

# THE FUNCTIONING OF OMBUDSMAN (PUBLIC PROTECTOR) IN SOUTH AFRICA: REDRESS AND CHECKS AND BALANCES?

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## Abstract

The first South African Ombudsman appointed in 1979 in terms of the Advocate-General Act 118 of 1979, as amended by Advocate-General Amendment Act 55 of 1983, was known as the Advocate-General. The need for this office was apparent after the facts about the Information Scandal had come to light. The office of the Advocate-General could be compared to that of the Special Prosecutor of the United States, which was also instituted in similar fashion in the wake of the Watergate scandal. The primary reason for the creation of the office of the Advocate-General was to maintain honest public administration and orderly government. This office was replaced by the Ombudsman in 1983 after amending the Advocate General Act by the Ombudsman Act of 1983. Then in 1994 the Constitution Act 108 of 1996 repealed the Interim Constitution Act 200 of 1993 and paved the way for the promulgation of the Public Protector Act 23 of 1994 which made provision for the establishment of the office and the governing principles of the Public Protector. In view of the above brief explanation, this article seeks to unravel evolution of the Ombudsman in South Africa, the challenges affecting the functioning of the Public Protector including the "independence" of the office as well as the duplication of functions with other agencies. One case study will be used, namely, the controversial "Arms Deal Joint Investigation" as well a comparative study will be done with the Parliamentary Ombudsman of Sweden.

## **Introduction**

The office of the Ombudsman in South Africa was first established in 1979 and was called the Advocate-General. In 1983 the Advocate-General changed its name to Ombudsman. The purpose of this office was to ensure and maintain efficient and proper public administration. During the multi-party negotiations that preceded the 1994 elections, political parties in the multiparty negotiation forum agreed that South Africa should have a Public Protector (Ombudsman).

The basis of this idea was taken from the King Report of 1992 which formed the framework of corporate governance in South Africa. In addition to the King Report, the framework of the Advocate General and the Ombudsman were also considered. The Public Protector was established by means of the provisions of the Interim Constitution Act 200 of 1993 and confirmed as an institution that strengthens constitutional democracy by the final Constitution Act 108 of 1996. As a result of legislative amendments, the office of the Public Protector was finally established on 1 October 1995.

In this article, the author highlights the evolution of the Ombudsman office in South Africa, the challenges, the basic principles that governing public administration in South Africa, the principles of corporate governance as well as the duplication of functions and the recommendations.

## **Research methodology**

The basis of this research is a literature study. A thorough literature study is an indispensable component of all research. It familiarizes the researcher with both the research which has already been done in his/her field as well as with current research. In addition unstructured interviews and a case study were used to gather evidence. It is worth noting that little exists in the way of official records of Ombudsman under apartheid. Many of the official records were destroyed prior to 1994, and this is a huge challenge to researchers.

## **Background**

### ***The "Information" scandal***

In the latter part of the 1970s, South Africa was rocked by a major political scandal involving the Department of Information, which was allegedly misappropriating State funds for secret projects. The Information Scandal (or Infogate or Rhoodiegate or Muldergate), as it came to be known, was to culminate in the resignation of Cabinet Minister Dr Connie Mulder and the State President, B.J. Vorster (Rees and Day, 1980, p. 34).

At the beginning of 1971, Eschel Rhodie, then Press Officer of the South African embassy at The Hague, clandestinely negotiated an agreement with a Dutch publisher by the name of Hubert Jussen whereby Jussen agreed to help with the establishment of a new magazine - To the Point.

To the Point was to be secretly financed by the South African government and was intended to counter some of the unfavorable press coverage South Africa was receiving overseas (Roherty, 1992, p. 105). This secret scheme had the approval of the then Prime Minister, B.J. Vorster; the chief of the Intelligence Services, General Hendrik van den Bergh; the Minister of Information, Dr Connie Mulder and Mr. Gerald Barrie, the then head of the Department of Information. To the Point was launched before the end of 1971. In July 1972, Rhoodie was appointed to the post of Secretary of Information.

