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AN OVERVIEW OF AN OMBUD OFFICE TO ENHANCE CO-OPERATION BETWEEN SCHOOL GOVERNING BODIES AND THE DEPARTMENT OF EDUCATION

SUMMARY

There is ample evidence that the relationships between some school governing bodies (SGBs), provincial departments of education (DBEs), and the national Department of Education (DBE) are strained. In some instances, the parties resort to the courts to adjudicate the matter. This is contrary to the constitutional imperative of cooperation among organs of state and that litigation should be the last resort. This article provides an overview of the different generations of ombudsman offices, the range of powers that can be conferred upon them, and the general advantages of an ombudsman office. It also highlights the popularity of the institution and further investigates the suitability of an ombudsman office to address the conflict between the mentioned stakeholders, in order to enhance cooperation among them.

1. INTRODUCTION

This contribution argues the appropriateness of the creation of an ombudsman office as a suitable dispute-resolution mechanism to improve cooperation among school governing bodies (SGBs), the national department of education (DBE), and the provincial departments of education (PDEs). Subsequent to South Africa becoming a democratic state, the relationship between the SGBs and the PDEs has seemingly been rather strained – as is evident from newspaper headlines.¹ The gist of such



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1 Mere 2022:1; Central SA OFM 2020:1; Koko 2020:1; Damons 2020:1; Charles 2021:1; De Vos 2013:1; Mooki 2015:1; Areff 2015:1; Johnson 2013:1; Gernetzky 2015:1; Swart 2015:3; Beangstrom & Phillips 2016:3.

newspaper articles has been the frequent conflict between the PDEs and the SGBs. Case law further highlights that the interests of the SGBs can also contribute to conflict in the school environment.²

There are several South African court cases between the SGBs of the more affluent public schools and the PDEs, particularly on the rights of the SGBs to determine school policies such as admission, pregnancy, language, and religion.³ The underlying problem stems from the powers of the PDEs to depart from, or override, the policies adopted by the SGBs. Courts have been required to strike an appropriate balance between the powers and the duties of heads of department (HODs) of both the PDEs and the SGBs, taking into account the interests of parents who want to ensure that their children receive a quality education versus the PDEs' obligation to ensure that all learners have access to basic education.

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- 2 *Deon Scheepers v The School Governing Body, Grey College Bloemfontein and 2 Others*, case number 2612/2018; *Head of Department, Department of Education, Free State Province v Welkom High School and Another and Head of Department, Department of Education, Free State Province v Harmony High School and Another* 2013 (9) BCLR 989 (CC); *Head of Department, Mpumalanga Department of Education v Hoërskool Ermelo* 2010 (3) BCLR 177 (CC), and *MEC for Education in Gauteng Province and Others v Governing Body of Rivonia Primary School and Others* 2013 (12) BCLR 1365 (CC).
- 3 *Governing Body of Mikro Primary School and Another v Western Cape Minister of Education and Others* [2005] JOL 13716 (C); *Head of Department, Mpumalanga Department of Education v Hoërskool Ermelo* 2010 (3) BCLR 177 (CC); *MEC for Education in Gauteng Province and Others v Governing Body of Rivonia Primary School and Others* 2013 (12) BCLR 1365 (CC); *Queenstown Girls High v MEC, Department of Education, Eastern Cape and Others* 2009 5 SA 183 (CK); *Federation of Governing Bodies for South African Schools v The Head of Department, Department of Education, Northern Cape Province and the Member of the Executive Council for Education, Northern Cape Province* [2016] ZANHC 28; *School Governing Body, Northern Cape High School and Others v The Member of the Executive Council for Education in the Northern Cape and Others* [2016] ZANHC 14; *Head of Department, Department of Education, Free State Province v Welkom High School and Another and Head of Department, Department of Education, Free State Province v Harmony High School and Another* 2013 (9) BCLR 989 (CC); *Organisasie vir Godsdienste, Onderrig en Demokrasie v Laerskool Randhart and Others* 2017 (6) SA 129 (GJ); *The Governing Body Hoërskool Overvaal v Head of Department* [2018] 2 ALL SA 157 (GP).

It is clear from case law that the courts have resolved many of these cases with reference to the principle of legality and the best interests of the learners concerned.⁴ Litigation is counterproductive for the SGBs and the PDEs, in that relationships become strained, thus hampering cooperation and the preservation of a sound, harmonious working relationship, both of which are needed if the governance model envisaged for education is to be successful.⁵

From a study of education legislation, it is apparent that no explicit provision is made therein for alternatives to litigation, nor are there alternative forums for those SGBs that do not have access to courts. The Constitutional Court has highlighted the importance of the SGBs and the PDEs cooperating to find solutions to their problems.⁶ To facilitate this, the Constitutional Court has ordered consultation and meaningful engagement between the SGBs and the PDEs, in order to find such solutions.⁷ Furthermore, the proposed Basic Education Amendment Bill makes provision for arbitration and mediation, in order to resolve the conflict between the SGBs and the PDEs.⁸ However, this

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- 4 *Governing Body of Mikro Primary School and Another v Western Cape Minister of Education and Others* [2005] JOL 13716 (C); *Head of Department, Mpumalanga Department of Education v Hoërskool Ermelo* 2010 (3) BCLR 177 (CC); *MEC for Education in Gauteng Province and Others v Governing Body of Rivonia Primary School and Others* 2013 (12) BCLR 1365 (CC); *Queenstown Girls High v MEC, Department of Education, Eastern Cape and Others* 2009 5 SA 183 (CK); *Federation of Governing Bodies for South African Schools v The Head of Department, Department of Education, Northern Cape Province and the Member of the Executive Council for Education, Northern Cape Province* [2016] ZANHC 28; *School Governing Body, Northern Cape High School and Others v The Member of the Executive Council for Education in the Northern Cape and Others* [2016] ZANHC 14; *Head of Department, Department of Education, Free State Province v Welkom High School and Another and Head of Department, Department of Education, Free State Province v Harmony High School and Another* 2013 (9) BCLR 989 (CC); *Organisasie vir Godsdienste, Onderrig en Demokrasie v Laerskool Randhart and Others* 2017 (6) SA 129 (GJ); *The Governing Body Hoërskool Overvaal v Head of Department* [2018] 2 ALL SA 157 (GP).
- 5 Department of Basic Education 1995:ch. 4. See also Serfontein & De Waal 2018:2.
- 6 *Head of Department, Mpumalanga Department of Education v Hoërskool Ermelo* 2010 (3) BCLR 177 (CC); *MEC for Education in Gauteng Province and Others v Governing Body of Rivonia Primary School and Others* 2013 (12) BCLR 1365 (CC); *Head of Department, Department of Education, Free State Province v Welkom High School and Another and Head of Department, Department of Education, Free State Province v Harmony High School and Another* 2013 (9) BCLR 989 (CC).
- 7 *Head of Department, Mpumalanga Department of Education v Hoërskool Ermelo* 2010 (3) BCLR 177 (CC):par. 106; *MEC for Education in Gauteng Province and Others v Governing Body of Rivonia Primary School and Others* 2013 (12) BCLR 1365 (CC):paras. 111-116; *Head of Department, Department of Education, Free State Province v Welkom High School and Another and Head of Department, Department of Education, Free State Province v Harmony High School and Another* 2013 (9) BCLR 989 (CC):par. 128.
- 8 *Government Gazette* 41178/2017. The provision in the proposed BELA pertaining to “mediation” is not couched in peremptory terms. It is worth noting that the changes proposed in the BELA have not been adopted as yet. If the legislation is passed as is, there is no obligation on the SGBs and the PDEs to consider this alternative and it may simply become a non-compliance issue.

contribution investigates the suitability of an ombudsman office to address the conflict between the SGBs and the PDEs, so as to enhance cooperation, as envisaged in sec. 41 of the *Constitution of the Republic of South Africa (Constitution)*.⁹

In what follows, the constitutional requirement of cooperation is investigated as well as the challenges that inhibit cooperation in instances of conflict between the parties. An overview of the possible ombudsman offices is provided and their powers and role in resolving the conflict to ensure that a working relationship among the stakeholders is maintained.

2. THE LEGAL FRAMEWORK IN RESPECT OF SCHOOLS AND COOPERATIVE GOVERNANCE

As a result of apartheid, there were huge disparities in access to education for learners across South Africa.¹⁰ Moreover, in the past, schools were governed by the state, with minimal involvement by parents.¹¹ The new democratic dispensation, however, required a new structure of school organisation and governance that would be both flexible and transformative.¹²

2.1 Laws and policies on school governance

The new structure referred to above is captured in various policies and legislative instruments and will be discussed in the following sections.

