Article

The Binding Nature of the Ombudsman's Remedial Actions in Lesotho: Lessons from South Africa

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Abstract

The Constitution of Lesotho is regarded as liberal, with the separation of powers of the executive, judiciary and legislature, but provision was made for institutions to oversee the exercise of such powers. One of these is the Office of the Ombudsman, which has wide-ranging powers to investigate malpractice in public administration and to make recommendations for remedial action. These powers notwithstanding, there is a paucity of judicial precedent and scholarship on the binding nature of the remedial action of the Ombudsman. The main question is whether the remedial action of the Ombudsman is binding, which this article seeks to investigate and determine whether South African jurisprudence could be helpful in the case of Lesotho. The binding nature of the Public Protector's remedial action under the Constitution of South Africa has been a subject of considerable judicial and scholarly engagement in recent times. While the subject is still yet to be settled in South Africa, it nevertheless has developed principles that could assist in both the interpretation and reform of the Ombudsman's powers in Lesotho.

Keywords: Constitution of Lesotho; Ombudsman; Remedial Action; Public Protector; Constitution of South Africa

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Introduction

When Lesotho gained independence from Britain in 1966,[1] the organisation of state institutions was cast in the mould of British constitutional design,[2] arguably more than any other African member country of the Commonwealth.[3] Public power was classically divided between the three main branches of government—the judiciary, the legislature and the executive,[4] with the monarch of Lesotho acting as titular head[5] in line with British constitutional design.[6] As is the case with all liberal constitutions, it was hoped that the liberty of the individual would be assured by this separation of powers and would provide a counter-balance in cases of abuse of power.[7] No provision was made

1 Vernon Palmer and Sabastian Poulter, *Legal System of Lesotho* (Michie Company 1972); Hoolo 'Nyane, 'Development of the Constitution of Lesotho since Independence: The Critique of Westminster Design in Lesotho' in Tumelo Tsikoane (ed), *Lesotho at Fifty Years of Independence: Aspects of Chequered Development Journey* (Morija Printing Works 2018) 121; Hoolo 'Nyane, 'Development of Constitutional Democracy: 20 Years of the Constitution of Lesotho' (2014) Lesotho LJ 59.

2 Allan Macartney, 'African Westminster? The Parliament of Lesotho' (1970) Parliamentary Affairs 121.

3 In the case of *Law Society of Lesotho v Ramodibedi* (Constitutional Case No 1 of 2003) [2003] LSHC 89 (15 August 2003) Maqutu J at para 7 shared a similar view thus, '[i]t seems to me that the present constitutional dispensation is a continuation of a tradition that Lesotho has inherited from Britain. Time and time again when constitutional problems arise Britain is our first reference point.'

4 Nqosa Leuta Mahao, 'Judicial Independence and the Enforcement of The Constitution in Lesotho' (2005) J of Commonwealth L and Legal Education 51; Anthony Nwafor, 'The Lesotho Constitution and Doctrine of Separation of Powers: Reflections on the Judicial Attitude' (2013) African J of Legal Studies 49; *Judicial Officers' Association of Lesotho and Another v The Right Honourable The Prime Minister Pakalitha Mosisili NO and Others(Const/C/3/2005) [2006] LSHC 32 (4 July 2006); Swissbourgh Diamond Mines (Pty) v Military Council of Lesotho* [LAC 1995–99] 214; *Law Society of Lesotho v Right Honourable Prime Minister* C of A (CIV) 5 /1985 (Lesotho Court of Appeal) unreported 3 September 1985.

5 Winston Maqutu, *Contemporary Constitutional History of Lesotho* (Mazenod Institute 1990).

6 Jesse Harris Proctor, 'Building a Constitutional Monarchy in Lesotho' (1969) Civilisations 64; Lehlohonolo Machobane, 'Perceptions on the Constitutional Future for The Kingdom of Lesotho' [1988] J of Commonwealth & Comparative Politics 185; Nqosa Leuta Mahao, 'The Constitution, The Elite and the Monarchy's Crisis in Lesotho' (1997) Lesotho LJ 165.

7 Maurice Vile, *Constitutionalism and Separation of Powers* (2nd edn, Liberty Fund 1998). At 1 the author aptly notes that '[t]he history of Western political thought portrays the development and elaboration of a set of values – justice, liberty, equality and the sanctity of property – the implications of which have been examined and debated down through centuries; but just as important is the history of the debates about the institutional structures and procedures which are necessary if these values are to be realised in practice … for the values that characterise Western thought are not self-executing.'

for institutions to oversee the three branches of government,[8] despite the fact that the institution of the Ombudsman was gaining global ascendency,[9] including in Britain.[10]

The 1966 constitutional design collapsed in 1970[11] but was reinstated in 1993 when the country returned to constitutional democracy.[12] The monarch was retained as the titular and indivisible head of the three classical branches of government and one of the few changes introduced was that of the Ombudsman's office[13] to combat administrative malfeasance.[14] In particular, it provides that the Ombudsman shall investigate the actions taken by any officer or authority in any sphere of government, including parastatals, '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.'[15] After investigation, the Ombudsman must present a report that complies with at least two constitutional requirements. The first requirement is that the report 'shall include a statement of the action if any, taken by the officer or authority concerned as a consequence of such investigation.'[16] The second requirement is that such a report 'may include a recommendation as to what remedial action, including the payment of compensation, should be taken.'[17] The Ombudsman's reports are to be submitted annually to parliament,[18] although parliament seldom finds the time to consider the Ombudsman's reports. In the Annual Report for the year 2014/15, the Ombudsman lamented that 'this obligation … the Ombudsman has been carrying out since the

8 The oversight institutions such as the Human Rights Commission, The Office of Ombudsman, The Directorate on Corruption and Economic Offices, the Independent Electoral Commission did not exist in Lesotho. The judiciary was the sole institution entrusted with checking on the excesses of the other branches of government.

9 Donald Rowat, *The Ombudsman. Citizen's Defender* (University of Toronto Press 1968); Victor Ayeni, 'The Ombudsman around the World: Essential Elements, Evolution and Contemporary Issues' in Victor Ayeni and Linda Reif (eds), *Strengthening Ombudsman and Human Rights Institutions in Commonwealth Small and Island States* (Commonwealth Secretariat 2000); Sabine Carl, 'Toward a Definition and Taxonomy of Public Sector Ombudsmen' (2012) Canadian Public Administration 203.

10 Geoffrey Marshall, 'The British Parliamentary Commissioner for Administration' (1968) The Annals of the American Academy of Political and Social Science 87; Bernard Schwartz, 'The Parliamentary Commissioner and His Office: The British Ombudsman in Operation' (1970) NYUL Rev 45; William Gwyn, 'The British PCA: "Ombudsman or Ombudsmouse?"' (1973) The J of Politics 45.

11 Makalo Khaketla, *Lesotho, 1970: An African Coup Under the Microscope* (University of California Press 1972); Allan Macartney, 'The Lesotho General Election of 1970' (1973) Government and Opposition 473.

12 Hoolo 'Nyane, 'Development of the Constitution of Lesotho' (n 1).

13 Constitution of Lesotho, 1993 s 135.

14 ibid s 1(a) provides that, 'The Ombudsman 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.'

15 Constitution of Lesotho, 1993 s 135(1)(a).

16 ibid 135(3)(a).

17 ibid 135(3)(b).

18 Ombudsman Act 9 1996 s 16(1) provides that, 'the Ombudsman shall submit the annual report referred to in s 135(3) of the Constitution to Parliament.'

establishment of the Office in 1993 and this is the 22nd report made to the Parliament although none have been tabled before the Parliament.'[19] Besides this evident dereliction of duty by parliament, other frustrations experienced by successive ombudspersons in Lesotho is the enforceability and the binding nature of their remedial actions. It was expressed by the Ombudsman in the Annual Report for the year 2013/14 that public agencies do not want to implement the remedial actions of the Ombudsman. She lamented that:

> What emerges is a systemic problem where everybody and nobody possess (sic) powers and therefore nobody wanting to be corrected; in short downright impunity still prevails in public management and administration. In my encounters with some agencies, the understanding is that the Ombudsman seems to interfere with their exercise of powers under their specific legal frameworks. The assumption is that their legal powers run parallel to those of the Ombudsman, therefore, the latter need not question how they exercise such powers.[20]

The binding nature of the remedial actions of the Ombudsman seems problematic in Lesotho.[21] The paper starts off by locating the office within the broader theoretical and historical framework of the institution. The second part is dedicated to the legal regime regulating the institution in Lesotho. The third part makes the comparison with the South African jurisprudence on the juridical nature of the remedial action of the Public Protector. In the end, the paper contends that the jurisprudence emerging from South Africa on the subject can be helpful in Lesotho. The article uses the tools of comparative constitutionalism to invoke constitutional patterns emerging in South Africa to bear on the constitution questions in Lesotho.

Why the Choice of South Africa as a Comparator

According to the genealogical theory of constitutional comparison, constitutional systems in the same family share similarities, and they provide the best models for comparison.[22] The logic of this theory is that 'the decisions of similarly situated decision-makers, facing parallel questions, can often be an important source of practical

19 The Office of the Ombudsman *2014/2015 Annual Report* 5 <http://www.ombudsman.org.ls/wp-content/uploads/2018/05/Report-2014-2015.pdf> accessed 25 February 2020.