From 1973 onwards, by which time Rhoodie was working in close cooperation with 'the power behind the throne' - General Hendrik van den Bergh, the then head of the Bureau of State Security (BOSS), new schemes and projects were constantly being introduced. They were all run by Eschel Rhoodie's Department of Information and they were all paid for with government money. Due to the delicacy of the situation, money was often handed over in cash - without any receipt (Barron, 1999, p. 107). By July 1977, rumors and speculation concerning financial malpractice in the Department of Information became so serious that an audit of the department's books was ordered. In the autumn of 1978, the Information Affair reached crisis proportions.

The then Minister of Finance, Owen Horwood, instituted an inquiry under the auspices of Judge Anton Mostert to probe exchange-control violations. On 2 November 1978, despite protestations from the new Prime Minister, P.W. Botha, and Minister Horwood, Justice Mostert called a press conference to divulge details of the 'scandal' (De Beer, 1995, p. 60). Judge Mostert released evidence, which showed beyond doubt, that The Citizen newspaper was financed through State funds (Rees and Day, 1980, p. 70). And in evidence under oath, Mr Louis Luyt named the former Prime Minister, Mr. B.J Vorster, the then Minister of Plural Relations, Dr Connie Mulder and General Hendrik van den Bergh, as key figures in the secret project to finance the newspaper.

In February 1979, journalists finally tracked Rhoodie to the ground in Ecuador. By this time he was South Africa's "Most Wanted Man" and the government had instituted legal proceedings against him. In March 1979, Rhoodie moved to the Great Britain where he attempted, albeit unsuccessfully, to gain political asylum (De Beer, 1995, p. 45).

The trial of Dr Eschel Rhoodie began at the Pretoria Supreme Court on 22 September 1979. He was charged with seven counts of fraud, alternatively theft, involving a total of R63 205 of government money. Despite the fact that it was shown during the trial that he controlled a series of slush funds in Switzerland, Holland and Great Britain to finance the Information Department's secret projects - a total of between R18- and R20-million, of which 'not a cent was missing' - he was found guilty on 8 October 1979 of five charges of fraud and sentenced to an effective six years' imprisonment (De Beer, 1995, p. 46).

A year later, in October 1980, Dr Eschel Rhoodie was acquitted on all counts involving State monies by the Appeal Court in Bloemfontein (Barron, 1999, p. 52). The following day, he gave a press conference and issued a ten-page statement in

which he expressed his abhorrence and outrage at the treatment he had received at the hands of the South African government. It was estimated that the South African government spent almost R500 000 to establish that Dr Eschel Rhoodie was innocent of fraud charges brought against him (Barron, 1999, p. 54). In March 1982, Dr Eschel Rhoodie and his wife Katie emigrated to the United States.

His book *“The Real Information Scandal”* which was published in October 1983, contained sweeping allegations of big-name involvement in secret information projects. He further maintained that dozens of senior government officials were aware of the secret projects his department actively pursued, and that R75million had been allocated over a five-year period to finance these projects. Official figures released when the scandal broke, accounted for only R64-million. Dr Rhoodie lived in the United States until his death in the mid 1990s (Rees and Day, 1980, p. 49). As a result of the information scandal, the then Prime Minister asked the parliament to institute a Commission of an Inquiry to identify the alleged irregularities committed within the Department of Information (Brynard, 1986, p. 2).

At the same time, the South African Parliament realized that, after the Commission had published its final report, there would always be a need to investigate matters of a similar nature. The thinking was that there were no guarantees that another scandal will not take place in the future.