2.1.1 The *Constitution*

The *Constitution* guarantees equal access to a basic education for all¹³ and affirms the notion that South Africa is a democratic state where everything is executed through the lens of participation and cooperation.¹⁴ Preceding the *Constitution*, important provisions were contained in the *Interim Constitution*,¹⁵ the White Paper 1 on Education and Training,¹⁶ and the White Paper 2 on the Organisation, Governance, and Funding of Schools.¹⁷

2.1.2 Education White Papers and governance

The right to education for all was first expressed in sec. 32 of the *Interim Constitution*, with four very distinct rights being established, namely the right to a basic education; the right to have equal access to educational institutions;

9 *Constitution of the Republic of South Africa* 1996 *Interim constitution* 200/1993.

10 Amnesty International 2020:7.

11 Sayed 2002:35-36. See also Matshe & Pitsoe 2013:644.

12 Department of Basic Education 1996:par. 1.7.

13 *Constitution of the Republic of South Africa* 1996:sec. 29(1)(a)-(b) and sec. 9.

14 *Constitution of the Republic of South Africa* 1996:preamble. See also Matshe & Pitsoe 2013:648.

15 *Interim Constitution* 200/1993.

16 Department of Basic Education 1995:ch. 1-13.

17 Department of Basic Education 1996:paras. 1-7.

the right to choose the language of instruction, and the right to establish educational institutions of a particular character.¹⁸

To achieve these rights, a new system of school governance was ultimately required – a system that would produce the conditions for developing a coherent, united, and flexible education system for bringing about redress, democratic governance, and school-based decision-making.¹⁹ The only way to achieve this new structure in a democratic dispensation was by way of “negotiated change” procedures based on the notion that public schools would operate in partnership with the PDEs and the local school communities they served.²⁰

To this end, the general theme espoused in these policy documents was that parents or guardians would have primary responsibility for the education of their children. Parents would have the right to be consulted by state authorities regarding education matters and would take part in the governance of a school by being elected to serve in governing body structures.²¹

The policy document further required that the principle of democratic governance be reflected progressively in every level of the system through a process of consultation and appropriate decision-making between the DBE, the PDEs, the SGBs, educators, learners, and the broader school community.²² In this regard, school governance should symbolise shared responsibility between not only the PDEs and the SGBs, but also between parents, teachers, learners, and the school community in general. The intention of the policy documents was thus to reduce the influence of government in particular areas, which is in keeping with the notion of the separation-of-powers doctrine. The details of how the DBE, the PDEs, the SGBs, principals, educators, learners, and the local school communities should collaborate were captured in school governance requirements of education legislation, namely the *National Education Policy Act (NEPA)* and the *South African Schools Act (Schools Act)*.²³

2.1.3 The *National Education Policy Act* and governance

The relevant directives are captured in secs. 4(m) and 4(b) of the *NEPA*²⁴ and encompass the democratic requirement that the DBE ensures that there is broad public participation in the development of education, by including all stakeholders in the decision-making process of the education structure.²⁵ They further direct that policy be developed to include the advancement of

18 Department of Basic Education 1995:paras. 9-10.

19 Department of Basic Education 1996:par. 1.1.

20 Department of Basic Education 1996:par. 1.1.

21 Department of Basic Education 1995:ch. 4, par. 3; Department of Basic Education 1996:par. 1.10.

22 Department of Basic Education 1995:ch. 4, par. 11.

23 *South African Schools Act* 84/1996:Preamble.

24 *National Education Policy Act* 27/1996. See also Smit & Oosthuizen 2011:58, 59; Oosthuizen *et al.* 2015:305.

25 *National Education Policy Act* 27/1996:sec. 4(m).

democracy in the education system, by decentralising powers to the SGBs and the PDEs.²⁶

2.1.4 The *South African Schools Act* and governance

The *Schools Act*, in its Preamble, refers to the notion of partnership between the DBE, the PDEs, the SGBs, parents, educators, and learners.²⁷ Various roles and responsibilities are demarcated in the *Schools Act* concerning the funding,²⁸ governance,²⁹ and daily running of schools.³⁰ The *Act* captures the roles and responsibilities of the DBE, the PDEs, and the SGBs.³¹

To ensure the success of the partnership referred to, a cooperative approach is needed in which a climate of democracy, accountability, and ownership is enhanced. This cooperative approach is set out in education legislation and is in keeping with the standards of cooperative governance, as laid down in sec 41(1)(h) of the *Constitution*. This will be elaborated on below.

The next section discusses the laws and policies on cooperative governance in the education context.

2.2 Laws and policies on cooperative governance

Cooperative governance measures are prescribed in a separate chapter of the *Constitution* dedicated specifically to such governance.³² Organs of state such as the PDEs and the SGBs are obliged to implement and comply with these measures when dealing with matters pertaining to education.³³ Education legislation, in particular, also sets out measures to give effect to cooperative governance. This is explored below.

2.2.1 The cooperative governance relationship in education legislation

The *NEPA*³⁴ creates channels of communication between the DBE and the PDEs to enable the expansion of the education system in accordance with the aims and values provided for in the *Act* which include the Minister's power to determine national policy for cooperation between the DBE and other state

26 *National Education Policy Act 27/1996*:sec. 4(b).

27 *South African Schools Act 84/1996*:Preamble.

28 *South African Schools Act 84/1996*:ch. 4, secs. 34-44.

29 *South African Schools Act 84/1996*:secs. 16(1) and 20.

30 *South African Schools Act 84/1996*:secs. 16(3) and 16A. See also Serfontein & De Waal 2010:94.

31 *National Education Policy Act 27/1996*:secs. 2(b)-(d) and 3(4)(a)-(e). *South African Schools Act 84/1996*:secs. 1; 5(5); 6(2); 8; 8A; 9; 12(1)(d); 12(3)(a)(i)-(iii); 15; 16(1); 16(3); 20(1)(a)-(b); 20(1); 20(1)(eA); 20(1)(i) and (j); 20(1)(g); 20(2); 21 and 36(1).

32 *Constitution of the Republic of South Africa 1996*:ch. 3.

33 *Constitution of the Republic of South Africa 1996*:sec. 239.

34 *National Education Policy Act 27/1996*.

departments, local government, and other non-government organisations.³⁵ The national policy must ensure broad public participation in the development of the education policy and the representation of stakeholders in the governance of all aspects of the education system.³⁶ The objective of the *Act* requires of the Minister to consult with relevant role-players prior to the determination of policy.³⁷

The DBE and the PDEs are required to coordinate and share opinions on national education and on matters involving various facets of the *Act*.³⁸ For example, the Minister is responsible for determining the national education policy, subject to the provisions of the *Constitution* and the *NEPA*.³⁹ The Minister may determine policy to ensure the cooperation among the DBE and other state departments, the PDEs, local government, and non-government organisations with a view to advancing education.⁴⁰ In this regard, the Minister has not made any determination, despite the fact that courts have pronounced on this very important issue as an imperative to resolve conflict and avoid litigation.

The Minister has, however, promulgated various national policies relating to, *inter alia*, admission to ordinary public schools;⁴¹ HIV/AIDS in respect of learners and educators in public schools;⁴² the management of drug abuse by learners in public and independent schools;⁴³ religion and education,⁴⁴ as well as learner attendance.⁴⁵

The national admission policy⁴⁶ will be discussed as an example to illustrate the cooperative governance relationship required by the SGBs and the PDEs. In terms of this policy, the roles, responsibilities, and coordination are provided for in the national admissions policy,⁴⁷ where the HOD of a specific PDE is responsible for the determination of the process for admitting learners to a public school.⁴⁸ The SGBs, in turn, are responsible for determining a school's admission policy.⁴⁹ It is incumbent upon the HOD to coordinate the provision of schools and the administration of the admission of learners to public schools with the SGBs to ensure that all learners of school-going age

35 *National Education Policy Act 27/1996*:sec. 3(4)(p).

36 *National Education Policy Act 27/1996*:secs. 4(m), 5 and 6.

37 *National Education Policy Act 27/1996*:secs. 2(b), 3(p), 5 and 6.

38 *Head of Department, Department of Education, Free State Province v Welkom High School and Another; Head of Department, Head Department of Education, Free State Province v Harmony High School and Another* 2013 BCLR 989 (CC):par. 145. See also *National Education Policy Act 27/1996*:sec. 3(4)(p).

39 *National Education Policy Act 27/1996*:sec. 3(1) and (2).

40 *National Education Policy Act 27/1996*:sec. 3(p).

41 *Government Gazette* 2432/1998.

42 *Government Gazette* 1926/1999.

43 *Government Gazette* 3427/2002.

