The South African Public Protector, the Ugandan Inspector-General of Government and the Namibian Ombudsman: a comparative review of their roles in good governance and human rights protection

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Abstract

Three African ombudsman institutions – the South African Public Protector, the Ugandan Inspector-General of Government (IGG), and the Namibian Ombudsman – as well as attendant legislation, are assessed in terms of the historical role played in ensuring good governance and human rights protection. South Africa, Namibia and Uganda were chosen for comparison because all are transitional societies with similar recent histories, and because over the last two decades all three countries have been in the process of reforming and transforming their societies by attempting to improve the protection of human rights. The differences between the three ombudsman institutions, however, are not a reflection of their strengths and weaknesses, as they were established under different circumstances, for slightly different reasons, and within particular contexts. The differences are, in fact, grounded in the extent of the mandates of the institutions; the level of their independence; the extent of their powers; and how they exercise such mandates, independence and powers. The Namibian Ombudsman has several 'strengths' over its

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counterparts: a much broader mandate; a unique, innovative and progressive environmental mandate; and a higher level of independence. The Ugandan IGG, on the other hand, seems to enjoy more powers than its counterparts. It is concluded that all three institutions have played, and continue to play, an important role in good governance and human rights protection – albeit in varying degrees.

Introduction

The 'ombudsman' is generally and broadly referred to as a national human rights institution. The term has its origins in Sweden, where it was originally instituted by the Swedish parliament in the nineteenth century 'to safeguard the rights of citizens by establishing a supervisory agency independent of the executive branch'.[1] The classic definition of an ombudsman was provided by the International Bar Association (IBA) in 1974, as

> an office provided for by the Constitution or by action of the legislature or parliament and headed by an independent, high-level public official, who is responsible to the legislature or parliament, who receives complaints from aggrieved persons against government agencies, officials and employees, or who acts on [his] own motion, and who has the power to investigate, recommend corrective action, and issue reports.[2]

Although the concept has since changed considerably in many parts of the world, the South African Public Protector, the Ugandan Inspector-General of Government, and the Namibian Ombudsman, still fit the IBA definition reasonably well. They also fit the framework of the Paris Principles[3] which set out the minimum standards for the

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1 Ruppel-Schlichting 'The independence of the ombudsman in Namibia' in Horn & Bosl (eds) *The independence of the judiciary in Namibia* (2008) 271.

2 See Satyanand 'Growth of the ombudsman concept' (1999) 3/1 *Journal of South Pacific Law* available at http://www.vanuatu.usp.ac.fj/journal_splaw/articles/Satyanand1.htm (last accessed 16 June 2012).

3 Principles Relating to the Status of National Institutions (The Paris Principles) adopted by General Assembly Resolution 48/134 of 20 December 1993.

roles and responsibilities of national human rights institutions. The Paris Principles deal with the competence and responsibilities of such institutions, their composition and guarantees of independence and pluralism, and their methods of operation. Although the Principles also deal with the status of commissions with 'quasi-jurisdictional competence'[4], they do not dictate institutional models and structures. Consequently, different institutional structures have evolved, resulting in variations such as those between the South African Public Protector, the Ugandan Inspector-General of Government, and the Namibian Ombudsman.

This article is a comparative study that will explore the different ways in which the three national institutions assure good governance and human rights protection. It will be argued that all three institutions could play a more meaningful role, despite the challenges they face, and it will be concluded that there are lessons to be learnt from each other.

By African standards, and to some extent internationally, South Africa is a fledgling multi-party democracy that respects the rule of law, whereas Uganda is a benevolent dictatorship with little regard for the rule of law and democratic governance. Namibia's form of government lies somewhere in between. One would therefore question the rationale of comparing the role of human rights institutions in three countries with such divergent democratic systems. The answer to this argument is that it is precisely for that divergence that a comparison is necessary.

There are other obvious reasons why South Africa, Namibia and Uganda make good comparisons. Firstly, in many respects, the three countries are transitional societies with a history of either autocratic dictatorship or apartheid, periods of conflict, or foreign domination.

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4 This terminology has been criticised as being meaningless and as having come about as a result of the hurry with which the Paris Principles were drafted. The correct term should, in fact, be 'quasi-judicial' competence (see Sidoti 'National human rights institutions and the international human rights system' in Goodman *Human rights, state compliance, and social change assessing national human rights institutions* (2012) 96.

Secondly, since the early 1990s, South Africa, Namibia and Uganda have been attempting to reform and transform their societies, by amongst other things, trying to improve the protection of human rights. South Africa has been relatively more successful in this endeavour, compared to Uganda and Namibia. Moreover, the three countries have much in common insofar as constitutional and human rights developments are concerned. Among the three countries, the 'constitutional revolution' started in 1990 in Namibia, with its attainment of independence and the adoption of a new constitution. In 1994, South Africa followed suit, by entering a new political and constitutional era – the highlight of which was the adoption of the interim Constitution,[5] and later the Constitution of the Republic of South Africa.[6] At around the same time, Uganda adopted a new constitution of its own.[7] All three countries' constitutions have bills of rights. In drafting its interim Constitution, South Africa took guidance from the then newly-adopted Namibian Constitution, much as Uganda took guidance from the newly-adopted South African interim Constitution. As a result, all three Constitutions contain provisions establishing certain national human rights institutions such as the ombudsman – a comparison of which forms the basis of this paper.

