2nd Edition

PARLIAMENT
OF THE REPUBLIC OF SOUTH AFRICA

International Comparative Study

INTERNATIONAL COMPARATIVE STUDY

THE MANDATE AND REPORTING AND ACCOUNTING OBLIGATIONS OF THE SOUTH AFRICAN HUMAN RIGHTS COMMISSION AND THE PUBLIC PROTECTOR

International Comparative Study

PARLIAMENT

OF THE REPUBLIC OF SOUTH AFRICA

Institutions Supporting Democracy

1. Auditor-General of South Africa
2. Commission for Gender Equality
3. Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities
4. Electoral Commission
5. Financial and Fiscal Commission
6. Independent Communications Authority of South Africa
7. National Youth Development Agency
8. Pan-South African Language Board
9. Public Protector
10. Public Service Commission
11. South African Human Rights Commission

Acknowledgments

Adv. Nonkosi Princess Cetywayo

I as the Head of the Office on Institutions Supporting Democracy, conducted an international comparative study on the Mandates; and Reporting and Accounting obligations of the Ombudsman as compared to the Public Protector and the South African Human Rights Commission. The Study was commissioned by the National Assembly Portfolio Committee on Justice and Constitutional Development. The Committee commissioned the study due to the fact that the two South African institutions report and account to it in terms of the Parliamentary processes put in place to fulfil the constitutional dictate as contained in Section 55 of the Constitution.

I wish to express our appreciation to the Committee for affording us this opportunity and entrusted us with this prestigious responsibility. It comes at a time when our Parliament is busy with a process of taking stock of what it did during the past 20 years, as the voice of the electorate in terms of policy making and overseeing the implementation thereof. The process is intended to also identify opportunities for further improvement. Our wish is that this piece of work also finds its way to this body of knowledge for purposes of continuous improvement in so far as complementary oversight is concerned

The exercise has been an experience of a life time in terms of appreciating deeper what the South African Constitutional Democracy is all about; we have learnt a lot in the processes. To the team that supported me all the way throughout the process I would like to say:

- Siph'Esihle Pezi you may be an Intern fresh from Varsity, your sharpness in terms of information gathering exceeds your experience
- Adv. Kayalethu Zweni you guided the team very well
- Ms Elmarie Lewis your support in terms of ensuring efficiency in terms of information gathering was invaluable
- Hlumisa Maxham (My Personal Assistant) you were by my side 24/7

Thank you to all of you.
Adv. Nonkosi Princess Cetywayo

table of contents

THE EXECUTIVE SUMMARY
THE INTERNATIONAL COMPARATIVE STUDY ON THE OMBUDSMEN

1 INTRODUCTION

In its meetings with the South African Human Rights Commission (SAHRC) and the Public Protector, respectively, the Portfolio Committee on Justice and Constitutional Development requested the Office on Institutions Supporting Democracy (OISD) to do an international study on the mandates, reporting and accounting methods of the Ombudsmen in comparison with these two Chapter 9 South African Constitutional Institutions.

1.1. Problem Statement

The Public Protector and the South African Human Rights Commission account and report to the National Assembly. The National Assembly oversees them. The oversight question is whether the current approach adopted by the two institutions to prioritising which cases to investigate is efficient, effective and cost effective given their financial constraints.

The accountability question is whether Parliament, when asking this question is allowed to go to an extent of citing specific cases the two institutions have, or are investigating. The Public Protector contests that, it is her sole discretion to decide which cases to or not to investigate and that such questions interfere with her constitutional independence.

2 OBJECTIVES OF THE STUDY

The study objective is to establish some common appreciation of the Constitutional intention of the National Assembly's oversight authority over the two institutions and their constitutional independence.

3 SAMPLING

Due to financial constraints and other resources the study adopted a sampling approach of gathering information. The following six countries were chosen:

- Kenya
- Ghana
- Netherlands
- Sweden
- Singapore
- United Kingdom

4 THE STUDY FINDINGS

The two institutions assert that they are Ombudsmen and that the oversight authority when calling them to account cannot cite specific cases the two institutions have investigated, or are investigating. They maintain that it is their sole discretion to decide what cases to investigate and that their position as stated in the introduction above maintains globally. The study has revealed that the positions of countries differ from country to country on what structures/ institutions they require to take up what responsibility; to assist the functionality of what type of a country and what to name such structures.

4.1. The Public Protector As The Ombudsmen

The study has revealed that, after its' considered deliberations on what to name the office of the Public Protector, the Constitutional Assembly adopted the name "Public Protect" as the most relevant for the envisaged South African democracy to the exclusion of the name "Ombudsman". Therefore the Legislator intentionally named this office "Public Protector" to the exclusion of any other name including Ombudsman, for South Africa as a unique democracy.

4.1.2. Powers Of The Public Protector

The Committee acknowledges that the Public Protector has wide powers of investigation. However, the Committee is concerned as to whether she is competent to make findings of unfair labour practice, a labour dispute issue, as she did in the case "There are no Heroes".

It is not readily clear from the information gathered about the countries studied as to whether the Ombudsman has powers to pronounce on "unfair labour practice". However the Ombudsmen in Kenya and UK do not have powers to investigate anything in respect of which the complainant has other legal remedy and right of appeal unless the Ombudsman believes the circumstances indicate otherwise in her or his opinion.

This requires the involvement of the Public Protector only after all other relevant remedies have been exhausted unless circumstances indicate otherwise. There is nothing in the case "There Are No Heroes" suggesting that the circumstances would have prevented the complainant from appealing against the two Labour Court decisions.

There seems to be an agreement between the Committee and the Public Protector that she cannot investigate court decisions in terms of S182 (3). The difference of opinion seems to be arising on whether her investigations on outstanding courts decisions and appeals, as she has conducted them, do not border on indirect review or even interference with judicial independence. Court decisions are reached by judicial officers, having been supported by staff governed in terms of the Public Service Act.

The researcher is of the view that this is a question of interpretation of the Public Protector and Judicial Service Commission Acts. The researcher's interpretation is that, any matter pending before the judiciary is a matter for the judiciary. Judicial matters are the responsibility of Judicial Service Commission in terms of the Judicial Service Commission Amendment Act of 2008.

The study has revealed that, with the exception of Sweden and Singapore, all the Ombudsmen do not have the powers to investigate the commencement of court proceedings or actions that are subject to the jurisdiction of the courts.

They do not have powers to investigate matters where the aggrieved **has or had** a right of appeal; or other legal remedy to be resorted to. The same applies where the matter has been referred to a judicial tribunal. This asserts the position that once a matter serves before the judicial officer, such a matter becomes a matter solely for the judiciary.

4.1.3. Accounting And Reporting Lines and Citation Of Specific Cases

As the body to which these institutions are accountable to and in pursuit of its constitutional oversight obligation, the Committee asked whether the Public Protector believes her current approach to prioritising which cases to investigate is efficient, effective and cost effective given her concern about the office's financial constraints.

The Committee made specific reference to her report entitled "There are no Heroes" on the Mamodupi v Department of Trade and Industry case in the context of section 6(3) of the Public Protector Act and possible forum shopping. This section empowers the Public Protector to **refuse** to investigate a complaint if the complainant has not exhausted all legal remedies at her or his disposal. The Committee also expressed a concern about delays in finalising investigations. A specific reference was made to two complaints one of the political parties had laid with her office.

A further question was asked as to whether she ever does referrals to other bodies. Reference was also made to her findings on reparations by the Truth and Reconciliation Commission. Even though the Public Protector acknowledges the Committee's oversight responsibility and authority she nevertheless feels

that citing specific cases she is investigating or has investigated amounts to interference with her constitutional independence. Even though she did not address the question of her "unfair labour practice" finding, she maintains that her investigations did not focus on the labour aspects. She maintains that it is her sole discretion to decide which cases to or not to investigate.

The Committee maintains that it is within its constitutional oversight competence to put questions of this nature to these institutions for purposes of ensuring oversight and accountability for the economic use of state resources. The Committee also feels that answers to these questions would enable the Committee in its endeavours to support the requests of the institutions for more resources, having been fully informed.

