

THE STATUS OF THE PUBLIC PROTECTOR WITHIN THE
GOVERNANCE FRAMEWORK IN SOUTH AFRICA

BY

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Submitted in fulfilment of the requirements in respect of the Doctoral
Degree in the Programme Governance and Political Transformation in
the Department of Political Studies and Governance in the Faculty of
Humanities at the University of the Free State

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MAY 2019

Table of Contents

ABSTRACT.....	iv
DECLARATION	v
DEDICATION	vi
ACKNOWLEDGEMENTS.....	vii
LIST OF FIGURES.....	viii
LIST OF TABLES.....	ix
ANNEXURES	x
KEYWORDS.....	xi
LIST OF ACRONYMS.....	xii
CHAPTER 1: GENERAL INTRODUCTION AND OVERVIEW	1
1.1 Background and motivation for the study.....	1
1.2 Significance and contribution of the study.....	4
1.3 Problem statement	5
1.4 Aims and objectives of the study.....	8
1.5 Context of the study	9
1.6 Research methodology and design.....	10
1.7 Scope and delimitation of the study.....	14
1.8 Ethical considerations	14
1.9 Research outline	15
CHAPTER 2: THEORETICAL PERSPECTIVES AND CONCEPTUALISATION	17
2.1 Introduction	17
2.2 Theoretical perspectives on Governance	18
2.3 Governance: a conceptualisation and definitions	30
2.4 Good governance as a normative concept	40
2.5 Good governance as a global strategic vision.....	54
2.6 Arguments against good governance as the normative approach.....	55
2.7 The concept of Ombudsman.....	59
2.8 Models of Ombudsman	65
2.9 Expanding mandate	71
2.10 The plurality of Ombudsman institutions.....	75
2.11 The generic functions and normative values of an Ombudsman	89
2.12 Conclusion.....	103
CHAPTER 3: THE CONCEPTION OF THE PUBLIC PROTECTOR IN SOUTH AFRICA: AN OVERVIEW	106
3.1 Introduction	106
3.2 The conception of the Ombudsman in South Africa.....	106

3.3	Classical or hybrid model?	111
3.4	The macro socio-political and legal context within which the PP operates	118
3.5	The macro-institutional context within which the PP operates	135
3.6	The role and powers of the Public Protector	141
3.7	Conclusion.....	149
CHAPTER 4: THE CRISIS OF GOVERNANCE AND ITS EFFECTS ON THE INSTITUTIONAL INTEGRITY OF THE PUBLIC PROTECTOR IN SOUTH AFRICA.....		154
4.1	Introduction	154
4.2	Challenges threatening constitutional democracy and good governance	154
4.3	The effects of the crisis of governance on the institutional integrity of the Public Protector 187	
4.4	Conclusion.....	195
CHAPTER 5: A COMPARATIVE ANALYSIS.....		198
5.1	Introduction	198
5.2	Sources of international standards for Ombudsman institutions	199
5.3	Comparison with Ombudsman within the European Union.....	203
5.4	Comparison with Latin America.....	217
5.5	A comparison with African Ombudsmen.....	222
5.6	Conclusion.....	265
CHAPTER 6: EVALUATION		270
6.1	Introduction	270
6.2	Governance Framework in South Africa.....	271
6.3	The status of the Public Protector within the Governance framework.....	273
6.4	Good governance as a normative function of the Public Protector	282
6.5	The Public Protector and other Chapter 9/10 institutions	287
6.6	The PP and other Ombudsman-like independent investigative bodies in South Africa	295
6.7	The institutional governance and capacity of the PP	299
6.8	The normative leadership virtues, values and ethics and the Public Protector	305
6.9	Parliamentary oversight.....	319
6.10	Comparative analysis	320
6.11	Conclusion.....	329
CHAPTER 7: SUMMARY, FINDINGS, RECOMMENDATIONS AND CONCLUSION.....		332
7.1	Introduction	332
7.2	Summary	333
7.3	Findings	344
7.4	Recommendations	349

7.5	Contribution of the study.....	366
7.6	Conclusion.....	368
	Annexure A.....	374
	Annexure B.....	375
	List of references.....	376

ABSTRACT

The Public Protector (PP) is a genus of the Ombudsman and its status within governance has been a controversial subject in the national discourse in South Africa. This institution was created in terms of Section 181 of the Constitution as part of the coterie of institutions mandated to protect and strengthen constitutional democracy. These institutions are colloquially called the Chapter 9 institutions. They have been described as not forming part of government, although they are an integral part of the governance system in South Africa.

It has become necessary to study the status of one of these institutions, namely the PP, within the governance framework in South Africa. The governance framework consists of the institutions that form the *trias politica*, the co-operative government and the organs of state, as defined in Section 239 of the Constitution. This research has indicated that the PP, like all other Chapter 9 institutions, exists outside the *trias politica* and co-operative government framework, but it is an organ of state as defined in Section 239. As a result of this complex status of the PP within the governance framework, the researcher has defined its place as being part of co-operative *governance*, although it is not part of co-operative *government*, as defined in Chapter 3 of the Constitution. This characterisation of the status of the PP means that it is not part of the intergovernmental framework and it is not restricted by the legal and structural strictures of this framework, but it is required to co-operate with other organs of state to achieve its objectives of protecting and strengthening constitutional democracy and promoting good governance.

This study has been a normative exercise, which places the PP within the trilogy of normative frameworks: the governance and Ombudsman theoretical frameworks; good governance as a normative function; and the normative values that inform the ethics of the PP as a genus of the Ombudsman.

The study's findings and recommendations seek to further elucidate and embed the status of the PP within the governance framework in South Africa. Therefore, it makes an original contribution to the interdisciplinary science of Governance and Political Transformation.

DECLARATION

I, Molefinyana Phera, declare that the thesis that I herewith submit for the Doctoral Degree in Governance and Political Transformation at the University of the Free State, is my independent work, and that I have not submitted it for a qualification at another institution of higher education.

Signature: _____

Date: _____

DEDICATION

To my wife, Majale, my daughter, Tshepang, and my only surviving sisters, Matselane and Mpewane, my nephews and nieces, and the rest of my extended family and loved ones for the solid support system you have provided during this lonely journey. It was your love, support and patience that gave me the courage and strength to pursue my dreams and to achieve self-actualisation.

I hope this inspires you also to pursue your dreams with the same passion, vigour and dedication. I am sure this is your achievement too.

I further dedicate this to my mother, Molulela, my grandmother, Matshediso, and my siblings, Molelekeng, Tlalane, Puleng and Moeketsi (Lopa), who are sadly now late. Whatever the significant achievements in my life, you laid the seeds.

ACKNOWLEDGEMENTS

Thank you, the Freedom Spirit, for giving me the purpose, passion and persistence to pursue this study until its completion. It has been a lonely journey, but many people have contributed selflessly to make it possible.

I am grateful to my late grandmother, Matshediso Phera, and my late mother, Molulela Phera, from whom I continue to draw inspiration. In the midst of abject poverty and want, they raised me and my siblings with love. They sacrificed so much of themselves, within their meagre means, to guide us through the trials of life.

I am indebted to my promoter, Dr Tania Coetzee, for her patient guidance and insightful comments. Her forthright, firm, but benevolent character assisted to shape and direct my own thoughts in a manner that uncovered the potential I never knew I possessed.

I acknowledge contribution and support of friends and colleagues throughout this journey. The moral support and assistance of Drs David Mohale and Mamiki Maboya, Advocates Jonas Mosia and Makhabane Mopeli, and Messrs. Derek Martin, Lorato Banda, Mohlamme Makhathe and Mlungisi Khanya (the Provincial Representative of the PP in the Northern Cape), and Mss Janine Krieg (my PA), Masego Tlhalogang, Halejwetse Seepamore and Gaelebale Montwedi, is especially acknowledged and appreciated. *E ahela ka tshibana tsa e nngwe!*

The people of Masilo, the African National Congress, the South African Communist Party, and the National Education Health and Allied Workers' Union have all variously and at different times contributed to my intellectual growth.

To all of you and others I may have forgotten to mention: *Le kamoso!*

MOTHO KE MOTHO KA BATHO BA BANG!

LIST OF FIGURES

NO	DESCRIPTION	PAGE
6.1	Normative framework of the PP	263
6.2	Governance framework and the place of the PP within it	273
7.1	Proposed macro-structure of the PP	349

LIST OF TABLES

NO	DESCRIPTION	PAGE
2.1	Features of Courts and Offices of the Ombudsman	71
3.1	Comprehensive Legislative Mandate of the PP	111
3.2	Policy Mandates of the PP	114
3.3	Macro-structure of Governance in South Africa	132
4.1	Categories of State Dysfunctionality	153
4.2	South Africa's historical ranking on the Corruption Index	179
6.1	Differences/similarities between the SIU and the PP	289

ANNEXURES

Annexure A. Illustration by amaBhungane indicating how monies were swindled from the controversial Estina dairy project in the Free State

Annexure B. Images of the leadership attitudes of Public Protectors in South Africa by the cartoonist, Zapiro

KEYWORDS

Governance, Democratic Governance, Good Governance, Good Enough Governance, Ombudsman, Public Protector, Democracy, Constitutional Democracy, Constitutionalism, Remedial Action.

