



**Address by Public Protector Adv Thuli Madonsela at the Seminar on
the Freedom of the Public Protector from Political Parties/Influence
hosted by the University of South Africa on Thursday, 21 April 2011 at
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Ladies and Gentlemen

I am humbled by both the honour and privilege of addressing this important seminar which basically focuses on the independence of the Public Protector. The honour is also deeply appreciated in the light of my background and interest in academia. The academic community is also important for arranging discourse that defines the space to be accorded to the Public Protector as an Ombudsman institution in our democracy. An ongoing dialogue on the independence of my office and other institutions supporting democracy, from political and other influences, is critical for the sustainability, growth and maturity of our hard-won constitutional democracy. Such dialogue is also timely in view of the fact that issues of good governance and respect for the rule of law have come under sharp focus across the African continent.

Programme Director, before I zoom into the focus of today's dialogue which is the Freedom of the Public Protector from Political Influence, allow me touch on the nature and constitutional mandate of my office.

What is the Public Protector and what purpose does the Public Protector serve in a constitutional democracy?

The Public Protector is a home brewed version of the global institution of the Ombudsman (some prefer to say Ombudsperson) that was formally entrenched as a buffer between the citizens and government in Sweden about 201 years ago. I am emphasizing the formal aspect because there is evidence of various traditional versions of the institution that existed long before Swedish initiative.

Closer to home, we have identified, amongst others, the Venda *Makhadzi* as an example of an

Ombudsman-like buffer between the community and its traditional leader. The idea is to have a high level independent public officer to reconcile citizens with the state by giving citizens a voice while giving the state a conscience through exacting accountability from the state when citizens complain.

The Public Protector is an independent constitutional officer appointed under Chapter 9 at the same level as a judge of the Supreme Court of Appeal by the President on the recommendation of Parliament. The parliamentary process is a transparent one which commences with open public nominations.

The place of the Public Protector in our democracy is defined by sections 181 and 182 of the Constitution, which outline the mandate and powers of this office.

Section 181 of the Constitution, which has the same wording as Section 165(4) spelling out the independence of the courts, requires the Public Protector to be **independent and subject only to the Constitution and the law and he/she must be impartial and must exercise his/her powers and perform his/her functions without fear, favour or prejudice.**

Section 181(3) of the Constitution goes further to compel other organs of state to assist and protect the Public Protector and other institutions supporting democracy, through legislative and other measures, to ensure the **independence, impartiality**, dignity and effectiveness of the institutions.

The constitution further prohibits any person or organ of state from interfering with the functioning of the Public Protector and other institutions supporting democracy (section 181(4)).

The Public Protector is only accountable to the National Assembly and reports on her/his activities and performance of her functions at least once a year (section 181(5)).

While the Public Protector is one of several institutions supporting democracy, this office has its own distinct mandate which is spelt out in section 182 of the Constitution.

What exactly does the Constitution require from the Public Protector? Section 182 of the Constitution specifically places a responsibility on the Public Protector to:

- “(a) investigate any conduct in state affairs, or the public administration in any sphere of government, that is alleged or suspected to be improper or to result in any impropriety or prejudice;
- (b) to report on that conduct; and
- (c) to take appropriate remedial action.”

The Constitution further stipulates that the Public Protector has **additional powers** and functions prescribed by national legislation. I’ve underlined additional powers to highlight the fact that the powers and functions conferred by legislation are additional to the Constitutional mandate and therefore cannot be interpreted in a manner that seeks to diminish the constitutional mandate.

There are about 16 statutes that further define and confer additional powers to the Public Protector as envisaged in the Constitution. When I assumed office, one of the first few things I did was to collate these into a booklet and publish it for ease of reference. Copies of this book titled “Constitutional and Legislative Mandate of the Public Protector” are available on request.

Key among these statutes, are the following:

- Public Protector Act 23 of 1994 (PPA)
- Executive Members' Ethics Act of 1998 (EMEA) and the Executive Ethics Code
- Prevention and Combating of Corrupt Activities Act 12 of 2004
- Protected Disclosures Act 26 of 2000
- Promotion of Access to Information Act 2 of 2000; and
- Housing Protection Measures Act 95 of 1998

The PPA gives the Public Protector to investigate on request by any person, or on his or her initiative maladministration in connection with government affairs at any level, abuse or unjustifiable exercise of power or capricious, discourteous, delay or other improper conduct; improper or dishonest act or omission or offences referred to in the Prevention and Combating of Corrupt Activities Act, with respect to public money; improper or unlawful enrichment, or receipt of any improper advantage in the public administration or state affairs or any act or omission by a person in the employ of government at any level or person performing a public function.