The 'ombudsman', good governance and human rights

Good governance and human rights play a vital role in the realisation of democracy. In order to understand the role of human rights institutions in enhancing and promoting these ideals, it is important to have a clear understanding of these concepts. 'Good governance' is a much used but ill-defined concept; ill-defined, because it tends to mean different things to different people. Narrowly defined, 'governance' means 'the process of decision-making and the process by which decisions are implemented (or not implemented)'.[8] In that narrow sense, it therefore means the exercise of political power to manage a nation's affairs. Broadly defined, however, governance refers to

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5 The Constitution of the Republic of South Africa Act 200 of 1993.
6 The Constitution of the Republic of South Africa 1996.
7 The Constitution of the Republic of Uganda 1995.
8 Fernando *Corporate governance: principles, policies and practices* (2006) 45.

> the various processes relating to leadership, such as policymaking, transparency, accountability, the protection of human rights and the relationship among the public, private and civil sectors in determining how power is exercised.[9]

In short, it means 'the responsible use of political authority to manage a nation's affairs'.[10] As for 'human rights', it could be said that the concept refers to those rights which belong to an individual as a consequence of being a human being, and for no other reason. Human rights, therefore, are those rights which one possesses by virtue of being a human being, and one need not possess any other qualification to enjoy human rights.

In determining the role of the ombudsman in good governance and human rights protection, one should understand the variations in the nature and functions of ombudsman institutions. Whereas the classic ombudsman plays an administrative oversight role by operating as a check on the executive branch of government, there is also a hybrid type of ombudsman that has both administrative oversight and human rights protection functions.[11] Such a hybrid ombudsman may also be given a wider mandate over other functions, such as anti-corruption or environmental protection.[12] It is these variations that largely account for the differences in the role of the South African Public Protector, the Ugandan Inspector-General of Government, and the Namibian Ombudsman, in good governance and human rights protection.

In so far as the role of the ombudsman in building good governance is concerned, it has been argued that the ombudsman can 'improve the legality and fairness of government administration, thereby increasing government accountability'.[13] As for human rights protection, the role of the ombudsman has to be seen in the context of the constructive

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9 Mutume 'Beyond the ballot: widening African reform' (2005) 18/4 *Africa Renewal* 10.

10 Dias & Gillies *Human rights, democracy and development* (1993), as quoted in Reif 'Building democratic institutions: the role of national human rights institutions in good governance and human rights protection' (2000) 13 *Harvard Human Rights Journal* 16.

11 Reif *The ombudsman, good governance, and the international human rights system* (2004) 2.

12 *Ibid*.

13 Reif n 11 above at 2.

function that the ombudsman institution plays in ensuring that the law is properly observed. It is against this conceptual background that the role of an ombudsman in ensuring good governance and protecting human rights in South Africa, Uganda and Namibia should be viewed.

The South African Public Protector

In South Africa, the institution of the ombudsman has its genesis in the Office of the Advocate-General, which was established by the apartheid government in 1979. This part-time ombudsman-like official, whose jurisdiction was mainly limited to financial conduct in administration, was replaced in 1991 by the Ombudsman, whose functions were closer to the classical ombudsman model.[14] This position in turn was abolished in 1995, and replaced by the Office of the Public Protector (OPP). This South African version of the ombudsman was first introduced by the 1993 (interim) Constitution – the forerunner of the 1996 Constitution, by which South Africa is now governed.

Chapter 9 of the 1996 Constitution established certain state institutions designed to provide meaningful support for the system of constitutional democracy and good governance. The relevant institutions include the Public Protector; the Human Rights Commission; the Commission for Gender Equality; the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities; the Auditor-General; and the Independent Electoral Commission. In addition to supporting constitutional democracy, these institutions are instrumental in promoting South Africa's Bill of Rights, which is enshrined in Chapter 2 of the Constitution. Their mandate includes ensuring that all state institutions observe fundamental human rights and are geared towards effective service delivery and socio-economic transformation of the country. They are further tasked with the responsibility of ensuring that society at large also adheres to the democratic rights and principles contained within the Constitution.

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[14] Baqwa 'South Africa's ombudsman' in Hossain, Besselink, Selassie & Volker *Human rights commissions and ombudsman offices: national experiences throughout the world* (2000) 639.

The functions of the Public Protector – as laid out in section 182 of the South African Constitution – are threefold:

a) 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 any impropriety or prejudice;
b) to report on that conduct; and
c) to take appropriate remedial action.