20 The Office of the Ombudsman *2012/2013 Annual Report* 7 <http://www.ombudsman.org.ls/wp-content/uploads/2013/03/Report-2012-13.pdf> accessed 25 February 2020.

21 Mohalenyane Phakela, 'LCS Boss Illegally in Office: Ombudsman' (*Lesotho Times*, 5 February 2019) <http://lestimes.com/lcs-boss-illegally-in-office-ombudsman/> accessed 1 March 2020; Mohalenyane Phakela, 'Ombudsman Lied About Me: LCS Boss' (*Lesotho Times*, 19 February 2019) <http://lestimes.com/ombudsman-lied-about-me-lcs-boss/> accessed 1 March 2020.

22 Sujit Choudhry, 'Globalization in Search of Justification: Toward a Theory of Comparative Constitutional Interpretation' (1999) 74(3) Indiana LJ 819.

wisdom or insight.'[23] As such, the usual comparison for Lesotho constitutional studies would be the Westminster design, Lesotho being a former colony of the United Kingdom. However, genealogical theory renders the United Kingdom an inappropriate comparator, which is the main subject of this study. The theory does not only presume that countries being compared share similar historical antecedents; the text of the legal principles being compared must also be similar.

This study is mainly concerned with the binding nature of the powers of the Ombudsman, as provided by the text of the Constitution of Lesotho, which provides that the Ombudsman may make 'a recommendation as to what remedial action … should be taken.'[24] The question of whether this remedial action is binding is mainly theoretical. The most appropriate comparator should be from a country with a written constitution with a similar provision, therefore the South African Constitution provides the best comparative guide. The comparable text from the South African Constitution provides that the Public Protector, an institution modelled on the Ombudsman, has the power 'to take appropriate remedial action.'[25] Whether the remedial action of the Public Protector is binding has been the subject of much scholarly and judicial scrutiny, which could provide insight into the interpretation of a similar clause under the Constitution of Lesotho. Conversely, there is a glaring paucity of judicial precedent on the matter in Lesotho; neither has scholarly interest been taken.[26] This is so, even though, at a global level, literature on ombudspersons and their ilk is burgeoning.[27] Similarly, the questions around the binding nature of the Public Protector's remedial actions, a similar institution in neighbouring South Africa, has been the subject of a litany of judicial pronouncements and scholarship.[28] Furthermore, South African jurisprudence has

23 Rosalind Dixon 'A Democratic Theory of Constitutional Comparison' (2008) 56(4) The American J of Comp L 947, 954.

24 Section 135(3)(b) of the Constitution of Lesotho.

25 Section 182(1)(c) of the Constitution of South Africa.

26 The few publications on the Ombudsman in general, and not specifically on the juridical nature of the remedial action of the office are: Nqosa Mahao, 'The Ombudsman and The Enhancement of Good Governance in Lesotho' (1996) Lesotho LJ 35; Motlamelle Kapa, *Promoting The Effectiveness of Democracy Protection Institutions in Southern Africa the Office of the Ombudsman in Lesotho* (EISA 2009); Victor Ayeni, 'Evolution of and Prospects for the Ombudsman in Southern Africa' (1997) International Review of Administrative Sciences 543; JA Akokpari, 'Contemporary Governance and Development Issues in Lesotho: Implications for The Ombudsman's Office' (1990) Lesotho LJ 67; Hoolo 'Nyane, 'Book Review: Promoting Administrative Justice in Lesotho - The Role of the Ombudsman by Sekara Mafisa' (2015) Lesotho LJ 145.

27 Benny Tai, 'Models of Ombudsman and Human Rights Protection' (2010) Intl J of Politics and Good Governance' 1; Linda Reif, *The Ombudsman Concept* (International Ombudsman Institute; 1995); John Robertson, 'The Ombudsman Around the World' (1998) 2 International Ombudsman Yearbook 112; Mary Seneviratne, *Ombudsman: Public Services and Administrative Justice* (Butterworths 2002).

28 Certification of the Constitution of the Republic of South Africa, 1996 (4) SA 744 (CC); *South African Broadcasting Corporation v Democratic Alliance* (2015) 4 All SA 719 (SCA); *The Public Protector v Mail & Guardian Ltd and Others* 2011 (4) SA 420 (SCA); *Economic Freedom Fighters v Speaker of the National Assembly; Democratic Alliance v Speaker of the National Assembly* 2016 (3) SA 580

arguably more influence than the United Kingdom's on Lesotho's contemporary constitutional jurisprudence.[29]

The Theories and Models of the Ombudsman

The notion of an Ombudsman is a fairly recent phenomenon, worldwide[30] and is not inherent to the classical theory of liberal constitutionalism, the central philosophy of which is the division of public power between the three traditional branches of government, namely the legislature, executive and judicature.[31] This organisation of state powers was founded on such liberal values as 'justice, liberty, equality and the sanctity of property',[32] the values on which Western political history is based. The notion of accountability, which provides the *raison d'être* for the institution of the Ombudsman,[33] has never overtly been in the remit of these liberal values.[34] The idea of what one can term 'fourth estate institutions'—the media and other independent oversight institutions—attested to the fact that constitutional liberalism has deficiencies.[35] In the majority of cases, the three traditional branches of government can easily coalesce not only to suppress accountability but even to defeat, sometimes, the very values they were created to respect and promote.

The creation of an Ombudsman in Sweden in 1809 was originally regarded with scepticism. This was the heyday of liberalism in general and liberal constitutionalism in

(EFF 1); *Economic Freedom Fighters and Others v Speaker of the National Assembly and Another*; 2018 (2) SA 571 (EFF II).

29 See for instance, *President of the Court of Appeal v The Prime Minister* (C of A (CIV) No 62/2013) [2014] LSCA 1 (4 April 2014); *All Basotho Convention and Others v The Prime Minister and Others* (Constitutional Case No 0006/2020) [2020] LSHCONST 1 (17 April 2020); Hoolo 'Nyane, 'Judicial Review of the Legislative Process in Lesotho: Lessons from South Africa' (2019) 22(1) PELJ 1.

30 Donald Rowat, *Ombudsman Plan: Essays on the Worldwide Spread of an Idea* (McGill-Queen's Press 1973); U Lundvick, 'A Brief Survey of the History of the Ombudsman' (1982) 2 The Ombudsman J 85.

31 John McMillan, 'The Ombudsman and The Rule of Law' (2005) AIAL Forum 11.

32 Vile (n 7); See also Nicholas William Barber, *The Principles of Constitutionalism* (Oxford University Press 2018); Charles Manga Fombad (ed), *Separation of Powers in African Constitutionalism* (Oxford University Press 2016).

33 Ann Abraham, 'The Ombudsman and the Executive: The Road to Accountability' (2008) Parliamentary Affairs 535.

34 Carol Harlow, 'Accountability and Constitutional Law [2014] The Oxford Handbook of Public Accountability 195; Charles Fombad, 'The Constitution as a Source of Accountability: The Role of Constitutionalism' (2010) 2 Speculum Juris 41.

35 According to McMillan (n 26) 424: 'The unifying theme in each theory is that society now relies on a range of independent institutions and mechanisms to perform the same scrutiny and accountability role as courts. Sometimes they do this more effectively than courts. That is why it is necessary to "rethink the separation of powers", to build a more accurate picture of legal accountability and to question long-standing beliefs that impede a proper appreciation of how people are protected in relation to government.'

particular.[36] As Buck and others note: 'from the original inception of the ombudsman onwards, there have always been some who have not accepted the notion that a body, largely without enforcement powers, can effectively promote justice.'[37] Put like that, the institution was largely regarded as 'a constitutional misfit' and as an antithesis of the dominant and orthodox theory of the separation of powers.[38] This criticism notwithstanding, the idea of the Ombudsman has generally spread across the world;[39] to the extent that today almost all modern constitutions have an Ombudsman in one form or another[40] and gained impetus by 'the mass growth in administrative bureaucracy that occurred throughout the twentieth century.'[41] The excesses of the administrative bureaucracy became so complex that the tripartite structure of government could no longer adequately contain them.[42]

Despite it being widely accepted in the organisation of a constitutional state, the Ombudsman's role and model are far from being settled in constitutional scholarship and practice. Several countries bestow varying powers to the institution, and the models adopted throughout the world differ markedly.[43] Since the classical Swedish 'justitie ombudsman' in 1809,[44] the institution has taken on many forms.

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36 Giovanni Sartori, *The Theory of Democracy* Revisited Vol 1 (Chatham House Pub 1987); Walter Murphy, *Constitutions, Constitutionalism, and Democracy* (American Council of Learned Societies 1988).

37 Trevor Buck, Richard Kirkham and Brian Thompson, *The Ombudsman Enterprise and Administrative Justice* (Routledge 2016) 19.

