THE ROLE OF THE OMBUDSMAN IN FIGHTING CORRUPTION

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Introduction

It is a fact of human existence that maladministration, abuse of power, crime and corruption occur not only in the lowest but also in the highest of places.

Corruption takes many forms, and many tactics are necessary as part of a strategy to effectively combat this global scourge. It will hopefully be clear from what follows that an ombudsman is an institution that therefore necessarily plays a complementary role in this regard. Although not originally designed to combat corruption, but rather to address grievances relating to administrative issues, the institution of the ombudsman, with its unique set of tools and competencies and its focus on the quality of governance, has proven itself to be a useful ally in the struggle against this common human frailty.

The South African version of the national/parliamentary ombudsman is the Public Protector. To the extent that it is possible to pin down some kind of sensible definition of ombudsmanship, capable of generalisation, it draws most of its characteristics from the classical national ombudsman of Northern Europe, specifically Sweden, as well as from the Commonwealth model.

A classical ombudsman, and South Africa's Public Protector, exhibit several defining characteristics. Apart from being a complaint-handling mechanism (as opposed to a complaint repository), the Public Protector, like the classical ombudsman, lacks executive authority. He or she normally possesses only persuasive powers in the form of the right to make recommendations, or by means of the ability to engage in negotiation or mediation in order to resolve grievances. This latter feature distinguishes it from other anti-corruption entities and agencies that usually possess powers of enforcement in some form.

While this difference may, at first blush, appear to relegate the ombudsman to a back seat role in the fight against corruption, the truth of the matter is that it is an advantage, for several reasons.

The very absence of executive authority makes it relatively easy to accord the ombudsman real independence and a wide mandate. These, in turn, bring with them a great freedom of movement and of action. Thus, for example, the ombudsman is permitted simple and quick access to confidential documentation held by the state and individuals, coupled with the power to refuse to disclose it to any person.

Independence

Independence characteristically means, *inter alia*, that the ombudsman:

(a) is appointed by the head of state after nomination by the democratically-elected national legislature, by a special majority. S/he is accountable to (and only indirectly controlled by means of powers delegated by statute) the democratically-elected national legislature. S/he should, accordingly, not be appointed or dismissed by or be required to report exclusively to any element of the executive (whether minister, cabinet or president) or administrative arms of the state;
(b) can refuse to disclose to any person any information that relates to an investigation;
(c) is competent but not compellable as a witness in a court of law;
(d) is empowered to initiate investigations without awaiting receipt of a complaint;
(e) has powers of subpoena, search and seizure, and of taking evidence under oath;
(f) possesses the discretion to publish reports and recommendations;
(g) is not dependent for budgetary allocations upon any element of the executive or administrative arms of government;
(h) is afforded a mechanism whereby s/he can report directly to the legislature

Wide and clear mandate

SA's Public Protector also addresses issues of human rights and corruption in the broad sense. As a protector of human rights, he deals primarily with the constitutional right to administrative fairness. In terms of corruption, the Public Protector has a wide mandate to investigate corruption in the broad sense of any conduct that reflects slippage from ideal norms and standards.

Equity and Ethics

Although he exists to uphold the Rule of Law, the ombudsman is at liberty to be guided principally by considerations of fairness and natural justice, rather than being bound by the strict, narrow letter of the law. As such, his task is to mediate and persuade in order to ameliorate the often unforeseen consequences of laws of general application, and not only to recommend corrective action in cases of clear breaches of the law.

Accessibility

This same apparent absence of coercive power allows greater operational flexibility and informality. This means that public access is greatly facilitated, giving the ombudsman the advantage of insight into a wide spectrum of life experiences. The public should be able to have ready access to the ombudsman, regardless of their financial or social status or the resources available to them.

Thus, the ombudsman will need offices accessible to those in rural areas; those who are disabled or unwell; those who are illiterate or speak only their mother tongue, etc. S/he will also require an adequate staff complement who are suitably educated and trained. All of this, of course, has implications for the national fiscus and budgetary allocations.

Additional features of power

When one considers that an ombudsman is frequently given the authority to request assistance from other state agencies, the initial impression of the ombudsman's powerlessness is somewhat dissipated. In any event, significant procedural powers such as search and seizure, subpoena, and administering the oath, that are usually afforded the ombudsman, assist him/her to obtain credible evidence when making and publishing findings.

The Ombudsman and corruption

Perhaps these brief arguments would be rather more meaningful were they to be placed within the context of what an ombudsman understands to be corruption.

