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**OVERSIGHT IN LOCAL GOVERNMENT IN
SOUTH AFRICA**

**A Case Study of the Ombudsman's Office for
the City of Cape Town**

BY

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the degree of

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(i) DECLARATION

I declare that this dissertation has not been previously submitted, in whole or in part, for the award of any degree. This study is my own work. Each significant contribution by and quotation from the work of others have been duly acknowledged, cited and referenced.

Fairouz Nagia-Luddy

SIGNATURE: -----

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(ii) ACKNOWLEDGEMENTS

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(iii) ABSTRACT

The municipal ombud is a relatively new concept in South Africa and only two municipal ombud offices currently operate within the country.¹ While there is a growing body of literature on the organisational ombud, as well as established works on various classical ombud, the practice of 'ombudsing' within local government currently enjoys no consistent or comprehensive theoretical foundation, particularly in relation to the required structure or processes, institutional support systems, or legal frameworks for the effective or optimal operation of an institution of this nature.

The ombud at the local level calls for a hybrid approach² to the ombud practice, and further requires particular arrangements to ensure the independence and credibility of the institution. This paper explores some of these critical factors required for the effective operation of an ombud, such as its 'independence' and 'credibility'. Linked to these factors, are aspects relating to the ombud's 'accountability'. Whereas the office has to ensure organisational accountability to the public, it also has to report to the host organisation. The result is a form of dual accountability, which means that the office needs to optimise its credibility and legitimacy both in the public realm, and within the host organisation.

This dissertation argues that while such paradoxes are not uncommon to oversight institutions, numerous problems arise as a result of the lack of a clear and coherent approach, and the lack of understanding of the basic requirements for the ombud's effective or optimal functioning.

One of the challenges to developing sound theories and approaches is that, while there is growing agreement on the need for a hybrid approach to the ombud practice specific to municipal authorities, there is no uncontested ideas on a 'hybrid approach' for municipal ombudsing; neither are there existing guidelines on what balance should be struck between the classical and organisational ombuds in order to generate an appropriate or effective synthesis of these two forms of the institution.

This paper considers current approaches to the establishment of the local level ombud practice with specific reference to the municipal ombud office in Cape Town, South Africa. The paper examines the

¹ There is currently a debate, both nationally and internationally, on whether to use the term "ombudsman" or "ombud" to refer to the institution that is the subject of this study. This debate emanates from the contention that although the word is Scandinavian in origin, in English it is seen as a gender exclusive term. Language and the use of words is a powerful mechanism to entrench unequal power relations and gender discrimination in society. However, the researcher applies the gender neutral term 'ombud', which denotes 'a government official or representative that investigates citizens' complaints against the government and its functionaries'. In referring to the case study, the researcher applies the term currently used by the institution of study, i.e. The Ombudsman's Office.

² This approach entails a mixture of form and operation of the classical and organisational ombuds.

macrostructure of the Cape Town municipal ombud office, and takes a critical look at aspects of its microstructure pertinent to its operation and success.

In assessing whether the ombud is operating effectively, the study includes an examination of the ombud's current impact, and an assessment of whether its methods, approach and objectives allow for the address of the needs of its intended beneficiaries.³ It is hoped that the lessons learned may assist in expanding the knowledge base and understanding of the basic requirements for the successful establishment of the municipal ombud.

The complex relationship between the state and society often lead to problems that occur either on political or administrative levels. These problems may lead to dissatisfaction or grievance, and the litmus test of our democracy may be the ability of citizens to challenge injustices freely, with the guarantee that their grievances will be attended to in a fair, just and earnest manner. Further, where they arise, appropriate measures should exist that provide for just and fair recourse.

Accountability, civil liberty and citizen human rights are crucial to the survival of any democracy. This paper critically investigates some of the measures aimed at facilitating and supporting these objectives, with particular reference to the local level.

³ The beneficiaries of the ombud's services, if one considers its current function, mission and vision, is primarily the citizens residing within the municipality of the City of Cape Town.

(iv) ACRONYMS AND ABBREVIATIONS

ANC	African National Congress
AOA	African Ombudsman Association
DA	Democratic Alliance
EAP	Employee Assistance Programme
ED	Executive Director
EMU	Executive Management Unit
IAU	Internal Audit Unit
IDP	Integrated Development Plan
IOA	International Ombudsman Association
IOI	International Ombudsman Institute
LCS	Legal Compliance Section
TOA	The Ombudsman Association
UCOA	University and College Ombuds Association
UN	United Nations

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(v) LIST OF DIAGRAMS

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⁴ Fairouz Nagia-Luddy, 2008

⁵ Fairouz Nagia-Luddy, 2008; Sabatier and Jenkins-Smith in W. Parsons, Public Policy. (Cheltenham, Cheltenham Publishers, 1995), 41

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CHAPTER ONE

Introduction: General Overview of the Study

The promotion of the respect for human rights is a central aspect of democracy. It is argued that the global debate on democratisation and human rights can be enhanced through a focus on institutions aimed at upholding these that operate at the local, national and international levels.⁶ With this in mind, this chapter explores the tools for democratisation and human rights at the local level.

Despite the growing strength of the human rights movement, there is still a wide gap between the articulation of democracy and the global principles of human rights, and their application in the majority of national public institutional settings.⁷ The causes of this problem may be analysed from various perspectives and ideologies. It is posited that the underlying factor inhibiting the institutional articulation of human rights and democracy is the nature of the state bureaucracy, and the tendency of incorporating highly centralised and often personalised measures of control within state institutions.⁸ Further, the line functions of state bureaucracies depend on the dictates of senior managing officials and legislation, the latter of which is often outdated and out of sync with the rapidly changing demands of a democratic society.

Of relevance to the above trajectory is the observation that a large number of countries that have attempted to move toward democracy have suffered a serious crisis of governance.⁹ It has further been argued that this crisis has been underpinned by the lack of a stable and efficient public sector. Following this, it is argued that without a stable and efficient public sector that enjoys the confidence of the local population, it is virtually impossible to uphold democracy. The focus is thus turned towards the roles of democratic institutions such as the ombud in creating an enabling environment for democracy and human rights.

Since the adoption of its Constitution in 1996, South Africa has attempted to restructure and realign the state and its institutions to embody a people-centered government with a strong human rights approach.

6 "Democracy, Governance and Human Rights", Web page introduction to research done by the United Nations Research Institute for Social Development (UNRISD) in 2000 – 2005. Available at <[http://www.unrisd.org/80256B3C005BB128/\(httpProgrammeAreasForResearchHomeOther\)/7E49CBA637292F6E80256B48003D1C81?OpenDocument](http://www.unrisd.org/80256B3C005BB128/(httpProgrammeAreasForResearchHomeOther)/7E49CBA637292F6E80256B48003D1C81?OpenDocument) > [Accessed on 01 June 2008]

7 UNRISD, 2008

8 These approaches often characterise African bureaucracies. See Goran Hyden, Dele Olowu and Hastings Okoth-Ogendo (Eds) African Perspectives on Governance. (First Printing: Eritrea, 2000)

9 UNRISD, 2008

Integral to the elevation of human rights, is an understanding of the institutional and social systems that oppress and impact human rights; and how violations manifest themselves in communities and in the lives of citizens. It is only with this understanding that one can successfully address and attempt to prevent the issues that cause such violations.

For the purposes of this study, maladministration is a violation of citizen rights, and is defined as the following:

According to the *Crossman Catalogue*¹⁰, it includes bias; neglect; inattention; delay; incompetence; inaptitude; perversity and arbitrariness.

According to the *Reid Catalogue*, it incorporates rudeness; the unwillingness to treat the complainant as a person with rights; the refusal to answer reasonable questions; neglecting to inform the complainant of their rights or entitlement; knowingly giving misleading or inadequate advice; ignoring valid advice or over-ruling considerations which would give an uncomfortable result for the over-ruler; offering no redress or manifestly disproportionate redress; showing prejudice due to sex, race or any other grounds; omitting to notify individuals of their right of appeal or refusing to notify individuals of their right of appeal, who thereby lose their right of appeal; faulty procedures; failure of management to adequately monitor compliance with procedures; cavalier disregard of guidance which is intended to result in equitable treatment of service users; partiality and failure to mitigate the effect of the rigid adherence to the letter of the law where that produces manifestly inequitable treatment.¹¹

In addition to using the above in assessing complaints, the Ombudsman for the City of Cape Town also makes reference to existing policy and legislation that governs administrative action. This includes legislation that is grounded in a human rights approach. The elements that underpin the human rights approach in legislation are rooted in the Constitution itself. These legislative developments are driven by principles that, in essence, “put people first”¹². Central to this paper are the measures instituted to ensure the realisation of these principles, with a particular focus on local government.

10 PCA Annual Report, 1993, cited in the Ombudsman Study Programme, Public Administration International (PAI, Quebec, 2003)

11 These definitions have been used as indicators of maladministration during investigations by the Ombudsman's Office for the City of Cape Town since their involvement in the study programme in 2003.

12 The motto of the Ombudsman's Office for the City of Cape Town is “Putting People First. Putting Things Right”. This resonates the Batho Pele principles, with ‘Batho Pele’ loosely being translated as “People First”.

In the current dispensation, a growing concern is that the concept and practice of oversight is being diluted as a result of political interference and political vested interests. While this observation is becoming increasingly apparent at all levels and branches of government, the scope of this paper is confined to examining the challenges to effective oversight at the local level.

The municipal ombud institution is a novel concept, which has evolved from a need to promote citizens' rights at the coal-face of service delivery. Local government, from a service delivery perspective, is the first port of call and contact for citizens.

From 2003 to 2005, the focus of the City of Cape Town ombud was to protect citizen's rights within the municipality. However, their approach shifted in 2006 to isolate and exclude the broader human rights emphasis from administrative procedure. With a narrowed focus on administrative justice, the mandate of the ombud was then seen to exclude human rights issues.¹³ Among other things, this paper briefly discusses this approach of isolating the idea of administrative justice from the broader human rights discourse in the context of South African society, and specifically in the context of the City of Cape Town.

In this study, the municipal ombud is analysed through, among other methods, a comparison with the national ombud.¹⁴ Of critical importance are the legislative foundations of these institutions. Through this analysis, the paper explores the requirements for an adequate and appropriate legal framework for the support of a municipal ombud office. Central to the discussion is the role of legislation in establishing clear terms of reference and institutional mandates. Following the discussion, it is proposed that a lack of appropriate grounding legal frameworks inhibit the effective functioning of the municipal ombud institution.

Various ideas on the ombud and the conventional practice of the institution are further scrutinised. It is hoped that the varying perspectives on the local practice may lead to the development of new approaches to the way in which the institution currently operates.

The issues associated with political accountability, internal organisational dynamics and the ethical responsibilities toward the external public weave a tapestry of contradiction and paradox. Despite this, it

¹³ Detailed information on the City Ombudsman's jurisdiction is available at < <http://www.capetown.gov.za/ombudsman> >

¹⁴ While it should be noted that the municipal ombud requires a clearly unique frame of reference, there are however overlapping features that are common to oversight mechanism and bodies of an investigative nature.

is argued that the basic idea of the municipal ombud, if formulated clearly and distinctly, could potentially complement existing checks and balances, and enhance the realisation of the rights of local communities. The existing mechanisms for checking state power and monitoring the performance of government include the constitutionally mandated national oversight institutions as well as other mechanisms within municipalities, such as the local government Internal Audit Unit (IAU). These bodies have been legislatively established to prevent and address corruption and maladministration.¹⁵

Purpose and Objectives of the Study

The purpose and objectives of the study include the following:

- i. To determine the criteria for effective municipal ‘ombudsing’;
- ii. To determine the threats to the effective operation of the municipal ombud in the South African context, and ways of overcoming these threats;
- iii. To explore opportunities to effectively establish the municipal ombud institution in the South African context, with particular reference to the municipal ombud for the City of Cape Town;
- iv. To ascertain the scope and need for a local government ombud institution when internal local government entities such as the Internal Audit Unit (IAU) and external entities such as the national Public Protector exist and have been legislatively established to prevent and address corruption and maladministration; and
- v. To contribute to the existing body of literature on the ombud.

Key Research Questions

The specific questions that this research paper set out to answer are the following:

- i. Is the Office of the City Ombudsman currently operating effectively?
- ii. What are the obstacles to the effective operation of the municipal ombud?
- iii. What are possible solutions to these problems?

¹⁵ The Internal Audit Unit of Local Government is provided for by the Municipal Systems Act

Hypotheses

The concept of the ombud institution provides hope for accountability, responsiveness, and the protection of citizens' rights within the local municipal administration.

However, the current reality is quite distanced from this notion. The institution faces a range of obstacles including the abandonment of its human rights approach and the limited understanding of institutionalising human rights in the context of critical social issues, such as pervasive inequalities in terms of class, race and gender, among other factors. These obstacles are further exacerbated by the municipal line-department's fears of taking on issues that are easily politicised, particularly in the highly volatile environment of South African local government.

A further problem is a lack of clear strategies on how to identify violations, how to prevent such violations, and how to address these within the administration. This observation is directly linked to weaknesses and problems in the complaints handling process within the municipality subject to the study. Therefore, one of the major challenges, external to the ombud institution, lies in the need to re-organise complaints handling and response systems within the municipal bureaucratic administration, in order to reflect a commitment to resolving the issues brought forward by the municipal ombud and other oversight bodies.

Further, the recruitment and retention of trained and appropriately skilled personnel pose fundamental challenges to the institution in terms of maintaining its credibility and effect. Ultimately, the provision of appropriate legislative frameworks that provide for the durability and credibility of the institution, clear mandates and appropriate jurisdiction, are key to enhancing the effectiveness of the municipal ombud institution.

Definitions and Operationalisation of Key Concepts

Key indicators for the effectiveness of the municipal ombud institution include their "independence" and "accountability". In relation to both concepts, there are various conceptual tensions that impact the municipal ombud institution. The municipal ombud is viewed as an organisational ombud. As an organisational ombud, certain codes apply that delineate how the institution should conduct itself. Included in this code, is that even though the organisational ombud should look at issues objectively, as a

part of the organisation, and directly accountable to the organisation, it may not commit any acts which may be to the disbenefit of the organisation, or which may be costly for the organisation.

Further, as an office within, and very much part of, a larger organisation, members have to ensure that all organisational protocols are observed and respected. This requirement for the ombud to comply with internal organisational and bureaucratic processes arguably impacts the outcomes of the services rendered by the municipal ombud, and additionally impacts critical outcomes such as the ombud's credibility, legitimacy and independence.

The discussion on the local municipal ombud is located in the broader discussion on national Chapter Nine institutions¹⁶. The local ombud has been initially modeled according to the national ombud, the Public Protector, and it is asserted that the challenges faced by the national ombud and other Chapter Nines are similarly faced by the Ombudsman for the City of Cape Town and other local institutions of oversight. These common challenges are argued to be underpinned by the nature of state bureaucratic institutions and systems of authority. The following section highlights the institutional commonalities among these bodies, and explores avenues and opportunities for their address at the local level. Key concepts examined include notions of "democracy", "independence" and "accountability".

One of the most common points of emphasis is that ombud institutions, whether municipal or national, should operate without prejudice, favour or fear of interference from organisational, departmental or state bodies. Political interference is not uncommon in local government. This is a problem mainly due to the proximity of political and administrative branches within municipalities, and state institutions generally. Political decisions further affect the budget, structure, powers, jurisdiction and position of the ombud within the broader organisational framework. These render the municipal ombud vulnerable to interference and ultimately impact the ombud's independence.

A solution posed to these problems is the development of an appropriate and empowering legislative framework for the ombud that makes provision for the allocation of adequate powers and resources. This, however, is argued to be a necessary but not sufficient requirement for the effective operation of municipal ombud institutions. In other words, there are other key requirements for such effectiveness, and an empowering legislative framework, even in the form of a by-law that entrenches the office within the

¹⁶ Chapter Nine institutions are those included in Chapter Nine of the Constitution of South Africa of 1996, and include the Public Protector, Human Rights Commission, Commission on Gender Equality, etc.

municipal institution, will not secure the effective operation of the office on its own. Political will delineates the explicit or implicit conscious and deliberate choice of action of the political leadership.¹⁷ Political will is key to the effective functioning of any government institution. Therefore, of relevance to this study is the political will behind establishing the office effectively. In the context of this study, political will entails the will of the administrative executive (the City Manager and Executive Directors) and the Council of the municipality to make adequate legislative and resource-related provisions for the ombud office that will guarantee the ombud's independence and credibility, while additionally providing adequate and appropriate political and administrative support for its effective operation.

A Comparative Look at National Oversight Bodies: Chapter Nine Institutions and the Local Ombud

Our institutions of national state oversight are established by Chapter Nine of the Constitution of South Africa of 1996. The main purpose of these independent institutions is to strengthen constitutional democracy in South Africa. *"They are subject only to the Constitution and the law, and they must be impartial and must exercise their powers and perform their functions without fear, favour or prejudice"*.¹⁸ The provision that these bodies are subordinate to the Constitution *only* is intended to ensure the impartiality and independence of these Chapter Nines. Whether this occurs in practice or not is debatable.

While the municipal ombud is intended to similarly strengthen constitutional democracy, and is expected to operate impartially and without fear, favour or prejudice, they are currently however, subject to the organisation in terms of its powers, form and function. It is obvious thus, that certain tensions would arise with particular implications for the local ombud's independence. Reif and others¹⁹ however, posit that the position of the organisational ombud strategically allows for the exertion of 'influence' over the outcomes of matters that arise in favour of the complainant.²⁰ There seems to be an implicit 'negotiation' of powers and abilities by the ombud in respect of their interaction with the organisation. It is argued that this approach may impact the credibility of the ombud office in the public eye, particularly where an 'amicable conclusion' translates into the maintenance of the *status quo*.

17 'Will' is defined as 'the faculty of conscious and deliberate choice of action', in The New Collins Concise Dictionary: 1984

18 Institute for Democracy in South Africa (IDASA), "FAQ Topics" [Electronic] Available at <http://www.idasa.org.za/index.asp?page=faqs_details.asp%3FRID%3D76> [Accessed on 01 June 2008]

19 2004

20 Linda Reif, "The Ombudsman, Good Governance and the International Human Rights System" (Leiden & Boston, Martinus Nijhoff Publishers, 2000). Reif, Also in The Ombudsman Association, Lecture Series (USA, 2004)

Murray expands on the constitutional provisions and emphasis on the independence of Chapter Nine institutions. According to her, ‘the first section of Chapter Nine asserts the independence of these institutions in strong terms.’²¹ It states that:

*“...Other organs of state, through legislative and other measures, must assist and protect these institutions to ensure the independence, impartiality, dignity and effectiveness of these institutions. No person or organ of state may interfere with the functioning of these institutions.”*²²

These provisions place an onus on the legislative organs of the state to produce legislation that provides for the independence, impartiality and effectiveness of Chapter Nine bodies, and has resulted in the promulgation of the Public Protector Act, and the Human Rights Commission Act, for example, that upholds the intention of the Constitutional provisions mentioned.

Broad national frameworks, such as the Municipal Systems Act, have been promulgated to support the establishment of independent, impartial and effective mechanisms of oversight. However, these frameworks, while supporting the legal establishment of institutions such as a municipal ombud, have not led to the promulgation of legislation specific to the municipal ombud within local government. In fact, there seems to be a denial that such support exists.²³

Murray identifies six constitutionally established independent state institutions that support our constitutional democracy. They are the Public Protector (or the national ombud), the South African Human Rights Commission (HRC), the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities (the CRL Commission), the Commission for Gender Equality (CGE), the Auditor-General and the Independent Electoral Commission.²⁴ The Public Protector is the most relevant institution for the purposes of this study. Murray draws together the commonalities between the distinct Chapter Nine institutions. These commonalities converge in the mutual roles of these

21 Christina Murray, “What Is the Role Of South Africa’s Chapter 9 Institutions?” (2006) [Electronic] Available at <http://www.puk.ac.za/opencms/export/PUK/html/fakulteite/regte/per/issues/2006_2__Murray_art.pdf> [Accessed on 15 June 2008] : 1-2 . Christina Murray is Professor of Constitutional Law and Human Rights at the University of Cape Town

22 Murray, 1-2; Also in Chapter Nine of the Constitution of South Africa of 1996.

23 Anecdotal evidence as provided in interviews with various City Staff, largely at top and middle management levels

24 Murray, 1

institutions that intend to check government and to contribute to transformation.²⁵ Three features are distinguished in terms of the above. They are:

- i. Although Chapter Nine institutions are state institutions, they are located outside government, and are not “a branch of government”;
- ii. Similar to the courts, they are expected to be independent and impartial; and
- iii. To varying degrees, they are “intermediary institutions”, providing a link between people on the one hand and the executive and legislative branches of government on the other.²⁶

The importance of institutions which can serve as intermediaries between the people and government in a young democracy in which many people are impoverished and have limited access, if any, to services and no contact with politicians has been stressed by a number of authors, including Murray.²⁷

According to Murray, Chapter Nines are intended both to check government by enhancing its accountability and to contribute to the constitutional project of transformation. She is of the view that the appropriate emphasis on transformation and checking government varies from institution to institution, but both responsibilities are posited to fall within the ambit of Chapter Nines.²⁸ These roles are viewed to be in alignment to the overall constitutional commitment to limited government and transformation. Murray further observes that ‘in liberal democratic constitutions like ours, checks and balances on government take many forms.’²⁹

Murray observes that the traditional checks and balances intended to control government and the use of power have developed over centuries. However, she asserts they have not always been effective. She argues that ‘this problem is exacerbated in systems like that in South Africa, in which one party dominates and under an electoral system in which accountability to citizens is easily perceived as less important than accountability to party structures.’³⁰

25 Murray, 1-2

26 Murray, 2

27 Murray, 7

28 Murray, 7

29 Murray, 8

30 Murray, 8-10

It is important to note that even within such a system of separation of powers, the checking role of Chapter Nines is, however, different from the checking role one branch of government exercises over another in a system of separation of powers. As previously highlighted, Chapter Nine institutions are not a branch of government, and therefore do not have governmental power. Murray adequately makes the point when she states that:

“Unlike the courts, they cannot conclusively declare government action to be unconstitutional or illegal; unlike Parliament, they cannot legally enforce resignation upon the executive; and unlike the executive, they cannot exert direct control over the legal system by selecting our top judges, or control the implementation of policy by managing budgets and processes. They further cannot order executive action and cannot penalise unconstitutional behaviour.”³¹

While the municipal ombud is aimed at providing checks to municipalities, they are located within these municipalities, and at the same time are expected to operate independently and impartially. They are viewed as intermediaries, and are even described as being ‘conduits’ of complaints to the municipality.³² While the former implies an active role in complaints resolution, the latter, however implies a tacit and passive role in the complaints process. Further, in the latter instance, the ability and clout of the municipal organisational ombud as a protector of citizens’ rights are seriously put to question. If this view is accepted, it becomes possible to mark the processes through which the national classical ombud concept becomes diluted in the local organisational form of the practice.