44 *Government Gazette* 1307/2003.

45 *Government Gazette* 361/2010.

46 *Government Gazette* 2432/1998.

47 *Government Gazette* 2432/1998.

48 *Government Gazette* 2432/1998:par. 6.

49 *Government Gazette* 2432/1998:par. 7.

are accommodated.⁵⁰ The *Schools Act*⁵¹ contains the same provisions, and this reinforces the provisions of the *Constitution* that indicate that cooperative governance entails recognition of the distinct, interdependent, and interrelated features between the levels at which the SGBs and the PDEs operate.⁵² Despite this, there are still problems in the relationship between the PDEs and the SGBs and their cooperation and coordination is still lacking – as is evident from case law on admissions.⁵³

2.2.2 The cooperative governance relationship in the *Constitution*

The final *Constitution* lays out principles designed to promote coordination rather than competition between the various spheres of government and organs of state.⁵⁴ Sec. 40(1) of the *Constitution* establishes that government in South Africa is constituted at national, provincial, and local levels of government, which are distinctive, interdependent, and interrelated, and enjoins them to “cooperate with one another in mutual trust and good faith”.⁵⁵ This means that with this cooperative relationship there needs to be a clear understanding of each sphere of the government’s powers and functions to ensure that a sphere of government or organ of state “does not encroach on the geographical, functional or institutional integrity of government in another sphere”.⁵⁶ In addition to the *Constitution*, various legislations govern. Given the overlap of concurrent competencies of the DBE and the PDEs, the *Constitution* and the *NEPA* make provision for a system of coordination, in order to manage potential conflict and disputes between the DBE and the PDEs.⁵⁷

Woolman and Roux⁵⁸ state that the Constitutional Court suggests that this new philosophy of cooperative government be governed by two principles, namely that an organ of state may not use its powers in such a way as to undermine the effective functioning of another,⁵⁹ and that the actual integrity of each sphere of government and organ of state must be understood in light of the powers and the purpose of that entity. In this regard, although the *Constitution* demands mutual respect, an organ of state may be entitled to determine the objectives of another organ of state and dictate the means whereby those objectives are achieved.⁶⁰ This can create conflict among

50 *Government Gazette* 2332/1998:par. 8.

51 *South African Schools Act* 84/1996:sec. 5.

52 *Head of Department, Department of Education, Free State Province v Welkom High School and Another; Head of Department, Head Department of Education, Free State Province v Harmony High School and Another* 2013 BCLR 989 (CC):par. 147.

53 Govender 2022:1. (Court rules in favour of Gauteng Education Department in placement dispute).

54 Woolman & Roux 2014:14-1.

55 *Constitution of the Republic of South Africa* 1996:sec. 40(1)(a).

56 *Constitution of the Republic of South Africa* 1996:sec. 40(1)(g).

57 De Vos 2017:273.

58 Woolman & Roux 2014:14.8.

59 Woolman & Roux 2014:14.8.

60 Woolman & Roux 2014:14-8. See also *Premier, Western Cape v President of the Republic of South Africa* 1999 BCLR 382 (CC):paras. 54-55.

organs of state. Secs. 40 and 41 require of the different spheres of government or organs of state to exhaust all means of dispute resolution before turning to the courts.⁶¹ Sec. 41 of the *Constitution* states that all spheres of government and all organs of state within each sphere of government must, *inter alia*:

- Have regard for the constitutional status, institutions, powers and functions of role players in a service delivery contest;⁶²
- Not exercise any power or function, except those bestowed on them in terms of the *Constitution*;⁶³
- Not exercise their powers and perform their functions in a way that impinges on another's powers and functions,⁶⁴ and
- Cooperate with one another in mutual trust and good faith.⁶⁵

In order to achieve these standards, the spheres of government, including all organs of state, must cooperate with one another in mutual trust and good faith, by encouraging friendly relations in matters of education;⁶⁶ assisting and supporting one another;⁶⁷ apprising one another of, and consulting one another on matters of mutual interest (for example, school admissions);⁶⁸ coordinating their activities pertaining to the education-related processes with one another;⁶⁹ adhering to agreed procedures,⁷⁰ and avoiding legal proceedings against one another.⁷¹ Woolman and Roux⁷² state that the principles set out in sec. 41(1) stand for two basic propositions. First, cooperative government does not diminish the autonomy of any given sphere, but it recognises the place of each sphere within the whole and the need for coordination and cooperation to make the whole work.⁷³ Secondly, secs. 41(1)(e), (g) and (h) reinforce the notion that each sphere of government is distinct.⁷⁴

Within the context of the PDEs and the SGBs, this means that education legislation has clearly earmarked the key stakeholders that will be involved in this governance area. Legislation has assigned each key stakeholder certain powers, roles, and responsibilities and, at the same time, has required that

61 Woolman & Roux 2014:ch. 14:7.

62 *Constitution of the Republic of South Africa* 1996:sec. 41(1)(e). See also De Vos 2017:273.

63 *Constitution of the Republic of South Africa* 1996:sec. 41(1)(f). See also De Vos 2017:273.

64 *Constitution of the Republic of South Africa* 1996:sec. 41(1)(g). See also De Vos 2017:273.

65 *Constitution of the Republic of South Africa* 1996:sec. 41(1)(h). See also De Vos 2017:273.

66 *Constitution of the Republic of South Africa* 1996:sec. 41(1)(h)(i).

67 *Constitution of the Republic of South Africa* 1996:sec. 41(1)(h)(ii).

68 *Constitution of the Republic of South Africa* 1996:sec. 41(1)(h)(iii).

69 *Constitution of the Republic of South Africa* 1996:sec. 41(1)(h)(iv).

70 *Constitution of the Republic of South Africa* 1996:sec. 41(1)(h)(vi).

71 *Constitution of the Republic of South Africa* 1996:sec. 41(h)(i)-(vi). See also *National Education Policy Act 27/1996*:sec. 3(4)(p)(i)-(iv).

72 Woolman & Roux 2014:ch. 14:14.

73 Woolman & Roux 2014:ch. 14:14.

74 Woolman & Roux 2014:ch. 14:15.

these stakeholders work together in fulfilling their respective responsibilities to ensure that basic education is accessible to all.

This also implies that these role players do not have to agree with one another on each and every aspect. It does, however, mean that each of the role players must execute its respective responsibilities meticulously and in harmony with both the *Constitution* and the national and provincial laws. Therefore, the SGBs and the PDEs should not deceive or demoralise each other when executing their duties envisaged in the *Schools Act*. Where a dispute arises, the role players should first try to find an amicable solution in a spirit of cooperation, using mechanisms and procedures provided for that purpose, and must exhaust all other remedies prior to approaching the courts.⁷⁵ In fact, if a court is not satisfied that the stakeholders have made all reasonable attempts to resolve their dispute amicably, it might refer the matter back to them.⁷⁶ However, although the *Intergovernmental Relations Framework Act*⁷⁷ (*IRFA*), which was promulgated only in 2005, was intended to provide the above-mentioned mechanisms and procedures, it is not applicable to the PDEs and the SGBs in conflict with each other.

This was confirmed in the matter of *Minister of Education, Western Cape, and Others v Governing Body, Mikro Primary School and Another*⁷⁸ (*Mikro*). The Supreme Court of Appeal found the requirements of sec. 41 irrelevant to disputes concerning the SGBs and reasoned that the SGBs were not subject to executive control insofar as the determination of language and admissions policies is concerned.⁷⁹

However, the Constitutional Court rejected this reasoning and confirmed in the matters of *MEC for Education in Gauteng Province and Others v Governing Body of Rivonia Primary School and Others*⁸⁰ (*Rivonia case*) and the *Welkom High School and Another; Head of Department, Head Department of Education, Free State Province v Harmony High School and Another* (*Welkom case*)⁸¹ that the requirements of sec. 41 of the *Constitution* relating to cooperative governance are indeed applicable to the relationship between the SGBs and the PDEs. The court held that “[e]ducation governance and management is thus pre-eminently an area where the constitutional principles of co-operative government must apply”.⁸²

75 *Constitution of the Republic of South Africa* 1996:sec. 41(3).

76 *Constitution of the Republic of South Africa* 1996:sec. 41(4).

77 *Intergovernmental Relations Framework Act* 13/2005.

78 *Minister of Education, Western Cape, and Others v Governing Body, Mikro Primary School and Another* 2006 (1) SA 1 (SCA):par. 22.

79 *Minister of Education, Western Cape, and Others v Governing Body, Mikro Primary School and Another* 2006 (1) SA 1 (SCA):par. 22.