Corruption has, of course, a hard core of meaning, usually understood to be reflected in the definitions of the criminal versions of that activity. But corruption may also be understood in a broader sense. Thus, corruption is defined in the Shorter Oxford Dictionary to mean:

- "The destruction or spoiling of anything, especially by disintegration or decomposition. Making or becoming morally corrupt; the fact or condition of being corrupt; moral deterioration; depravity.
- Perversion of integrity by bribery or favour; the use or existence of corrupt practices.
- The perversion of anything from an original state of purity."

Thus, the deterioration of moral or ethical standards in the Public Service, the perversion of the integrity of its officials and the inevitable result this would lead to, namely, the destruction of an efficient state administration, could all be classified under the heading of corruption. To bribe or accept a bribe, would be only one example, but maladministration could also lead to the corruption (in the broad sense) of state administration. It matters not whether such maladministration is due to ignorance, mala fides, laziness or merely decisions taken without due and proper consideration, as opposed deliberate malfeasance.

Similarly, the abuse or unjustifiable exercise of power could be an indication of the deterioration of ethical standards or the perversion of integrity, as would unfair, capricious, discourteous or other improper conduct on the part of an official. Even undue delay by an official could indicate such deterioration or perversion. These forms of improper conduct could also be a manifestation of the deterioration of ethical standards or the perversion of integrity within the public service and thus corruption in the broad sense.

These are areas which are firmly within the Public Protector's (and most ombudsmen's) brief or mandate and, as such, indicate that the ombudsman is an important role-player regarding corruption both in the narrow and broad sense.

To refer, by way of example, to the provisions of the Public Protector Act, No. 23 of 1994, we have jurisdiction over:

> "(i) maladministration in connection with the affairs of government at any level;
> (ii) abuse or unjustifiable exercise of power or unfair, capricious, discourteous or other improper conduct or undue delay by a person performing a public function;

(iii) improper or dishonest act, or omission or corruption, with respect to public money;
(iv) improper or unlawful enrichment, or receipt of any improper advantage, or promise of such enrichment or advantage, by a person as a result of an act or omission in the public administration or in connection with the affairs of government at any level or of a person performing a public function; or
(v) act or omission by a person in the employ of government at any level, or a person performing a public function, which results in unlawful or improper prejudice to any other person…".

These provisions should be seen in the context of the broad wording of Section 182(1)(a) of the Constitution of the Republic of South Africa Act, No. 108 of 1996, which reads as follows:

"The Public Protector has the power, as regulated by national legislation (viz. the Public Protector Act) -
(a) to investigate any conduct in state affairs, or in the public administration in any sphere of government, that is alleged or suspected to be improper or to result in any impropriety or prejudice...".

In many instances, what may be investigated by an ombudsman under the powers referred to above, would amount to the criminal offence of corruption. For instance, in a complaint by someone that they have suffered improper prejudice at the hands of the State, the improper prejudice could turn out to have been caused by a criminal act. An example would be where someone is aggrieved by not having been awarded a tender, and it appears that an official had been bribed to give the tender to another party.

Similarly, a complainant may allege that he was improperly prejudiced by a decision taken by a local authority. It may emerge that a councillor who had a (legal or illegal) interest in the affair did not declare such interest and did not recuse himself from voting when the decision was taken at a council meeting. This would amount to a contravention of the Code of Conduct for City Councillors, thus warranting intervention by the Public Protector on the basis that the councillor's conduct constituted improper conduct by a person performing a public function.

These examples would all, of course, constitute corruption in the broad sense, even if not in the legal-technical sense. On the other hand, with regard to public money and improper or dishonest acts, the actions of an official who steals or defrauds to enrich himself would always amount to criminal conduct, and the crime of corruption in some jurisdictions.

The ombudsman's competence to investigate goes much further than merely to investigate only complaints that could be classified as criminal acts capable of being prosecuted in a criminal court. There is a large grey area in between criminal behaviour and acceptable behaviour, where the ombudsman would be able to investigate and recommend corrective action or corrective procedures. Thus, he can investigate matters that fall into the frequently grey and ill-defined area of ethics, where a law may not have been transgressed but where the community's sense of right and wrong is offended. Because of this characteristic responsibility of an ombudsman, the institution is able to operate as an early-warning system, with the responsibility to monitor *inter alia* aberrations of the standards of ethical conduct that fall short of the narrow definition of criminal corruption.

He may, thus, be compared to the caged canary carried down coal mines to detect noxious gases, or to the frog that serves as an indicator of the presence of toxic pollutants in water sources. In this sense, the ombudsman is uniquely placed to report on what Transparency International has termed 'integrity slippage', which is often a precursor to or is otherwise associated with further forms of misconduct and corruption.