While the reasons for such dilution as cited above are systemic, common causes for the dilution of both *national classical* and *local organisational* forms of the ombud are located in the politics that underpin state authority and bureaucracy.

In expanding on the independence and impartiality of Chapter Nines, Murray asserts that they should not only operate outside of government, but that they should also operate outside of partisan politics and be free from interference by other organs of state.³³ According to her, ‘the Constitution asserts their independence in strong terms, using language virtually identical to that used to declare the independence

31 Murray, 8-10

32 The Ombudsman Association, Lecture Series (USA, 2004)

33 Murray, 5-6

of the courts.’³⁴ She draws on a crucial point in terms of ensuring the independence and impartiality of Chapter Nines, and asserts that ‘independence and impartiality cannot be created by declarations.’³⁵ According to her:

*“To secure their independence, the selection of people to office under Chapter Nine ...must be made by a special majority in the [legislature (as the highest decision making body in the country)] and their dismissal likewise requires a special majority [within the legislature].”*³⁶

This is viewed as a common device for ensuring that Chapter Nine officials command broad political support and are not merely the “cronies” of the governing party. Further, this also ensures that their work is credible to all parties and is not seen as partisan, either to political parties, or to the government structures.³⁷ In the context of local government, the above translates into the requirement for the provision that decisions taken on the municipal ombud, including that of selection to office, dismissal, jurisdictional issues, etc, should be taken by a special majority of the full municipal Council.

In local government, the restructuring of the municipality and all constituent departments usually follow a change in dispensation. The municipal ombud office is regarded as a department within the municipality. In the absence of legislation that distinguishes it as an independent institution, the municipal ombud usually undergoes similar changes to its micro- and macro-constitution and structure. Not only is this volatility an obstacle to its credibility but it is also problematic to establishing an effective and consistent service to the public. Murray is of the view that the Constitution intends to depoliticise the issues that Chapter Nines deal with, by attempting to secure their independence and by locating them outside government.³⁸ This approach should arguably be replicated at the local level. Murray further expands on the role of Chapter Nines as intermediaries:

*“Chapter Nines...provide a different opportunity for public participation in public life to that provided in political processes. Located between citizens and the government, they provide a way in which the needs of citizens can be articulated outside the loaded environment of party politics.”*³⁹

34 Murray, 5-6

35 Murray, 5-6

36 Murray, 6

37 Murray, 5-6

38 Murray, 6

39 Murray, 7

In respect of the above, the benefits of the organisational ombud as an ‘inside outsider’ is particularly noteworthy. The organisational ombud provides the opportunity to closely monitor whether the needs of communities, as expressed through complaints and processes such as the Integrated Development Plans (IDP) and budget planning, are reflected in the organisations plans for implementation. Such interventions do not form part of the traditional operation of the national Public Protector and offers a niche for the local ombud that is focused, proactive and much needed.

In respect of the intermediary role of Chapter Nines, Murray asserts that ‘if the Chapter Nines are truly independent, they can provide a reliable voice for people, unburdened by the political exigencies of the day or vested interests.’ This provision is particularly important for local government, where the boundaries between the political and administrative spheres are often quite blurred. The underlying importance of the intermediary role of oversight bodies is that this potential link to the people enables the fulfillment of the dual roles of checking government and contributing to the programme of transformation to which the Constitution commits us.⁴⁰ However, in the instance of the municipal ombud, it is important to make the distinction between being an intermediary, and being a conduit of complaints.

⁴⁰ Murray, 6-7

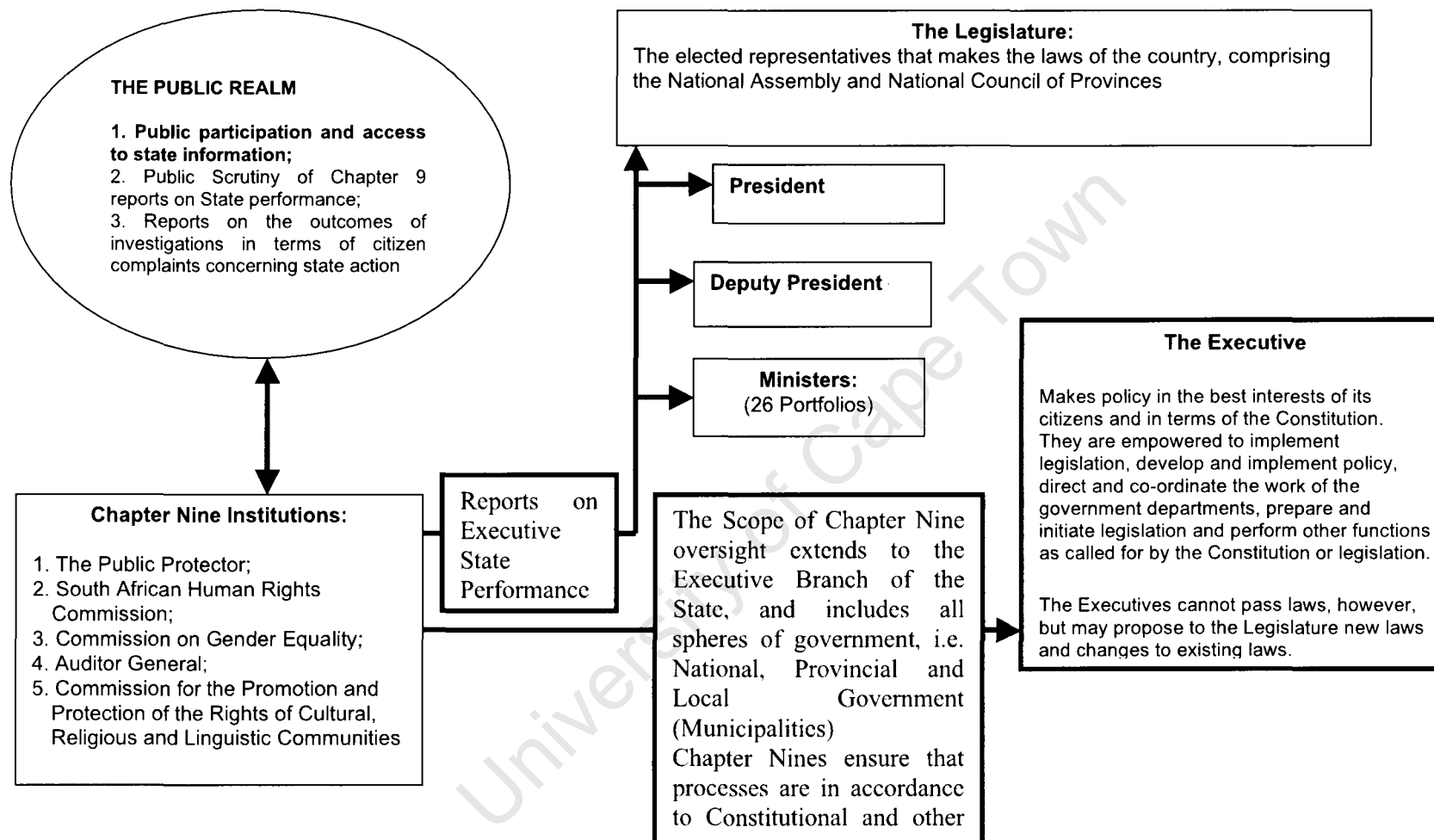


Diagram 1. Representation of the relationship between Chapter nines, state organs and members of the public.

In summary, the check that Chapter Nines provide on the exercise of government power is not through compulsion, direction or power. Rather, they check government power by providing a legitimate and authoritative account of government's action and performance, which can be used by citizens and the legislature in scrutinising government's performance.⁴¹

Linked to the securing of accountable government as discussed above, is the distinction between enforceability and answerability. Accordingly, Reif states that:

“Answerability is ... the power given to an institution to ask “accountable actors” to give information on their decisions and to explain the facts and the reasons upon which these decisions are based, whereas the enforcement element of accountability is composed of punishment or other negative sanctions for inappropriate behaviour”.⁴²

Under this distinction, Chapter Nine institutions do not have the power to enforce accountability, but can demand an account of what the state has done to remedy breaches of constitutionally defined parameters in state action. In other words, the state is answerable to the Chapter Nines.⁴³

Murray highlights the alternative way of understanding the accountability function of Chapter Nines. Attention is drawn to the mechanisms that they can use to control or check government. In respect of these, it is important to distinguish between enforcement and compliance. According to Reif:

*“If the focus is on compliance, it is possible to look not only at the effectiveness of mechanisms to obtain enforcement of the law (the “sticks” approach), but also at approaches or incentives that engender voluntary conformity with the law (the “carrots” approach).”*⁴⁴

Reif characterises the control that our Chapter Nines can apply to government as “cooperative control” as opposed to the “coercive control” of the courts. She expands on the distinction between “cooperative control” and “coercive control” in the following:

41 Murray, 8-10

42 Reif in Murray, 10-11

43 Murray, 10-11

44 Reif, Hertogh and Oosting in Murray, 11

*“Cooperative control is facilitative and proactive, using advice and persuasion, wherein the actors confer and dialogue to try to obtain the desired result and change behaviour. In contrast, coercive control is reactive, and control is imposed by unilateral decision.”*⁴⁵

By way of example, Murray introduces various other elements considered as crucial to the credibility of Chapter Nines. Murray expands on the *modus operandi* of the Auditor-General:

“When the Auditor-General audits government’s annual financial statements he (or she) provides a professional appraisal of government’s spending against the budget agreed to by Parliament at the beginning of the financial year. In so doing he provides Parliament and the public with an independent account of the government’s behaviour. However, the Auditor-General has no power to act on findings of financial mismanagement or unauthorised spending. That power is vested in Parliament.

The Auditor-General’s authority lies in his power to get information and the credibility of his reports. The credibility of the reports in turn lies both in the quality and professionalism of the work of the Auditor-General’s office and in the legitimacy of the office as an independent constitutional institution.

The issues of professionalism, credibility and legitimacy are key to the success of oversight bodies that operate by recommendation, rather than compulsion or enforcement. The higher the level of professionalism, the higher the credibility and legitimacy in terms of the perceptions on the ombud.

*Ultimately, the force of the Auditor-General, as with other Chapter Nines, and as should be the case with all other forms of oversight as institutions that contribute to accountable government, lies in influence, not in formal power.”*⁴⁶

However, Murray highlights a very important point when she states that ‘the effectiveness of these “soft” accountability mechanisms is not guaranteed by constitutional declarations of their independence and impartiality, special appointment processes or security of tenure’.⁴⁷ According to her, this is particularly the case in a regime of one-party dominance, where the governing party can choose or dismiss the incumbents of the Chapter Nine institutions without having to secure inter-party support or endorsement for these decisions. According to Murray, ‘in such circumstances, the challenge the individuals in office

45 Reif in Murray, 11

46 Murray, 11

47 Murray, 11-12

under Chapter Nine face to establish their credibility and to fulfill their responsibilities effectively, is formidable.⁴⁸

Murray reflects on the specific and interrelated challenges to our constitutional democracy, and expands on the roles of Chapter Nines in mitigating and remedying these challenges. According to Murray, ours is a 'young and impressionable democracy' and our understanding of what constitutional democracy and the rule of law means 'is still developing'.⁴⁹

By virtue of their location outside of government, and with their constitutional legitimacy, the Chapter Nines are viewed to have an opportunity to enhance the public's and states understanding of what constitutional democracy means.⁵⁰

While South Africa is a one-party dominant state, Murray asserts that such 'dominance is not illegitimate'. While she describes the situation as 'a reflection of the ANC's success in government', she also cautions on the danger of the party coming to 'feel that it owns the system and pays limited attention to opposition or even the voters'. The role of Chapter Nines as intermediary institutions that offer citizens an opportunity to express their needs and concerns play a role in counter-balancing this threat. Murray further suggests that 'Chapter Nines can also demonstrate the compatibility of constructive debate with government within the programme of transformation and nation-building'.⁵¹

An important point to mention, as Murray categorically states, is that 'the challenges that constitutional democracy in South Africa faces are challenges for the Chapter Nine institutions too'. Some of these challenges include that 'they are still finding their feet and developing their understandings of their roles'. A comparison to other South African institutions is drawn in that they similarly 'struggle with limited resources'. Furthermore, one-party dominance weakens the impact of the institutions that ought to place a check on state functioning. These bodies could easily be held to ransom through processes that govern their financing, appointment and tenure. The super-imposition of the will of the dominant party over these bodies would inevitably be 'legitimised' through their claim that popular will and support underpin their actions.⁵²

48 Murray, 12-13

49 Murray, 12-13

50 Murray, 20-21

51 Murray, 20-21

52 Murray, 20-21

Another noteworthy challenge is that ‘the dominance of the ANC... implicitly challenges the efforts of the Chapter Nines to create a space for critical debate outside government’. Murray points out that

*“...the democratic legitimacy of the government is still firmly underpinned by its liberation legitimacy. This is often taken to give it a monopoly on understanding the goals of transformation and makes it difficult to establish legitimate parallel voices...”*⁵³

In addressing these challenges, Murray asserts that:

*“...if the Chapter Nines are to fulfill their mandates and live up to the title [of] ‘Institutions Supporting Constitutional Democracy’”, they must open up a space for participation in public life outside government. Responsive and accountable government and an environment of tolerance and trust are essential ingredients of the constitutional democracy anticipated by the Constitution. The Chapter Nines are expected to contribute to building all these by what they do and how they do it...”*⁵⁴

Accordingly, what is needed is Chapter Nines to be ‘independent and rigorous in overseeing government, and relentless in pursuing transformation’.⁵⁵

In the case of local government, while municipalities are increasingly placed under pressure to transform and deliver on its mandated responsibilities on the one hand; on the other, there are growing problems associated with political instability, allegations of manifest and growing corruption and maladministration, the lack of service delivery, uninformed constituencies and widening inequality. These problems have not surfaced overnight. It is argued that required checks and balances need to be enhanced in order for these problems to be remedied. Internal mechanisms such as the municipal ombud presents an optimal support measure for the protection and promotion of citizens rights, not just for the local authorities, but for the existing bodies legislated and intended to secure the constitutional rights of all citizens.

Chapter Nines can act as an early warning system to government for when issues are spiraling and when constitutional violations are imminent. They can hold government to account, and reassure the public when ‘all is well and alerting it to problems when it is not’.⁵⁶ Given the importance of the Chapter Nine

53 Murray, 21

54 Murray, 21

55 Murray, 21

56 Murray, 21

institutions, the effective performance of such bodies ultimately lead to the realisation of citizen rights to the very basic level. The same principles apply to local level ombud institutions.

The Development of the Ombud Institution

The general principles and standards of the institution of the ombud, as practiced today, takes root in the traditional ombud practice established in Sweden almost two centuries ago.⁵⁷ These principles and standards have been adopted and adapted by countries across Europe, and over the years spread to other regions such as the United States and relatively quite recently, to Africa.

The ombud institution has been redefined and formalised by the international and continental umbrella bodies that represent the ombud institution and practice worldwide. There are two international bodies, which represent the two approaches to ombudsing. The International Ombudsman Institute (IOI) promotes and supports the development of the classical form of the ombud as per the common understanding of the practice, which takes root in the first Swedish ombud institution. The International Ombudsman Association represents, supports and promotes the organisational ombud practice. As the ombud institution subject to this study is a member of both bodies, they will briefly be discussed to provide insight into the international criteria and parameters within which the Cape Town municipal ombud operates.

The International Ombudsman Institute (IOI), a worldwide organisation of ombud offices, is based in Canada and was established in 1978. Institutional members of the IOI are public sector, independent ombud offices located around the world. Specialised ombud offices and public human rights organisations can become Institutional members if they meet the specific criteria of the IOI.⁵⁸

The purposes of IOI are, among other things:

- i. To promote the concept and institution of the Ombud and to encourage its development throughout the world;
- ii. To promote regional participation in the activities of the Institute and to develop regional constituencies with a view to decentralising the activities of the Institute;

⁵⁷ Stacey, F. *Ombudsmen Compared*. (Oxford, Clarendon Press, 1978). See also Anderson, 1980; Gregory and Giddings, 2000 et al.

⁵⁸ Information on Membership criteria for the International Ombudsman Institute is available at <<http://www.law.ualberta.ca/centres/ioi/About-the-I.O.I./Concept-and-Organization.php>>

- iii. To develop and operate programs enabling an exchange of information and experience between Ombud throughout the world and to encourage the professional development of members through co-operation; and
- iv. To undertake such other matters as are necessary to further the purposes of the Institute.⁵⁹

The IOI further recognises and supports the concepts of:

- i. Respect for human rights and fundamental freedoms;
- ii. Adherence to the rule of law;
- iii. Effective democracy and open and accountable government; and
- iv. Access to justice for all.⁶⁰

A public institution, whether titled Ombudsman, Mediator, Parliamentary Commissioner, People's Defender, Human Rights Commission, Public Complaints Commission, Inspector General of Government, Public Protector or like designation, is eligible to become an Institutional Member, provided that it exercises the following functions fully, and further meets the following criteria:

- i. It is created by enactment of a legislative body whether or not it is also provided for in a Constitution;
- ii. Its role is to protect any person or body of persons against maladministration, violation of rights, unfairness, abuse, corruption, or any injustice caused by a public authority;
- iii. It does not receive any direction from any public authority which would compromise its independence and performs its functions independently of any public authority over which jurisdiction is held;
- iv. It has the necessary powers to investigate complaints by any person or body of persons who considers that an act done or omitted, or any decision, advice or recommendation made by any public authority within its jurisdiction has resulted in maladministration;
- v. It has the power to make recommendations in order to remedy or to prevent any maladministration and, where appropriate, to propose administrative or legislative reforms for better governance;

⁵⁹ International Ombudsman Institute By-Laws of November 2000, Available at <<<http://www.law.ualberta.ca/centres/loi/About-the-IOI/Concept-and-Organization.php>>

⁶⁰ International Ombudsman Institute By-Laws of November 2000

- vi. It is held accountable by reporting publicly to the Legislature or other appropriate authority;
- vii. Its jurisdiction is national, regional or local;
- viii. Its jurisdiction applies to public authorities generally or is limited to one or several public authorities, or to one or several public sectors; and
- ix. Its incumbent or incumbents are appointed or elected, according to the relevant legislative enactment, for a defined period and can only be dismissed, for cause, by the legitimate and competent authorities.⁶¹

The municipal ombud fails to meet the above criteria in respect of (iii), (vi) and (ix) above. Firstly, the municipal ombud receives direction from the City Manager and to a lesser extent, the Mayor. It is further also held accountable by the City Manager. This places the municipal ombud in a very difficult position and places a direct limitation on its independence. Secondly, the City Manager appoints the ombud, who may be dismissed for any of the reasons, which constitute a fair dismissal in respect of staff members of the municipality. The decision may be taken solely by the City Manager in his official capacity. The municipal ombud therefore may not be permitted membership to the IOI as an Institutional Member.

A public institution, which is not eligible to become an Institutional Member, may be eligible to become an Associate Member of the Institute, provided that it shares 'common or compatible interests' with the Institute regarding its purposes. Due to these provisions, the municipal ombud for the City of Cape Town was admitted to the Institute as an Associate Member, particularly as a result of its proclaimed and reported focus on the respect for human rights and fundamental freedoms, the adherence to the rule of law, the promotion of effective democracy and open and accountable government, and access to justice for all.

On the continental level, the African Ombudsman Association (AOA) is the regional Chapter of the IOI, and performs a supportive function to regional members. In 2001, the AOA was established in Africa. Entrenched in its constitution, is the recognition of 'the need for creating, developing and promoting the Ombudsman Institution on the African continent.'⁶² In 2004, the Ombudsman for the City of Cape Town became an associate member of both the IOI and the AOA. All member ombud institutions are required to

⁶¹ Article 6 of the International Ombudsman Institute By-Laws of November 2000

⁶² The Constitution of the African Ombudsman Association, Preamble, South Africa, 2002

abide by the Association's Code of Ethics and Standards of Practice⁶³. Some of the observations on the institutions ability to meet these standards include the following:

- i. The Cape Town municipal ombud does not meet the full requirements for independence, as it does not, in practice, report to the highest decision-making body of the organisation;
- ii. It reports and is accountable to the City Manager and to some extent, the Executive Mayor; and
- iii. It relies on the City Manager for its conditions of appointment or dismissal.

