

ADVOCATE - GENERAL:

SOUTH AFRICA'S VERSION OF AN OMBUDSMAN

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International Ombudsman Institute  
OCCASIONAL PAPER #37  
**October 1986**

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## A. INTRODUCTION

The office of the Advocate-General was instituted in 1979 in South Africa and is therefore still relatively new. As a result, there is still much uncertainty outside and inside South Africa as to its usefulness to the South African society. In order to put the matter into perspective and to determine to what extent this office resembles the legislative ombudsman system, the general functioning of the office should be analysed. An analysis of the functioning of the office will necessarily involve the review of the evolution, definition, organizational aspects, jurisdiction, procedures of investigation and annual reports of the office.

## B. EVOLUTION

The office of Advocate-General was instituted in terms of the Advocate-General Act, 1979 (Act 118 of 1979). To bring the origin of the office of Advocate-General into perspective, it should be pointed out that the need for such an office was realized after the facts about the Information debacle<sup>1</sup> had come to light. The office was thus created in the aftermath of the inquiry concerning the former Department of Information.<sup>2</sup> Despite certain functional

<sup>1</sup> The Information debacle revealed the misappropriation of public funds. *Reports of the Commission of Inquiry into Alleged Irregularities in the Former Department of Information: Report (RP113/1978); Interim Report (1979); and Supplementary Report (RP63/1979)*

<sup>2</sup> van der Walt, P.J. "Het die amp van Advokaat-generaal 'n bestaansreg?" - "Does the office of the Advocate-General have a reason for existence?", *Modern Business Law* Vol.3,

differences, the office of Advocate-General is comparable to that of the Special Prosecutor in the United States, which was also instituted in the wake of a scandal -in this case, the Watergate Scandal.<sup>1</sup> A primary reason for the creation of the office of Advocate-General was the former Prime Minister's commitment on 28 September 1978 to maintain honest public administration and orderly government.<sup>2</sup> The institution of the office of the Advocate-General was one outcome of this commitment. In view of this it seems that the Advocate-General was established as a result of a need of the government and not necessarily as a result of a need of the citizen. This is in contradiction to the fact that the Information debacle has proven that the greater the powers given to the executive, the greater the need to safeguard the citizens from their arbitrary or unfair exercise. It seems that the Advocate-General's office was established in the absence of a thorough prior study and investigation on the needs of the citizens for such an institution. The Information debacle also necessitated the appointment of the Erasmus Commission to identify the alleged irregularities. At the same time it was realised that, after this Commission had published its final report, there would always be a need for investigating matters of a similar nature.<sup>3</sup> In a certain sense the Advocate-General was

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<sup>2</sup>(cont'd) No. 1, March 1981, p.6

<sup>1</sup>South Africa (Republic) *Debates of the House of Assembly (Hansard)*. Part 81, Wednesday 23 May 1979, col.7007.

<sup>2</sup>South Africa (Republic). *Debates of the House of Assembly (Hansard)* Part 79, Friday 16 March 1979, col.2638

<sup>3</sup>*Ibid.* col. 2655

to become the permanent successor of the Commission, and he consequently took over its jurisdiction regarding scope of inquiry. Related to this is the establishment in Tanzania of the Permanent Commission of Inquiry with the jurisdiction to investigate allegations of misconduct or abuse of office or authority by public officials. In addition to all that has been said, the institution of the office of the Advocate-General is a recognition of the right of Parliament to keep a watchful eye on the public financial administration of South Africa. It also seems that the South African Parliament has provided an institution which embodies Parliament's own administrative conscience.

### C. DEFINITION OF THE OFFICE

The South African Office of the Advocate-General should not be confused with the office of the Advocate-General in the European Communities<sup>1</sup> or the King's Advocate-General which existed until 1872 in England.<sup>2</sup> The office of the Advocate-General is unique in that it is the first and only one of its kind instituted either by the South African Parliament or in the history of Westminster democracy.<sup>3</sup> Its uniqueness is evident in the designation "Advocate-General", which is peculiar to South Africa, as well as in its unique

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<sup>1</sup>Dashwood, A.A. "The Advocate-General in the Court of Justice of the European Communities", *Legal Studies*. Vol. 2, 1982, p.202-216

<sup>2</sup> Edwards, J.L.J. *The Law Officers of the Crown* London: Sweet and Maxwell, 1964, p.119-140.

<sup>3</sup>South Africa (Republic) *Debates of the House of Assembly (Hansard)*. Part 81, Wednesday 16 May 1979, col. 6461.

sphere of jurisdiction which distinguishes it from more or less parallel offices and institutions in other countries. Cases in point are the ombudsmen of the Scandinavian countries, the Parliamentary Commissioner for administration in Britain, the French *Mediateur*, the Special Prosecutor in the United States of America and the Permanent Commission of Inquiry in Tanzania.