A typical example might be where it is alleged that someone received an improper advantage in that he received, through the intervention of a family member who works for a certain department, contracts which that department puts out. It might be found that no criminal act is involved but unethical behaviour is. Nepotism is not yet classified as criminal in our law, yet it is clearly reprehensible and sufficiently unacceptable to require action on the part of the ombudsman. Furthermore, the act of nepotism may be a red flag alerting the ombudsman to the possibility of the official's perceived need to surround him-/herself with those considered to more than ordinarily capable of being relied upon to act with 'discretion'.

In a recent instance of what might be termed 'attempted nepotism', a complainant wrote to us expressing apparently genuine amazement that his deceased mother's job in a provincial government department had not automatically been given to him as her eldest son. Few institutions would be as suitably placed as an ombudsman, with his avowed educative role, to deal with the fallout of such divergent cultural expectations.

A somewhat different example would be where, for example, fraud is rife in a certain department. The investigation and prosecution of the perpetrators would have to be dealt with by the prosecuting authorities, after referral of the problem by the ombudsman. But the investigation to find and remedy the environmental cause of the fraud being so rife, would lie with the Public Protector/ombudsman if the cause falls within what could be described as Public Administration.

The ombudsman is required to analyse trends in these behavioural areas in government and to recommend specific or systemic corrective action in order to remove the cause of repetitive aberrations of corrupt behaviour. The fact that crime or corruption does occur within the Public Administration, could be an indication of a systemic or structural defect. It is indeed the Public Protector's business to identify instances of systemic maladministration, and it is his brief to rectify the situation.

Corruption can also be defined as acts involving the misuse of entrusted power for personal or sectional gain. Corrupt practices in government undermine democracy, for they distort normal decision-making processes and subvert the policy objectives of legitimate democratic government. Corruption perpetuates discrimination as it results in unfair advantage or undeserved benefit. Ultimately, corruption, if unchecked, can destroy a democratic society

The Public Protector, as one example of an ombudsman, is tasked (together with a small number of other bodies) in our Constitution with the responsibility of strengthening constitutional democracy. Any conduct that falls within the above-mentioned definition would, accordingly, represent the Public Protector's responsibility.

Consideration of comparative anti-corruption agencies

It will be apparent that many of these functions are quite inconsistent with many other methods of combating corruption. For example, criminal enforcement by the National Directorate of Public Prosecutions and the tools of civil recovery of the proceeds of crime and corruption, as utilised by the Heath Investigative Unit and Tribunal, sit uneasily alongside methodologies such as mediation, negotiation and persuasion as tools for securing practical solutions to many kinds of grievances against state and government entities. Where the prospect of disciplinary action or criminal prosecution exists, even as a possibility, individuals and departments would frequently be unwilling to be candid and co-operative with an ombudsman's investigation.

Further, as alluded to earlier, the Public Protector also addresses issues of human rights and corruption in the broad sense. As a protector of human rights, he deals primarily with the constitutional right to administration open court do not necessarily assist when quick, simple compromises are sought to remedy individual concerns. Obviously, where an investigation reveals criminal conduct or other forms of misconduct, the Public Protector takes seriously the exercise of his discretion to refer an appropriate matter to the prosecuting or other responsible authorities. There are occasions when resort this method of addressing a complaint or grievance is the only appropriate route to follow, but a strict obligation to do so clearly bears with it the potential to inhibit the room for manoeuvre required for effective problem-solving.

Another significant difference one may encounter, this time within the ombudsman movement, is the extent of the jurisdiction within the broadly-defined public sector.
South Africa, for example, has its national ombudsman existing as a constitutional entity separate from and with some jurisdiction over the criminal investigation and prosecution, and civil recovery, agencies. We have the responsibility of investigating administrative issues associated with the judicial arm of government. Consistent with the separation of powers, however, we are pertinently barred from investigating the decision of any court of law. Certain other countries, specifically in Scandinavia, have empowered their ombudsman with broader authority over the judicial branch of government. I am unable to comment on whether or not this broader mandate in this field is an advantage in the fight against corruption.

Other countries, including some within the Commonwealth, do not have an ombudsman-type institution along these lines, or at all. Some countries, such as Botswana and Hong Kong, have a single agency that combines the tasks of criminal investigation and prosecution with the more flexible tactics usually associated with the classical model of an ombudsman described earlier.

Other Commonwealth countries, such as Canada and Australia, and other countries that also possess a federal constitutional structure, such as the United States of America, have an individual State-based ombudsman. Australia has a specialised national anti-corruption agency in addition to its individual State-based ombudsman.

The relative or comparative advantages and disadvantages of these various forms of institutional intervention forms precisely the subject-matter of today's debate.