38 According to McMillan, 'Re-thinking the Separation of Powers' (2010) Federal LR 423, 'The growth of non-judicial accountability bodies has not been constrained by the doctrine of the separation of powers, but equally this new system of government accountability does not fit easily within that doctrine. In a functional sense, the new bodies are not part of the legislative, executive or judicial branch.'

39 Donald Rowat, *Ombudsman Plan: Essays on the Worldwide Spread of an Idea* (McGill-Queen's Press 1973).

40 Linda Reif, *The Ombudsman, Good Governance, and the International Human Rights System* (Martinus Nijhoff Publishers 2004).

41 Buck and others (n 32) 28.

42 See Dennis Pearce, 'The Ombudsman: Review and Preview – The Importance of Being Different' (1993) The Ombudsman J 45. The author says the Ombudsman is '… undoubtedly the most valuable institution from the viewpoint of both citizen and bureaucrat that has evolved during this century … there has been broad public demand for the establishment of an Ombudsman to resolve problems in a very large number of countries and institutions. This astonishing growth of an institution is not and has not been emulated by any other body. Contrast the many centuries that it took Parliament and the Courts to establish their roles …'

43 Victor Ayeni, 'The Ombudsman Around the World: Essential Elements, Evolution and Contemporary Issues' in Victor Ayeni, Hayden Thomas and Linda Reif (eds), *Strengthening Ombudsman and Human Rights Institutions in Commonwealth Small and Island States: The Caribbean Experience* (Commonwealth Secretariat 2000).

44 Alfred Bexelius, 'The Swedish Institution of the Justitieombudsman' (1961) International Review of Administrative Sciences 245.

Nevertheless, it is still imperative to recount the classical conception of the idea. It will become evident, later in this article, that the Lesotho model is arguably cast on the Swedish model. In the 1960s, when the idea was spreading beyond Scandinavia, Rowat, as one of the leading authorities on the subject, distilled three key features of the classical conception of the Ombudsman, namely:

- it is an independent and non-partisan office established by the legislature or the constitution who supervises the public administration;
- who handles the public complaints concerning administrative injustice; and
- who has the power to investigate and criticise but has no power to change the administrative action concerned.[45] In 1974, the International Bar Association defined the Ombudsman as:

> An office provided for by the constitution or by an 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 or who acts on his own motion, and who has the power to investigate, recommend corrective action and issue reports.[46]

It is apparent that the definition still retains the Ombudsman as an independent institution that is accountable to parliament, receives and investigates complaints about public maladministration and issues reports embodying recommendations about the remedial measures. In that way, the classical Ombudsman is reactive rather than proactive;[47] this role has been classified as 'fire-fighting' rather than 'fire-watching'.[48] These ombudsman models are limited in terms of jurisdictional competency and powers; they deal specifically with administrative malpractice, and are based on 'recommendation'.[49] The reactive ombudsman model is often distinguished from the other two models: the variegated and proactive models. The variegated model extends the original scope of the Ombudsman beyond administrative justice. While it retains some of the classical (reactive) model features, it extends the 'scale and scope of the

45 Rowat (n 9); Roy Gregory and Philip James Giddings (eds), *Righting Wrongs: The Ombudsman in Six Continents* (IOS Press 2000).

46 Ombudsman Committee, *International Bar Association Resolution* (Vancouver: International Bar Association 1974). See also LC Reif, *The Ombudsman, Good Governance and the International Human Rights System* (Martinus Nijhoff Publishers 2004) 3.

47 Anita Stuhmcke, 'The Evolution of the Classical Ombudsman: A View from the Antipodes' (2012) Intl J of Pub L and Policy 83–95.

48 Carol Harlow and Richard Rawlings, *Law and Administration* (3rd edn, Cambridge University Press 2009) 537–8; see also Rick Snell, 'Australian Ombudsman: A Continual Work in Progress' in Matthew Groves and Hoong Lee (eds), *Australian Administrative Law* (Cambridge University Press 2007) 101.

49 Ann Abraham, 'Making Sense of the Muddle: The Ombudsman and Administrative Justice, 2002–2011' (2012) 34 J of Social Welfare and Family L 91.

ombudsman's jurisdiction.'[50] It covers other areas such as audit, corruption and human rights. In a way, this model is a hybrid as it combines the functions of other oversight institutions such as anti-corruption commissions and human rights commissions.[51] The newly established Ombudsman falls in this category. The South African and Kenyan models are prime examples of expanded functions of the Ombudsman. The Kenyan Commission on Administrative Justice Act of 2011[52] empowers the Commission amongst others, to:

> … investigate any conduct in state affairs, or any act or omission in public administration by any State organ, State or public officer in National and County Governments that is alleged or suspected to be prejudicial or improper or is likely to result in any impropriety or prejudice.[53]

The South African model also falls in this category. In terms of the Public Protector Act,[54] the South African Public Protector is not only competent to investigate administrative malpractice.[55] It also investigates and reports on 'abuse or unjustifiable exercise of power or unfair, capricious, discourteous or other improper conduct or undue delay by a person performing a function connected with his or her employment'[56] as well as corruption.[57] The third model is the proactive model. The fundamental philosophy of this model is that 'the individual redress function is no longer central to the Ombudsmen conforming to this model.'[58] Most countries are still divided between, and sometimes combine, the reactive and variegated models. An example of this model is the New South Wales Ombudsman in Australia.[59]

The foregoing analysis demonstrates that the Lesotho model is still in the classical mould where it deals with administrative justice narrowly, reports on it and recommends remedial action. The South African model retains the classical aspects but strongly adds 'corruption' to the remit of its functions. It also makes recommendations about the appropriate remedial action. As will more fully appear in the succeeding parts of this article, the advantage with the South African model is that the judiciary has immensely

50 Chris Gill, 'The Evolving Role of the Ombudsman: A Conceptual and Constitutional Analysis of the "Scottish Solution" To Administrative Justice' (2014) Public Law 662.
51 John Hatchard, 'The Ombudsman in Africa Revisited' (1991) The Intl and Comp LQ 937.
52 Act 23 of 2011.
53 ibid, s 8.
54 Act 23 1994.
55 Constantine Theophilopoulos and Charles De Matos Ala, 'An Analysis of the Public Protector's Investigatory and Decision-Making Procedural Powers' (2019) PELJ 1–28.
56 Section 6(5)(b).
57 Section 6(4) (iii) and (iv). See also Prevention and Combating of Corrupt Activities Act 12 of 2004.
58 Gill (n 46) 669.
59 ibid 669.

expanded the powers of the Public Protector concerning the juridical nature of its remedial action.[60]

Powers of the Ombudsman in Lesotho: Is the Remedial Action Binding?

The inquiry into the juridical nature of remedial action of the Ombudsman in Lesotho must start with the Constitution.[61] In terms of the Constitution, the report of every investigation done by the Ombudsman 'may include a recommendation as to what remedial action, including the payment of compensation, should be taken.'[62] The constitutional injunction, as demonstrated above, is in keeping with the classical conceptions of the Ombudsman—that its powers are limited to making recommendations about the improvement of administrative efficiency.[63] The Ombudsman Act operationalises the Constitution.[64] The Act confirms that the Ombudsman can investigate and make recommendations about the remedial action if need be.[65] However, the Act is much more detailed about the enforceability of the Ombudsman's recommendation. It provides that:

> If in his recommendation … the Ombudsman decides that injustice or an infringement of a fundamental right should be remedied, he shall specify the manner and the time within which the injustice or infringement of a fundamental right should be remedied, and if at the expiry of the time specified no sufficient action has been taken to remedy the injustice or infringement of a fundamental right then the Ombudsman shall submit a special report to Parliament on the case.[66]

The authorities in Lesotho do not follow the recommendation as a matter of course.[67] The question, though, is whether members of the public, in whose favour the

60 Stu Woolman, 'A Politics of Accountability: How South Africa's Judicial Recognition of the Binding Legal Effect of the Public Protector's Recommendations Had a Catalysing Effect That Brought Down a President' (2016) Constitutional Court Review 155; Chiedza Patience Mlingwa, 'Towards The Sustenance of an Accountable and Corruption-Free Constitutional Democracy: A Critical Examination of the Legal Nature of the Public Protector's Remedial Powers in Light of the Constitutional Court's Interpretation In *Economic Freedom Fighters v Speaker Of The National Assembly And Others 2016*' (LLM Thesis, University of KwaZulu-Natal 2018) <http://ukzn-dspace.ukzn.ac.za/bitstream/handle/10413/15871/Mlingwa_Chiedza_Patience_2018.pdf?sequence=1&isAllowed=y> accessed 25 February 2020.

61 Constitution of Lesotho 1993 ss 134 and 135.

62 Constitution of Lesotho 1993 s 135(3)(b).

63 Benny Tai, 'Models of Ombudsman and Human Rights Protection' (2010) Intl J of Politics and Good Governance 1.

64 Act 9 of 1996.

65 ibid s 17.

66 ibid s 7(5).

67 The Office of the Ombudsman *2012/2013 Annual Report* (n 20) 7. See also Marafaele Mohloboli, 'Ombudsman Told to Cancel LCS Hearings' (*Lesotho Times* 10 August 2018) <http://lestimes.com/ombudsman-told-to-cancel-lcs-hearings/> accessed 29 February 2020.