The researcher is of the view that the resolution to this dilemma lies in understanding that accountability is a matter of governance rather than a question of independence. Governance in simple terms should be understood as the entirety of processes that result in a systematic and structured manner in which any organisation is managed. This seems to be the distinction that the Constitutional Assembly made during its deliberations on the establishment and the independence of Chapter 9 "Chapter 7 at the time" Institutions as contained in its report adopted on 9 November 1995.

In terms of this report full consideration was given to the fact that these institutions are fully independent in their work but not in their structure. It therefore explains why the final section 181(4) of the final Constitution reads "No person or organ of the state may interfere with the functioning of these institutions". They are functionally but not structurally independent. Therefore it is in order for the Committee to ask as to whether when she exercises her sole discretion to decide which cases to or not to investigate; she also is informed by whether or not her decision enhances cost effectiveness. This is more so because the Minister of Finance has been consistent in his budget speeches that the country experiences very low revenue intake compared to the current country's expenditure.

It also needs to be kept in mind that independence is conferred by a country for that country's purpose. Therefore any institution bestowed with independence cannot be said to be independent of the country that gives it such independence. It is independent from being told or influenced by the country as to what outcome its investigation should give hence the provisions of section 181(2) that such institutions must be **impartial** and must exercise their powers and perform their functions without **fear, favour or prejudice.** The country is nothing but a collective term for people who live together, sharing more or less the same values, governed by the mutually agreed principles within the same borders.

In government the structure that represents the country is the body the members of which, in one way or the other, are elected by the citizens of such a country. In South Africa such a body is Parliament. Specifically section 42 of the Constitution specifically provides that the National Assembly is elected to represent the people and to ensure government by the people under this Constitution."

The study has revealed that accounting and reporting lines of Ombudsmen differ from one country to another. In Singapore the Ombudsman **accounts** and reports to the Prime Minister. In Kenya she or he is accountable to the President and Parliament while in Netherlands she or he is accountable to Parliament and Cabinet.

In the other three countries they account to Parliament. On the question of whether or not the structure(s) that oversee(s) the Ombudsman can cite specific cases when calling her or him to account the study has revealed that the principle of accountability applies.

The Swedish Parliament uses reports submitted by the Ombudsman to scrutinise her or his performance and activities of such an office. The reports of the Ombudsman in Kenya must, in terms of the law, include the office's financial statements and the description of its activities. In Ghana the reports must

include a summary of matters investigated. In Netherlands the Ombudsman goes and presents the annual report on activities of the office in person to the President of the House of Representatives.

The study supports the understanding of the Portfolio Committee on Justice and Constitutional Development and the Public Protector that it is the sole discretion of the Public Protector to decide which complaints, falling within her or his area of jurisdiction, to or not to investigate.

4.1.4. Opening Of Public Protector's Reports To The Public

Section 8(1) of the Act requires the Public Protector to bring her or his views, findings or recommendations to the attention of any **person** subject to the Public Protector making them available to the complainant and any person implicated. The essence of this requirement is the Administrative Law principle of "audi alteram partem", listening to both parties to the investigation before making a final decision.

Section 182(5) of the Constitution provides that any report issued by the Public Protector **must** be open to the public unless exceptional circumstances require that a report be kept confidential. The section requires such circumstances to be determined by national legislation. Section 8 (2A) (a) of the Public Protector Act as a result provides that any report issued by the Public Protector **shall** be open to the public unless exceptional circumstances require that a report be kept confidential. The two sections do not specify how the opening of the report to the public should be done. They only require that the report must first be issued. Sections 182 (1) (b) and (c) of the Constitution require her or him to report on the conduct she or he has investigated.

Section 181(5) says she or he must report to the National Assembly on the activities of his or her office and performance of her or his functions. She or

he reports to the National Assembly by issuing written reports to the National Assembly. Activities should be interpreted to include investigations on conducts as envisaged in section 182(1) (b) and (c). Therefore a report on her or his activities and performance of her or his functions must be issued to the National Assembly. It is logical therefore that, only after a report has been issued to the National Assembly, some authority must then make sure that it is open and accessible to the public. The Constitution is also silent on who should take this responsibility.

4.2. South African Human Right's Commission As Ombudsman

The current South African Human Rights Commission expressed that as the Ombudsman it is empowered to protect citizens from the inappropriate use of state powers by the organs of the state. The research could not reveal any reference to the discussions on the naming of this institution during the deliberations of all the structures of the Constitutional Assembly.

It appears as though from the word go there was no intention to understand this Commission as the Ombudsman. This could be attributed to the mandate of this institution as contained in the legislation of various countries including South Africa.

Contrary to what the Commission says, the study locates the mandate of the Human Rights Commissions solely as related to human rights; and not protection of citizens against inappropriate use of state powers by the organs of the state. The mandate of the Ombudsmen on the other hand revolves around good governance and maladministration in the public service. These are the institutions that could be interpreted to have the mandate of protecting the citizens against the inappropriate use of state powers by the organs of the state.

4.2.1. Powers And Functions Of The SAHRC: Excessive Use Of Force Finding

The Committee expressed a concern about the involvement of the Commission in the Tatane case and its finding of "excessive use of force" by Police. The Committee felt that such a finding was criminal in nature and falls within the criminal court jurisdiction. The Commission maintained that it had not overstepped any of its powers by virtue of its finding. It highlighted that the finding was a recommendation and not a final finding.

The study has revealed that both in Kenya and Ghana the Human Rights Commissions are not mandated to investigate any matter pending before any court or judicial tribunal. By interpretation therefore the Human Rights Commissions in the two countries cannot make a finding of "excessive use of force" irrespective of whether or not its findings are meant to be recommendations. In Kenya the Human Rights Act expressly provides that the Commission is not competent to investigate a criminal offence. The UK Commission has powers to investigate whether or not a person has committed an unlawful act.

5 CONCLUSION

The apparent difference of opinion between Public Protector and the South African Human Rights Commission; and the Port Folio Committee for Justice and Constitutional Development in terms of interpretation of the applicable constitutional and legislative provisions is noted. Reference to other countries in this regard by the Public Protector in particular is also appreciated.

However the bottom line is that the Public Protector is one of the institutions that were created by the South Africans for the benefit of the South Africans. Like many organs of the state it emerged within the context of a strong desire by the South Africans for a system of government that is people oriented

with great respect for human rights. This is the debate that preoccupied the deliberations of the constitution making process in South Africa about these very important institutions including their names. This process deliberately chose the names "Public Protector" and "South African Human Rights Commission" to be reflective of their mandates within this context.

It is for this reason that it is advisable that comparison with any other country needs to be approached with the greatest circumspection. What needs to be guarded against is a situation where apples are compared with pears. They are both sweet but surely contain different nutrients. Reference to Ombudsman when referring to these institutions has got to be made sparingly therefore, bearing in mind that they are created to support the South African democracy. South African democracy is unique to South Africa due to a unique political history.

South Africa stands for judicial independence as against Executive minded Judges. What should preoccupy every South African's mind is the fact that South Africa is a Constitutional State. Nothing and no one is above the Constitution. Our constitution is clear and deliberate in naming these institutions.

It is within this same context that the Constitution provides for both the independence of the Public Protector and Human Rights Commission; and the oversight duty of the National Assembly. The Constitution grants these institutions the independence to perform their functions without fear, favour (preference) or prejudice (bias). The study has revealed that such independence is confined to their functionality as against their structure. It is not surprising therefore, that the very same Constitution places the accounting and reporting duty on these institutions on one hand and oversight duty over these institutions on the National Assembly on the other.

When you oversee you are allowed to ask probing questions of why, when and why not for as long as the intention is to enhance accountability and not to influence the outcome of the performance of a function to favour a particular party.

Perhaps it should be understood as a fine comb approach with no intention to dictate which party the outcome of an activity should favour, thereby interfering with functional independence. It needs to be understood within the context of the country, constantly grappling with approaches to ensure cost containment measures and balancing them with uncompromised constitutional independence.

6 RECOMMENDATIONS

The Researcher is of the view that the above difference of interpretation in terms of the applicable legislation including the Constitution is serious. It is for this reason that it is recommended that the National Assembly and or the relevant Portfolio Committees consider(s) reviewing the applicable legislation and conducting international study visits.