In addition to the IOI, The International Ombudsman Association (IOA), based in the United States, aims to advance the profession of organisational ombudsman and ensure that practitioners are able to work to the highest professional standards. The International Ombudsman Association (IOA) was officially formed in July 2005, subsequent to the merger of the University and College Ombuds Association (UCOA) and The Ombudsman Association (TOA). The IOA is the largest international association of professional *organisational* ombud practitioners in the world, representing over 500 members from the United States and across the globe.⁶⁴

The association supports organisational ombud worldwide, who work in corporations, universities, non-profit organizations, government entities and non-governmental organizations. In addition, the association works to support and promote the profession through strategic partnerships and communication with government agencies and other professional organisations, as appropriate.⁶⁵

There are definite principles and ethics that govern members of the IOA, and the institution itself. These include the following:

- i. Independence: The ombud should be independent in structure, function, and appearance to the highest degree possible within the organization;
- ii. Neutrality and impartiality: The ombud, as a designated neutral, should remain unaligned and impartial. The ombud does not engage in any situation, which could create a conflict of interest;
- iii. Confidentiality: The ombud holds all communications with those seeking assistance in strict confidence, and does not disclose confidential communications unless given permission to do so.

63 Annexure (v) and (vi): The Ombudsman Association Code of Ethics and Standards of Practice. Available at <<http://www.ombudsassociation.org/>>

64 Available at <<http://www.ombudsassociation.org/>>

65 Available at <<http://www.ombudsassociation.org/>>

The only exception to this privilege of confidentiality is where there appears to be imminent risk of serious harm; and

- iv. Informality: The ombud, as an informal resource, does not participate in any formal adjudicative or administrative procedure related to concerns brought to their attention.⁶⁶

The criteria for the organisational ombud are thus established and known by all members and accessible to those who strive to be part of this body. It therefore becomes easier to assess the degree to which the ombud for the City of Cape Town municipality adheres to these standards. An observation of the internal workings of the office yields the following insights:

While independence is raised as one of the principles for the organisational ombud, the definition of such independence is vague. What, for example, is independence to “the highest degree possible”? According to the IOI, independence clearly means having to account to the highest legislative authority within the organization or state (or other) institution. This provision is intended to ensure that there is no political or administrative hold over or influence on the ombud. These conflicting criteria create a tension in the operation of the ombud, particularly when that ombud institution is a member of both The IOI and the IOA, and is seen as a hybrid between the classical and organisational forms of the ombud institution.

The issue of confidentiality is also problematic to the ombud that considers itself a hybrid form of both organisational and classical ombud. As an organisational ombud, the idea of confidentiality is facilitated through the informal approach through which the investigation process and actual complaints are left unrecorded or undocumented. Resolve is typically reached through mediation between the aggrieved party and the municipality (in the case of the municipal ombud). No paper trail therefore exists and this frees the ombud from being compelled to present documents, which would be considered as confidential, in formal adjudication procedures.

The classical ombud, however, documents the investigation process and complaints. The protection for the classical ombud is typically that it should discriminately decline any matter that could lead to formal adjudication processes. This, however, is in practice quite difficult as basically any matter can be taken to court where a person feels wronged or aggrieved by the administration, and where there is evidence to support these claims. No complainant would state the intention to go to court upfront, but the evidence

⁶⁶ The International Ombudsman Association (IOA) Code of Ethics [Electronic] Available at <http://www.ombudsassociation.org/standards/Code_Ethics_1-07.pdf>

gathered by the ombud could substantiate legal action. In response to this, legislative measures are typically established to ensure privilege. In the instance of the Ombudsman for the City of Cape Town, no such protection measure exists to protect the confidentiality of the complaints and complainants from the organisation. While this matter cannot be resolved by the ombud itself, the organisation, if committed to the effective operation of the ombud institution, has the responsibility to develop the required protection mechanisms to ensure confidentiality and privilege.

The international bodies and their membership criteria, and the extent to which the City Ombudsman's Office for the City of Cape Town meet these, have thus been discussed at some length. While the two forms of the ombud practice, i.e. the classical and organisational forms of the ombud, have been mentioned, the following sections provide deeper insight into these forms of the ombud practice.

The Classical Ombud

The Swedish Parliament first legislatively institutionalised the practice of classical 'ombudsing' in 1809.⁶⁷ It is recorded that the office of the ombud was designated to listen to grievances and complaints of citizens concerning governmental departments and policies.⁶⁸ The traditional Swedish ombud offices had powers to address the abuse of power or violations of rules, and remedied these abuses using persuasion and at times, exposing the issue through publicity.⁶⁹

Classical ombud representatives serve 'as formal investigators and fact-finders with subpoena power and strong legal safeguards for their independence and for the confidentiality of their records'.⁷⁰ Classical ombud are traditionally legislatively established by the highest law making body in the country. This was a measure intended to safeguard the ombud's independence.⁷¹

The ability to 'influence' decision-making and outcomes of conflict between the state and the citizen or aggrieved person is seen as vital to the successful operation of the ombud.⁷² Today, in the case of the Finnish, Swedish, Norwegian, and other offices, the ombud may recommend systemic changes within the administration that addresses systemic inequalities that affect or may potentially affect members of the

67 Stacey, 1978

68 Stacey, 1978

69 Stacey, 1978

70 Rowe, 3

71 Stacey, 1978

72 The Ombudsman Association, Lecture Series (USA, 2004)

public.⁷³ They may also intercede or mediate the public's interests, or attempt to make procedures 'friendlier' or more understandable to the citizens.⁷⁴

It has been established that in order to become a full *bona fide* member of the international classical ombud associations, the institution should be legislatively established, and should report to the highest decision-making body of the relevant institution subject to oversight (such as Parliament, on a national level, or the full City Council, on a local level)⁷⁵. These criteria are set to ensure the integrity of the ombud institution, to ensure that there is no dissolution of the concept of the ombud, and to ensure that the credibility of the ombud institution is maintained. These assurances attempt to secure the ombud's independence, neutrality and accountability to the members of public who appeal to these institutions for assistance. The foundation principles of the classical form of the institution include the following:

- i. That the ombud is an independent agent that may intervene on behalf of complainants; and
- ii. That they may use their unique structural situation (as an independent) and their powers of investigation and persuasion (or more) to mitigate or improve the condition that caused the complaint.⁷⁶

The meaning of the classical ombud thus presupposed that the independence, the quasi-legal nature, and the focus of the ombud can mitigate the tendency of institutions to make mistakes; to be inefficient; to break their own rules; to lose contact with the constituency; or to commit any other marginal abuses of power or authority.⁷⁷ However, the ombud had no authority or power to ensure that the recommendations made by them are enforced:

'They (the parliamentary ombud) were generally established as advisors, not commanders, who rely on recommendation, not compulsion'.⁷⁸

The classical legislative parliamentary ombud is the most well known form of the ombud institution. The practices, powers and terms of reference for the classical ombud institution are fallaciously assumed by

73 The Ombudsman Association, 2004

74 The Ombudsman Association, 2004

75 These are criteria promoted by the International Ombudsman Association, as highlighted in The Ombudsman Association, 2004

76 The Ombudsman Association, 2004

77 Stacey, 1978

78 Stacey, 1978

many practitioners and researchers to be generic and applicable to all forms of the institution.⁷⁹ The required distinctions are the foci of this section.

According to Stacey, the enabling legislation of all ombud offices provides authority to these offices to 'discretionally act in the interest of the aggrieved person'.⁸⁰ This idea is however quite difficult to balance with the stated requirements for 'objectivity' and 'impartiality' of the ombud as presented by the modern day ombud associations.⁸¹ The latter are particularly important to organisational ombud institutions, which operate within the protocols of their host organisation. Trust and credibility both within and outside of the organisation are argued to be essential to the effectiveness of this form of the institution.⁸² The tensions that arise as a result of this approach is argued to manifest themselves in the everyday operations of ombud offices, as is the case in the City of Cape Town municipal ombud, and many other offices surveyed during this study.

The legislative foundations of the ombud institution, in terms of the classical and organisational ombud, arguably constitute the cornerstones of its success and effectiveness. Whether in the form of a policy, By-law or Act, appropriate legislation defines the parameters and scope of the ombud operation, and outlines its powers and terms of reference. Legislating for an ombud affords the institution durability and clarity (clear standards of operation) and is a testimony to the political will to establish these oversight mechanisms in the correct and appropriate manner.

The institution would, through appropriate legislative foundations and frameworks, be afforded a greater level of independence and immunity from organisation or departmental restructuring (which, in the South African context, frequently occurs) and other internal dynamics unique to state institutions, particularly local government. Additionally, for the organisational ombud, the institution would not have to constantly rely on definition by the host organisation and the organisational executive.

Thus, legislation needs to be developed that accommodates for and upholds the distinct uniqueness of the ombud institution. The necessary understanding of the two forms of the institution is important to this process. The dichotomy that exists in this practice is found in the organisational and classical form of the institution.

⁷⁹ The terms of reference for the ombud for the City of Cape Town were drafted to incorporate those of the classical ombud. The Public Protector is an example of a classical ombud institution by virtue of it reporting to parliament and being legislatively established as a body fully independent from the executive

⁸⁰ 1978

⁸¹ Reference is made to the IOI and the IOA

⁸² The Ombudsman Association, 2004

It is understood that as a disjuncture from the classical ombud, the organisational form of the institution is established by the organisations they oversee.⁸³ Depending on the municipal organisations themselves, municipal ombud will experience and will be expected to operate optimally within an environment characterised by extremely diverse dynamics that take root in the political nature of local government. Municipalities are also creatures of statute. They incorporate corporate, organisational and state-institutional characteristics. The boundaries between politics and administration are blurred, with party-politics often influencing employee selection (particularly at higher levels of the organisation), and decisions taken by the administrative executive members. These dynamics influence where the organisational ombud is located within the organisation, and affects the institution's ability to constructively engage in higher level interaction and investigations.

The Organisational Ombud

The organisational ombud is generally classified as 'a confidential and informal information resource, communications channel, complaints-handler and dispute resolver, and a person who helps an organisation work for change'.⁸⁴ The primary purposes of the organisational ombud are to 'foster values and 'decent' behaviour such as fairness, equity, justice, equality of opportunity and respect'.⁸⁵

The general understanding of the ombud is that this office should represent the interests of beneficiaries in instances of rights violations where citizens are powerless against the monolithic bureaucratic institutions involved in such violations. Rowe defines the role of the organisational ombud more broadly and states that these offices 'will be especially concerned with ... those who are less powerful than others in a given situation'.⁸⁶ Furthermore, the organisational ombud is:

"a designated neutral within an organisation and usually reports at...the top of that organisation...Both the designation of the neutrality and direct access to the Chief Executive Officer (of the organisation) help to preserve the independence and contribute to the effectiveness of ombud people..."⁸⁷

83 The Ombudsman Association, 2004

84 M. P Rowe, Options, Functions and Skills (USA, TOA, 1995), 2

85 Rowe, 2

86 Rowe, 2

87 Rowe, 2

As is commonly acknowledged by the collective ombud practice, the aspect of independence is a key factor to the effective operation of the ombud. The issues typically dealt with by the ombud are often contentious, and parties involved each desire that their best interests or views are reflected in the outcomes. Therefore, during the processes of its operation, bias is a quality the ombud representative can ill afford if it intends to maintain its credibility with its beneficiaries as well as with their host organisations.

In summary, the organisational ombud has been introduced 'to promote fair processes within an organisation'.⁸⁸ This concept of the organisational ombud is relatively new to local government in South Africa, and there are only two offices of this nature that currently operates – one in the EThekweni Municipality, the other, in the City of Cape Town.

The concept takes root in North America and Canada, where a particular focus on the university ombud has developed. The theory on the organisational ombud thus predominantly emanates from this region.⁸⁹ In respect of the organisational ombud, the result of the existing focus translates that the basic theoretic foundations of the organisational ombud have been developed in consideration of the contexts of organisations other than local government.

A point of concern here is that no critical engagement has taken place with respect to the requirements for the effective establishment of a local government organisation ombud, in the South African context or otherwise, or of the grounding theory that has given rise to the concept of the organisational ombud.

The origin of the concept of the organisational ombud: a matter for critical engagement

The concept of the organisational ombud originated around the late 1970s in the United States.⁹⁰ Their establishment was based on the premise that the classical ombud, the earliest records of which date back to the 1800's, was purely and distinctively designed to oversee classical state functions.

The theory proposes the evolution of the state. This philosophy relates that modernisation has resulted in the transformation and evolution of our society, which has resulted in a reciprocal evolution of the

⁸⁸ The Ombudsman Association, Lecture Series (USA, 2004)

⁸⁹ Rowe, 2

⁹⁰ Reif in The Ombudsman Association, Lecture Series (USA, 2004)

structure of the state.⁹¹ The very nature of bureaucracies is stated to have faced a forced renewal due to the dynamics of a changing society. Ideas underpinned by globalisation feature strongly in this rationale: it projects that the growing private sector, accompanied by a culture of gross consumerism, has affected the way the state and its agencies operate. This approach is similarly a key component of neo-liberalism, which sees the state as fundamentally inefficient in delivering public services.⁹² This neo-liberal approach has various implications for local government (as captured in various World Bank Reports⁹³) and includes the view of a City as ‘not a community, but a conglomerate of firms, institutions, organisations and individuals with contractual agreements among them.’⁹⁴

The neo-liberal take on local government is further expanded by Van Niekerk, who states that

*“the vision for local government is a municipality where...local government is redefined into a ‘core’ administrative municipality...which regulates service delivery...[furthermore, there exists] a particular understanding of [the role of local government that] ...is often reduced to creating an environment for small business to develop in and for capitalists in general to operate with few restrictions...Service delivery is commercialised through...turning citizens into consumers who have a commercial [or] business relationship with the service provider...”*⁹⁵

The approach similarly projected by The Ombudsman Association (TOA) is of citizens as the consumer of state products. According to the TOA, with an increased awareness of consumer rights, government and even private sector service providers find themselves under growing pressure to institutionalise a system that caters for the growing trend of consumer-rights culture. The various oversight mechanisms thus established are underpinned by these varying philosophies, and aim to promote consumer satisfaction in the case of grievances.⁹⁶

Concerns arise when considering the differences between the ‘consumer’, who by default are ‘customers’ who can afford to pay for higher levels of services, and who are offered their consumer rights in terms of

91 The Ombudsman Association, Lecture Series (USA, 2004)

92 S Van Niekerk, “Developmental Local Government” (2000). Paper delivered to the Conference of the National Association of Democratic Lawyers (NADEL) [Electronic] Available at <www.cosatu.org.za/samwu/sandra1.html> Accessed on 01 June 2008]

93 Van Niekerk, 2000

94 Van Niekerk, 2000

95 Van Niekerk, 2000

96 The neo-liberal philosophy and approach is reflected by The International Ombudsman Association, formerly known as The Ombudsman Association, or the TOA. This philosophy is further contained in publications used in the TOA course on organizational Ombudsing, held in 2004. We currently see the proliferation of both private and public sector ombud including the Consumer Protector, the various Banking Ombud, and organizational ombud such as university and even local government ombud.

neo-liberal theory; and the citizen, who in the South African context, are socio-economically stratified and experience varying degrees of affluence on the one hand, and poverty on the other. The polarised socio-economic situation of Cape Town and South Africa in general, is evident through a range of observable factors that are indicated by polarised per capita income, disparate levels of literacy and education, etc.

According to studies:

“The unequal income distribution between the households in different population groups in the City of Cape Town, as is the case nationally, can be ascribed to a variety of factors. These include:

- i. The unequal distribution of skill and education levels between population groups;
- ii. The higher incidence of unemployment and informal sector employment among previously disadvantaged individuals (which in turn is partially due to point (i) above), and differences in household sizes and dependency burdens among population groups;
- iii. Poverty levels remain high in the City of Cape Town with 26% of the respondents of the household survey recording below subsistence income levels...⁹⁷

These factors directly affect the level of access to services by citizens and delineate the special service needs of these populations. The fundamental rights of relevance in these cases are citizens’ rights to equality and to the equal benefit of the law.⁹⁸ In ensuring administrative justice, these rights cannot be overlooked, as turning a blind eye to social contexts of human rights only perpetuate the existing skewed social and economic outcomes and support the status quo. The fundamental problem with the neo-liberal approach is that a very large proportion of the population in the City of Cape Town cannot even afford basic services. If citizen rights were equated with ‘consumer rights’ a large proportion of the population would be denied access to their rights (which is essentially commoditised by the neo liberal approach) because these members simply cannot afford to pay for them. Essential services, for the purposes of this argument, are viewed as basic rights.

In the organisational ombud’s ascription to the principles of neo-liberalism, mechanisms established accordingly would fail to meet the needs of the poorest citizens, who would be marginalised by the system. If there are no policies that address or convey an understanding of the inability of citizens to ‘pay’

⁹⁷ Graham Gotz, Kevin Allen, Kirsten Harrison, State of the Cities Report (South Africa, South African Cities Network, 2004)

⁹⁸ Section 9 of the Constitution of the Republic of South Africa.

to access their service rights, the ombud would fall short of the institutions purpose and intention of protecting the rights of citizens against their arbitrary or unjust violation.

In order to establish a theoretical foundation for the municipal ombud that is appropriate to the local context, it is important to make a clear and unequivocal distinction between ‘consumer rights’, and citizen rights. The absence of this distinction constitutes the fundamental problem with the ideological underpinnings of the organisational ombud as it currently stands, particularly in respect of an organisation such as the South African Local Government.

The problem with this philosophy is that it fails to appropriately capture the idea of human rights in relation to the concept of developmental local government. In the context of South African Local government that still strives to shed the legacies of apartheid, such as the prevailing sexism, racism, and substantive inequality, the current grounding philosophies are silent with respect to these crucial issues and how an institution such as an ombud should effectively capture and deal with these through their objectives and *modus operandi*.

Furthermore, in respect of the neo-liberal approach, while the ombud is generally seen as ‘putting out the fires’ in the case of grievances, the words of Alex Cary appropriately captures the dilemma when he stated that:

“The 20th century has been characterised by three developments of great political importance: The growth of democracy, the growth of corporate power, and the growth of corporate propaganda as a means of protecting corporate power against democracy...”⁹⁹

The purpose of the ombud as a ‘representative of the powerless’ is thus abandoned, and the criteria for the ombud’s independence are further violated. The result is an inevitable dilution of the concept of ‘ombudsing’. It is therefore argued that the organisational ombud should maintain its independence and human rights approach. It should further avoid its dilution through becoming a mouthpiece or public relations (PR) unit for the organisation. Further, on the neo-liberal approach, a larger emphasis is placed on the level of access to service information:

⁹⁹ Alex Carey, Australian social scientist. Quote available on <http://www.wisdomquotes.com/cat_human_rights.html> [Accessed on 26 February 2008]

*“The organisational ombud institution typically supports its constituencies and the organisation through providing advice to visitors on how the system works and how they can best access it. They provide visitors with information which enable them to go directly to the people who can best address their concern”.*¹⁰⁰

It is important to note that in the context of an administration that previously operated in secrecy and that had been distanced from the citizenry, providing access to information and promoting transparency is a basic right of citizens. Access to information thus forms a crucial part of citizen empowerment. However, this role should not form the core of ombud activities as this may lead to a reduction of the organisational ombud to that of a conduit, a means to an end other than that of the broad and necessary protector of citizen rights or stalwart of just administrative action.

This form of dilution of the concept of ombudising further leads to criticism of the ideological underpinnings of the organisational ombud. The construction of the organisational ombud, according to this ideology, renders an instrument that merely imposes the globalisation agenda and is intended to mitigate the affects of this on citizens. For example, when citizens’ rights are subordinated to the interests of business or other institutional forces, and the Office is used to “put out the fires” arising from a citizen initiated dispute. The impact of the organisational ombud would thus be diminished in that while providing a listening ear, the organisational ombud would essentially offer no real change to the circumstance of the citizen.

Practitioners are thus cautioned about the pitfalls in failing to critically engage with (i) the context within which one sets out to establish a municipal ombud; (ii) the criteria for the office’s effective establishment and (iii) the actual processes and outcomes involved in the daily operations of the office. While the level of engagement of the ombud may vary according to the beneficiary’s and host organisation’s needs, the local government ombud operates within a distinct socio-political environment and is still subject to broader Constitutional and other national legislative imperatives.

It is re-iterated that the organisational ombud should reflect the democratic principles it serves. In the context of the City of Cape Town, the organisation takes a developmental approach in alignment to its democratic values. As a monitoring agent of these values, it serves the greater purpose to understand what

100 The Ombudsman Association, 2004

this approach entails. Van Niekerk gives insight into the concept of developmental local government in juxtaposition to the neo-liberal idea of local government:

“The developmental role of local government must be about alleviating poverty, reducing inequalities in communities, and providing a reasonable standard and quantity of service that will have positive health, environmental, [and] social spin-offs in the community...”¹⁰¹

Developmental local government has a specific role to play within a democratic state such as South Africa. According to Van Niekerk:

“Part of the developmental role of local government is to build participative democracy, and encourage community participation. Since local government is the most direct interface between the government and the community, it should be the best location for the development of grassroots, participative, deep-rooted democracy...”¹⁰²

Van Niekerk cites the key democratic principles to include:

- i. Maximum direct participation of the people;
- ii. Accountability with continuous social auditing of performance; and
- iii. An emphasis on transparency with the right to information and openness of all documents.

The key democratic principles as mentioned above should thus ideally be included in the indicators for the municipality, as well as for the ombud.