### ***The Erasmus Commission***

The aftermath of the Information Scandal resulted in the establishment of the Erasmus Commission in 1978. The Erasmus Commission under Judge R P Botha Erasmus was given a broad mandate but a short period of time to conduct the investigation on the “Information Scandal”. The findings of the Commission reported that former Prime Minister John Voster and Dr Connie Mulder *“knew everything about the misuse of funds”* by the Department of Information. This report destroyed the political careers of the two individuals. Interestingly, van Vuuren (2006, p. 31) states that from the findings of the Commission, it was clear that it did not undertake its work without intimidation from the likes of van der Berg, the then head of Bureau of State Security (BOSS), who did not mince his words when appearing before the Commission by stating the following:

*“I really want to tell you...that I can do the impossible...I have enough men to commit murder if I tell them...to kill. I do not care who the prey is or how important they are. These are the types of men I have. And if I want to do something like that to protect the security of the state, nobody would stop me. I would stop at nothing”.*

Although commissions of enquiry are meant to signal the beginning of attempts to tackle issues such as abuse of power/office, as epitomized by the Information Scandal, the attempts to investigate this scandal signaled, in reality, the end of any attempt at probing the myriad of secret accounts that would grow under the tenure of Prime

Minister P W Botha's presidency. Indeed, after the results of the Commission were published, the South African Parliament recommended that a permanent structure should be established to serve as a guardian of "*honest public administration and orderly government*" (Brynard, 1986, p. 2).

On the basis of this parliamentary recommendation, the idea of establishing an Advocate General as a replacement of the Erasmus Commission was announced in September 1978. It is worth noting that there is a causal connection between the Information Scandal and the Erasmus Commission which resulted in the establishment of the Advocate General.

### ***The Advocate General and the office of the Ombudsman***

The office of the Advocate General was established as an attempt by the Apartheid government to establish an institution to deal with the abuse of office by public officials. This institution was established in terms of section 4 (1) of the Advocate General Act 118 of 1979. In terms of this section, the Advocate General had the power "to act if approached by any person who had a reasonable suspicion that public money was being dealt with dishonestly or that a person was being enriched or was receiving an advantage in an improper or unlawful manner at the expense of the State or any institution dealing with public money or as a result of any act or omission by any employee of the state or public institution or in connection with the affairs of the State or any such institution". Due to the fact that this agency was hastily assembled, the government realized that a mistake was made in the mandate by including Black people.

As a result, in 1983, a new Constitution Act 83 of 1983 was promulgated. This Act formally classified the South African population into four groups, namely, Blacks, Coloureds, Indians and Whites (Akpomuvire, 2007, p. 13). After the promulgation of the Act, the government decided to exclude Blacks from the services of the Advocate General. The office of the Advocate General was then replaced by the Ombudsman when the Ombudsman Act 110 of 1983 was promulgated in 1983. In terms of section 11 of the Act, the institution of the Ombudsman was empowered to act as a remedy to deficiencies in the legislation. If in the exercise of the Ombudsman's supervisory powers it transpires that there are grounds for initiating a change in the statutes or some other official measure, the Ombudsman was empowered to represent this circumstance to the South African Parliament or the government.

More often an Ombudsman of this era would submit adjudication to the appropriate authority or parliamentary committee when it was considered to indicate legislative shortcomings that the legislature should be aware of. In 1995 the office of the Public Protector replaced the Ombudsman. This is how the Information Scandal influenced the establishment of the Erasmus Commission which in turn led to the establishment of the Advocate General. Over and above all this, the Advocate General was hastily replaced by the Ombudsman in 1983 which was also replaced by the Public Protector in 1995. It is also worth noting that the King Report of 1992 which was adopted in 1994 formed an integral part in formation of the Public Protector in 1995.

## **Theories of corporate governance in South Africa**

Corporate governance in South Africa was institutionalized by the publication of the King Report on Corporate Governance in November 1994. The King Committee on Corporate Governance was formed in 1992, under the auspices of the Institute of Directors, to consider corporate governance, of increasing interest around the world, in the context of South Africa (King Report, 2002, p. 6). This coincided with profound social and political transformation at the time with the drawing of democracy and the re-admission of South Africa into the community of nations and the world.

According to Akpomuvire (2007, p. 13), the King Report was used by National Party whilst negotiating for a democratic South Africa with the African National Congress in 1992. Therefore, the King Report became a blueprint document where various institutions and policies were established to address the recommendations outlined in the report. The purpose of the King Report was, and remains, to promote the highest standards of corporate governance and ethics in South Africa.