6.1 A Consideration On The Review Of Applicable Legislation

Given this difference of interpretation of applicable legislation it might be that time has come for the review and amendment of these pieces of legislation for greater clarity and more common understanding. The review might consider once again whether the independence of these institutions should be interpreted to mean structural or professional independence or even both. This is said with the appreciation that no institution in any country including Parliament and the other constitutional institutions could be perceived as independent from the country it was created by.

6.2 International Study Visits

The findings that are given under this piece of work are mainly a product of a desktop study. Therefore they are more the product of interpretation of available written work with minimal personal interaction with the representatives of the studied countries. It is therefore recommended that for purposes of a deeper insight and practical experience the National Assembly represented by the Committees that oversee the Institutions Supporting Democracy consider going on study visits of the studied countries. Such visits have a potential of presenting themselves also as an opportunity to learn from best practices. The Committees could consider joint trips with the participation of these institutions.

1 INTRODUCTION

In its meetings of 30 April and 2 May 2013 with the South African Human Rights Commission (SAHRC) and the Public Protector, respectively, the Portfolio Committee on Justice and Constitutional Development requested the Office on Institutions Supporting Democracy (OISD) to do an international study on the mandates, reporting and accounting methods of the Ombudsmen in comparison with these two Chapter 9 South African Constitutional Institutions.

1.1 Problem Statement

The Public Protector and the South African Human Rights Commission account and report to the National Assembly. The question at stake is whether the current approach adopted by the two institutions to prioritising which cases to investigate is efficient, effective and cost effective given their financial constraints. The further question is whether Parliament, when asking this question is allowed to go to an extent of citing specific cases the two institutions have investigated or are investigating. The Public Protector responds that it is her sole discretion to decide which cases to or not to investigate.

The essence of this dilemma is the respect for constitutional line that exists between the constitutional independence of the constitutional institutions to make decisions and the constitutional oversight authority of the National Assembly to call these institutions to account for consequences of such decisions. The Public Protector asserts that her position as stated above maintains globally in countries like Singapore. The Committee requested that research be done in this regard on countries that are similar to South Africa. As a necessary consequence the study focuses on the following questions:

- Are the Ombudsmen in other countries Constitutional creations?
- If the answer is to the affirmative are they independent in terms of such Constitutions?
- Do they account to Parliament?

- Are the said Parliaments Bi-cameral or otherwise?
- If they are Bi-cameral do the Ombudsmen account to a specific house?
- Do they account to such a house in terms of the Constitution?
- Do such Constitutions specify how they should do so?
- Do they get overseen by such houses?
- Is the oversight authority of such houses provided for in the Constitution?

2 OBJECTIVES OF THE STUDY

The Committee would like the study done to assist towards the creation of some common appreciation of the extent of the National Assembly's oversight authority over the Public Protector and the South African Human Rights Commission given their constitutional independence within the context of the South African constitutional democracy and the global village for quality parliamentary oversight over the ISDs and other state organs. The Committee believes quality oversight will enhance its support to the institutions in their requests for more resources in pursuit of their effectiveness and accountability for consequences of decisions taken in so far as they relate to employment of state resources.

3 SAMPLING

Due to the fact that there are a lot of countries that are similar to South Africa, the study has adopted a sampling approach of gathering information. Scarcity of resources, like time and money, necessary for census approach also motivated in favour of this approach. The sample has been chosen using the following criteria:

- The nature of the state (Constitutional, Presidential or Parliamentary)
- Ensuring representation of under-developed, developing and developed states
- Some continental representation: Africa, Asia, Europe

The following countries as a result were chosen to constitute the sample:

- Kenya
- Singapore
- Ghana
- Netherlands
- Sweden
- United Kingdom

4 OMBUDSMEN IN OTHER COUNTRIES

It is the view of the current Public Protector and the South African Human Rights Commission that Parliament through its Committees, in particular the Portfolio Committee on Justice and Constitutional Development, should not question their decisions as to which cases they prioritise to investigate. In particular the Public Protector asserts that it is her sole discretion to decide which cases to investigate or not. From this statement it is implied that she feels such questions impinge on her constitutional independence. The Committee on the other hand firmly believes that it is their constitutional oversight duty to put questions of this nature for purposes of ensuring accountability for economic use of state resources. The two institutions assert that they are Ombudsmen and that their position as stated above maintains globally.

4.1 The Ombudsman In Sweden

Sweden is a Constitutional Monarchy with a Parliamentary form of government. In this system the monarch could either have strictly ceremonial duties or reserved powers, depending on individual country's Constitution. The Swedish King, as the Monarchy acts as the Head of State within the guidelines of the Constitution. He has ceremonial duties only. Parliament is made up of members directly elected by proportional representation for a term of four years. The Swedish Constitution is set out in the following four different fundamental laws unlike the single codified South Africa's:

- The 1810 Act of Succession *(Swedish: Successionsordningen)*
- The 1949 Freedom of the Press Act *(Swedish: Tryckfrihetsförordningen)*
- The 1974 Instrument of Government (*Swedish: Regeringsformen)*
- The 1991 Fundamental Law on Freedom of Expression *(Swedish: Yttrandefrihetsgrundlagen)*

They are referred to as fundamental laws because every other law passed must be consistent with them. The Instrument of Government is the most important of these laws because it outlines the basic principles for fundamental rights. The Swedish Ombudsmen called Parliamentary Ombudsmen are created in terms of this fundamental law. For purposes of this study this fundamental law will be referred to as the Swedish Constitution.

4.1.1. The Creation and Appointment of the Swedish Ombudsman

There are four Ombudsmen in Sweden called Parliamentary Ombudsmen. They are created in terms of the Swedish Constitution. Chapter 13 Article 6 of the Constitution provides that the Riksdag shall elect one or more Ombudsmen. As a result Chapter 8 Article 11 of the Riksdag Act provides for the election of the Chief Parliamentary Ombudsman, the other Parliamentary Ombudsmen and the

Deputy Parliamentary Ombudsmen. In terms of this Act the Committee on the Constitution prepares the election of the Ombudsmen. Persons considered for this position in terms the Act must qualify to be the Justices of the Supreme Court. As a result they are usually elected from the members of the Judiciary.

4.1.2. Powers and Functions of Swedish Ombudsmen

Swedish Ombudsmen are agents acting under Parliament according to the websites of the Swedish Parliament and Ombudsman. They form part of parliamentary control. Parliamentary control is the authority of Parliament to monitor and review the public administration. In terms of South African terminology it is Parliament's oversight authority. They therefore assist Parliament to oversee implementation of laws and other regulations in the public sector. In South Africa this would be referred to as complementary oversight function.

The authority of the Swedish Ombudsmen is not provided for in the Constitution but in terms of their Constitution. Chapter 13 Article 6 of the Constitution requires Parliament to prescribe rules for the authority of the Ombudsman. The Riksdag Act and the Act with Instructions, as a result, provide that the Ombudsmen have the responsibility to supervise the application of laws and other statutes in public activities. They have the responsibility to supervise that public authorities, including courts and commissioned army officers with the rank of second lieutenant and above, comply with the laws and fulfil their obligations. They must ensure that these public authorities observe the principles of impartiality and objectivity as is required by the Constitution. They must guard against the infringement of the basic freedoms and rights of the citizens. The Act with Instructions empowers the Ombudsmen, in consultation with the Chief Ombudsman, to investigate on their own initiative and in response to public complaints.

The outcomes of their investigations are not legally binding. The investigated authority does not have to comply with such outcomes. They are merely

recommendations. The Act empowers them to conduct regular inspection visits of public authorities and courts reviewing files and relevant documents. They can issue guiding statements to promote uniform and appropriate application of law. They have powers to prosecute any criminal violation of the law and are viewed as Extra-ordinary Prosecutors.

4.1.3. Limitations: Powers Of Swedish Ombudsman

There are limitations in terms of the jurisdictional authority of the Swedish Ombudsmen. In terms of the Act with Instructions for the Ombudsmen, the powers and authority of the Ombudsmen do not extend to the following institutions:

- Members of Parliament, its structures and the Clerk of the House
- The Government or Ministers except prosecuting them on behalf of the Parliament and its Committees Assembly when the Committee decide to initiate legal proceedings.
- The Chancellor of Justice (Government Ombudsman)
- Members of policy-making municipal bodies

Their authority to prosecute does not extend to violations of the Freedom of Press and the right to freedom of expression.