LIST OF ACRONYMS

ADR	Alternative Dispute Resolution
AGSA	Auditor-General of South Africa
ANC	African National Congress
AOMA	African Ombudsman and Mediators' Association
AORC	African Ombudsman Research Centre
AU	African Union
BEE	Black Economic Empowerment
CHRAGG	Commission for Human Rights and Good Governance
COO	Chief Operations Officer
CSCE	Commission on Security and Cooperation in Europe
DA	Democratic Alliance
DPCI	Directorate for Priority Crimes Investigation
DPP	Deputy Public Protector
EFF	Economic Freedom Fighters
EU	European Union
EUO	European Union Ombudsman
IEC	Independent Electoral Commission
IOI	International Ombudsman Institute
IPID	Independent Police Investigative Directorate
JSC	Judicial Services Commission
M&E	Monitoring and Evaluation
MP	Member of Parliament
NA	National Assembly
NCOP	National Council of Provinces

NDP	National Development Plan
NDPP	National Director of Public Prosecutions
NPA	National Prosecuting Authority
NPC	National Planning Commission
OECD	Organisation for Economic Co-operation and Development
OPP	Office of the Public Protector
OUTA	Organisation Undoing Tax Abuse
PCA	Parliamentary Commissioner Act, 1967
PCE	Permanent Commission of Enquiry
PHSO	Parliamentary and Health Service Ombudsman
PMG	Parliamentary Monitoring Group
PO	Parliamentary Ombudsman
PP	Public Protector
PPA	Public Protector Act, 1994
PRASA	Passenger Rail Corporation of South Africa
PSC	Public Service Commission
SABC	South African Broadcasting Corporation
SACC	South African Council of Churches
SACP	South African Communist Party
SAHRC	South African Human Rights Commission
SCoAG	Standing Committee on the Auditor-General
SIU	Special Investigative Unit
UK	United Kingdom
UN	United Nations

UNDP United Nations Development Programme
UNESCAP United Nations Economic and Social Council for Asia and the Pacific
UNESCO United Nations Education and Scientific Council

CHAPTER 1: GENERAL INTRODUCTION AND OVERVIEW

1.1 Background and motivation for the study

The position of the Public Protector (PP) is embedded in the Constitution, with the mandate of supporting and strengthening constitutional democracy in South Africa. This is an important, albeit a vague, mandate given that the concept 'constitutional democracy' is not defined in the Constitution of the Republic of South Africa, Act 108 of 1996 (the Constitution, 1996), and is referred to only once in the whole constitutional text, as a mandate of all the Chapter 9 institutions (institutions created in terms of Section 182 of the Constitution). The mandate of promoting good governance is not even enunciated in the Constitution. Given this vagueness of the concept of constitutional democracy and the unarticulated mandate of good governance, which the PP is meant to support and strengthen, it is no wonder the question of the status and powers of the PP has been controversial and therefore needs scientific scrutiny.

Furthermore, the questions regarding the status, powers and mandate of the PP have dominated the public discourse in recent times, ending up in the Constitutional Court. While the jurisprudential clarity has been provided by the apex court, the need for providing the political lucidity regarding the status of the PP within the governance framework remained germane. In the aftermath of the Nkandla judgment (see *Economic Freedom Fighters v Speaker of the National Assembly and Others and Democratic Alliance v Speaker of the National Assembly and Others CCT 143/15 and CCT 171/15*), there is a need to critically evaluate the status and powers of the PP within the governance framework in South Africa.

The departure point of the study is that the PP is the genus of the Ombudsman; hence, the theoretical underpinning of the study has been the study of the concept of the Ombudsman as it originated in Sweden in 1809. However, as the researcher sought to understand the institution of the Ombudsman from a governance perspective, at the heart of the study has also been the discussion of the Governance Theory as the normative framework that spawned the popularity, plurality, ubiquity and spread of the Ombudsman throughout the world, and the PP in particular. It is important to comprehend a working theory of governance because the Constitution does not define governance or good governance. Therefore, an in-depth

study of the Governance Theory from diverse literature has been collated, collected and analysed in order to understand governance in general, and good governance in particular, as a normative framework for the Ombudsman in general, and the PP in particular.

The conceptualisation and origin of the Ombudsman institution has been discussed from its Swedish origin and theoretically analysed from the theoretical and institutional perspectives of the Parliamentary Ombudsman (the United Kingdom), *Le Mediateuer* (France), and *El Defensor del Pueblo* (Spain). Although there are features common to all Ombudsmen, there are also distinctive features because of different politico-legal systems, constitutionalism, cultures and history of each polity (Stuhmcke, 2012: 10-13; Diamandouros, 2006a). Stuhmcke (2012), for instance, distinguishes between the Reactive, Variegated and Proactive models of the Ombudsman. This study focused on these models with a view to understanding the theories underpinning the Ombudsman institution. This study is important in that it sought to analyse the status of this institution within the constitutional framework, determine its location within the *trias politica* and co-operative governance, and critically analyse how its independence is assured from the perspective of its mandate, structure and resources allocation and control, in order for it to play its role of promoting good governance and supporting and strengthening constitutional democracy.

The PP primarily uses its power to take remedial action to promote or enforce good governance. Therefore, it was important to critique and analyse its power to investigate any alleged improper conduct in state affairs, or in the public administration in any sphere of government; to report on that conduct; and to take appropriate remedial action, especially given the earlier disagreements in the public discourse about the binding effect of its remedial action. Now that the question as to whether the remedial action of the PP is binding has been settled through a judicial intervention (see *Economic Freedom Fighters v Speaker of the National Assembly and Others and Democratic Alliance v Speaker of the National Assembly and Others CCT 143/15 and CCT 171/15*), the study critically analysed the effectiveness or capacity of the institution to enforce its remedial actions as part of its mandate to promote or enforce good governance.

The departure point of this study was that the PP has a mandate to promote good governance in South Africa, as required by Section 182(1) of the Constitution to: (a) 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 results in any impropriety or prejudice; (b) to report on that conduct; and (c) take appropriate remedial action (Constitution of the Republic of South Africa, Act 108 of 1996). Hence, the important question of the study was how the PP was mandated, structured and resourced in order to promote good governance in South Africa. These factors were critically analysed.

Despite its constitutional mandate, the issue of the status, especially the powers, of the PP has been questioned within the political milieu. Hence, at some level, the study also evaluated the political actions that had an impact on the integrity of the PP by the various political actors in the country.

According to Diaw (2008: 1), the work of an Ombudsman has been an integral part of state transformation and has become a feature and a standard of the modern democratic state. This is true of the PP in South Africa; hence, the importance and motivation of this study has been to analyse critically the status and powers of this institution within the context of governance and political transformation in the country.

The Parliamentary Ombudsman, *Le Mediateuer* and *El Defensor del Pueblo* models of the Ombudsman have been used to establish the conceptualisation and theorisation of the idea of the Ombudsman in general, and the PP in particular. For this purpose, authors such as Kirkam (2007), Diaw (2008), Maer and Everret (2016), Boustia and Sagar (2014), Mora (2015) and Castells (2000), who wrote extensively on these models of the Ombudsman were consulted and used to formulate a conceptualisation or theorisation of the idea of the Public Protector, as a genus of the Ombudsman.

The study also focused briefly on an **institutional comparison of the PP with other Ombudsmen** in Europe. This was done mainly to understand the underlying philosophical and political context that informs the preference or adoption of different models.

1.2 Significance and contribution of the study

Conventionally, studies on the state and governance in South Africa have tended to focus on the *trias politica* – the separation of powers between the executive, the legislature and the judiciary, with some attention paid to the public service. This focus tended to ignore the status and significance of constitutional institutions supporting democracy that form part of the governance framework (Musuva, 2009: vii). This study was significant in that it evaluated and analysed the status and powers of one such constitutional body, the Public Protector; therefore, it contributed to the science of Governance and the depository of knowledge on the state of governance in South Africa.

The study is significant as a theoretical contribution to the existing body of knowledge about the subject matter – the institution of the Public Protector from within a governance perspective. As Kumar (2011: 10) argued, “The knowledge produced through pure research is sought to add to the existing body of knowledge...”. Therefore, this study critically analysed the concept of Ombudsman and theories of Governance with a view to both unpack and locate the status and powers of the PP within these broader conceptual and theoretical frameworks. The significance of this study is that it endeavoured to contribute to the interdisciplinary study field of Governance and Political Transformation. An interdisciplinary approach was adopted in conducting the research in that the researcher sourced information from diverse but interrelated fields, such as Political Science, Public Administration, Administrative Law and Constitutional Law. Zambansen (2011: 84) points out that the key to understanding governance lies in appreciating its interdisciplinary and transformative nature.

Chapter 9 institutions are said to be part of governance, but not part of government (*IEC v Langeberg Municipality*). This controversial notion that an organ of state is not part of government (i.e. not controlled by the executive) but is part of governance (i.e. forming part of a network of stakeholders in the governance process) needed to be studied, unpacked and expounded scientifically and academically from the perspective of the constitutional framework on co-operative governance in South Africa. This study endeavoured to analyse this notion critically, as it applies to the institution of the Public Protector of South Africa. It therefore contributed significantly to the understanding of the concept of co-operative governance in the country.

