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Enforcement of Decisions of Ombudsmen and the South African Public Protector: Muzzling the Watchdogs

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Abstract**—**Ombudsmen often face the challenge of a lack of authority to have their decisions and recommendations enforced. This lack of authority may be seen as one of the major obstacles in the way of the effectiveness of the institutions of Ombudsman and also the South African Public Protector. The paper will address the current legal position in South Africa with regard to the status of the decisions and recommendations of the South African Public Protector and the enforcement thereof. In addition, the paper will compare the South African position with the experiences of other jurisdictions, including Scandinavian countries like Sweden, Denmark and Norway, but also New Zealand and Northern Ireland, with regard to the enforcement of the decisions of Ombudsmen. Finally, the paper will make recommendations with regard to the enhancement of the power and authority of Ombudsmen in order to effectively enforce their decisions. It is submitted that the creation of the office of Ombudsman, and the Public Protector in the South African system, is an essential tool to ensure the protection of society against governmental abuse of power and it is therefore imperative to ensure that these watchdogs of democracy are not muzzled by a lack of powers of enforcement.

Keywords**—**Enforcement of decisions of Ombudsmen, Governmental control, Ombudsman, South African Public Protector.

I. Introduction

STATES create laws and other legal mechanisms in order to regulate society. These laws and legal mechanisms must also protect society against governmental abuse of power and maladministration by the state. One of the ways in which society can be protected against the state is by establishing institutions outside the traditional legislative, executive and judicial organs. In this way an independent "fourth tier" of government is created which acts as a watchdog over the other organs of state. In the South African context some independent institutions have been introduced by Chapter 9 of the Constitution of the Republic of South African of 1996, including, for example, the Public Protector, Human Rights Commission and the Auditor-General. In other states this role is fulfilled *inter alia* by the office of Ombudsman. These independent institutions can, however, only function effectively if their decisions and recommendations are made enforceable against the organs of state. If this is not the case, there is little point in establishing these institutions and essentially leaves the government unchecked. There are, of course, direct and indirect ways of enforcing the decisions of these institutions. It will primarily rely on the effectiveness of the state's public administration whether indirect enforcement of an Ombudsman's decision will be sufficient or if other direct methods will be more effective.

This paper addresses the problem of the enforcement of the decisions and recommendations of these independent institutions by using the South African position as a point of departure. The South African position with regard to the enforcement of the decisions and recommendations of the Public Protector is compared with the position in various other jurisdictions, including some Scandinavian countries, New Zealand and Northern Ireland. Finally, some general recommendations are made with regard to enhancing the powers of these independent institutions.

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II. The South African Position with Regard to the Enforcement of the Decisions of the Public Protector

The Public Protector, together with institutions like the Human Rights Commission and the Auditor-General, form part of the Chapter 9 institutions established by the South African Constitution. These institutions were created in order to monitor the other organs of state and to protect the South African society against abuse of power. Section 181(2) of the Constitution provides that these institutions are independent, only subject to the law and the Constitution and must perform their functions without fear, favour or prejudice. Importantly, Section 181(3) of the Constitution provides that the other organs of state must, through legislative and other measures, assist and protect these institutions and ensure their independence, impartiality, dignity and effectiveness. Especially the duty to ensure the *effectiveness* of these institutions should play a significant role in developing and enhancing the powers of enforcement of these institutions. Section 181(4) provides that no person or organ of state may interfere with the functioning of these institutions, while Section 181(5) confirms that these institutions are accountable to the National Assembly. Sections 182 of the Constitution specifically deals with the powers of the South African Public Protector. This provision states that the Public Protector has the power to investigate conduct in state affairs or public administration, which is alleged or suspected to be improper, report on that conduct and to take remedial action. The Public Protector also has other powers assigned by the Public Protector Act 23 of 1994. Neither the Act nor the Constitution, however, provides for the enforcement of the Public