4.1.4. Reporting and Accounting: Swedish Ombudsmen

The Office of the Ombudsman, in terms of their Constitution, is constituted by politically independent officials, who are completely independent in their decisions and activities. Each Ombudsman has a direct individual responsibility to Parliament for his/her actions. The Chief Ombudsman cannot 'intervene' in another Ombudsman's inquiry or adjudicate in any case within another ombudsman's supervision. In terms of the Act with Instructions they must

report on their performance in writing annually to Parliament. Their reports can include matters affecting the competence, organisation, personnel or working procedures of the body under investigation and any issue that has arisen in their supervisory activities.

Their report must also contain a survey of their activities in other respects. The reports are processed by the Constitutional Committee. The Committee uses such reports to scruitinise performance and activities of the Ombudsmen and report to the House.

4.2 The Ombudsman in Kenya

Kenya is a presidential representative democracy according to the response given by the High Commissioner of Kenya to our questionnaire. The President is both the Head of State and the Head of Government according to Section 131(1) (a) of the Constitution of Kenya. They have a bicameral Parliamentary system consisting of the National Assembly and the Senate.

4.2.1. The Creation And Appointment Of The Kenyan Ombudsman

The Kenyan Ombudsman is called the Commission on Administrative Justice. It is created in terms of the Constitution. The Constitution empowers Parliament to pass legislation restructuring the Kenya National Human Rights and Equality Commission created by the Constitution into two or more separate commissions. The Commission on Administrative Justice Act as a result, restructures the old Commission into the Office of the Commission on Administrative Justice (Ombudsman). The Office of the Ombudsman is the most important Commission.

4.2.2. Powers And Functions Of The Kenyan Ombudsman

The function of the Ombudsman is to ensure that public authorities respect the sovereignty of the people of Kenya in terms of Kenyan Constitution. In terms of Article 59(5) (b) of the Constitution the Ombudsman has the powers equivalent to the Human Rights and Equality Commission as provided for in the Constitution. This Commission has constitutional proactive and reactive investigative powers. It has any powers necessary for conciliation, mediation and negotiation. It is empowered to perform any other function and exercise any powers prescribed by legislation in terms of the Constitution. The Commission on Administrative Justice Act as a result provides that it must inquire into allegations of maladministration, inefficiencies or ineptitude within the public service.

The office can recommend compensation or other appropriate remedies against persons or bodies to which this Act applies. The Act further empowers the office to investigate any conduct, abuse of power or omission in the public administration or by any state organ that is alleged or suspected to be improper or prejudicial. The office can issue summons to discharge its mandate. It also has the powers to obtain, by any means lawful, any information it considers relevant, including reports and any information from any person, including governmental authorities. The Act also empowers the office to seek a court order to enter any premises for any purpose material to the fulfilment of its mandate.

4.2.3. Limitations: Powers of Ombudsman in Kenya

In terms of section 30 of the Commission on Administrative Justice Act the Ombudsman does not have the powers to investigate a matter pending before any court or judicial tribunal; the commencement or conduct of criminal or civil

proceedings before a court or other body carrying out judicial functions. The Ombudsman does not have the power to investigate anything in respect of which there is a right of appeal or other legal remedy unless, in the opinion of the Ombudsman, it is not reasonable to expect that right of appeal or other legal remedy to be resorted to. He or she cannot investigate any matter that is still a subject of investigation by any other person or Commission established under the Constitution or any other written law.

4.2.4. Reporting And Accounting Lines For The Kenyan Ombudsman

The Office of the Kenyan Ombudsman is independent in terms of Article 249 of the Constitution. It is not subject to the direction or control of any authority in terms of Constitution. She or he is subject only to the Constitution and the law. She or he is accountable to the President and Parliament. The Constitution requires her or him to submit a written report annually to the President and Parliament. Such a report in terms of the Commission of Administrative Justice Act should include the office's financial statements and a description of its activities. It must also include recommendations on specific actions to be taken in furtherance of the findings of the Commission. The Act requires that all the Ombudsman's reports be published and publicised. The President, the National Assembly or the Senate may at any time require the Ombudsman to submit a report on a particular issue in terms of the Act.

The Act also requires her or him to report bi-annual to the National Assembly on complaints investigated and remedial action taken and publish periodic reports on the country's status of administrative justice.

4.3 The Ombudsman In Ghana

The Republic of Ghana has a Unitary System of Government headed by an Executive President. The Executive President is the Head of State and the Head

of Government according to their Constitution. She or he is also the Commander-in-Chief of the Armed Forces. Ghana has a unicameral system of Parliament.

4.3.1. The Creation And Appointment Of The Ombudsman In Ghana

Ghana does not have a typical Ombudsman. It has an institution that combines what is known as the Ombudsman, a human rights body and anti-corruption agency according to the website of this Commission. This institution is called Commission of Human Rights and Administrative Justice. It is created in terms of Article 218 of the Constitution. It is a three persons' office made up of the Commissioner and the two Deputy Commissioners appointed by the President in terms of the Commission on Human Rights and Administrative Justice Act of 1993.

4.3.2. Powers And Functions Of The Ombudsman In Ghana

Articles 218(a) and (b) of the Constitution provide that, the mandate of this institution is to protect and promote administrative justice for an accountable, transparent government. The Constitution empowers the office to investigate complaints concerning injustice and unfair treatment of any person by a public authority. It has powers to issue subpoenas. It can initiate legal proceedings and seek any suitable remedy.

4.3.3. Limitations: Powers of The Ombudsman in Ghana

The office does not have the powers to investigate a matter which is pending before a court or judicial tribunal. It does not have authority to investigate any matter involving the relations or dealings between the Government and any other Government or an international organisation in terms of Article 219 (2) of the Constitution.

Article 225 of the Constitution and Section 6 of the Commission of Human Rights Act appear to be providing for the professional independence of the Commission and the Commissioners. These provisions provide that except as provided for by the Constitution or by any other law consistent with the Constitution, the Commission and the Commissioners shall, in the performance of their functions not be subject to the direction or control of any person or authority. Put differently these provisions say the Commission and the Commissioners do not perform their functions under the direction or control of any person except where the law allows this to happen.

4.3.4. Reporting And Accounting Lines For Ombudsman In Ghana

In terms of Section 19 of the Commission of Human Rights Act the Commissioner is expected to submit an annual report to Parliament. The report must include a summary of investigated matters and the action taken by the Commission to remedy the situation. The Act gives discretionary authority to Parliament to debate the report of the Commission and to pass such a resolution as it considers fit.

The Act also says the Commissioner may, in the interest of public, any person, department or any other authority, publish reports generally relating to the exercise of its functions. It may also publish reports relating to cases it has investigated whether or not such cases had been reported on to Parliament.

4.4 The Ombudsman In Singapore

Singapore has a parliamentary system of Government. In this system there is no clear cut separation of powers between legislature and the executive. Its system is based on the Westminster Model. The Prime Minister in terms of the Prime Minister's Government website is the Head of the Executive and is appointed by the President. The Constitution is the supreme law of the country. Singapore has a unicameral system of parliament.

4.4.1. The Creation And Appointment Of The Singaporean Ombudsman

Singapore has a Corrupt Practices Investigation Bureau (CPIB). The CPIB is enabled by the Prevention of Corruption Act of 1960. The office is headed by the Director appointed by the President in terms of the Act. The Director is assisted by the Deputy Director, Assistant Directors, Investigators and staff also appointed the President in terms of the Act.

4.4.2. Powers And Functions Of The Singaporean Ombudsman

The CPIB was established by the British colonial government in 1952 with the aim of preventing corruption. It has a responsibility of safeguarding the integrity of the public service. It has a responsibility to investigate allegations of corruption and mal-practices in the Public Service. It has powers to investigate offences under the Penal Code including proactive or reactive arrest, search and seizure without warrant if the officer has reasonable grounds to believe that any delay in obtaining the warrant is likely to frustrate the purpose of the search in terms of the Prevention of Corruption Act.

4.4.3. Limitations: Powers Of The Singaporean Ombudsman

In terms of their Constitution the Prime Minister can deny the Ombudsman the authority to investigate. However the Constitution gives the President the final say in this regard.