From the doctoral theses reviewed, it became clear that aspects of good governance such as corruption (Cloete, 2013), enhancing democratic rights in governance (Lubinga, 2014), and corruption and reform (Camerer, 2009) have been studied before. However, a gap existed in terms of the academic study of the statuses, powers and roles of Chapter 9 institutions, particularly the PP, in the promotion of good governance (inclusive of the fight against corruption and maladministration). This study has contributed immensely in closing this gap.

This study is relevant, important and necessary as it contributed to the depository of knowledge on the concepts of constitutionalism (including transformative constitutionalism), constitutional supremacy and Chapter 9 institutions, and how all these concepts contextualised the constitutional status, powers, mandate, legal framework and structure of the PP. As the PP exists as part of the coterie of state institutions supporting and strengthening constitutional democracy in South Africa, the similarities/dissimilarities and complementary mandates between the PP and some of these institutions have been analysed. The similarities/dissimilarities and complementary mandates of the Public Service Commission and Special Investigating Unit (SIU) and other Ombudsman-like institutions have been discussed, all with a view to understand the status and powers of the PP within the governance framework in South Africa.

Significantly, the study has undertaken a comparative analysis of the PP of South Africa with similar institutions in Africa, Latin America and Europe, with the latter studied specifically for conceptualisation and theorisation purposes. Similarities and differences were analysed and discussed. For instance, in many jurisdictions the Ombudsman only has powers of recommendation (Söderman, 2004), but the South African PP's remedial action is binding, unless successfully reviewed by a court of law as per the Constitutional Court ruling in the Nkandla matter.

1.3 Problem statement

The status and powers of the PP have been politically questioned in the public discourse, and its remedial actions have been legally challenged with regularity, calling into question its independence and acceptance of its decisions, findings and remedial actions. Thus, this indicated a problem with understanding the status of the PP within the governance framework in South Africa. This could be because the key

mandates of the PP, namely constitutional democracy and the promotion of good governance, are not defined in the Constitution. The mandate of the PP to support and strengthen constitutional democracy, which it shares with the coterie of other Chapter 9 institutions, is mentioned only once in the Constitution, but as a concept or programme of action it has not been defined. The concepts of governance or good governance are never mentioned in the Constitution. The vagueness of these mandates could be one of the reasons for the political disagreements that ensued on the status and mandate of this important institution of South Africa's democracy. As a result, the need was identified for the scientific study of the status of the PP within the governance framework.

From this problem statement, the following research questions were formulated:

- (i) What is the status and powers of the PP within the governance framework existing in South Africa?
- (ii) How is the PP empowered constitutionally, legally, institutionally and resources-wise to promote good governance in South Africa?
- (iii) What is the PP doing to support constitutional democracy and promote good governance?
- (iv) Is good corporate governance promoted or what is the outcome in the aftermath of the investigations, decisions, findings and remedial actions of the PP considering how these have been perceived, received and effected by the affected public institutions?
- (v) What are the requisite qualities for a PP and what has been the legacy of the successive PPs to date?
- (vi) How does the PP compare with similar institutions in Africa, Europe and Latin America, in terms of the status, powers and functions, with a view to evaluate the international normative guidelines for similar institutions?

The following are some of the controversies from the public discourse on the status and powers of the PP that informed the research problem and research questions, as formulated above:

- The powers of the PP to take remedial action to correct or control the administrative action are often questioned, either politically and/or legally.

Some people, in particular the former Secretary General of the ruling African National Congress (ANC), Gwede Mantashe, have argued that the PP's powers are limited to making recommendations (News24, 2016).

- The Supreme Court of Appeal (SCA) corrected an earlier confusing judgment by the Western Cape High Court, which had suggested that the powers of the PP were limited to making recommendations, which could be reasonably ignored. The SCA ruled that the remedial action taken by the PP was binding, unless successfully reviewed by a court of law (*SABC v DA*, 2015). Eventually, the Constitutional Court, which is the highest court on constitutional matters, pronounced in detail on the role and powers of the PP. It affirmed that the remedial action of the PP is binding and cannot be second-guessed (*EFF v Speaker of National Assembly*, 2015). These cases are discussed mainly in Chapter 3 of this study.
- Despite this comprehensive affirmation of the powers of the PP by the apex court, there was an issue with the interpretation of both the Nkandla report and judgment, which suggested a lack of elucidation. In this milieu of uncertainty, even deliberate distortion, the question remains: What is the status and powers of the PP within the governance framework?
- Politically-charged claims were made by the Deputy Minister of Defence and Military Veterans, Kenny Maphatsoe, that former PP Thuli Madonsela was a spy, who served the foreign interests of her foreign handlers (Feketha, 2016).
- The requests for funding have often been refused, which affects the independence, effectiveness and efficiency of the PP (Gqirani, 2016). Parliament's portfolio committee has refused to back the request by the PP to increase its budget, arguing that the PP must reduce the number of cases it investigates rather than seek more resources to conduct more investigations. Is the funding and resourcing of the PP adequate to carry out its mandate?
- The Parliament has been hostile towards the work of the PP, second-guessing Madonsela's Nkandla report and replacing it with its own. A special parliamentary *ad hoc* committee released a report that exonerated President Jacob Zuma from paying for non-security related features at Nkandla on the basis that they were broadly speaking security features. On 18 August 2015, the Parliament adopted the report with 198 votes in favour and 93 against

(Africa Check, 2016). This effectively second-guessed the PP's report titled *Secure in Comfort*, which required the President to pay for the non-security features at his Nkandla household (PP, Report no. 25 of 2013/14).

All these controversies informed the research questions above. The answers to these questions, determined through qualitative research methods, will elucidate the status and powers of the PP within the existing governance framework in South Africa.

1.4 Aims and objectives of the study

The aim of this study was to critically evaluate and analyse the status and powers of the PP of South Africa within the governance framework and produce basic research that will add to the existing body of knowledge on the subject of the research. As Kumar (2011: 10) suggests, "The knowledge produced through pure research is sought to add to the existing body of knowledge...". Therefore, the study intended to be an evaluative and theoretical study of the subject matter, with a view to contribute to the existing body of knowledge on the status of the PP within the governance framework in South Africa.

The **first objective** of the study intended to establish the normative theoretical frameworks and working governance theory for the conceptualisation of the PP, as a genus of the Ombudsman, with a view to contribute to the interdisciplinary science of Governance and Political Transformation in South Africa. This is dealt with mainly in Chapter 2 of the study.

The **second objective** was to locate the status of the PP within the governance framework through the analysis of its conception and the macro socio-politico-legal context within which it exists, and to analyse its powers and functions within the constitutional setting in South Africa. Chapter 3 of the study deals with this objective.

The **third objective** was to analyse the crisis of governance in South Africa and its effect on the integrity of the Office of the PP. This provided the political environmental setting within which the PP exists. This is dealt with in Chapter 4 of the study.

The **fourth objective** was to conduct a brief comparative analysis with other Ombudsman institutions in Africa, Europe and Latin America in order to understand

the unique constitutional characteristics of the PP and how it fares in terms of international norms and standards for the institution, based on the following five factors:

- The structure of the Ombudsman Office, constitutional provisions and enabling legislation.
- The powers and functions of Ombudsman Offices will be analysed and compared to those of South Africa.
- The appointment and removal procedures of Ombudsmen will be analysed and compared to those of South Africa.
- The reporting, oversight and accountability of Ombudsmen will be analysed and compared to that of South Africa.
- The independence of Ombudsman Offices will be analysed and compared to that of South Africa.

Similarities, dissimilarities and best practices have been identified, and findings, recommendations and conclusions made accordingly.

1.5 Context of the study

Further, the study focused on the broader political environment within which the PP of South Africa operates. The study concluded that the political environment is characterised by a **crisis of governance** at this stage of the political development of South Africa. These challenges fall within the purview of the PP to investigate, report on, and take remedial action where appropriate. The study evaluated the phenomena of State Capture and Corruption, from the lens of political decay and weak state theories, based on the theories of Huntington (1965), Migdal (1988), and Duvenhage (2003), among others. The reports of Swilling *et al.* (2017), the South African Council of Churches, and the #Guptaemails, among others, were used to analyse the phenomenon of State Capture and Grand Corruption in South Africa.

The study also focused on the effects of these crises of governance on the institutional integrity of the PP. For the theoretical foundation of this aspect, the

researcher relied on the studies of institutionalisation and institutionalism by Huntington (1965), Esman (1967), and Barma, Huybens and Vinuela (2014).

Challenges of the **rule of law** were addressed from different experiences, such as the President al Bashir saga and the political attacks on the judiciary by prominent political actors in the country. Moreover, the challenges of the corporate governance of state-owned enterprises were analysed by studying PP reports, including *When Governance and Ethics Fail* (2013), *Derailed* (2015), and *State of Capture* (2016).

1.6 Research methodology and design

This section provides an explanation of the methodology the study utilised by discussing the research paradigm, research design, research methods and techniques, and aspects of data collection.

- **Research paradigm**

Thomas Kuhn, the father of the paradigm theory, defines 'normal science' as meaning: "Research firmly based upon one or more past scientific achievements, achievements that some particular scientific community acknowledges for a time as supplying the foundation for its further practice". These achievements should be sufficiently *unprecedented* to attract an everlasting group of enthusiasts away from contending approaches of scientific activity and be sufficiently *open-ended* to leave all kinds of problems for the specified group of practitioners (including their students) to resolve; that is, through scientific research. These achievements are called *paradigms* (Kuhn, 1962: 10).