Protector's decisions and recommendations against the government. This problem was however addressed in a recent judgment by the South African Supreme Court of Appeal in *South African Broadcasting Corporation and Others v Democratic Alliance and Others* [2015] 4 All SA 719 (SCA); 2016 (2) SA 522 (SCA) (hereafter *SABC v DA*). In this case the court had to decide on the legal status and enforceability of the decisions and recommendations of the Public Protector. The Public Protector initially received complaints about maladministration at the South African Broadcasting Corporation (SABC) (South Africa's national public broadcaster) including the wrongful appointment of the Acting Chief Operations Officer (COO), Mr Motsoeneng. After the Public Protector investigated the matter, it compiled and released a report which concluded that there was indeed gross maladministration within the SABC. The national Department of Communications and the SABC however ignored the Public Protector's findings and continued to appoint Mr Motsoeneng as the permanent COO of the SABC. The Democratic Alliance (the official opposition party in the South African Parliament) brought an application in the Western Cape Division of the High Court for an order confirming that the maladministration at the SABC should be addressed and that the COO should be suspended, pending further disciplinary measures against him. The High Court consequently granted such an order. The SABC appealed to the Supreme Court of Appeal against the decision of the High Court. The Supreme Court of Appeal reflected on the legal status and enforcement of the decisions of the Public Protector. Firstly, the Court pointed out that the Constitution confers the power on the Public Protector to *take* appropriate remedial action (*SABC v DA* par 42). The word "take" therefore implies that the Public Protector may choose some course of action and is not only empowered to give advice. Secondly, the Court found that the Public Protector cannot fully realise the constitutional purpose of the office if other state organs may second-guess its findings and ignore its determinations. Section 182(1)(*c*) of the Constitution, seen in the light of its language, history and purpose, clearly intends the Public Protector to have the power to provide an effective remedy for state misconduct which would include the power to *choose* the remedy and *direct* its implementation (*SABC v DA* par 52). Thirdly, the Court pointed out that a person or an organ affected by a decision of the Public Protector is not entitled to simply ignore the recommendations of the Public Protector, although such a decision may be reviewed by the courts. The Court found that if the powers of the Public Protector were simply to be interpreted as a power of recommendation, this would be "neither fitting nor effective, denudes the office of the Public Protector of any meaningful content, and defeats its purpose" (*SABC v DA* par 53). Consequently, the judgment in *SABC v DA* has considerably clarified the status and direct enforceability of the decision of the Public Protector and has therefore strengthened its powers to a great extent.

This decision was also recently confirmed by the South African Constitutional Court in *Economic Freedom Fighters v Speaker of the National Assembly and Others; Democratic Alliance v Speaker of the National Assembly and Others* 2016 (5) BCLR 618 (CC). In this case, the Public Protector investigated certain allegedly unlawful non-security upgrades and renovations at the South African President's private residence called Nkandla. In essence, the Public Protector's report determined that the President, and not the tax payers, should pay for any non-security upgrades to his home in his private capacity. The President however failed to comply with the Public Protector's suggested remedial action. In this case the Constitutional Court therefore had to affirm the binding nature of the recommendations of the Public Protector. Firstly, the Court stated that it would be doubtful that such a substantial budget, staff and offices would be allocated to the Public Protector if the "Public Protector's powers or decisions were meant to be inconsequential" (*EFF v Speaker of the NA* par 49). Secondly the Court found that it would be incomprehensible to argue that the Public Protector can contribute to the strengthening of the South African democracy if its powers were not binding and if public bodies could simply choose to ignore the Public Protector's recommendations (*EFF v Speaker of NA* par 56 and par 67). Consequently, the Constitutional Court therefore confirmed what the Supreme Court of Appeal had already decided with regard to the binding effect of the decisions and recommendations of the Public Protector.

In future, organs of state in South Africa will not be able to argue that they are not bound by the decisions of the Public Protector due to its mere "advisory" status. These judgments may therefore be seen as a victory for the protection of the South African society against maladministration, abuse of state powers and also supports and strengthens the South African democracy.