The office of Advocate-General was instituted to afford anyone who has reasonable grounds to suspect irregularities as defined in section 4(1) of the Advocate-General Act, 1979. (Act 118 of 1979), the opportunity to lay their suspicions before the Advocate-General, who may order a full inquiry into a report on such alleged irregularities.

#### D. ORGANIZATIONAL ASPECTS

The Advocate-General is an independent and impartial official of Parliament who is appointed by the State President in a full-time or in a part-time capacity and is not subject to political authority or accountability to any government department.<sup>1</sup> The Advocate-General may be suspended from office by the State President and his suspension and reasons thereof must be communicated to the legislature. Should the legislature wish for his reinstatement he must be restored. If, however, there is no such request the State President must confirm the suspension and remove the Advocate-General from office. He can also be -----

<sup>1</sup>South Africa (Republic). *Advocate-General Act*, 1979 (Act 118 of 1979), Section 2(2).

removed from office by the State President when requested thereto by the legislature.<sup>1</sup> In theory the Advocate-General functions as a representative of Parliament and is thus responsible to Parliament. This means that he has to report to Parliament on inquiries held in terms of the Act.<sup>2</sup> Therefore the office has derived its importance not only from the specific powers given to it, but rather from the fact that it represents Parliament and that its holder enjoys the confidence<sup>3</sup> of Parliament. The success of the office would also be dependent upon the prestige of the office and its acceptance by public opinion.<sup>4</sup> All this can be enhanced by the fact that the Advocate-General must be "a person who by virtue of his qualifications is entitled to be admitted and authorized to practise and be enrolled as an advocate...and...(must have been) concerned in the application of the law for a continuous period of at least ten years".<sup>5</sup> Constant reference to the "Advocate-General" might suggest to the unwary that he single-handedly copes with all the complaints received. He does in fact utter the final word in each instance, but he has able assistance to do so because provision has been made for an assistant or several persons as assistants to the Advocate-General. It

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<sup>1</sup>*Ibid.* Section 2(5)-(7).

<sup>2</sup>*Ibid.* Section 5(1).

<sup>3</sup>South Africa (Republic). *Debates of the House of Assembly (Hansard)*. 18-22 April 1983, col. 5449

<sup>4</sup>Knoll, J.E. "The Case for an Ombudsman in South Africa", *Codicillus* Vol. 23, No. 2, 1982, p.28.

<sup>5</sup>South Africa (Republic). *Advocate-General Act*. Section 2(2). These are the requirements set by custom for admission as a Senior Counsel (Q.C.)

is, however, clearly stated that such assistance should be subject to the control and directions of the Advocate-General.<sup>1</sup> The Advocate-General also has a small staff which consists of officials appointed by the Advocate-General as well as officers in the Public Service seconded to the service of the Advocate-General to perform certain tasks.<sup>2</sup>

#### E. INDEPENDENCE AND IMPARTIALITY

Although Parliament is organized as a public forum in which to air grievances<sup>3</sup> individuals feel obliged to bring their needs to the attention of government otherwise than through the formal channels of political representatives. At this point the need for the Advocate-General arises. But to earn the respect of the public there must be affirmation that the Advocate-General will function in an impartial fashion. If the Advocate-General is to be an impartial judge of complaints against public administration, his decisions should not depend on any institution, governmental or private. This also implies that members of the legislative authority who instituted the office should by no means intervene to influence particular decisions. This should result also in its independence from political parties or interest groups. To be impartial the Advocate-General should also possess a well-balanced viewpoint and a sense of

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<sup>1</sup> *Ibid* Section 2(13)

<sup>2</sup> *Ibid* Section 3

<sup>3</sup> South Africa (Republic) *Debates of the House of Assembly (Hansard)* 23 March 1973, col. 3330



fairness.

The test of impartiality of the Advocate-General will depend on the extent to which the office can comply with the indicated conditions. The first means of proof is to be found in the fact that the office of Advocate-General is external to, and operationally independent of, the public institutions that are subject to its investigations.<sup>1</sup> Although it is only natural that some citizens may think that the Advocate-General is somehow in league with the public officials, the office is certainly not an adjunct of public bureaucracy because the office is functionally autonomous. The Advocate-General is only responsible to the State President and Parliament<sup>2</sup> and is not subject to any Minister or any other institution.<sup>3</sup> The independent

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<sup>1</sup>The fact that the Advocate-General is hierarchically independent of public institutions does not mean that the relationship between the two entities is one of hostility. In fact, public institutions should recognize that having an Advocate-General can be beneficial.