Ombudsman has recommended, should regard the Ombudsman's reports as hollow promises that have no meaningful impact on the grievances of people affected by administrative malfeasance. There are three reasons why Lesotho has no judicial precedent on this question. The first is that the authorities against whom remedial actions are issued simply disregard the Ombudsman's reports by not reviewing them. The Ombudsman has called this 'downright impunity.'[68] The second reason is that members of the public in whose favour the remedial actions are made do not approach courts of law to seek enforcement. The Court of Appeal declined an indirect attempt to use the Ombudsman report in the case of *the Ministry of Public Service v Lebona.*[69] This case concerns a civil servant who approached the High Court claiming arrears in her salary. She alleged that that in terms of a certain government notice styled 'savingram', the entry point of all civil servants who hold the Bachelor of Laws (LLB) degree was revised from grade 10 to grade 12. She alleged that she ought to have benefited from the revision. As part of the evidence in court, she attached the Ombudsman's report which had found in her favour and ordered that she must benefit from the revision and her salary revised. The High Court accepted the Ombudsman's report as persuasive evidence and ruled in favour of the plaintiff.[70] However, the Court of Appeal rejected the Ombudsman's report outright. The court said:

> The court a quo also placed some reliance on a document which was said to be a report by an ombudsman. But the only evidence as to its relevance was the statement by the respondent in her evidence that "this document is a letter that was prepared by the ombudsman as I had asked his office to intervene and mediate in the matter." There is, in any event, nothing in its contents which, in my view, provides any material assistance in the construction of the Savingram.[71]

The plaintiff had reduced such a high constitutional remedy to a level of mere evidence in a normal civil case because neither the Constitution nor the statutory framework for the Ombudsman provides for the enforceability of Ombudsman decisions.[72]

The third reason is that parliament hardly gives serious consideration to the reports of the Ombudsman, which are sometimes never tabled for parliamentary debate.[73]

68 The Office of the Ombudsman *2012/2013 Annual Report* (n 20) 7.

69 (C of A (CIV) NO 6/12) [2012] LSCA 46 (19 October 2012) [unreported] <https://lesotholii.org/node/3309> accessed 20 January 2020.

70 *Lebona v Ministry of Public Service and Another* (CIV/T/246/2005) [2011] LSHC 146 (16 November 2011) (unreported) <https://lesotholii.org/node/7747> accessed 15 February 2020.

71 ibid para 7.

72 Constitution of Lesotho 1993 ss 134 and 135 and the Ombudsman Act 9 1996.

73 Milan Remač, 'Coordinating Ombudsmen and the Judiciary?' (2014) Central European Public Administration Review 11–29.

Generally, the juridical nature of the remedial actions of the Ombudsman is a fairly controversial subject in constitutional studies.[74] There are two conflictual approaches. On the one hand, decisions of the Ombudsman are not binding; they are intended to provide political rather than legal accountability.[75] On the other, remedial actions cannot be ignored for to do so will undermine the dictates of good governance.

Although there is no judicial precedent on the matter in Lesotho, it would seem that remedial actions are not binding.[76] This approach has been preferred by the Canadian Supreme Court as far back as 1984 in the case of *British Columbia Development Corporation v Friedmann (Ombudsman)*.[77] The court decreed that:

> The Ombudsman's powers, far from being formidable, are in reality quite limited. The Ombudsman may only investigate, recommend and publicise. His recommendations are binding on no one; he has no power to overrule the decisions of government officials. Nor can he bring a punitive action for official malfeasance.[78]

This view seems to be predominant in Lesotho. Hence, public officials have never found a need to review the Ombudsman's remedial actions. The longstanding feud between public officials and the Ombudsman came to a head in 2018 during an investigation concerning promotions in the Lesotho Correctional Service, when a complaint was filed with the Ombudsman that the promotional procedures were not followed properly. Upon receiving the complaint, the Ombudsman issued an interim restraining order to the effect that the promotions were suspended pending the finalisation of the investigation. However, the concerned department did not obey the order and went ahead with the controversial promotions. The Ombudsman warned the official concerned, that failure to obey such orders was a criminal offence and according to an

74 Milan Remac, 'Standards of Ombudsman Assessment: A New Normative Concept' (2013) Utrecht LR 9; Carol Harlow, 'Ombudsmen in Search of a Role' (1978) 41 MLR 446; *R v Parliamentary Commissioner for Administration ex p Dyer* (1994) All ER 375.

75 Remac (n 70). At 62 the author contends that '… ombudsmen, albeit often backed by legal acts or even by national constitutions, have to prove their place within the existing legal system. This is also connected with generally legally non-binding or legally enforceable results of the ombudsman investigations (reports). Normally, the ombudsman can only use the persuasive powers of his personality that are inter alia linked with his working relations with the administration and with his acceptance as an independent assessor.'

76 In the 2014/15 Annual Report, the Ombudsman lamented that '[i]n the year 2014/15 the Office faced the same challenges as in all the years; the respondent Ministries and Agencies delayed to respond to Ombudsman's inquiries and to implement his decisions. Non-cooperation of Chief Accounting Officers remained the biggest challenge facing the Office and has always resulted in a huge number of cases taking too long to be resolved and therefore creating a backlog.'

77 [1984] 2 SCR 447.

78 ibid, 473–475; See further Re Ombudsman Act (1970) 72 WWR 176; Re Ombudsman of Ontario and *Minister of Housing of Ontario (*1979), 26 O.R. (2d) 434 (H.C.); *Re Ombudsman for Saskatchewan* (1974), 46 DLR (3d) 452 (Sask QB); *Re Board of Police Commissioners for the City of Saskatoon and Tickell* (1979) 95 DLR (3d) 473.

Ombudsman official, 'the principal Secretary has said she defied the Ombudsman's restraining order deliberately, and we, therefore, have no other option but to report a criminal offence at the police.'[79] Neither the Constitution nor the Ombudsman Act grants the Ombudsman substantive powers to issue interim or restraining orders. Instead, section 9 of the Act gives the Ombudsman the power 'to summon and subpoena in writing and compel any person to appear before him and give evidence or explanation.'[80] The Act further provides that the Ombudsman 'shall have similar powers to those of a High Court judge, but subject to the same rules relating to immunity and privilege from disclosure as apply in the High Court.' These are only investigatory powers. Ironically, the Act provides in its list of offences that any person who 'without reasonable excuse refuses or fails to comply with a notice, summons or subpoena or a restraining order under section 9.'[81] As mentioned before, section 9 empowers the Ombudsman to investigatory powers only. The phrase 'restraining order' appears for the first time in the list of offences under section 20 of the Act and is not in accordance with the Constitution.[82] In terms of the Constitution and the Act, the strength of the Ombudsman's work is in the issuing of reports recommending remedial action. However, the juridical nature of this action is vague and unclear.

This question has also troubled Lesotho's former colonial power, the United Kingdom. In terms of the United Kingdom Parliamentary Commissioner Act of 1967,[83] the powers of the Parliamentary Commissioner for Administration (commonly known as the Ombudsman) were roughly the same as the current Ombudsman in Lesotho. In terms of section 10, read with section 5 of the Act, the Parliamentary Commissioner had the powers to make reports on his investigations. If, after conducting an investigation it appeared to

> the Commissioner that injustice has been caused to the person aggrieved in consequence of maladministration and that the injustice has not been, or will not be, remedied, he may, if he thinks fit, lay before each House of Parliament a special report upon the case.

The question of whether the remedial actions recommended by the Commissioner was binding on public authorities has been a subject of several decisions. These cases follow the precedence in *R v Local Commissioner for Administration, ex parte Eastleigh Borough Council*,[84] which is widely regarded as a landmark case in so far as that, in the

79 'Makhotso Rakotsoane, 'PS In Trouble Over Promotions' (*The Post*, 28 May 2018) <https://www.thepost.co.ls/news/ps-in-trouble-over-promotions/> accessed 27 February 2020.

80 Section 9(1)(e).

81 Section 20(a).

82 See ss 134 and 135 of the Constitution of Lesotho, 1993.

83 1967 c. 13; For the historical discussion of the Act see Geoffrey Marshall, 'The British Parliamentary Commissioner for Administration' (1968) The Annals of the American Academy of Political and Social Science 87–96.

84 [1988] 1 QB 855.

absence of a successful application for judicial review, the findings of a Local Government Ombudsman are binding on the relevant local authority.[85] According to this view, unless 'flawed in law or *Wednesbury* unreasonable, a finding by the Ombudsman that a maladministration has occurred and has caused injustice is binding on the public authority against which it is made.'[86] The United Kingdom Supreme Court rejected this approach in the case of *R (on the application of Bradley) v Secretary of State for Work and Pensions.*[87] The Supreme Court held that a public authority can reject the Ombudsman's recommendation provided the decision of the public authority itself is not irrational. The court held that:

> … it is not enough that the Secretary of State has reached his own view on rational grounds: it is necessary that his decision to reject the Ombudsman's findings in favour of his own view is, itself, not irrational having regard to the legislative intention which underlies 1967 Act: he must have a reason (other than simply a preference for his own view) for rejecting a finding which the Ombudsman has made after an investigation under the powers conferred by the Act.[88]

Therefore, it would seem that the public authority's decision to reject the Ombudsman's decision is also reviewable.[89]

Nevertheless, the South African jurisprudence on the enforceability of the decisions of the Ombudsman provides a more favourable comparison and lessons for Lesotho. The following section analyses the evolving South African jurisprudence on the enforceability of the Public Protector's remedial action.

