the liqoqo or any member thereof) . . . in respect of the exercise, abuse or neglect by him of the functions or authority of his office.

The Decree went on to stipulate that:

. . . the Ombudsman shall, whenever so directed by the King, inquire into the conduct of any person concerned and may, unless the king otherwise directs, carry out an enquiry whenever he

10 Kingdom of Swaziland, Queen Regent's Decree, No. 2, 1983, para. 16 (2).

11 Gerald Caiden, »Ombudsmen in Developing Democracies: Comment«, *International Review of Administrative Sciences*, Vol. L. No. 3. 1984, p. 222.

deems it desirable that an enquiry be made into the conduct of any person in respect of whom allegations exist, of misconduct or abuse of office or authority.¹²

Thus the Swazi Ombudsman, like in most developing countries, was given the power to investigate any action taken by certain public institutions, agencies and officials in the exercise of their administrative function. These included any department or ministry of the country; any member of the public services and any »corporate or unincorporate institution, in which, the Government, the Ngwenyama in trust for the Swazi Nation or the Swazi National Council or the Swazi National Treasury holds shares or any financial or monetary interest and includes any such body in which such corporation holds shares or any monetary or financial interest.«¹³

We should note five points about the jurisdiction of the Ombudsman. First, only the administrative acts of those institutions and officials were to be investigated. Thus judicial or quasi-judicial acts were excluded from the Ombudsman's jurisdiction. Second, as in Denmark, the Judiciary was completely excluded from his jurisdiction:

Nothing in this paragraph or in any other law shall confer or be construed as conferring on the Ombudsman any jurisdiction to inquire into or review any decision of any Judge, Magistrate or any Registrar of a Court where that decision was made by him in the exercise of the functions of his judicial office and the Ombudsman shall, similarly, have no power to inquire into or review any decision of any tribunal or similar body established by law for the performance of judicial functions in the exercise of those functions.¹⁴

This provision is in sharp contrast to the rules in Sweden and Finland, where the Ombudsman is given powers to challenge even the judicial decisions of the Judiciary. Third, the Ombudsman's activities have been restricted with the proviso that he cannot investigate even the administrative acts of the King, the Indlovukazi (the Queen Mother), the Authorized Person and members of the Liqoqo, (the then Supreme Council of State), all members of the executive arm of government. This proviso is in keeping with the Swazi tradition that the King and for that matter the monarchy »can do no wrong«. This exclusion of the King, who is the executive Head of State, from the jurisdiction of the Ombudsman does not augur well for the smooth and uninterrupted operations of the institution in Swaziland. This is because the Ombudsman will not work unless:

The government is willing to allow an independent voice to represent grievances against public administration. The government admits administrative fallibility and the right of the public to demand higher standards of administrative performance. If wrong has been done, the offending agency is expected to correct its error and devise ways to prevent recurrence. If wrong has not

¹² *Ibid.* pp 221–224.

¹³ Queen Regent's Decree, *op. cit.* para. 16 (3).

¹⁴ *Ibid.* para. 16 (5).

been done, it is important to know what misconceptions and grievances people may have toward officialdom and to restore confidence in the relations between state and citizen.¹⁵

Fourth, unlike most developing countries where the Ombudsman submits his report to the legislature, in the case of Swaziland, »the Ombudsman shall submit to the king a report on the proceedings of the enquiry and his conclusions and recommendations«.¹⁶ Fifth, there has been a blanket exclusion of the judiciary and law officers department from the jurisdiction of the Ombudsman. This seems curious and bizarre! It would make sense to exclude the Ombudsman from investigation of cases that are *sub-judice* or pending before the courts but to exclude the entire judiciary especially in the exercise of its administrative functions from the operations of the Ombudsman is conceptually faulty and portrays an elitist preservation of self-interest. Besides in practice such an exclusion is liable to lead to a great deal of injustice which cannot be corrected by appeals to the courts themselves. Experience has shown, for instance, that unjustifiable delays by the courts in the exercise of their judicial and administrative functions are a common and grave source of injustice. This is clearly brought out within the African context by the Annual Report of the Tanzanian Permanent Commission of Inquiry. The Report stated that the judiciary topped the list of complaints in 1970, registering 238 of 1651 complaints.¹⁷

The Organization of the Swazi Ombudsman

To enable it to perform its functions effectively, the Ombudsman office has the following staff establishment that was approved by the Department of Establishments and Training:

<i>Post</i>	<i>Establishment</i>
Ombudsman	1 (equivalent to a Cabinet Minister)
Commissioner of Investigations	1
Senior Crown Counsel	1
Financial Controller	-
Private Secretary	1
Senior Personal Secretary	1
Assistant Accountant	1
Executive Officer	1
Chauffeur	1
Clerical Officer	1
Typist	1

¹⁵ Caiden, *op. cit.* p. 222.

