ACADEMIA | Letters

The Public Protector of South Africa: An Ombudsman of A Special Type

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1 Introduction

The purpose of this short article is to indicate the distinctive features of the Public Protector of South Africa (the PP), compared to those of the western Parliamentary Ombudsman. The International Bar Association (1974) defines 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.

But the PP does not recommend the corrective action, but rather takes corrective action. I hereby argue that this makes the PP an Ombudsman of a Special Type. Furthermore, although the PP is selected by and accounts to Parliament, it is independent from it and is neither its aide nor functionary. But the western Ombudsman is the functionary of Parliament.

2 The Concept of Ombudsman

The Ombudsman was born in Sweden in 1809. Initially a regional Nordic phenomenon, it came to spread all over the world, with New Zealand the first non-Nordic country to establish one in 1962 (Remáč, 2014: 3). However, even this Nordic phenomenon was far from being homogenous. Swedish and Finnish Ombudsman controlled the entire administrative branch

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and were vested with the power to arraign judges and civil servants, while the Danish and Norwegian models departed from this practice (Remáč, 2014). These three original Nordic models are discussed below for conceptual clarification:

(a) The Parliamentary Ombudsman of Sweden (*Justitieombusmannen*)

This Ombudsman exercised its role on behalf of the *Riksdag* - the Swedish Parliament (Remáč, 2014: 3), and it had the power to control the public administration and judiciary, and to prosecute public officials for their failure to carry out their functions. In essence, the Swedish Parliamentary Ombudsman's mandate was twofold: to oversee the rule of law in the public administration and the judiciary, and protect the fundamental rights and freedoms of citizens (Salman, 2006: 18).

(b) The Parliamentary Ombudsman of Finland

The Parliamentary Ombudsman of Finland is an independent authority elected by the *Enduskunt* (the Finnish Parliament) to supervise, on its behalf, the legality of the performance of public power, including supervising the exercise of powers by judges and other public officials in order to check maladministration in the performance of their duties (Salman, 2006: 19). In addition, it has the power to order the institution of criminal charges against any public official for misconduct or negligence in the performance of their duties, and oversee the judiciary, within the principle that the independence of the judiciary as guaranteed in the Constitution cannot be violated (Salman, 2006: 20).

(c) The Ombudsman of Denmark

As Salman (2006: 21) indicates, the Danish model differs from its two Nordic forerunners in that the Danish Ombudsman neither has power of prosecution, nor of supervision of the courts but supervises civil and military central government administration, local government and other public administration institutions. The other characteristics of parliamentary control of the Danish Ombudsman are that parliament appoints and dismisses the ombudsman, and parliament controls its budget and enacts its implementing provisions.

This Danish model is one that came to spread mainly to Western democracies and came to be the primary point of reference for all subsequent parliamentary ombudspersons in the world (Reif, 2004: 6; Salman, 2006: 20). The Danish Ombudsman has power to control the administration, but this power is confined to only making findings and recommendations, and issuing reports (Kucsko-Stadlmayer, 2008: 3).

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3 The Western Parliamentary Ombudsman

Basically, the western parliamentary Ombudsman is the off-shoot of the Danish model, propelled by the similarities of the parliamentary systems in Scandinavia and Commonwealth countries. In a parliamentary system, both the legislative and executive arms of government are fused into a unified system of government, in which the legislature reigns supreme. Thus the Ombudsman forms part of the parliamentary system (Diaw, 2008).

For instance, in the Westminster parliamentary system in the United Kingdom, the parliamentary Ombudsman is elected by parliament and is its officer (Maer and Everret, 2016: 10). The Parliamentary Ombudsman's powers and responsibilities are set out in the Parliamentary Commissioner Act 1967, as amended. The public accesses the Ombudsman via the so-called "MP's filter" (Maer and Everret, 2016: 3, 7), making it explicit that the Ombudsman is an instrument in the hands of the British Parliament and its members.

Therefore, the parliamentary Ombudsman is an aide to parliament (Kirkam, 2007), with only unenforceable power of recommendation. This is the main distinction between the parliamentary Ombudsman and the Public Protector. This distinction is fundamental because the western Parliamentary Ombudsman operates within the system of parliamentary supremacy, while the PP operates within the system of constitutional supremacy. The PP is the constitutional Ombudsman!

4 The Conception of the Public Protector in South Africa

In its 1992 *Ready to Govern* document, the ANC mooted the idea of an Ombudsman for post-apartheid South Africa. It proposed that:

> "…that a full-time independent office of the Ombud should be created, with wide powers to investigate complaints against members of the public service and other holders of public office and to investigate allegations of corruption, abuse of their powers, rudeness and maladministration. The Ombud shall have power to provide adequate remedies. He shall be appointed by and answerable to parliament".

Consequently, it was included in the 34 Constitutional Principles that constituted the political settlement. Constitutional Principle XXIX specifically said:

The independence and impartiality of… a Public Protector shall be provided for and safeguarded by the Constitution in the interests of the maintenance of effective public finance and administration and a high standard of professional ethics in the public service.

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In the 1996 Constitution it was conceived and conceptualised as a Chapter 9 institution (State Institutions Supporting Constitutional Democracy), established to ensure government accountability and provide remedies for maladministration and the abuse of authority, subject only to the Constitution and the law. This conception and conceptualisation meant that the PP has been assured of its independence (Section 181(2)), and that its removal from office would be onerous, requiring a two-thirds majority of the National Assembly (Section 194(2)). Importantly, its decisions cannot be second-guessed even by Parliament, although they are subject to judicial review (see *Economic Freedom Fighters v Speaker of the National Assembly and Others and Democratic Alliance v Speaker of the National Assembly and Others*). This judicial review is an important counter-balance for the institution as powerful as the PP. Without this counter-balance and in wrong hands the PP would be an institutional monster, whose binding powers could be abused.

Bishop and Woolman (2013: 24A-2) criticises the Ombudsman institution in that it generally lacks the powers to make binding decisions. However, this is not the case with the PP. The *Certification* judgment said:

> "Members of the public aggrieved by the conduct of government officials should be able to lodge complaints with the Public Protector, who will investigate them and take appropriate remedial action".

The plain and clear language used in this judgment is indicative that, and as clarified by the Constitutional Court in the Nkandla judgment, the PP's decisions are binding unless successfully reviewed by a court of law. This is so, not because the Constitutional Court has decreed it, but by constitutional design.

Thus, the PP is South Africa's version of the Ombudsman, with its own unique characteristic because of its binding remedial action. In the *Nkandla* judgment, Chief Justice Mogoeng, had this to say about the choice of the name for the institution:

The office of the Public Protector is a new institution – different from its predecessors like the 'Advocate General', or the 'Ombudsman' and only when we became a constitutional democracy did it become the 'Public Protector'. That carefully selected nomenclature alone, speaks volumes of the role meant to be fulfilled by the Public Protector. It is supposed to protect the public from any conduct in State affairs or in any sphere of government that could result in any impropriety or prejudice (*EFF v Speaker of the National Assembly*, 2016).

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5 Conclusion

Given the outlined differences, a conclusion is made that the PP is an Ombudsman, but of a Special Type.

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