A paradigm is a particular theoretical orientation, founded upon a specific epistemology and research methodology, reflective of a specific scientific community at a particular time. In other words, a paradigm is the worldview that reflects the beliefs and values in a particular scientific community, and guides its action (Schwandt, 2001; Guba and Lincoln, 1994: 105).

Some paradigms may be connected with specific methodologies. For example, a positivistic paradigm normally adopts a quantitative methodology, while a constructivist or interpretive paradigm and critical theory normally adopt a qualitative methodology. However, this is not a rule of thumb, as some research projects may adopt mixed-methodology or one or either methodology in any of

the paradigms. No paradigmatic or theoretical framework is more right or wrong than the other.

For this particular research, the researcher chose to adopt an interpretive paradigm, informed by the theoretical perspectives he has on the subject of research, the literature review he conducted, and his own value system. Interpretive researchers hold the belief that reality comprises of people's subjective familiarity with the external world; hence, they may espouse an inter-subjective epistemological and ontological belief that reality is socially constructed (Willis, 2007), and that understanding the context in which the research is conducted is critical to the interpretation of the collected data (Willis, 2007: 4). Because the researcher surmised that there was no single rigid method of understanding the governance and ombudsman theories, he chose the flexibility of interpretivism, as with this theory there is no single path or method to knowledge (Willis, 1995). As Bevir (2010: 8) argues, while many social scientists think in terms of methods, it may be appropriate to approach governance in terms of the logical form of its argument, rather than the method. Bevir (2010: 8) further states that interpretive social science "appeals to a case or series of cases to illustrate an aspect of the world rather than a systematic evidence of its extent or inner logic". Hence, the researcher's goal with adopting the interpretive approach in this study was to focus attention on an aspect of governance and political transformation in South Africa that has generally been under-researched, namely the status of the PP within the governance framework in the country. This led to new insights into the theoretical and normative framework that informs the functions of the Ombudsman generally, and the status of the PP in particular. The theories of governance and good governance were developed in a manner that aligned them to the constitutional framework in South Africa.

- **Research design**

According to Polit and Hungler (1997), a research design is the overall plan for collecting and analysing data. Burns and Grove (2001) state that research design refers to the researcher's overall plan for obtaining answers to the research problem; it is associated with the structural framework of the study and concerns the planning of the implementation of the study in order to reach the goals set out.

Leedy and Ormond (2001) surmise that research design has to do with the planning and visualisation of data, and the problems associated with the employment of the data in the entire research project. Mouton (2001) states that the research design should address the question of what type of study will be undertaken in order to answer the research problem or question.

Given the nature of this study, a descriptive and analytic research design was used. This research design used facts and available information to evaluate the research problem critically. Using this research design, the study comprehensively answered all the research questions enunciated under the problem statement.

- **Research methods and techniques**

This study adopted qualitative research methods and techniques. According to Berg (2007: 8), a qualitative research approach provides a means to accessing unquantifiable facts and to understand the structure of a particular subject.

Burns and Groove (2000: 388) state that the strength of qualitative research lies in the fact that it can be descriptive or exploratory, and it stresses the importance of context and the subject's frame of reference. In that context, the nature of the study and the type of information required called for the application of multi-faceted qualitative research methods to obtain the research goals.

The qualitative research method used to inform the study was a literature study, by means of library research and internet searches. The use of secondary sources entailed research techniques involving the analysis of pre-recorded documents and historical records; hence, the use of qualitative document analysis (QDA).

- **Qualitative Document Analysis**

The technique of QDA was utilised to skim through, thoroughly examine and interpret data contained in the secondary data consulted. This process involved rigorous content analysis. Bowen (2009: 32) states that QDA is about skimming, reading and interpretation, which is an iterative process that combines elements of content analysis and thematic analysis. Bhattacharjee (2012: 115) describes

content analysis as the systematic analysis of the content of a text. This study preferred the use of QDA as it was considered less time consuming than other methods of data collection as it involves data selection, rather than data collection *per se*.

To this effect, the researcher engaged in document content analysis in order to organise information into categories relevant to the objectives of the research. This process entailed a thoroughgoing document review, in order to gain insights and select relevant information for use in the research process.

The research followed a rigorous, three-stage process for the analysis of qualitative literature, namely:

- (i) In the first stage, the researcher took a broad overview of the raw materials at his disposal, in search of general themes. In QDA studies, this is called open-coding stage, which involves reading through a smaller sample of the available documents, and recording any noticeable patterns in these texts.
- (ii) In the second stage, the researcher conducted axial-coding, which enabled him to review the entire sample of documents, marking specific passages as belonging under the various theme categories identified in the initial phase of open-coding.
- (iii) During the third and final stage, called the selective-coding stage, the researcher combed through the documents in search of miscoded passages and discrepant evidence, which were finally eliminated.

Wesley (2010: 8) suggests that by following this three-stage process, qualitative document analysts are more likely to produce trustworthy and convincing interpretations of their data.

The content analysis process, described above, was followed by thematic analysis. The process involved a careful re-reading and reviewing of the information, in order to organise it into categories or themes pertinent to the phenomena being investigated. Thematic analysis involves the searching across the data set to find the repeated patterns of meaning (Braun and Clarke, 2006:

15). The researcher drew from the six-phase thematic analysis process. This involved familiarising himself with the relevant literature; generating initial codes or organising data into meaningful groups; searching for themes by sorting the different codes into potential themes; reviewing the themes by refining them; defining and naming the themes to present them for analysis and analysing data within them; and finally, using the analysed data to produce the report.

1.7 Scope and delimitation of the study

The scope of this study connects two distinct theories or concepts: Governance Theory and the concept of the Ombudsman. This made the study complex and challenging in that at all times the concepts had to be discussed and analysed in relation to each other. The intention of the study was not to be ground-breaking *per se*, in the sense of being the first to study the role of the PP within the governance framework in South Africa, but only sought to locate the mandate of the PP within the theoretical and normative framework of governance and the conceptual framework of the Ombudsman, as it evolved from Sweden in 1809. The study was conducted within the ever-changing current political context, characterised by the crisis of governance and the controversies affecting the PP. At times, the study may sound like a recitation of current affairs. However, current news was used and analysed only for its empirical value and care was taken that the study remained essentially a theoretical study intended to contribute to the science of Governance.

The study is limited in that access to academic material for comparative studies purposes from French- and Spanish-speaking countries was constrained by language, which meant that the researcher had to rely on a few translated works. The other issue related to the fact that most authors on the concept of Ombudsman write about their own countries; therefore, the researcher occasionally had to rely on a single source to analyse a particular Ombudsman.

1.8 Ethical considerations

Ethical considerations in research refer to the concerns, dilemmas and conflicts that arise while the research is being conducted (Neuman, 2011: 143). Research ethics is important, as it is possible for the scientific enquiry to be abused by the researcher. Scientists should not manipulate their data collection, analysis and interpretation procedures contrary to the principles of science to advance their personal agenda

(Bhattacharjee, 2012: 137). The researcher ensured that in his pursuit of scientific knowledge, no person suffered any harm. Furthermore, he did not manipulate data collection, analysis and interpretation procedures in a manner that violated scientific principles and methods or advanced a personal agenda through the research project.

1.9 Research outline

The research outline is as follows:

Chapter 1: Introduction

This chapter deals with the executive summary, the motivation for the study, the aims and objectives of the study, and the methodology utilised in the study. It further provides the roadmap for the research project, including providing an outline of each chapter.

Chapter 2: Theoretical Perspectives and Conceptualisation

In essence, this chapter is a literature review on Governance and the Ombudsman. The chapter studies the theories of Governance that establish the normative framework for the conception of Ombudsman, as well as establishes Governance Theory as the normative framework for the Public Protector of South Africa. It further deals with the overview and origins of the concept of Ombudsman, as this forms the conceptual basis of what in South Africa came to be known as the Public Protector.

Chapter 3: The Conception of the Public Protector: an overview

In this chapter, the macro socio-politico-legal context within which the PP exists is analysed. The status and powers of the PP are evaluated and analysed within the constitutional and governance framework in South Africa. Questions such as where the institution fits within the *trias politica* and co-operative governance, as well as whether it is an organ of state as defined in the Constitution are critically evaluated and analysed with a view to understand the status of this institution.

Chapter 4: The crisis of governance and its effects on the integrity of the Public Protector in South Africa

This chapter deals with the current political environment within which the PP operates, as well as the characterisation of South Africa as a possible weak state where political decay has encroached. The chapter chronicles the phenomenon of State Capture and Grand Corruption within the political environment. In closing, the chapter analyses the impact of this political environment (a crisis of governance) on the institutional integrity of the PP.

Chapter 5: A Comparative Analysis

This chapter comparatively analyses the Ombudsman institutions in Europe, Latin America and Africa, from the perspective of international sources of Ombudsman normative values, as developed by international bodies such as the United Nations (UN), the International Ombudsman Institute (IOI), and the African Ombudsman and Mediators' Association (AOMA).

Chapter 6: Evaluation

In this chapter, an in-depth evaluation of the study is provided and its contribution to the science of Governance is assessed. This essentially is a review of the previous chapters to present a coherent picture of the study.