In terms of section 182(2), the Public Protector has additional powers and functions prescribed by national legislation. Accordingly, the provisions of the Constitution relating to the OPP have to be read and applied in conjunction with the relevant legislation, namely the Public Protector Act[15] and the Public Protector Amendment Act.[16] In terms of this legislation, the Public Protector is also empowered to investigate, report, and take remedial action in relation to improper prejudice, maladministration, dishonesty or improper dealings with respect to public money, improper enrichment, and receipt of improper advantage.[17]

The Public Protector Act also provides for, *inter alia,* the appointment and functions of a Public Protector and Deputy Public Protector(s),[18] finances and accountability of the Office of the Public Protector[19] and, in considerable detail, the additional powers of the Public Protector.[20] Furthermore, the Act provides for the procedure to be followed when conducting investigations and the manner in which findings may be made known to the complainant, to parliament, and/or to other parties.[21] The Act also deals with matters pertaining to contempt of the Public Protector, compensation for expenses, and offences and penalties.[22] Finally, the Act lays down certain guidelines for provincial

15 23 of 1994.
16 113 of 1998.
17 Section 6(4) of the Public Protector Act (23 of 1994).
18 Sections 2 and 3.
19 Sections 4 and 5.
20 Section 6.
21 Sections 7 and 8.
22 Sections 9–11.

public protectors,[23] an aspect that was provided for under the 1993 Constitution, but on which the 1996 Constitution is interestingly silent. The Public Protector Amendment Act was promulgated in November 1998, to 'amend the Public Protector Act, 1994, so as to bring it into line with the Constitution of the Republic of South Africa, 1996; and to provide for matters connected therewith'.[24] To that end, the Amendment Act replaces all references to the 1993 Constitution with references to the 1996 Constitution. As a result, almost all sections of the old Act have been amended in some way or the other, the main effect of which is to bring the statute in line with the 1996 Constitution – taking into account other relevant legal developments that may have taken place between 1994 and 1998.

A cursory perusal of the Constitution and the Public Protector Act shows that the Public Protector has the power to investigate any institution of government at any level (and in any sphere), any institution in which the state is the majority or controlling shareholder, any public entity, and any person performing a public function. With respect to these institutions, the Public Protector can investigate various types of conduct, including maladministration, abuse or unjustifiable exercise of power, improper or unlawful enrichment, and any act or omission that results in unlawful or improper prejudice to any other person.

The Public Protector cannot investigate the judicial functions of the courts or disputes between private persons; however, it is clear that the office has wide jurisdiction covering virtually all levels/spheres of government, and by exercising that jurisdiction the Public Protector can, and indeed does, play a crucial role in building good governance. In addition, although the OPP is not a court of law, it serves the public and assists the courts and the legislature by addressing those complaints about the administration of justice that fall beyond the courts' purview, and by monitoring the performance of the executive and answering those complaints that elected representatives are unable

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23 Section 12.

24 See long title of the Act.

to address.[25] In order to do this properly, the OPP should, at least in theory, be free from political pressure. This is because independence is the attribute that most clearly underpins a national institution's legitimacy and credibility, and hence its effectiveness.[26] The OPP, however, is not entirely independent. This is first because, although the OPP enjoys priority over other institutions in the exercise of its functions, it still often has to act together with the courts and other Chapter 9 institutions.[27] As a result, a common criticism is that the OPP lacks the power to make binding decisions. Secondly, although the Public Protector is subject to a more stringent appointment process than are members of other Chapter 9 institutions, he/she is still appointed by the President, albeit on the recommendation of the National Assembly.[28] Moreover, despite constitutional and legislative guarantees of political autonomy, the OPP is currently entirely financially dependent on the executive. Almost the whole budget for the OPP is a direct allocation from the Department of Justice and Constitutional Development.[29]

With regard to its composition, it is vital that membership of the OPP takes into account issues of public legitimacy. One may ask, therefore, whether the membership of the OPP reflects South Africa's diversity, or whether it has any political leanings. In view of the legislature's role in the appointment of the Public Protector, and the power of the minister to appoint the Deputy Public Protector(s), it is difficult not to question whether these appointments are actually made on merit.

From the foregoing discussion, it can be seen that the Public Protector's mandate is primarily that of building good governance through investigations into poor administration and allegations of corruption. Thus, the role of the Public Protector in the protection of human rights is somewhat indirect. As mentioned earlier, the functions of the OPP are to investigate any improper conduct in state affairs or

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25 Bishop & Woolman 'Public Protector' in Woolman, Roux & Bishop (eds) *Constitutional law of South Africa* (2005) 24A.

26 See OHCHR & International Council on Human Rights Policy *Assessing the Effectiveness of National Human Rights Institutions* (2005) 12.

27 *Ibid*.

28 Bishop & Woolman n 25 above at 24A.

29 *Ibid.*

public administration, to report such conduct, and to take appropriate remedial action. It may be argued that in performing these functions, human rights abuses resulting from state misconduct and public maladministration are curbed. Moreover, despite the fact that the OPP has no express human rights mandate, it does undertake investigations involving human rights components.[30] This is because the OPP considers the violation of human rights by government to fall within the concept of 'improper prejudice' suffered by a person.[31] It is in this context that the OPP deals with numerous complaints against the police. The most prominent of these were the complaints and allegations of maladministration, improper and unlawful conduct by the South African Police Service (SAPS) relating to the leasing of office accommodation in Pretoria and Durban. The outcome of the Public Protector's investigation led to the dismissal of the National Commissioner of the SAPS. Moreover, pursuant to understandings with the Human Rights Commission and the Commission for Gender Equality, the Public Protector investigates individual cases of human rights complaints brought against the public sector.[32] Thus, the human rights in the Constitution are relevant for the work of the OPP, both in maladministration complaints, and in investigations that raise more direct human rights issues.

