An Appraisal of the Upholding of Moral Good Actions by the Censor (44 BCE) in the Roman Empire and its Culmination in the Public Protector of South Africa

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ABSTRACT

Centuries ago in the Roman Empire the satirist, Juvenal raised the question: Quis custodiet ipsos custodies? This means literally: "Who watches the watchmen?" or "Who guards the guards?" In addition, it points to promoting the upholding of moral good acts among both the citizens and those who must defend the rights and interests of the individual against the abuse of power by those who possess public authority. In this article it has been postulated that the duties of the then Censor (44 BCE) showed similarities to those of the present-day Public Protector. This phenomenon will be investigated by examining whether or not the Public Protector still fulfils the duties and powers of the Censor. From the conclusion, it is clear that the Censor was indeed the predecessor of the Public Protector. But such conclusion hinged upon the necessary phases the Censor underwent to ultimately culminate in the Public Protector. It is also explicated in this study that at times the duties and powers of the Censor developed or changed in order to conform to the changing circumstances of the time. Notwithstanding such developments or changes, upholding moral good acts remained the same for both offices and this is particularly the purview of this article.

Keywords: Censor; public protector; ombudsman; constitutional dispensation; regimen morem; caligula; promoting moral good actions; nota censorial; constitution of South Africa; 108 of 1996; South African law commission.

1. INTRODUCTION

The proponents or fathers of the Roman Empire believed that in order for a society to exist, the citizens should adhered to moral good actions and should have respect for the laws of the country. The office of the censor materialised in support of such a noble idea. Such office started off under the reign of Servius Tullius and culminated eventually in the censor. The censor not only prevented or penalised crime or immoral actions by means of censure, but also had to uphold the traditional character, ethics and customs of the Roman nation. It is along these lines that this paper wants to contrive a semblance of the censor with the duties and obligations of the modern day public protector of South Africa. The public protector also had to undergo some changes before it culminated in the position as it is known today. The paper sets out to establish that the functions of both institutions are congruent in nature. It is only in the execution of punishment for a transgression that there appears a deviation between the operations of these two organisations. Such deviation was triggered by the fact that the public protector of South Africa was subject to the constitutional demands of the time during an era

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of human rights dynamics. This study aims to explicate the phenomena. It starts off with a historical evolution of the office of the censor to culminate eventually under the public protector.

2. MATERIALS AND METHODS

2.1 Purpose of the Paper

The paper aims to clarify the role and functions of the censor and its historical evolution into the public protector of South Africa. It proposes modelling the idea of moral good actions among the citizenry. The research contrives a constitutional developmental approach of moral good actions from the erstwhile antiquarian depiction of the role of the censor. The functions of the censor showed some congruence with that of the public protector, but due to the constitutional demands of the time, the public protector enjoyed a wider jurisdiction of authority.

2.2 Design/methodology of the Paper

The paper opted for a theoretical study. The data acquired are going to be complemented by documentary analysis. Textbooks in law and other antiquarian sources of history will also be employed to render a holistic picture of the position of the censor. With regard to the contemporary position of the public protector, statute law, such as the Interim and Final Constitution of South Africa and the Public Protector Act will shed some light upon the functions and jurisdiction of the Public Protector.

3. THE CENSOR: A HISTORICAL PROCESS OF DEVELOPMENT

Servius Tullius, the sixth King of Rome, introduced the erstwhile census. Subsequent to the dethronement of the kings and the formation of the Republic, the *consules* (consuls) took over the census in 443 BC [1]. As the census was labour intensive and beneath the dignity of a consul, there was a need for a suitable bureaucracy, namely the *censori*, to fulfil this task [1]. Papirus and Sempronius were the first censors [1].

Until 442 BC, consuls were no longer elected; only military tribunes. As the latter could only be plebeians (ordinary workers), the patricians (nobility) feared that the plebeians would gradually gain control of the census. The patricians thus tasked the tribunes and entrusted the task to two officials known as the censors, who were to be chosen from among the patricians.

The patricians fulfilled the duty of censor until 351 BC, when Marcius Rutilus was appointed as the first plebeian censor [1]. Approximately twelve years later, a public law ordained that at least one of the censors had to be a plebeian [1]. For the first time, in 131 BC, both censors were thus plebeians.

Briefly: Such an important duty, namely the census, only belonged to the king as head of state. In time, the census belonged to the emperors (*principes*) and thereafter to the consuls (*consules*). Ultimately, the census became the duty of the censors [2].