Chapter 7: Findings, recommendations and conclusion

This chapter presents a summary of each chapter and the findings of the study, and offers conclusions and recommendations.

CHAPTER 2: THEORETICAL PERSPECTIVES AND CONCEPTUALISATION

2.1 Introduction

The central thesis in this study is that the PP of South Africa is a genus of the concept Ombudsman. The purpose of this study is to locate the political standing and status and powers of the PP within the governance framework in South Africa. Therefore, in this chapter, the researcher sets out to analyse the Governance Theory and define the concepts 'governance framework' and 'Ombudsman', in order to lay the theoretical basis to later in the study address the question of the status and powers of the PP within the governance framework in South Africa.

The researcher begins with an analysis of the Governance Theory as a theoretical framework within which the Ombudsman system has evolved. The Governance Theory evolved from Traditional Public Administration. Hence, the managerial, political and legal approaches to public administration are discussed and analysed, followed by a discussion and analysis of neoliberal reforms, with their two waves being analysed. The first wave of neoliberal reform was based on the notions of marketisation and New Public Management. The second wave of reforms ushered in the era of 'new governance' or 'good governance' or 'democratic governance'. These terms are used interchangeably in this study.

The notion of Good Governance is discussed, analysed and developed as a normative framework for Ombudsman institutions worldwide and the PP in particular. Factors such as the origin of the notion, and the dimensions and principles of Good Governance are discussed and analysed with a view to locate the conceptual relevance of the Ombudsman within this proposed normative framework. The study

also tackles an important aspect of the normative values or ethics for the Ombudsman, relating to the personal characteristics or traits of the Ombudsman.

After dealing with the theoretical and normative frameworks that inform the Ombudsman institution, the study turns to the conceptualisation and conception of the Ombudsman institution itself. The institution has spread all over the world since its Swedish origins in 1809 and has become a key promoter of Good Governance and human rights wherever it exists. The evolution of the system is discussed from its Nordic origins, to its Western versions (Britain, France and Spain), and to its human rights variants of the Eastern European, Latin American and some African states.

2.2 Theoretical perspectives on Governance

From the reading of literature on the subject of this study, the researcher has come to the realisation that the Ombudsman institution functions within the theoretical framework of Governance. Governance theories provide both the context and the content for the spread, growth, acceptance and development of the concept and practice of the Ombudsman.

It is important to understand, at the outset, the concept and theory of Governance, as this provides the context for the conceptualisation and development of the Ombudsman institution. Bevir (2007: xxxv) argues that the word 'governance' provides a language that describes and theorises changes in the world. To provide context, the two theories of public administration that preceded the advent of governance will be analysed, namely Traditional Public Administration and Neoliberal Public Sector Reforms. Thereafter, the concept and theory of Governance will be discussed.

2.2.1 Traditional Public Administration

Traditional Public Administration (TPA) owes its origins to the bureaucratic theories of Marx Weber (1864-1920), founded on the twin principles of hierarchy and meritocracy (Pfiffner, 2004: 1). Its features are centralised control, set rules and guidelines, separation between policy-making (politics) and implementation (bureaucracy), and hierarchical structure (Osborne, 2006: 379). The traditional approach to public administration can be studied from three different perspectives, namely the managerial approach, the political approach and the legal approach;

each arising within a particular political context and emphasising different values (Zia and Khan, 2014: 429).

- **Managerial approach**

The managerial approach to public administration has its theoretical roots in the classical administrative theories of Frederick Taylor's scientific management movement (1912), Henry Fayol's administrative principles (1916), and Max Weber's bureaucratic model (1922). All of these influenced the managerial approach to public administration (in Shafritz and Hyde, 1997: 40).

Mora (2008: 88) mentions that the managerial approach to public administration has its roots in the last decades of the 19th century when certain reform movements completely changed the face of administrative systems. One of the most influential theoretical bases of managerialism came from the works of Woodrow Wilson in the United States of America, who argued for the separation of administration and politics (politics-administration dichotomy), and advocated that the field of administration was a field of business that lied outside the proper scope of politics (Wilson, 1887: 229-230). According to this approach, the object of administrative study was to determine what a government could do properly and effectively, and how a government could appropriately do this with the greatest conceivable efficiency and cost-effectiveness, of either money or energy (Wilson, 1887: 197). Therefore, in accordance with the managerial approach, public administration should be concerned with ensuring the economy, efficiency and effectiveness of public administration using practices and principles similar to those applicable in the private sector.

The politics-administration dichotomy led to the study of public administration being concerned with organisational and control issues to ensure both the accountability and efficiency of the administrative apparatus. The dichotomy theory, according to Svava (1998: 58), has been of value in signifying the confines of public administration as an intellectual endeavour and for asserting the normative relationship between the public administrators and elected public representatives in a democracy. Hence, it is the researcher's understanding that the politics-administration dichotomy has never suggested a rigid separation of administration and politics. It would be an unrealistic suggestion because public

administration, by its very nature, exists within the political environment. Thus, politics has to be taken into account when studying public services (Le Squeren, 2016: 24). Therefore, the theory of the politics-administration dichotomy only served to demarcate the intertwined roles of administration and politics.

Taylor's (1912) scientific management movement suggested four principles to be followed in order to make an organisation effective and efficient. These are:

- (i) systematic and scientific methods of assessing and managing individual work components;
- (ii) scientific methods of personnel selection;
- (iii) financial rewards to motivate employees for high performance; and
- (iv) the specialisation of functions, for instance, by establishing the rational division of work roles and responsibilities between employees and management (in Shafritz and Hyde, 1997: 3).

Fayol (1916), on the other hand, proposed 14 principles of administration intended to improve organisational efficiency and effectiveness. The principles were "the division of labour, authority, discipline, unity of command, unity of direction, subordination of individual interests to general interests, remuneration, centralisation, hierarchy, order, equity, stability of personnel, initiative and unity of personnel or *esprit de corps*" (Botes *et al.*, 1998: 21).

Likewise, Marx Weber (1922) accentuated formal organisational structures as a prerequisite for organisational efficiency and effectiveness. A Weberian organisational structure (i.e. a bureaucracy) was characterised by a high degree of "specialisation, impersonal relations, the merit system of appointment and hierarchical authority structure" (Botes *et al.*, 1998: 23). This bureaucratic model had a major philosophical impact on the science and practice of public administration until the mid-20th century. However, this theory disregarded the value of individuals and their surroundings to the entire organisational performance. It might be apposite at this stage to list the conditions of Weberian bureaucracy as defined in Weber's *Economy and Society* (1922), and as summarised in Fukuyama (2013: 5):

1. Officers are personally free and subject to authority only with regard to their impersonal official responsibilities;
2. Officers are organised into a well-defined hierarchical structure;
3. Each office has a well-defined scope of “competence in a legal sense”;
4. Officers are engaged by means of freedom of contract and freedom of selection;
5. Officers are appointed on the basis of technical qualifications;
6. Officers are compensated based on fixed salaries in monetary terms, usually with an entitlement to pensions;
7. The office is regarded as the officer’s only or, at the very least, main occupation;
8. The officer’s tenure is a lifelong career;
9. The officer works wholly detached from “ownership of the means of administration and without appropriation of his position”; and
10. Officers are subject to firm discipline and control in the running of the office.

Fukuyama (2013: 5) suggests that conditions 1 to 5 and 9 are probably what are referred to as a “modern bureaucracy” as they evidently delineate such an organisation from the corruptible offices that existed under the “Old Regime” in Europe, or those that exist in today’s “neo-patrimonial developing countries”. However, conditions 6, 7, 8 and 10 may not be compatible with modern governance. For instance, condition 6, which calls for fixed salaries, is not compatible with the incentive packages that are often granted to public servants under NPM. Conditions 7 and 8 are not compatible with the tendency of public officials to engage in remunerative work outside the public service, such as serving on both public and private sector boards, and one could add the phenomenon of fixed-term, performance-based contracts that have become a norm in the public service. Condition 10 is incompatible with the idea of “bureaucratic autonomy” – the idea that bureaucrats, independent of the desires of their political principals, can shape public policy, set goals and define tasks for public administration. Condition 10 treats bureaucrats as robots who simply do the bidding of the political principals. In reality, bureaucrats play a key role in policy-making, including initiating policy.

Later on, the influences of human relations and behavioural scientists, such as Mayo, Maslow, Barnard, Hommans and Likert, came to demonstrate that the environmental contexts of employees, their motivation, leadership, status, communication, conflict and social interactions were also important management aspects that needed consideration (Botes *et al.*, 1998: 25-32). They further influenced theories of managerialism.

Despite the influence of managerialism in the 19th and 20th century, the fact that public administration took place within the political environment meant that the politics-administration dichotomy would be a prominent consideration. That is why the political approach to public administration emerged to challenge the dominance of the managerial approach.

- **Political approach**

From the reading of the literature, it is understood that the political approach to public administration posits that public servants are subordinate to political office-bearers. Wallace (1978: 201) treated public administration as a function of political philosophy in which the public administration is subject to popular regulation by the elected political office-bearers. This flowed from the work of Paul Appleby (in Shafritz and Hyde, 2017: 93) who observed that during the New Deal and World War II administration in the United States was considered part of the political process. His main thesis was that politics in administration was not a negative thing as it served the purpose of checking the administration.