Over the years, there has been a general perception that the Public Protector was not the independent and fearless watchdog that the Constitution had envisaged. This perception was fuelled in part by the fact that the previous Public Protector was appointed after serving as an ANC MP and as the Deputy Chairperson of the National Council of Provinces (NCOP). These are high political offices that would leave no doubt in anybody's mind as to the political allegiance of the then Public Protector. According to one commentator, 'this appointment was clearly a mistake as it created the impression – rightly or wrongly – that the Public Protector was an ANC lackey who would do everything within his power to shield ANC politicians and the

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30 Reif n 10 above at 66.

31 *Ibid*.

32 Baqwa 'The role of the public protector vis-à-vis other institutions that redress grievances in South Africa' (1999) 3 *International Ombudsman Yearbook* 136.

governing party from embarrassment'.[33] Furthermore, a 2009 decision of the North Gauteng High Court in *M & G Media Limited and Others v The Public Protector*[34] did not do the Public Protector any favours. The length and scope of this paper do not allow for a detailed discussion of the judgment in that case. Suffice it to say, that the judge criticised the Public Protector for refusing to investigate certain complaints lodged by the *Mail and Guardian* newspaper relating to the siphoning of state money by a state-owned oil company to the ANC, via a private company. The judge ordered a re-investigation. In the subsequent Supreme Court of Appeal decision, *The Public Protector v Mail & Guardian and Others*,[35] the court was equally critical of the Public Protector, concluding that 'even in so far as the Public Protector purported to investigate the remnants with which he was left, the investigation was so scant as not to be an investigation at all'.[36]

It should be pointed out that, as far back as 2007, a Committee, established by the National Assembly to review Chapter 9 institutions, came up with important findings and recommendations.[37] The main recommendation of the Committee was the creation of a single umbrella human rights body, instead of the multiplicity of institutions that purport to protect and promote the rights of specific constituencies in South Africa. In the specific context of the Public Protector, the Committee did not recommend any substantive changes, except that the OPP should be more pro-active in increasing public awareness of its activities, and should participate and formally collaborate with the proposed human rights structures to ensure coordination of activities and to avoid their duplication or overlap. The Committee also recommended a review of the appointment procedures for the Public Protector and the Deputy Public Protector(s), the budget process of the OPP, the lines of authority and accountability, as well as the

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33 De Vos 'The Public Protector in the dog box' available at: http://constitutionallyspeaking.co.za/the-public-protector-in-the-dog-box/ (last accessed 25 June 2012).

34 2009 (12) BCLR 1221 (GNP).

35 2011 4 SA 420 (SCA).

36 Paragraph 141.

37 See 'Report of the Ad hoc Committee on the Review of Chapter 9 and Associated Institutions' available at: http://www.parliament.gov.za/content/chapter_9_report.pdf. (last accessed 25 June 2012).

establishment of clear protocols for the delegation of powers and functions. It is important to point out that the recommendations of the Committee are yet to be implemented, and it is doubtful whether they ever will be. Were they to be implemented, it is submitted that the following should be added: that the OPP should be financially independent and better resourced; that there is a need for political autonomy – the Public Protector should not be a person with formal ties to a particular political party; and there should be more investigations undertaken at the Public Protector's own initiative, rather than focusing on investigations undertaken on receipt of a complaint.

In a multi-racial and multi-cultural society, with a multi-party democracy such as South Africa's, human rights and governance problems will continue to exist. The role of national institutions such as the Public Protector cannot, therefore, be overemphasised. The Public Protector must continue to play, and even improve, its role of building good governance and protecting human rights, if the democratic 'miracle' that has characterised South Africa over the last eighteen years is to be maintained. Developments during the last two years have shown that this is indeed possible. The Public Protector has regained public confidence through various achievements, including successful investigations into government accommodation leases, overcharging of outsourced services, payment for shoddy workmanship, non-competitive procurement processes, and denial of critical services that impacted on some people's human rights, such as the right to social security.[38]

The Ugandan Inspector-General of Government

The dark days of Uganda's troubled history are usually associated with Idi Amin's military rule and the subsequent and equally unstable governments, the last of which was removed by Yoweri Museveni in 1986. The hallmarks of these governments were corruption and

[38] See 'Public Protector highlights key achievements' available at: http://www.pprotect.org/media_gallery/2011/25102011.asp (last accessed 26 June 2012).

rampant violation of human rights. In an attempt to deal with these, the National Resistance Movement (NRM) of Yoweri Museveni established, through the Inspector-General of Government Act of 1987, the Inspector-General of Government (IGG), who was 'charged with the duty of protecting and promoting the protection of human rights and the rule of law in Uganda'.[39] The IGG was also given the responsibility of eliminating corruption and the abuse of public office.

