PAPER FOR ADDRESS BY ADV KEVIN MALUNGA: DEPUTY PUBLIC PROTECTOR

Twenty Years of South African Constitutionalism

"An assessment of the role and challenges of the Office of the Public Protector in asserting South Africa's transformative constitutionalism"

"... the basic purpose of an Ombudsman is ... (to) bring the lamp of scrutiny to otherwise dark places even over the resistance of those who would draw the blinds. If [his] scrutiny and reservations are well founded, corrective measure can be taken in due democratic process, if not no harm can be done in looking at that which is good".[1]

1. BACKGROUND

The Public Protector South Africa is part of a global family of what is traditionally referred to as "Public Service Ombudsmen". Chapter nine of the South African Constitution of 1996 provided for the establishment of the Public Protector as one of the institutions that strengthens the constitutional democracy of the Republic and came into existence in October 1995.

Before South Africa's advent to democracy, the office was previously known as the Office of the Ombudsman which was established on 22 November 1991.

In terms of Section 182(1) of the South African Constitution of 1996, the Public Protector is vested with the powers to investigate the conduct of government, government departments, government agencies, government officials and bodies performing public functions that is alleged or suspected to be improper or to result in any impropriety or prejudice; to report on that conduct; and to take appropriate remedial. The Public Protector my not investigate decisions of a Court of Law and must be accessible to all persons and communities.

[1] *Re Alberta Ombudsman Act* (1970), 10 D.L.R. (3d) 47 at p. 61, 72 W.W.R. 176 at pp. 192-3 (Alta. S.C.), *per* Milvain C.J.T.D.

The Constitution anticipates mandate expansion through legislation, and legislation passed since establishment 15 years ago has resulted in the Public Protector being a multiple mandate agency with the following 6 key mandate areas:

a) Maladministration and appropriate resolution of dispute the Public Protector Act 23 of 1994(PPA). The maladministration jurisdiction transcends the classical public complaints investigation and includes investigating without a complaint and redressing public wrongs(Core);

b) Enforcement of Executive ethics under by the Executive Members' Ethics Act of 1998(EMEA) and the Executive Ethics Code (Exclusive):

c) Anti-corruption as conferred by the Prevention and Combating of Corrupt Activities Act 12 of 2004 (PCCAA) read with the PPA(Shared);

d) Whistle-blower protection under the Protected Disclosures Act 26 of 2000. (Shared with the Auditor General and to be named others;

e) Regulation of information under the Promotion of Access to Information Act 2 of 2000;(PAIA) and

f) Review of decisions of the Home Builders Registration Council under the Housing Protection Measures Act 95 of 1998.

Except under the EMEA, anyone may lodge a complaint with the Public Protector against any organ of state and the service is free. The complainant need not be a victim of the alleged improper conduct or maladministration. The Public Protector may institute an investigation on own initiative and does not need to receive a complaint.

This office is independent and impartial, subject only to the Constitution and the rule of law.The Public Protector is appointed for a non-renewable period of seven years.

The Constitutional mandate of the Public Protector to investigate and report on improper conduct or improprieties in state affairs, and the imperative to be accessible to all people, translates to a multi-pronged approach to handling complaints. In complying with its oversight function and its role in reconciling the

citizens with the state, the Public Protector seeks to ensure that transgressions by organs of State must be corrected, that a proper diagnosis and correction of any administrative inadequacies should also be conducted and that proper redress is provided in cases requiring remedial action, as envisaged in section 182(1)(c) of the Constitution . It aims to assist the State in good governance practice.

Adv. Selby Baqwa was the first Public Protector of the Republic of South Africa after 1994 appointed by president Nelson Mandela following his approval by a 75,9% majority at a joint sitting of the National Assembly and the Senate and he served his seven year term from 1995-2002.

President Thabo Mbeki appointed advocate Lawrence Mushwana, to succeed Selby Bawqa in October 2002 after he was endorsed by the National Assembly by 278 votes to 32 and became the Public Protector on 1 November 2002. He completed his seven-year term as Public Protector on 16 October 2009.

Some changes were made in 2003 in which the Public Protector Act was amended to provide for the position of Deputy Public Protector with the intention to support the Public Protector and further capacitate and strengthen the Office of the Public Protector. These has resulted in the appointment of Advocate Mamiki Shai as deputy to Advocate Lawrance Mushwana on 19 November 2005 by President Thabo Mbeki and she served until her term expired on 30 November 2012. She was recommended by the Ad hoc Committee after 257 members of the National Assembly endorsed her appointment.

On 19th October 2009, President Jacob Zuma appointed a former Law Reform Commissioner and human rights lawyer Advocate Thulisile Madonsela to succeed Lawrance Mushwana as South Africa's new Public Protector.

President Jacob Zuma appointed Adv.Kevin Sifiso Malunga as South Africa's second Deputy Public Protector in December 2012 to deputise for Public Protector, Adv. Thuli Madonsela. They are both currently serving in their respective position.