Thus, public administration must be organised in such a way that it reflected the organised political and socio-economic interests of the broader community (Rosenbloom and Kravchuck, 2002: 18). The political reality is one of political supremacy over the public administration. Hence, the political approach to public administration emphasised the representation of public interests by elected officials, and responsiveness and accountability of these elected officials to the citizenry (Rosenbloom and Kravchuck, 2002: 18). The Westminster political system is an example of the political approach to public administration. In this system, the concept of parliamentary supremacy holds sway; hence, as will be seen later, the institution of the Ombudsman in this system is not independent of

the British Parliament. In fact, the Ombudsman in this system is a functionary of the Parliament.

While the managerial approach to public administration originated as a solution to the culture of political patronage in making civil service appointments (Zia and Khan, 2014: 429), the political approach to public administration sought the exact opposite: the ability to control public administration through political appointments. The researcher surmises that the concept of cadre deployment in the South African political environment is a characteristic of the political approach to public administration. As Twala (2014: 159) observes, it has been the policy of the governing ANC to deploy its cadres in strategic positions in public administration. These cadres are controlled by the ANC; hence, they are subject to political control.

- **Legal approach**

The legal approach to public administration, on the other hand, infuses into public administration legal and adjudicatory practices, rooted in Administrative Law, and Judicialisation and Constitutional Law. Administrative Law emphasises law as a foundation of arranging and managing the public agencies (Goodnow, 1905: 16). Judicialisation involves tendencies to adopt processes similar to court processes in the public administration, such as established procedures to protect individual rights, while the Constitutional Law approach emphasises the protection of individual rights and often sees courts decree ongoing relief that requires institutional reforms (Zia and Khan, 2014: 432).

Rosenbloom and Kravchuck (2002: 35) indicate that the legal approach to public administration embodies three principles, namely *due process*, that is procedural fairness designed to protect the citizens against arbitrary, malicious or capricious action by public administrators, which may cause unconstitutional or unlawful harm against anyone; *respect for an individual's substantive rights* as embodied in the constitution or laws of the country; and *equity*, encompassing the value of fairness between the government and private parties. Hence, rights and duties in public administration are subject to the principles of procedural and substantive fairness, or administrative justice. The provisions for the review of administrative

action by the courts of law or other impartial and independent tribunals are elements of the legal approach to public administration.

The notion of non-majoritarianism, an aspect of the theory of constitutionalism, resonates with the constitutional approach to public administration. Theorists, such as Majone (2001: 57-58), advocate for non-majoritarian institutions to protect crucial policy areas, such as banking and budgeting, from majority rule principles. Others, such as Bevir (2010: 106), disagree with this blatant undermining of democracy. But they see value in restricting majority rule in areas such as human rights and the protection of minority rights.

The wider definition of the constitution is that it is a body of rules, whether written or unwritten, legal or extra-legal, which describes the government and its operations. However, the other definition is one that states that the idea of a constitution is the instrument that seeks not only to define, but also to confine, the role of government in society. This means, for instance, devising mechanisms to limit the authority of government through checks and balances. The proscription of government authority in this manner is called constitutionalism (Wormuth, 1949: 1). Therefore, constitutionalism enables the legal approach to public administration. The theory of constitutionalism is discussed further in Chapter 3, which deals with the status of the PP.

A possible negative aspect to the legal approach is that it could lead to the over-regulation of public administration, rather than to administrative simplification. Many times, following strict legal rules to enforce the efficiency of public administration, it may lead to malicious compliance rather than substantive service delivery. Instead of being legally enabled by the legal approach, public administration could become too legalistic and compliance-driven. This could undermine the effectiveness and efficiency of public administration, as public administrators need to negotiate excessive red tape to make an effective decision. In this regard, the Organisation for Economic Co-operation and Development (OECD) indicated that “Administrative burdens refer to regulatory costs in the form of asking for permits, filling out forms, and reporting and notification requirements for the government”, which lead to compliance burdens (OECD, 2009: 6).

Irrespective of the approach, it is clear that public administration is a powerful institution. Lord Acton once observed, “Power tends to corrupt and absolute power corrupts absolutely. Great men are almost always bad men, even when they exercise influence and not authority; still more when you super add the tendency of the certainty of corruption by authority” (Acton Institute, 2017). Because of this realisation, there was a need for *corps intermediaires* to mitigate against the abuse of power by public officials.

Public administration had to evolve as the traditional approaches were becoming moribund in addressing the new challenges of the modern and powerful institution of public administration in a rapidly transforming and globalising society. Below is a discussion of the modern theories of governance.

2.2.2 Neoliberal Public Sector Reforms

The term ‘neoliberalism’ has frequently been used in general discussions around the world to describe the economic system in which the free market is made applicable to every aspect of people’s lives – public and private. It involved the transformation of the government from being a provider of social services to an enabler of markets by opening them up for competition. It is concomitant to policies such as removing trade barriers and tariffs. It liberalised the capital movement, and limited the bargaining power of trade unions. Further, it led to the commercialisation of state-owned enterprises and the privatisation of public assets, and generally enabled the dominance of markets (Birch, 2017).

The literature shows that Neoliberal Public Sector Reforms followed two main streams, described as waves of reforms by authors such as Mark Bevir (2010):

- **The first wave of reforms: marketisation and New Public Management**

Bevir (2010: 69) points out that Neoliberal Public Sector Reforms arose in a large part from the conviction among academics and policy makers that the “bureaucratic, Keynesian, welfare state” had become untenable. Therefore, they advocated for public sector reforms. These reforms came largely as a result of the neoliberal policies of Margaret Thatcher and Ronald Reagan, who championed these reforms in the 1980s (Harvey, 2005: 22-24).

The first wave of reforms sought to completely remove the state from some public services, expose others to competition, and infuse private sector management techniques in the public sector (Bevir, 2010: 67). Hence, neoliberal reforms have two main strands: **marketisation** and **New Public Management (NPM)**. Marketisation involves the privatisation of public services and the transfer of assets from the state to the private sector. Thereafter, the state plays little or no role in the provision of those services. NPM can be defined as a series of deliberate attempts to reform public sector management in accordance with private sector techniques (Bevir, 2010: 71).

From the early 1980s, the study of Public Administration has been concerned predominantly with the paradigm shift from principles of public administration (the Weberian model) to those of NPM, aimed at reforming the organisation and processes of the public sector in order to make it more competitive and efficient in resource use and service delivery. In this sense, NPM is concerned with the commercialisation, as far as possible, of the state's role in providing services to its citizens, and of the state's relationship with its citizens (Promberger and Rauskala, 2003: 1). Vyas-Doorgapersad (2011: 240) identified the following factors as the common features of NPM as it has found expression mostly in Africa and other developing countries:

- (i) Decentralisation, which involves the disaggregation, rationalisation, deconcentration, delegation, devolution or privatisation of public services;
- (ii) Contracting out or outsourcing, which involves contracting, subcontracting, or outsourcing non-core business (such as cleaning or security services) to untie scarce resources needed for providing core services;
- (iii) Performance contracting: This is a service delivery model through which government enters into a service level agreement or similar negotiated instrument with state-owned enterprises or other public agencies for the delivery of specified public services, with measurable targets set and monitored as agreed.
- (iv) Corporatisation, which is the conversion of public service departments into independent agencies or enterprises, either as autonomous components of the public service or completely free-standing from it. These freestanding corporatised entities are allowed to increase wages, dismiss poor

performers while employing a suitably qualified workforce, offer performance bonuses for high performers, and raise own-revenue for their operations.

Linked to these reforms is the warning by Manzetti (2009: 23) that neoliberal reforms come with so-called transaction costs, which end up undermining the reform process along the following channels:

- **Corruption** – this happens in the form of the manipulation of reforms by public officials to use the proceeds from privatisation and deregulation for private gain, instead of the intended public purpose.
- **Crony capitalism** – instead of fostering market competition, public officials craft economic policies to reallocate rents from the state to the private sector; thus, depriving reforms of their potential for sustaining long-term growth.
- **Political patronage** – public officials circumvent fiscal austerity agreements contracted with international lending agencies by borrowing massively in the international bond market to secure support from political clienteles.

Manzetti's thesis (2009: 23) is that if reforms happen within the democratic polity, but where institutions of accountability are weak, then vices such as corruption, cronyism and patronage will thrive. Conversely, where institutions of accountability such as ombudsmen, independent prosecution authorities and specialised agencies exist, there will be fewer of these vices.

It is in this context that *corps intermediaires*, such as Ombudsmen, should be independent and insulated from political interference. They must be protected from being subverted or repurposed for nefarious agendas.

However, NPM's wave of reforms was not always successful and, in many countries, governance remains untransformed along its prescripts. Bureaucratic hierarchies still perform most government functions in most states and in most local, regional and international bodies (Bevir, 2010: 69).

It must be noted that developing and transitional states adopted these reforms under pressure from multinational corporations, other states, and international organisations mainly because donor funding was conditional to these reforms (Bevir, 2010: 67, 69-70). Some of these reforms failed to materialise because they were not adequately internalised and institutionalised, or they were unsuited to the environments in which they were introduced. That is why there was a necessity for a second wave of reforms, which will be discussed next.