The adoption of the 1995 Constitution and the enactment of the Inspectorate of Government Act of 2002, led to several changes whereby the renamed Inspectorate of Government was to consist of the Inspector-General of Government, and a number of deputy Inspectors-General as prescribed by parliament.[40] The most important change brought about by the new legal and constitutional regime was the transfer of the responsibility for human rights to the newly-created Uganda Human Rights Commission (UHRC), leaving the Inspectorate of Government with fighting corruption and the abuse of public office as its main responsibilities. The ability to discharge these responsibilities was strengthened by the Constitution, which gave the Inspectorate of Government more extensive powers of investigation, arrest and prosecution.[41]

The functions of the Inspectorate of Government are set out in article 225(1) of the Ugandan Constitution, and include the following:

(a) to promote and foster strict adherence to the rule of law and principles of natural justice in administration;
(b) to eliminate and foster the elimination of corruption, abuse of authority and of public office;
(c) to promote fair, efficient and good governance in public offices;
(d) subject to the provisions of this Constitution, to supervise the enforcement of the Leadership Code of Conduct;

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39 Section 7(1) of the Act.
40 Articles 223(1) and (2).
41 These powers are set out in Article 230 of the Constitution.

(e) to investigate any act, omission, advice, decision or recommendation by a public officer or any other authority to which this article applies, taken, made, given or done in exercise of administrative functions; and
(f) to stimulate public awareness about the values of constitutionalism in general and the activities of its office, in particular, through any media and other means it considers appropriate.

In terms of article 225(2), the Inspectorate of Government may undertake investigations 'on its own initiative or upon complaint made to it by any member of the public Y'.

An important aspect of the Inspectorate of Government relates to the issue of independence. Under the Constitution, the Inspector-General is appointed by the President, with the approval of parliament.[42] The independence of the IGG is guaranteed by the Constitution, which also makes the IGG responsible only to parliament.[43] The Inspectorate of Government is also assured of an independent budget appropriated by parliament and controlled by the Inspectorate.[44]

Significantly, the Inspectorate of Government is responsible for implementing and enforcing the Leadership Code of Conduct which is provided for under article 233 of the Constitution.[45] Legislation governing this Code was initially enacted in 1992 and amended in 2002.[46] The mandate to enforce the Code has been one of the biggest challenges of the Inspectorate of Government. Although the IGG has regularly reported breaches of the Code by many 'leaders', there have been few penalties or sanctions for such non-compliance.[47] Cases have

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42 Article 223 (4).
43 Article 227.
44 Article 229(1).
45 Chapter 14 of the Constitution, article 234. For more information on the Leadership Code see The Leadership Code Act (No 17 of 2002) at: http://www.igg.go.ug/static/files/publications/leadership-code-act.pdf (last accessed 28 June 2012).
46 See The Leadership Code Act (No 17 of 2002)
47 For example in 1998 the IGG reported that five cabinet ministers, 123 MPs and twelve judges had failed to declare their wealth in terms of the Code but no action was taken against them, see Tangri & Mwenda 'Politics, donors and the ineffectiveness of anti-

been reported where efforts to penalise the offenders of the Code have been thwarted by President Museveni himself.[48]

Under article 231(1) of the Constitution, the Inspectorate of Government is required to submit a report to parliament every six months, with the necessary recommendations and any other information parliament may require. A brief look at the latest available report (July to December 2011) is quite instructive in demonstrating the achievements and challenges of the IGG. According to the report, during this period, the Inspectorate of Government received or initiated a total of 1 254 complaints.[49] A total of 898 complaints were investigated and completed, while 138 were referred to other institutions.[50] In the specific context of corruption, the Inspectorate of Government received 836 complaints (66,7 per cent of the total number of complaints).[51] About 369 corruption complaints were investigated and completed, while forty-seven were referred to other institutions.[52] The report also details the role of the Inspectorate of Governance in the enforcement of the Leadership Code. During the period under review, 6 910 declarations were examined, assets and liabilities of eleven leaders were verified, and eighteen bank accounts inspected.[53] There were thirteen investigations into complaints of breach of the Code, although no actual breach was established.[54]

As mentioned earlier, and as can be seen from the foregoing discussion relating to the Inspectorate of Government's latest report

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corruption institutions in Uganda' (2006) 44/1 *Journal of Modern African Studies* 108.

48 See Tangri & Mwenda n 47 above at 109 wherein it is reported that in May 2003, the IGG recommended to the president the dismissal of several 'leaders', including the presidential advisor Major Kakooza Mutale, for failing or refusing to declare their assets. President Museveni initially refused to accept the recommendation until the World Bank threatened to withhold certain funding. Only then did the president take action to sack Mutale.

49 See the 26th Report of the Inspectorate of Government to the Parliament of Uganda, available at: http://www.igg.go.ug/static/files/publications/Report_to_Parliament_July_Dec_2011.pdf (last accessed 29 June 2012).

50 *Ibid*. These 'other institutions' include the Auditor-General, the Police and the Director of public Prosecutions.