Lessons from South Africa: The Remedial Action is Binding

The South African Public Protector: The Ombudsman Par Excellence?

The office of the Public Protector was created in terms of chapter 9 of the Constitution of South Africa. This could be regarded as a unique form of Ombudsman.[90] The Public Protector is the technical successor of the erstwhile office of the Advocate-General, whose brief was limited to misappropriation of public funds.[91] In the *Ex Parte Chairperson of the Constitutional Assembly In Re: Certification of the Constitution of the Republic of South Africa*,[92] the Constitutional Court confirmed that '[t]he Public

85 ibid.
86 Bradley (HC) (n 81), 47.
87 [2008] 3 All ER 1116(SC).
88 ibid para 91.
89 ibid.
90 See s 181 of the Constitution of South Africa, 1996.
91 Dirk Brynard, 'South African Public Protector (Ombudsman) Institution' in Righting Wrongs: The Ombudsman in Six Continents (n 41) 299; Harold Rudolph, 'The Ombudsman and South Africa' (1983) SALJ 92.
92 1996 (4) SA 744 (CC).

Protector is an office modelled on the institution of the ombudsman.'[93] It has been contended that the drafters disliked the word 'ombudsman' because of its gender insensitivity.[94] The origins of the word 'Public Protector' are traceable to the Spanish *defensor del pueblo,* which means defender or protector of the public.[95] Despite its name being linked to the Spanish,[96] the South African model of the Ombudsman still subscribes to the broader global idea of the Ombudsman, which is rooted in the Swedish *Justiteombudsman.*[97]Hence, the Public Protector is an ombudsman par excellence.

The office of the South African Public Protector is enshrined in the constitution by an Act of parliament.[98] Like most ombudsman structures, it has the power to investigate allegations of administrative malpractice and report its findings to parliament.[99] More importantly, the constitution gives the Public Protector the powers 'to take appropriate remedial action.'[100]

The Development of a Judicial Approach to Remedial Action of the Public Protector

The juridical nature of the Public Protector's remedial action has always been controversial. Initially, there was a widely held view that the Public Protector does not have legally binding powers. As such, the reports of the Public Protector and recommended remedial action have been regarded as no more than 'naming and shaming.'[101] This view was confirmed by the Western Cape High Court decision in the

93 ibid para 161.

94 See Dion Basson, *South Africa's Interim Constitution: Text and Notes* (Juta 1995); George Devenish, *The South African Constitution* (LexisNexis 2005).

95 Michael Bishop and Stu Woolman, 'Chapter Nine Institutions: Public Protector' in Stu Woolman and Michael Bishop (eds), *Constitutional Law of South Africa* (2nd edn, OS 2008) 24A-1; Marten Oosting, 'The Ombudsman and His Environment: A Global View' in Linda Reif (ed), *The International Ombudsman Anthology* (International Ombudsman Institute 1999) 5.

96 The model is used in Spain and Latin America. See for example Fredrik Uggla, 'The Ombudsman in Latin America' (2004) J of Latin American Studies 36(3) 423–450; Jorge Luis Maiorano, 'The Defensor del Pueblo in Latin America' in Roy Gregory and Philip Giddings (eds), *Righting Wrongs: The Ombudsman in Six Continents* (Amsterdam 2000).

97 Woolman and Bishop (n 95) 24A-1.

98 Public Protector Act 23 of 1994.

99 Constitution of South Africa 1996 s 182.

100 ibid 182(1)(c).

101 Woolman (n 56); Nomfundo Manyathi-Jele, 'Public Protector's Findings Not Legally Binding' *De Rebus* (2016) 2 <http://journals.co.za/docserver/fulltext/derebus/2015/550/derebus_n550_a3.pdf?expires=1476623360&id=id&accname=guest&checksum=1FBF70A8C6DF3D4ADA58320A63895448> accessed 10 February 2020; See also Stu Woolman, *The Selfless Constitution: Experimentalism and Flourishing as Foundations of South Africa's Basic Law* (Juta 2013). At 271 the author contends that: '[I]n point of fact, the ability of the Public Protector to investigate and report effectively – without making binding decisions – is the real measure of its strength.'

case of *Democratic Alliance v South African Broadcasting Corporation.*[102] The case concerned the remedial action that the Public Protector had recommended regarding the South African Broadcasting Corporation's administrative malpractice. The Public Protector's finding was that the appointment of an Acting Chief Operations Officer (COO) was irregular. The recommended remedial action was that the board must ensure that: all monies irregularly spent should be recovered from the appropriate persons; the board take appropriate disciplinary action against Mr Motsoeneng; and that the board must ensure that irregular salary increments to Motsoeneng and others were recovered from the appropriate persons. The relevant minister was subsequently directed to submit a plan for the implementation of the remedial action, which was not carried out. Instead, the board decided to recommend to the minister that Motsoeneng be appointed as CEO, which resolve was followed through. The main question was whether the Public Protector's remedial action was binding—a question for the concerned public authorities. The court adopted the *Bradley* case's United Kingdom Supreme Court approach.[103] The essence of the approach is that the Public Protector's remedial action differs from a legal judgment and is not automatically binding. To that effect, the court said:

> In contrast to their investigatory powers, ombudsmen ordinarily do not possess any powers of legal enforcement. Indeed, the power to make binding decisions is considered antithetical to the institution - the key technique of the Ombudsman is one of intellectual authority (making logically consistent and defensible findings) and powers of persuasion. It seems to me that in principle, the position of the Public Protector is no different.[104]

However, the public authority may not prefer its decision to that of the Public Protector; its decision to reject the Public Protector must be rational. The court distilled about four principles that must govern a public authority when confronted with a public protector's remedial action.[105] The first is that the state must properly consider the findings and remedial action and then decide whether or not the findings should be accepted and the remedial action implemented. The second is that the process by which the decision to reject the remedial action, must be rational.[106] Thirdly, should a dispute arise, the state does not accept the findings or implement the remedial action, it has to engage the Public Protector. Lastly, the relevant state organ may apply for judicial review of the Public

102 2015 (1) SA 551 (WCC).

103 *R (on the application of Bradley) v Secretary of State for Work and Pensions* [2008] 3 All ER 1116 (CA).

104 *Democratic Alliance v South African Broadcasting Corporation* (n 24) para 57.

105 ibid para 72.

106 ibid paras 73–74 the court said: 'It goes without saying that a decision by an organ of state rejecting the findings and remedial action of the Public Protector is itself capable of judicial review on conventional public law grounds … For these reasons I have come to the conclusion that the findings of the Public Protector are not binding and enforceable. However, when an organ of state rejects those findings or the remedial action, that decision itself must not be irrational.'

Protector's investigation and report if it strongly believes that the remedial action is not acceptable.

However, this approach was rejected by the Supreme Court of Appeal (SCA)[107] by disallowing the applicability of the *Bradly* approach in the context of South Africa.[108] It categorically laid down the principles guiding the person confronted by the remedial action.[109] The first is that the public authority confronted by the remedial action cannot reject it; neither can it institute a parallel process intended to second-guess the remedial action by the Public Protector. Secondly, a party that is dissatisfied with the remedial action may take it to review.[110]

This approach by the SCA ushered in a new era in the juridical nature of remedial action; it led to a shift from the orthodox view of non-binding to a new standard of binding until it is set aside for review.[111] This approach was endorsed by the Constitutional Court in the case of *Economic Freedom Fighters v Speaker of the National Assembly*,[112] in which the Public Protector had investigated the security upgrades that had been made at former President Zuma's Nkandla private residence. The Public Protector's finding was that several improvements at the President's private residence were non-security features and she recommended that they amounted to undue benefit or unlawful enrichment for him and his family and must therefore be personally reimbursed by him.[113] The President did not comply with the recommendation, which raised the question whether the Public Protector's remedial action had a binding effect on the President.[114] The

107 *South African Broadcasting Corporation v Democratic Alliance and Others* 2016 (2) SA 522 (SCA).

108 ibid para 46 the court said: 'Bradley does not in any way assist in the interpretation of our Public Protector's constitutional power "to take appropriate remedial action". It concerned a different institution with different powers, namely, the powers of the Parliamentary Commissioner under the Parliamentary Commissioner Act, 1967 … The Parliamentary Commissioner does not have an equivalent of our Public Protector's power to 'take appropriate remedial action.' Bradley is consequently not of any assistance in the interpretation and understanding of the Public Protector's remedial powers. Schippers J's reliance on Bradley was therefore misplaced.

109 ibid.