The King Report (1994, p. 7) went beyond the financial and regulatory aspects of corporate governance in advocating an integrated approach to good governance in the interests of a wide range of stakeholders having regard to the fundamental principles of good financial, social, ethical and environmental practice. As a result, the King Report (1994, p.10) recommended seven characteristics of good corporate governance:

### ***Discipline***

Corporate discipline is a commitment by a carport's senior management to adhere to behavior that is universally recognized and accepted to be correct and proper. This encompasses an institution's awareness of, and commitment to, the underlying principles of good governance, particularly at senior management level.

### ***Transparency and openness***

According to the King Report, citizens should be told how national, provincial and other government institutions are run, how much they cost and who is in charge. These aspects are outlined in annual plans of all government institutions, including Auditor General's Report.

### ***Independence***

Independence is the extent to which mechanisms have been put in place to minimize or avoid potential conflicts of interests that may exist, such as dominance by a strong bureaucrat. These mechanisms range from the composition of the board of directors, tender committees, selection committees and external parties such as the auditors. In this regard the King Report further proposed that when decisions are made, and internal processes established, should be objective and should not allow for undue influences. This was based on an assumption that corruption and, undue influence and tender rigging were prevalent in most government institutions as well as in State Owned Enterprises (SOE) (King Report, 1992, p. 7).

### ***Accountability***

Individuals in any level of governance, who make decisions and take actions on specific issues, need to be accountable for their decisions and actions. The King Report recommended that mechanisms must exist and be effective to allow for accountability. These provide investors with the means to query and access the actions of the board and its committees.

### ***Responsibility***

Responsibility pertains to behavior that allows for corrective action and for penalizing mismanagement. Responsible management would, when necessary, put in place what it would take to set the organization on the right path. In addition, the King Report recommended that management at all levels of governance must act responsively to and with responsibility towards all stakeholders.

### ***Fairness***

Fairness is usually related to the concept of justice. This involves what is right and equal. Fairness can also be regarded as being equal in provision, in opportunity or in result. The King Report recommended that government institutions are expected to treat citizens fairly and equally.

### ***Social responsibility***

A well managed company will be aware of, and respond to, social issues, placing a high priority on ethical standards. A good corporate citizen is increasingly seen as one that is non-discriminatory, non-exploitative, and responsible with regard to environmental and human rights issues.

### **Basic values and principles governing public administration in South Africa**

Section 195 of the Constitution Act 108 of 1996 states that the basic values and principles governing public administration are as follows: "Public administration must be governed by the democratic values and principles enshrined in the Constitution, including the following principles; a high standard of professional ethics must be promoted and maintained, efficient, economic and effective use of resources must be promoted, public administration must be development-oriented, services must be provided impartially, fairly, equitably and without bias, people's needs must be responded to, and the public must be encouraged to participate in policy-making, public administration must be accountable, transparency must be fostered by providing the public with timely, accessible and accurate information, good human-resource management and career-development practices, to maximize human potential, must be cultivated, public administration must be broadly representative of the South African people, with employment and personnel management practices based on

ability, objectivity, fairness, and the need to redress the imbalances of the past to achieve broad representation”. The above principles apply to administration in every sphere of government, organs of state; and public enterprises. These principles are a cornerstone to which the South African Public Protector as well as other agencies with similar functions has been established.

### **The south african public protector**

#### ***Why the office of the Public Protector was established***

Any government institution is established for a reason. According to Akpomuvire (2007, p. 13), the South African Public Protector was established due to the following reasons:

- *Discrimination*: The state institutions were not always readily available to the poorest of the poor. There was also fear of reprisals if one complained.
- *Geographical location*: Vast geographical rural areas of South Africa also made it impossible to reach each and every individual.
- *Ignorance of basic Human Rights*: Human rights cannot be properly exercised if not known by the people.
- The majorities of people in South Africa are blacks and are located in the rural areas. As victims of oppression, they were deprived of any knowledge or their rights.
- *Abuse of power*: Abuse of power and chronic maladministration practiced by the apartheid regime was a major stumbling block to effective service delivery. Therefore this needed to be eliminated at all means.
- *Constitutional democracy*: Since South Africa became a democratic state, there was a need to maintain and sustain constitutional democracy in South Africa by all government institutions and other agencies or enterprises attached to the government.