80 *MEC for Education in Gauteng Province and Others v Governing Body of Rivonia Primary School and Others* 2013 (12) BCLR 1365 (CC):par. 77.

81 *Welkom High School and Another; Head of Department, Head Department of Education, Free State Province v Harmony High School and Another* 2013 (9) BCLR 989 (CC):par. 140.

82 *Welkom High School and Another; Head of Department, Head Department of Education, Free State Province v Harmony High School and Another* 2013 (9) BCLR 989 (CC):par. 152.

Every public school is considered to be an organ of state, in the sense that it is a functionary or institution exercising public powers and performing public functions in terms of legislation.⁸³ Within this context, public schools perform typical administrative actions in the day-to-day management and governance of the school and its domestic policies.⁸⁴ Even though a public school (and SGB) is considered an organ of state, it does not form part of the spheres of government, with the result that the provisions in the *IRFA*⁸⁵ do not apply to a school or SGB for the purposes of intergovernmental relations. It is, therefore, important to determine what cooperation entails outside of *IRFA* and what measures (for example, an ombud) should be followed to ensure cooperation in line with the *Constitution*.

The relationships between the PDEs and the SGBs, as constitutionally defined, require cooperation with one another in a spirit of mutual trust and good faith by assisting, supporting, and consulting with one another and coordinating their activities, by adhering to agreed procedures, and by avoiding litigation.⁸⁶ These are the key principles that define what the relationship should be like. Stewart⁸⁷ states that it is undoubtedly easier to foster good relations, in order to assist and support when there are structured relationships to work with. On the face of it, the relationships between the SGBs and the PDEs are structured, in that their roles and responsibilities are legislated, but perhaps not clearly enough.⁸⁸ In addition, there is no provision in education legislation directing the SGBs and the PDEs on how to deal with their disputes. This is addressed, to some extent, in the Basic Education Law Amendment Bill that envisages mediation and arbitration. These dispute resolution mechanisms can be part of the functions of an ombudsman office. However, the question remains whether an ombudsman office with a wider mandate than simply mediation and arbitration would not be in a better position to facilitate sustainable cooperation across the sector and not only for the SGBs and the PDEs that are already in a position of conflict. It is, therefore, important to continue with an investigation on the suitability of an ombudsman office for education, in order to address the conflict and restore relationships between the SGBs and the PDEs.

The fact that the PDEs and the SGBs have often resorted to courts of law to resolve their disputes regarding various education matters points to relationships between some SGBs and PDEs currently being somewhat strained and to there being a lack of cooperation, support, and consultation when it comes to coordinating their actions.⁸⁹ In light of this, it is clear that there is a sense of mistrust between these two partners.

83 Bray 2007:14.

84 Bray 2007:14. See also *Promotion of Administrative Justice Act (PAJA)* 3/2000:sec. 1.

85 *Intergovernmental Relations Framework Act* 13/2005.

86 *Constitution of the Republic of South Africa* 1996:sec. 41(h)(i)-(vi).

87 Stewart 2009:41.

88 Clase *et al.* 2007:244-245.

89 Clase *et al.* 2007:251.

It must, therefore, be acknowledged that cooperative governance is a complex concept to grasp and one that proves to be even more difficult to apply in practice. There are many challenges with its implementation and this, in turn, causes conflict. For example, the DBE, the PDEs, and the SGBs are used to doing things independently and without the obligation of cooperating when executing their functions. There is also a strong perception that the DBE and the PDEs are centralising control over education policy for transformation purposes.⁹⁰ This is particularly the views of some SGBs in Quintile 4 and 5 schools that have the means to challenge the decisions of the DBE and the PDEs.⁹¹ This perceived or real continued recentralisation of powers undermines both the principles of democracy espoused in the *Constitution* and the transformation of the education system and creates hostility among stakeholders. On the other hand, Quintile 1 to 3 schools do not have the means to challenge the administrative action of the PDE that adversely affects them. This places them in an inferior position to the PDE. Measures are, therefore, necessary to address any possible abuse of power by the PDE, such as the over-enrolment of schools by PDE officials, contrary to the admission policy of the school. These perceptions and other actions such as an abuse of power hamper the successful cooperation between the PDEs and the SGBs and will be discussed in more detail below.

3. CHALLENGES IN IMPLEMENTING COOPERATIVE GOVERNANCE AT AN SGB AND PDE LEVEL

In their empirical study, Clase *et al.*⁹² identify the following core challenges experienced by the SGBs and the PDEs in applying cooperative governance principles: mutual mistrust of each other's motives; lack of knowledge about the content and provisions of education legislation; inadequate communication and misinterpretation of education legislation and policies; lack of transparency and ill-considered actions by the PDEs; lack of adequate support structures for the SGBs; misapplication of education laws and policies; SGB fears of PDE interference with their powers, and, in some instances, the deliberate refusal of the SGBs to adapt to the new changes in the education system.⁹³ All of these challenges no doubt contribute to any power struggle that may ensue.

A further challenge is that education legislation requires of PDEs and SGBs to form a partnership.⁹⁴ The problem with this is that there are no standardised mechanisms and procedures in place for the SGBs and the PDEs to facilitate the formation of partnerships which, in turn, creates conflict. The Constitutional Court, as the upholder of the *Constitution*, has the duty to promote a culture of cooperative governance and to compel organs of state to adhere to these

90 Bray 2002:516; Smit & Oosthuizen 2011:62.

91 Clase *et al.* 2007:245.

92 Clase *et al.* 2007:250.

93 Clase *et al.* 2007:259; Smit 2022:91-107, 215-228.

94 *South African Schools Act* 84/1996:Preamble.

principles,⁹⁵ as it did in the *Rivonia*⁹⁶ and *Welkom*⁹⁷ cases. Notwithstanding these cases, there has still been a steady stream of education rights disputes adjudicated by courts over the years. This is indicative that role players, for what it is worth, do not view these constitutional objectives as important, or the requests for cooperation fall on deaf ears. It is apparent that both the DBEs and the PDEs have not made provision in legislation for alternatives to litigation, nor have they introduced any mechanisms to foster cooperation.

The next section investigates the establishment of an ombudsman office as an alternative to litigation.

4. OVERVIEW OF OMBUDSMAN OFFICES

The notion of 'ombudsman' spread continuously throughout the world during the course of the 20th century. The constitutional concept of independent, easily accessible, and 'soft' control of public administration through highly reputable offices or institutions is inextricably linked to the principles of democracy and the rule of law, as it is an essential contribution to the efficiency of those principles. Ombudsmen's increasing significance for the protection of human rights and the liability of administration is recognised worldwide.⁹⁸ Ombudsman institutions are an inherent feature in all kinds of legal orders.

The word 'ombudsman' is considered a powerful brand name used to describe a model of an institution which originates from the 1809 Swedish Parliamentary Ombudsman (Riksdagens Ombudsman).⁹⁹ Roughly 213 years ago, the institution of an ombudsman was confined to a handful of countries and the word 'ombudsman' meant nothing to the vast majority of people outside of Scandinavia.¹⁰⁰ The word 'ombud' in Swedish means representative, agent, intermediary, and delegate.¹⁰¹ It is noteworthy to concede that parallels of the ombudsman have been found in the Roman, Chinese, and Islamic systems. However, the modern roots of the ombudsman are to be found in the Swedish example.¹⁰² The concept and institution have indeed become a worldwide phenomenon.

Nowadays, ombudsmen are both global in operation and multifaceted by nature, existing on every continent, at various levels of government, and across both public and private sectors. In Stuhmcke's¹⁰³ view, ombudsmen

95 Bray 2007:520.

96 *MEC for Education in Gauteng Province and Others v Governing Body of Rivonia Primary School and Others* 2013 (12) BCLR 1365 (CC).

97 *Head of Department, Department of Education, Free State Province v Welkom High School and Another and Head of Department, Department of Education, Free State Province v Harmony High School and Another* 2013 (9) BCLR 989 (CC).

98 Glusac 2019:6; Reif 2020:1.

99 Stuhmcke 2012:83.

100 Reif 2020:2-3; Gregory & Giddings 2000:1; Reif 2011:269.

101 Batalli 2015:233.

102 Reif 2004:4-5.

103 Stuhmcke 2012:83.

are ever evolving, and the expansion of the ombudsman institution is not only one of scale, but also one of scope. One such important development is the changing focus of the classical ombudsman model from primarily providing redress to individuals' complaints to placing more emphasis on systemic investigations and expanding functions and monitoring, with the primary goal to improve the overall quality of public administration.