<sup>2</sup>Van der Walt, P.J. "Advocate-General" *Saipa: Journal for Public Administration*. Vol. 16, No.1, March 1981, p.4

<sup>3</sup>An example of this can be found in a report of the Advocate-General where it was stated that the office of the Advocate-General does not receive any institution or order from the government. Cf. *Report of the Advocate-General*. 19 February 1981, p.1. Another example can be found in a press statement on the mini-Krugerrand affair released by the Advocate-General on 16 October 1981. The Danish Ombudsman operates under the same principle which is clear from this quotation: "He cannot be instructed in his dealing with individual cases. The Ombudsman has interpreted his statutory independence to mean that he cannot accept complaints from the *Folketing* (Danish Parliament) and that he must act in a nonpartisan way. This does not preclude the investigation of politically controversial complaints, and it is generally accepted that the Ombudsman is politically neutral." Nielsen, L.D. "Denmark" in Caiden, G.E. *International handbook of the Ombudsman: Country Surveys*. Westport. Connecticut: Greenwood Press, 1983, p.74

decision-making of the Advocate-General is further emphasized by the fact that provision has been made in the act against improper influencing of the proceedings and findings of an inquiry by the advocate-general. <sup>1</sup>

A further attempt to secure impartiality derives from the provision that the office can investigate complaints without being influenced by political considerations. Thus it remains aloof from political involvement.<sup>2</sup> This means that the Advocate-General is a nonpartisan official who is independent of political control.<sup>3</sup> For political parties and interest groups to pursue an attempt to control the decisions of the Advocate-General is only to invite the loss of popular support they need for achieving their objectives and therefore a risk hardly worth taking. The result of this is that the Advocate-General is not tainted in the eyes of the public with any doubts about susceptibility to partisan influence.

Another contributing factor to impartiality is that the Advocate-General operates on the basis of universalistic norms. In other words the Advocate-General follows a

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<sup>1</sup>South Africa (Republic). *Advocate-General Act*. Section 8(1)(a) and 9(1). Some writers, however, feel that the procedural requirements are unduly restrictive since it may effectively prevent publicity. Rudolph, H. "The ombudsman and South Africa" *South African Law Journal* Vol.100, No.1, February 1983, p.574; Baxter, L. *Administrative Law*, Cape Town: Juta, 1984, p.289

<sup>2</sup>Ndokweni, M.B. "Advocate-General", *Bulletin of the Institute for Public Service and Vocational Training: University of Zululand*. Vol. 3, No.2, December 1979, p.80

<sup>3</sup>Sing, D. "The Ombudsman and public administration", *Bulletin of the Institute for Public Service and Vocational Training: University of Zululand*, Vol.7, No.2, December 1983, p.38

universalistic approach where complaints from different social backgrounds and racial groups are treated equally and fairly. In South Africa this characteristic is of major importance because it results in the provision of assistance to those population groups who are not represented in Parliament.<sup>1</sup> In establishing the impartiality of the Advocate-General reference should also be made to the person of the Advocate-General. The Advocate-General is expected to be a person of recognized legal ability and integrity. It is for this reason that the present acting Advocate-General is a judge which undoubtedly contributes to the impartiality of the office. To emphasize the impartiality of a judge it is apt to quote Eckhoff in this regard.

"Sometimes his person (the judge) gives sufficient guarantee. He is, for instance, because of his high rank, ... or his recognized wisdom and strength of character, regarded as infallible, or at least freed from suspicion of partisanship."

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Credibility is another factor. In South Africa the Advocate-General ranks high in credibility because his professional stature is respected.<sup>3</sup> This personal prestige

<sup>1</sup>Thornhill, C. "Political control of administration", in Hanekom, S..X. & Thornhill, C. *Public Administration in contemporary society: A South African perspective*. Johannesburg: Macmillan South Africa, 1983, p.210

<sup>2</sup>Eckhoff, T. "The mediator, the judge and the administrator in conflict-resolution", *Acta Sociologica*. Vol. 10, 1967, p.164

<sup>3</sup> Brynard, D.J. "Jurisdiksie van die Advokaat-generaal" (Jurisdiction of the Advocate-General), *Address delivered at a departmental seminar in the*

may also be an important factor in the office's credibility. Credibility will also depend on his reputation for fairness in the handling of complaints. This in turn, will contribute to impartiality. If it now can be assumed that the Advocate-General is impartial in his investigatory activities, then one of the basic principles for impartiality should be equal protection of both the citizen and the public official. This implies a *quid pro quo*: if it is the intention of the Advocate-General to protect the citizen, he should also protect the public official.

#### F. PROTECTING THE CITIZEN

In public institutions the provisions and substantive rules are applied by human beings. With the continually expanding size, complexity, and importance of public bureaucracy at all levels, contemporary South African society becomes a "bureaucratic society". Therefore, the protection of the citizen should primarily be regarded as a protection against arbitrariness, partiality, unfairness, abuse of power, passivity and unlawful and erroneous actions.<sup>1</sup> This implies that when public officials have to deal with the expectations of the citizens, they have to be careful not to become subjective in their decisions and

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<sup>3</sup>(cont'd) *Department of Political Sciences*. University of South Africa, Pretoria, 1984, p.3.