110 ibid para 57, the court poignantly said: 'Our constitutional compact demands that remedial action taken by the Public Protector should not be ignored. State institutions are obliged to heed the principles of co-operative governance as prescribed by s 41 of the Constitution. Any affected person or institution aggrieved by a finding, decision or action taken by the Public Protector might, in appropriate circumstances, challenge that by way of a review application. Absent a review application, however, such person is not entitled to simply ignore the findings, decision or remedial action taken by the Public Protector.'

111 Woolman (n 60) 155–192.

112 2016 (3) SA 580 (CC).

113 Office of the Public Protector, Secure in comfort: Report on an investigation into allegations of impropriety and unethical conduct relating to the installation and implementation of security measures by the Department of Public Works at and in respect of the private residence of President Jacob Zuma at Nkandla in the KwaZulu-Natal Province (report no 25 2013/14) 2014.

114 EFF 1, para 73.

Constitutional Court was unequivocal in endorsing the approach adopted by the Supreme Court in *South African Broadcasting Corporation v Democratic Alliance and Others.*[115] The Constitutional Court stated:

> The judgment of the Supreme Court of Appeal is correct in recognising that the Public Protector's remedial action might at times have a binding effect. When remedial action is binding, compliance is not optional, whatever reservations the affected party might have about its fairness, appropriateness or lawfulness. For this reason, the remedial action taken against those under investigation cannot be ignored without any legal consequences.[116]

As a result, the court held that '[a]bsent a court challenge to the Public Protector's report, all the President was required to do was to comply.'[117] Thus, it can be argued conclusively that the current position is that the Protector's remedial action is binding and the public authority against which it has been made, does not have the option of rejecting it;[118] even if the decision to reject was rational. The only option available to a person aggrieved by the remedial action is to take it to review, based on irrationality or illegality.[119] This approach marks a clear departure from the *Bradley* approach that the Western Cape High Court initially preferred in *Democratic Alliance v South African Broadcasting Corporation.*[120] The case had the effect of suggesting that a party aggrieved by the remedial action has an option of rejecting it; as long as the decision to reject it is, in itself, not irrational.[121]

Critical Scholarship on the New Judicial Approach

It is important to note, though, that although the courts in South Africa have seemingly settled the question of the juridical nature of the remedial action of the Public Protector—that it is binding unless it is reviewed—there is significant scholarly criticism of the *Economic Freedom Fighters* case.[122] This case was the last decision of the Constitutional Court to settle the juridical nature of the Public Protector's remedial action. The decision has attracted wide-ranging criticism from scholars. Mhango and Dyani-Mhango hold that making the remedial action of the Public Protector binding,

115 ibid.
116 EFF 1 para 73.
117 ibid para 82.
118 *Economic Freedom Fighters and Others v Speaker of the National Assembly* (EFF II) 2018 (2) SA 571 (CC).
119 *Minister of Home Affairs and Another v Public Protector of the Republic of South Africa* 2018 (3) SA 380 (SCA); *South African Reserve Bank v Public Protector & Others* 2017 (6) SA 198 (GP); *Oudekraal Estates (Pty) Ltd v City of Cape Town* 2004 (6) SA 222 (SCA).
120 2015 (1) SA 551 (WCC).
121 ibid para 74.
122 Michael Tsele, 'Constitutional Principles and Two Overlooked Problems with the Nkandla Judgment: A Brief Comment' (2018) 135(2) SALJ 220–237.

disregards the plain text.[123] They base their viewpoint on the celebrated *dictum* from the Constitutional Court in *S v Zuma* that ‘the beginning point for determining the meaning of a constitutional provision is the text itself.’[124]

The authors contend that the text of section 182(1)(c) of the Constitution of South Africa ‘cannot be deemed as granting powers to the Public Protector to take legally binding remedial action.’[125] They contend that if the framers of the constitution intended the remedial action to be binding, they could have categorically said so in the text of section 182(1)(c) of the Constitution. In their view, the framers of the constitution, ‘left out the term “binding” because the framers chose not to give power to make binding recommendations to the Public Protector.’[126] In addition to this textual approach to interpretation, the authors also critique the decision on the basis of the historical approach to constitutional interpretation. To this end, the authors sought to rely on *travaux préparatoires* to make a point that the Constitutional Assembly never intended the Public Protector’s recommendations to be binding. This argument may be compelling, both textually and historically. The Supreme Court of Appeal dealt with the historical approach in the *SABC* case. The court therein said: ‘[i]t follows that the language, history and purpose of section 182(1)(c) make it clear that the Constitution intends for the Public Protector to have the power to provide an effective remedy for State misconduct, which includes the power to determine the remedy and direct its implementation.’[127]

Similarly, Tsele observes that the Constitutional Court decision is based on the erroneous supposition that for the Public Protector’s decision to be effective, it must be binding. The author states that: ‘the conclusion that the Public Protector must have binding powers in order to be effective was neither based on sufficient facts nor principles of law.’[128] Tsele’s argument is based on Bishop and Woolman’s view, published before the *SABC* and *Economic Freedom Fighters* cases. Bishop and Woolman contend that: ‘[i]n truth, however, the ability of the Public Protector to investigate and to report effectively—without making binding decisions—is the real

123 Mtendeweka Mhango and Ntombizozuko Dyani-Mhango, ‘The Powers of the South African Public Protector: A Note on Economic Freedom Fighters v Speaker of the National Assembly’ (2020) 13(1) African J of Legal Studies 23–42.

124 *S v Zuma* 1995 (2) SA 642. The court therein went further to say: ‘While we must always be conscious of the values underlying the Constitution, it is nonetheless our task to interpret a written instrument. [It] cannot be too strongly stressed that the Constitution does not mean whatever we might wish it to mean. If the language used by the lawgiver is ignored in favour of a general resort to “values” the result is not interpretation but divination.’

125 Mhango and Dyani-Mhango (n 123) 12.

126 ibid.

127 Paragraph 52.

128 Michael Tsele, ‘Coercing Virtue in The Constitutional Court: Neutral Principles, Rationality and the *Nkandla* Problem’ (2016) 8(1) Constitutional Court Review 193–220.

measure of its strength.'[129] This view is widely held about the powers of the Ombudsman.[130]

Hence, it may be observed that although the judicial approach is almost settled in South Africa, the scholarly debate about the juridical nature of the remedial action of the Public Protector in South Africa has yet to be settled.

Conclusion

- The legal regimes determining the operation of the Ombudsman seems to be similar to those in most countries.[131] The functions, jurisdictional competence, and the Ombudsman's powers in Lesotho are not that different from the same powers enjoyed by those in the majority of the Commonwealth countries.[132] The Lesotho Ombudsman's office is, like in most countries, mandated to guard against 'bad government' generally and administrative malfeasance in particular.[133] It has strong and broad investigatory powers. It even has the powers 'to summon and subpoena in writing and compel any person to appear before him and give evidence or explanation.'[134] To that end, it has the 'similar powers to those of a High Court judge.'[135] After concluding the investigations, the law gives the office power to make recommendations on a wide-ranging number of reliefs such as:

- negotiation and compromise between the aggrieved person and the specified authority concerned;

- reversal or modification of the decision made or contemplated by a specified authority;

- pecuniary compensation or otherwise, for the aggrieved person; and

129 Bishop and Woolman (n 95) Chapter 24A 3.

130 Richard Kirkham, 'Explaining the Lack of Enforcement Power Possessed by the Ombudsman' (2008) 30(3) J of Social Welfare & Family L 253–263.

131 Hatchard (n 47) 937; Lind Reif, *The Ombudsman, Good Governance, and The International Human Rights System* (Martinus Nijhoff Publishers 2004).

132 Victor Ayeni, Hayden Thomas and Linda Reif (eds), *Strengthening Ombudsman and Human Rights Institutions in Commonwealth Small and Island States: The Caribbean Experience* (Commonwealth Secretariat 2000); Anita Stuhmcke, '"Each for Themselves" or "One for all"? The Changing Emphasis of the Commonwealth Ombudsman' (2010) Federal LR 143–167.

133 Constitution of Lesotho 1993 s 135.

134 ibid s 9.

135 ibid.

- restitution; and (e) the practice on which such decision, recommendation, act or omission was based be altered, and reasons are given for such decision recommendation act or omission.[136]

However, there is a widely held view by the public authorities in Lesotho that the remedial actions of the Ombudsman are not legally binding. This view is so pervasive that the status of the Lesotho Ombudsman has generally been compromised, with regard to dignity and efficiency, to the extent that even parliament does not take the Ombudsman reports seriously.[137] This tendency of reducing the Ombudsman to a 'useless' constitutional structure is contrary to the broader intent and spirit of the Constitution of Lesotho, which is based on the principles of public accountability, rule of law and respect for human rights. This view was reiterated by the Constitutional Court of South Africa in the case of *Economic Freedom Fighters v The Speaker of the National Assembly*.[138] The court therein held that,

> … our constitutional order hinges also on the rule of law. No decision grounded on the Constitution or law may be disregarded without recourse to a court of law. To do otherwise would "amount to a licence to self-help". Whether the Public Protector's decisions amount to administrative action or not, the disregard for remedial action by those adversely affected by it, amounts to taking the law into their own hands and is illegal. No binding and constitutionally or statutorily sourced decision may be disregarded willy-nilly.[139]

It may be argued that a mere disregard of remedial action of the Ombudsman is contrary to the Constitution of Lesotho.[140] The emerging jurisprudence in South Africa could therefore be a useful example for Lesotho. It seems that the principles governing the juridical nature of the remedial actions of the Ombudsman may be adumbrated thus:

136 Ombudsman Act s 159.

137 See Report of the Ombudsman for the year 2012/2013 (n 20).

138 EFF II (n 118).

139 ibid, para 74 [Mogoeng CJ]. This was aptly summed up by Cameron J in *Member of the Executive Council for Health Eastern Cape v Kirland Investments* 2014 (3) SA 481 (CC) para 103 that: 'The fundamental notion – that official conduct that is vulnerable to challenge may have legal consequences and may not be ignored until properly set aside – springs deeply from the rule of law The courts alone, and not public officials, are the arbiters of legality.'