3.1 PRINCEPS (Emperor)

The *princeps* had considerable power so that he could interfere in every sphere of government and society. He was thus viewed as the most suitable person to promote the citizens' compliance with moral good actions, on the one hand, and to inculcate the same discipline of compliance with moral good actions upon officials, on the other. However, the *princeps* did not always do so by virtue of the principle *princeps legibus solutus est* (according to which the *princeps* is considered elevated above the law) [3]. By virtue of this principle, *princeps* (emperor) Caligula, for instance, raised his horse Incitatus to the status of consul. Despite this, there were also good *principes* (plural form of *princeps*) such as, for instance, Augustus, who respected the law [4].[1] Under Augustus, besides the juridical aspect, the religious obligation of the *princeps* was emphasised. By virtue of the religious character, a moral character was ascribed to the *princeps*, according to which he was considered the upholder or protector of moral good actions among the citizenry.

As sanction, rebel *principes* such as, for example, Caligula were declared undignified, *damnatio memoriae* (condemnatory remembrance), upon their death, because they did not promote moral good actions [5].

[1] The notion shows similarities with that of the rule of law in the sense that both the citizenry and the state are bound by law. The notion of the rule of law guarantees equality for all before the law and excludes arbitrary or discretionary wielding of power by the state, as in the case of Calligula.

3.2 Consules (Consuls)

The power of the *princeps* (emperor) soon devolved upon the *consules* (consuls). Like the *princeps*, the *consules* also fulfilled priestly functions. There were two *consules*. Collegiality was considered a prerequisite for effective management, in the sense that one official cannot accomplish anything if his colleague forbids his action by virtue of the *ius intercedendi* (right of veto) [6].

By virtue of the *imperium* (power), the *consules* had the *ius edicendi* (right to issue orders) and to enforce (*coercitio*) those orders. They were empowered not only to catch and tie (*vincula*) a transgressor of the *edicta*, but also to flagellate (*verbera*) or impose fines upon the transgressor. According to this, the *consules*, like the *princeps*, were considered to uphold or protect moral good actions among the citizenry. Should the *consules* abuse their power, they could be called to account upon the expiry of their terms of office [5]. This indicates similarities with the *princeps*, who was declared unworthy after his death, because he neither encouraged nor promoted moral good actions.

3.3 Censor

As the state expanded, the *consules* could not fulfil all their administrative functions, some of which being transferred to the censor. The office of censor was considered the most dignified in the Roman Empire. It obtained the status of *sanctus magistratus* (sacred magestry) which demanded the highest respect [7]. The dignified office of the censors was entrusted to the function, by virtue of their encouraging and promoting moral good actions among the citizenry. On this basis, the censors had the *regimen morum* (general control over the moral conduct of the citizens of the state). This ensured that the censor could guarantee a society's religious conservatism. The censors thus also opposed the decline of civilization and impiety in the (later Christian) Roman Empire [4].[2] The qualities of the censor show similarities with the present-day "public protector" [8].

[2] This likely happened at the downfall of the pagan Roman Empire (where the emperors were worshipped as gods). During Emperor Constantine's reign, the Roman Empire was Christianised and the Christian religion became the state religion.

To a Roman, the climax of a successful career was to become a censor. Besides the origin of the candidate censor, his moral character was also taken into account in order to determine whether he would be capable of promoting moral good actions among the citizenry. The choice of a candidate for the position of censor was not only influenced by the status of his ancestors, but also by the place of origin of his *gens* (family name) and by his family's present domicile.

In addition to a candidate censor's moral conduct, his family also had to reflect integrity [8]. Van Zyl writes that the censors were dignified old gentlemen of irreproachable character who were held in great respect in society [9]. As upholders or protectors of moral good actions and of morals (*custos morum*), the censors were nicknamed *censorius* [9].

The census survey, previously conducted by the *consules*, was now transferred to the two *censores* [10]. In addition to the census survey, the censor was also responsible for the registration of properties. By virtue of these two important functions, previously fulfilled by the *consules*, the censor thus became aware of the citizens' activities. The *censores* were considered the most suitable persons to promote moral good actions and to counteract deviant behaviour. The promotion of moral good actions was directed mainly at the senators, but also at the ordinary citizens.

Only former *consules* could as a rule be appointed as *censores* [2]. Thomas writes the following about the remarkable position of the censors: "[their] office became more august than even that of [consules ...]" [11].