101 Van Niekerk, 2000

102 Van Niekerk, 2000

Democracy and Constitutionalism

Democracy is generally associated with freedom, a better way or quality of life for citizens, and accountability of the state, its agents and institutions to citizens.¹⁰³ Schmitter and Karl discusses the relationship between accountability and democracy, and states that:

“Modern political democracy is a system of governance in which rulers are held accountable for their actions in the public realm by citizens...”¹⁰⁴

Accountability is therefore closely linked to democracy, and the political legitimacy of those who are accountable to the citizenry correspondingly increases with the level accountability.

While academics agree that democracy is an ambiguous term, there have been many common denominators evident in the various forms of democracy.¹⁰⁵ While not unique to democracies (in relation to any other dispensation), one such commonality is the importance of legitimacy to the ability to maintain “power” and “authority”. To those who are “in power”, political legitimacy is keenly sought as vital in maintaining such “power” and “authority”. Heng puts forward that on a growing global scale, democracy is emerging as the only enduring source of political legitimacy.¹⁰⁶ It is therefore not surprising that politicians would opt to nurture (or at least seem to be in support of) a democracy. Schmitter supports these ideas in stating that:

“Politicians with a wide range of convictions and practices [strive] to appropriate the label [of being democratic] and attach it to their actions...”¹⁰⁷

South Africa is no exception, with a strong commitment to democracy signified by, as it stands, one of the most progressive and democratic Constitutions in the world. Russell contests that the development of codes of fundamental human rights since the Second World War has prompted many states to include

103 Philippe C. Schmitter, “The Ambiguous Virtues of Accountability”, *Journal of Democracy*, 15.4 (October 2004): 47-60

104 Schmitter, 47-60

105 Schmitter, 47-60

106 Heng (date and page unknown)

107 Schmitter, 75

(democratic) rights in their domestic constitutions in order to ingratiate themselves with the international community.¹⁰⁸

What then is the litmus test of democracies and their commitment to democratic constitutionalism? Democracy loosely translated means 'rule by the people', or 'rule which involves all citizens in a community'.¹⁰⁹ This sentiment implies that within democratic societies, government is limited. Yet, it has been juxtaposed that a country may have a constitution, but may not necessarily enjoy constitutionalism.¹¹⁰

Russell proposes that 'Constitutionalism is a political condition in which the constitution functions as an effective and significant limit on government...and those who govern are constrained by its terms'.¹¹¹

Following this position, Constitutionalism is associated with checks and balances to state power. To expand on the requirements for constitutionalism, Hardin further states that;

*"The reality of constitutionalism depends on whether there are... [bodies]...genuinely independent of the government of the day [and] powerful enough to insist on the government's observance of constitutional limits..."*¹¹²

This view is relevant in any constitutional democracy. Essentially, the provisions for effective oversight mechanisms and the extent to which state institutions support and facilitate the establishment of these mechanisms indicates the level of commitment and political will that rests behind the states efforts to promote constitutionalism and ultimately democracy itself.

Furthermore, the United Nations (UN) holds that the concept of democracy 'will only assume true and dynamic significance when policies and national legislation... reflect equitable regard for the interests and aptitudes of both halves of the population.'¹¹³

108 R. Hardin, *Liberalism, Constitutionalism and Democracy*. (Oxford, Oxford University Press, 1999). Page unknown

109 Alexander Johnson, Kenneth Christie, Mervyn Frost, Jeremy Grest, *Politics: A Beginners Guide*. (Juta & Company Ltd: Kenwyn, 1997), 2

110 Hardin, page unknown

111 Hardin, page unknown

112 Hardin, page unknown

113 The United Nations in Colleen Lowe Morna & Susan Tolmay, Eds. *At the Coalface: Gender and Local Government in Southern Africa*. (Southern Africa, Gender Links, 2007),

According to Lowe Morna and Tolmay, the governance discourse emphasises that democracy is not just about representation. It is about participation and citizenship that empowers people to hold those who make decisions and those who implement these decisions more accountable.¹¹⁴ In a democracy then, both men and women should be afforded the necessary measures for and levels of empowerment that will ensure the equal ability and opportunities to hold democratic institutions of the state accountable.

In view of this, a gendered approach cannot be precluded from the institutionalisation of human rights and the prevention of the state abuse of power. In the vertical application of human rights, the consideration that the rights of women are subverted through patriarchy and the resultant skewed distribution of resources should not be omitted. Furthermore, women face greater institutional oppression as a result of their prejudicial treatment by service providers. In addressing violations, a sensitivity to gender dynamics within government and society is crucial, and is in accordance to International and National legal frameworks that prohibit discrimination.

The concepts, such as the organisational and classical ombud, accountability, independence, credibility, democracy and constitutionalism, and their close relationships with one another, have been defined in greater detail, and the foundations for the study are hence laid.

Structure of the Thesis

Chapter 1 provides an overview of key arguments of the study. It presents the purpose and objectives, and highlights the central questions to the study. In defining key concepts, the chapter explores the notions of democracy, constitutionalism and human rights, which provide the scaffolding for the exploration into the effectiveness of the municipal ombud. The chapter briefly introduces Chapter Nine institutions and overviews the historical development of the ombud institution. The chapter introduces the dichotomy in the ombud practice, i.e. the organisational and classical ombud, and highlights key ideological approaches to the organisational form of ombudsing.

Chapter 2 deals with the significance of the ombud institution to the public policy arena and the linkages between these concepts and public management.

Chapter 3 discusses the research methodology underpinning the study.

Chapter 4 focuses on the ombud in South Africa and presents the Case Study of the Ombudsman for the City of Cape Town

¹¹⁴ Lowe Morna & Tolmay. 27

Chapter 5 presents the Findings and Analysis, and **Chapter 6** presents the concluding chapter to the study.

Annexure include media articles related to the case study, as well as documents of the international umbrella bodies that detail the standards of practice and code of ethics for all member ombud institutions.

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CHAPTER TWO

The significance of the ombud institution to public policy and the linkages between these concepts and public management

According to Parsons, there are many philosophical, ethical, normative and methodological frameworks for the analysis of public policy.¹¹⁵ Machiavelli believed that in analysing policy, it was important to understand how power worked, and that through this knowledge and the proper interpretation of good quality information, it was possible to make general conclusions about the influence of policy on institutions and structures.¹¹⁶ His idea of policy 'was embedded in the idea that it was possible to acquire knowledge to make better policy'.¹¹⁷ This study is in keeping with Machiavelli's notion through its analysis of the political dispensation, and the focus on decision-making structures and how decisions and policies impact the structure and institution of the ombud. The latter is shown to be directly and indirectly dependent on the policies made by legislative structures.

A close proximate of Machiavelli's notion is that of Francis Bacon, who held that 'policy was the use of knowledge for the purposes of governance'.¹¹⁸ In accordance with this idea, the theories propounded throughout this study aims to inform and assist in enhancing governance processes, and are aimed at both a policy and public management level. It is through Bacon's notion itself that the linkage between policy and public management (governance) is made, where good governance, for example, is a product of good policy. Since the rule of law and access to justice form part of good governance, the ombud, as an instrument for achieving the rule of law and access to justice, is therefore an instrument of (good) governance, and stand to benefit directly from appropriate and good policies.

To re-iterate Machiavelli, it is policy that ultimately influences the structure of institutions. Chapter Nines and other oversight institutions such as the ombud are not precluded from this provision.

115 W. Parsons, *Public Policy*. (Cheltenham, Cheltenham Publishers, 1995), 41

116 Parsons on Machiavelli, 41

117 Parsons, 42

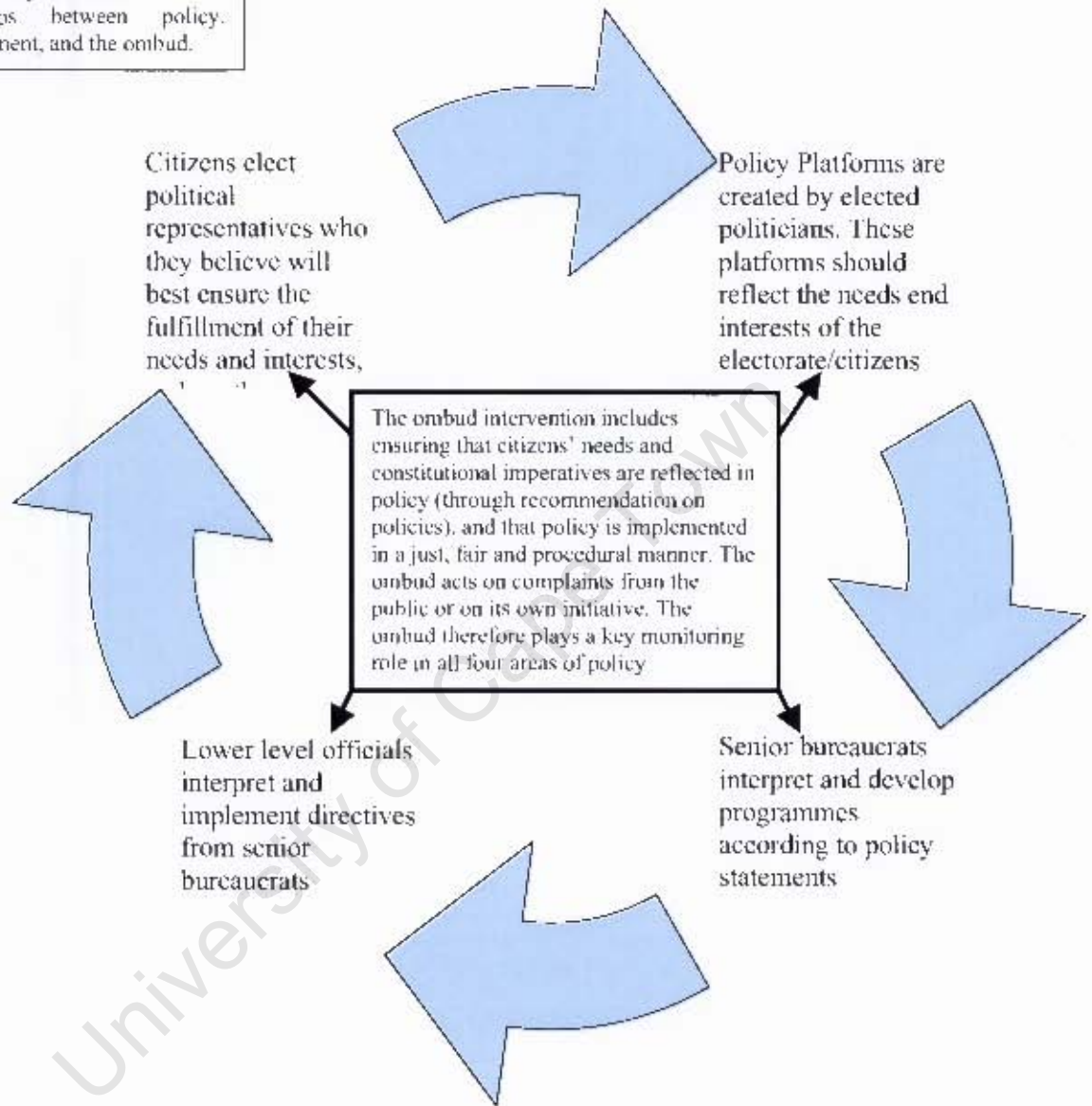
118 Parsons on Bacon, 43

In exploring the relationship between public policy, public management and the institutions of oversight, reference is made to the 'stages model' of public policy. While this model has been criticized as being too simplistic for the required level of analysis of policy, the model will suffice in illustrating the relationship between relevant concepts. According to the stages model:

*“Policy emerges from the interrelationships between intentions and actions of political participants. Citizens elect politicians to carry out policy platforms. Politicians create programmes for bureaucrats to implement. Senior bureaucrats order lower level officials to carry out policy decisions”.*¹¹⁹

¹¹⁹ P. John, *Analysing Public Policy*. (London, Continuum, 1998), 22

Diagram 2. Representation of the interrelationships between policy, public management, and the ombud.



Public policy incorporates the entire process, but more importantly entails the creation of policies and programmes for bureaucratic implementation. Public management is concerned with 'optimally utilising resources in an inventive and cost effective manner in an attempt to address the multitude of needs that exist.'¹²⁰ Both disciplines of public policy and public management need to be approached from the perspective that 'public institutions are increasingly functioning within a complex and rapidly changing

¹²⁰ Allen Jonker, 'Challenges and Imperatives Facing Modern Government' in Van Niekerk, Van Der Waldt & Jonker, *Governance, Politics and Policy in South Africa*, (Oxford: Oxford University Press, 2007), 24'

environment.’¹²¹ Given this context, it is argued that ‘poor performance in service delivery emphasises the need for policy makers to attend to policy issues, and not to focus as strongly on bureaucratic structures and service delivery mechanisms’.¹²² However, this notion leaves a gap in that the insurance of effective implementation cannot always be provided by senior bureaucrats. This gap allows for room for manipulation and the abuse of authority. The ombud acts as a mechanism to fill this gap by feeding into both policy and public management processes, while maintaining constructive interaction with citizens.

By integrating the existing body of knowledge and theories on public policy, public management and the ombud institution, clear linkages between the concepts become evident that essentially supports this study and locates it as an overlap across the various disciplines.

121 Jonker, 255

122 Jonker, 255

CHAPTER THREE

Research Methodology

Introduction

The study is grounded in current theories on human rights, democracy and constitutionalism in the South African context and examines the legislative frameworks relevant to the topic. As such, the evaluation of the institution is set against the backdrop of the South African human rights legislative framework, which includes the Constitution, as well as current theoretic frameworks grounding the ombud practice.

The Case Study Approach and Design

As a research strategy, the case study is used in a range of disciplines, including policy, political science, and public administration. According to Schramm (1971):

*“The essence of a case study [and] the central tendency among all types of case study, is that it tries to illuminate a decision or set of decisions, why they were taken and with what result.”*¹²³

The link with public policy is again made in the definition of the research process and fortifies the relevance of the study to public policy. To further clarify the trajectory of the study in the context of the above definition, while the research questions highlight an assessment of the effectiveness of the ombud, the factors upon which such effectiveness is directly dependent includes decisions and policies underpinning the structure and functioning of the ombud. These factors are brought to the fore through the case study.

There are difficulties involved in the constructing case studies, however. The development of a research design involving case studies is asserted to be a difficult process. Yin states that ‘unlike other research strategies, a comprehensive “catalogue” of research designs for case studies has yet to be developed’.¹²⁴ Furthermore, case study research designs have not been codified.¹²⁵

However, the aims of the research were clear, which aided in the process. The research methodology employed was required to provide a framework to determine:

¹²³ Schramm in Robert K. Yin, *Case Study Research: Design and Methods* (2nd ed.) (Beverly Hills CA, Sage Publishing, 1994), 12

¹²⁴ Yin, 18

¹²⁵ Yin, 19

- i. What the criteria for effective municipal 'ombudsing' are; and
- ii. Whether the criteria for effective municipal 'ombudsing' are currently being met by the existing municipal ombud office for the City of Cape Town.

The study therefore incorporated both a case study, and interviews, the latter of which is aimed at supporting the case study method. The interviews, as an enhancement of the primary case study method, serves to strengthen the process.

The case study, as a research method, was chosen in this study because it has the potential to contribute to our knowledge of individual, organisational, social and political phenomena.¹²⁶ It further allows investigations that 'retain the holistic and meaningful characteristics of real life events, such as...organisational and managerial processes...'¹²⁷

These aspects play an important role in the ombud environment, and the relevance of this method is thus established. The case study is a preferred method in examining contemporary events, when the relevant behaviours cannot be manipulated. It employs direct observation as well as systematic interviewing.¹²⁸

Participant Observation

Issues of impartiality, objectivity and editing rights are important considerations when establishing the role of the researcher. The role of 'participant-observer' was assumed by the researcher when a discussion with the researcher's employer, the City Ombudsman, yielded an agreement that the research be conducted on the ombud office, with an understanding that the process would enable an expansion of the knowledge base on the organisational ombud, while simultaneously acknowledging that the study would be submitted towards the formal academic development of the researcher.

Thus, the period from 2002 to 2005, which comprised the employment period of the researcher with the ombud office, yielded the highest level of access to the relevant information. The reason for this is that observation without participation would have inhibited people who did not know the motivations of the case-study worker.

¹²⁶ Yin, 2

¹²⁷ Yin, 3

¹²⁸ Yin, 8

While the study incorporates an evaluation of the ombud practices, in evaluation research, there are at least five applications of the case study method:

- i. To explain the causal links in real life interventions that are too complex for other strategies such as survey or experimental strategies;
- ii. To describe the real-life intervention and the context in which it occurred;
- iii. To illustrate, in a descriptive mode, certain topics within an evaluation;
- iv. To explore situations in which the intervention being evaluated has no clear, single sets of outcomes; and
- v. To develop a meta-evaluation (a study of an evaluation study).¹²⁹

In respect of the above, the aims of the case study method employed in this paper include:

- i. To illustrate, in a descriptive mode, certain topics within an evaluation; and
- ii. To explore situations in which the intervention being evaluated has no clear, single sets of outcomes.

As such, the paper includes a critical look at factors determining and impacting the effectiveness of the municipal ombud, such as independence and accountability by firstly, defining what these are, and secondly, assessing the extent to which they are demonstrated in the case study.

Supporting Research: Surveys and Interviews

The Target Population

The study aimed at developing a 360° evaluation of the ombud office. This entailed analysing the impact of the office on citizens and staff members of the municipality, from a perspective of management, internal staff members to the ombud office, and 'peer' officials from within other line departments. As part of the 360° degree evaluation of the effectiveness of the office, survey questionnaires were distributed to councilors, line departments, as well as to members of the public.

¹²⁹ Yin, 15

A media survey is incorporated to highlight trends within the country and municipality in relation to oversight, and the Ombudsman for the City of Cape Town, more specifically. Through the media survey, expectations and perceptions of the municipal ombud are evident, and the political and policy environment relevant to the ombud at both national and local levels are observable and noteworthy.

Data and Information Collection

Primary data and information have been accumulated over the researcher's three year period of employment within the ombud office for the City of Cape Town. Presentation papers and speeches of the executive members of the municipality involved in the study have additionally been consulted.

Post 2005, the head and staff of the ombud institution have been interviewed in order to get insight into their current practical experiences in relation to the topic.

Statistical information of case work by the institution involved in the study, as documented by the institution itself, is analysed, and covers areas of citizen satisfaction, recommendations implemented/not implemented, reasons for non-implementation, the time it takes to conclude a case, as well as the kinds of matters dealt with and not dealt with. This provides a base-line for the micro-evaluation of the institution.

Academic and professional accounts of leading ombud practitioners and academics affiliated to the International Ombudsman Institute (IOI), and the International Ombudsman Association (IOA), such as Giddings, Gregory, Reif, and Rowe, as well as presentation papers by members of the African Ombudsman Association, provides additional base line and supporting information on the ombud practice.

Interviews

The study includes the use of secondary sources, including data collected through interviews with municipal executives and officials, and reports of the City of Cape Town ombud office. Interviews with City officials on operational and management levels were incorporated into the study to strengthen the research process. The questionnaire used contained both open-ended and close-ended questions, which allowed for a focused response to questions, while providing space for the participants to express their experiences where a deeper insight of these was required.

The researcher further audited the IDP processes of the City of Cape Town, and through this process, conducted citizen surveys during four (4) IDP meetings across Cape Town, which included the areas of Mitchell's Plain, Khayalitsha, Goodwood, Bellville. Community members of Maitland and Kensington

were further surveyed. The objective of the process was gauge citizen's experiences with the City Ombudsman's Office. The sample was comprised of a specific population of people who attended the IDP meetings. However, due to the limited sample population, the sample is unrepresentative in that it only covers individuals who demonstrated an interest in holding local government accountable. Furthermore, of the seventy-five (75) surveys that were conducted in total, 88% of the sample population had not heard of the Ombudsman's Office for the City of Cape Town. This rendered most of the remaining questions, which were based on the possible experiences of citizens with the office, either superfluous or obsolete. It is however interesting to note that even citizens motivated and knowledgeable enough to attend IDP meetings mostly have not heard of the ombud for the City of Cape Town. However, due to the limited size of the population, the results have very low generalisability.

Data Analysis, Validation and Reporting

The data analysis process involved in this study included the systematic comparison of findings on the topic that had been generated by different research methods and data sources. These processes of data and methodological triangulation were incorporated to ensure methodological rigour. The usage of a multi-method research design was thus complemented by the exploration of different data sources, and the resultant comparison of data derived from the different methods served to deepen and extend the analysis. Validation was thus pursued through triangulation.¹³⁰

The study will be availed to executive members of the City of Cape Town, as well as to the Ombudsman's Office for the City of Cape Town. A copy will further be provided to the IOI, and IOA, in the hope of enhancing perspectives on ombudsing from the African continent.

Linking Data to Propositions and criteria for interpreting findings

Linking data to propositions can be done in a number of ways, but Yin asserts that none of these ways have been precisely defined. In an attempt to make the relevant linkages, the study attempts to incorporate "pattern-matching", through which several pieces of information from the case are related to the theoretical propositions.¹³¹ Thus, perception surveys included in interviews conducted with staff and management were used to determine the perceived 'independence', 'accountability' and overall usefulness of the ombud office, in relation to the theoretical propositions of the study.

130 Michael Bloor, & Fiona Wood, *Keywords in Qualitative Methods: A vocabulary of research concepts*. (London, Sage Publications, 2001), 170-172

131 Campbell in Yin, 25

Limitation of the Study

While the researcher's employment in the ombud office facilitated greater access to the relevant policy documents of the municipality and the ombud office, it also presented certain limitations to the ability to be entirely detracted from the issues raised. Once the researcher resigned her position within the ombud office, the space for objective and critical engagement with the issue was established.