¹⁶ Queen Regent's Decree, *op. cit.* para. 16 (3).

¹⁷ Ocran, *op. cit.* p. 112.

Driver	1
Security Guard	1
Telephone Operator	1
Nightwatchman	-
Messenger	1
Cleaner	1

Source: The Ombudsman Annual Report, January 1985–December 1985, pp. 25–26. Judging from the staff establishment above, one is tempted to say that the Swazi Ombudsman, like in most developing countries, had the »necessary« personnel that would enable him to discharge his statutory obligations. The offices of the Commissioner for Investigations and the Senior Crown Council portray the investigatory and quasi-judicial nature of the institution.

The operations of the office were financed fully by the Government of Swaziland and budgetary vote approved by Parliament annually. The vote of the Swazi Ombudsman was controlled by the Ombudsman himself and payments were effected through the Accountant General Office as is normal with any government department or ministry. Budget estimates for the Ombudsman's office were approved for the following years:

<i>Year Ending</i>	<i>Amount</i>
31st March 1985	E205,000
31st March 1986	E220,100
31st March 1987	E212,000

Source: Report of Financial and Related Matters of Ligoqo and Ombudsman's Office for the Period 25th August 1982 to 25th May 1986, p. 25.

A point to note is that by controlling the vote himself, the Ombudsman was financially independent, which therefore may forestall any political interference in the exercise of his statutory functions.

Performance of the Ombudsman

Since the appointment of the first Ombudsman on 18th November 1983 by Legal Notice No. 114 of 1983, the office has published only one annual report to date. The Report, which covers the period January 1985 to December 1985, shows a list of seven cases¹⁸ in

18 The cases are (i) The E13 Million Customs Duty Fraud (Ministry of Finance); (ii) the National Industrial Development Corporation of Swaziland; (iii) the Proposed purchase of a persetel computer by the Swaziland Government; (iv) the activities of officers in Central Medical Stores; (v) the Swaziland Railway; (vi) the financial collapse of Swaziland Chemical Industries; (vii) the Royal Swaziland National Airways Corporation.

which the then Queen Regent directed that inquiries be held into by the Ombudsman and forty other individual complaints by members of the public ranging from »labour disputes up to cases involving procedural matters involved in taking complaints to a higher authority«.¹⁹ This maiden annual report, which is supposed to cover a three year period, is a lean one of 15 pages, unlike annual reports of Ombudsmen in other developing countries which are voluminous ranging from between 50 to 120 pages. While the report dilated a little on the seven cases which the Queen Regent requested the Ombudsman to enquire into, its coverage of the 40 individual cases was »uncharacteristic« of an annual report of an Ombudsman to say the least. These cases were just mentioned in passing in the web of one line.²⁰ The information in the report is therefore inadequate and marked by substantial lacunae.

A further characteristic of the report is its inability to cover the procedural aspects of receiving complaints and conducting inquiries. The procedure for lodging complaints had not been documented even in the Decree establishing the office.

From what has been said so far it is tempting to say that the Ombudsman annual report was hastily written to meet a statutory requirement of the Decree which created it.

Two factors contributed to what one may call the dismal performance of the Ombudsman. The Ombudsman, Mr. Robert Mabila, whose position earned him the status of a cabinet minister was at the same time holding two other positions; namely Secretary to the Likoqo (the Supreme Council of State) and Secretary and an Administrative Officer of the Border Adjustment Committee. By holding these positions concurrently, it was not only impossible but also difficult to discharge his functions as an Ombudsman effectively. In fact, his functions as an Ombudsman and at the same time Secretary to the then Supreme Council of State (Likoqo) were anomalous, ambiguous and ambivalent. His association with the now discredited Supreme Council of State, whose members are being tried for high treason committed during the interregnum of 1982–86, had won a bad name and image of the office of the Ombudsman in the eyes of the public. Second, the reaction of the people to the institutions was apathetic. Few people knew it existed. To what extent did the people – especially the ordinary people – use the Ombudsman as a dispute settlement machinery? In 1983–85, the Ombudsman office received only 40 cases. This might suggest some disappointment with or apathy to the institution. It is therefore tempting to say that knowledge and use of the office of the Ombudsman was very much the preserve of a tiny minority, the urban and literate population.

The above factors largely contributed to the scrapping of the office of the Ombudsman in Legal Notice No. 48 of 1987. Thus the Ombudsman institution has disappeared and has been abandoned by the Swazi government that has no use for it.

19 Kingdom of Swaziland, *The Ombudsman Annual Report*, January, 1985 – December 1985, Swaziland Publishing and Printing Co. Ltd., Mbabane, 1986, p. 13.

20 Kingdom of Swaziland, *Report of Financial and Related Matters of Likoqo and Ombudsman's Office for the Period 25th August 1982 to 25th May 1985*, Swaziland Publishing and Printing Co. Ltd, Mbabane, 1986, pp. 27–30.