<sup>1</sup>Wennergren, B. *Protection of the citizen in administrative procedures*. Brussels: International Institute of Administrative Sciences, 1969, p.4

actions.<sup>1</sup> The result of this may then be that the public fears the official and the extension of official activities because it feels there is no chance of appeal and no alternative to official judgement. This leads to a need among citizens to find channels through which they can express the frustrations they have with public bureaucracies and seek redress of grievances. But for aggrieved citizen access to the courts is difficult because procedures are almost incomprehensible, delays long and costs prohibitive.<sup>2</sup> In this situation the Advocate-General provides a much needed complement to courts as well as to the citizen's right to turn to his elected representative with his grievances. The mere existence of an institution independent of the executive as the Advocate-General is, should sharpen the attention of public officials and have a preventative influence on abuses in public administration in general. This implies that consciousness of the Advocate-General's vigilance should have a "healthy" effect on the public sector which makes it more sensitive to public opinion and to the demands of fairness. This means of protection was emphasized by Gellhorn when he wrote:

"Without exception, every country that leans heavily on  
ombudsmen or other administrative critics has strengthened  
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<sup>1</sup>Brynard, D.J. "Die administratiefregtelike implikasies van besluitneming deur die openbare beampte" (The administrative law-implications of decision-making of the public servant.), *Nexus: Prison Service Magazine*. Vol. 11, No. 12, December 1982, p.14

<sup>2</sup>Ridely, F.F. "The citizen against authority: The British approaches to the redress of grievances", *Parliamentary Affairs* Vol. 37, No.1, Winter 1984, p.74.

its civil service in the process of solacing those whom civil servants have offended."<sup>1</sup>

#### G. PROTECTING PUBLIC OFFICIALS

There can also be a need for protection of the public official. The office of the Advocate-General serves in this need by protecting the public official against unfounded criticism and accusations. It is for this reason that the public official, who has no other similar mechanism by which to express his views on unjustified attacks, regards the Advocate-General as a valuable aid to disprove unjustified accusations.<sup>2</sup> An analysis of the reports of the Advocate-General indicates that the vast majority of the charges against public officials are without foundation.<sup>3</sup> This means that the Advocate-General can serve as a forum before which unjustified complaints can be identified as such. In this sense the Advocate-General brings about a new relation of confidence between the civil service and the members of the public. It also contributes to the improvement of public official morale. Another advantage is that a complainant may not accept as valid an explanation coming from a public institution itself, but the same explanation coming from the obviously impartial

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<sup>1</sup>Gellhorn, W. "Confining public administration without crippling it", in *When Americans complain: Governmental grievance procedures*. Cambridge, Mass.: Harvard University Press, 1966, p.44.

<sup>2</sup>Thornhill, C. *op. cit.* p.209

<sup>3</sup> An analysis of the Reports of the Advocate-General indicates that 66.6% of the complaints investigated by the office were found to be unjustified. (*Reports No. 1-8.*)

Advocate-General is often accepted. In doing so the Advocate-General draws away from public officials and on to himself those complaints of persistent cranks.<sup>1</sup> In the end the solution should seem to be to pay proper attention to the aggrieved and at the same time give proper support to those who truly serve.<sup>2</sup>

#### H. JURISDICTION AND/OR POWERS

The word "jurisdiction" refers to the institution's right or power to act. Thus the extent of the Advocate-General's action is determined by the jurisdiction and/or powers vested in his office. The jurisdiction of the Advocate-General as regards the scope of his inquiries is set out in section 4(1) of the Act. In terms of this section the Advocate-General is entitled to act if approached by any person who has a reasonable suspicion that public money is being dealt with dishonestly or that a person is being enriched or is receiving an advantage in an improper or unlawful manner at the expense of the State or any institution dealing with public money as a result of any act or omission by any employee of the State or public institution or in connection with the affairs of the State

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<sup>1</sup>van der Walt, P.J. *Address delivered at the University of Pretoria*, 28 May 1980, p.11 CF. Gwyn, W.B. "Transferring the Ombudsman", in Anderson, S.V. (ed.) *Ombudsmen for American government*, Englewood Cliffs, N.J.: Prentice-Hall, p.42 et. seq.

