

ADV THULI MADONSELA
FORMER
PUBLIC PROTECTOR OF SOUTH AFRICA

ADDRESS TO 11TH IOI WORLD CONFERENCE

BANGKOK 16 NOVEMBER 2016

EVOLUTION OF OMBUDSMANSHIP: SOUTH AFRICAN CASE STUDY

EVOLUTION OF OMBUDSMANSHIP

OUTLINE OF PRESENTATION

1. BEYOND MORAL SUASION: *EFF V SPEAKER OF THE NATIONAL ASSEMBLY*
2. POWERS THAT BIND, POWERS THAT ARE WIDE: AN IMPERCEPTIBLY REVOLUTIONARY CONSTITUTION
3. WHAT HAS BEEN GAINED FOR DEMOCRACY
4. A NOTE ON CHALLENGES
5. THE FUTURE: A GLIMMER OF HOPE

EVOLUTION OF OMBUDSMANSHIP

POWERS THAT BIND, POWERS THAT ARE WIDE: AN IMPERCEPTIBLY REVOLUTIONARY CONSTITUTION

❖ FROM MALADMINISTRATION TO IMPROPER CONDUCT

“ THE PUBLIC PROTECTOR HAS THE POWER AS REGULATED BY NATIONAL LEGISLATION –
LEGISLATION –

(A) TO INVESTIGATE ANY CONDUCT IN STATE AFFAIRS OR IN THE PUBLIC ADMINISTRATION IN ANY
ADMINISTRATION IN ANY SPHERE OF GOVERNMENT THAT IS **ALLEGED** OR **SUSPECTED** TO BE

EVOLUTION OF OMBUDSMANSHIP

POWERS THAT BIND, POWERS THAT ARE WIDE: AN IMPERCEPTIBLY REVOLUTIONARY CONSTITUTION

❖ **FROM MALADMINISTRATION TO IMPROPER CONDUCT**

(B) TO REPORT ON THAT CONDUCT; AND

(C) TO TAKE APPROPRIATE REMEDIAL ACTION” (SECTION 182(1) OF 182(1) OF THE CONSTITUTION)

EVOLUTION OF OMBUDSMANSHIP

POWERS THAT BIND, POWERS THAT ARE WIDE: AN IMPERCEPTIBLY REVOLUTIONARY CONSTITUTION

(2) THE PUBLIC PROTECTOR HAS **ADDITIONAL POWERS** AND FUNCTIONS PRESCRIBED BY NATIONAL LEGISLATION

- IMPROPER CONDUCT UNDER THE PUBLIC PROTECTOR ACT TRANSCENDS MALADMINISTRATION;
AND

- ADDITIONAL POWERS INCLUDE EXECUTIVE ETHICS ENFORCEMENT, WHISTLE-BLOWER SAFE HARBOUR, ANTICORRUPTION ENFORCEMENT, ANTIDISCRIMINATION FORUM AND REVIEW OF BUILT ENVIRONMENT DISPUTES

EVOLUTION OF OMBUDSMANSHIP

POWERS THAT BIND, POWERS THAT ARE WIDE

❖ FROM PUBLIC OFFICIALS TO STATE FUNCTIONARIES AND OTHER PERSONS INVOLVED IN STATE AFFAIRS (SS3 ONLY EXCLUDES COURT DECISIONS & PP V MAIL & GUARDIAN- SAYS FOLLOW PUBLIC FUNDS.

“HERS ARE INDEED VERY WIDE POWERS THAT LEAVE NO LEVER OF GOVERNMENT POWER ABOVE POWER ABOVE SCRUTINY, COINCIDENTAL “EMBARRASSMENT” AND CENSURE”(53)

EVOLUTION OF OMBUDSMANSHIP

POWERS THAT BIND, POWERS THAT ARE WIDE

- ❖ INDEPENDENT AND SUBJECT ONLY TO THE CONSTITUTION AND THE LAW (SECTION 181(2) OF THE CONSTITUTION)
- ❖ RIGHT TO COMPLAIN: THE PUBLIC PROTECTOR MUST BE ACCESSIBLE TO ALL PERSONS AND COMMUNITIES (S 182(4))
- ❖ (DEFAULT POSITION IS TRANSPARENCY: REPORT MUST BE OPEN TO THE PUBLIC UNLESS EXCEPTIONAL CIRCUMSTANCES... (S182(5))