III. The Enforcement of Decisions of Ombudsmen in Other Jurisdictions

A. Sweden

Sweden has the oldest rules with regard to Ombudsmen, dating back to the early eighteenth century [1]. The Swedish Constitution of 1974, Chapter 12, article 6 makes provision for the office of the Parliamentary Ombudsman. The Swedish Parliamentary Ombudsman is also regulated in terms of The Act with Instructions for the Parliamentary Ombudsmen of 1986. The Parliamentary Ombudsman's office has four Parliamentary Ombudsmen. The Ombudsmen are independent from government entities and have full discretion and independence when deciding on the investigation of complaints. The Swedish Ombudsmen may serve as special prosecutor when an official has committed an offence when disregarding the obligations of his or her office. The Ombudsmen also act as prosecutor in disciplinary proceedings against officials [2]. The Swedish Ombudsmen also give opinions on the acts of civil servants and judges without prosecuting them. These opinions also form part of an annual report to Parliament. The Swedish Ombudsmen are however not only advisory bodies, but take an active role in the

resolution of allegations and complaints of maladministration.

B. Denmark

The Danish Ombudsman was first instituted in terms of Section 55 of the Danish Constitution of 1953 and the Ombudsman Act 203 of 1954. The Danish Ombudsman is however largely confined to supervision of the Danish public administration and not the actual prosecution of public officials [3]. Christensen also remarks that the range of sanctions available to the Danish Ombudsman was remarkably small. The Ombudsman had no authority to vary decisions of state organs who have found to be at fault, nor could the Ombudsman order the organ to change or reconsider its decision, award damages or impose penalties. The Danish Ombudsman could therefore only order the relevant organ to institute criminal proceedings or the Ombudsman could order the appropriate body to institute disciplinary proceedings against the organ. The third and more frequently used remedy that the Danish Ombudsman has is that the Ombudsman could state his or her view on a matter. These "views" are then included in the Ombudsman's annual report to Parliament and apparently receive a great deal of attention from government and the public press [4]. The Danish Ombudsman is however now regulated by the Ombudsman Act of 1996, although it does not seem to have changed the procedures of the Ombudsman very much. Section 7 of the Act provides that the Ombudsman's jurisdiction extends to all parts of the public administration. Section 10 of the Act guarantees the independence of the Ombudsman and Section 11 provides for the submission of the Ombudsman's annual report to Parliament. Section 20 however provides that the Ombudsman shall not criticize any organ or make recommendations, until that organ has had an opportunity to make a statement on the matter, while Section 24 provides that the Ombudsman must report a matter to the Legal Affairs Committee of Parliament and the relevant minister or local government when errors or derelictions of major importance has been found. In the Danish system therefore there seems to be an indirect enforcement of the Ombudsman's recommendations.

C. Norway

The Norwegian Parliamentary Ombudsman was established by the Law on the "Stortingets Ombudsmann" of 1962. Section 3 of the Act states that the purpose of the Parliamentary Ombudsman is to ensure that individuals are not unjustly treated by the public administration and to ensure that the public administration respects and safeguards human rights. The Norwegian Ombudsman does not have the power to enforce his decisions against the government, but he or she can inform the public prosecutor of steps that he or she thinks are necessary in the circumstances [5]. The Ombudsman also has the authority to give an opinion on a matter within his or her jurisdiction (Section 10 of the Act). Although Section 4 provides that the Ombudsman has jurisdiction over the whole public administration and all persons engaged in its service, it also provides a list of persons and organs whom are excluded from the Ombudsman's jurisdiction. It therefore seems that the Norwegian Ombudsman, similar to the Danish Ombudsman, does not have direct powers of enforcement of its decisions against the government. Its main remedy therefore remains its powers of persuasion.

D. New Zealand

In 1962 New Zealand created the office of Parliamentary Commissioner (Ombudsman) in terms of the Parliamentary Commissioner Act [6]. This Act has subsequently been repealed by the Ombudsman Act of 1975. Section 13 of the Act provides that the Ombudsman has the power to "investigate any decision or recommendation made, or any act done or omitted… relating to a matter of administration and affecting any person or body of persons in his or its personal capacity". Section 18(6) provides that if the Ombudsman finds substantial evidence of any significant breach of duty or misconduct he or she may refer the matter to the appropriate authority. If it appears that that there may be sufficient grounds for making an adverse recommendation or report against a department or organ such department or organ should be given an opportunity to be heard. This would seem to correspond with the position of the Danish Ombudsman. Also similar to both the Danish and Norwegian Ombudsmen, New Zealand's Ombudsman also does not have a direct power to enforce its decisions.