<sup>2</sup>Blom-Cooper, L.J. "An Ombudsman in Britain?", *Public Law* 1960, p.145-151 de Smith, S.A. "Anglo-Saxon Ombudsman", *Political Quarterly* Vol. 33, 1962, p.9-19.

or any such institution.<sup>1</sup> Thus the Advocate-General's jurisdiction refer, in *the first place*, to certain actions and *secondly*, to an unacceptable state of affairs resulting from these actions.<sup>2</sup> This gives an indication of the extend of the competence of investigation on the spectrum of maladministration and can therefore be called the *horizontal jurisdiction*.<sup>3</sup> Thus the jurisdiction on the horizontal level of investigation is restricted to the financial side of governmental activity. This implies that the office is concerned with financial maladministration and not maladministration in general which provide the office with a unique jurisdiction among complaint-handling institutions. The *vertical* extent of the Advocate-General's jurisdiction is indicated by the key phrase "public money". The words "public money" in the outlined jurisdiction indicate the institutions<sup>4</sup> and persons subject to jurisdiction. Any institution which deals with public money is subject to the jurisdiction of the Advocate-General. This indicates a substantial jurisdiction in the vertical line of investigation. The proof of this is found in the wide territorial jurisdiction of the Advocate-General which

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<sup>1</sup>South Africa (Republic). *Advocate-General Act*. Section 4(1)

<sup>2</sup>Kachelhoffer, G.C. "Die Advokaat-Generaal: 'n Ombudsman", (The Advocate-General: an Ombudsman.) *Modern Business Law*. Vol.2, No.1 March 1980, p.122

<sup>3</sup>Brynard, D.J. "The Advocate-General in the public encounter: Impartiality or prejudice?", *Politeia: Journal for Political Sciences*. Vol.4, No.1, 1985, p.44

<sup>4</sup>These institutions are described in sections 1(a), (b) and (c) of the *Advocate-General Act* 1979 (Act 118 of 1979).



spread over all three levels of government.<sup>1</sup> This means that whilst the powers attached to the office of the ombudsman in some countries are restricted by legislation, and specific public institutions are explicitly excluded from his sphere of competence, the Advocate-General has unrestricted authority to investigate the misappropriation of public moneys and in this sphere has wider powers than any ombudsman<sup>2</sup>

## I. SCOPE OF JURISDICTION

An analysis of the words "public moneys" as defined in section 1 of the Act casts more light on the scope of jurisdiction. Briefly, the term implies that all institutions, statutory or otherwise, that deal with public moneys are under the jurisdiction of the Advocate-General. His jurisdiction over diverse statutory institutions, funds, statutory accounts and boards can be termed *vertical jurisdiction* because it suggests a hierarchy. In other words, it includes a large variety of public institutions at all levels such as government departments, provincial institutions, local authorities, control boards, statutory funds and statutory accounts. The range is such that it would be difficult to conceive of any institution officially empowered to receive public money that is excluded from this vertical jurisdiction. In this regard the Act stipulates

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<sup>1</sup>Cf. South Africa (Republic) *Advocate-General Act* Sections 1(a), (b) and (c).

<sup>2</sup>van der Walt, P.J. "Advocate-General", op. cit. p.4

that the Advocate-General may order any person to give evidence or produce any document in his possession. <sup>1</sup> This implies that the right to withhold evidence in terms of State prerogative <sup>2</sup> is not valid in an inquiry by the Advocate-General. Any person in the Republic of South Africa, regardless of his office, can be summoned for questioning by the Advocate-General. <sup>3</sup> A case in point was a charge laid against a public prosecutor of a magistrate's court and a police officer. The complaint was fully investigated by the Advocate-General.<sup>4</sup> Thus the vertical jurisdiction of the Act is not limited by any specific exclusions.

By contrast, the jurisdiction of an ombudsman, as it exists in other countries, is invariably limited by law in that certain institutions in the public administration are specifically excluded from it.<sup>5</sup> Especially the power to investigate complaints against the police is usually not found in every ombudsman's arsenal. In some offices legislation excludes the power to deal with complaints against individual members of the police and in other offices the same result has been reached by

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<sup>1</sup> South Africa (Republic). *Advocate-General Act*. Section 7(1).

<sup>2</sup> South Africa (Republic). *General Law Amendment Act*. 1969 (Act 101 of 1969, Section 29.

<sup>3</sup> South Africa (Republic). *Advocate-General Act* Section 7(1)

<sup>4</sup> South Africa(Republic) *Report of the Advocate-General*. 11/02/1980, p.2-3.

<sup>5</sup> Kachelhoffer, G.C. "The Advocate-General: An extension of jurisdiction", *Modern Business Law* Vol. 5, No.2, July 1983 p.108.

interpretation.<sup>1</sup>

The Scandinavian ombudsmen deal with large numbers of such grievances but the British Parliamentary Commissioner for Administration has no jurisdiction over the police.<sup>2</sup> In this respect therefore the Advocate-General is in a stronger position since he possesses complete vertical jurisdiction subject only to the limitation of financial maladministration. As mentioned earlier, however, this limitation defines his horizontal jurisdiction.