51 *Ibid.*

52 *Ibid.*

53 *Ibid*.

54 *Ibid*.

to parliament, the Inspectorate's role in human rights protection is minimal. Such a role, as in the case of the South African Public Protector, is indirect and tangential. However, it has been opined that the Inspectorate of Government's main areas of mandate (fighting corruption and maladministration) 'involve human rights issues and therefore the Inspectorate has the potential of complementing the work of the [Human Rights] Commission'.[55]

The challenges facing the Ugandan Inspectorate of Government are reflective of the socio-economic situation in Uganda and the political and democratic constraints facing the country. Those challenges are captured in the Inspectorate's July to December 2011 report, to include:

> … inadequate funding; understaffing; operating in rented premises; court delays; lack of computerized data in other Institutions; inadequate institutional support in the fight against corruption; sophistication in corruption practices; negative societal attitudes, high expectations from the public to deal with their complaints expeditiously, lack of a Leadership Code Tribunal and challenges of acts of the Inspectorate of Government in courts of law for not being properly constituted.[56]

The Namibian Ombudsman

The origins of the Namibian Ombudsman can be traced to the 1986 Ombudsman for South West Africa Act,[57] and its 1988 amendment.[58] These statutes and the ombudsman they established, disappeared with the advent of independence in 1990, when the current Office of the Ombudsman was established by the new Constitution and the Ombudsman Act.[59] Chapter 10 of the Constitution of Namibia is dedicated to the ombudsman. It deals with the establishment,

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55 Ssenyongo 'The domestic protection and promotion of human rights under the 1995 Ugandan Constitution' (2002) 20/4 *Netherlands Quarterly of Human Rights* 479.

56 See the 26th Inspectorate of Government Report to Parliament (n 49 above).

57 Act 26 of 1986.

58 Act 11 of 1986.

59 Number 7 of 1990.

independence, appointment, term of office, functions, powers of investigation, and removal from office of the ombudsman. The Ombudsman Act defines and prescribes the powers, duties and functions of the ombudsman – thereby giving it legislative articulation as required by article 92 of the Constitution.

With its relatively broad mandate, the Namibian Ombudsman is seen as a hybrid ombudsman with powers to investigate and act upon violations of human rights, maladministration, corruption, and environmental degradation. The ombudsman's investigative powers extend to complaints of human rights abuses; abuse of power; unfair, harsh, insensitive or discourteous treatment; injustice; and corruption or conduct regarded as unlawful, oppressive or unfair.[60] It must be pointed out, however, that the powers to investigate corruption have since been transferred to the Anti-Corruption Commission (ACC), which was established in 2006. This means that all corruption-related complaints are now dealt with by the ACC. It has been opined though, that the relationship between the ombudsman and the ACC is rather vague, as a result of conceptual confusion.[61] This is mainly because the constitutional obligation to investigate corruption lies with the ombudsman while the Anti-Corruption Act[62] hands it to the ACC.

An important aspect of the Namibian Ombudsman is its human rights protection mandate. The human rights to be protected are laid out in Chapter 3 of the Constitution, and include civil, political, socio-economic and cultural rights. It is this human rights protection mandate that gives the Namibian Ombudsman its distinctive hybrid character, and the right to qualify as a national human rights institution. This is further reflected through the express provision in the Namibian Bill of Rights for the enforcement of fundamental human rights and freedoms by the ombudsman. In that regard, article 25(2) of the Constitution states that:

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60 Article 91 of the Constitution.

61 Blaauw *Promoting the effectiveness of democracy protection institutions in Southern Africa: the case of the Office of the Ombudsman in Namibia* (2009).

62 See No 8 of 2003.

> Aggrieved persons who claim that a fundamental right or freedom guaranteed by this Constitution has been infringed or threatened shall be entitled to approach a competent Court to enforce or protect such a right or freedom, and may approach the Ombudsman to provide them with such legal assistance or advice as they require, and the Ombudsman shall have the discretion in response thereto to provide such legal or other assistance as he or she may consider expedient.

Another distinctive aspect of the Namibian Ombudsman is its environmental protection mandate. This is a unique mandate that goes beyond the traditional functions of an ombudsman. According to one commentator:

> The environmental mandate of the [Namibian] Ombudsman's Office can be regarded as a progressive and innovative step towards environmental protection, as environmental concerns have significantly gained importance within the legal environment for the past few decades.[63]

In terms of article 91(c) of the Constitution, the ombudsman's environmental mandate includes, *inter alia*, 'the duty to investigate complaints concerning the over-utilisation of living natural resources, the irrational exploitation of non-renewable resources, the degradation and destruction of ecosystems and failure to protect the beauty and character of Namibia'. Innovative and progressive as this mandate may be, its execution has been criticised, for example the failure of the ombudsman to deal with environmental complaints as and when they are submitted. A case in point was the widely publicised complaint relating to the slaughter of seals and exploitation of the seal colony in contravention of the Animal Protection Act[64] and the Marine Resources Act.[65] The ombudsman was criticised for not living up to his mandate to protect the seals, by neglecting to investigate and report