- **The second wave of reforms: New Governance or Good Governance**

The new managerial reforms discussed above gave way to a second wave of reforms focused on institutional arrangements (especially networks and partnerships) and administrative values (including public service and social inclusion). This second wave of reforms included a number of overlapping trends that are brought together under the label of new governance or simply the governance approach (Bevir, 2010: 75).

Below is a summary of the concepts and theories of governance, from traditional public administration to new governance:

Table 1: Summary of Governance Theories and Practices

THEORY	Traditional Public Administration	Neo-liberal Public Sector Reforms	New Governance
Historical period	19 th to early 20 th century	1980s onwards	Early 2000s and current period
Guiding principles	Bureaucracy; hierarchy; formalism; legality; rationalisation	Efficiency; effectiveness, economic use of resources	Participation; transparency; responsiveness; efficiency; accountability; equity; etc.
Function of the state	Strong state: government	Minimal state: corporatisation; commercialisation;	Collaborative state: policy networks; metagovernance;

	decides	privatisation	participatory governance
Scope of public administration	Large administration; direct provider of public services	Lean administration; outsourced, contracted-out and/or privatised services	Lean administration, but directing public service delivery networks
Politics-administration dichotomy	Apolitical, professional public administration. Administration ran like a business (i.e. Wilsonian Public Administration); no political interference in administration	Neutral, apolitical management	Delegation, coordination and participation
Organisation of public administration	Efficient bureaucracy, with clear hierarchical lines of responsibility	New managerialism – management has more power in public administration and a business approach to public management	Collaborative governance, network governance and metagovernance – emphasis on the ‘steering’ role of the state
Status of recipients of public services	Beneficiary is a citizen, with clear rights and responsibilities	Beneficiary is a customer, consumer, user or client	Beneficiary is a citizen and participant in decision-making

Status of public servants	Bureaucrat	Service provider	Serves public interest, mediates private interests
Orientation of public law	Human rights protection; strict procedural law; courts adjudicate administrative disputes	Protection of fundamental rights; deregulated dispute resolution; administrative tribunals; ombudsman institutions - focusing on maladministration	Protection of fundamental rights; alternative dispute resolution; ombudsman institutions – expanded mandate to include human rights protection, administrative justice and social justice

Source: Researcher's own summary

In this study, the concept of New Governance has the same theoretical underpinnings as the concepts of democratic governance and good governance; hence, they are used interchangeably. The discussion of the concept of governance and good governance that follows is considered in this sense.

2.3 Governance: a conceptualisation and definitions

There is no universal definition of the concept of governance. Even though some definitions are so broad as to complicate it, others are too narrow to fit the particular interests (Hough, 2013: 31). The World Bank, for example, defines governance as follows: "...the exercise of political authority and the use of institutional resources to manage society's problems and affairs" (World Bank, 1992: 1; World Bank, 1994: vii). The United Nations Development Programme (1997: 1) similarly defines the concept as, "...the exercise of economic, political and administrative authority to manage a country's affairs at all levels". Similarly, the OECD (2007) defines governance as, "...the exercise of political, economic and administrative authority necessary to manage a nation's affairs". Moreover, the United Nations Economic and Social Commission for Asia and the Pacific (2009: 1) defines governance as, "...the process of decision-making and the process by which decisions are implemented". The IMF

(2017: 1), in turn, defines governance as, "...a broad concept covering all aspects of how a country is governed, including its economic policies, regulatory framework, and adherence to rule of law". The European Ombudsman has traditionally defined good governance to include respect for human rights, the rule of law and principles of good administration (European Ombudsman, 2005:9). This is a predominantly normative view of the concept of governance.

Asaduzzaman (2016: 4) reiterates the analysis of Bratton and Rothchild, which identified five interpretations of governance, namely:

- Governance is a conceptual approach that frames a comparative analysis of macropolitics.
- Governance concerns big questions of a "constitutional" nature that establish the rules of political conduct.
- Governance involves the creative intervention of political actors to change structures.
- Governance emphasises the interaction between state and social actors.
- Governance refers to a particular type of relationships among political actors; that is, those who are socially sanctioned rather than arbitrary.

As a concept, governance finds application in all manner of collective endeavours, and it is more about the strategic direction and roles of stakeholders in a society. Hence, it is not only about "where to go", but it also involves the issue of "who should be involved in deciding" the direction and "in which capacity" (Asaduzzaman, 2016: 4-5). In this regard, Asaduzzaman (2016: 5) identifies five areas in which the concept of governance finds relevance and application, namely:

- **Global governance**, which deals with global issues that are outside the control of national governments.
- **National governance**, which deals with governance within a country, and that includes all levels of government control: at national, provincial, traditional and local level.

- **Organisational governance**, which deals with the activities of organisations that are typically governed by a board of directors; for example, business corporations and state-owned entities.
- **Service governance**, which reflects the coordination of frontline service providers, comprising the private, public and non-profit sector.
- **Community governance**, which involves the informal organisation and coordination of stakeholders in a locality, rather than a formal and legal form such as a board or entity.

The discussion of the multiple uses and application of the concept of governance thus far indicates that governance as a concept and practice has become ubiquitous (Bevir, 2011: 1). It is used in various senses as corporate governance, international governance, national governance or local governance, policy networks, public management, and public-private partnership (Katsamunskaja, 2016: 134). That is why some scholars have argued that there is little analytic utility in using governance as a concept in the social sciences (Gibson, n.d.: 1). However, others argue that the ambiguity of the concept is one of the reasons for its ubiquity, as it is flexible enough to be shaped to the intellectual preference of an individual researcher, which at times obfuscates its meaning while at the same time enhancing it (Peter, 2011: 20).

Some scholars, such as Levi-Faur, describe governance as an interdisciplinary research agenda on the order, efficiency and legitimacy of control that allows for the production of a fragmented and multidimensional order within the state, without the state, and beyond the state (Levi-Faur, 2011: 4). He further suggests that governance can be described in terms of its structure, process, mechanism and strategy:

As a structure, governance signifies the architecture of formal and informal institutions; as a process it signifies the dynamics and steering functions involved in a lengthy never-ending process of policy-making; as a mechanism it signifies institutional procedures of decision making, of compliance and of control (or instruments); finally, as a strategy it signifies the actor's efforts to govern and manipulate the design of institutions and mechanisms in order to shape choice and preferences (Levi-Faur, 2012: 8).

Lynn (2011: 50) points out that there are two divergent views in efforts to redefine governance. One view groups the government and the non-profit sector together, albeit not dominant participants in new governance. Lynn (2011: 50) calls this “governance within government”. The other view has new governance as the provision of societal direction primarily by non-governmental actors, with governance centred in civil society. The former entails adaptation, and the latter entails transformation.

Rhodes (2011: 34) suggests that governance signifies a change in the meaning of government, entailing new processes of governing or changed conditions of ordered rule, and new methods by which society is governed. Rhodes (2011: 34) makes a distinction between “governance in public administration and policy, governance in international relations, governance in comparative politics and good governance”. Rhodes (2011: 34-45; Bevir and Rhodes, 2016: 2-10) further differentiates between the three waves of governance, namely “network governance, metagovernance and decentred or interpretive governance”. These waves are briefly explained below:

- **Network governance**

The network theory of governance posits that governance involves a plurality of actors engaging in networks that cut across the organisational and conceptual divides by which the modern state has been understood through the distinction between state and civil society, and the distinction between public and private sectors (Katsamunskaja, 2016: 135). In this sense, policy network theory is “critical, analytical and emancipatory” (Enroth, 2011: 19).

Network governance follows the public sector reforms of the 1980s and is based on the neo-liberal notion that government has shifted from a hierarchic bureaucracy to greater use of markets and quasi-markets in the delivery of public services (Rhodes, 2011: 34; Bevir and Rhodes, 2016). In this sense, it can take the form of policy networks centred on a major government institution or department, and it either may emerge progressively or be actively sponsored by public officials and political office-bearers. Either way, it then metamorphoses into a specific institutional form for managing public affairs (Klijn and Koppenjan, 2016: 249).

The theory of network governance assumes the movement away from *government* to *governance* (Katsamunskaja, 2016: 135). The concept 'government' denotes the exercise of formal legitimate power with definite policy drivers, such as executive, legislative and judicial authority, imbued with the coercive powers of enforcement. Some governance theorists assert that various challenges, reforms and trends during the 20th century have both complicated and disrupted this conception of government within sovereign states (Klijn and Koppenjan, 2016: 22). Consequently, there was a need for alternative analytical models of governance, in which a conglomerate of public and private actors collaborate to govern society, within the constraints of the complex processes that emerged. Hence, networks are an essential response to the myriad of challenges that confront modern states, due to the changed socio-political conditions at play (Klijn and Koppenjan, 2016: 21).

The review of literature indicates that network governance essentially contributes in three ways to governance; namely, the informality of relations and predictability regarding the new legislative direction (Héritier and Lehmkuhl, 2010: 133); consensus-orientation and deliberative participation (Ansell and Gash, 2008: 544); and the advantages of the pooling of resources and shared interests in public policy and delivery (Pierre and Peters, 2000: 25).