Further limitations to the study included:

- i. A lack of a broad selection of more critical secondary sources on the topic of 'ombudsing', as most of the literature is descriptive rather than analytical;
- ii. The possibility that adequate and accurate appraisals of experiences were not always given in interviews with ombud staff;
- iii. Once the researcher ended her employment with the ombud office and a significant amount of time lapsed before actual interviews with the ombud representatives took place, it became more difficult to access more sensitive information; and
- iv. Low generalisability of the citizen survey, and the limited knowledge and awareness of citizens on the ombud office.

In spite of these limitations, the most relevant data was available and in the process of triangulation, contradictions were eliminated. These, as well as the regular monitoring of the ombud activities allowed for the development of a defensible response to the research questions.

Significance of the Study

On a macro-level, the results from the research enhance the knowledge base on the ombud practice, particularly the municipal ombud, in the midst of the search for the most relevant form of the institution applicable to local government. It provides perspectives from members within the ombud office, staff and officials within the municipality, executive members of the municipality, as well as beneficiaries of the service, namely citizens. This approach thus ensured a non-biased approach to addressing pertinent challenges to the effective functioning of the institution.

On the micro-level, the study provides an evaluation of one of the two existing municipal ombud offices in South Africa, with a view to shedding light on the challenges and problems that the institution faces from political and administrative spheres.

Summary

The study incorporates data and methodological triangulation for the achievement of methodological rigour. Whereas the case study is viewed as the primary research method, this is supported through the use of interviews. This study is intended to enhance the current knowledge base on the ombud practice, particularly on the municipal ombud, in the midst of debates on the various forms of the institution most applicable to the local government setting and ombud practice.

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CHAPTER FOUR

The Case Study: The City Ombudsman for the City of Cape Town

There are currently two local government ombud institutions in South Africa. These offices are relatively new Offices, both to local government in South Africa, as well as to the global institutional practice of the ombud. They pose as tools to enhance transparency and accountability within local government, and further present effective checks and balances that ensure the protection of citizens' rights against any arbitrary and abusive action by the administration at the coal-face of government. The usefulness and necessity of such protection mechanisms within state institutions is undeniable, but how effective is this office in reality, and is it operating efficiently, and according to its intended purpose? The case study of the City of Cape Town ombud office is intended to provide the answer to this, as well as many other salient questions put forward in this paper.

Establishment

The proposal for a 'Public Complaints Commissioner' was tabled by the Office of the City Manager in 2002.¹³² The proposal was tabled for the decision of the full council, but due to the anticipated dissent by the opposition party (the ANC at the time), the matter was determined as being for decision by the Executive Committee (EXCO) of the Council, then largely comprised of the leading DA party. Many recommendations contained in the original proposal did not enjoy approval at the time. These include the following:

- i. That the Complaints Commissioner be of assistance to WECLOGO and other local authorities;
- ii. That the Complaints Commissioner report to the Mayor and Council; and
- iii. That the Complaints Commissioner submits a six (6) monthly report to the full Council on the working of the office.

These recommendations displayed a vision for the office that would promote its efficacy and viability in the region, as well as its credibility, both inside and outside of the organisation through structural and functional independence from the ordinary line functions and administrative management of the municipality. None of these were however approved, and no reasons were found on the rejection of these recommendations at the time, neither were they revisited in subsequent years, or even at present.

132 The documented history of the establishment of the Office as cited in the minutes of the Executive Committee of Council at the time, reference: EXCO 29/05/02

The City Manager was authorised to establish the Office. Furthermore, the Office had been positioned to primarily report to the City Manager.

The 'policy' to establish the ombud office, referred to in the early policy documents as the 'Public Complaints Commissioner', was aimed at 'supporting the Council's pledge of being a well-run, corruption-free City. It aimed at establishing 'an independent Office with the power to deal with complaints against the administration'.¹³³ Based on interviews with the current organisational management of the City of Cape Town, this idea is still ascribed to.¹³⁴

Background

The Office of the Ombudsman was in existence since the late 1990's. In 2000, the municipal manager was requested to submit a report on the status of the office. Upon the submission of this report in 2001, Dr. Donald Craythorne was commissioned to formulate a policy for the establishment of a city-wide Public Protector. A report with recommendations on its establishment, as well as a draft by-law, was submitted in March 2001, but soon after this, the national Public Protector established a regional office for the Western Cape. This created the threat for potential conflict and the need arose to clarify the functions of the regional national Public Protector and its potential impact on the City's proposals.

It is important to note that there still currently exists a lack of understanding of the City Ombudsman's Office on behalf of the national office. The By-law was never passed and the only legal foundation for the Office is a Council resolution passed in 2000. It is important to note that Council resolutions are easily rescinded. Therefore, for an office of this nature to rely on a resolution poses questions on the level of commitment and indeed political will behind the office's establishment.

Political Support

During the lifespan of the ombud office, the host organisation experienced numerous waves of political changes accompanied by changes in organisational leadership structures. The responsibility for the ombud office was initially viewed to be within the ambit of the City Manager, as the previous discussion of the founding documents of the office illustrates. There were four (4) different individuals in the

¹³³ Dr. Donald Craythorne as cited in the minutes of the Executive Committee of Council at the time, reference: EXCO 29/05/02

¹³⁴ Achmat Ebrahim, City Manager for the City of Cape Town (Interview, 23-10-2007)

position of City Manager between 2000 and 2005. The City Manager and administrative champion for the ombud office in 2000 had a very good understanding of the requirements of the office.¹³⁵

The employment of a new City Manager resulting from the change in dispensation of Council ushered in a movement of the ombud office from within the line responsibility of the City Managers office, to that of the Assistant Manager's Office.¹³⁶ This arrangement continued until the ANC regained power, and posed numerous challenges the effectiveness of the office, including those, which impacted the independence of the office, as well as on its access to sufficient resources. It is re-iterated that the Office was staffed with two (2) individuals for quite some time. In relation to the changes in executive management, vital institutional memory had been lost during the change-over periods, resulting in decision-makers having very little knowledge of how the ombud should function, or which institutional arrangements were required for its effective functioning.

From its inception to 2003, the ombud office operated as a conduit of complaints. In 2003, transformation once more engulfed the municipality. The ombud office, then boasting a staff complement of four (4) (in addition to the Ombudsman), acquired one (1) additional member in the process, which brought the total staff complement to six (6). The office was still grossly under-capacitated in comparison to the proposed twenty-four (24) staff members required for a relatively effective structure.

2003 to 2005 presented the greatest challenges to the ombud office. The Office operated within an environment underpinned by nepotism and graft. The ombud office posed a serious threat of exposing those who were involved in these acts, were they to stumble across evidence for this in an investigation. The perceived threat of the ombud office became apparent through the subsequent treatment of the office by the executive members of the organisation. It should be noted that the attitudes and approaches toward the office, and the rules established for the ombud office, had dire effects on the independence and even basic operations of the office.

Independence

The criteria for the independence of the ombud office have been discussed in some detail. Structural changes that were instituted in 2003 left the office questioning its independence, credibility, purpose and

¹³⁵ The City Manager at the time was Andrew Borain, who was subsequently succeeded by Robert Maydon.

¹³⁶ Dr. Stewart Fisher as cited in the minutes of the Executive Committee of Council at the time, reference: EXCO 29/05/02

effectiveness. While the organisational ombud ideally reports to, and is accountable to, the highest decision making body in the municipality, the ombud office was placed within a line function, alongside various other departments, and was required to report to the Executive Management Unit (EMU).

The EMU was set up as an executive directorate, with a reporting line to the City Manager and the Executive Mayor. Directorates falling within the EMU included Collective Bargaining, Governance Integration, etc. These functions entailed crucial municipal processes that required monitoring. The rationale behind the decision was that even though the ombud office promoted advanced principles of democracy, “our democracy was still very young”, and the development of the ombud office was therefore proposed to be approached incrementally.

The proposed structure and conferred status of the ombud office signified the lack of political will behind addressing the need for institutional monitoring and oversight. There was also a lack of commitment to seriously evaluate processes and practices within the organisation in relation to violations of human rights and maladministration. In practical terms, the approach to the office from management echelons manifested itself in the constant denial of additional human and other required resources, as well as a lack of action/ reaction to recommendations by the office on a senior administrative level. Therefore, where recommendations required executive approval or follow up, none were forthcoming, resulting in no real change of the complainant’s situation.

The situation highlights the vulnerability of the ombud to bureaucratic or political interference in the absence of established legal frameworks that provide effectively for the offices existence, structure and functions.

Terms of Reference

Further challenges were posed by the terms of reference for the ombud office. These have been modeled directly from those of the Public Protector and have not been informed by discourses on organisational ombud practices. While some of the provisions were relevant, many of them did not provide for the space for effective oversight in required areas, such as in procedural aspects that deny or impact a citizen’s right, even where these procedures are to be viewed in isolation from actual decisions taken. Understandably, investigations into decisions by Council fell outside the jurisdiction of the ombud, as separate processes and mechanisms of appeal against Council decisions were legislatively provided for.

However, the ambit of the ombud office included investigations into matters that questioned whether decisions had been arrived at in a 'procedurally fair' manner, which in effect supported the appeals process. But the terms of reference did not make a distinction between the procedure and the decision and thus limited the potential role of the ombud in this regard. The terms of reference merely stated that the Council, as a legislative body, and its decisions, may not be investigated by the City ombud.¹³⁷

The terms of reference also provided that the office could investigate Executive Councilors acting individually in respect of their functions and in regard to their delegated powers, outside of decision-making, if the Council so decided. Yet, the office was directed not to investigate councilors. No engagement on this issue was forthcoming and, while contained in the terms of reference, and despite huge numbers of complaints of dereliction of duty and maladministration by councilors, no investigations were undertaken into the action of individual councilors.

Developments on the issue, as of 2005, relate that the ombud could investigate the action of councilors, subject to agreement by the Speaker of Council.

The following has been established to be outside the jurisdiction of the ombud:

- i. Any decision taken by the municipality's political structures (in terms of legislative or executive powers or delegated powers of political office bearers);
- ii. Any decision taken by a Constitutional body (Courts, chapter 9-institutions such as the public Protector, Human Rights Commission, Author-General, etc);
- iii. Conduct of Councilors, except where such investigation is called for by the Speaker of Council;
- iv. Complaints that are vexatious or frivolous;
- v. Complaints relating to municipal financial irregularities (The Internal Audit Unit is the competent oversight body of government spending and public finance management);
- vi. Any matter that must be addressed in accordance with a particular prescribed procedure e.g. appeal procedure;
- vii. Matters that relate to and affect any other spheres of government;
- viii. Matters relating to and affecting other municipalities;

¹³⁷ See <http://www.capetown.gov.za/ombudsman>

- ix. Dispute between private individuals; and
- x. Matters that do not relate to the administration (City of Cape Town municipality) or an employee of the administration.

[As a General Rule the City Ombudsman will investigate complaints against administrative actions, procedures and practices rather than decisions]¹³⁸ The terms of reference has been established as a protection mechanism for the ombud, as well as to provide parameters for its functioning.

Evaluating Investigation Outcomes:

i) The Case of Ms E

Ms. E. approached the Ombudsman's Office for the City of Cape Town in 2004. The complaint related that her neighbour had undertaken building works without her consent. Furthermore, the proposed building extended over the boundaries of her property.

Ms. E. produced the plan according to which the building was undertaken. The building plan had been approved by the City of Cape Town.

Legislation

According to Council policy, no building and development may take place without the consent of effected parties. Building further had to provide for three (3) meters between the dwellings, in the instance of development in a residential area. Furthermore, the National Building Regulations and Building Standards Act No. 103 of 1977 provide that plans may only be approved by an official with the relevant qualifications.¹³⁹

Investigation Outcomes and Recommendations

The building works were found to have deviated from prescribed legislation due to (i) the lack of obtaining consent from parties directly, and (ii) by exceeding the spatial limits between the dwelling of Ms. E. and the proposed boundaries of the developing building. Ms E. had further not been provided the opportunity to object to the building plans, as prescribed by legislation.

Ms. E.'s privacy was a concern, as well as her rights to object to the building by virtue of the violation of her privacy, if the building were to continue as proposed in the building plan. Further, the 'junior official'

138 Available at <http://www.capetown.gov.za/ombudsman>

139 S5 (2) of the National Building Regulations and Building Standards Act No. 103 of 1977

did not have the authority to approve building plans, but was only legislatively mandated to make recommendations regarding the plans. The action of the official, as per the information ceded by the department, was in fact in violation of national legislation that governed the processes concerned.

The matter was taken up by the Ombudsman's Office for the City of Cape Town. The Department's response, provided by the Director, was that the plan was approved by a junior official. The official was recorded to face disciplining as a result of the act of maladministration committed. The Ombudsman's Office further recommended that the Council review the decision to approve the plans, and that building works were halted via a cease-order until the matter had been resolved.

However, the approval for the building was not rescinded, despite (i) the findings of maladministration; (ii) The Department's admission of maladministration; and (iii) despite the building not having progressed at the conclusion of the investigation.

The matter persisted for a period of approx. 7 months, during which time the matter was escalated to the Executive Director and the City Manager, also during which time the building had commenced and was nearly completed. It was also later found that the 'junior official' in fact did not have the necessary qualifications to perform certain duties, but continued to operate as such.

The matter was concluded to the dissatisfaction of the complainant. Problems encountered in the investigation included:

- i. The Executive Director (ED) received private counsel from the Department before entering into discussions with the Ombudsman's Office. The ED was informed that there was no way to address the mistake as the plans had already been approved by Council. The ED was also advised that to remedy the problem would be extremely costly for the department and the City as a whole;
- ii. The ED felt that he was not empowered to sustain or over-rule the recommendations from the Ombudsman's Office;
- iii. The City Manager similarly reported that he was not empowered to sustain or over-rule the recommendations from the Ombudsman's Office due to the implications of the recommendations. A review of the City's decision entailed the costly process of having to go to court as well as having to face negative publicity in the media, in view that the building was completed; and

- iv. If the matter were to end up in court, the Ombudsman's Office would be required to divulge sensitive information in court.

The root causes of problems to the investigation included:

- i. The lack of effective complaints handling processes within the municipality;
- ii. The lack of institutionalised procedures to effectively deal with recommendations from the Ombudsman's Office;
- iii. The lack of effective institutional procedures for dealing with sensitive matters, which includes Ombud's privilege;
- iv. Entrenched maladministration within departments that are normalised due to the lack of effective evaluation and response systems; and
- v. Unofficial organisational culture (this includes bureaucratic stone-walling when a department is found to be guilty of a serious administrative breach).

ii) The Pooke Road Complaint

In 2004, the Ombudsman's Office for the City of Cape Town was approached by the Pooke Road Residents' Association. The complaint related that the entrance to Pooke road via an intersecting main transport route, which had been closed for decades, had been opened; causing an influx of heavy vehicles that took a detour through the residential area along the residential road. The Residents of Pooke Road further only received notice of the developments, but had not been given the opportunity to object to such developments.

The heavy vehicles were causing extensive damage to the foundations of the properties along Pooke Road, which was reported to be a very narrow road.

Investigation Outcomes and Recommendations

The enquiry into the matter by the Ombudsman's Office yielded that the road was designated to be opened before the establishment of the residential area, and that due to the expanding industrial area surrounding Pooke Road, the Road was opened as a thoroughfare for trucks that carried products to and from the surrounding industries.

However, the residents of the area were materially prejudiced by the opening of the thoroughfare route and were further not provided the opportunity to object to the developments. The Municipal Systems Act provides that communities that are affected by municipal activities and developments should be given the opportunity to object to such developments, and that such objectives are to be considered and addressed reasonably, and in a manner that did not prejudice affected parties.

The recommendations from the Ombudsman's Office included that the legislation was not abided by, and that the Pooke Road residents were prejudiced due to (i) the lack of opportunity to object and have such objections considered fairly; and (ii) the damage to their properties were directly linked to the thoroughfare of heavy-duty vehicles along the narrow residential road. Furthermore, it was recommended that the road be closed and that heavy duty vehicles use the alternative thoroughfare routes as they had been using prior to the opening of the road at the verge of Pooke Road and the Main Road.

The recommendations were sustained by the ED of the department, and the complainants were satisfied. However, follow up with the complainants later in 2004, 2005, and in 2008 related that the road had not been closed and it had in fact been widened. This widening was effected by the reduction of walkways and pavements along Pooke Road. This development had caused greater safety concerns for the residents and pedestrians of Pooke Road, as they reported an increase in pedestrian injuries as a result of collisions, and further damages to properties and boundary walls as a result of these collisions.

There was an apparent deviation from the recommendations by the Ombudsman's Office, which yielded deteriorating outcomes for the Pooke Road complainants.

The root causes of the problem are viewed to include:

- i. The lack of established, fair and rights-based procedure in dealing with recommendations from the Ombudsman's Office;
- ii. The lack of organisational guidelines on affecting recommendations from the Ombudsman's Office, symptomatic of a deficient organisational complaint's handling system; and
- iii. A lack of credibility of the ombudsman in terms of organisational matters.

Media Reports: Tool for awareness-raising and political lens

Awareness-raising is a crucial aspect of promoting access to one's rights through the access to information about these rights. While an analysis of media reports indicates the level of access the public has to information, it also serves to reveal political trends that affect all aspects of our society. Thus, the media is a good source that provides an insight into the contexts within which the ombud office operated. As stated, the year 2003-2004 marked a difficult period for the ombud due to a range of internal political issues that disabled the office's independent functioning. However, while these dynamics were manifest at the local level, it is argued that they were indicative of the national political climate – a climate, which affected the way in which our oversight mechanisms operated. In a Cape Times opinion piece (2004),¹⁴⁰ Johnson warned of the threat posed by an over-concentration of power in any political body, where this power may be seen as a license to encroach upon the independence of oversight bodies. On a national level, various bodies fell under public scrutiny such as the National Public Protector, and its mandate to conduct independent investigations. It was also during this period, that the operations of the ombud were extensively contained.

Then, for a brief period in 2005, there was pervasive attention on the role of Chapter Nines in protecting the rule of law from the highest levels of government¹⁴¹. In the City of Cape Town, media reports highlighted how the office has been established to 'right wrongs' within the municipality¹⁴²; informing citizens of their rights to accessing avenues for recourse in cases of an infringement to their rights to administrative justice¹⁴³; and also highlighting the role the City Ombudsman's Office in ensuring that citizens realise this right.

In respect of the integrity of our oversight bodies, trends shift from favourable to unfavourable, seemingly dependent on the volatility that comes with political transition, and the potential threat that exists for power and political position. This paints a dreary picture for those inalienable rights of our citizens that are linked to the check placed on the absolute power of the state promoted by democratic constitutionalism.

140 Anthony Johnson [Guest columnist]. 2004. "As the ANC grows, we should watch our precious watchdogs". Cape Times [Monday, 7 May]

141 "Mbeki promotes Ombuds System". SAPA, April 12, 2005. See Annexure

142 Bulelani Phillip, "City's first ombudsman vows to put right what people think is wrong" in the Cape Argus, April 22, 2005. See Annexure

143 Myolisi Gophe, "Ombudsman: Improving Public Service" in the Weekend Argus, April 9, 2005. See Annexure

CHAPTER FIVE

Findings and Analysis: Conditions for an effective ombud operations

Political Support

Political support is key to the effective establishment of an institution of the ombud. While political support is vital for the classical form of the institution, it holds particular importance to an organisational ombud. One of the reasons for this is linked to the foundations of this particular form of the institution. The powers, terms of reference and jurisdiction of the organisational ombud are usually developed by the host organisation. The way the office operates, what it may or may not do, as well as its annual resources are subject to the organisation.

For the classical ombud in South Africa, i.e. the Public Protector, its powers are derived both from the Constitution itself, as well as a national Public Protector Act. The institution's powers, terms of reference and jurisdiction are all ensured through this legislation, with additional provisions intended to ensure the Public Protector's independence and autonomy. Assessing how this is manifested in practice falls outside of the scope of this research. For the purposes of this study, it suffices to state that these legislative provisions are a matter of national interest, and any change to any of these would require a protracted and, in all possibility, a very controversial process.

For the organisational ombud, these protections are non-existent, and the development of all things relevant for an office of this nature is left to the whims of the host organisation, and more accurately, the executive members of the City Council and the City Manager.

It is argued that if there is an appropriate level of political support for the ombud office, it would receive the appropriate terms of reference, powers and jurisdiction, an adequate budget, resources, etc.

“How the organisational ombud works depends to a large extent on the culture of the organisation. However, the common factor in all of these institutions is that, to be effective, the ombud must have the support of top management, and be able to access any individual manager within the organisation...”¹⁴⁴

144 The Ombudsman Association. 2004

One may argue that a political party would overtly support an institution such as the ombud in order to create (the perception of?) democracy and good governance. Democracy and good governance are seen to incorporate accountable governance, respect for the rule of law and protection of human rights, among other aspects. These ideas are ideally embodied and promoted by ombud institutions, and undoubtedly the reason for the institutions existence.¹⁴⁵ Political will extends beyond the verbal or even written expressions of support for the ombud, but incorporates concrete decisions followed by action towards establishing the ombud in a manner that enables and empowers the institution to act with effect.

Financing

Closely linked to issues of political will, is the aspect of financing. The financing of independent oversight bodies is generally an issue of grave concern. All oversight bodies are financed through the 'kitties' of the executive arm of the state or public body, therefore dependence on the executive supply and approval of the budget is not a problem unique to the local level ombud. The contradiction in required operational and structural independence and actual financial dependence paves the way for a myriad of complications.

The crux of the matter is simply that, following from the above, the 'power of the purse' rests in the hands of the executive, and by extension, the organisation. It is important to caution that the ombud office may thus inevitably be held to ransom by bureaucratic procedures for financing.