Judging from the above-mentioned reasons, it is quite clear that the King Report played a major role as a blueprint to the establishment of the Public Protector. According to Akpomuvire (2007, p. 15), during the negotiations for a democratic South Africa in 1992, some political parties wanted Judge Mervin King, the author of the King Report to be the chairperson of a new agency which could perform some oversight functions over government institutions. However this proposal was rejected by the African National Congress (ANC) and its allies. One of the reasons for the rejection of Judge King was that although he was a retired judge, the liberation movements felt that he was not suitable to lead such an important institution because he had been an apartheid judge. However, as a compromise, most of the recommendations from the report formed part of the guidelines used to establish the Public Protector. Such guidelines were incorporated into the Interim Constitution Act 200 of 1993 which paved the way for the promulgation of the Public Protector Act 23 of 1994.



## ***Mandate***

The mandate of South Africa's Public Protector is found in section 181 and 182 of the Constitution Act 108 of 1996 read with the Public Protector Act 23 of 1994. In terms of section 4 (a) of the Public Protector Amendment Act 113 of 1998, the Public Protector is competent to investigate maladministration in connection with the affairs of government at any level, abuse of or unjustifiable exercise of power or unfair, capricious, discourteous or other improper conduct or undue delay by a person performing a public function, improper dishonest act or omission or corruption, with respect to public money, improper or unlawful enrichment, or receipt or 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 a person performing a public function. Furthermore, the office of the Public Protector has a mandate to investigate an act or omission by a person in the employ of government at any level, or person performing a public function, which results in unlawful or improper prejudice to any other person. In addition, the Public Protector's mandate is to investigate and make recommendations to state departments and state enterprises on any conduct which may have resulted in prejudice to citizens.

## ***Powers and functions***

The Public Protector is neither an advocate for the complainant nor for the public authority concerned. According to the Public Service Commission Report (2001, p.20) the Public Protector has the following core functions: to undertake investigations within its sphere of jurisdiction and to provide administrative support for such investigations. During an investigation, the Public Protector, may if he/she considers it appropriate or necessary; direct any person to appear before him to give evidence or to produce any document in his/her possession or under his/her control which, in the opinion of the Public Protector, has bearing on the matter being investigated, and may examine such person for that purpose. This is done in terms of section 7 of the Public Protector Act.

## ***Jurisdiction***

The Public Protector has jurisdiction over all organs of state, any institution in which the state is the majority or controlling shareholder and any public entity or parastatal as defined in section 1 of the Public Finance Management Act 1 of 1999.

The Public Protector has no jurisdiction to investigate court decisions, including convictions and sentences, private acts by individuals, private companies, doctors or lawyers who are not working for the state, matters occurring before 1 October 1995, complaints brought to the attention of the Public Protector more than two years after the date of the occurrence which gave rise to the complaint, unless there are exceptional circumstances.

## ***Independence of the Public Protector***

It is alleged that the independence of the Public Protector is found in section 181 (2) of the Constitution Act 108 of 1996, where it provides that the institution is independent, and subject only to the Constitution and the law. The Constitution stipulates that the Public Protector must be impartial and must exercise his/her powers and perform his/her function without fear, favor or prejudice. This is not possible because the Public Protector is an entity of the South African Department of Justice and Constitutional Development.

This means that the Minister of Justice and Constitutional Development is responsible for all the work of the Public Protector. Therefore “independence” in this instance is suspicious.

## ***Appointment***

The President of the Republic of South Africa appoints the Public Protector in his capacity as the Head of State, on recommendation of the National Assembly, in terms of section 193(5) of the Constitution. The recommended candidate requires a support vote of at least 60% of members of the National Assembly. The appointment of the South African Public Protector is little bit controversial. Since the office was established in 1995, the incumbents have been political deployees from the ruling African National Congress (ANC). Such appointment taints the aspect of impartiality especially when members of the ruling party are to be investigated by the Public Protector.