Reif¹⁰⁴ defines the classical ombudsman as an office provided for by the constitution or by action of the legislature or parliament and headed by an independent, high-level public official who is responsible to the legislature or parliament, and who receives complaints from aggrieved persons against government agencies, officials, and employees, or who acts on his/her own motion and who has the power to investigate, recommend corrective action, and issue reports. The classical or first-generation ombudsman, therefore, investigates government administration to determine whether or not there has been illegal or unfair conduct. It can make recommendations for rectifying any wrongdoing uncovered, but it does not have an express mandate to inquire into human rights breaches by the government.¹⁰⁵

However, the classical ombudsman office and the second-generation ombudsman offices developed over time. In the early 1980s, the International Ombudsman Institution (IOI) stated that:

The ombudsman is an independent and non-partisan officer (or committee of officers) often provided for in the Constitution, who supervises the administration. He deals with specific complaints from the public against administrative injustice and maladministration. He has the power to investigate, report upon, and make recommendations about individual cases and administrative procedures. He is not a judge or a tribunal, and he has no power to make orders or to reverse administrative action. He seeks solutions to problems by a process of investigation and conciliation. His authority and influence derive from the fact he is appointed by and reports to one of the principal organs of state, usually parliament or a chief executive.¹⁰⁶

It is important to emphasise the ombudsman office's responsibility to seek solutions to problems and to promote conciliation. These functions of an ombudsman office can play an important role in addressing conflict between the SGBs and the PDEs, ultimately enhancing cooperation.

During the course of the next three decades, the office multiplied rapidly at national, provincial, and municipal levels of government. The concept spread throughout the liberal democracies of Western Europe, North America, the

104 Reif 2004:2-3; Reif 2020:2. The International Bar Association (1974) defines a classical ombudsman as an office provided for by the constitution or by action of the legislature or parliament and headed by an independent, high-level public official who is responsible to the legislature or parliament, who receives complaints from aggrieved persons against government agencies, officials and employees or who acts on his own motion, and who has the power to investigate, recommend corrective action, and issue reports.

105 Reif 2016:28.

106 Gregory & Giddings 2000:4.

Caribbean, Australia, and the Pacific region, and also reached parts of the Middle East, Africa, and the Indian sub-continent.¹⁰⁷ Over and above the adoption of the institution in liberal democracies worldwide, a third generation of ombudsmen institutions started emerging in the late 1970s. Since then, governments have established hybrid or third-generation ombudsmen, by giving one institution multiple mandates.¹⁰⁸ These additional mandates include protecting human rights, fighting corruption, and ensuring ethical conduct by elected public officials.¹⁰⁹ It is noteworthy to concede that, since the 1970s, many ombudsmen institutions have been given human rights-related duties, and the classical or first-generation ombudsmen institutions are increasingly transformed, through the conferral of constitutional or legislative mandates, also to protect human rights.¹¹⁰

The third-generation ombudsman was introduced by Portugal and Spain as hybrid or human rights ombudsman fighting maladministration.¹¹¹ This ombudsman is dubbed as hybrid, because it has a dual mandate,¹¹² which includes both the power to focus on human rights violations and maladministration, which entails investigating poor government administration and claiming that government authorities have violated the states' human rights obligations.¹¹³

Ombudsmen, with a focus on human rights, are often adopted by countries with emerging democracies. The reason for this is that ombudsmen are viewed as instruments that can develop democratic accountability and build good governance.¹¹⁴ Ombudsmen are protectors of human rights and leaders in the fight against corruption, which is endemic in many developing and transitional economies.¹¹⁵ In this regard, Seneviratne¹¹⁶ quotes Hill's definition of an ombudsman to mean:

A reliable person who for the purposes of legal protection of individuals as well as parliamentary control supervises almost all administrative bodies and civil servants. He or she cannot correct their decisions, but – based on submitted complaints or on own initiatives – he may criticize them.

5. POPULARITY OF THE OMBUDSMAN

As to why the practice of the ombudsman has flourished and multiplied, part of the explanation, it would seem, is to be found in the perceived need, increasingly acknowledged in democratic states, to promote accountable administration in

107 Gregory & Giddings 2000:7. See also Reif 2004:6-7.

108 Reif 2020:14-20; Reif 2011:271.

109 Reif 2020:14-20; Reif 2011:271.

110 Reif 2020:14-20; Reif 2011:271-272.

111 Glusac 2019:6.

112 Reif 2011:28; Reif 2020:14-16.

113 Reif 2004:8; Reif 2011:28.

114 Seneviratne 2002:8; Reif 2004:8.

115 Seneviratne 2002:8; Reif 2004:8.

116 Seneviratne 2002:8-9.

an era of big governments.¹¹⁷ In this regard, and as will become apparent from arguments later on, researchers indicate that democratic governments perceive an advantage in finding some means to make governments more accountable to the people they serve and to eliminate the political fallout resulting from maladministration at the periphery of government activity.¹¹⁸ This was envisaged by softening the relationship between the governed and the government, in order to create a fair and just government, considered to be an important element in the search for a modern democratic state.¹¹⁹

The classical or first-generation ombudsman is an institution that uses 'soft powers' of persuasion and cooperation to control conduct, rather than coercive or adjudicative means.¹²⁰ Reif¹²¹ further states that there are schools of common thought among the research fraternity that common law and administrative law refer to the ombudsman as a non-judicial alternative for overseeing public administration.¹²²

Against this background, governments in countries worldwide were seeking constitutional devices that would improve citizens' rights and their ability to enforce accountability in the political and administrative processes. There has been an exponential spread in global institutions, and by the 1980s, the ombudsman idea had been accepted by almost every country in Western Europe. By the end of the 1990s, over 90 countries worldwide had ombudsman offices, including South Africa.¹²³

With the emergence of any new democratic state, there are concerns regarding the protection of human rights and the growth of public education and participation. With these new concerns, ombudsmen came to be viewed as useful in modern growing democratic states, with the increase of powers given to the state (government).¹²⁴ This resulted in a need for additional protection against possible administrative arbitrariness, particularly as there was often no redress for those aggrieved by administrative decisions.¹²⁵

Not only has the number of countries, in which an ombudsman operates, grown substantially over the years, but there has also been an exceptional diversification of ombudsman offices. This diversification of the abovementioned models is important for the focus of this article, insofar as it relates to the exploration of enhanced cooperation and an alternative to litigation for administrative action breaches for education stakeholders.

The popularity of these offices are further attributed to the fact that they are free for the users thereof and, in terms of the volume of cases they deal with, they are more cost effective for the government or institution that creates

117 Gregory & Giddings 2000:1; Reif 2011:281.

118 Gregory & Giddings 2000:1; Reif 2011:281-282.

119 Gregory & Giddings 2000:1; Reif 2011:270.

120 Reif 2011:270.

121 Reif 2011:270.

122 Reif 2011:270.

123 Seneviratne 2002:1.

124 Seneviratne 2002:10-11.

125 Seneviratne 2002:11.

and funds the office.¹²⁶ In light hereof, ombudsmen would, therefore, present good value for money for the parties involved, as the costs would be kept to a minimum because, unlike the courts, legal representation is neither required nor advantageous.¹²⁷

The popularity of the institution can be noted from the way in which this intended public sector body has been copied in the private sector. In South Africa, universities, much like schools, are the perfect breeding ground for conflict and disputes. In 2011, the University of Cape Town (UCT) was the first university to establish an ombudsman office as a specialist conflict-resolution mechanism to receive confidential complaints, concerns or inquiries from students, parents, and staff about possible improprieties and broader systemic problems within the institution.¹²⁸ The ombudsman is also required to identify gaps in policies and provide feedback to the university, in order to point out urgency to any hotspots identified by the office.¹²⁹ Since then, six other universities across South Africa have established ombudsman offices. The advantages of ombudsmen mirror the disadvantages with a traditional dispute-resolution forum, the courts.¹³⁰ In this regard, court processes are notoriously slow and expensive and do not always provide an effective remedy. Ombudsman institutions can provide these alternative remedies.

Seneviratne¹³¹ argues that the problems associated with the civil justice system can be side-stepped by the use of an ombudsman as a non-judicial mechanism. With this argument in mind, it is safe to say that ombudsmen, therefore, present an attractive alternative to the courts. Not only would they be in a position to overcome the procedural hurdles associated with litigation, but they would also provide remedies where none may be available in the courts. Ombudsmen would further be of assistance to those who do not have the funding to approach the courts. However, access to justice is not the focus of this article. In this sense, ombudsmen can be viewed as genuine alternative dispute mechanisms to the courts.