4. RESULTS AND DISCUSSION

4.1 The Nature of the Censor's Position

The censor's duties were divided into three types. First, they had to register the citizens' and their own properties; secondly, they had to look after the *regimen morum* (uphold the moral conduct of the citizens), and they had to supervise the public funds. Upholding the public morals and morality (*regimen morum*) can be viewed as one of the censor's most important duties [1]. This made the position of censor one of the most respected and feared in the Roman state. As far as this duty is concerned, the censors were also known as *castigators* (chastisers). They not only prevented or

penalised crime or immoral actions by means of censure, but also had to uphold the traditional character, ethics and customs (*mos majorem*) of the Roman nation [1].[3] The important duty of the censor had a positive impact on the past and future (Christian) societies. It provided room for expansion by the public protector in South African society.

In performing the two important functions (taking the census and registering properties), the *censores* (as mentioned earlier) were entitled to enquire about the private and public lives of the citizens [8].[4] Once the *consules* could no longer manage these two functions, the function of censor was created in 443-435 BC. The position of censor entailed exposing the misconduct of both senators and citizens. According to Cary and Scullard, misconduct by citizens included the following transgressions: cowardice in battle, misuse of public funds, immorality, and so on [12]. Suolahti adds neglect of civil duties, misuse of position, jurists accused of corruption, election fraud, those who unlawfully usurp the rights belonging to other groups of people, perjury, theft, and breach of contract [8]. On the basis of this, the citizens believed that the censor must uphold moral good actions and punish transgressions. As such, the censor upholds or protects moral good actions in the community and thus sets an example of irreproachable character to the citizens [2].

The *censores* also used general measures to stifle exaggerated luxurious ways of life, which were, according to them, incompatible with public policy and the moral tradition of the Roman nation. Wolff writes: "[They] developed a general jurisdiction in matters of morals [...]" [6]. Due to the moral undertones associated with the position of censor, new duties were later attributed to the censor, namely to prepare the senatorial list (*lectio senatus*). In approximately 300 BC, the *Lex Ovinia* transferred the election of senators to the censor; this duty was previously managed by the *consules* [11]. This function considerably raised the censor's esteem, in the sense that he could prosecute public office-bearers [11, 2]. It is important to note that the censor's power to prosecute served as deterrent for the ordinary citizen. The censor's power to prosecute strengthened his effectiveness as upholder of moral good actions to a great extent.

Soon the management of public funds was also entrusted to the *censores*. Accordingly, the censor increased tax in order to punish those accused of immoral conduct, the childless and those who possess items which the censors consider to be luxury [12].

As upholder and promoter of moral good actions, the *censores* issued a friendly warning concerning the neglect of family devotion, the misuse of power by the *pater familias*, unequal marriages, and unjustified divorces [8].

5. THE NATURE OF THE TRANSGRESSION

Senators filled their positions for life, except when they were found guilty of gross public and private misconduct. When a senator was guilty of misconduct, it was the censor's duty to punish him. This meant that, even if a senator could not be accused of a breach of positive law, the censors could nonetheless condemn his reprehensible behaviour [2].

5.1 Punishment for a Transgression

The Latin phrases *iudicium censorium*, *gravitas consortia* and *auctoritas consortia* indicate that the censors were invested with power and could thus pronounce judgements and inflict punishments.

Censors usually affixed a mark (*nota censoria*) to a (public official) senator's name who was found guilty of misconduct. Accordingly, this lowered the transgressor's rank and esteem in society. Thomas writes: "By affixing their mark of disapproval [*nota censoria*] to the name of an enrolled person, they could degrade him in rank and remove him from his tribe [...]" [11]. Wolff writes concerning the *nota censoria*: "[it ...] became [the censors] dreaded weapon" [6].

Due to the impact of the *nota censoria*, the

[3] Livy, iv: viii. "[...] quae deinde tanto incremento aucta est ut momm disciplinaeque Romanae penes, earn regimen, senatui equitumque cenhu·iis decoris dedecorisque discrimen sub dicione eius magistratus, uis publicorwn privatorumque J ocorum , vectiga lja populi Romani sub nutu atque arbitrio eius essent."

[4] Suolahti, *op cit*., p. 22. Naturally, the census survey was transferred to the older colleague. The younger colleague was as a rule deployed in battle. Suolahti appears to be stultified. On p. 31 (by contrast with p. 22) of his book, *The Roman censors*, he writes that both censors are tasked with the census survey.

censor also had the authority to terminate a senatorial official's career. According to this, the censors had the right not to appoint former members of the senate whom they deem to be undignified. Wylie writes: "[the censors ...] deleting the names of those who had [...] in their opinion [...] by reason of misconduct, [be] unworthy to hold the senatorial dignity" [2]. The *nota censoria* could also negatively affect a senator's credit standing. However, this did not apply to women, because they were not taxpayers, soldiers or enfranchised citizens [8].