According to some experts least three well-defined phases can be identified in the process of making an Ombudsman institution function well: an initial phase where the Ombudsman concept becomes part of the agenda and a battlefield for various administrative, political, legal and economical interests; a second phase where the institution is organised (or reorganised) and starts its operations; and a third phase where the institution is running, consolidating its position and finding practical solutions to a variety of organisational, legal and political problems.

2. EARLY DAYS: BECOMING PART OF THE CONSTITUTIONAL AND ADMINISTRATIVE LANDSCAPE AND TRANSFORMATION TO DEMOCRACY

At its inception in 1995 the services of the Public Protector proved to be much in demand by the Public. When the then Public Protector Selby Baqwa, took office there was an immediate response with the number of complaints doubling compared to the time when it was the Office of the Ombudsman. In April 1996 the rate of incoming complaints rose to an average of 200 a week (with a total staff compliment of 8). In the first 9 months the Public Protector received 1398 complaints and finalised 503. Early complaints related to pension matters, procurement issues and proceedings before the Truth and Reconciliation Commission (TRC)

The Public Protector also noted in is 1996 half –yearly report that State Institutions were responding were well to the presence and role of the Public Protector and that he experienced excellent levels of co-operation from the outset. He also observed that valuable lessons came out of the first few months of operations about how citizens could be seen to hold the state accountable for any maladministration and also how the Public Protector operated as an instrument to enforce such accountability.

At the same time he emphasized that

> *One thing that became clear to me was that to be an effective Public Protector did not simply mean being a receptacle of complaints and processing them on a piecemeal basis. It became clear that to being an effective public Protector meant being knowledgeable about the realities being faced both by the public and the public service … It also means being sensitive to the magnitude of the challenge faced by Public Servants who are struggling to meet what they see as increasing service expectation from their clientele with rapidly decreasing or reconfigured resources.*

The Public Protector was instrumental in significant developments in public administration including the implementation of chapter M of the Public Service Regulations, which served as an administrative guide to ethical and efficient conduct in the Public Service and the relationship between public servants, the legislature, the Executive and the public. The Code of conduct in Chapter M was a significant recognition of the need to keep the interests of the people clearly in view and to care for the welfare of the whole of society. It was also the ethical foundation for the launch of the *Batho Pele* programme aimed at the institutionalising of the principles an d values of public administration as en envisaged in section 195 of the Constitution.

A further significant development was the promulgation of the Executive Members' Ethics Act in 1998, governing the conduct of members of Cabinet, Deputy Ministers, Members of Provincial Executive Councils and Premiers. In terms of the Act the Public P:rotector was mandated to investigate any breaches of the Code of Ethics and report thereon to either the President or the Premier. One of the first investigations in terms of the Act resulted in Report no 12 of 1999/2000 on an investigation of public statement by the Premier of Mpumalanga, Mr N Mahlangu.

While the bulk of complaints received by the Public Protector related to what we would call "bread and butter " issues, including social grants, pension, delay in service delivery, and the number of complaints increased annually in the region of

35 %, the Public Protector was establishing itself as an accessible, credible institution with systemic investigations into nepotism in Government as well as own initiative investigations such as into alleged improprieties by the then Director-General of Home Affairs . The Public Protector also acted proactively with the view to contribute to the improvement of public administration by analysing trends in complaints relating, for instance to public procurement, and identifying possible areas for improvement.

After the initial period of establishment, the Public Protector focused on its constitutional imperative to be accessible to all persons and communities by establishing provincial and regional offices, as well as outreach and visiting points.

After 10 years of democracy the Public Protector was well established with a case load of 22 350 complaints received annually, and investigations relating to the Constitutional duty of the State to render health care, service standards by public servants, high level conflict of interests, corruption and principles of administrative justice. Systemic investigations included delays in the administration of crime in al appeals, compensation for injuries on duty, maintenance of minor children and the protection of whistle-blowers.

Much of the strategic direction of the second Public Protector, Advocate Lawrence Mushwana, focussed on objectives to improve the organisational efficiency of the Public Protector through prompt and quality investigations and to hold the State accountable by ensuring proper remedial action. A number of high profile investigations included an investigation into the alleged failure by the National Assembly to follow Constitutional procedures during the vote on the Constitutional Twelfth Amendment Bill and alleged unethical and improper conduct by the then deputy President P Mlambo-Ngucka relating to an overseas visit. The majority on complaints, however related about the realisation of the constitutional promise of a better life for all and issues affecting the lives of ordinary South Africans, including delays in service delivery, pensions, housing subsidies, improper deductions from social grants, compliance failures and bad governance. By the end of Advocate Mushwana's term complaints received were averaging around 13 000 per annum.

The appointment of the current Public Protector coincided with the commemoration of the 15th anniversary of the Public Protector as a Constitutional Institution and the inauguration of its annual flagship outreach programme, the (Public Protector) Annual Good Governance Week. The Public Protector committed to a three-pronged service promise:

a) Accessible and trusted by all persons and communities;

b) Provide prompt remedial action; and

c) Promote good governance in conduct of all state affairs.