### **Case study**

#### ***The Arms Deal Joint Investigation***

In 2003, the Public Protector undertook a joint investigation with the National Prosecuting Authority of South Africa. The investigation became known as the “Arms deal investigation”. The purpose of the investigation was to find out if the then Minister of Defense, the then Deputy President of South Africa and Mr. Schabir Shaik were involved in corruption with regard to awarding of government tenders. According to Fourie (2003, p. 20), the Public Protector concluded its findings and comments. *“No evidence was found of any impropriety or unlawful conduct by the Government. The irregularities and improprieties referred to in the findings as contained in the report, point to the conduct of certain officials of the government departments involved and cannot be ascribed to the President, the Ministers involved or Cabinet. There are therefore no grounds to suggest that the Government’s contracting position is flawed”*. However, subsequent investigation by the Directorate of Special Operations found that Mr. Schabir Shaik committed corruption during the awarding of the tenders and was found guilty and sentenced to 15 years of imprisonment (Montesh, 2007, p. 130). The two conflicting investigations drew criticism to the role and functions of the Public Protector.



On top of the Mercedes Benz is Mr Tony Yengeni, the former African National Congress Chief Whip who was convicted of fraud and corruption after he obtained 50% of the same vehicle as part of his reward for his part in the “Arms Deal”. On the right hand side are the two former South African National Defence Force Generals (General Sphiwe Nyanda and General Roelof Beukes) who also got massive discounts from Daimler Chrysler for their roles in the “Arms Deal” and in front are German representatives who were implicated in the “Arms Deal scandal”. (Source: www.udm.org.za).

## **Challenges**

### ***Duplication of functions***

In 2001, the South African Public Service Commission commissioned a review of South Africa’s national anti-corruption agencies. The commission found that there were serious duplication of functions between the Public Protector and the Public Service Commission. Such duplication is found in section 196 (4) of the Constitution Act 108 of 1996 read with sections 8, 10 and 11 of the Public Service Laws Amendment Act 13 of 1997 which states that “the main functions of the Public Service Commission are to promote the values and principles of public administration; to investigate, monitor and evaluate the organization and administration and personnel practices of the public service; to advise national and provincial organs of state regarding personnel practices as well as reporting its findings and recommendations to the National Assembly”.

These are the same functions of the Public Protector as outlined in sections 7 and 8 of the Public Protector Act 23 of 1994 read with section 182 of the Constitution Act 108 of 1996. Therefore, there is a thin line between the two sections of the Constitution. If so, then there is no need to have the two institutions because this amounts to waste of taxpayer’s money.

### ***Lack of power and authority to enforce findings***

One of the criticisms leveled against the South African Public Protector is the lack of power and authority to enforce findings. The current arrangement in the Constitution and in the Public Protector Act does not allow the Public Protector to take any institution to court for failure to implement its findings. Such an arrangement

renders the institution ineffective and is often called a “toothless dog” which does not bite. This is a serious concern to the author because the Public Protector is a very important office, yet it has not been accorded the same status and powers as the South African Human Rights Commission which can take any individual or institution to court for failure to implement its recommendations.

### ***Impartiality and independence***

One of the challenges facing the Public Protector in South Africa is doubts about the independence and impartiality of the office holder. Fombad (2001, p. 60) states that this has usually centered on the manner of their appointment, tenure, staffing, budgeting and other related matters. In terms of the Public Protector Act 23 of 1994, the Public Protector is appointed by the president in conjunction with the Parliament. Since 1994, the incumbents have been political deployees from the ruling party. In addition, the Public Protector is accountable to the Minister of Justice and Constitutional Development. This arrangement is often criticized because although the incumbents have “resigned” from their political activities, they are always vulnerable to political interference.