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63 Ruppel-Schlichting n 1 above.
64 71 of 1962.
65 27 of 2000.

on this complaint.[66] When the investigation was eventually conducted, the ombudsman's report was described as 'disappointing'.[67] This was mainly because he had failed to subpoena the Ministry of Marine Fisheries and Marine Resources (MFMR) to provide critical data on the population of the Cape fur seals, information that was crucial to the investigation.[68] As such, the report was seen as ill-researched and inadequate. Further criticism of the ombudsman's execution of the environmental mandate has included the low level of public awareness of the role of the ombudsman in environmental matters, the lack of adequately trained staff, insufficient financial resources, and the heavy workloads in an inadequately staffed Ombudsman's Office.[69]

The independence of the Namibian Ombudsman is guaranteed under article 89(2) of the Constitution. Under article 89(3):

> No member of the Cabinet or the Legislature or any other person shall interfere with the Ombudsman in the exercise of his or her functions and all organs of the State shall accord such assistance as may be needed for the protection of the independence, dignity and effectiveness of the Ombudsman.

In addition to the constitutional and legal guarantees, there are several factors that determine and influence the independence of the Namibian Ombudsman. These include, but are not limited to

- the two-stage process through which the ombudsman is appointed by the President on the recommendation of the Judicial Service Commission;[70]

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66 Dickens 'Namibia: Ombudsman not living up to his mandate to protect seals' available at: http://www.africanconservation.org/201206132633/network-news-section/namibia-ombudsman-not-living-up-to-his-mandate-to-protect-seals (last accessed 29 June 2012).

67 See Shepherd 'Long awaited Ombudsman report proves disappointing for Namibia's case fur seals' available at: http://www.seashepherd.org/news-and-media/2012/06/29/long-awaited-ombudsman-report-proves-disappointing-for-namibias-cape-fur-seals-1401 (last accessed 30 June 2012).

68 *Ibid.*

69 Ruppel-Schlichting 'The Ombudsman and the environment' in Ruppel & Ruppel-Schlichting (eds) *Environmental law and policy in Namibia* (2011) 375.

70 Article 90 (1).

- the strict selection criteria – including the requirement of legal qualifications and expertise – for the ombudsman;[71]
- the provision for a fixed, long term of office – up to the age of 65;[72] and
- the method and conditions of removal of the ombudsman from office.[73]

It is also important to note that the Namibian Ombudsman is required to report annually to the national assembly on the exercise of his or her powers and functions.[74] These annual reports reflect the ombudsman's activities during the calendar year. In that regard, the 2009 annual report (the latest available) urged the national assembly to consider amending the Ombudsman Act in order to increase the ombudsman's powers to monitor and assess human rights violations.[75] This would include requiring the various organs of state and private enterprises to provide information to the ombudsman on measures taken to realise the rights in the Constitution. According to the report, the Office of the Ombudsman received 1 608 complaints during the year in question, 330 of which were against the police, 264 against the judiciary, and 179 against the prison service.[76] It is noteworthy that of the total number of complaints, 1 064 related to maladministration, 165 to human rights violations, with the remainder relating to miscellaneous matters including thirty for corruption and, notably, only six for environmental issues.[77]

The nature of the complaints received by the Namibian Office of the Ombudsman reflects its hybrid character. This is but one of the ways in which this particular ombudsman differs from its South African and Ugandan counterparts. These three institutions, as has been seen, have comparative and contrasting characteristics and features through

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71 Article 89 (4).
72 Article 90 (2).
73 Article 94.
74 Article 91(g) of the Constitution, and section 6 of the Ombudsman Act.
75 Weildlich 'Ombudsman wants human rights strengthened' *The Namibian* 19 October 2010.
76 See Ruppel-Schlichting n 69 above at 375.
77 *Ibid*.

which they can learn from each other – an aspect which is now considered.

Comparative lessons

It is clear from the foregoing discussion that there are important similarities and differences between the South African Public Protector, the Ugandan Inspector-General of Government, and the Namibian Ombudsman. In looking at these similarities and differences, an important point of departure is acknowledging that all three institutions were established by the national constitutions of the various countries, and they all are backed by the necessary legislation.

While there are comparative lessons to be learnt, it has to be emphasised that the differences between the three institutions are not a reflection of their strengths and weaknesses. As mentioned earlier, they were established under different circumstances, for slightly different reasons, and within particular contexts. However, there is no doubt that they have achieved relatively different levels of success, and they face different types of challenges – mainly due to the political and socio-economic contexts within which they operate. As a result, the main differences between the three institutions are grounded in the extent of their mandates, the level of their independence, and the extent of their powers and how they exercise such mandates, independence and powers. This inevitably informs the level and extent of the success they are able to enjoy, and the challenges they have to face.