As regards the horizontal jurisdiction of the Advocate-General, it would seem from an analysis of the reports submitted by the Advocate-General thus far that the apparent restriction to financial matters does not altogether exclude inquiries into maladministration in general. Both from the reports issued thus far and from the various speeches made by the Advocate-General it is clear that he has interpreted extremely generously the jurisdictional provisions of the Act. Justification for such a statement may be found in section 5(1), which stipulates that the Advocate-General must, after completing his inquiry, submit a report on his findings and recommendations to Parliament. The interesting point here is that the nature of his recommendations is not defined or limited. This implies that, to enable him to report on the main financial

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<sup>1</sup> Frank, B. "The Ombudsman and the Human Rights - Revisited", *Israel Yearbook on Human Rights*. Vol.6, 1976, p.154

<sup>2</sup>Great Britain.*First Report of the Parliamentary Commissioner for Administration, Session 1967-1968*. p.7.

issue, any general maladministration that may emerge in the course of an inquiry into a complaint about financial maladministration may also be investigated as an unavoidable side-issue. <sup>1</sup> This is illustrated in the second report of the Advocate-General, which recommends that a certain act be amended to improve administrative procedures so as to prevent maladministration in the future.<sup>2</sup> The said report affords another interesting sidelight on the horizontal jurisdiction of the Advocate-General. The complainant in the inquiry alleges that there is a suspicion of *improper advantage* in connection with public affairs. The grievance investigated concerned that abuse of government authority to obtain information for political gain, and the abuse of public moneys is mentioned only by implication. Thus the emphasis falls on *improper advantage* and not on unlawful enrichment, which would have a financial implication. During the investigation it was found that officials had acted in good faith and seemingly in accordance with the stipulations of the Act authorizing their action. However, closer analysis of the relevant section of the act revealed a failure to comply with the *essence* of the section. Thus the officials' authority to act was merely ostensible and therefore all related expenditure could probably be regarded

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<sup>1</sup>Van der Walt, P.J. *Beheer en kontrole van die Landsadministrasie: Advokaat-generaal en/of Ombudsman?* (Control of the administration: Advocate-General and/or Ombudsman?) Address delivered in the Department of Political Sciences, University of South Africa, Pretoria, 1982 p.7.

<sup>2</sup>South Africa (Republic). *Report of the Advocate-General*. 22/4/1980, p.11-14.

as unauthorized. Hence the abuse of public moneys was at issue only by implication.

If the emphasis in the jurisdiction were to be placed on *advantage* to be derived, the question is whether the sphere of jurisdiction could not extend far beyond the mere mispending of public moneys. Advantages to be derived will not necessarily always have a financial implication and can therefore also be the result of maladministration. A *shortcoming* of the sphere of jurisdiction is that it does not provide for *prejudice*. This means that the emphasis does not fall on prejudice but on *advantage* or *enrichment*. Hence, a person can be prejudiced, either financially or otherwise, by government action without anyone necessarily benefiting or being enriched.

In terms of the Act the jurisdiction of the Advocate-General may in no way have a restricting effect on inquiries conducted by, or powers conferred and duties imposed on any institution in terms of existing legislation.<sup>1</sup> One could infer from this that the jurisdiction of the Advocate-General is directed at unethical conduct and not necessarily at criminal behavior. Thus the jurisdiction of the Advocate-General covers a much wider field than the settlement of civil disputes or the adjudication of purely criminal cases. The law therefore ensures that the jurisdiction of the Advocate-General will not conflict with that of the South African Police, the

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<sup>1</sup> South Africa (Republic). *Advocate-General Act*. Section 12.

Auditor-General or the Attorney-General. In general it seems that within broad (or limited ?) boundaries, Parliament has given considerable discretion to the Advocate-General to determine his own authority.

#### J. EXTENSION OF JURISDICTION

The Advocate-General's sphere of jurisdiction has already expanded considerably since 1979 when the office was instituted. After implementing the act for just over a year, the present acting Advocate-General already considered it necessary to submit a memorandum to the State President to propose a number of amendments to the Act.<sup>1</sup> The need for extending the jurisdiction arose after a number of complaints had been lodged with the Advocate-General in connection with the funds of institutions whose accounts, although subject to audit by the Auditor-General, could not be investigated by the Advocate-General because the funds in question fell outside the definition of "State moneys". Such funds are, however, public money, and therefore the Advocate-General's powers of inquiry had to be extended to include these funds. On 27 April 1983 the Advocate-General Amendment Act, 1983 (Act 55 of 1983) provided for the substitution of the definition of "State moneys" for "public moneys". The Advocate-General's scope of inquiry was thus extended to include both the categories defined as "State moneys" and the funds of local authorities and statutory

<sup>1</sup>South Africa (Republic). *Debates of the House of Assembly (Hansard)*. 22 April 1983, col.5561

boards. Thus provision was made for the inclusion of all aspects of money collected from members of the public by government institutions or statutory bodies. This also implies that the Advocate-General's jurisdiction covers the same field as the audit powers of the Auditor-General, and in certain cases an even wider field. The effect of the extension of the jurisdiction of the Advocate-General was to install him as the watch-dog of Parliament over the entire public sector as far as the mismanagement of public moneys is concerned. This implies that the number of matters that can be investigated by the Advocate-General has obviously been increased considerably.