Some specific problems in the South African experience

1. There exists a perception of a lack of commitment by some political leaders and officials to justice, equity and fairness, as interpreted by the Public Protector, and to fighting corruption. We have encountered instances of reluctance and even failure to co-operate or to implement

recommendations. It is, however, necessary to recognise that this is not a problem facing only the ombudsman institution.

2. A potential threat is posed to the independence of the Public Protector's office the Justice Minister's power to appoint a Deputy Public Protector. As discussed earlier, independence is a jealously-guarded characteristic of an ombudsman, essential to the credibility of his findings and the persuasive influence of his recommendations. The potential of control implied in the power to appoint carries with it the seeds of a fatal lack of credibility.

3. We have recognised widespread ignorance among many public servants and holders of public office concerning the constitutional status, role and function of the Public Protector. During the drafting of our Constitution, it was recognised that the concept and name of an ombudsman is somewhat alien to our society. But the alternative title of Public Protector has created its own difficulties with the widespread perception that we are not an impartial institution, but a legal aid organisation akin to the public defender or a firm of attorneys specialising in actions against the state and/or private individuals.

Our office has, consequently, recently launched a national awareness campaign designed to educate, among others, those with whom we work and upon whom we frequently are obliged to rely in performing our constitutional mandate.

4. We perceive ourselves to be struggling with under-resourcing. This perception is evident in terms of funding and staff overload which, in turn, leads to uneven accessibility to the office, backlogs and delays. One is reminded of the aphorism 'Justice delayed is justice denied'.

5. South Africa presently has inadequate whistleblower protection, although the Open Democracy Bill carries with it the seeds of substantial improvements in this regard. While the Public Protector is empowered with extensive rights of confidentiality, thereby affording complainants and other informants anonymity on request, the Open Democracy Bill does not guarantee this when a complaint or report is lodged with other institutions. Where, however, for example, we have referred matters to the criminal investigative authorities, that anonymity is lost and effective witness-protection is not guaranteed.

The ever-present fear of reprisal therefore finds expression in fewer complaints about serious issues and poorer quality of information and evidence.

6. Together, these factors have lead to a consequent lack of public confidence in ability of the Public Protector to achieve successes in fight against corruption.

7. The co-ordination between and co-operation with other entities fighting various forms of corruption in a variety of ways has proven something of a challenge. Although apparently beginning to decline, public confusion (and possible consequent apathy) concerning who does what and how has led to the Public Protector's office, as the most accessible to the person in the street, becoming a kind of clearing house for corruption complaints. While this assists us to obtain a slightly broader-than-otherwise impression of the extent of the problem of corruption, it has also created significant time-management constraints.

On the other hand, the recent series of high-level, Presidentially-endorsed anti-corruption conferences has facilitated the enhancement of co-operation between South African entities

charged with the responsibility to combat corruption in its various incarnations. A co-ordination committee has been established and is producing results.

In addition, the our recent National Anti-Corruption Summit has recognised the need for broader, public-private sector co-operation, and a co-ordinating structure has been initiated.

On the other hand, alongside all these challenges, one should mention one extremely significant positive factor inherent in the institutional fragmentation of the struggle against crime and corruption. In a constitutional democracy predicated upon the recognition that power corrupts, the extension of the principle of the devolution of power constitutes a valuable check and balance against the potential of abuse within the anti-corruption movement.

While I am not in a position to criticise 'all-in-one' institutions, reference to historical experience of human nature would suggest that a spectrum of agencies keeping an eye on each other while co-operating in the fight against the insidious evil that is corruption cannot be altogether a bad thing.

Similarly, it will have been apparent that not all of the problems described will be specific to the office of an ombudsman. Many of you, from your diversity of experiences, will have encountered such difficulties. To my mind, this serves only to reinforce the view that different societies, with their varying cultural traits and political structures, will necessarily prefer divergent solutions to the common problem of corruption. One would find it extremely difficult, I would suggest, to deny some valuable contribution from almost every kind or type of agency represented here.

This is not to deny, however, that we can nevertheless learn a great deal from each other. Perhaps this is where Transparency International's concept of Networks of Integrity is a particularly innovative and valuable insight. Ultimately, however**,** as Justice Hand of the US Federal Court said in his book "The Spirit of Liberty",

> "I often wonder whether we do not rest our hopes too much upon constitutions, upon laws and upon courts. These are false hopes, believe me. They are false hopes. Liberty lies in the hearts of men and women; when it dies there, no constitution, no law, no court can save it; no constitution, no law, no court, can even do much to help it."

This emphasises the need for maximum co-operation and communication between all anti-corruption agencies and frequently non-government structures that are directly involved in fighting to establish a culture of moral and ethical behaviour, and of respect for human rights. In the current climate of a growing understanding of the meaning and extent of corruption, such co-operation is not a matter of choice, it is imperative.