As society is constantly developing, adhering to the rights of children, as enshrined in the United Nations Convention on the Rights of the Child, places a constant demand on politicians, public authorities, and professionals working with children. Effective since 2021, the Western Cape Provincial Government in South Africa has established an ombudsman office for children through its Provincial Constitution, known as the Western Cape Commissioner for

126 Seneviratne 2002:11; Gregory & Giddings 2000:15-18.

127 Seneviratne 2002:11; Gregory & Giddings 2000:15-18.

128 Mguqulwa 2015:1-3.

129 Mguqulwa 2015:1-3. Report by the UCT ombudsman that every varsity should have an ombudsman.

130 Seneviratne 2002:11. See also Gregory & Giddings 2000:15-18.

131 Seneviratne 2002:11. See also Gregory & Giddings 2000:15-18.

Children.¹³² Various others countries such as Canada,¹³³ Denmark,¹³⁴ New Zealand,¹³⁵ and Ireland¹³⁶ have established ombudsman offices specifically mandated to deal with challenges related to children.¹³⁷ It is noteworthy to concede that these institutions do not have an express specialist mandate on education, but cover a broader scope to ensure it covers all rights of children, as is envisaged in international law instruments, save for the Education Ombudsman established in Ohio.¹³⁸

In the South African context, the education environment is a specialist environment and, given the systemic issues and ongoing legal battles between the SGBs and the PDEs, there is a dire need for an alternative to litigation, not only to ensure that these stakeholders adhere to the cooperative governance principles. The creation of an ombudsman office for education might be that alternative. Build One South Africa (BOSA) wrote to the President of South Africa in support of and calling for the establishment of an education ombudsman.¹³⁹

6. POWERS OF OMBUDSMAN OFFICES

The main criterion for a distinction between the administrative or public sector ombudsman versus the hybrid ombudsman is based on the functions allocated to it. The following sections explore the various powers that can be allocated to an ombudsman. This exploration is done in the context of this article which is to investigate the ombudsman office as a suitable platform to enhance cooperation between the SGBs and the PDEs.

6.1 Administrative justice and human rights powers

Reif's¹⁴⁰ examination of these institutions reveals that many of them combine administrative justice duties with responsibilities for protecting and promoting human rights, but there can be considerable differences in emphasis, depending on the institution's constitutional or legislative mandate and its unique political

132 *Constitution of the Western Cape* 1/1998:ch. 9. The Western Cape Commissioner for Children is a Chapter 9 institution in terms of the Provincial Constitution and is, therefore, similar to the Chapter 9 institutions of the *Constitution of the Republic of South Africa* 1966.

133 Canadian Council of Child and Youth Advocates, <http://www.ccy.ca/content/index.asp?langid=1> (accessed on 12 September 2020).

134 The National Council for Children, <https://www.boerneraadet.dk/english> (accessed on 12 September 2020).

135 Commissioner, <https://www.govt.nz/organisations/childrens-commissioner/> (accessed on 12 September 2020).

136 Glendenning 2004:133-143.

137 The European Network of Ombudspersons for Children includes a specific model which was adopted by European countries: Austria, Belgium, Iceland, Norway, and Sweden, https://www.humanrights.gov.au/our-work/childrens-rights_publications (accessed on 12 September 2020).

138 Coles 1997:1-2.

139 Zondi 2023:1-3.

140 Reif 2011:275.

and economic context.¹⁴¹ Some of the government single-purpose ombudsmen have mandates similar to those of a human rights commission, which focuses on the protection and promotion of human rights and lacks an express ability to oversee administrative justice.¹⁴² Some institutions have only investigation, reporting, and recommendation functions, while others also have stronger powers such as the right to inspect facilities, to bring review actions before Constitutional Courts, to participate in administrative court proceedings, or to prosecute or recommend the prosecution of public officials.¹⁴³

Historically, in the South African context, our highest courts have ruled that findings, decisions or remedial actions taken by the Public Protector may not be ignored.¹⁴⁴ In this regard, the Constitutional Court commented that, if compliance with remedial action taken by the Public Protector were optional, very few culprits, if any at all, would allow it to have any effect.¹⁴⁵ The affected person or institution may, however, review such a finding, decision or action taken by the Public Protector. With this said, it can be inferred from this that the government has a duty to implement the findings, decisions or action recommended by the Public Protector. Failing this, the matter must be taken on review. It, therefore, suggests that the findings and recommendations of the Public Protector in South Africa have some binding effect and that, if an ombudsman is established for the education sector, the effect hereof is that the PDE, the DBE and the SGBs will be obliged to implement such findings, decisions or actions.

Another important power is to be able to establish structures to consult regularly with vulnerable groups in the education environment, especially children. This is important to realise the South African ideals of a transformative and participatory democracy where there is cooperation among organs of state.

It is recommended that the ombudsmen also have the powers to initiate administrative proceedings, or to make complaints to the administrative court and to participate in pending proceedings. South Africa does not have specialist administrative courts. Litigants in South Africa have the following courts at their disposal for review applications within the education context: the High Court, the Supreme Court of Appeal, and the Constitutional Court. The High Court is the court of first instance. Education disputes have often been pronounced upon by the highest court. This power will be useful where the DBE or the PDE fails to implement recommendations; the ombudsman will have the power to enforce the recommendations in a court of law.

141 Reif 2011:275. See also *Constitution of the Republic of South Africa* 1996:ch.9. The establishment of chapter 9 institutions.

142 Reif 2011:275. Single-purpose ombudsmen are ombudsmen created for a specific sector. For example, increasingly more states are moving towards establishing an ombudsman for children and education.

143 Reif 2011:275.

144 *South African Broadcasting Corporation Soc Ltd and Others v Democratic Alliance and Others* 2016 (2) SA 522 (SCA):par. 52; *Economic Freedom Fighters v Speaker of the National Assembly and Others* 2016 (3) SA 580 (CC).

145 *Economic Freedom Fighters v Speaker of the National Assembly and Others* 2016 (3) SA 580 (CC):par. 56.

This power will indeed be useful to an ombudsman for education within the South African context for matters relating to learner discipline, school codes of conduct, admissions, language issues, or learner pregnancy, to name a few. This will, in turn, assist in ensuring that dignity, equality, and the best-interest principle are not compromised.

6.2 Legality control powers

Glusac¹⁴⁶ indicates that the main purpose of an ombudsman is to control the legality and regularity of the work of public administration. If this is the case, then certainly an argument is to be made that an ombudsman is able to control the legality and regularity of the work in the education sector. By doing so, the ombudsman determines whether the conduct of the public administration body (for example, the PDEs and the SGBs) in question was in accordance with the law, while the regularity aspect covers compliance with the principles of good administration (governance). Glusac notes that, while there are different definitions of good administration, in general, the notion of good administration covers all efforts to improve the individual's procedural position *vis-à-vis* the administration, by promoting the adoption of rules, which would ensure fairness in the relations between citizens and the administrative authorities.¹⁴⁷

The following core principles, in Glusac's¹⁴⁸ view, are important for an efficient administration: administration through law, non-discrimination, proportionality, legal certainty, the protection of legitimate expectations, and the right to a hearing before an adverse decision is taken by a public authority. This ultimately means that every person should have the right to have access to a forum to be heard before a public administration, in order to have his/her affairs handled impartially and fairly and within a reasonable time; to be heard before any individual measure is taken that would affect the person adversely; the obligation to provide reasons in writing for all decisions, and the right of access to documents.

To achieve these core principles, the public administration must be service minded; be in a position to indicate the remedies available to all persons concerned; notify all persons of a decision that concerns them; keep records and registers, and document all administrative processes. Ombudsmen can initiate investigations on maladministration, improprieties, and systemic problems, either on a complaint from the citizens concerned, or on their own initiative.¹⁴⁹ Ombudsmen may investigate administrative action taken by, or on behalf of a school where the action may affect a child adversely, actions were taken without authority, or taken on irrelevant grounds. This power is important, as the ombudsman will be able to investigate where a SGB, principal, and the PDE took an arbitrary decision that might affect the rights of the learner. Following the investigation, the ombudsman can make recommendations

146 Glusac 2019:7.

147 Glusac 2019:7.

148 Glusac 2019:7.

149 Wiese 2016:204.

to the school and the PDE on his/her findings and the recommendations to improve the situation at the level of the school. In the South African context, learner discipline and school safety (issues such as abuse of illegal substances, smoking in schools, sexual abuse, physical punishment, bullying and, more recently, the debates on gender orientation in schools, and the state of school infrastructure) are major challenges. Therefore, this would be a most useful power to empower and assist schools in aspects such as these.

In further promoting children's and SGBs' rights, the ombudsman should have the power to advise and encourage the PDEs and the DBE on policy development, practices, and procedures designed to promote the rights and welfare of those in the education environment. It is further important for the ombudsman to be able to promote awareness among members of the public relating to education rights and how the rights can be enforced. In addition, the ombudsman should also cooperate with the other established ombudsmen offices in the provinces, as well as civil society partners to monitor and review legislation affecting children.