140 While the Constitution of Lesotho does not expressly provide for the right to fair administrative action, it is still a fair embodiment of the panoply of the devices of constitutionalism such as the rule of law, respect for human rights, the supremacy of the constitution and separation of powers. See Hoolo 'Nyane, 'The State of Administrative Justice in Lesotho' in Hugh Corder H and Justice Mavedzenge (eds), *Pursuing Good Governance: Administrative Justice in Common-Law Africa* (CiberInk 2019) 1–20.

- the Ombudsman is a constitutional construct and its decisions are based on the Constitution. It cannot be the intention of the Constitution to create an ineffectual structure;

- consequently, a decision of the Ombudsman to issue a remedial action against a public authority may not be ignored; and

- the public authority cannot prefer its view about the remedial action even if it thinks that its decision to reject the remedial action is rational. Neither can the public authority institute its process to second-guess the decision of the Ombudsman; and if the decision of the Ombudsman aggrieves the public authority or any other person, such authority or person may decide to take the Ombudsman on review. The Ombudsman is itself not above the Constitution and the law and the Ombudsman’s decisions still have to be, like all other public decisions, rational and legal.

References

Abraham A, 'The Ombudsman and the Executive: The Road to Accountability' (2008) Parliamentary Affairs <https://doi.org/10.1093/pa/gsn020>

Abraham A, 'Making Sense of the Muddle: The Ombudsman and Administrative Justice, 2002 – 2011' (2012) 34 Journal of Social Welfare and Family Law <https://doi.org/10.1080/09649069.2012.675467>

Akokpari JA, 'Contemporary Governance and Development Issues in Lesotho: Implications for The Ombudsman's Office' (1990) Lesotho Law Journal.

Ayeni V, 'Evolution of and Prospects for the Ombudsman in Southern Africa' (1997) International Review of Administrative Sciences <https://doi.org/10.1177/002085239706300407>

Ayeni V, 'The Ombudsman around the World: Essential Elements, Evolution and Contemporary Issues' in Ayeni V and Reif L (eds), *Strengthening Ombudsman and Human Rights Institutions in Commonwealth Small and Island States* (Commonwealth Secretariat 2000).

Ayeni D, 'The Ombudsman Around the World: Essential Elements, Evolution and Contemporary Issues' in Victor Ayeni, Hayden Thomas and Linda Reif (eds), *Strengthening Ombudsman and Human Rights Institutions in Commonwealth Small and Island States: The Caribbean Experience* (Commonwealth Secretariat 2000).

Barber NW, *The Principles of Constitutionalism* (Oxford University Press 2018) <https://doi.org/10.1093/oso/9780198808145.003.0001>

Basson D, *South Africa's Interim Constitution: Text and Notes* (Juta 1995).

Beckman L and Uggla F, An Ombudsman for Future Generations: Legitimate and Effective?' in González-Ricoy I and Gosseries A, *Institutions for Future Generations* (OUP 2016) <https://doi.org/10.1093/acprof:oso/9780198746959.003.0007>

Bexelius JA, 'The Swedish Institution of the Justitieombudsman' (1961) International Review of Administrative Sciences <https://doi.org/10.1177/002085236102700303>

Bishop M and Woolman S, 'Chapter Nine Institutions: Public Protector' in Woolman S and Bishop M (eds), *Constitutional Law of South Africa* (2nd edn, OS 2008).

Brynard D, 'South African Public Protector (Ombudsman) Institution' in Gregory R and James P Giddings(eds)*Righting Wrongs: The Ombudsman in Six Continents* (IOS Press 2000).

Buck T, Richard Kirkham and Brian Thompson, *The Ombudsman Enterprise and Administrative Justice*. (Routledge 2016) <https://doi.org/10.4324/9781315555034>

Carl S, 'Toward a Definition and Taxonomy of Public Sector Ombudsmen' (2012) Canadian Public Administration 203 <https://doi.org/10.1111/j.1754-7121.2012.00208.x>

Devenish G, *The South African Constitution* (LexisNexis 2005).

Fombad C, 'The Constitution as a Source of Accountability: The Role of Constitutionalism' (2010) 2 Speculum Juris.

Fombad CM, (ed), *Separation of Powers in African Constitutionalism* (Oxford University Press 2016).

Gill C, 'The Evolving Role of the Ombudsman: A Conceptual and Constitutional Analysis of the "Scottish Solution" To Administrative Justice' (2014) Public Law.

Gregory R and James P Giddings(eds), *Righting wrongs: The Ombudsman in Six Continents* (IOS Press 2000).

Gwyn, W 'The British PCA: "Ombudsman or Ombudsmouse?"' (1973) The Journal of Politics <https://doi.org/10.2307/2129037>

Hatchard J, 'The Ombudsman in Africa Revisited' (1991) The International and Comparative Law Quarterly <https://doi.org/10.1093/iclqaj/40.4.937>

Harlow C 'Ombudsmen in Search of a Role' (1978) 41 Modern Law Review <https://doi.org/10.1111/j.1468-2230.1978.tb01498.x>

Harlow C, 'Accountability and Constitutional Law (2014) *The Oxford Handbook of Public Accountability*.

Harlow C and Rawlings R, *Law and Administration* (3rd edn, Cambridge University Press 2009) <https://doi.org/10.1017/CBO9780511809941>

Kapa M, *Promoting the Effectiveness of Democracy Protection Institutions in Southern Africa the Office of the Ombudsman in Lesotho* (EISA 2009).

Khaketla M, *Lesotho, 1970: An African Coup Under the Microscope* (University of California Press 1972) <https://doi.org/10.1525/9780520334496>

Lundvick U, 'A Brief Survey of the History of the Ombudsman' (1982) 2 The Ombudsman Journal.

Macartney A, 'African Westminster? The Parliament of Lesotho' (1970) Parliamentary Affairs <https://doi.org/10.1093/oxfordjournals.pa.a051517>

Macartney A, 'The Lesotho General Election of 1970' (1973) Government and Opposition <https://doi.org/10.1111/j.1477-7053.1973.tb00872.x>

Machobane L, 'Perceptions on the Constitutional Future for the Kingdom of Lesotho' (1988) Journal of Commonwealth & Comparative Politics <https://doi.org/10.1080/14662048808447542>

Marshall G, 'The British Parliamentary Commissioner for Administration' (1968) The Annals of the American Academy of Political and Social Science <https://doi.org/10.1177/000271626837700109>

Mahao M, 'The Ombudsman and the Enhancement of Good Governance in Lesotho' (1996) Lesotho Law Journal.

Mahao NL, 'The Constitution, the Elite and the Monarchy's Crisis in Lesotho' (1997) Lesotho Law Journal.

Mahao NL, 'Judicial Independence and the Enforcement of the Constitution in Lesotho' (2005) Journal of Commonwealth Law and Legal Education <https://doi.org/10.1080/14760400508522900>

Maqutu W, *Contemporary Constitutional History of Lesotho* (Mazenod Institute 1990).

Manyathi-Jele, N 'Public Protector's Findings Not Legally Binding' *De Rebus* (2016) 2 http://journals.co.za/docserver/fulltext/derebus/2015/550/derebus_n550_ *De Rebus* a3.pdf?expires=1476623360&id=id&accname=guest&checksum=1FBF70A8C6DF3D4ADA58320A63895448> accessed 10 February 2020.

McMillan J, 'The Ombudsman and the Rule of Law' (2005) AIAL Forum.

McMillan J, 'Re-thinking the Separation of Powers' (2010) Federal Law Review <https://doi.org/10.1177/0067205X1003800308>

Mlingwa CP, 'Towards the Sustenance of an Accountable and Corruption-Free Constitutional Democracy: A Critical Examination of the Legal Nature of the Public Protector's Remedial Powers in Light of The Constitutional Court's Interpretation In *Economic Freedom Fighters V Speaker Of The National Assembly And Others 2016*' (LLM Thesis, University of KwaZulu-Natal 2018) <http://ukzn-dspace.ukzn.ac.za/bitstream/handle/10413/15871/Mlingwa_Chiedza_Patience_2018.pdf?sequence=1&isAllowed=y> accessed 25 February 2020.

Mohloboli M, 'Ombudsman Told to Cancel LCS Hearings' (*Lesotho Times*, 10 August 2018) <http://lestimes.com/ombudsman-told-to-cancel-lcs-hearings/> accessed 29 February 2020.