### ***Political deployment of cadres***

Ever since the Public Protector was established in 1995, the office bearer (Public Protector) has been a political deployee from the ruling African National Congress (ANC). Such an appointment tarnishes the image and the integrity of the office of the Public Protector. In most cases, complaints are registered against various government departments which are managed by ministers from the ruling party. This becomes difficult for the Public Protector to conduct a fair investigation because in one hand an investigation needs to be carried out in terms of the Constitution, whilst on the other hand the Public Protector need to respect his/her political masters. As a result of this arrangement, the office of the Public Protector becomes a “toothless dog”.

### **Recommendations**

#### ***Legislative reforms***

It is clear from the above discussion that there are serious legislative flaws within the South African Public Protector. It is therefore recommended that amendments in the Constitution Act 108 of 1996 as well as in the Public Protector Act 23 of 1994 need to be made. In this instance, it is recommended that legislation creating the Public Protector should provide powers necessary to function according to international norms. This is in line with the recommendations of the Report on the ad hoc Committee on the Review of Chapter 9 and Associated Institutions (2007, p. xii).

Although the same report makes recommendations that “*the failure of state departments and other organs of state to respond to recommendations made by the respective institutions should be pertinently brought to the attention of parliament*”, such

a recommendation is insufficient because the parliament has no power to take such departments to court. This is a serious problem. Legislation needs to be amended to make provision for the Public Protector to challenge government agencies in a court of law. By so doing, justice will be served to the victim of injustice and maladministration.

### ***Appointments***

In terms of section 2 of the Public Protector Act, “the Parliament in accordance with the rules and orders of the Parliament, appoints a committee for the purpose of considering appointments of the Public Protector”. This has so far proved to be ineffective because all the recommendations that have been made so far proved to be overpowered by the ruling party. Therefore, it is recommended that a body like the South African Judicial Service Commission which is used to identify and appoint judges be appointed to scan, screen, interview and make recommendations to parliament for the appointment of a Public Protector. Such a body needs to given powers to challenge the parliament in case deviations have been made from the preferred candidate. This recommendation can solve political deployment.

### ***Independence and impartiality***

Independence is probably the most fundamental and indispensable value for the successful functioning of the Public Protector. Generally speaking, independence describes a state of not being controlled by other people or things. The underlying rationale for independence in this context is that the Public Protector has to be capable of conducting fair and impartial investigations, credible to both complainants and the authorities that may be reviewed by the office of the Public Protector. In South Africa, although the Public Protector is accountable to the Parliament, it is an entity of the Department of Justice and Constitutional Development. Therefore this arrangement dilutes the notion of independence and impartiality. It is recommended that for the Public Protector must be impartial, and should be independent from the Department of Justice and Constitutional Development.

### ***Handling of corruption in the public sector***

One of the duties of the Public Protector is to investigate “improper dishonest acts, or omission or corruption, with respect to public money as well as improper or unlawful enrichment by public servants”. In essence all these acts are criminal offences (corruption). Corruption means the giving or offering of a benefit to another with the intention of influencing them to commit or to do any action relating to their power of duty (Snyman, 1992, p. 277).

This definition covers aspects such as, donations and gifts, employment or contract of employment, any favor or advantage of any description, any right or privilege. All these acts are punishable in terms of section 10 of the Prevention and Combating of Corrupt Activities Act 12 of 2004. Therefore if this is the situation, then the Public

Protector is usurping the functions of the South African Police Service. The Public Protector has no power to arrest and detain suspected individuals. Therefore the Public Protector's efforts to combat corruption are ineffective. It is therefore recommended that legislative amendments be effected to remedy this situation. Corruption must be removed from the mandate of the Public Protector.

### **Conclusion**

Drawn from this evidence of the article, it is clear that office of the Public Protector has been in existence in South Africa since 1978. From then up to now, the institution has gone through various stages of growth. However, one needs to highlight that in the last seven years since democracy was established in South Africa, the Public Protector has been clouded with controversy. The Arms Deal Joint Investigation is a classical example where the findings of the Public Protector did not find any wrongdoing on the part of the politicians and government officials but a criminal investigation has proved otherwise. This is one of the reasons that the author believes that drastic reforms needs to effected as a matter of urgency into the way in which the South African Public Protector operates. South Africa needs to urgently evaluate the current setup and bring about legislative reforms which will protect the individual from violations of their rights by the government, abuse of power, administrative errors, negligence, unfair decisions and maladministration.