As an ombudsman office continues to grow, increasingly more ombudsmen have powers and functions to engage and mediate. The concept of meaningful engagement is not a new one. It is, however, a fairly new concept to education. Meaningful engagement is a useful tool and/or power for an ombudsman to have. Liebenberg¹⁵⁰ notes the need for remedial innovation in the context of school governance conflict. In addition, the three significant Constitutional Court judgments in *Head of Mpumalanga Department of Education and Another v Hoërskool Ermelo and Others*¹⁵¹ (*Ermelo*), *Head of Department, Department of Education, Free State Province v Welkom High School and Another; Head of Department, Department of Education, Free State Province v Harmony High School and Another*¹⁵² (*Welkom*) and *MEC for Education in Gauteng Province and Others v Governing Body of Rivonia Primary School and Others (Rivonia)*¹⁵³ emphasise the need for cooperative governance measures. Mediation is considered a very effective way to address conflict that culminates in disputes.¹⁵⁴ Conflict mediation is basically a process that facilitates dialogue because it is coordinated by an impartial third party who helps identify common interests with a view to reaching some kind of agreement.¹⁵⁵ Mediation entails the development of negotiation strategies that focus on communication between parties that are in conflict with one another. The process enhances an understanding of the other's needs and interests, in order to facilitate a mutually acceptable agreement.¹⁵⁶

150 Liebenberg 2016:2.

151 *Head of Mpumalanga Department of Education and Another v Hoërskool Ermelo and Others* 2010 (3) BCLR 177 (CC).

152 *Head of Department, Department of Education, Free State Province v Welkom High School and Another; Head of Department, Department of Education, Free State Province v Harmony High School and Another* 2013 (9) BCLR 989 (CC).

153 *MEC for Education in Gauteng Province and Others v Governing Body of Rivonia Primary School and Others* 2013 (12) BCLR 1365 (CC).

154 Wiese 2016:47; Rycroft 2013:187; Patelia & Chikhtay 2015:3; Lyster 1996:231.

155 Gaspodini *et al.* 2016:194.

156 Elnegahy 2017:783.

In general, mediation, as opposed to adversarial litigation processes, can address the needs of both the PDEs and the SGBs. The reason for this is that the process is flexible, confidential, and a means of enhancing communication and empowerment, all of which are critical for fostering, maintaining, and preserving good relations between these two stakeholders.¹⁵⁷ In preserving good relations, it might further encourage the SGBs and the PDEs to engage with each other regularly and in a more meaningful manner. The ultimate outcome hereof is that the SGBs and the PDEs will adhere to the principles of cooperative governance. Mediation is thus a means to facilitate the achievement of cooperative governance principles. According to Gaspodini *et al.*,¹⁵⁸ mediation is suitable for resolving conflict within the education context. As an expert in the field of education, the ombudsman office will be best suited to facilitate such a process to ensure that outcomes are in line with the legal framework and constitutionally compliant. Facilitated outcomes are also more likely to advance cooperation.

The next section explores the advantages and disadvantages of how the ombudsman institution can act as a mechanism to promote human rights and enhance cooperation. This exploration will be undertaken with reference to democratic accountability, the rule of law, good governance, and cooperation, and will be linked to the education system in South Africa.

7. THE ADVANTAGES AND DISADVANTAGES OF AN OMBUDSMAN OFFICE FOR THE EDUCATION ENVIRONMENT

The advantages of an ombudsman are to be viewed and linked with the powers attributed to it. It is trite that, since the 1960s, and as states worldwide have grown, nations perceived an ombudsman as a useful mechanism for controlling administrative misconduct and human rights breaches.¹⁵⁹ Furthermore, ombudsmen are there to ensure that the fundamental rights and freedoms of citizens are not encroached upon by the public administration.¹⁶⁰

Further discussions on the advantages of an ombudsman office are linked to the advantages in favour of arguing for an education-specific ombudsman. These advantages include the promotion of accountability, the enhancement of the rule of law, good governance, cooperation, and to act as a preventative strategy. These points will be discussed with specific reference to education.

7.1 An ombudsman as a preventative strategy for education

Wright¹⁶¹ states that the best approach to a potential legal issue is to prevent it from happening at all. This approach is sometimes aimed at assessing risks

157 Elnegahy 2017:783.

158 Gaspodini *et al.* 2016:195.

159 Reif 2011:273. See also discussion above.

160 Reif 2011:276.

161 Wright 2010:73-74.

before there is an issue and putting safeguards in place to reduce the risk.¹⁶² For an ombudsman office, preventative law would ultimately mean that it is a way of approaching a matter from a preventative perspective, aiming not to put structures in place to win a lawsuit, but to keep it from happening altogether. An ombudsman is able to do this in that s/he can conduct investigation on his/her own motion and make recommendations to the legislature directly as well as to the PDE in question. Such a method will greatly assist the SGBs for most of the schools when their cries for assistance to the PDEs go unanswered. It will assist the PDEs and the SGBs in highlighting possible human rights breaches and propose remedies for implementation.

Mary Robinson,¹⁶³ former United Nations High Commissioner for Human Rights, states the following:

I have become increasingly convinced of the necessity to focus on *preventative* strategies. This has convinced me of the importance of creating strong, independent national human rights institutions to provide accessible remedies, particularly for those who are most vulnerable and disadvantaged. Frequently these institutions are “human rights commissions,” but in many countries, drawing on traditions originating in Sweden, they are related to or identified as human rights “ombudsman” or “ombudsperson” ... It is precisely the Ombudsman’s capacity to contribute substantially to the realization of individual human rights which makes independent institutions so significant.

An ombudsman can also publicise and use his/her reports in particular cases to persuade the administration to change law and/or policy.¹⁶⁴ This could be particularly beneficial in the education sector, where laws and policies are not updated regularly, thus leading to litigation such as admission and language policies.¹⁶⁵

162 Wright 2010:73.

163 Robinson 1998:np.

164 Reif 2011:307.

165 *Government Gazette* 1701/1997 (Norms and standards for language policy in public schools); *Government Gazette* 776/1998 (Guidelines for the consideration of governing bodies in adopting a code of conduct for learners); *Government Gazette* 1010/2001 (Regulations for safety measures at public schools); *Government Gazette* 2432/1998 (Admission policy for ordinary public schools); *Government Gazette* 1307/2003 (National policy on religion and education); *Government Gazette* 3427/2002 (National policy on the management of drug abuse by learners), and *Government Gazette* 361/2010 (Policy on learner attendance) are examples of policies that were gazetted by the National Minister and have never been amended to bring them in line with development in the education law as a result of changes to the *South African Schools Act* and court judgments over the past 25 years. The only policy that is in the process of being revisited is *Government Gazette* 2432/1998. See case law on admissions and language policies such as *MEC for Education in Gauteng Province and Others v Governing Body of Rivonia Primary School and Others* 2013 (12) BCLR 1365 (CC) and *Head of Department, Mpumalanga Department of Education v Hoërskool Ermelo* 2010 (3) BCLR 177 (CC).

7.2 The ombudsman and the enhancement of cooperation in education

Ombudsman institutions have the power to launch investigations on their own motion.¹⁶⁶ In this regard, they need not wait for an actual complaint. An ombudsman can be more proactive in monitoring events in his/her jurisdiction to enhance the protection of human rights. In addition hereto, the ombudsman has the power to investigate facilities and make recommendations to the state on improving its service delivery.

These own-motion investigations can benefit the vulnerable and further enhance cooperation among education stakeholders so as to avoid costly litigation and to preserve relationships. Own-motion investigations will further serve as a preventative strategy, as discussed earlier. Further aspects of ombudsmen are the reports they generate, which provide useful information and assistance to the public. Annual and special reports provide information on important investigations undertaken, which may increase the public's understanding of the office's role, thus enhancing further cooperation.¹⁶⁷ The reports may further enhance the public's perception of the usefulness of the institution.

The fact that an ombudsman may have the powers to make recommendations for changes in law and policy can enhance cooperation among education stakeholders such as the PDEs and the SGBs, whose conflict related to school policies has, for the most part, opted to approach the courts for determination on who has the power and final say on school policies. This function will further enhance the cooperative governance requirements, as envisaged in Chapter 3 of the *Constitution* dealing with cooperative governance.