4.4.4. Reporting And Accounting Lines Of The Singaporean Ombudsman

The independence of CPIB is not guaranteed in the Constitution. This office is under the charge of the Prime Minister's Office and the Director reports directly to the Prime minister.

4.5 The Ombudsman In The United Kingdom

The United Kingdom is a constitutional monarchy with a parliamentary system. The Monarch is technically vested with sweeping executive powers, known as the royal prerogative in terms of the Constitution. The Monarch exercises her powers after being advised by the Prime Minister or other Ministers according to the Standard Note On The Royal Prerogative Powers issued by Parliament. The United Kingdom does not have a single constitutional document. Her Constitution is a set of laws and principles in terms of which the She is governed. It is sometimes referred to as an uncodified or unwritten Constitution. Some of its elements come live in written sources including statutes, court judgements and international treaties according to the response of the British High Commissioner to our questionnaire.

Legislative authority vests in Parliament. Parliament is bicameral system and consists of the House of Commons and the House of Lords. Members of the House of Commons are directly elected while Members of the House of Lords are mostly appointed and include experts in many fields.

4.5.1. The Creation And Appointment Of The United Kingdom Ombudsman

The Ombudsman in UK is called the Parliamentary and Health Service Ombudsman. It is an office that combines two statutory roles of Parliamentary Commissioner for Administration (the Parliamentary Ombudsman) and

Health Service Commissioner (Health Service Ombudsman). The Ombudsman is appointed by the Crown on the recommendation of the Prime Minister in terms of Section 1 of the Parliamentary Commissioner Act and Schedule 1 of the Health Services Commissioners Act.

4.5.2. Powers And Functions: The Ombudsman In United Kingdom

In terms of the Parliamentary Commissioner Act of 1967 the Ombudsman has a mandate to investigate people's allegations of unfair treatment, maladministration, improper conduct or poor service by government departments and public authorities. Her or his powers and functions are provided for in the Parliamentary Commissioner Act of 1967 and the Health Service Commissioners Act of 1993. She or he is empowered to require from any person any information or document relevant to the investigation. She or he also has subpoena powers and administration of oaths or affirmations. In terms of the Parliamentary Ombudsman website, the Ombudsman has final decision making authority on these matters. Her or his decisions can only be challenged in the courts by way of Judicial Review, according to the British High Commissioner to South African.

4.5.3. Limitations: Powers of The United Kingdom Ombudsman

The Ombudsman in UK can investigate only subject to an MP filter system in terms of section 5(1) of the Parliamentary Commission Act. This section provides that she or he can investigate only upon a referral of a complaint to her or him by a Member of Parliament. In terms of section 4(1) of the Parliamentary Commission Act she or he cannot investigate courts, Members of Parliament, Police and Political parties.

She or he does not have powers to investigate a matter where the aggrieved has or had a right of appeal; the matter has been referred to a tribunal in terms of both the Parliamentary Commission Act and the Health Service Commission Act. She or he has no jurisdiction over a matter where the complainant has a remedy by way of legal proceedings in any court of law in terms of the two Acts. She or he can do so only if it is not reasonable to expect the aggrieved to use such other legal remedies.

4.5.4. Reporting and Accounting Lines for the United Kingdom Ombudsman

According to the High Commissioner's response to our questionnaire, the Ombudsman is accountable to Parliament through the Public Administration Select Committee. This is a Committee of the House of Commons. The Parliamentary Commissioner Act and the Health Services Commissioners Act require the Ombudsman to submit annual reports on the performance of her or his functions to each House of Parliament. The two Acts also require the Ombudsman to submit other reports relating to her or his work to each House of Parliament when she or he thinks it necessary to do so. The British High Commissioner in his response to our questionnaire maintains that the Ombudsman is independent in the way she or he makes decisions on her or his casework. The High Commissioner is supported in this regard by the website on the Ombudsman

4.6 The Ombudsman In the Netherlands

The Netherlands is a hereditary constitutional monarchy. It has a parliamentary form of government based on principles of ministerial responsibility. The Government is subject to parliamentary scrutiny.

In terms of Article 42.1 of the Constitution Government consists of the King and the Cabinet of Ministers. The King is the Head of State. It has a bicameral system of Parliament made up of the Senate and the House of Representatives.

4.6.1. The Creation And Appointment Of The Ombudsman: Netherlands

The Ombudsman in Netherlands is a High Council of State. The Ombudsman and her or his deputy are appointed by the House of Representatives in terms of the National Ombudsman Act.

4.6.2. Powers And Functions Of The Ombudsman In The Netherlands

The mandate of this institution is to promote good governance within public administration. The National Ombudsman Act of 1981 provides that the primary function of the institution is to defend citizens' interests and to keep a critical eye on government operations. It is said to be an independent and impartial intermediary between citizens and the public administration in terms of the National Ombudsman Website.

In terms of the Constitution, the General Administrative Law Act and the National Ombudsman Act, the office has powers to proactively and reactively investigate the actions of state bodies or other public entities. It is empowered to conduct on-site investigations, summon any person or authority and make recommendations to government on its findings.

4.6.3. Limitations: Powers Of The Ombudsman In The Netherlands

In terms of section 16 of the National Ombudsman Act, the Ombudsman may not investigate a case where there is a possibility of a judicial review procedure under administrative law and a conduct subject to the supervision of judiciary.

The Act also states that she or he has no jurisdiction over cases that are sub-judice. She or he is neither competent to investigate a complaint that is before another independent complaints body nor authorised to investigate matters of policy.

4.6.4. Reporting And Accounting Lines: The Ombudsman In The Netherlands

The Constitution prescribes that an Act of Parliament must provide for powers, accountability and related measures for the Ombudsman. Consequently the National Ombudsman Act requires the Ombudsman to submit annual reports to both Houses of Parliament and the Cabinet on her or his activities. According to an official publication called The Institution, Task and Procedure of National Ombudsman the Ombudsman goes in person to present his annual report to the President of the House of Representatives.

The report is then discussed by a Committee of the House of Representatives called the Standing Committee on the Interior and Kingdom Relations and other Committees in preparation for a plenary debate by the House of Representatives. The Standing Committee is responsible for governance matters concerning the National Ombudsman, such as legislation, budgetary issues, appointments and the annual report. The Act also requires the Ombudsman to report to both Houses on her or his findings and decisions immediately after closing an investigation if in her or his opinion it is necessary to do so or whenever one of the Houses requests such information. The Act requires the Ombudsman's reports to be made public.

The National Ombudsman also prepares a quarterly review report on responses given to her or his recommendations by public authorities. She or submits such a report to the Chairman of the Committee of the House of Representatives on Petitions for purposes of monitoring the impact of her or his work. If it is necessary the Committee discusses it with the Ministers or state secretaries concerned.

5 THE PUBLIC PROTECTOR AND SOUTH AFRICAN HUMAN RIGHTS COMMISSION

The Public Protector and the South African Human Rights Commission (SAHRC) are creatures of the Constitution. They both have a constitutional mandate to strengthen constitutional democracy in South Africa. The powers and functions of the two institutions are provided for in the Constitution.

They are further elucidated in the respective enabling legislation. This therefore requires that the provisions of the relevant enabling pieces of legislation in this regard to be read together with the Constitution.

Reading together of the relevant legislation and the Constitution is a subject of interpretation. Interpretation of statutes is about establishing the intention of the Legislator. Parliament is the Legislator. The approach for the current study therefore is to attempt to answer a question as to what the intention of Parliament was when creating, empowering and declaring the two institutions independent in the context of accountability; and parliamentary oversight responsibility and authority.

The interpreters of legislation are often accused of thinking that they must tell the Legislator what the intention of the Legislator was as against enquiring as to what it was. In an attempt to avoid this and remain objective in establishing what the intention of Parliament was, the researcher studied the deliberations of the Constitutional Assembly during the Constitution making process. The study has revealed that the two institutions were subject matters of Theme Committee six, specifically Sub-theme Committee 6.3 of the Constitutional Assembly.