Adequate Human resources

One of the pillars for the success of the ombud is its human resources. This translates that, not only should there be enough staff to fulfill the daily operational requirements, but these staff members should be appropriately skilled to supply the necessary expertise.

Senior staff within the ombud office confirmed that there was contention surrounding the development of an Ombuds By-law, however, the main area of concern was the lack of competent staff.¹⁴⁶

The lack of competent staff within the ombud office up until the date of the interview was a major area of concern. One of the consequences of the lack of competent staff was that investigations were done that were outside the stated jurisdiction of the ombud. Investigation Managers were alerted to such enquiries by departments, and managers were constantly required to 'put out fires'. This placed a huge strain on the

¹⁴⁵ AWEPA, "Parliament as Instrument for Peace" in Sustainable Democracy and Human Rights: Occasional paper Series 8. (Unpublished, 2001), 15

¹⁴⁶ Interview, Lorika Elliot, Office Manager, City Ombudsman's Office for the City of Cape Town (21-08-2007)

ombud's already battered credibility. The main areas of concern in respect of public investigations were cited as a lack of credibility, a lack of a clear mandate, and inappropriate terms of reference.¹⁴⁷

On the level of the director, having sufficient knowledge about laws, policies and regulation relevant to the host organisation, as well as the processes and systems within the organisation is vital. Knowledge of the social context and dynamics, as well as human rights and gender is highly advisable. This would translate into the ability to deal both reactively as well as proactively to issues that arise within the organisation, and to those that present themselves within communities.

While it is important to be apolitical, having political savvy can only lend to the improvement of survival strategies for the ombud. The political nature of local government presents a constant threat to the Office, not only due to the pursuit of the required political support, but also due to the need for the office to maintain its autonomy, independence and credibility. If the office was seen to be a political tool for a majority party or any other, this would severely impact the legitimacy and credibility of the ombud. Thus, the director of such an office should, while engaging in advocacy activities that would ideally optimise its influence within the organisation, be able to maintain its integrity and neutral stance.

Important lessons can be learned from the practices of the ombud internationally, and from these important roles, stems an understanding of the requisite skills;

"In the case of the Finnish, Swedish, Norwegian, and other offices, the ombud may request changes in administration that affect everyone who has the same problem as the complainant who brought the case. The ombud may intercede and ask the agency in question to make procedures friendlier to the citizenry".¹⁴⁸

The ability to deal diplomatically with people from all walks of life and all orientation is crucial. Above all, the ability to provide strategic direction to the office cannot be overemphasised. Coupled with this is the ability to communicate these strategies to the executive and political champions of the organisation effectively and persuasively, in the absence of which, required activities would not enjoy complete, or any, support.

147 Lorika Elliot (21-08-2007)

148 F. Stacey, *Ombudsmen Compared*. (Oxford, Clarendon Press, 1978), page unknown

Managers require a similar knowledge of laws, policies and regulation relevant to the host organisation, as well as the processes and systems within the organisation. Administrative skills such as financial management, as well as investigation management and supervision skills are vital on this level. Knowledge on human rights and gender and administrative rights should be mandatory on all levels, as this forms, or should form, the core of all ombud activities.

In the absence of these key competencies, the ombud will suffer dilution and its objectives will detract from those that makes the ombud what it is - a protector and promoter of human and administrative rights within the organisation of local government. The local level ombud should be more than a reactor to public complaints, but one that should use those inputs to address systemic, procedural and legal aspects that impact negatively on the rights of the citizens and constituencies of local government, whether they manifest themselves at the door of the Office, or within the communities the office serves.

While the necessary skills-base is important for the office to operate effectively, staffing capacity in terms of the number of staff within the office to fulfill the various roles, duties and tasks necessary is equally critical. However, in 2004 to 2005, the ombud office was staffed by six members, and was deemed by the decision makers to be “fully resourced”¹⁴⁹

Independence

The ombud must be, and must appear to be, free from interference while performing ombud work, and should be independent of and separate from the human resource and other existing administrative structures. Furthermore, the ombud typically reports directly to the highest decision making body of the organisation.¹⁵⁰ Being independent and being perceived as independent is vital to the role of the ombud. There should be no interference from others in the organisation. While the ombud should know what an ombud is expected to do, similarly should the organisation have a common understanding of that role. It is further important to encourage internal debate within appropriate forums about pitfalls for independence with relevant members of the organisation.

149 Nomaindia Mfeketo, Executive Mayor, City of Cape Town. Speech given at the Ombudsman Conference on Administrative Justice, (16-11-2005)

150 The Ombudsman Association, 2004

The ombud should be alert to possible threats to being independent. Independence includes the freedom to provide upward feedback.¹⁵¹ In other words, there should be no bureaucratic obstacles to unbarred reporting access by the ombud to the City Manager, The Executive Mayor *and* the City Council.

These aspects constitute some of the most crucial criteria for effective ombud operations. In the context of local government, independence should be addressed on a structural as well as procedural level. On the structural level, the organisational ombud should enjoy provisions for independent operation from typical line departments. A direct reporting line should exist between the ombud and the highest decision making bodies in the organisation. This would mean, for local government, that the ombud directly reports to the full Council primarily, and secondarily, to the City Manager and Executive Mayor.

The procedure incorporated in investigations should also be underpinned by principles and methods that do not compromise its independence. This is relevant and applicable to evidence gathering as well as analysis and recommendation.

If the Office is viewed as a liability to the organisation, the political will to ensure its effectiveness will be lacking. The regional Commissioner for the South African Human Rights at the time observed and problematised this dilemma, cautioning that “one would not keep a dog in the backyard and feed it ‘till it grows so big that you cannot control it...’”¹⁵²

Accountability

Issues of accountability are important for the ombud as it has a direct impact on the independence, or perceived independence, of the institution. The inherent problem posed by this concept, however, is that by virtue of the prescribed functions and structure of the organisational ombud, it poses one of the biggest challenges to the independence of the institution if not managed with the required skill, understanding, sensitivity and commitment to fair principles.

Ironically, the roots of the threat to its independence stems from one of the requirements for its independence, that is, its accountability to the highest decision making bodies of the organisation, and to organisation as a whole, by proxy. As such, protocols, procedures and rules that aim to protect organisational confidentiality and interests should be adhered to by the ombud as a ‘department’ within the

¹⁵¹ The Ombudsman Association, 2004

¹⁵² Ashraf Mohamed, Western Cape Commissioner for Human Rights, 2004

organisation. On the other hand, the ombud, as a public body, is also accountable to members of the public who, as potential victims of maladministration by the organisation, seek objective assistance and redress in a manner that upholds unquestioning justice and fairness.

Contextual Relevance, Efficacy and Viability

While the internal arrangements of the host organisation should accommodate the requirements for the independent, credible and effective functioning of the organisational ombud, the institution itself should also incorporate the values, and exercise methods that promote its relevance to its users. Not only should the ombud reflect legislation and frameworks such as the Constitution, but it should also cater for the realities experienced by local citizens. Discourses on gender, human rights, and poverty should not be dismissed as extra-mandatory, but should be included in service approaches and used to inform strategies in relation to public education, as well as to guide recommendations.

The trend that is increasingly becoming apparent in the area of public sector management, particularly at the local level, is the growing lack of trust of citizens. *“Organisations are currently faced with growing challenges, one of them being that trust in leadership is declining, while constituents are reluctant to surface issues.”*¹⁵³ This seems to be a global phenomenon, and the correlation between the diminishing level of trust in leadership and the lack of surfacing of issues by the public is critically linked. When there is no credible recourse for citizens to redress maladministration or rights violations, citizens will hesitate in bringing the matter forward.

The perception that matters will not be fairly and appropriately dealt with is a direct reflection of the leadership of the organisation and the resultant approaches to public service delivery. ‘Getting it right’ in terms of the protection of the rights of citizens at the very basic level of service delivery remains an elusive imperative if there are no effective structures in place to ensure this.

Empowering Legislative Framework

Another issue of importance is empowering legislation for ombud action. This refers to a legal framework that spells out the office’s terms of reference, powers, jurisdiction, etc. Ideally, these should not be implicit but should clearly define the parameters of the institution in a durable framework that should not easily be

¹⁵³ The Ombudsman Association, 2004

retracted by the 'the powers that be'. This framework should further provide for all requisite factors that enable the ombud to operate independently, effectively and without threat or prejudice.

"Law creates the classical ombudsman function, it is appointed by legislative bodies and it has the power to do formal investigations. Its powers of investigations range from the power to subpoena, the power to promote and institutionalise strong legal safeguards for their independence and the confidentiality of their records, and the power to publish public reports." ¹⁵⁴

The ombud office for the City of Cape Town has been established as per council resolution to, by implication, give effect to the Constitutional mandate, where the Constitution states that South Africa is one sovereign democratic state founded on the following values:

- i. Human dignity and the achievement of equality and the advancement of human rights and freedoms;
- ii. Non-racialism and non-sexism;
- iii. Supremacy of the Constitution and supremacy of the rule of law;
- iv. Chapter 2 (The Bill of Rights) and primarily the equality clause in Section (9);
- v. Section 152 (a), which state the obligation of Local Government 'to provide democratic and accountable government for local communities' and to the duties imposed on local Government in terms of Section 195 (i) and (ii) of the Constitution 1996; and
- vi. The local Government Municipal Systems Act of 2000.

The ombud's establishment and existence is provided by a Council Resolution, which can be rescinded with relative ease. Therefore, unlike the pure classical ombud, the municipal ombud does not enjoy national legal provisions that concretises and systematises its operations, neither is it afforded protection from legal liability. In addition to the procedural obstacles these deficiencies pose in relation to basic operations and investigations, this presents a specific threat to its credibility and the establishment of the office as a 'safe', 'confidential' and alternative dispute resolution system. While the ombud should fit in with existing arrangements for administrative regulation, it is imperative that the ombud be safeguarded

154 M. P. Rowe, Options, Functions and Skills (United States of America, The Ombudsman Association, 1995)

from having to expose their sources to victimisation in the course of judicial or administrative proceedings (such as internal hearings and tribunals). The effective maintenance of confidentiality and credibility is hinged on the provision of safety mechanisms, instituted by and within the municipality, which promotes confidentiality and privilege.

Organised local government is legislatively mandated to find solutions for problems relating to local government generally.¹⁵⁵ The autonomy of local government is further ensured through the following provisions:

The Municipal Systems Act, in accordance to the Constitution, provides that the council of a municipality has the right to govern, on its own initiative, the local government affairs of the local community; to exercise the municipality's executive and legislative authority, and to do so without improper interference; and the municipality has the duty to use the resources of the municipality in the best interests of the local community and provide, without favour or prejudice, democratic and accountable government. This provision allows local authorities to establish mechanisms to ensure their effectiveness at their own accord and independent from the other spheres of government.

In addition to this, a municipality must, in the exercise of its executive and legislative authority, respect the rights of citizens and those of other persons protected by the Bill of Rights. Citizens rights are thus explicit in the Act, which states that members of the local community have the right (in accordance with processes and procedures provided for in terms of this Act or other applicable legislation) to submit written or oral recommendations, representations and complaints to the administration of the municipality, and to prompt responses to their written or oral communications. This provision is construed as enabling legislation in terms of establishing internal mechanisms to uphold constitutional democracy, (and is currently used by the existing municipal ombud office to substantiate their activities, though no explicit legal provisions for the ombud currently exist outside of the 2000 Council Resolution).

The City of Cape Town declined the proposal to pass an organisational ombud By-law, stating that the municipality was not empowered to pass a by law of that nature. A heated debate ensued in 2007, on whether the ombud by-law could be passed.¹⁵⁶ The By-law went for public comment in 2006, and subsequent to effecting changes emanating from this process, the by-law went back to Council, which later

¹⁵⁵ The Municipal Systems Act, Act No. 32, 2000

¹⁵⁶ Mbulelo Baba, Ombudsman for the City of Cape Town (2000 –current) (Interview, 08-08-2007)

declined the passing of the By-law. Arguments opposing the passing of the by-law included that the municipality was not legally enabled to pass the by-law. The ombud sought senior legal counsel on the matter and was advised that the Council was empowered to pass the by-law, as legislation made such provision. The debate illustrates the contention underpinning local oversight, and is indicative of the lack of political will to establish the office effectively.

The pervasive lack of grounding and clear terms for the office poses a threat to the effective operations of the office, and in actual fact, reduces its effect, credibility within and outside the organisation, and limits action by the office in relation to its intended purpose. A By-law would ensure the durability and standardisation of the ombud proceedings, and would protect the office from the volatility caused by constant political change and its resultant constant organisational restructuring, uncertainty and vulnerability.

While municipalities are provided the autonomy to establish and maintain its administration and administer and regulate its internal affairs and the local government affairs of the local community, Section 10 of the Municipal System's Act empowers the MEC to assign functions to the specific municipalities, and delineates the required processes for such assignment.¹⁵⁷ Therefore, in addition to mechanisms internal to local government, the MEC for local government in a province has been empowered to establish mechanisms, processes and procedures to monitor municipalities in the province in managing their own affairs, exercising their powers and performing their functions.

Section 106 states that if an MEC has reason to believe that maladministration, fraud, corruption or any other serious malpractice has occurred or is occurring in a municipality in the province, the MEC may designate a person or persons to conduct an investigation into the matter(s). The alternative provincial establishment of municipal ombud offices may present an alternative avenue for establishment for municipal oversight on a higher level and possibly larger scale. The obstacles to this are, however, arguments underpinning the autonomy of local government in administering its own affairs, and constitutional provisions for local government as an autonomous sphere of government.

Furthermore, the defined jurisdiction of the office led to a confusion of principles in that, firstly, the jurisdiction was meant for a classical ombud with extensive legislative protection and provisions, which

¹⁵⁷ The Municipal Systems Act, Act No. 32, 2000

included privilege. One of the crucial aspects that had to be considered was that the ombud office was not protected by statutory provisions in relation to issues of privilege and confidentiality, and more importantly, provisions that empowered the ombud office to engage with the administration in an appropriate and effective manner.

Mechanisms were proposed by the ombud to protect the office from compromise through being forced to testify in any formal judicial or administrative hearings following ombud investigations, and in so doing, protecting the privilege and integrity of the office. Additionally, permission was requested for the office to obtain separate, external legal counsel when and if necessary. These motions were however denied.

According to section 5 of the Act, the Public Protector is competent to investigate any allegation which he or she may investigate under section 112 of the Constitution, on his or her own initiative or on receipt of a complaint.¹⁵⁸ While this provision is common to those for the ombud office, the office strictly reacts to complaints received. This is arguably due to a lack of strategy and vision for self-initiated investigations.

Further, the fact that the provisions were not tailor made to suit the needs of both the organisation, in terms of what it required an organisational ombud to do, and the ombud itself, posed serious challenges that saw scant address. While a by-law was proposed to deal with the lack of appropriate legislative foundations and clear terms of reference, the move to institute the by-law was strongly opposed by the organisation.

The ombud office and the defense of human rights

In a recent interview, the ombud office was questioned on whether they considered gender aspects and dynamics in the course of the ombud work, to which the office replied that they had been “advised” to avoid human rights issues and not to include this in their function.¹⁵⁹

This new approach arguably deviates from the original intention for the ombud, as all founding documents illustrate. Since a violation of administrative rights overlap violations of citizens’ human rights, the current approach may lead to the further dilution of the ombud operations. As a matter of principle, *prima facie* cases only include those that will not have undesired outcomes such as having the matter end up in court. If the office is intent upon avoiding matters that are easily politicised, namely human rights issues, this

¹⁵⁸ Public Protector Act, No. 23 of 1994.

¹⁵⁹ Lorika Elliot (Telephonic interview, 27-11-2007)

will reduce the intake of complaints, with the majority of overlapping issues therefore falling by the way-side. These consequences of jurisdiction therefore have to be weighed carefully.

The Constitution had consistently been cited as an implicit foundation for the ombud, and the promotion and protection of human rights have featured in the objectives and aims of the office until 2005/6. The omission of crucial principles is argued to detract from the ombud offices intended purpose and serves to add to the dilution of the concept of organisational 'ombudsing', and local level oversight in general.

The omission further lends to a contrasting practice to actual environmental, social and political contexts of the South African local government experience. The lack of clear direction and deviation in important principles compromises the office in terms of its contextual viability, and ultimately, its effectiveness.

Lack of understanding of the mandate, *modus operandi* and accountabilities of the ombud office

The lack of understanding of the mandate, *modus operandi* and accountabilities of the ombud within the municipality, particular by members within the higher levels of the organisation, makes the office vulnerable. This is aggravated by a lack of political support to clarify these misunderstandings and ensure provisions that clearly establish the ombud effectively.

According to the current ombud investigation process, investigations are done by the departments involved in the enquiry. The views of these departments would be provided along with substantiation for the administrative action, usually in the form of a policy. In many instances, as per the requirement, an apology is extended for the deviation, and further, an undertaking is expressed to address the matter by 'disciplining' the official concerned, usually stated to be a 'junior official'. Nothing is provided subsequently and the matter is closed and documented as having been dealt with satisfactorily.

The citizen, on the other hand, receives no recourse, and no change in their unfortunate circumstances.

If a matter were further escalated to the Executive Director (ED), according to the ombud's procedure, the director of that department and relevant officials would be interviewed by the ED. If the 'recommendations' by the Department are deemed as reasonable, no further action will be taken by the ombud, and the matter will be laid to rest, particularly if the matter may lead to a civil claim by the complainant.

The summary of the process above indicates one of the greatest internal threats to the ombud. This threat involves the lack of a monitoring and evaluatory culture within state institutions, including local government, and the lack of an effective complaints-handling process that feeds into the impartial and independent approach of the ombud.

The Hybrid Approach to Organisational Ombudsing, Confidentiality, and Privilege

Due to the complexity of local government¹⁶⁰, the ombud office has adopted a ‘hybrid’ approach to the local government organisational ombud institution. This means that the office views itself as operating as both a classical and organisational ombud. Due to the subject of the organisational ombud still requiring definition in the South African local government context, the merging of approaches poses huge challenges to the institution.

The classical identity of the City of Cape Town ombud has been inherited through the original proposal on the Public Complaints Commissioner in 2000, when the terms of reference established were directly taken from those of the Public Protector. Bearing in mind that there are statutory provisions for the protection of the Public Protector in terms of privilege and legal liability, the City of Cape Town ombud enjoyed no such provision.

Rowe defines the roles and requirements of the organisational ombud in terms of the above in stating that even with permission to speak, the organisational ombud typically will not appear in formal proceedings inside or outside their organisations. In order to safeguard both the appearance and practice of neutrality and confidentiality, they do not keep case records for the employer, and they resist appearing as witnesses in judicial or quasi-judicial proceedings.

The organisational ombud maintains that there should be a privilege, which belongs to the office and not to any visitor to the office. In support of this practice, ombud have an agreement with their employers that the employer will not call the ombud in its own defence.¹⁶¹

While requests to provide for the safeguard of the office in terms of privilege were submitted to Council (2005), no move has been made to approve and institute these measures. The Office therefore remains

¹⁶⁰ Local government is regarded as having a corporate, state institutional and organisational facet.

¹⁶¹ Rowe, 2

vulnerable in terms of its credibility and neutrality, should they be forced to participate in legal proceedings on any matter. The fact that the ombud keeps records further deviates from the typical organisational ombud practice and exacerbates vulnerabilities. While a change in this process is not necessarily a solution, institutionalised protection for the Office remains an imperative.

The Ombudsman's Office for the City of Cape operates as a combination of the classical, corporate and organisational form of the institution. Therefore, the office undertakes investigations as per the classical ombud institution and keeps records of cases. This approach juxtaposes the organisational ombud approach that highlights privilege through informal proceedings and non-documentation of issues. There is as yet no real clarity on how the classical-organisational synergy can be created. This places the ombud at risk as it openly states that it is a hybrid institution.

The Ombud, Internal Audit Unit and Legal Compliance Section

One of the issues that require clarity is the misconception around the role of the municipal ombud in relation to the Internal Audit Unit (IAU) and Legal Compliance Section (LCS). The latter bodies are separate entities within the organisation, and are responsible for areas, which are viewed to overlap ombud functions. The key role of the internal audit is defined as the following:

"To assist the (organisation) in discharging its governance responsibilities by delivering an objective evaluation and internal control framework, providing a systematic analysis of ...processes and associated controls, providing information on major frauds and irregularities, reviewing the compliance framework and specific compliance issues, (and) rendering feedback on adherence to the organisation's values and code of conduct/code of ethics..."¹⁶²

In view of this definition, the roles of the internal audit unit and the roles of the ombud office become quite blurred. One of the major areas of conflict is the issue of fraud and 'irregularities', more commonly termed by both the internal audit and ombud practitioners as 'maladministration'.

Further similarities are observed and one may conclude that there should reasonably be a strong sense of empathy between these institutions. These similarities are highlighted through the following:

¹⁶² KPMG, available at <http://aci.kpmg.com.hk/docs/AC/Internal_audit_role.pdf>

“In attempting to adequately discharge their responsibilities, internal auditors... report to senior management within the organisation, yet are expected to objectively review management’s conduct and effectiveness...”¹⁶³

However, despite similar aims the IAU seems to have more clout than the ombud office. Municipal employees comply with the IAU much quicker, and more thoroughly than to the ombud office. One of the reasons for this is argued to be the explicit empowering legislative framework of the IAU, as contained in The Municipal System’s Act.

The human resource function and the Employee Assistance Program (EAP) also have similar functions to that of an organisational ombud. If the ombud is to prove its worth in any organisation, these areas which may be viewed as ‘overlaps’ should be clarified and the ombud should prove itself as a unique entity necessary to the development and promotion of democracy within the organisation, and within society.