#### K. PROCEDURES OF INVESTIGATION

Although the Advocate-General has not been granted jurisdiction over complaints relating to maladministration in general and, for this reason, is not an ombudsman in the true sense of the word, it is necessary to point out that, in regard to the procedures and investigations falling within the jurisdiction of the Advocate-General, he in fact, in many ways acts as an ombudsman. Any person who wishes to lay a complaint before the Advocate-General have to do so by means of an affidavit or affirmed declaration containing the nature of the suspicion, the grounds on which the suspicion is based, and all other relevant information known to the declarant.<sup>1</sup> The fact that complaints made to the

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<sup>1</sup>South Africa(Republic) *Advocate-General Act*.Section 4(2)

Advocate-General must be lodged with him either in the form of an affidavit or in the form of an affirmed declaration is a restrictive procedural requirement in terms of free access to the institution.<sup>1</sup> Unrestricted access is usually a contributing force towards the success of such an office and in this sense the Advocate-General does have a procedural shortcoming in relation to most ombudsmen.

The word "suspicion" in the definition of the jurisdiction implies that a complaint need not be substantiated when lodged with the Advocate-General, but the condition is that there should be reasonable grounds for such suspicion. The expression "reasonable grounds" is used to prevent trivialities<sup>2</sup> from being laid before the Advocate-General and certainly not to make it more difficult for the public to lay complaints, thus limiting the scope of inquiries. The principle of reasonable grounds for a suspicion can also be used by the Advocate-General as an objective criterion to determine if there is adequate reason for ordering an inquiry. In other words, the Advocate-General must determine whether a complainant's suspicion is well-founded before ordering an inquiry.

The Advocate-General is also empowered to inquire into any matter falling within his jurisdiction on his own initiative as if it had been laid before him in the

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<sup>1</sup>It is usually not possible for the Advocate-General to follow up or to endeavour to prove or refute every rumour and he does not see it as his task to attempt to ferret out evidence to prove or refute speculative rumours.

<sup>2</sup>Rudolph, H. *op. cit.* p.104; Baxter, L.*op. cit.* p.291.



prescribed manner by a member of the public.<sup>1</sup> This authority has been used in relatively few cases. The first example of a complaint investigated on the Advocate-General's own initiative appears in his very first report, which deals with an inquiry of poaching of game in South West Africa. Another example can be found in the fourth report where it stated that the Advocate-General initiated an inquiry of his own accord as a result of persistent rumours and also newspaper reports concerning allegations that a former State President had deposited a considerable amount of "public money" in a bank account in a Swiss Bank.<sup>2</sup> Usually this power is exercised when rumours of possible enrichment by means of public moneys in an improper way receive considerable publicity and the Advocate-General on his own initiative orders a preliminary inquiry to determine whether there are any grounds for suspicion. This power is one of the prerequisites for the wide discretion which the Advocate-General has in dealing with complaints. In such cases the Advocate-General's activities assume a special character because then it is his aim to get to the bottom of the case, to segregate the core of truth from the exaggerations and controversy, and to try to put an end to the affair. This power to investigate a matter *mero moto*, without a formal complaint having been filed, represents one of the strongest positive features of the system.

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<sup>1</sup>South Africa(Republic).*Advocate-General Act*. Section 5(5)

<sup>2</sup>South Africa(Republic). *Report of the Advocate-General* 19/2/1981, p.1

Once a complaint is filed, the Advocate-General is the moving force. To establish whether or not a suspicion in question in a complaint is well-founded the Advocate-General inquires immediately into a matter laid before him.<sup>1</sup> The procedure to be followed in conducting the inquiry is determined by the Advocate-General at his own discretion with due regard to the circumstances of each case.<sup>2</sup> Up to the present the Advocate-General has endeavored to assist complainants informally to solve their problems as far as it is possible to do so without being subject to rely on the provisions of the act only.<sup>3</sup> To act on an informal basis is common usage in countries with ombudsmen because all such institutions sometimes sought to change official determinations on an informal basis without being illegal or subject to criticism. By conducting investigations in an informal manner the Advocate-General has succeeded also to accommodate complaints on the broader spectrum of maladministration. This implies that the complaints falling outside the scope of the act can be dealt with in the same way that an ombudsman would have dealt with them.<sup>4</sup>

It is also important to note that the Advocate-General is not an officer investigating criminal cases but rather a functionary investigating offences at a moral and ethical level within his sphere of jurisdiction.<sup>5</sup> That is why the

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<sup>1</sup>South Africa(Republic)*Advocate-General Act*. Section 5(1)

<sup>2</sup>*Ibid* Section 6(1).