5.1 The Public Protector As Ombudsman

The current Public Protector maintains that **as the Ombudsman**, she does not approve of certain approaches adopted by the Portfolio Committee when calling her to account. The research has revealed that during the deliberations of the Sub-theme Committee on the Public Protector there were divergent views on what name to call this institution initially.

The names that the committee entertained at great length were the "Public Protector" and the "Ombudsman". According to the report of the Sub-theme Committee 25 May 1995 the majority of the political parties represented preferred Public Protector as it already was used in terms of the Interim Constitution. The further motivation advanced was that **protecting the public** gets closer to what the office was created for while the ombudsman had sexist connotations within the context of gender equality mindful South Africa.

The minority of the parties argued that the term "Ombudsman" is a Swedish name for Officer or Commissioner with **no sexist meaning.** They further argued that the Public Protector was not meant to protect but to act as an impartial mediator.

It is clear that this debate considered the name of the institution within the context of the envisaged South Africa as a gender equality and public oriented democracy. It is a debate that had to be informed by **the functions and powers of this institution, therefore its mandate for such a democracy.**

The final position in this regard was taken by the Constitutional Committee representing all political parties as adopted by the Constitutional Assembly on 19 November 1995. The Constitutional Committee decided that this office will remain the "Public Protector". This therefore should be interpreted that the Legislator deliberately named this office "Public Protector" to the exclusion of any other name including Ombudsman in South Africa as a unique democracy.

5.1.2 Powers And Functions Of The Public Protector

Section 182 (1) (a) of the Constitution provides that the Public Protector has powers to investigate any conduct in state affairs, or in the Public Administration in any sphere of government, that is alleged or suspected to be improper or to result in impropriety or prejudice. Sections 182 (1) (b) and (c) require her or him to report on that conduct and take appropriate remedial action. Section 182(1) requires such powers to be regulated by the national legislation. Section 182(2) provides that she or he has additional powers and functions prescribed by the national legislation.

Section 6(4)(a) of the Public Protector Act, as a result, provides that this institution is competent to, among others, proactively or on receipt of a complaint investigate any alleged maladministration within government affairs. The section further empowers her to investigate any alleged abuse or unjustifiable exercise of power or unfair conduct, improper conduct or undue delay by a person performing public function. Section 6(4)(b) states that the Public Protector is competent to try, in his or her sole discretion and resolve any dispute or rectify any act or omission by mediation, conciliation or negotiation and advise the complainant about the appropriate remedy.

Section 6 (4) (c) provides that she is competent to bring a matter to the notice of prosecuting authority or refer any matter which has a bearing on the investigation to the appropriate public body or make any other appropriate recommendation prior to, during or after the investigation. Section 6 (5) empowers her to proactively investigate or on receipt of a complaint any alleged maladministration in any institution in which the State is the majority or controlling shareholder or any public entity as defined in section 1 of the Public Finance Management Act 1999.

5.1.2(a) Committee Concerns And The Public Protector's Response

The Committee acknowledges that the Public Protector has wide powers of investigation. However, the Committee is concerned as to whether she is competent to make findings of unfair labour practise as she did in the case "There are no Heroes". The Committee felt that this is effectively a labour dispute issue. The committee expressed doubts as to whether the Public Protector was the correct body to investigate such matters.

The complainant in this case had lost twice before the Labour Court according to the Committee. Even though she did not give a direct answer to the question of her "unfair labour practise" finding, the Public Protector responded that her investigation did not focus on the labour aspect of the matter.

The researcher appreciates the powers to investigate any alleged abuse or unjustifiable exercise of power or unfair conduct and to resolve any dispute or rectify any act or omission by mediation, conciliation or negotiation given to the Public Protector by section 6(4)(a) and 6(4)(b) of the Act respectively. However the essence of the Committee concern is the duplication of efforts and possible perception of interference with the jurisdiction of the labour dispute resolution mechanisms deliberately provided for in the labour legislative framework. It is within this framework that the findings of unfair labour practise are provided for.

In this context therefore it cannot be concluded that the Legislator in providing Public Protector with investigative powers of "unjustifiable exercise of power or unfair conduct" intended such powers to include investigation of "unfair labour practise".

5.1.2(b) The Study Findings

It is not readily clear from the information gathered about the countries studied as to whether the Ombudsman has powers to pronounce on "unfair labour practice". However as indicated above the Ombudsman in Kenya cannot

investigate anything in respect of which the complainant has other legal remedy unless the Ombudsman does not believe that the circumstances are such that the complainant would not be able to do so. The Ombudsman is required to be involved only after all other legal remedies have been exhausted unless circumstances are not making it easy to access such remedies.

Nothing in the case "There Are No Heroes" suggests that the circumstances would have prevented the complainant from appealing against the decisions of the Labour Court. The same applies in UK. She or he does not have powers to investigate a matter where the aggrieved has or had a right of appeal unless in the opinion of the Ombudsman the circumstances indicate otherwise. In the case in question the complainant apparently lost twice at labour court and had a right of appeal to the Labour Appeal Court as another remedy at her disposal.

5.1.3 Limitations: Powers of The Public Protector

Section 182(3) of the Constitution provides that the Public Protector may not investigate court decisions. Section 6(6) of the Public Protector Act reiterates this provision and states that the jurisdiction of the Public Protector does not include the performance of judicial functions by any court of law.

5.1.3(a) The Committee Concerns and The Public Protector's Response

The Public Protector reported to the Committee that a number of complaints she dealt with relating to the Department of Justice and Constitutional Development, were in respect of outstanding judgements and appeals. The Committee was not impressed with this and asserted that this area is clearly judicial in nature. The Committee referred her to section 182(3). In her response the Public Protector maintains that she looked at the issue of undue delays and outstanding appeals only in so far as they relate to matters of administrative processes.

There seems to be an agreement between the Committee and the Public Protector on this limitation in terms of interpretation. The difference of opinion seems to be arising on whether her investigations as she has done do not border on indirect review or even interference with judicial independence. This is more so because the judiciary in performing its functions is supported by administration staff. This staff forms part of the public service because they are governed in terms of the Public Service Act. The Public Protector has investigative jurisdiction over public servants.

The researcher is of the view that this is a question of interpretation, be it a literal or a purposive interpretation of this provision. The researcher's interpretation is that, any matter pending before the judiciary is a matter for the judiciary. That the judicial officer is authorised to make use of the services of a person who is not a judicial officer does not take away judicial authority pertaining to such a matter. Equally the independence that goes with it needs to be respected at all times by all. Outstanding judgements and appeals are certainly a judicial matter. Judicial matters are provided for in the Judicial Service Commission Amendment Act of 2008. In terms of the Act efficiency or effectiveness of the courts should be dealt with by the Judicial Service Commission.

This amendment to the Judicial Service Commission Act can only be interpreted to also enhance the interpretation that the legislator's intention is to leave functions pertaining to processes involving the judiciary to the sole competence of the judiciary.

5.1.3(b) The Study Findings

The study has revealed that, with the exception of Singapore, in all the countries considered, the Ombudsmen are independent institutions. In Singapore the Ombudsman's powers to investigate are subject to the Ombudsman obtaining consent from the Prime Minister or the President.

The study has further revealed that, with the exception of Sweden and Singapore, similar to the South African Public Protector, all the Ombudsmen do not have the powers to investigate the commencement of court proceedings or actions that are subject to the jurisdiction of the courts (judicial functions). She or he does not have powers to investigate a matter where the aggrieved has or had a right of appeal; or other legal remedy to be resorted to.

The same applies where the matter has been referred to a judicial tribunal. This asserts the position that once a matter serves before the judicial officer, such a matter becomes a matter for the judiciary. No other person or authority is authorised to make a decision around such a matter.

5.1.4 Accounting And Reporting Lines: The Public Protector

Sections 182 (1) (a) and (b) of the Constitution require her or him to report on conduct she or he has investigated. In terms of Section 181(5) of the Constitution the Public Protector is accountable to the National Assembly. This section obligates her or him to report on her or his activities and the performance of her or his functions to the National Assembly at least once a year. Section 8 (2) (a) of the Public Protector Act reiterates this position and obligates her or him to report to the National Assembly in writing on the activities of his or her office. This section also requires her or him to table a written report to the National Council of Provinces as well. Section 8 (2)(b)(iv) of the Act obligates her or him to submit a report to the National Assembly on the findings of a particular investigation if requested to do so by the Speaker of the National Assembly or the Chairperson of the NCOP. Section 55(2)(b) of the Constitution dictates that the National Assembly, as the body to which these institutions account, must provide for mechanisms to maintain oversight of the exercise of the national executive authority and any organ of the state.