In addition, such legislative reforms must be able to uncover structural weakness in government administrative reforms. Over and above, the office of the Public Protector must be able to enforce its decisions via a court of law. This will ensure that the findings of the Public Protector are not taken for granted. The appointment of the Public Protector needs a lot of attention. The current position where appointees have revealed a tendency of political deployment from the ruling African National Congress, taints the credibility and independence of the office.

### **References**

1. Akpomuvire, M., *The Ombudsman phenomenon in African states public services*, Nigeria: Obafeni Awolowo Universty, 2007.
2. Barron, C., 'The Judge was a pawn in PW's cover up bid', 1999, Sunday Times, Insight from 25 April 1999, p. 4, [Online] at: <http://www.sahistory.org.za/pages/chronology/thisday/1969-05-16.htm>, accessed 12/08/2009.
3. Brynard, P., *The advocate General: The South African Ombudsman*, Pretia: UNISA.
4. De Beer, M., *Who did what in South Africa*, Jeppesstown: AD Donker, 1995.
5. Fombad, C, M., 'The enhancement of good governance in Botswana; a critical assessment of the Ombudsman Act of 1995', 2001, *Journal of Southern African Studies*, Vol. 27, No. 1, pp. 57-77.
6. Fourie, S., *The Joint Investigation into the Strategic Defense Procurement packages of the South African Defense Force*. Pretoria: Office of the Public Protector, 2003.
7. King Report, 'King Committee on Corporate Governance', Institute of Directors, 1994.
8. King Report, 'King Committee on Corporate Governance', Executive Summary, Institute of Directors, 2002.

9. Montesh, M., 'A critical analysis of crime investigative institutions within the South African Criminal Justice System: A comparative study', 2007, DLIT et PHIL in Police Science, Pretoria: UNISA.
10. Public Service Commission Report. 2001. Public Service Commission. Pretoria.
11. Rees, M. and Day, C., *Muldergate: The Story of the info scandal*, Macmillan, 1980.
12. Roherty, J.M., *The state security in South Africa. Civil-Military relations under P.W. Botha.*, New York and London: ME Sharpe Inc., 1992.
13. Snyman, C.R., *Criminal Law*, Only study guide for CRL 100-E., Pretoria: UNISA, 1992.
14. South Africa, 'Advocate General Act 118 of 1979', 1979, Pretoria: Government Printer.
15. South Africa, 'Constitution of the Republic of South Africa Act 108 of 1996', 1996 Pretoria: Government Printer.
16. South Africa, 'Interim Constitution Act 200 of 1993', 1993, Pretoria: Government Printer.
17. South Africa, 'Ombudsman Act 110 of 1983', 1983, Pretoria: Government Printer.
18. South Africa, 'Public Finance Management Act 1 of 1999', 1999, Pretoria: Government Printer.
19. South Africa, 'Public Protector Act 23 of 1994', 1994, Pretoria: Government Printer.
20. South Africa, 'Public Protector Amendment Act 113 of 1998', 1998, Pretoria: Government Printer.
21. South Africa, 'Public Service Act 103 of 1994', 1994, Pretoria: Government Printer.
22. South Africa, 'Public Service Laws Amendment Act 13 of 1997', 1997, Pretoria: Government Printer.
23. South Africa, 'Prevention and Combating of Corrupt Activities Act 12 of 2004', 2004, Pretoria: Government Printer.
24. South Africa., 'Report on the ad hoc Committee on the Review of Chapter 9 and Associated Institutions', 2007, Cape Town: South African Parliament.
25. United Democratic Movement, 'Arms Deal Joint Investigation Report: UDM's reaction', 2006, [Online] at <http://www.udm.org.za>, accessed on 28/07/2009.