5.2 Remedies against the *Nota censoria*

The *nota censoria* had to be accompanied by an explanation, whereafter the senator concerned had the right to defend himself. However, there was no right to appeal against the censor's decision, because the censors were not considered bound to any right. Only his colleague's right of veto could influence a censor's decision. The censor's decision was valid up to and including the next census survey. However, the new censors were not bound to their predecessors' decisions and could choose to ignore their predecessors' remarks [8].

5.3 Jurisdiction

The censors had jurisdiction in those cases where the interest of the State was in conflict with that of a private individual. They acted as chairpersons of the courts. Censors could mitigate penalties prescribed by the courts. They waived the debt of some individuals, for example compensation to a contractor who did not comply with his contractual obligations, which must be forfeited and given to another person who would indeed comply with the contract. If this is not feasible, the censor would evaluate the damage or accept property as security or guarantee. It is likely that the penalties were minimal [8]. Due to his power of jurisdiction, the censor was required, in the interest of justice, to uphold moral good actions between citizens and was obliged to uphold these actions himself.

In the post-Republic, censors were rarely appointed; after 22 BC, censors were no longer officially elected [9].

The censor's powers can be likened to those of the ombudsman (in the previous South African constitutional dispensation). Soon the office of ombudsman culminated in that of the public protector (in the new constitutional dispensation). The ombudsman and the public protector kept the censors' powers; however, due to constitutional prescriptions, changes took place and the censors' functions and powers were expanded to comply with the requirements of a specific constitutional dispensation. The changes must be judged according to the circumstances of the time of a specific constitutional dispensation. Despite the changes, the role of the censor as upholder of moral good actions runs like a golden thread through the ombudsman to ultimately culminate in the public protector.

6. THE OMBUDSMAN

Examples of the ombudsman can be traced back to 221 BCE in China and Korea, during the Joseon Dynasty. The example of the second Muslim Kalief, Umar (634-644) and the idea of Qadi al-Qadat influenced Swedish King Charles XII to create the office of ombudsman, which would soon become the office of the Minister of Law and Order.

The word *ombudsman* derives from the old Swedish word *umbuosmann*, means representative. In the Danish Law of Jutland of 1241, the term *ombudsman* refers to a royal public official. Since 1552, the name *ombudsman* is also found in other Scandinavian languages such as Iceland's *urn boosmaour*, Norway's *ombudsman* and Denmark's *ombudsmand*. In 1809, a Swedish parliamentary ombudsman was appointed to protect the rights of the citizens.

In the earlier constitutional dispensation of South Africa the public protector was also known as the ombudsman, hence the *Ombudsman, Act* 118 of 1979. The public protector was also known as the advocate general (the Amendment *Act of Advocate General* 104 of 1991).

In the present day context of South Africa, the ombudsman refers to the state official who controls government activities in the interests of the citizens. He could also investigate claims of incorrect government actions. Therefore, the state was prevented from wielding uncontrolled power over any individual, unless the law stated otherwise. The ombudsman's function as controller is thus equal to the upholding of moral good actions (as the censors did). The ombudsman's compliance with and upholding of moral good actions soon became part of the machinery of government. However, the ombudsman kept the powers of the state under control: "[Government] had to act within the

powers lawfully conferred on it" [13]. This means that the government may not exceed the limits of its power and may not take up more power than it may possess [14]. In terms of the Roman principle of *nemo plus iuris ad alium transferre potest quam ipse haberet*, the government cannot exercise more rights than those it obtained from the citizenry [15]. Despite this moral opinion, the prescription (in the quotation) was ignored by the previous dispensation, because the government incorrectly usurped powers that were not meant for it. Usurped powers caused the government (who enjoyed parliamentary sovereignty) to take up a dominant position; thus the ombudsman and other institutions such as the courts were hamstrung in the performance of their tasks. This derogation of rights prevented the ombudsman from effectively investigating immoral laws or actions of the government of the time.

Due to the suppressive attitude and the doctrine of parliamentary sovereignty of the former South African constitutional dispensation, the role of the ombudsman could not be realised, thus contributing to the ombudsman's inability to promote and uphold moral good actions. In the new dispensation, the parliamentary sovereignty of the old dispensation was replaced with the doctrine of constitutional supremacy [14]. This necessitated not only a name change, but also a change in the exercise of the functions and powers of the ombudsman. This means that the functions of the ombudsman were replaced with the public protector. The public protector thus had wider powers than the ombudsman. The latter only investigated cases of general mal-administration, whereas the public protector investigated alleged uncivil action by an official or employer in the service of the state, and so on [16].