The process of defining the ombud’s role should not, however, entail the deliberate dissolution of the ombud function in order to comply with cooperative agreements. It is thus important to assert that the ombud’s role is significantly different by virtue of its focus on the complainant, which is held as the primary beneficiary of the ombud service. With other bodies, the primary beneficiary is the organisation, hence the interests of the organisation supersedes any notions of citizen rights. The distinction is vital to maintain and will only be facilitated through an approach that upholds the basic foundations of ombudsing.

Quantitative Analysis

Case Handling

A useful indicator of the effect and purpose of the ombud is its case handling. In 2001, the Office dealt with 107 complaints for the entire year. The contributing factors to the low level of cases handled were cited as the following:

- i. The opening of the regional Public Protector’s Office;
- ii. Lack of resourcing¹⁶⁴;

¹⁶³ KPMG. available at <http://aci.kpmg.com.hk/docs/AC/Internal_audit_role.pdf>

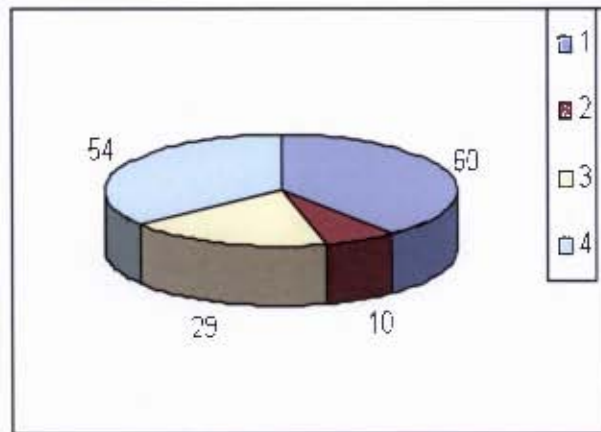
- iii. Inadequate marketing of the office to the public; and
- iv. However, the case management of the office did not increase over the years and by 2002/3, statistics remained the same.

The content of the ombud's six (6) monthly report, dated July 2004 to January 2005 allows one to gauge the effectiveness of the Office. Effect may be measured through the number of cases handled. The higher the number of cases closed to the satisfaction of the citizen, the more effective the Office is perceived as. Additionally, the higher the number of cases handled overall, the greater the perceived efficiency. The ombud office statistics on their case handling procedure reflected the following:

Out of a total of 153 cases handled during the period under scrutiny:

- i. 60 cases were reported as being 'concluded to the satisfaction of the complainant';
- ii. 10 cases were cited as being 'concluded to the dissatisfaction of the complainant';
- iii. 29 cases were recorded as 'falling outside the jurisdiction of the Office'; and
- iv. 54 cases were still 'in hand' (pending/ under investigation). During the period of this study (2004 to 2007), the statistics showed no stark deviation. The statistics for 2004/5, as a sample, is viewed as an accurate appraisal applicable to the study period.

¹⁶⁴ While the Office served a population of 2 893 251 (Stats 2001), from the year 2000 to 2003, the City Ombudsman's Office was staffed by the Director and Personal Assistant to the Director, who, despite the lack of requisite skills, was tasked to handle public complaints received by the office. Complaints received were routed to the Departments concerned – in other words – the Office served as a notice to the organization. Complaints were thus 'investigated' by the departments - a process which included referral to subcouncil managers and line departments – subcouncil managers could not always act on complaints due to gray areas which they had no jurisdiction over and of unclear mandates in respect of issues which are generally the responsibility of respective line departments. Additionally, issues routed directly to departments were subject to an internal departmental enquiry involving the issuing of comment by the department, usually from the official involved in the complaint. Responses were forwarded to the complainants and basic follow-up was done with departments to ensure that such comment was duly forthcoming. The role of the ombud was reduced to that of a conduit of complaints, which severely impacted on the purpose and credibility of the office. This approach continued until 2003, but was taken up again from 2005 to the present.



Graph 1
Cases handled by the ombudsman office (2004 - 2005)

The fact that (a) such a low number of cases have been handled, and (b) that such a large number was still pending, reflects:

- i. The lack of public awareness of the Office; and
- ii. The lack of capacity within the Office.

Additionally, while +/- 39% of cases (60 cases) were handled to the satisfaction of the citizen, no follow-ups were made on whether recommendations were in fact implemented. The responses thus reflect 'satisfaction' based on a lack of return of the enquiry from the citizen. This, however, could be due to a number of reasons.

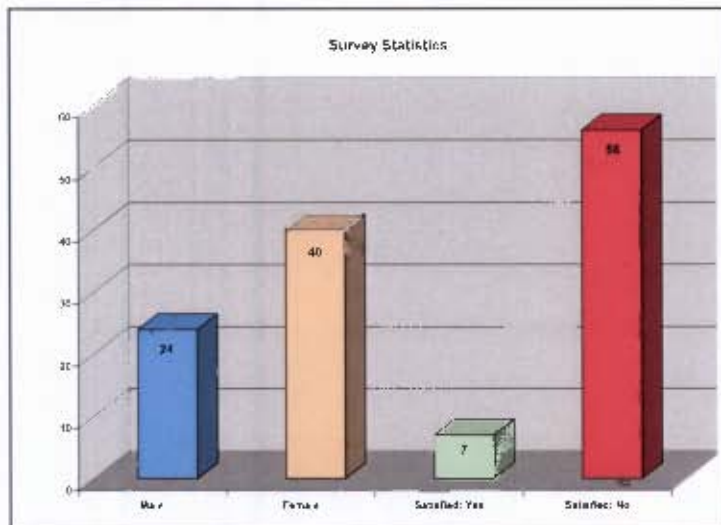
An interview with a municipal councillor revealed that, whereas he used to forward complaints to office, he had 'not used the office in a while'. According to the councillor, he had lost confidence in the office...¹⁶⁵

"...Going to the Ombudsman—it doesn't go anywhere..."

(Response by Councillor Brian Watkyns, 26-10-2007)

¹⁶⁵ Brian Watkyns, Executive Councillor, City of Cape Town (interview, 26-10-2007)

Subsequent independent follow-ups with past complainants related that recommendations were not



implemented, and that the status of the situation of the complainant and cause for the complaint was unchanged.¹⁶⁶

The results of an accompanying citizen satisfaction survey were intended to provide an indication of the satisfaction level of the public in respect of the ombud office. The, results, however, reveal unexpected insights on the awareness level on the office by citizens in the Cape Town

area, with 88% of the respondents being unaware of the ombud's existence. These results have been noted despite a high level of dissatisfaction with City of Cape Town services recorded within the sample population.

76% of the respondents stated that they were dissatisfied with the treatment and services they received from the City of Cape Town, and 37.3 % stated that they have raised matters with council structures, other than the ombud Office. 35% of respondents who raised issues directly with council (through letters and telephonically) stated that they have received no response, that 'you are always referred or put on hold', sent from one person to another, and that 'they (officials) are rude and unhelpful'. Further responses indicate that 'nothing is being done' and that they 'don't have the power'.

Subject to receiving information on the office by the researcher (pamphlets provided by the ombud office), citizens responded positively to questions on how the ombud office could make a difference to them. Responses included the following:

- i. That the office could assist in helping to solve problems when council staff doesn't assist well;
- ii. By informing the people about them, they can help "sort out problems";
- iii. By helping citizens because the council staff is rude and unhelpful;
- iv. By being their voice;

¹⁶⁶ Cases of N. Ebrahim (2004), Talaie'd (2004), The 'Peeke Road' complainants (2004-5), et al

- v. By being more vigilant and assisting where needed;
- vi. By strengthening community relationships with the municipality;
- vii. By listening to what the people have to say and assist and "complete one task at a time"
- viii. By educating people and informing people about the ombud's office; and
- ix. By talking to the Councilor to improve services.

All of the above fall within the ambit of ombud office. However, the problem of the communities' lack of awareness on the office and the resultant under usage of the ombud and lack of access to their services, pose certain questions to the way the office currently operates. Effectiveness can really only be accomplished if you are reaching your target beneficiaries and if there is adequate awareness on and access to the office.

Perception Survey: Peer Reviews

Two departments were interviewed in the process of peer reviews.¹⁶⁷ The responses reflect a good understanding of what the office does and its purpose. This is largely attributed to the fact that the office had made various presentations to some departments on the ombud's roles, functions and processes, and has a very good process of liaison and communication with departments. The office was seen to contribute to council objectives by promoting fair processes. The issue raised by the department of finance was the capacity of staff. Skilled personnel were required, as well as greater capacity (numerically).

The department of finance further demonstrated clarity on the roles and distinction of the office in terms of the human resources department (employee assistance programmes), the Internal Audit Unit, and the Public Protector. The Department of Housing made no distinction between the ombud office and the Public Protector, referring to them as a single entity. Internal education programmes would also ensure that no confusion exists concerning the role and function of the ombud in terms of other bodies such as the Public Protector.

The obstacles currently facing the office can be summarized as the following:

167 Boreford Williams, Manager, Department of Finance, City of Cape Town (interview, 24-08-2007). Astraf Slamdjnr, Manager, Department of Housing, City of Cape Town (interview, 23-10-2007).

- i. A lack of enabling and appropriate statutory provisions clearly defining the ombud's powers of investigation, authority, and terms of reference;
- ii. An inadequate understanding of the definition of its role, both within the office, and within the organization;
- iii. An inadequate knowledge base due to the inconsistencies in its establishment, and the exacerbation of this insufficient knowledge through the culture of secrecy and intransparency within the organization;
- iv. The lack of political will to establish ombud office effectively;
- v. The tradition of the non-evaluation culture within the organization;
- vi. A lack of effective, fair and appropriate complaints handling procedures within the municipality as a whole, and a lack of understanding of the ombud's role in this process;
- vii. The lack of strategic Management of evaluation and monitoring activities; and
- viii. The lack of institutional supports, and resources.

CHAPTER SIX

Conclusion

Much emphasis is placed on the role of the national ombud institution, and other national Chapter Nine bodies. However, even though the local level is thought to enjoy the attention of these bodies, the fact that capacity constraints, among other things, impact their ability to adequately address issues at this level has not been adequately heeded. Where one does not perceive a problem, one does not perceive a need for any solutions.

The contributions of local level oversight towards the attainment of continental and national priorities, which transcend all spheres of government and penetrate all levels of society, are not adequately understood. This lack of understanding, among other things, translates into the lack of adequate support for the effective establishment of the local level ombud institution. The lack of understanding is exacerbated by a lack of knowledge on how to effectively establish local level oversight. Channels of reporting and accountability that do not compromise its purpose, but yet, explicitly fit into the legislative and institutional framework of government are crucial to the ombud's effectiveness. The ombud should further be officially involved in policy procedures that promote a proactive promotion of citizens' rights within the administration.

There is also a need to empower citizens through civic and human rights education so that they can demand accountable and transparent governance from their governments and local authorities. It is argued that 'for citizens to do this effectively they need to overcome a lot of ignorance and fear - it is much easier to govern and exploit people who are poor, ignorant and fearful'.¹⁶⁸ When there is further no knowledge on the avenues for recourse and redress, a serious question needs to be posed concerning the ultimate effect of the office.

¹⁶⁸ W. Mchael, *Developing Anti-corruption Strategies in a Changing World: Global challenges in civil society*. Paper presented at the 11th International Anti-Corruption Conference (IACC) (Unpublished) (Durban, South Africa, 1998).

It is interesting to note that a large amount of citizens refused to participate in the survey for this study due to fear of some or other repercussions. This supports Mallesi's view of the importance of civic and human rights education to encourage citizen participation in effecting positive change in addressing corruption and maladministration.

Knowledge, information and access to the office are of primary importance. According to the former president of South Africa, Thabo Mbeki, "*(Ombudsman) procedures and processes must be simple, understandable and accessible to all... (it) should be easily within reach of the ordinary citizen...*"¹⁶⁹

Political will is seen as an essential ingredient to the success of the ombud office. Political will can be translated into adequate resource allocations for the ombud, as well as the provision of appropriate grounding legal foundations that clearly define appropriate terms of reference. At present, the office's effect is severely curtailed by a lack of these requisite factors.

For practical purposes there needs to be an appropriate review or follow up on recommendations emanating from the ombud office to ensure implementation of the principles which were made in pursuit of the goals towards good governance. In the absence of this, the basis upon which the office currently measures its success is not validated.

The ombud office should further be driven with a vision for the upliftment of society in a manner that upholds their dignity, equality and sense that they will be heard and responded to in an effective and appropriate manner.

In terms of the above, the municipal ombud explored in this study does not currently adequately support our constitutional democracy, and resultantly fails to play a meaningful developmental role within the municipality. One of the causes of this is the lack of conceptual understanding of the purpose, aims, objectives and meaning of an ombud in relation to the values that underpin the developmental state.

Political directives that proscribe the handling of socio-economic and human rights issues by the ombud further curtail the office from operating independently and from adopting an approach fitting the context of its beneficiaries. This prohibition is based in the premise that human rights issues are easily politicised, particularly in the context of local government. As an independent body, the ombud should have clear guidelines and discretionary powers to deal with valid complaints against the administration that involve a violation of their socio-economic and human rights. A process that allows for the speedy and effective address of these complaints would prevent burdens on both the municipality and the citizen.

¹⁶⁹ Cited in the Argon Press, April 2000. The President addressed ombud delegates from African states at a conference hosted by the African Ombudsman Association from the 4 - 9 April 2005, Pieteria. The researcher attended the Conference as a representative of the City Ombud Office for the City of Cape Town.

While there are numerous curtailments to the effective operations of the ombud office, the value that this office can bring to realising the goals of good governance and maintaining a human rights culture within the organisation is undeniable.

In respect to the ombud office subject to this study, it is with due regard to this perspective that the problems highlighted throughout this paper need be addressed from the highest level within the organisation. In doing so, the commitment to constitutional imperatives, and the interests of parties that matter most, namely the citizens of our cities, and our country, would effectively be demonstrated.

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References

Adedeji, A. (2002) From Lagos to NEPAD: Keynote Address at the African Scholars Forum on Emerging Initiatives Towards a New Vision for Africa. April 26-29, Nairobi. (Unpublished)

Ahmed, M. A. A. (2005) Independence and Accountability of the Ombudsman Institution in Africa. A Paper delivered by Judge Mohammed Abuzeid Ahmed, President of the Public Grievances and Corrections Board, Republic of Sudan, and Vice President of the African Ombudsman Association: Presented at the 1st General Assembly of the African Ombudsman Association. April 11-14, 2005. Muldersdrift, Johannesburg. (Unpublished)

Alexander Johnson, Kenneth Christie, Mervyn Frost, Jeremy Grest, (1997) Politics: A Beginners Guide. Juta & Company Ltd, Kenwyn.

Annan, K. (1999) Global Integrity in a Changing World. Paper presented at the 9th International Anti-Corruption Conference (IACC): Durban, South Africa. (Unpublished)

Anderson, S. V. (1980) Ombudsman Readings. Prepared for a Political Science Seminar on Grievance Mechanisms. The International Ombudsman Institute (IOI) (Unpublished)

AWFPA, (2001) Parliament as an Instrument for Peace in Sustainable Democracy and Human Rights: Occasional paper series 8.

Background Report: City of Cape Town: Economic Trends and Analysis: 1980-2000, Chapter 8 Local Market Conditions: Summary of Main Findings. [Electronic] Available at <cdesd@emc.gov.za> or <<http://www.capetown.gov.za/econstats/pdf/8.pdf>> [Accessed on 03-03-2008]

Baker, R., (1992) Transformation and the Civil Service in Bulgaria [Electronic] Available at <http://www.spea.indiana.edu/bakerr/working_papers_files/DemversusBur%20revised.doc> [Accessed on 04-05-2004]

Belgrave, J. (2005) The Ombudsman and Citizen Participation. A presentation by the Chief Ombudsman of New Zealand: Presented at the 1st General Assembly of the African Ombudsman Association. April 11-14, 2005. Muldersdrift, Johannesburg. (Unpublished)

Bhebe, N., & Ranger, T. (eds.) (2001) *Historical dimensions of democracy and human rights in Zimbabwe: Volume 1: pre-colonial and colonial legacies*. University of Zimbabwe Publications

Birkenshaw, P. (1994) *Grievances, remedies and the State*. Sweet and Maxwell: London

Bloor, M. & Wood, F. (2001) *Keywords in qualitative methods: A vocabulary of research concepts*. Sage Publications: London.

Bosch, O.J. H. (1996) *Monitoring as an Integral Part of Management and Policy Making*. Presented at the Symposium on Resource Management: Issues, Visions, Practice. 5-8 July, 1996, Lincoln University, New Zealand. 12-21.

Chengu, I. & Mukwamba, M. (2004) *Women and the Anti-Corruption Debate*. Available at <<http://www.peacewomen.org/news/Zimbabwe/April04/corruption.html>> [Accessed on 24-02-08]

Chibwana, E. (2005) *Independence and Accountability of the Ombudsman Institution in Africa*. Presented at the 1st General Assembly of the African Ombudsman Association. April 11-14, 2005. Muldersdrift, Johannesburg. (Unpublished)

Democracy, Governance and Human Rights. Web page introduction to research done by the United Nations Research Institute for Social Development (UNRISD) in 2000 – 2005. [Electronic] Available at <[http://www.unrisd.org/80256B3C005BB128/\(http\)ProgrammeAreasForResearchHomeOther/7E49CBA637292F6E80256B48003D1C81?OpenDocument](http://www.unrisd.org/80256B3C005BB128/(http)ProgrammeAreasForResearchHomeOther/7E49CBA637292F6E80256B48003D1C81?OpenDocument)> [Accessed on 01-06-2008]

Gotz, G, Allen, K., Harrison, K., (2004) *State of the Cities Report*. South African Cities Network, South Africa.

Gregory, R, & Giddings, P (Eds.) (2000) *Righting Wrongs: The Ombudsman in Six Continents*. IOS Press: Oxford.

Hardin, R. (1999) *Liberalism, Constitutionalism and Democracy*. Oxford University Press: Oxford.

Hateca, S. M. (2005) *The Role of the African Ombudsman in the Promotion and the Protection of Human Rights*. Presented at the 1st General Assembly of the African Ombudsman Association. April 11-14, 2005. Muldersdrift, Johannesburg. (Unpublished)

Human, P. (1998) *The Strategy of the Goat in Yenza; A Blueprint for Transformation* (pp 23-41). Oxford University Press: Cape Town.

John, P. (1998) *Analysing Public Policy* (pp 22-37). Continuum: London

Jonker, A. (2002) *Challenges and imperatives facing modern government in Van Niekerk, Van Der Waldt & Jonker (2002) in Governance, Politics and Policy in South Africa.* Oxford University Press.

Lowe Morna, C. & Tolmay, S. Eds. (2007) *At the Coalface: Gender and Local Government in Southern Africa.* Gender Links: Southern Africa

Martin, R. (1993) *A System of Rights.* Clarendon Press. Oxford

Mathaai, W (1999) *Developing Anti-corruption Strategies in a changing world: Global challenges to civil society.* Paper presented at the 9th International Anti-Corruption Conference (IACC); Durban, South Africa. (Unpublished)

Murray, C (2006) *What Is the Role Of South Africa's Chapter 9 Institutions?* [Electronic] Available at <http://www.puk.ac.za/openems/export/PUK/html/fakulteite/regte/per/issues/2006_2__Murray_art.pdf > [Accessed on 15-06-2008]

Nagia-Luddy, F (2005) *The Organisational Ombudsman.* Presented at the 1st General Assembly of the African Ombudsman Association. April 11-14, 2005. Muldersdrift, Johannesburg. (Unpublished)

Ndir, D. (2005) *The Role of the African Ombudsman in the Promotion and the Protection of Human Rights.* A Paper by the Public Protector of the Republic of Senegal. Presented at the 1st General Assembly of the African Ombudsman Association. April 11-14, 2005. Muldersdrift, Johannesburg. (Unpublished)

(OECD) Paris. Busby, J. S. (1999). *An Assessment of Post Project Reviews.* PMI 30: 3. 1-44.

Ohiohenuan, J.F.E. (2002) *NEPAD and the Dialectics of African Under-development in New Agenda:* South African Journal of Social and Economic Policy. Issue 7, Third Quarter

Okoth-Ogendo, H. W. O. (2000) *The Quest for Constitutional Government in Iyden, G., et. al. African Perspectives on Governance.* Africa World Press.

Olbrich, K. (1999) Maputo Corridor Tracking System. Published in association with the Maputo Corridor company, P&DM, Wits University, Nelspruit.

Olowu, D. (2000) Bureaucracy and Democratic Reform in Hyden, G., et. al. African Perspectives on Governance. Africa World Press.

Parsons, W. (1995) Public Policy. Cheltenham; pp41-54

Picard, L.A. & Garrity, M. (1997) Development Management in Africa: Issues for South Africa in P. Fitzgerald, P et al (eds.), Managing Sustainable Development in South Africa, 2nd edition, pp. 62-83. Cape Town: Oxford University Press.

Presentation of the Ombudsman of the Republic of Djibouti, at the 1st General Assembly of the African Ombudsman Association: Muldersdrift (2005).

PUMA (1999) Improving evaluation practices: Best practice Guidelines for Evaluation.

Riggs, F. W., (1996) Bureaucracy and Constitutional Democracy. Notes for presentation at the COVICO-SPONSORED SHORT COURSE on Requisites for the Survival of Constitutional Democracy: San Francisco, USA. [Electronic] Available at <<http://webdata.soc.hawaii.edu/fredr/6-aps7a.htm> > [Accessed on 04-05-2004]

Reif, L. C. (2000) The Ombudsman, Good Governance and the International Human Rights System. Martinus Nijhoff Publishers: Leiden/Boston.