Oversight entails the informal and formal watchful, strategic and structured scrutiny exercised by the Parliament in respect of the implementation of laws

and the use of state resources including the allocated budget. The established mechanism that the National Assembly uses to oversee these institutions is the House Committees. In terms of the Public Protector Act, the Public Protector is overseen by the National Assembly through the Portfolio Committee for Justice and Constitutional Development. She or he accordingly accounts and reports to this Portfolio Committee practically speaking.

5.1.4(a) The Committee Concerns And The Public Protector's Response

In pursuit of the oversight responsibility the Committee wanted to know whether the Public Protector believes her current approach to prioritising which cases to investigate is efficient, effective and cost effective given her concern about the office's financial constraints.

The Committee asks this question within the context of the country's limited resources and the greater need for more economic use of available state resources. The questions arose in response to the Public Protector's presentation where she indicated that she needed additional funds of about R100 million to meet the increase in complaints brought to her office. From her report it was clear that Public Protector's office was unable to investigate all complaints received per year due to resource constraints including finances.

The Committee made specific reference to her report entitled "There are no Heroes" on the Mamodupi v Department of Trade and Industry case. This case was referred to in the context of section 6(3) of the Public Protector Act. This section empowers the Public Protector to refuse to investigate a complaint if the complainant has not exhausted all legal remedies at her or his disposal. The Committee was particularly concerned about possible forum shopping, time and expenses involved, given the fact that the complainant had lost two cases at the labour Court in this regard. In such a case the complainant had a Labour Appeal Court against the decision of the labour Court.

A further question was asked as to whether she ever does referrals to other bodies. Reference was also made to her findings on reparations by the Truth and Reconciliation Commission. The Committee also raised a concern on the amount of time her office takes to finalise investigations. A specific reference was made to two complaints one of the political parties had laid with her office.

The Public Protector acknowledges the Committee's oversight responsibility and authority. She however feels that in exercising this authority the Committee is not competent to go to an extent of citing specific cases she is or has investigated. Even though she did not address the question of her "unfair labour practice" finding, she nevertheless maintains that her investigations did not focus on labour aspects. She maintains that it is her sole discretion to decide which cases to or not to investigate. In her view such questions impinge on the independence of the Public Protector.

The independence of this office is provided for in the Constitution. Section 181 (2) of the Constitution provides that Chapter 9 institutions are independent and subject only to the Constitution and the law. This section further provides that they must be impartial and must exercise their powers and perform their functions without fear, favour or prejudice.

Section 181(4) of the Constitution, states that, no person or organ of the state may interfere with the functioning of these institutions. The Public Protector believes the Committee acted in contravention of these provisions.

The Committee believes their line of questioning does not interfere with this office's independence. They maintain that it is within their constitutional oversight competence to put questions of this nature to these institutions for purposes of ensuring oversight and accountability for the economic use of state resources as well. The Committee also feels that answers to these questions would enable the Committee in its endeavours to support the requests of the institutions for more resources having been fully informed. The Committee

acknowledges that the Public Protector is doing a commendable job and asserts that it is also within the context of continuous improvement that they also ask these questions. The Public Protector maintains her position and stresses that it maintains in other countries as well.

The researcher is of the view that the resolution to this dilemma lies in unpacking what accountability means in the context of the constitutional independence. Wikipedia defines accountability as follows: "In ethics and governance, accountability is answerability, blameworthiness, liability and the expectation of account-giving. In leadership roles, accountability is the acknowledgement and assumption of responsibility for actions, products, decisions and policies including the administration, governance and implementation within the scope of the role or employment position and encompassing obligation to report explain and be answerable for resulting consequences.' In governance, accountability has expanded beyond the basic definition of being called to account for one's actions. It is frequently described as account-giving relationship between individuals e.g. 'A is accountable to B when A is obliged to inform B about A's actions and decisions, to justify them, and to suffer punishment in the case of eventual misconduct".

This can be said to be intended to restrain reckless decision making in particular when it involves public or other people's funds while seeking to encourage responsible decision-making by responsible public authorities. The researcher therefore is inclined to conclude that accountability in the current dilemma is a matter of governance rather than a question of independence. Governance in simple terms should be understood as the entirety of processes that result in a systematic and structured manner in which any organisation is managed.

This seems to be the distinction that the Constitutional Assembly made during its deliberations on the establishment and the independence of Chapter 9 "Chapter 7 at the time" Institutions as contained in its report adopted on 9 November 1995. In terms of this report full consideration was given to the fact that these institutions are fully independent in their work but not in their structure. It

therefore explains why the final section 181(4) of the final Constitution reads "No person or organ of the state may interfere with the functioning of these institutions". They are functionally but not structurally independent.

Therefore it is in order for the Committee to ask as to whether when she exercises her sole discretion to decide which cases to or not to investigate; she also is informed by whether or not her decision enhances cost effectiveness. This is more so because the Minister of Finance has been consistent in his budget speeches that the country experiences very low revenue intake compared to the current country's expenditure.

It also needs to be kept in mind that independence is conferred by a country for its purpose. Therefore any institution bestowed with independence cannot be said to be independent of the country that gives it such independence. It is independent from being told or influenced by the country as to what outcome its investigation should give hence the provisions of section 181(2) that such institutions must be impartial and must exercise their powers and perform their functions without fear, favour or prejudice. The country is nothing but a collective term for people who live together, sharing more or less the same values, governed by the mutually agreed principles within the same borders.

It is also important to remember then that in government the structure that represents the country is the body the members of which, in one way or the other, are elected by the citizens of such a country. In South Africa such a body is Parliament. Our Constitution specifically says that the National Assembly is such a structure. Section 42(3) of the Constitution provides that: "The National Assembly is elected to represent the people and to ensure government by the people under this Constitution."

5.1.4(b) Study Findings

The study has revealed that accounting and reporting lines of Ombudsmen differ from one country to another. In Singapore the Ombudsman accounts and reports to the Prime Minister. In Kenya she or he is accountable to the President and Parliament while in Netherlands she or he is accountable to Parliament and Cabinet. In the other three countries they account to Parliament. On the question of whether or not the structure(s) that oversee(s) the Ombudsman can cite specific cases when calling her or him to account, the study has revealed that the principle of accountability as defined above applies.

The Swedish Parliament uses reports submitted by the Ombudsman to scrutinise her or his performance and activities of such an office. The reports of the Ombudsman in Kenya must, in terms of the law, include the office's financial statements and the description of its activities. In Ghana the reports must include a summary of matters investigated. In Netherlands the Ombudsman goes and presents the annual report on activities of the office in person to the President of the House of Representatives. The study supports the understanding of the Portfolio Committee on Justice and Constitutional Development and the Public Protector that it is the sole discretion of the Ombudsman to decide which complaints falling within her or his area of jurisdiction to or not to investigate.

5.1.4 (c) Opening Of Public Protector's Reports To The Public

Section 8(1) of the Act requires the Public Protector to bring her or his views, findings or recommendations to the attention of any person subject to the Public Protector making them available to the complainant and any person implicated. The essence of this requirement is the Administrative Law principle of audi alteram partem, listening to both parties to the investigation before making a final decision.

Section 182(5) of the Constitution provides that any report issued by the Public Protector must be open to the public unless exceptional circumstances require

that a report be kept confidential. The section requires such circumstances to be determined by national legislation. Section 8 (2A) (a) of the Public Protector Act as a result provides that any report issued by the Public Protector shall be open to the public unless exceptional circumstances require that a report be kept confidential. The two sections do not specify how the opening of the report to the public should be done. They only require that the report must first be issued. Sections 182 (1) (b) and (c) of the Constitution require her or him to report on the conduct she or he has investigated.

Section 181(5) says she or he must report to the National Assembly on the activities of his or her office and performance of her his functions. Activities should be interpreted to include investigation on conducts. Therefore a report on her or his activities and performance of her or his functions must be issued to the National Assembly. It is logical therefore that, only after a report has been issued to the National Assembly, some person must then make sure that it is open and accessible to the public. The Constitution is also silent on who should take this responsibility, but is clear that the Public Protector reports to the National Assembly.