Here I must pose to state that my team and I have come to the conclusion that those that have been saying all along that there is no legal impediment to investigating the actions of persons not in the employ of government when such persons are involved in state affairs are correct. We have decided that my findings will now include improper actions of persons outside government who conduct themselves improperly when engaged in state affairs.

The PPA also gives the Public Protector the authority to resolve and redress complaints against organs of state through conciliation, mediation, negotiation and any other appropriate action. In fact, most of the 15 000 or so complaints that my office handles annually, are resolved through one or more of these informal means. Only a little over 40 result in formal reports with findings and remedial action as envisaged in section 182 of the Constitution.

The EMEA designates the Public Protector as the sole agency for investigating and advising on all breaches of the Executive Ethics Code by Members of the National and Provincial Executives including the President and Premiers. It is important to note that only members of national and provincial legislatures, the President and Premiers may lodge a complaint under the EMEA. (Section 4)

The Public Protector is also recognized as one of the enforcement agencies by the Prevention and Combating of Corrupt Activities Act. This is one of the least known mandates of this office. A related and equally relatively unknown mandate is the responsibility conferred by the PDA to receive and process protected disclosures by whistle blowers. The PDA protects whistle-blowers from reprisals when they disclose information on alleged corruption, fraud and related abuses of state power or resources.

The Public Protector is also one of the institutions that adjudicate on disputes regarding information requests under the Promotion of Access to Information Act (PAIA).

Another obscure yet important mandate of the Public Protector is the power to review decisions of the Homebuilders Registration Council as envisaged in section 22(4) of the Housing Protection Measures Act 95 of 1998.

The Constitution specifically compels the Public Protector to be accessible to all persons and communities. I must say that this is something we aspire towards but a budget of about R140 million and a staff complement of about 270 are cold comfort against the challenge of meeting this constitutional injection in respect of a national population of about 48 million. Even if we exclude babies and very young children, we are still dealing with at least 30 million people.

Programme Director,

The independence of the Public Protector is firmly entrenched in the Constitution and legislative framework. This brings me to the focus of today's dialogue.

Perhaps the starting point for initiating a conversation on "Freedom of the Public Protector from political influence" is to consider the value of the independence of the Public Protector.

It is globally recognized that the efficacy of the Ombudsman institution depends a lot on integrity and trust. Indeed the same applies to the courts. People trust the Public Protector if they view its findings as biased and inconsistent and invariably unfair or unjust. Clearly political or any other influence outside influence will result in decisions that have no basis in fact, law, policies, regulations, prescripts and principles of administrative justice. Needless to say that such findings cannot be fair or just. Political influence will also invariably negate the important justice component of consistency.

I must hasten to state though that it's not real political influence or interference that is a problem. Any conduct that leads to a perception of such influence or interference undermines public confidence in the institution. This is well captured in local and international jurisprudence. Two cases that immediately come to mind are the Canadian case of *Valente v the Queen* and to local case of *van Rooyen*. These cases, which deal with the independence of the judiciary also provide valuable insights on what factors are critical for independence.

You probably are wondering why we rely on jurisprudence on judicial independence when the Public Protector is not a court. I've concluded that the similarities in wording between sections 165 of the Constitution dealing with the independence of the judicial system and section 181 dealing with the independence of institutions supporting democracy cannot be attributed to a writer's block. The drafters of our Constitution consciously wanted the same arm's length between institutions supporting democracy and organs of state as they wanted for the courts.

The one difference is accountability to Parliament for activities and performance of functions by institutions supporting democracy as they do not constitute a fourth arm of government. However, the wording clearly does not give Parliament the power to micromanage the affairs of the Public Protector or any other constitutional institution. Parliament's role is to ensure that these institutions serve their constitutional purposes and use resources allocated to them cost effectively and in line with approved expenditure framework.

Programme Director

We can accordingly agree that the freedom or independence of the Public Protector from political and other external influences is a non-negotiable constitutional guarantee.

Let us the quickly examine some of the factors that are globally recognized as collective guarantors of the independence of the institution of the Ombudsman. The same factors

obviously go a long way with regard to insulating the Public Protector from political parties/influence.

Constitutionally entrenched position and tenure

In South Africa, the position of Public Protector is constitutionally entrenched. The Constitution guarantees a 7-year non-renewable tenure. It is globally understood that the tenure should be either life or fixed. This seeks to limit the pressure of making decisions that may seek to secure favours relating to reappointment.

Open and Inclusive process of appointment

The process of appointment is open and transparent and the appointment criteria is objective and transparent. Any person or entity may nominate any person with the requisite qualification and competence. The involvement of civil society is a constitutional guarantee. (Section 183(6)). A multi-party Parliamentary Committee conducts interviews and recommends to Parliament. The Constitution requires a 60% vote in favour of the candidate to be referred to the President for appointment.