E. Northern Ireland

One example from the United Kingdom's ombudsman provisions is the Ombudsman of Northern Ireland. Northern Ireland in fact has two ombudsman offices, namely the Assembly Ombudsman for Northern Ireland (the "Ombudsman") provided for by the Ombudsman (Northern Ireland) Order of 1996, and the Northern Ireland Commissioner for Complaints (the "Commissioner") provided for by the Commissioner for Complaints (Northern Ireland) Order, 1996. These Orders replaced the Parliamentary Commissioner Act (Northern Ireland) Act of 1969 and the Commissioner for Complaints Act (Northern Ireland) Act of 1969 which introduced the office of Ombudsman into Northern Ireland [7]. These provisions are however currently being reviewed and it is proposed that the two offices of Ombudsman and Commissioner be combined into a single office to be known as the Northern Ireland Public Services Ombudsman. The proposed legislation, currently known as the Public Services Ombudsman Bill 47/11-16, will also introduce a power for the Northern Ireland Ombudsman to investigate matters on his or her own initiative – a power which its predecessor lacked. The Bill also provides that if the Ombudsman is of opinion that there is evidence of systematic maladministration in a department, and that this is likely to continue unless the High Court intervenes, the Ombudsman may request that the Attorney General make an application to the High Court in order to address the matter. It does not however seem that the new combined office of Ombudsman has more powers of enforcement than its predecessors, although its decisions and recommendations are enforceable through the courts, which gives more protection to individuals

than in jurisdictions where this is not the case.

IV. Conclusion

This paper has considered the position with regard to the enforceability of the decisions and recommendations of Ombudsmen in various jurisdictions, with the South African position as a point of departure. The status of the South African Public Protector's decisions and recommendations have recently been bolstered considerably by a decision of the Supreme Court of Appeal. The Court's interpretation of the relevant legislative provisions entails that the South African Public Protector's decisions have been elevated from mere "advisory" suggestions to actual enforceable decisions. In the other jurisdictions that have been discussed this is not always the case. Only the Swedish Ombudsman has real powers of enforcement and powers to act as prosecutor in certain matters. In Northern Ireland the Ombudsman's decision may be enforced by the courts. It would seem that in the other jurisdictions, Ombudsmen only have powers to suggest, recommend and persuade. This does not necessarily affect the effectiveness of the office of Ombudsman in those jurisdictions. There may be various reasons for this, but it is submitted that the main reason is most probably that those states had already established very effective public administrations before adopting ombudsman regulations. In the case of South Africa, the public administration has many deficiencies and corruption and maladministration remain enormous problems. It is therefore appropriate that the South African Public Protector's powers be extended to ensure that the South African community is adequately protected against abuse of power. But even with regard to the other jurisdictions which have been considered where Ombudsmen do not have direct powers of enforcement, those jurisdictions could also benefit from the added protection that such a power could provide. In the South African system more emphasis could also be placed on the consideration of the annual reports of the Public Protector, as is the case in the other jurisdictions that have been considered. These reports provide valuable guidelines to administrators on how to act in similar cases which were handled by the relevant Ombudsmen. It is therefore clear that the office of Ombudsman is an important legal mechanism to protect society against maladministration and abuse of governmental powers. This can however not be done effectively if the decisions and recommendations of these independent institutions have no legal force. In states with a weaker public administration, like South Africa, more direct enforcement of the decisions of Ombudsmen is therefore necessary. In states with stronger public administrations a less direct approach seems to be enough in order to keep the government in check. The approach should therefore fit the particular state's administrative context. Whatever the approach used in a particular state, however, it must never result in the muzzling of these important watchdogs of government and guardians of democracy.

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