5.2 South African Human Rights Commission As Ombudsman

The current South African Human Rights Commission expressed its discomfort with certain approaches adopted by the Portfolio Committee when calling them to account. This was prompted by the Committee's questions on the investigations on the case of Council for the Advancement of the SA Constitution V SAPS, popularly known as the Andries Tatane case. The Committee questioned whether it was appropriate for the Commission to investigate and make a finding of "excessive use of force" on the matter, given the fact that criminal litigation was already underway. The Commission maintained that as a Chapter 9 Institution it is empowered as an Ombudsman to protect citizens from the inappropriate use of state powers by the organs of the state.

The research could not reveal any reference to the discussions on the name of this Commission during the deliberations of the Sub-theme Committee 6.3 of the Constitutional Assembly. It appears as though from the word go there was no intention to understand this Commission as the Ombudsman. This could be attributed to the mandate of this institution as contained in the legislation of various countries including South Africa.

Contrary to what the Commission says, the study locates the mandates of the Human Rights Commissions solely as related to human rights; and not protection of citizens against inappropriate use of state powers by the organs of the state. The mandate of the Ombudsmen on the other hand, as shown above, revolves around good governance and maladministration in the public service. These are the institutions that could be interpreted to have the mandate of protecting the citizens against the inappropriate use of state powers by state organs.

The structures of the Human Rights Commissions also do not seem to support the name of Ombudsman. An Ombudsman is a one person office, the powers of which are so vested. The powers of the SAHRC are vested in a collective called Commission.

Of the countries considered only Kenya, Netherlands and the United Kingdom have Human Rights Commissions. The Kenya National Commission on Human Rights is made up of five Commissioners including the Chairperson. The United Kingdom has the Equality and Human Rights Commission, made up of 11 commissioners.

Ghana on the other hand does not have a typical Ombudsman or Human Rights Commission. It is a hybrid of three institutions under one umbrella, a human rights institution, the Ombudsman and an Anti-Corruption Agency according to the website of this Commission. As a result it is called the Commission on Human Rights and Administrative Justice and is made up of the Commissioner and two Deputy Commissioners.

5.2.1 Powers And Functions Of The SAHRC

Section 183(1) of the Constitution provides that the mandate of the Commission is to promote respect for human rights and the culture of human rights. It must promote the protection, development and attainment of human rights. The Commission must monitor and assess the observance of these rights in the country. Its functions are to research, educate people and report on the observance of human rights in terms of the Constitution; and to require relevant organs of state to provide it with information on the measures taken to realise the human rights.

The Constitution dictates that national legislation should be passed to empower the Commission to execute this mandate and perform its functions. The Constitution further dictates that such powers should include powers to investigate and take steps to secure appropriate redress.

The Human Rights Commission Act of 1994 gives the Commission a whole range of powers including search and attachment and removal of articles, dispute resolution, mediation, conciliation, or negotiation. The Commission also has the power to initiate litigation and conduct pro-active and reactive research on fundamental rights among others.

5.2.1(a) Committee Concerns And SAHRC Response

The Committee expressed a concern about the involvement of the Commission in the Tatane case and its finding of "excessive use of force". The Committee was concerned that the finding was made from an investigation based purely on a desktop inquiry.

The Committee questioned whether it was appropriate for the Commission to investigate and make a factual finding of this nature, which the Committee felt falls within the criminal court jurisdiction, without interrogating any witnesses.

The Commission maintained that it had not overstepped any of its powers by virtue of its findings. It highlighted that the finding of the Commission was a recommendation and not a final finding.

5.2.1 (b) Study Findings

The study has revealed that both in Kenya and Ghana the Human Rights Commissions are not mandated to investigate any matter pending before any court or judicial tribunal. In Kenya the Commission is not competent to investigate a criminal offence in terms of their Human Rights Act. By interpretation therefore the Human Rights Commissions in the two countries cannot make a finding of "excessive use of force" irrespective of whether or not its findings are meant to be recommendations. The UK Commission has powers to investigate whether or not a person has committed an unlawful act. Therefore it could be interpreted to be empowered to make a finding of excessive use of force.

5.2.2 Accounting And Reporting Lines

In terms of Section 181(5) of the Constitution the South African Human Rights Commission is accountable to the National Assembly. This section obligates the Commission to report on its activities and the performance of its functions to the National Assembly at least once a year.

5.2.2(a) Committee Concerns

The Committee raised a concern as to whether the involvement of the SAHRC in the Marikana matter does not potentially duplicate the work of the Farlam Commission of Inquiry. The Committee indicated that they also ask this question to establish whether their involvement did not impact on the judicious use of scarce state resources. The SAHRC acceded to the concerns of the Committee and reassured them that they are not involved in the investigations.

6 CONCLUSION

The apparent difference of opinion between Public Protector and the South African Human Rights Commission; and the Port Folio Committee for Justice and Constitutional Development in terms of interpretation of the applicable constitutional and legislative provisions is noted. Reference to other countries in this regard by the Public Protector in particular is also appreciated. However the bottom line is that the Public Protector is one of the institutions that were created by the South Africans for the benefit of the South Africans.

Like many organs of the state it emerged within the context of a strong desire by the South Africans for a system of government that is people oriented with great respect for human rights.

This is the debate that preoccupied the deliberations of the constitution making process in South Africa about these very important institutions including their names. This process deliberately chose the names "Public Protector" and South African Human Rights Commission to be reflective of their mandates within this context.

It is for this reason that it is advisable that comparison with any other country needs to be approached with the greatest circumspection. What needs to be guarded against is a situation where apples are compared with pears. They are both sweet but surely contain different nutrients. Reference to Ombudsman when referring to these institutions has got to be made sparingly therefore, bearing in mind that they are created to support the South African democracy. South African democracy is unique to South Africa due to a unique political history. South Africa stands for judicial independence as against Executive minded Judges. What should preoccupy our minds is the fact that South Africa is a Constitutional State. Nothing and no one is above the Constitution. Our Constitution is clear and deliberate in naming these institutions.

It is within this same context that the Constitution provides for both the independence of the Public Protector and Human Rights Commission; and the oversight duty of the National Assembly. The Constitution grants these institutions the independence to perform their functions without fear, favour (preference) or prejudice (bias). The study has revealed that such independence is confined to their functionality as against their structure. It is not surprising therefore, that the very same Constitution places the accounting and reporting duty on these institutions on one hand and oversight duty on the National Assembly over these institutions on the other.

When you oversee you are allowed to ask probing questions of why, when and why not for as long as the intension is to enhance accountability and not to influence the outcome of the performance of a function to favour a particular party. Perhaps it should be understood as a fine comb approach with no intention to dictate which party the outcome of an activity should favour, thereby interfering with functional independence.

It needs to be understood within the context of the country constantly grappling with approaches to ensure cost containment measures and balancing them with uncompromised constitutional independence.

7 RECOMMENDATIONS

The Researcher is of the view that the above difference of interpretation in terms of the applicable legislation including the Constitution is serious. It is for this reason that it is recommended that the National Assembly and or the relevant Portfolio Committees consider(s) reviewing the applicable legislation and conducting international study visits.

7.1 A Consideration On The Review Of Applicable Legislation

Given this difference of interpretation of applicable legislation it might be that time has come for the review and amendment of these pieces of legislation for greater clarity and more common understanding. The review might consider once again whether the independence of these institutions should be interpreted to mean structural or professional independence or even both. This is said with the appreciation that no institution in any country including Parliament and the other constitutional institutions could be perceived as independent from the country it was created by.

7.2 International Study Visits

The findings that are given under this piece of work are mainly a product of a desktop study. Therefore they are more the product of interpretation of available written work with minimal personal interaction with the representatives of the studied countries. It is therefore recommended that for purposes of a deeper insight and practical experience the National Assembly represented by the Committees that oversee the Institutions Supporting Democracy consider going on study visits of the studied countries. Such visits have a potential of presenting themselves also as an opportunity to learn from best practices. The Committees could consider joint trips with the participation of these institutions.

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