The Public Protector continued to give priority to bread-and-butter matters, bringing relief to many destitute persons whose lives had come to a standstill due to service failure relating to identity documents, social grants, government employee pensions, Unemployment Insurance Fund, and workers' compensation. The Public Protector also saw an increase in the number of complaints involving executive ethics and integrity violations in the exercise of state power and control over state resources. These matters are handled in line with the Public Protector's promise of prompt remedial action and promoting good governance. The focus of the Public Protector also includes the Governments' Twelve Outcomes as well as the Country's attainment of the Millennium development Goals.

The workload of the Public Protector increased dramatically of the last number of years, with 33777 new complaints received in 2012/13 and a caseload exceeding 40000 cases in the previous financial year.

3. THE ROLE OF THE PUBLIC PROTECTOR IN SOUTH AFRICA'S TRANSFORMATION TO CONSTITUTIONALISM

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3.1 Strengthening democracy

Recognising that the task of ensuring adherence to the Constitution and good governance could not be guaranteed by the traditional institutions such legislature, courts and tribunals alone, Chapter 9 of the Constitution created a multiplicity of institutions to protect and promote the rights of specific constituencies in South Africa, each of them with a specific mandate, including the Auditor-General, the Commission for the Promotion and Protection of Cultural, Religious and Linguistic Communities (together with the Pan South African Language Board), the Commission for Gender Equality and the Human Rights Commission, as well as the Public Protector. These Institutions are referred to as Institutions Supporting Constitutional Democracy (ISCD)

The late President Nelson Mandela accurately described the role of these institutions as additional measures to guaranteed democracy, human rights and the rule of law. This is demonstrated in the following statement made by him during the International Ombudsman Institute conference in South Africa.

"*Even the most benevolent of governments are made up of people with all the propensities for human failings. The rule of law as we understand it consists in the set of conventions and arrangements that ensure that it is not left to the whims of individual rulers to decide on what is good for the populace. The administrative conduct of government and authorities' are subject to the scrutiny of independent organs. This is an essential element of good governance that we have sought to have built into our new constitutional order.*

An essential part of that constitutional architecture is those state institutions supporting constitutional democracy. Amongst those are the Public Protector, the Human Rights Commission, the Auditor-General, the Independent Electoral Commission, the Commission for Gender Equality, the Constitutional Court and others."

In this context the Constitutional mandate of the Public Protector to "*strengthen Constitutional democracy*", is based on the recognition by the architects of our constitutional order that the transformation of democracy into the Constitutional promise of a better life for all South Africans, requires governance that is dependent on mechanisms, processes and institution through which citizens and groups can articulate their interests, exercise their legal rights, meet their obligations, mediate their differences and a develop tolerance to accept the things that we cannot change.

But the traditional democratic avenues of accountability -both in respect of ensuring accountability, and providing remedies to the aggrieved persons commensurable to the volume of irregularities - have become increasingly inadequate with the growth of state activity, expansion of government bureaucracy and the points of contact between citizen and the state. An important aspect of the role and functions of the Public Protector is therefore to bridge that gap by serve as an Accountability Institution with the power to scrutinise executive action and the conduct of organs of state and public bodies against Constitutional imperatives aimed at the promotion of the values of human dignity, equality, non-racialism, non-sexism, the supremacy of the Constitution, as well as upholding the rights of citizens and the basic values and principles governing public administration

Constitutional Institutions such as the Public Protector are therefore at the heart of the promotion of democracy, good governance, efficient administration and protection of human rights that is directly linked to the issue of power relations between the political executive and civil society and oversight institutions. It is fundamental to the democratic system of governance that those, to whom powers and responsibilities are given, exercise them in the public interest justifiably and according to the law, and more importantly, are answerable to the public for the actions of government.

3.2 Giving citizens a voice

Recognising that the task of ensuring adherence to the Constitution and good governance could not be guaranteed by the traditional institutions alone the Constitution created the Constitutional Institutions such as the Public Protector to protect and promote the rights of specific constituencies in South Africa and to contribute to the transformation of Democracy into the Constitutional promise of a better life for all South Africans. Such a democracy requires governance that is dependent on mechanisms, processes and institutions through which citizens and groups can articulate their interests, exercise their legal rights, meet their obligations, mediate their differences and a tolerance to accept the things that they cannot change.

From the Public Protector perspective it is absolutely crucial that citizens are able to respond to service or conduct failures by the state in a manner that reinforces the institutions and values of our precious democracy, our ethical values and justice, and protects sustainable development and the rule of law. Where people have lost confidence in the democratic structures it is an attractive option to sections of the population, particularly those marginalised in a socio-economic sense, to resort to protest and unrest, or even to revolting against the government as we have witnessed in the so-called Arab spring. The public Protector serves a crucial role in reconciling citizens with the State, especially in situations in which government–citizen relations are weak, broken down or even non-existent. A more ambitious role, beyond brokering, is where changed institutional practices are promoted and facilitated, reflecting sustainable mechanisms and practices for channelling relations between state and citizens.

In my opinion Resolution, conciliation and indeed, reconciliation are at the heart of constitutional governance that is needed to consolidate and sustain a high quality and liberal participatory democracy such as ours. It embodies some of the crucial elements of a Constitutional democracy build on -

- Participation - providing channels for settling conflicts over interests and values and for making broadly legitimate policy choices.