Clearly, the Namibian Ombudsman has a much broader mandate than the South African Public Protector and the Ugandan IGG. His mandate ranges from investigating and acting upon human rights violations, to maladministration, corruption (initially), and environmental degradation. It is the human rights mandate that makes the Namibian Ombudsman more akin to the classical concept of an ombudsman and typically different from the other two. It must be emphasised, however, that unlike Namibia, both Uganda and South Africa have Human Rights Commissions that carry the human rights mandate. Indeed, the Namibian Ombudsman carries a unique human rights mandate typically carried by Human Rights Commissions, and it has executed this mandate by not only investigating and acting upon

human rights violations, but also through outreach programmes and public education.[78]

Mention has already been made of the Namibian Ombudsman's innovative and progressive environmental mandate. This, indeed, is a unique and distinguishing characteristic of that institution in comparison to its South African and Ugandan counterparts. Despite the shortcomings in the execution of this particular mandate, as pointed out earlier, it still has the potential of playing a vital role in the ombudsman's activities, and in the protection of the environment.

The effectiveness of the ombudsman depends largely on the independence of the institution. Anything that undermines that independence can only compromise its credibility and effectiveness. It is for that reason that Namibia, Uganda and South Africa can learn from each other. Whereas the independence of the three institutions under discussion is guaranteed under the Constitutions of the three countries, there are some factors that have influenced the level of independence enjoyed by the institutions. These factors are mainly grounded in the processes of and criteria for appointment, unwarranted political interference, and the allocation of resources, including budgetary allocations. Comparatively speaking, and taking those factors into account, the Namibian Ombudsman seems to enjoy a higher level of independence than the South African Public Protector and the Ugandan IGG. The latter two countries may do well to learn from the Namibian experience in this particular regard.

Another aspect of comparative interest relates to the powers of the three institutions, and how such powers are exercised. Just as with the functions, the powers of the Namibian Ombudsman, the South African Public Protector, and the Ugandan IGG, are bestowed by the various Constitutions and enabling legislation. Although these powers vary from institution to institution, there is no doubt that they are fairly extensive in all three cases. However, there is no doubt that the nature and extent of these powers and the way they are exercised, vary from country to country.

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78 Walters 'The protection and promotion of human rights in Namibia: the constitutional mandate of the ombudsman' in Walters (ed) *Human rights and the rule of law in Namibia* (2008).

In theory, the Ugandan IGG seems to enjoy more powers than its South African and Namibian counterparts. In addition to the usual investigative powers, provision is made under the Ugandan Constitution and the Inspectorate of Government Act,[79] for special powers of the Inspectorate. These include the power 'to arrest, cause arrest, prosecute or cause prosecution in respect of cases involving corruption, abuse of authority or of public office'.[80] It has, however, been opined that these powers have sometimes been politically constrained,[81] although, according to a 2009 Global Integrity Report, such constraint is minimal and is usually occasioned indirectly 'through threats by some ministers, often those under investigation'.[82]

Recent developments have led to the strengthening of the powers of the South African Public Protector. New rules have been promulgated, in terms of which the Public Protector's powers to enforce accountability from state organs to ensure speedy resolution of cases, have been strengthened. The rules, which were published in the *Government Gazette* in December 2010,[83] are in accordance with section 7(11) of the Public Protector Act,[84] which allows for the formulation of such rules. This notwithstanding, it is submitted that the powers of the Ugandan IGG remain more extensive and stronger than these of the South African Public Protector. The same may be said in relation to the powers of the Namibian Ombudsman, in comparison with the Ugandan IGG. Although the Namibian Ombudsman enjoys the normal investigative powers, he/she may, in general, not make binding orders, and is not endowed with the type of special powers that the Ugandan IGG enjoys. In this respect, both South Africa and Namibia could take a leaf out of Uganda's book.

Conclusion

The last three decades have witnessed the establishment of many ombudsman institutions across the world, and particularly in Africa.

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79 Act No 5 of 2002.

80 Article 230 of the Constitution and s 14(5) of the Inspectorate of Government Act.

81 Tangri & Mwenda n 47 above at 107.

82 See Global Integrity Report, available at: http://www.globalintegrity.org/report/Uganda/2011/scorecard (last accessed 4 July 2012).

83 General Notice No 1085 of 2010.

84 23 of 1994.

A growing number of these institutions were established in order to promote good governance and, in some cases, to strengthen the domestic mechanisms for human rights protection. In their quest to achieve these goals, the institutions have faced different challenges, and have enjoyed varying degrees of success and achievement.

The benefits of a comparative legal analysis 'begin with the attainment of knowledge of another system in order to enhance the understanding of one's own system'.[85] Indeed, comparing national legal institutions is an important avenue by which to gain new insights about the institutions in one's own legal system.[86] Moreover, comparative lessons can also be learnt. In so far as the South African Public Protector, the Ugandan IGG, and the Namibian Ombudsman are concerned, such lessons revolve around the extent of their mandates, the level of their independence, the extent of their powers and how they are exercised, and the level of public confidence and legitimacy that they enjoy. Whatever differences exist between the three institutions, and whatever comparative lessons there are to be learnt, the fact remains that these institutions have all played, and continue to play, an important role in good governance and human rights protection, albeit in varying degrees.

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85 Schadbach 'The benefits of comparative law: A continental European view' (1998) 16 *Boston University International Law Journal* 335.

86 *Id* at 333.