EVOLUTION OF OMBUDSMANSHIP

WHAT HAS BEEN GAINED FOR DEMOCRACY

- REAL ACCESS TO JUSTICE: NOT A GATE TO NOWHERE
- RIGHT TO COMPLAIN FOSTERS PARTICIPATORY DEMOCRACY- VIOLENCE IS THE LANGUAGE OF THE DISEMPOWERED (CIVIL WAR AVOIDANCE STORY- SELF HELP PARADIGM MINIMISED)
- *“THE PUBLIC PROTECTOR IS A CRITICAL AND INDEED AN INDISPENSABLE FACTOR IN THE FACILITATION OF FACILITATION OF GOOD GOVERNANCE AND KEEPING OUR CONSTITUTIONAL DEMOCRACY STRONG AND STRONG AND VIBRABNT”(EFF CASE) : WHEN GOVERNANCE FAILS THINGS FALL APART- LIMITS OF LIMITS OF POLITICAL, JUDICIAL AND CIVIC OVERSIGHT*

EVOLUTION OF OMBUDSMANSHIP

A NOTE ON CHALLENGES

- NEW WINE IN OLD SKINS: THE CURSE OF BUILDING ON AN OLD INSTITUTION
- LIMITING TOOLS: THE LIMIT OF ADMINISTRATIVE INVESTIGATING TECHNIQUES
- CASE HARDENING EFFECT OF HARD POWER: SPONSORSHIP WEAKENED
- FRAGMENTED ENFORCEMENT : CONTEMPT AND OTHER CRIMES WITHOUT CONTROL OVER THE POLICE & PROSECUTION
- SEPARATION OF POWERS- WHICH BRANCH OF GOVERNMENT?
- WIDE SCOPE: THE IMPACT QUESTION AND RELATIONSHIP WITH OTHER OMBUD-LIKE BODIES

EVOLUTION OF OMBUDSMANSHIP

THE FUTURE : A GLIMMER OF HOPE

- LAW REFORM (INCLUDING RULES)
- FUNDING MODEL REVIEW
- INCREASING SCHOLARSHIP IN OMBUDSMAN STUDIES (E'G. AORC)
- JURISPRUDENCE: *PP V MAIL & GUARDIAN*, *DA V SABC*, *EFF V SPEAKER OF NATIONAL ASSEMBLY*
- PROFESSIONALISATION OF OMBUDSMANSHIP & ENSURING SPECIALISATION (E.G. CORRUPTION AND ADR)

EVOLUTION OF OMBUDSMANSHIP

THE FUTURE : A GLIMMER OF HOPE

- STRENGTHENING SYNERGIES IN GOOD GOVERNANCE OVERSIGHT VALUE CHAIN
- GLOBAL TURBULANCE PRINCIPALLY RELATING TO SOCIAL JUSTICE
- GLOBAL GOVERNANCE ATTENTION TO OMBUDSMANSHIP: AU CHARTER ON DEMOCRACY, ELECTIONS AND GOVERNANCE, OR TAMBO DECLARATION AND UN AGENDA 2030 AND UN GLOBAL COMPACT

EVOLUTION OF OMBUDSMANSHIP

THE FUTURE : A GLIMMER OF HOPE

“THE PUBLIC PROTECTOR IS THUS ONE OF THE MOST INVALUABLE CONSTITUTIONAL GIFTS TO OUR NATION IN THE FIGHT AGAINST CORRUPTION, UNLAWFUL ENRICHMENT, PREJUDICE AND IMPROPRIETY IN STATE AFFAIRS AND FOR THE BETTERMENT OF GOOD GOVERNANCE. THE TENTACLES OF POVERTY RUN FAR AND WIDE...LITIGATION IS PROHIBITIVELY EXPENSIVE AND THEREFORE NOT AN EASILY EXERCISABLE CONSTITUTIONAL OPTION FOR THE AVERAGE CITIZEN. FOR THIS REASON THE FATHERS AND MOTHERS OF OUR CONSTITUTION CONCEIVED A WAY TO GIVE EVEN TO THE POOR AND MARGINALISED, A VOICE AND TEETH THAT WOULD HIDE CORRUPTION AND ABUSE EXCRUCIATINGLY. AND THAT IS THE PUBLIC PROTECTOR”

EFF V SPEAKER OF THE NATIONAL ASSEMBLY

EVOLUTION OF OMBUDSMANSHIP

THE FUTURE : A GLIMMER OF HOPE

“THE PUBLIC PROTECTOR IS A CRITICAL AND INDEED AN INDISPENSABLE FACTOR IN THE FACILITATION OF GOOD GOVERNANCE AND KEEPING OUR CONSTITUTIONAL DEMOCRACY STRONG AND VIBRANT” EFF V SPEAKER OF THE NATIONAL ASSEMBLY

THANK YOU

@THULIMADONSELA3