This requirement goes a long way in engendering the credibility and reputation of the institution as it minimizes if not eliminate perception of political bias and/or pliability.

In my case I was humbled by the support from all parties represented in Parliament and the vote in my favour, which is 100%.

Objective Criteria and Transparent Process of Removal from Office

Grounds for removal are specified in the Constitution. The process is also transparent and includes the requirement of a 2/3rds majority vote by Parliament. The two thirds majority only applies to the Public Protector and the Auditor General.

Parliamentary Accountability as opposed to Executive Accountability

When the Public Protector accounts to a Member of the Executive, there is a real risk of her/his independence being compromised. Fortunately, in our country the Public Protector accounts to Parliament unlike in some of the other African countries.

Institutional independence including resources

It is crucial that the ombudsman institution is provided space to operate freely and without undue influence. In our democracy the constitutional and legal guarantees are there. For example, the Public Protector is not constitutionally and statutorily linked to any Department. However, in our country there is a lacuna. In most countries the Ombudsman's office functions as a ministry with a fully-fledged department headed by the equivalent of a Director General. In some countries e.g. Sweden and Angola, the Ombudsman is even senior to ministers.

A key anchor of institutional independence is adequate resources. This is one area where our country is lacking. The position is compounded by having to receive the budget via one of the organs of state that the office has oversight over. Who can forget the one occasion when the then Minister of Justice publicly refereed to the first Public Protector of South Africa, as a twit for daring to find against him.

Other globally recognized guarantors of independence include the following

- Adequate Power: The Public Protector has to wield adequate and appropriate powers that enable her/him to be effective
- Transparency and openness: The Public Protector needs to communicate the grounds for non-decision-making and ensure that decisions are forwarded to affected parties and are also made public. We have gone a step further to make our processes transparent throughout the investigation. However, we are mindful of managing the risk posed to confidentiality and trust.
- Working democracy based on respect for the rule of law: There is a need for a democratic governance culture in society for the Public Protector to be effective. This include for the rule of law and tied to this point is-
- Independent and effectiveness courts that make justifiable rulings or judgements based on the law.
- Solidarity within a strong and functioning integrity sector. In South Africa this includes oversight agencies such as the Auditor-General, the Public Service Commission, Inspector General of Intelligence and the Special Investigating Unit.
- Political will: Political is important for the implementation of the findings of the Public Protector and decisions of the judiciary.
- Media freedom: The importance of the role of the media in entrenching the independence of the Public Protector cannot be overemphasized. Hence the need for a free and independent media that not only looks after the welfare of the Public Protector but also holds her/him accountable is critical. The media is also an important ingredient in the moral suasion that is the hallmark of an effective Ombudsman.
- Accessibility of services: It is critical that the services of the Public Protector are accessible to all communities and not only those who are well-to-do.
- Accountability role of civil society: Organs of civil society need to ensure that their voices are heard regarding good governance in state affairs.

If all these things are working well and in sync with legislative prescripts, the Public Protector will indeed be insulated from political influence or interference. As things stand today, I have no reason to doubt that the Public Protector is shielded from undue influences.

However, South Africans and even the Public Protector should not be complacent but everyone should continue to be vigilant.

The government will also help a great deal if it continues to implement the findings of the Public Protector that include taking prompt remedial action as directed. Constitutional entrenchment of ethical governance through the Preamble, Bill of Rights and section 195 of the Constitution or Chapter 10 as we ordinarily refer to this.

When all of us do what we are supposed to do to support and strengthen the ombudsman institution, my office's credibility and reputation will grow exponentially and the Public Protector's efforts to nudge organs of state into being accountable and responsive will be enhanced.

The inclination to act with impunity will end and our democracy will be strengthened whilst the legitimacy of state institutions is reinforced. Without doubt, this contributes to the maturity of our constitutional democracy, stability and development.

Ladies and Gentleman, I hope that the thoughts I have shared with you will provoke robust

debate that will enrich the public discourse on the role of the Public Protector.

Our vision is to become a key contributor to an accountable state and access to justice in grievances against the state. The foresight of the seminar organizers in linking the work of my office and ethics is accordingly appropriate and commendable. The end result is an accountable and ethical government that is responsive, respects the rule of law leading to peace and stability.

The benefit to the state is reconciliation with its citizens. That is why our Strategic Plan uses the symbol of the Makhadzi as the one who reconciles citizens with state by exacting accountability from the state.

Thank you.

Adv TN Madonsela
Public Protector of South Africa