- Responsiveness to the needs and concerns of, and respect for the rights of society

- Equality among citizens – (Political equality is linked to economic equality, and that money and high social status are determining factors in access to power and more influence over government.

The Public protector processes also serve to making information and analysis available to a wide range of stakeholders, in order to stimulate reflection on a situation to which society and government may have got used to. A simple, yet potentially powerful catalyst for building accountability relations is the provision of relevant and accessible information, as that builds the capacity of citizens to have the knowledge and be aware of their rights. This is essential to build accountability relationships.

3.3 Monitoring compliance with and respect for the Rule of law

The Constitution provides the basis for the character of the state that is envisaged for the realisation of the constitutional vision of the country, to the extent of dictating that the state must be democratic, uphold the rule of law and operate on the basis of openness, transparency and accountability ethical standards which the executive should uphold and which include acting in the public interest.

In the recent judgment by the Constitutional Court in the ALLPAY case it was reiterated by the Court that the Rule of law is a founding value of our constitutional democracy. According to the Court it implies that the state, in all its dealings, operates within the confines of the law and, in so doing, remains accountable to those on whose behalf it exercises power. "The supremacy of the Constitution and the guarantees in the Bill of Rights add depth and content to the rule of law. When upholding the rule of law, we are thus required not only to have regard to the strict terms of regulatory provisions but so too to the values underlying the Bill of Rights." Public functionaries, as the arms of the state, are

further vested with the responsibility, in terms of section 7(2) of the Constitution, to "respect, protect, promote and fulfil the rights in the Bill of Rights.

The Constitutional Court also emphasised that the focus of the rule of law is upon controlling the exercise of official power by the State. The foundational principle is that agencies and officers of government, from the Minister to the desk official, require legal authority for any action they undertake, and must comply with the law in discharging their functions. Government is not above the law, but is subject to it.

Renewed emphasis on efforts to strengthen the rule of law is in large part driven by a "new consensus on the importance of statebuilding and governance", which in essence implies that those that we have elected and authorised to manage the affairs of our country, shall govern "so long as they can protect the interest of the people or the trust the people have placed in them" This is how the concepts of democracy, rule by consent, and good governance came into existence in the theory and practice of government. "Constitutional Democracy" in our case is based on the premise that those elected to form a government must do so in a manner ensures that our hard earned democracy becomes a reality in the lives of every south African and deliver on the Constitutional promise of a better life for all.

The rule of law, transparency, and accountability are not merely technical question of administrative procedure or institutional design. They are outcomes of democratizing processes driven not only by committed leadership, but also by the participation of, and contention among, groups and interests in society—processes that are most effective when sustained and restrained by legitimate, effective institutions

From a rule of law perspective, complaint handling by the Public Protector bolsters the notion that government is **bound** by rules, and that there can be an independent evaluation of whether there has been **compliance with the rules**. Government accountability and the right to complain go hand in hand.

Accountability is the process and means by which public services and government are held to account for their actions, ensuring that public resources are being used in accordance with publicly stated intentions, including the (public procurement) values contained in section 217 and the (public service) standards envisaged in Sect 195 of the Constitution , Batho Pele, etc are being adhered to.

A protected **right to complain** against public institutions is an essential part of accountability is, which implies

a) the obligation on state institutions to explain and justify conduct.
b) Interrogation of the conduct and questioning the adequacy of the information or the legitimacy of the conduct
c) Adjudication by means of finding on the conduct under scrutiny and remedying prejudice and impropriety
d) True accountability gives visible meaning to constitutional democracy by ensuring that authorities are "fair and take responsibility, acknowledge failures and apologise for them, make amends, and use the opportunity to improve their services"

Prof. John McMillan, former Commonwealth Ombudsman of Australia, noted that public disagreement with government decisions is a disputed right in many parts of the world. *Recognition of the right can be an important marker of whether democracy and the rule of law are being practised.*[2]

Another Colleague, Dr Diamandouros stated that

"…the emergence of the Ombudsman as an institution distinct from, but complementary to, the courts, capable of serving as a … mechanism of accountability and control geared to the enhancement of the rule of law and to the protection of citizens' rights, was both much easier and much more effective.

[2] **THE OMBUDSMAN AND THE RULE OF LAW** Address by Prof. John McMillan, Commonwealth Ombudsman, to the Public Law Weekend, Canberra *5-6 November 2004*

In turn, this made it possible to offer citizens a broader range of choice when it came to choosing between alternative mechanisms of redress and deciding on how best to exercise these rights…"

3.4 Remedying injustice suffered at the hands of the State

The Public Protector often acts as mediator between aggrieved individual and public institutions to ensure fairness and legality in public administration. The Public Protector has an important role in remedying government's administrative injustices or failures and reconciling the people with the state, which helps to divert, dilute and mitigate the anger and extreme frustration.

While the institution of the Public Protector has grown immensely over the last number of years, in stature, accessibility and awareness, our test of whether or not we are effectively discharging our Constitutional mandate, lies in the assessment of the impact and difference that the Public Protector makes in the lives of ordinary South Africans in their aspirations experience the Constitutional promise of a better life for all. In approaching the Constitutional and statutory mandate the Public Protector always endeavours to balance the values of accessibility, promptitude, responsiveness and effectiveness.