Conclusion

What comments can we make about the Ombudsman experiment in the Kingdom of Swaziland? In the first place the abolition of the institution is unfortunate because the »political system must guarantee multiple channels for the redress of individual grievances against the administrative state«.²¹ And one of the surest and inexpensive channels is the office of the Ombudsman. It is one thing revoking the appointment of the Ombudsman and another thing scrapping the office altogether. By doing away with the office of the Ombudsman the Government of Swaziland seems to have done a great disservice to the people of the country because:

in the present era of welfare state any good government that stands for the welfare of its citizens must aim at providing institutions that would look into the problems of redress of citizens grievances.²²

It must be pointed out and borne in mind that the Ombudsman institution is not portrayed here as the only institution that can take care of the abuse of discretionary power by public officials. Viewed in this way:

It (Ombudsman) cannot be a panacea. A number of people seem to regard »Ombudsman« as a kind of magic word that will cure all the administrative ills. But the age-old problem of the relation between the state and the individual is far too complex to be solved by one simple scheme. We need a whole variety of controls over administrative action, and the ombudsman scheme must be accompanied by a number of other reforms that are needed to fill the gaps in our system of control. Otherwise, the scheme may fail because we are trying to make it to do too much.²³

The last comment one can make of the Ombudsman experiment in Swaziland is that like all new creations in the history of institutions, the Swazi Ombudsman encountered some friction and at times opposition from the bodies or authorities whose conduct he sought to investigate and censure. In his only annual report the Ombudsman lamented:

Some officials have already exhibited a tendency to regard the Ombudsman and members of his staff with hostility, resentment and suspicion. The officials in question have openly spoken against the Office of the Ombudsman and some of them have already denounced its existence and advocated its abolition. Such officials are either completely misinformed about the functions of the Office of the Ombudsman and the gap it fills in administration of justice or hold a biased and ill-conceived view of the Office after perhaps their activities were called into question by the Ombudsman.²⁴

21 Caiden, *op. cit.* p. 222.

22 Jain and Pillai, *op. cit.* p. 855.

23 Donald C. Rowat, »The Spread of the Ombudsman Idea«, in Stanley V. Anderson, (ed.), *Ombudsman for American Government* Englewood Cliffs, N.J., Prentice Hall, 1968, pp. 24–25.

24 The Ombudsman Annual Report, *op. cit.* p. 13.

We should note that the demise of the Swazi Ombudsman institution is a vivid fulfilment of Machiavelli's observation on the fate of new institutions. He writes:

It must be remembered that there is nothing more difficult to plan, more doubtful of success, nor more dangerous to manage than the creation of a new system. For the initiator has the enmity of all who would profit by the preservation of the old institution and merely lukewarm defenders in those who could gain by the new ones.²⁵

It has therefore been a bitter and traumatic experimentation of the Ombudsman institution in the Kingdom of Swaziland. However, it is the contention of the present writer that the abolition of the institution is uncalled for and should, as a matter of urgency, be reinstituted.

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25 Niccolo Machiavelli, *The Prince*, Aldine Press, London, 1958, p. 113.

ABSTRACTS

The Ombudsman Experiment in the Kingdom of Swaziland: A Comment

By Joseph R. A. Ayee

The Ombudsman institution, one of the most important and inexpensive means for the redress of grievances of individuals against official abuse and misuse of power, has been experimented within the Kingdom of Swaziland for three years. The institution was abolished in June 1987. The article examines some of the constraints that hampered the smooth operation of the Ombudsman office and which led to its subsequent demise. The article argues that the abolition of the institution is unfortunate, since it is one of the time-honoured institution for the redress of individual grievances in any polity.

Unveiling A Hidden Painting: Islam And North African Constitutions

By Koen De Feyter

Islam, as a religion, is also a determinant ideology for political, economic and social activity; overarching all human affairs, it does not permit the separation, within a body politic, of the spiritual and the temporal. The instrument of God's will, the person of the Islamic ruler is aided, but not controlled or instituted in his office, by the people whose affairs he is to govern.

This pristine essence of Islamic doctrine has, however, been difficult to reconcile with the conditions of modern, often post-colonial, statehood in the Islamic world.

The article outlines some of the fundamental principles of Islamic religion with respect to the organisation and the conduct of government and the position of religious minorities. Subsequently, the constitutions of seven states with overwhelming Muslim majorities (Algeria, Egypt, Libya, Mauritania, Morocco, Sudan and Tunisia) are analysed in detail to elucidate how these modern polities have dealt, in different ways, with the delicate task of allying the divinely guided autarchy of the Islamic ruler with notions of Western-inspired constitutionalism. The survey shows that the caparison of such Islamic constitutions cloaks a system of government still profoundly informed by the tenets of the ancient faith.