<sup>3</sup>Brynard, D.J. "The Advocate-General..." *op. cit.* p.45

<sup>4</sup>van der Walt, P.J. "Advocate-General", *op. cit.*p.4

<sup>5</sup>van der Walt, P.J. *Corruption: A problem for government*  
 Opening address delivered during a seminar on corruption at

Act stipulates that if during or after an inquiry the Advocate-General is of the opinion that the facts disclose the commission of an offence, he may *at any time* inform the relevant authority in charge of prosecutions of such facts.<sup>1</sup>

#### L. ANNUAL REPORTS

Since the Advocate-General performs his duties on behalf of Parliament, he is obliged to inform Parliament of the cases where a person or institution under his jurisdiction has committed major mistakes. The Advocate-General has a duty to report to Parliament and to make recommendations, if he wishes, to Parliament.<sup>2</sup> For the purposes of publication of the contents of the report, it is handed over to the Speaker of the House.<sup>3</sup> If the report contains a recommendation by the Advocate-General that publication of the contents be prohibited in the interest of the security of the State, it will be submitted to Parliament as a confidential paper.<sup>4</sup> A select committee

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<sup>5</sup>(cont'd) the University of South Africa, Pretoria, 1983., p.1112.

<sup>1</sup>South Africa(Republic)*Advocate-General Act* Section 5(4).This power has been used several times: *Report of the Advocate-General* 10/9/1981, p.8 *Report of the Advocate-General*.29/6/1984, p.12

<sup>2</sup>South Africa (Republic)*Advocate-General Act*.Section 5(1)

<sup>3</sup>*Ibid* Section 5(1)

<sup>4</sup>The seventh report of the Advocate-General was tabled as a confidential paper. The Advocate-General was of the opinion that the publication of the full contents of this report would not be in the interest of the security of the State in view of the provisions of the *Petroleum Products Act* and the highly confidential nature of the information to crude oil purchases. The select committee recommended that the report should be published with certain omissions to achieve the

appointed by Parliament will then consider the recommendation and report back to Parliament.<sup>1</sup> This does not mean that the select committee can evaluate the general contents and recommendations of the report and re-investigate the complaints.<sup>2</sup> The report submitted to Parliament by the Advocate-General should be accompanied by a record of evidence of the proceedings of his investigation.<sup>3</sup> If the disclosure of a section of the report, in the opinion of the State, is prejudicial to the security of the State, this section will be excluded from the record of evidence submitted with the report. The select committee can however request the submission of this section<sup>4</sup> The Advocate-General has no power to enforce his recommendations. His only power is the right to investigate and make recommendations. His influence is based upon his objectivity, competence, superior knowledge and prestige. When these are unpersuasive, his main weapon to secure remedial action is publicity. This can be done through the press. The Advocate-General does not have powers of prosecution like Sweden and Finland which, in any case, are exceptional powers for an ombudsman to possess.

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<sup>4</sup>(cont'd) maximum disclosure without prejudice to the interests of the security of the State

<sup>1</sup>South Africa (Republic). *Advocate-General Act* Section 5(2)

<sup>2</sup> Brynard, D.J. "Die Advokaat-generaal en die ru-olie-aangeleentheid" (The Advocate-General and the crude oil affair). *De Rebus: The SA Attorneys' Journal*. No. 208, April 1985, p.164.

<sup>3</sup>Usually record of evidence is omitted as a result of the informal nature of investigations by the Advocate-General.

<sup>4</sup>South Africa (Republic). *Advocate-General Act*. Section 5(6)

## M. CONCLUSION

Drawn from this evidence of the article it was established that the Advocate-General can make a meaningful contribution towards the control function in the public sector and by virtue of the points raised in the article it is possible to give the following interim verdict on the future prospects for the office. Within the limits of his present sphere of jurisdiction the Advocate-General already acts as an ombudsman, but because of the limitations on his jurisdiction, he is not yet a fully-fledged ombudsman. At present his office has more of the characteristics of a special-purpose ombudsman. There is certainly a need for a further extension of the jurisdiction of the office but a few facts should be considered in this regard:

1. The office is a creation unique to the Republic of South Africa and the country should consider the ideal of developing it without impairing that uniqueness.
2. After more than seven years in operation the office is still relatively young and still developing. A possible solution could be to regard the office as being in a state of evolution and adaption to conditions in South Africa.
3. No ombudsman anywhere has unlimited powers of inquiry, and limitations on jurisdiction differ from country to country depending on local conditions. Hence the apparent limitation in South Africa is not exceptional.
4. There is the danger that if the jurisdiction of the

Advocate-General should be extended horizontally to include all aspects of maladministration, his limited vertical jurisdiction with regard to institutions and persons may suffer, which may reflect on the usefulness of the office.

5. The bounds of jurisdiction of such an office depend on the lengths to which the legislature in a country is prepared to go.

The important fact seems to be that the institution of the office was a step in the right direction. There are certainly grounds to believe that it should be desirable for the South African government to consider a formal investigation and review of the need to extend the jurisdiction of the Advocate-General to include all complaints regarding general maladministration.