Providing redress for wrongdoing is one of the underpinning principles of public accountability and giving visible meaning to constitutional democracy by ensuring that authorities are fair and take responsibility, acknowledge failures, make amends, and use the opportunity to improve their services. The Constitutional Court[3] has made it clear that no member of the public should suffer prejudice or injustice as result of the wrongful actions of an organ of state. It was emphasized that since the advent of our constitutional dispensation,

"… *administrative justice has become a constitutional imperative… and that every improper performance of an administrative function would implicate the*

3 Steenkamp v Provincial Tender Board, Eastern Cape 2007(3) SA 121 (CC).

Constitution and entitle the aggrieved party to appropriate relief." (own emphasis).

An **estimated** 70% of the matters dealt with by the Public Protector are being resolved through early resolution approaches involving the State taking responsibility in a voluntary and cooperative manner, without having to resort to the Public Protector's formal powers. These are cases that we call "**bread and butter**" matters that need to be resolved with speed because complainants in such cases are often on the verge of losing their houses or sources of income unless the Public Protector's office steps in to help.

4. CHALLENGES

4.1 Safeguarding the independence, impartiality and integrity of the Public Protector

Sections 181, 191, 196 and 220 of the Constitution guarantee the independence of the Chapter 9 Institutions. Section 181(2) furthermore provides that the Chapter 9 institutions "*must be impartial and must exercise their powers and perform their functions without fear, favour or prejudice*". Furthermore, section 181(3) requires other organs of state to "assist and protect these institutions" to ensure their "independence, impartiality, dignity and effectiveness".

The Constitutional Court provided guidelines on the issue of independence of these institutions in the two Constitutional Court judgments directly dealing with Chapter 9 Institutions, and another decision dealing with the concept of independence in more general terms[4]. A general test for judging the independence of a Chapter 9

4 Also discussed in the guiding principles considered by the *ad Hoc* Committee in Chapter 1 of the ***Report of the ad hoc Committee on the Review of Chapter 9 and Associated Institutions A report to the National Assembly of the Parliament of South Africa*** **31 July 2007**

institution was set out in *Van Rooyen and Others v S and Others*.[5] The determining factor identified by the Constitutional Court was whether from the objective viewpoint of a reasonable and informed person, there will be a perception that the institution enjoys the essential conditions of independence In other words, an institution must not only be independent. It must also be seen to be independent. Such a perception should be guided by the "*country's complex social realities, in touch with its evolving patterns of constitutional development, and guided by the Constitution,* its values and the differentiation it makes between different ***institutions"***

The Constitutional Court outlined the following key components of a Chapter 9 Institution's independence:

a) financial independence;
b) institutional independence with respect to matters directly related to the exercise of its constitutional mandate, in particular control over its administrative decisions;
c) appointment procedures and security of tenure of appointed office bearers.

The need to safeguard the administrative independence of Chapter 9 institutions was also identified in New National Party v Government *of the Republic of* South Africa *and Others* [6]where the Court ruled that neither the Executive nor Parliament may interfere in the day-to day running of the Chapter 9 Institutions.

There is general consensus that if the current arrangements are to satisfy the constitutional framework and protect the independence, the consultation process needs to be transparent; Treasury must acknowledge the legitimate requirements of the ISDs and Parliament must know and be involved in the determination of the reasonable resource requirements of the ISDs as is implied in the Constitutional Court case of *New National Party of South Africa v Government of the Republic of South Africa and Others,* [7] which dealt with the funding of the IEC. The failure to

5 2002 (8) BCLR 810 (CC).

6 (CCT9/99) [1999] ZACC 5

7 CCT9/99. 1999 (3) SA 191 (CC), 1999 (5) BCLR 489 (CC).

extent the ruling to the other IDS's established in terms of the same chapter of the Constitution creates a legal anomaly.

This process has led to a situation where the Public Protector is devastatingly underfunded to such an extent that it is difficult for the Public Protector to comply with its Constitutional imperatives and to meet its strategic objectives. Current staff members are working under increasing strain as a result of the additional case load and the achievement of objectives to reduce turnaround times and comply with the Public Protector's promise of prompt remedial action are becoming increasingly more difficult. The Public Protector cannot comply with the timeframe prescribed for investigations in terms of the Executive Members Ethics Act and cannot allocate resources required to discharge its functions in terms of the Promotion of Access to Information Act. There are simply not enough staff members to do ensure that these cases are attended to as required in terms of the mandate and strategic objectives of the Public Protector and her constitutional obligation.