Ombudsman institutions can play a vital role in training and establishing partnerships with universities, civil society institutions or the government to provide continuous training.¹⁶⁸ It was identified in the education sector that a lack of training and/or partnerships between stakeholders can be regarded as part of the reason for the struggle to implement cooperative governance measures. Bonturi and O'Reilly¹⁶⁹ hold the view that ombudsmen could further provide strategic guidance to developing transparent government practices and initiatives of the institution to strengthen their transparency, integrity, accountability, and stakeholder participation.

166 Reif 2004:302.

167 Reif 2011:307.

168 Bonturi & O'Reilly 2018:11.

169 Bonturi & O'Reilly 2018:10.

7.3 The ombudsman and the promotion of accountability in education

One of the key cornerstones of democracy is the notion that government actors and political representatives are subject to accountability.¹⁷⁰ A legislative ombudsman can serve as a control mechanism of horizontal accountability for government in a democratic state, because it is an entity that is part of the state governance structure, but external to the executive and administrative arm, and independent of all branches of government.¹⁷¹

The ombudsman also serves as a vertical accountability mechanism between citizens and the government, thus allowing members of the public to complain about the government administration and have their concerns investigated, assessed, and presented to the government as critical feedback.¹⁷² A disadvantage of the office is attributed to the fact that the office does not have the power to make decisions that are legally binding on the administration. However, the administration is free to implement, in whole or in part, or ignore the ombudsman recommendations, which is a common criticism among scholars. However, Reif¹⁷³ and Oosting hold the view that, if the ombudsman were to be given such powers, the institution would become another type of court and tribunal which the state already has in place and this would hinder cooperation among the SGBs and the PDEs. The importance of the legal and institutional aspects of the office is the authority of the ombudsman, which is essential to the strength of the institution.¹⁷⁴

This position has changed insofar as the Public Protector's findings and recommendations are concerned in South Africa,¹⁷⁵ where the constitutional order hinges on the rule of law. In the matter of *Economic Freedom Fighters v Speaker of the National Assembly and Others*,¹⁷⁶ the learned judge stated that the rule of law requires that no power be exercised unless it is sanctioned by law and no decision or step sanctioned by law may be ignored based on a contrary view held.¹⁷⁷ The foundational value of the rule of law demands of South Africans, as law-abiding people, to obey decisions made by those clothed with the legal authority to make them or else to approach an

170 Kuwali & Silungwe 2022:5.

171 Reif 2004:17. See also Kuwali & Silungwe 2022:1-23. A legislative ombudsman is one that is created in a Constitution by an Act of Parliament.

172 Reif 2004:17-18. See also Kuwali & Silungwe 2022:1-23.

173 Reif 2004:18; Oosting 1995:10.

174 Reif 2004:18.

175 *South African Broadcasting Corporation Soc Ltd and Others v Democratic Alliance and Others* 2016 (2) SA 522 (SCA) and *Economic Freedom Fighters v Speaker of the National Assembly and Others* 2016 (3) SA 580 (CC).

176 *Economic Freedom Fighters v Speaker of the National Assembly and Others* 2016 (3) SA 580 (CC).

177 *Economic Freedom Fighters v Speaker of the National Assembly and Others* 2016 (3) SA 580 (CC);par. 75.

appropriate forum or the courts to have such decision set aside, in order to validly escape the binding force of such a decision.¹⁷⁸

Reif¹⁷⁹ considers that the quality of the work of the ombudsman, the political support for the institution, public access to its work through the media, and the character and expertise of the office holder are the main building blocks of the authority of the ombudsman. The soft, non-coercive powers of recommendation and reporting given to the ombudsman are optimal to its working environment.¹⁸⁰

To further ensure accountability of the office, the ombudsman must be required to report to the legislature annually with information concerning the activities undertaken as well as any remarks regarding the rights of children in the education environment.

7.3.1 The value of soft, non-coercive powers to enhance cooperation

It might be trite to say that the ombudsman institution is a different legal body to that of the courts. The ombudsman institution has soft powers that give it more flexibility than adjudicative forms of dispute resolution, including the ability to rely on extra-legal principles and address issues that are nonjusticiable.¹⁸¹ The Supreme Court of Canada stated that the powers granted to the ombudsman allow him/her to address administrative problems that the courts, the legislature, and the executive cannot resolve effectively.¹⁸²

The different styles of legal control that can be applied to obtain compliance with the law or to achieve the desired behaviour highlight the advantages of the soft powers of the ombudsman institution. Examples of the different styles of control can be engagement and mediation, which are also ultimately measures to improve and enhance cooperation.

178 *Economic Freedom Fighters v Speaker of the National Assembly and Others* 2016 (3) SA 580 (CC):par. 75.

179 Reif 2004:18.

180 Reif (2020:24-26; 2004:18) quotes Stephen Owen who states: It may be that this inability to force change represents the central strength of the office and not its weakness. It requires that recommendations must be based on a thorough investigation of all facts, meticulous consideration of all perspectives and vigorous analysis of all issues. Through this application of reason, the results are infinitely more powerful than through the application of coercion. While a coercive process may cause reluctant change in a single decision or action, per definition it creates a loser who would be unlikely to embrace the recommendations in future actions. By contrast, where change results from a reasoning process, it changes a way of thinking, and the result endures to the benefit of potential complainants in the future. If genuine change is to take place as a result of ombudsman action, the office must earn and maintain the respect of government through its reasonableness. Without this, it will be at best ignored and, at worst, ridiculed.

181 Reif 2020:25.

182 *BC Development Corp v Friedmann* [1985] 1 WWR 193 (SCC):par. 206.

7.4 The ombudsman and the rule of law and good governance in education

The concepts of the rule of law and good governance are important aspects for accountability. A lack of accountability can harm relationships and will not enhance cooperation. A central question regarding the exercise of public duty such as in the instance of exercising education functions is the extent to which public officials can be held accountable by those affected by their decisions taken in the discharge of their public duties. A related question is: What must be the consequence of a failure to exercise a public duty as defined by law? It is important to note that an ombudsman, as part of his/her functions, can ensure compliance with the rule of law and enhance good governance between education stakeholders, which is a requirement of the democratic South Africa. The ombudsman can further use engagement and mediation to resolve conflicts and disputes which, if successful, will improve access to cooperation as the ombudsman will serve as a mediator between the SGBs and the PDEs and get them to engage with each other to find solutions to their conflict. It was also established that our courts have indicated that the recommendations of the Public Protector cannot be ignored and must first be set aside by a court of law. If similar status is given to an ombudsman for education, it will further enhance access to justice for the SGBs that do not have the financial means to approach courts, reduce abuse of power and mistrust among PDEs and SGBs that will ultimately enhance cooperation.

8. THE SUITABILITY OF AN OMBUDSMAN OFFICE TO ENHANCE CO-OPERATION

It is trite from the discussion above that the types of powers and the advantages of an ombudsman office are worthy of consideration to explore for the education environment. It is, however, of critical importance that the ombudsman for education will very likely require functions pertaining to human rights.

Ombudsman institutions that are established on the hybrid model are required to develop relationships and cooperate with other non-governmental organisations or civil society institutions.¹⁸³ The ombudsman for education will be able to develop relationships and cooperate with the institution it oversees and the education role players if the governance model is to survive.

Having these relationships will provide the institution with information and any feedback on their own work. It further provides a forum for mutual training, education, and support, which are all requirements for the cooperative governance model.

183 United Nations 1995, HR/P/PT4, <https://www.refworld.org/docid/4ae9acb7289.html> (accessed on 17 October 2022):14-15.

9. CONCLUSION

The objectives of cooperative governance are informed by principles of cooperation, the balancing of powers, shared responsibilities, and the coordination of activities. These principles must be executed in a spirit of mutual trust and good faith. However, the challenge for the PDEs and the SGBs in implementing cooperative governance principles is that, currently, their relationships are strained as a result of mutual mistrust and a lack of good faith in their dealings with each other. The conflict is exacerbated by both the PDEs and the SGBs lacking knowledge of education legislation; inadequate communication between each other; misinterpretation of education legislation and policies; a lack of transparency in their actions; the lack of support structures for the SGBs; constant interference by the PDEs in the affairs of the SGBs, and instances of SGBs refusing to adapt to changes in the education system. Despite these challenges, the PDEs and the SGBs have a constitutional mandate to execute their admission functions in light of the constitutional imperatives contained in sec. 41(1)(h)(i)-(vi).

The ombudsman system is one of the institutions essential to a society under the rule of law, a society in which fundamental rights and human dignities are respected. Human rights are not protected simply by constitutions or legislation, by guarantees or speeches, by proclamations or declarations, but primarily by the availability of remedies. The ombudsman system is one of the remedies that seek to preserve human rights and cooperation among role players and should, therefore, be considered as a mechanism to enhance cooperation.¹⁸⁴

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