7. THE PUBLIC PROTECTOR

The office of public protector, which is included in the *Interim Constitution, Act* 200 of 1993, culminated in the *Public Protector, Act* of 1994. The office of public protector is a significant improvement on that of the ombudsman in the sense, that, besides providing a wider jurisdictional power, it has also become more accessible for the ordinary citizen. The mandate of the public protector includes that he can investigate fair, unexpected, uncivil or other improper conduct or inexcusable delay by an official of the state involved in public administration. It is therefore obvious that the public protector covers a far wider field than simply complaints concerning unlawful or improper conduct by the State or an official of the State in a public position. With respect to the new trend, the South African Law Commission recommended that the public protector should also have the power to investigate complaints concerning breach of environmental rights, fundamental rights and freedoms, as well as corruption, bribery and theft of public funds, and so on. Section 177 (3) and (4) of the *Constitution of South Africa, Act* 108 of 1996 supports the Law Commission's recommendations. One can infer from this that the public protector, besides upholding moral good actions (such as the censors and the ombudsman did), also protects fundamental rights, in terms of Section 177 of the *Constitution of South Africa*. The public protector does so by controlling the actions of the State. He is thus considered to be champion of the rights of the ordinary citizen. The public protector acts in the interests of not only the individual, but also the government, in that, should the government be allowed to act lawlessly (there is no control over its actions), the citizenry would mistrust it and the government would thus contribute to its own downfall and be replaced unconstitutionally (*coup d'état*). By virtue of the public protector's power to control, he upholds and improves moral good actions for the citizenry and the State. As such, the office of public protector must be separate from party political influences. It is thus expedient that the independence of the public protector be guaranteed under section 177 (3) and (4) of the *Constitution of South Africa* and that he be appointed by a judicial commission rather than by the president [17].

The powers of the public protector are indeed an expansion of those of the erstwhile censor. The public protector not only upholds moral good actions (as did the censor and the ombudsman), but also acts ethically in that he can, in terms of section 29 of the *Interim Constitution*, investigate the misuse of natural resources, irrational elimination of non-renewable resources, destruction of the ecosystem and the neglect to protect the natural beauty and character of South Africa.

By virtue of the public protector's extensive powers, the *nota censoria* of the censor would have been declared unconstitutional under the new constitutional dispensation. The criminal implication of the *nota censoria* was sempiternal, and rehabilitation was not possible. On the basis of the prescriptions of the new constitution, the censor shall, instead of acting morally good, do

the opposite. At that time, the censor's conduct was not considered unheard off; it was considered normal. In a democratic constitutional dispensation, the penalty of a censor would be considered unsuitable and rather unconstitutional. It can be stated with conviction that the public protector followed in the censor's footsteps, but with changes that suit the time and circumstances. The two positions have in common the fact that they are both concerned with upholding or protecting moral good actions. They are examples for a moral guide for the conduct of the individual and society. The censors' influence is noticeable in the new Constitution, in respect of the promotion of a moral-ethical public administration towards the public at large by the State. The public administration's mandate is expressed in the democratic values of impartial service delivery and a representative administration. These values can also include human dignity, equality for all and the development of human rights. Section 7(1) of the *Constitution* (Charter of Rights) serves as cornerstone of these democratic values. For instance, in *National Coalition for Gay and Lesbian Equality v Minister of Justice*, the Constitutional Court declares: "[The] right to dignity is the cornerstone of our Constitution" [18]. Accordingly, the individual and the state are encouraged to act morally good by virtue of the demands of human dignity.

8. CONCLUSION

This study shows clear similarities in terms of the functions of both the censor and the public protector. When the censor's functions became obsolete in the course of history, the public protector continued the censor's functions, but with the essential expansions and changes. The public protector can thus be considered the follower of the censor, despite the expansions and changes. The extensions on the functions of the censor were necessary due to the demands of a new constitutional dispensation. Despite these expansions and changes, both the censor and the public protector endeavour to uphold and promote moral good actions in society.

The absence of the maintaining of moral good actions by the then censor would have had serious repercussions for the individual and society if it was the case. This would, among others, result in a corrupt citizenry that, in turn, would culminate in a corrupt government taking unlimited power for itself. According to Calvin, authorities may not misuse their powers [19]. Thomas Aquinas quotes from Exodus: "But select capable men from all the people – men who fear God, trustworthy men who hate dishonest gain – and appoint them as officials over thousands, hundreds, fifties and tens" [20]. According to Thomas Aquinas, the aim of human society is an honest life. By conducting an honest life, one can enjoy the glory of God. The powers and functions of the censor and the public protector must ensure that this ideal is being realised. Thomas Aquinas writes: "When the wicked reign, men are ruined […]" [20].

COMPETING INTERESTS

Author has declared that no competing interests exist.

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