On institutional independence it is critical that all parties in a dispute must see the Public Protector as impartial—neither a mouthpiece of government agencies nor a representative or spokesperson of complainants. An ombudsman office that is recognized for its independence and impartiality builds both citizens' and government's confidence in the institution, thereby boosting its own capacity to contribute to the improvement of public administration.[8]

The existence of an impartial independent Public Protector can contribute significantly to the public's sense of security and trust in not only the Institution, but ultimately in government action, and therefore, in the Constitution and our democratic system. This is especially helpful "*in a transitional society that has*

8 **The Role and Effectiveness of the Ombudsman Institution.** Working to Strengthen and expand democracy worldwide, National Democratic Institute for International Affairs (NDI) 2005.

moved from an authoritarian political system to one that is more open and based on democratic norms."[9]

The effectiveness of ombudsman offices in the eyes of the public is often boosted by prominent or hard-hitting verdicts in landmark cases. While this leaves a strong impression on the public mind that Ombudsman means business, that it is independent of the state organs and that citizens can trust the institution for safeguarding their interests, it may lead to the situation where the 'political masters and the bureaucrats' sometimes consider the institution as a hostile entity such as in India, Ontario and no doubt elsewhere. [10]

At the same time Public Protector needs to cultivate a strong working relationship with institutions of government and should have a reputation for impartiality and neutrality, to ensure voluntary cooperation with her office to the extent where public officials are likely to recognize the importance of the Public Protector's findings regarding administrative practices. Independence of Ombudsman ideally plays an "*indirect role in the political system pertaining to keeping a dynamic balance of powers among and between different organs of the state and different sections and individuals of the society"*.[11]

It is crucial that both parties to a dispute before the Public Protector have complete confidence that the Public Protector is not an advocate for the individual but rather an impartial investigator of individuals' complaints against the government.. As the Public Protector exercises her power of investigation, public employees are reminded that decisions made and actions taken affect individuals and may need to

9 **The Role and Effectiveness of the Ombudsman Institution.** Working to Strengthen and expand democracy worldwide, National Democratic Institute for International Affairs (NDI) 2005.

10 Independence of Ombudsman, *by Dr. Mohammad Waseem* Professor, Lahore University of Management Sciences

11 Independence of Ombudsman, *by Dr. Mohammad Waseem* Professor, Lahore University of Management Sciences

be explained or justified by an external reviewer with the ability to make his/her findings public.

From the nature of the ombudsman system and the mandate of the Public Protector it is natural that the organs of state or public authorities might not be comfortable with the fact that its conduct or actions are the subject of an investigation and scrutiny by the Public Protector. However, confidence in the impartiality and independence of the Public Protector means that such organs of state or public authorities have the assurance that it will be afforded due process during the investigation, that the adjudication and the resolution of the complaint will done in a fair and transparent manner as reflected in the details and contents of Public Protector reports, and by proper application of the law.

The Public Protector is a non-partisan figure and it is important not to allow the use of her office to promote partisan and political interests. Complaints by political parties, pressure groups and similar organisations, is generally a contentious issue amongst ombudsman offices because of the possibility that such complaints might be lodged with the view to embarrass or discredit a department or body or the government as a whole in order to promote the political or institutional goals of the organisation or party concerned.

4.2 Expanded mandate, role and jurisdiction, and impact on the workload of the Public Protector.

Section 182(4) of the Constitution specifically requires that the Public Protector **must** be accessible to all persons and communities. "Accessibility" does not refer to only the ability to lodge and submit complaints and report matters to the Public Protector, but more importantly, require real access to the services of the Public Protector - investigating, rectifying and redressing any improper or prejudicial conduct in state affairs and resolving related disputes through mediation, conciliation, negotiation and other measures.

The Public Protector operates in an environment where its stakeholders have high expectations, and there is an ever-changing demand for its services. Its functions have been progressively expanding over the past decade to the point where its mandate is informed by 16 different statutes, with an oversight responsibility over more than 1000[12] National and Provincial Departments, municipalities, organs of state and public bodies. The Public Protector is also responding to changing models of public service delivery as informed by, inter alia, the Government's 12 outcomes.

The size, function and location of the organs of state and public institutions falling within her oversight makes it impossible for the Public Protector to provide the service required in terms of her Constitutional mandate remotely at limited centralised locations. On Provincial and local Government the complaints related to conduct and service failures that impacts profoundly on the marginalised and the poor, including social grants, pensions, housing and essential services.The expanded mandate and the limitations to the availability of capacity and resources have implored us to challenge our individual and collective resolve to exercise greater responsibility in the use of financial and other resources. We start from the assumption that the South African public purse cannot afford as many resources as some of our First-World counterparts but that a certain level of support is essential if Institutions for Supporting Democracy are to fulfil their democratic responsibilities and constitutional mandate effectively.

As a result of its strategic focus based on Constitutional imperatives, the Public Protector experienced a substantial increase in complaints during the past year – driven largely by waves of publicity and growing public confidence and stakeholder faith in an awareness of the office. Current figures indicate a continuous rapid increase in the case load of the Public Protector as the office becomes accessible to

12 Idasa: Submission To The Ad Hoc Committee On The Protection Of Information Bill, *Schedule Of Organs Of State To Which The Protection Of Information Bill Applies,* [26 January 2011]

more persons and communities as envisaged in section 182(4) of the Constitution and as public trust levels increase. Case numbers had been much higher as the unexpected surges of new complaints resulted in the Public Protector having to re-allocate and maximise resources to actually attend to the increased number of new complaints.