Murphy W, *Constitutions, Constitutionalism, and Democracy* (American Council of Learned Societies 1988).

Nwafor A, 'The Lesotho Constitution and Doctrine of Separation of Powers: Reflections on the Judicial Attitude' (2013) African Journal of Legal Studies <https://doi.org/10.1163/17087384-12342020>

Nyane H 'Development of Constitutional Democracy: 20 Years of the Constitution of Lesotho' 2014 Lesotho Law Journal.

Nyane H, 'Book Review: Promoting Administrative Justice in Lesotho – The Role of the Ombudsman by Sekara Mafisa' (2015) Lesotho Law Journal.

Nyane H, 'Development of the Constitution of Lesotho since Independence: The Critique of Westminster Design in Lesotho' in Tsikoane T (ed), *Lesotho at Fifty Years of Independence: Aspects of Chequered Development Journey* (Morija Printing Works 2018).

Nyane H, 'The State of Administrative Justice in Lesotho' in Hugh Corder and Justice Mavedzenge (eds), *Pursuing Good Governance: Administrative Justice in Common-Law Africa* (CiberInk 2019).

Office of the Public Protector. Madonsela T, Secure in comfort: Report on an investigation into allegations of impropriety and unethical conduct relating to the installation and implementation of security measures by the Department of Public Works at and in respect of the private residence of President Jacob Zuma at Nkandla in the KwaZulu-Natal Province (report no 25 2013/14) 2014.

Ombudsman Committee, International Bar Association Resolution (International Bar Association, 1974).

Office of the Ombudsman Lesotho, *The Office of the Ombudsman 2012/2013 Annual Report* <http://www.ombudsman.org.ls/wp-content/uploads/2013/03/Report-2012-13.pdf> accessed 25 February 2020.

Office of Ombudsman Lesotho, *The Office of the Ombudsman 2014/2015 Annual Report* <http://www.ombudsman.org.ls/wp-content/uploads/2018/05/Report-2014-2015.pdf> accessed 25 February 2020.

Oosting M, 'The Ombudsman and His Environment: A Global View' in L Reif (ed), *The International Ombudsman Anthology* (1999).

Palmer V and Poulter S, *Legal System of Lesotho* (Michie Company 1972).

Phakela M, 'LCS Boss Illegally in Office: Ombudsman' (*Lesotho Times*, 5 February 2019) <http://lestimes.com/lcs-boss-illegally-in-office-ombudsman/> accessed 1 March 2020.

Phakela M, 'Ombudsman Lied About Me: LCS Boss' (*Lesotho Times*, 19 February 2019) <http://lestimes.com/ombudsman-lied-about-me-lcs-boss/> accessed 1 March 2020.

Pearce D, 'The Ombudsman: Review and Preview – The Importance of Being Different' (1993) The Ombudsman Journal.

Proctor JH, 'Building a Constitutional Monarchy in Lesotho' (1969) Civilisations.

Rakotsoane M, 'PS In Trouble Over Promotions' (*The Post*, 28 May 2018) <https://www.thepost.co.ls/news/ps-in-trouble-over-promotions/> accessed 27 February 2020.

Reif L, *The Ombudsman, Good Governance and the International Human Rights System* (Martinus Nijhoff Publishers 2004) <https://doi.org/10.1007/978-94-017-5932-8>

Reif L, *The Ombudsman Concept* (International Ombudsman Institute 1995).

Remač M, 'Standards of Ombudsman Assessment: A New Normative Concept' (2013) Utrecht Law Review <https://doi.org/10.18352/ulr.237>

Remač M, 'Coordinating Ombudsmen and the Judiciary?' (2014) Central European Public Administration Review <https://doi.org/10.17573/ipar.2014.2-3.a01>

Robertson J, 'The Ombudsman Around the World' (1998) 2 International Ombudsman Yearbook.

Rowat D, *The Ombudsman. Citizen's Defender* (University of Toronto Press 1968).

Rowat D, *Ombudsman Plan: Essays on the Worldwide Spread of an Idea* (McGill-Queen's Press 1973).

Rudolph H, 'The Ombudsman and South Africa' (1983) South African Law Journal.

Sartori G, *The Theory of Democracy Revisited* (Vol 1, Chatham House Pub 1987).

Schwartz B, 'The Parliamentary Commissioner and His Office: The British Ombudsman in Operation' (1970) New York University Law Review.

Seneviratne M, *Ombudsman: Public Services and Administrative Justice* (Butterworths 2002).

Snell R, 'Australian Ombudsman: A Continual Work in Progress' in Matthew Groves and Hoong Lee (eds) *Australian Administrative Law* (Cambridge University Press 2007).

Stuhmcke A, 'The Evolution of the Classical Ombudsman: A View from the Antipodes' (2012) International Journal of Public Law and Policy <https://doi.org/10.2139/ssrn.2310419>

Stuhmcke A, '"Each for Themselves" or "One for all"? The Changing Emphasis of the Commonwealth Ombudsman' (2010) Federal Law Review <https://doi.org/10.22145/flr.38.1.5>

Tai B, 'Models of Ombudsman and Human Rights Protection' (2010) International Journal of Politics and Good Governance.

Theophilopoulos C and De Matos Ala C, 'An Analysis of the Public Protector's Investigatory and Decision-Making Procedural Powers' (2019) Potchefstroom Electronic Law Journal <https://doi.org/10.17159/1727-3781/2019/v22i0a4351>

Uggla F, 'The Ombudsman in Latin America' 36(3) (2004) Journal of Latin American Studies <https://doi.org/10.1017/S0022216X04007746>

Vile M, *Constitutionalism and Separation of Powers* (2nd edn, Liberty Fund 1998).

Woolman S, *The Selfless Constitution: Experimentalism and Flourishing as Foundations of South Africa's Basic Law* (Juta 2013).

Woolman S, 'A Politics of Accountability: How South Africa's Judicial Recognition of the Binding Legal Effect of the Public Protector's Recommendations Had a Catalysing Effect That Brought Down a President' (2016) Constitutional Court Review.

Cases

British Columbia Development Corporation v Friedmann (Ombudsman) [1984] 2 S.C.R. 447.

Certification of the Constitution of the Republic of South Africa, 1996 1996 (4) SA 744 (CC).

Democratic Alliance v South African Broadcasting Corporation 2015 (1) SA 551 (WCC).

Economic Freedom Fighters v Speaker of the National Assembly; Democratic Alliance v Speaker of the National Assembly 2016 (3) SA 580 (EFF 1).

Economic Freedom Fighters and Others v Speaker of the National Assembly and Another 2018 (2) SA 571(EFF II).

Judicial Officers' Association of Lesotho and Another v The Right Honourable The Prime Minister Pakalitha Mosisili NO and Others (Const/C/3/2005) [2006] LSHC 32 (4 July 2006).

Law Society of Lesotho v Right Honourable Prime Minister C of A (CIV) 5 /1985 (Lesotho Court of Appeal) unreported 3 September 1985.

Law Society of Lesotho v Ramodibedi (Constitutional Case No 1 of 2003) [2003] LSHC 89 (15 August 2003).

Lebona v Ministry of Public Service and Another (CIV/T/246/2005) [2011] LSHC 146 (16 November 2011) [unreported] <https://lesotholii.org/node/7747> accessed 15 February 2020.

Member of the Executive Council for Health Eastern Cape v Kirland Investments 2014 (3) SA 481 (CC).

Minister of Home Affairs and Another v Public Protector of the Republic of South Africa 2018 (3) SA 380 (SCA).

Ministry of Public Service v Lebona (C of A (CIV) NO.6/12) [2012] LSCA 46 (19 October 2012) [unreported] <https://lesotholii.org/node/3309>accessed 20 January 2020.

Oudekraal Estates (Pty) Ltd v City of Cape Town 2004 (6) SA 222 (SCA).

R v Local Commissioner for Administration, ex parte Eastleigh Borough Council [1988] 1 QB 855.

R v Parliamentary Commissioner for Administration ex p Dyer (1994) All ER 375.

R (on the application of Bradley) v Secretary of State for Work and Pensions [2008] 3 All ER 1116 (CA).

Re Ombudsman Act (1970) 72 WWR 176.

Re Ombudsman of Ontario and Minister of Housing of Ontario (1979), 26 O.R. (2nd edn) 434 (HC).

Re Ombudsman for Saskatchewan (1974), 46 D.L.R. (3 edn) 452 (Sask. QB)

Re Board of Police Commissioners for the City of Saskatoon and Tickell (1979) 95 DLR (3d) 473.

South African Reserve Bank v Public Protector & Others 2017 (6) SA 198 (GP).

South African Broadcasting Corporation v Democratic Alliance and Others 2016 (2) SA 522 (SCA).

Economic Freedom Fighters v Speaker of the National Assembly 2016 (3) SA 580 (CC).

Swissbourgh Diamond Mines (Pty) v Military Council of Lesotho [LAC 1995–99] 214.

The Public Protector v Mail & Guardian Ltd and Others 2011 (4) SA 420 (SCA).