Rowe, M. P. (1995) Options, Functions and Skills. The Ombudsman Association: United States of America

Secretarial Report of the African Ombudsman Association (2005) Presented at the 1st General Assembly of the African Ombudsman Association. April 11-14, 2005. Muldersdrift, Johannesburg. (Unpublished)

Schmitter, Philippe C. "The Ambiguous Virtues of Accountability" in Journal of Democracy, 15,4 (October 2004): 47-60

Stacey, F. (1978) Ombudsmen Compared. Clarendon Press: Oxford.

The Municipal Systems Act, No 32 of 2000

The Ombudsman Association (TOA) (2004) *Ombudsman 101: An Introductory Program for New Ombudsman or Those seeking Information About the organizational Ombudsman Role*. Washington DC, USA.

The Public Protector Act, No 23 of 1994

UCI Ombudsman, *Recent Role Variations in the Ombudsman in Education* in *The Journal of Ombudsman*. University of California: Santa Barbara

Van Nickerk, S. *Developmental Local Government* (2000). Paper presented at the Conference of the National Association of Democratic Lawyers (NADEL) [Electronic] Available at <www.cosatu.org.za/samwu/sandra1.html> [Accessed on 01-06-2008]

Wallis, M. (1997) *The Problems of Bureaucratic Administration* in P. Fitzgerald, et al (eds.), *Managing Sustainable Development in South Africa*, 2nd edition, pp.84-97. Cape Town: Oxford University Press.

Williams, D. D. (1976) *Maladministration: Remedies for Injustice: A guide to the powers and practice of the British ombudsmen and similar bodies*. Oyez Publishing LTD: London.

Yaro, V; (2005) *Independence and Accountability of the Ombudsman Institution in Africa*. A Paper delivered by the National Secretary, Public Complaints Commission, Nigeria, at the 1st General Assembly of the African Ombudsman Association: Muldersdrift

Yin, R. (1994). *Case Study Research: Design and Methods* (2nd ed.) Beverly Hills, CA: Sage Publishing.

ANNEXURE

University of Cape Town

i. Interview Schedule

University of Cape Town

Interview Schedule

Interview Schedule				
	Name	Department	Designation	Date
1.	Helen Zille	Mayor's Office	Executive Mayor	24-08-2007
2.	Achmat Ebrahim	City Manager's Office	City Manager	27-11-2007
3.	Mbulelo Baba	City Ombudsman's Office	City Ombudsman	08-08-2007; 31-05-2008
4.	Lorika Elliot	City Ombudsman's Office	Investigation Manager	21-08-2007
5.	Beresford Williams	Finance Department	Manager: Revenue	21-08-2007
6.	Ashraf Slamdien	Housing Department	Head: Rental Stock	23-10-2007
7.	Brian Watkyns	City Council	Executive Councilor	26-10-2007

University of Cape Town

ii. CITIZEN SATISFACTION SURVEY

University of Cape Town

5. Have you heard of the City Ombudsman's Office?

Yes	<input type="checkbox"/>
No	<input type="checkbox"/>

6. Where did you hear about the Ombudsman's Office?

7. What, to your understanding, is the purpose of the City Ombudsman's Office?

8. How can the Ombudsman's Office make a difference to you?

9. Have you contacted the City Ombudsman's Office?

Yes	<input type="checkbox"/>
No	<input type="checkbox"/>

10. What was the complaint about?

11. Were you happy with the services of the Ombudsman's Office?

Yes	<input type="checkbox"/>
No	<input type="checkbox"/>

12. Was your waiting time for a response from the Ombudsman's Office:

- Less than expected
- Reasonable
- Too Long

13. Was the Ombudsman's Office able to assist you? Why/ Why not?

14. Were policies and processes involved in your complaint clearly explained and easy to follow?

Yes	<input type="checkbox"/>
-----	--------------------------

No

15. Do you perceive the Office to be independent? Please explain?

Thank you for your time and support

University of Cape Town

iii. PERCEPTION SURVEY: PEER REVIEWS

University of Cape Town

Survey Questionnaire: Evaluating the effectiveness of the Municipal Ombuds Office

NB: This questionnaire is intended as an evaluatory mechanism for the Municipal Ombuds Office within your organization, and forms part of a 360 degree evaluation. Kindly do not refer the questionnaire to the Ombuds Office, as a separate questionnaire is being administered for such purposes. In doing so, the results of the questionnaire and the research as a whole will be compromised. The researcher abides by the UCT code of Ethics for research and the responses will be used solely for the purposes of academic development. Thank you for your time in contributing to this research.

- 1) To your understanding, and in terms of its role within the Municipality, why was the Ombuds Office established?

- 2) How does it currently contribute to the overall objectives of the municipality?

- 3) What are the primary functions of the Ombuds Office?

- 4) What are the identified necessary supports that you provide to the Office for its effective operation?

- 5) What are the main challenges to the effective maintenance of such an Office, i.e. in terms of providing necessary supports?

- 6) Is the Office effective in executing its mandated responsibilities? Please explain why/why not?

- 7) How do you perceive the role of the Ombuds Office in relation to:
a) The Internal Audit Unit

b) Human resources (re: staff complaints)

c) The Public Protector

**THANK YOU FOR YOUR CONTRIBUTION TO THIS STUDY, AND FOR
YOUR TIME.**

Fairouz Nagia-Luddy
Student: UCT, Mphil Public Policy
Contact: 072 641 7092

iv. MEDIA REVIEWS

University of Cape Town

City's first ombudsman vows to put right what people think is wrong

"PUTTING people first and putting things right", is the motto of the City of Cape Town's new ombudsman, Mbulelo Baba.

In an interview this week, he pledged he would "act as a catalyst between aggrieved residents and the administration".

As the ombudsman, he will investigate and deal with all forms of maladministration to protect the public against abuse.

Baba, who grew up in Gugulethu and who says he is

BULELANI PHILLIP
Staff Reporter

the country's first full-time municipal ombudsman, starts work on May 1. He has been in the position on a contract basis since September 2000.

"We've had a low profile deliberately because we did not have enough staff," he says. "We did not publicise this office because one could just imagine the volume of work that we would receive

from the public if they knew about the ombudsman.

"We did not want to get large volumes of work when we were not in a position cope with it."

The office has five officials, including Baba, and is employing more staff under the city's restructuring programme to deal with the anticipated workload.

The office already investigates 50 to a 100 cases a month. "There is not a minute that someone is not phoning you," he says. "The phone

does not rest in this office."

He adds: "Before people come to this office, they should have exhausted all avenues in the administration. If they feel that they have been prejudiced, we will ensure that their concerns are dealt with.

"However, we won't turn anyone back. We will forward their concerns to the relevant department so that they can give us a comment. We understand the bureaucracy people are faced with, and we want them to be handled in a more considerate manner."

His office aims to have a turnaround time of less than 31 days to conclude investigations. For example, an investigation would be conducted if a home owner complained about his neighbour building on his property. An investigator from Baba's office, with the planning department, would handle the investigation.

The office would also make recommendations on how to prevent future incidents.

Telephonic complaints about uncollected refuse, untidy

public spaces or street lighting that do not work, for instance, would be immediately forwarded to the relevant departments for action to be taken.

Baba says "citizens should be consulted about the and quality of services they receive from the administration. Citizens should have equal access to the services and citizens should receive courtesy, respect and cooperation."

The ombudsman can be reached on 021 400 5487 or 021 400 5852.

Ombudsman: improving public service

Complaint? Here's the man to talk to

MYOLISI GOPHE

THE CAPE Town City Council has appointed an ombudsman to "promote accountable, transparent and responsive" local government.

Mbulelo Mazlzi Baba (this week accepted his appointment as the council's version of the public protector, joining other new managers in the City of Cape Town management.

He has been acting in the job since the unitary was formed in 2000 and kept a low profile while the lengthy restructuring process to amalgamate the seven former administrations decided his future.

"Now that I have been lucky enough to be appointed, people should know where to lodge complaints about rude officials and delays in the council, among other things," he said.

He starts officially on May 1.

The primary mandate of his office is to investigate maladministration, corruption or any other allegation which implies infringement of the constitutional rights of individuals within or by the council.

One of the complaints his office is

busy with is about the council's approval of the sale of a hostel in Langa to a church, leaving the hostel dwellers homeless.

The agreement, which was allegedly reached without public consultation, has angered residents who took the matter to the ombudsman as a last resort.

Other complaints include filth in informal settlements, canals and streets, including the Cape Town station deck taxi rank.

Others are about delays in the approval of building plans, empty council properties used by criminals and lack of houses.

"In such cases I inform the relevant departments or inform the complainants about what is being done to resolve the problem," he said.

Cape Town born and bred Baba said that during the mayor's Listening Campaign last year he found many people did not know their rights concerning the local authority and his office would have campaigns to address this.

One of the campaigns would be a drama to be performed at schools on what the ombudsman was all about.

With about three million people in Cape Town, Baba and his four assistants will not be able to deal with all grievances, and he has proposed that his staff be increased to at least 20.

He became involved in local government in 1992 when he was appointed chief executive of the Mfuleni Local Council. After the 39 municipalities in the greater Cape Town area were merged into seven administrations, he was redeployed as senior manager for the area before taking a deputy chief executive job with the SA Human Rights Commission in Johannesburg.

Baba, who is in his mid-50s, has spent much of the past 34 years studying and working at the same time.

He obtained a BA degree in social science from the University of South Africa in 1987, an honours degree in development studies from the University of the Western Cape and a masters in public administration from the University of Stellenbosch.

In 2003, Baba studied the role of ombudsmen in improving public service in London, and last year passed the Washington Ombudsman Association's Ombudsman 101 Plus exam.



Public protector: Mbulelo Baba became the city council's ombudsman this week.

1 - OK - ESTRADE

As the ANC grows, we should watch our precious watchdogs

Cape Times
Monday 1 March 2004

AMONG the outcomes of South Africa's multi-party constitutional negotiations was a commitment to a complex web of laws, institutions, operational routines and practices designed to bolster the diversity and vibrancy of our young democracy.

Holding together this birthright of the new nation was what to outsiders may have appeared an overly detailed and elaborate system of checks, balances, guarantees, political insurance policies and restraints pertaining to any new power elite.

At the centre of this protective safety net, of course, was the new constitution, along with its Bill of Rights and the Chapter 9 institutions.

The impressive array of independent watchdog bodies was established to support democracy by ensuring that the paper rights and freedoms granted to our richly diverse citizenry would be jealously guarded and advanced through practical action.

It is precisely because of South Africa's history of the unfair concentration of political power and its wholesale abuse that multi-party negotiators deemed it necessary to produce such an elaborate set of defensive measures.

It is also true, of course, that serial abusers of power would, for good reason, want to extract in negotiations a fairly detailed commitment that any incoming administration would not do unto them as they had for so long done unto others.

However, there was a more important reason why negotiators eventually settled on such an intricate web of measures to guard against an over-centralisation of power and ensure that control mechanisms were carefully monitored, separated and dispersed.

QUESTIONS



ANTHONY JOHNSON

In dealing with the establishment and governing principles of these watchdog bodies, the constitution requires that they be independent, impartial and exercise their powers without fear, favour or prejudice.

Other organs of state are required to protect and assist these institutions to ensure their independence and effectiveness. But they may not interfere with the functioning of these bodies, which are accountable to the people via their publicly elected representatives sitting in parliament's national assembly.

The constitution also stipulates that an independent authority must regulate broadcasting in the broad public interest, as well as ensure fairness and a diversity of views broadly representing South African society.

There are of course numerous other measures designed to ensure that the new political power elite do not become a law unto themselves and remain accountable to the electorate with its diverse needs and interests.

Among these are the separation of powers between the executive, legislative and judicial arms of government, the role parliament and its myriad of committees play in holding government and parastatals to account, the task of the second house (the national council of provinces) to serve as an additional check on legislation and guardian of provincial interests, and so on.

Continued...

This stemmed from the stated belief by all sides at the time that a stable and inclusive democracy would not be possible unless the vast majority of South Africans – whatever their political affiliation – believed that they had a real stake in the new order.

For this to happen, there needed to be credible mechanisms in place to ensure that their basic rights as citizens were not ignored by the authorities or dealt with in a cavalier, inconsistent and selective manner.

Also, citizens in general had to be reassured that their tax monies were being utilised in an efficient and non-partisan manner.

So it was that provision was made for a number of confidence-building, constitutionally enshrined and other statutory bodies to ensure that all citizens' rights were taken seriously, the abuse of state power was curbed and government was kept on its toes.

These included the Human Rights Commission, the Commission for Gender Equality, the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities, the auditor-general, the public protector, the Pan South African Language Board, and various others.

In addition, there are a number of more informal routines and traditions – some home-grown, others borrowed from democracies elsewhere – designed to ensure that opposition parties play a significant role when it comes to lawmakers' watchdog and oversight functions.

With all these checks and balances on the exercise of power, South Africa is on one level a textbook example of good governance and democratic systems.

But all this flies in the face of the ANC's unwavering commitment to "democratic centralism", which has as its stated goal taking control of all parastatals, statutory bodies and strategically important civil society structures by the ruling party.

The heady Prague Spring which followed the constitutional negotiations turned out to be relatively short-lived. The ruling party's decision to take control of the leadership of parliament's most important watchdog committee, Scopa (the Standing Committee on Public Accounts) is but the most recent example of a steady march towards greater centralisation of power, authority and control.

● Johnson is a former political editor and assistant editor of the Cape Times.

SAPA, April 12, 2005:

Mbeki promotes ombudsman system

Johannesburg - The ombudsman system should be available to all people because it is a less expensive avenue than the normal justice system, President Thabo Mbeki said on Monday.

"It is less expensive than the normal justice system, flexible and has a quick process to ensure that those in positions of authority perform their administrative functions in accordance with accepted and fair rules and procedures," Mbeki said at the opening of the general assembly of the African Ombudsman Association in Muldersdrift, west of Johannesburg.

An ombudsman was easy to access, cheap to use and offered an opportunity to settle disputes in an amicable way.

"While it is indeed not a court of law, its procedures and processes must be simple, understandable and accessible to all. The ombudsperson institution must act and be seen as an alternative structure for conflict resolution."

Mbeki said there had been positive developments in Africa in recent years towards democracy, the rule of law and respect for people's and human rights.

"Through the African Union, and specifically the African Human Rights Commission and the Peer Review Mechanism, we continue to strive to ensure that we assist one another, as Africans, to entrench democratic ideals and practice in all our countries and create free and open societies ... for the regeneration of our continent."

"For us further to entrench democracy, we need institutions such as the Office of the Ombudsperson to be strong, efficient, effective and independent of any control or manipulation by both the public and private sectors."

It was also important for an ombudsman to display, maintain and enhance African values and to recognise social and cultural diversities, Mbeki said.

Angola Press, April 12, 2005:

Mbeki urges Ombudsperson institution to resolve conflicts

Johannesburg, South Africa, 04/12 - South African President Thabo Mbeki has called on the Ombudsperson institution to act as an alternative structure for conflict resolution and be seen as one of the important agents of change on the continent.

"Because its role is not merely to apportion blame, but rather to protect and promote the rights of citizens, it has the possibility to draw on the wealth of wisdom found in African traditional ways of conflict resolution. It is important that Ombudspersons should

display, maintain and enhance African values, while observing the social and cultural diversities of the people they serve," Mbeki told the African Ombudsman Association (AOA) meeting in Johannesburg Monday.

He said the African Union, and specifically the African Human Rights Commission and the Peer Review Mechanism, will strive to ensure that democratic ideals are entrenched in member states.

But he said, to entrench democracy, there is need for institutions such as the office of the Ombudsperson to be strong, efficient, effective and independent of any control or manipulation by both the public and private sectors.

"The Ombud system should be easily within reach of the ordinary citizen. It is less expensive than the normal justice system, flexible and has a quick process to ensure that those in positions of authority perform their administrative functions in accordance with accepted and fair rules and procedures. The advantage of the institution of the Ombudsperson is that it is easy to access, cheap to use, and offers an opportunity to settle disputes in an amicable way," Mbeki said.

And Mbeki who noted that some of the countries are having difficulties to keep their subscriptions fees current, warned that while it is important to seek other sources of funding for the institution of the Ombudsperson to function properly, member countries have to be careful that in the process of developing a donor-recipient relationship, they do not deviate from the objectives of serving the interests of the African people.

He urged defaulting countries to be mindful of Africa`s history and reality, and contribute to the renaissance of the continent.

"It is critical that we forge closer relations between the AOA and the AU structures such the Pan African Parliament (PAP), the African Human Rights Commission and the African Peer Review Mechanism. An attempt must be made to synchronise activities of the AU structures with those of the AOA".

BuaNews (Pretoria), April 11, 2005 :

Ombudsman Should Help Entrench Democracy in Africa

By Richard Mantu
Pretoria

President Thabo Mbeki says institutions such as the office of the ombudsman need to be efficient, free from manipulation and accessible to ordinary people.

Speaking during the opening of the General Assembly of the African Ombudsman Association (AOA) in Johannesburg today, President Mbeki said the office of ombudsman should act and "be "seen as an alternative structure for conflict resolution."

"For us further to entrench democracy, we need institutions such as the Office of the Ombudsperson to be strong, efficient, effective and independent of any control or manipulation by both the public and private sectors," he said.

President Mbeki added that the ombud system should be within reach of the ordinary citizen, as it offered an opportunity to settle disputes in an amicable way, thus allowing parties to become joint owners of the end product.

"While it is indeed not a court of law, its procedures and processes must be simple, understandable and accessible to all. The ombudsperson institution must act and be seen as an alternative structure for conflict resolution," he said.

President Mbeki urged delegates to ensure that all African countries established such institutions to safeguard the freedoms of the citizens protect their rights.

"Accordingly, we share a common task to take all possible steps to assist those countries that are still having difficulties in establishing these important organs," he said.

President Mbeki said it was critical that African Union and its institutions forged closer relations with the AOA.

He also welcomed the news that the AOA has resolved that its research institute that previously located in Dar-es-Salaam be established within a South African university and arrangements are being made with the University of KwaZulu-Natal in this regard.

"Because the main object and purpose of this university-based institution is to serve as a resource to the AOA, do research, and conduct the training of staff and personnel of Ombud offices, it is important that all of us give this institution the necessary support," he asserted.

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The Star, April 12, 2005:

'Ombudsman system must be accessible'

The ombudsman system should be easily available to all people because it is a less expensive avenue than the normal justice system, according to President Thabo Mbeki.

"It is ... flexible and has a quick process to ensure that those in positions of authority perform their administrative functions in accordance with accepted and fair rules and procedures," Mbeki said yesterday.

He was speaking at the opening of the general assembly of the African Ombudsman Association (AOA) in Muldersdrift, west of Johannesburg.

The ombudsman system was accessible, cheap and offered an opportunity to settle disputes in an amicable way.

"While it is indeed not a court of law, its procedures and processes must be simple, understandable and accessible to all."

"The institution must act and be seen as an alternative structure for conflict resolution."

Mbeki said there had been positive developments in Africa in recent years regarding democracy, the rule of law and respect for people's and human rights.

"Through the African Union, and specifically the African Human Rights Commission and the Peer Review Mechanism, we continue to strive to ensure that we assist one another, as Africans, to entrench democratic ideals and practice in all our countries and create free and open societies ... for the regeneration of our continent."

The AOA plans to establish its research institute in South Africa, Mbeki announced yesterday.

"I am told that the AOA has resolved that the research institute of the association that was previously located in Dar es Salaam should be established within a South African university and that arrangements are being made with the University of KwaZulu Natal in this regard," he said.

Such an institute should have all the support it needed. - Sapa.

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v. THE OMBUDSMAN ASSOCIATION CODE OF ETHICS

University of Cape Town

The
Ombudsman
A S S O C I A T I O N

CODE OF ETHICS

The ombudsman, as a designated neutral, has the responsibility to maintain strict confidentiality concerning matters that are brought to his/her attention unless given permission to do otherwise.

The only exceptions, at the sole discretion of the ombudsman, are where there appears to be imminent risk of serious harm.

The ombudsman must take all reasonable steps to protect any records and files pertaining to confidential discussions from inspection by all other persons, including management.

The ombudsman should not testify in any formal judicial or administrative hearing about concerns brought to his/her attention.

When making recommendations, the ombudsman has the responsibility to suggest actions or policies that will be equitable to all parties.

vi. THE OMBUDSMAN ASSOCIATION STANDARDS OF PRACTICE

University of Cape Town

The **Ombudsman**

A S S O C I A T I O N

STANDARDS OF PRACTICE

We adhere to The Ombudsman Association Code of Ethics.

We base our practice on confidentiality.

We assert that there is a privilege with respect to communication with the ombudsman and we resist testifying in any formal process inside or outside the organization.

We exercise discretion about whether to act upon a concern presented by an individual contacting the office. An ombudsman may initiate action on a problem he or she directly perceives.

An organizational Ombudsman should report to the highest level of management (such as agency head, CEO, governing board, etc.), in a manner independent of ordinary line and staff functions and should not report to, nor have the appearance of reporting to, nor be structurally affiliated with, any compliance office of the organization. The Ombudsman should have direct access to the Board of Directors or other oversight body as appropriate.

We remain an informal and off-the-record resource. Formal investigations — for the purpose of adjudication — should be conducted by others. In the event that an ombudsman accepts a request to conduct a formal investigation, a memo should be written to file noting this action as an exception to the ombudsman role. Such investigations should not be considered privileged.

We foster communication about the philosophy and function of the ombudsman's office with the people we serve.

We provide feedback on trends, issues, policies and practices without breaching confidentiality or anonymity. We identify new problems and we provide support for responsible systems change.

We keep professionally current and competent by pursuing continuing education and training relevant to the ombudsman profession.

We will endeavor to be worthy of the trust placed in us.