This has a serious adverse impact on the objective of the Public Protector to balance the quality of investigations with swiftness in order to ensure the speedy resolution of matters and prompt remedial action as an efficient and cost-effective alternative to the courts. The current workload presents major challenges to properly set target times for disposing of complaints, targets for the number of cases to be disposed of by staff members in a given period and target times for completion of investigations.

The Public Protector is also receiving increasingly complex and challenging complaints overall. Changing pressures on different areas in the state sector result in changing levels and natures of complaints. In particular, the Public Protector is receiving increasing numbers of complaints relating conduct failures in respect of to public procurement, as well as service delivery failures on local government level. These complaints can raise more complex issues and tend to take longer and cost more to complete than complaints about the administrative conduct of state sector agencies.

4.3 Focus on investigation of significant and systemic issues

The reality for the Public Protector is that it serves 50 million members of the public in any situation where these members are adversely affected by the conduct of actions of any of the 1001 organs of state.

Linked to the fact that the institution is currently experiencing a high level of confidence and trust from members of the Public, this has led to a proposition that is seemingly self-contradictory. The success of the Public Protector to a very large degree depends on her ability to gain and retain the confidence of the complainants,

which is clearly a part of the whole idea of an Ombudsman office. On the other hand, great success might lead to more cases being lodged and the risk of a loss of confidence that threatens the Public Protector's operations if it turns out that the institution is not able to process and complete the incoming cases swiftly and effectively.

We have noted that this not a unique South African experience. All over the world, newly established institutions and even established offices with more pro-active ombudsmen, tend to become buried in actual complaint cases - African countries such as Ghana and Malawi or European countries such as Poland or Albania and even Denmark, as well as New Zealand[13], have shared this experience. The number of incoming complaint cases may exceed expectations, forcing the institution to find individual solutions case by case, with no resources left for the general influence on development of the administration. [14]

The first, obvious solution explored by these offices was to acquire additional human resources, and in most instances more staff was in fact supplied when the relevant Parliaments realised the problem. However, more staff was not enough, partly because the additional resources were only granted some time after the problem had arisen. By the time the extra staff was in place, a considerable backlog of unprocessed cases had accumulated.[15]

Efforts to apply a more vigorous filtering system in the initial assessment of complaints, by investing more time in analysing and discussing fundamental issues such as values, the significance, impact and priority of the matter concerned, were gradually used *to dismiss not only manifestly ill-founded cases, but also cases where the Ombudsman could clearly see that there was little or no likelihood of his being*

[13] CHALLENGES FOR THE OMBUDSMAN IN A CHANGING SOCIO-ECONOMIC ENVIRONMENT Presentation to the 12th Conference of the Asian Ombudsman Association, Japan, November 2011 Beverley A Wakem CBE, Chief Ombudsman, New Zealand & President of the International Ombudsman Institute

14 **Some Experiences in the Field of assistance and Cooperation between Ombudsmen,** By: Jens Olsen, Søren Knudsen, Ermir Dobjani, and Christian Møller

15 **ibid**

able to support the complainant. [16] The risk of this approach is that it requires a large degree of prejudgment of issues that have not been properly investigated, and where mistakes may have been made, would deny the complainant's access to justice.

In countries such as Denmark a new investigation model was for instance, introduced in 1988 in an attempt to deal with this situation. Instead of taking up individual cases for investigation on his own initiative, the Ombudsman from time to time decided to take up a whole sector for investigation (on own initiative). *After selecting between 100 and 150 cases from a specific institution or area, and after processing these cases as if they were complaint cases, the Ombudsman produced a full report which he hands over to the authorities. In Denmark, the term* ***own-initiative projects*** *are used for these major, focused investigations of the authorities' administration of selected legal areas*.[17]

Internationally, a natural development in complaint resolution activities has been the inclusion of system-wide investigation and reform, demand management, and governance training. By addressing the system, the office can reduce the number of individual complaints and, in turn, its own workload and costs. The Public Protector has therefore increasingly focussed on the investigation of significant and systemic issues. This reflects requests by communities as well as Parliament to undertake more general interventions, together with the Public Protector's own increasing recognition of the need for such proactive interventions in order to achieve its desired outcomes and impacts. However, to be done effectively, investigating significant and systemic issues can be a much more challenging and resource intensive process than individual complaints based investigations.

16 **ibid**

17 *"In his final report, the Ombudsman not only lists the errors he has found, but may also make recommendations on how to change procedures, adjust interpretations, etc. In other words, the own-initiative project involves an entirely different and more systematic contribution directed at the authorities' general standard, which obviously enables the Ombudsman to influence the interpretation of good governance in a broader and more forceful way":* **Some Experiences in the Field of assistance and Cooperation between Ombudsmen,** By: Jens Olsen, Søren Knudsen, Ermir Dobjani, and Christian Møller

The Public Protector's systemic interventions such as the current investigation into systemic deficiencies in the Government's Subsidised Housing Programme contribute directly to improved administrative processes including service delivery and complaint handling within the wider public sector. While this is much more resource intensive than individual complaints, the outcome of an investigation can resolve a problem affecting an agency or be of a more systemic nature with much wider application and consequently save agencies many thousands of rands that can be better used to deliver government programmes.

The ultimate objective is to find a balance between an institution focused on resolving individual complaint cases and *an institution transformed into a body supervising the general development of the rule of law as well as the general standards and attitudes within the administration.*[18]

4.4 Co-Operation by organs of State And Public Authorities in investigations and the implementation of Public Protector's reports

Ombudsman institutions such as the Public Protector is intended to operate as a cure for administrative and governance deficiencies; to protect citizens by bridging the rift between the bureaucracy and the citizens, "*bringing the bureaucratic experience closer to the ideals of democracy*." Hence, the principle aim of the Public Protector is to protect the rights and interests of the public against injustices caused by maladministration. In addition, the Public Protector strives to bring about, in the course of the investigation and resolving of complaints, "*a reform in the administrative process of government that will affect the manner in which similar matters are entertained in the future."*[19]

18 **Some Experiences in the Field of assistance and Cooperation between Ombudsmen,** By: Jens Olsen, Søren Knudsen, Ermir Dobjani, and Christian Møller

19 Ibid

This is accomplished, firstly by undertaking the impartial investigation of complaints submitted to the Public Protector, honest and good faith attempts at resolving disputes and rectifying improper acts and omissions, and the issuing findings to the administration and demanding compliance with the remedial action that is required to remedy the actions and the consequences thereof. These powers and functions of the Public Protector are regulated by the Constitution and the Public Protector Act, 1994, which also place corresponding obligations on the organs of state and public bodies to cooperate with the Public Protector to ensure its efficiency.

The Public Protector will achieve its purpose in this regard if the there is a willingness and readiness on the part of administrative agencies to cooperate with the Public Protector in the investigation and resolution of complaints, and to comply with its findings and remedial action.

The levels of awareness of the role and functions of the Public Protector and the profile of the Public Protector amongst government institutions and public bodies has increased significantly over the last number of years, and there are areas of cooperation by specific departments and officials that shows and understanding of and commitment to the principles of sound administration and accountability. However, the Public Protector has emphasised that the lack of cooperation, besides the issue of capacity constraints, is the biggest obstacle in achieving her Constitutional mandate. Failure to extend assistance and delays in the supply of information could significantly constrain and protract the Public Protector's investigative powers and capacity, since access to information and genuine, timely cooperation are decisive and central to the success of the Public Protector's investigations, reports, and remedial action.

Some of the challenges relate to the fact that State Institutions -

a) Do not show and willingness to take responsibility for findings of maladministration and to reverse the consequences as indicated in the remedial action;

b) Try their best to provide justification, using their information and resources to find support from experts and legal advisors, to avoid compliance with the findings and remedial action of the Public Protector.

c) Do not understand the constitutional imperative of the Public Protector in terms section 182 of the Constitution for providing remedial action for prejudice resulting from improper administrative action.

d) Confuse lawfulness and fairness. Fairness involves considering both legal and non-legal issues. Appropriate weight should be given to broad questions of reasonableness, the effect of decisions and the ethical obligations of fairness and accountability.

e) Do not live up to the principles and values contained in section 195 of the Constitution. These ethical principles for public sector agencies, including the *Batho Pele Principles*, are consistent with a redress framework which provides that, when people are unfairly or unreasonably affected by decisions, the agencies should take all fair and reasonable steps to make good.

4.5 Accessibility

Section 182(4) of the Constitution specifically requires that the Public Protector **must** be accessible to all persons and communities. "Accessibility" does not refer to only the ability to lodge and submit complaints and report matters to the Public Protector,

but more importantly, require real access to the services of the Public Protector - investigating, rectifying and redressing any improper or prejudicial conduct in state affairs and resolving related disputes through mediation, conciliation, negotiation and other measures.

The size, function and location of the organs of state and public institutions falling within her oversight makes it impossible for the Public Protector to provide the service required in terms of her Constitutional mandate remotely at limited centralised locations. This includes about 1001[20] organs of state and government agencies operating on all three levels of government, as well as public institutions and bodies performing a public function. On Provincial and local Government the complaints related to conduct and service failures that impacts profoundly on the marginalised and the poor, including social grants, pensions, housing and essential service delivery at municipal level.

The key change imperative emerged as the need to reposition the Public Protector to achieve real **accessibility to all those among the almost 50 million** population that need remedies for administrative wrongs. Achieving trust among all persons and communities while being accessible in terms of physical access, processes and opportunities, were identified as non- negotiable in order to comply with section 182(4) of the Constitution. The provincial and regional presence of the Public Protector is therefore not only a *demonstrateable need*, but a constitutional imperative.

20 Idasa: Submission To The Ad Hoc Committee On The Protection Of Information Bill, *Schedule Of Organs Of State To Which The Protection Of Information Bill Applies,* [26 January 2011]

5. CONCLUSION

South Africa has made a significant stride in terms of institutionalising an independent state embodying a democratic polity and a market economy. The transitional process in South Africa was bolstered, among other things, by the establishment of Constitutional Institution Supporting Democracy

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