Network governance, like any theory, is not without its weaknesses and critics. Some theorists have observed that networks cannot entirely replace or complement traditional democratic institutions. It is highly likely that a network will not be as inclusive of all potential voices, either at its point of creation or during its continuance; therefore, in this instance, the principles of due deliberation, representation and inclusion are diminished. Networks, mainly because some of their components are unelected, are therefore inherently unaccountable, and may be difficult to subject to public and/or judicial scrutiny. In short, because network governance repositions public engagements and deliberations into closed settings of networks of close-knit stakeholders, those who are excluded and citizens affected thereby may have little or no opportunity to review the decisions and decision-making processes of the network (Fung, 2006: 70; Weale, 2011: 75; Hazenberg, 2013: 7). Hence, the

need to bring all pertinent stakeholders into the network brings with it ethical and political considerations upon those who “initiate, design, and facilitate networks” (Johnston *et al.*, 2010: 2). It is for this reason that the designers and convenors of networks are burdened with a moral duty to include as many affected stakeholders as possible in order to protect the democratic ingredient of governance processes. As Johnston *et al.* (2010: 2) advise, “If a collaborative process is seen as excluding relevant stakeholders, it may be viewed as illegitimate, a conclusion that will threaten its political viability”.

- **Metagovernance**

The main preoccupation of the metagovernance theory is to address the potential pitfalls of network governance, especially the identified democratic deficit of networks. The essential claim is that principal government actors need to learn how to govern network arrangements; thus, enabling them to deliver public services to the broader community. That is why some authors refer to metagovernance as “the art of governing interactive governance” (Torfing *et al.*, 2012: 122). It is further suggested that metagovernance “poses a significant challenge to government at all levels, especially those employing a top-down style based on sovereignty and imposition; they must now learn the art of governing interactive processes at a certain distance and through more or less indirect measures that aim to respect the relative autonomy of the interactive policy arena” (Torfing and Triantafillou, 2013: 10).

Although metagovernance is critical towards some of the features of networks, it is not inimical towards them. In fact, it regards them as both necessary and desirable because of their flexibility and ability to link up the actors affected; thus, it holds the potential to improve public policy. In this sense, metagovernance is a theoretical approach that appreciates networks, but seeks to overcome the various problems associated with it (Larsson, 2005: 50).

According to Rhodes (2011: 37) and Bevir and Rhodes (2016: 2-4), metagovernance refers to the coordinating role of government in steering governance through its use of negotiation, diplomacy, and more informal ways of steering. The state steers or coordinates other organisations, governments

and networks to implement public policy as opposed to directly implementing policy through state machinery, or rowing, as it were. In other words, metagovernance retains the primacy of traditional government actors at the helm of governance. This is because networks often fail to endure and sustain processes that contribute to serving the public. Hence, Sorensen and Torfing (2009: 15) note, “The recognition of the possibility of governance network failure calls for a systematic analysis with regard to the formation of well-functioning governance networks that contribute to societal problem solving”.

Metagovernance is therefore about the *governance of governance*, in the sense that networks or other forms of governance do not just emerge but are processes of choice making, understanding, and management (Torfing *et al.*, 2012: 130). This view contradicts the position that networks are self-regulating and mistrusts network governance’s view that stakeholders will spontaneously collaborate in the network arrangements (Larsson, 2005: 51).

The critics of the metagovernance theory doubt the efficacy of the thinking that networks can be metagoverned from the outside, mainly due to their self-regulating nature, and argue that any arrangement of metagovernance must emerge within the network itself as it develops its own internal norms and principles (Kooiman and Jentoft, 2009). However, as Sorensen and Torfing (2009: 5) argue, the idea is to strengthen the democratic quality of governance networks by relinking them to the elected representatives and public authorities.

- **Decentred or Interpretive governance**

Decentred or Interpretive governance shifts the focus from institutions to meanings in action. It explains shifting patterns of governance by focusing on the actors’ own interpretations based on their cultural beliefs and practices (Rhodes, 2011: 39; Bevir and Rhodes, 2016: 4). This wave recognises that people act in accordance with their own beliefs and values, which inform their interaction with governance.

While network governance diminishes the hierarchical levels and ensures institutional norms of self-regulation within the networks, metagovernance

seeks to restore the government's central control of the networks, through institutional arrangements that place government actors at the helm of governance networks. Interpretive governance, on the other hand, is not an institutional arrangement. It is a narrative on how governance arises from the competing and conflicting ideas, beliefs, traditions, dilemmas and practices of varied people. It replaces social constructs, such as the state, institution, power and governance, among others, with narratives that link them to the beliefs and practices of the various individual actors. In this sense, governance arises from the actions of the varied actors informed by their unique set of beliefs and practices. An interpretive governance is one that seeks to bring people back into governance (Rhodes, 2011: 43-44).

According to Turnbull (2016: 380-391), interpretive governance research has exposed the position of meaning and culture in governance. From the perspective of interpretive theorists, governance is an "intersubjective" world comprising many diverse actors, meanings and influences. Governance is both a practical and interpretive process in which individual and institutional actors make sense of their surroundings and respond, as they perceive it; hence, they interpret their world, not through institutional lenses, but through a contextualised meaning. Therefore, understanding governance entails understanding what it means for the political participants and how deliberative engagements take place.

Institutional theory of governance

From a governance perspective, the concept of an institution encompasses numerous essentials: formal and informal conventions of conduct; processes of enforcing these conventions; procedures for the mediating of conflicts arising from these conventions; sanctions for breach of the rules; and organisations supporting market dealings (World Trade Organisation, 2004: 146). Institutions act in various ways to drive good governance, namely:

- They reduce the information gaps as they properly channel information; that is, in relation to market factors, goods and actors;

- They reduce risk; that is, by defining and enforcing rights and contracts, and creating certainty in the system; and
- They restrain the activities of political actors and other social actors, thereby rendering them accountable to the public (World Trade Organisation, 2004: 176). Thus, institutions play an important role in steering governance.

March and Olsen (2005: 4) define an institution as follows:

...a relatively enduring collection of rules and organized practices, embedded in structures of meaning and resources that are relatively invariant in the face of turnover of individuals and relatively resilient to the idiosyncratic preferences and expectations of individuals and changing external circumstances.

Institutions comprise of all formally formulated rules of society, such as the legal, economic and political systems in place, and the informal rules such as the social norms, values and conventions that shape society (Mira and Hammadache, 2017: 4). In this sense, even decentred or interpretive governance constitutes institutions because it is about the norms, ideas and cultures that influence the direction of governance (Bevir and Rhodes, 2016: 4). Hence, March and Olsen (2005: 4) suggested that within the institutional perspective there are rules, practices and codes prescribing appropriate behaviour for certain actors in specific situations, and there are sets of meanings, entrenched in common identities and a sense of belonging that give direction and meaning to behaviour, and serve to explain, justify and legitimise codes of conduct.

Kaufmann, Kraay and Zoido-Lobaton (2000: 10) define governance “as the traditions and institutions that determine how authority is exercised in a particular country”. This entails the election processes to select governments, and how they are made to account for their actions, how their performance or actions are monitored and substituted; governments’ capabilities to manage resources efficiently, and design, execute and apply policies and regulations that are sound; and the respect of economic and social governance institutions by the state and the citizens. Good governance is the set of state capacity and institutional reforms implemented by the state to advance coordination, the effective delivery of public goods and services, and the accountability of all political participants and citizens in steering the

development of public policies. In this sense, good governance is a means of connecting suitable institutions and practices to drive development (Mira and Hammadache, 2017: 4). These two definitions emphasise the institutional theory of governance as they both refer to governance as the “the traditions and institutions”, and good governance as the set of “state capacity” and “institutional reforms”.

In this regard, United Nations Department Economic and Social Affairs (UNDESA) (2016: 141) has advised that effective governance structures should be in place for the effective implementation of development policy. Hence, for effective governance to take place, institutional features such as accountable leadership, coherent policy coordination, decentralised service delivery arrangements, and partnerships with the non-governmental sector should be in place (UNDESA, 2016: 143-150). A similar argument is made with regard to economic successes arising out of institutional stability. Observing the economic successes of East Asian countries, Ahmad and Hall (2012: 4-5) stated that institutional features, such as strong political institutions and the protection of property rights and bureaucratic efficiency, contributed to the economic growth of the region. However, ascribing economic growth to governance indicators is a contested terrain as several authors dispute the link between good governance and economic growth, or record criticism thereof (see Grindle, 2004; Hazenberg, 2013; Pere, 2015). On the other hand, the aforementioned institutional characteristics of East Asian countries could result in bad governance in that legal enforcement could be compromised due to a relationship-based system (the lack of the rule of law); institutional and macroeconomic inflexibility due to an autocratic government; and the lack of transparency and accountability, which threatens property rights and institutional efficiency in the long run (Ahmad and Hall, 2012: 5).

From the new institutionalism perspective, although the importance of the social context of individual actors cannot be denied, the new institutionalism emphasises a more autonomous role for political institutions. For instance, new institutionalism insists that the state affects the society inasmuch as it is affected by it, and that democratic governance does not only depend on economic and social circumstances but also on the framing of political institutions – the administrative agency, the legislative body, and the courts are all the arenas for competing social forces and avenues for structured and procedural rules to propagate and protect interests.

Hence, these institutions are also legitimate political actors (March and Olsen, 1984: 738).

It is clear that new institutionalism emphasises the primacy of political institutions. New institutional governance theory, on the other hand, emphasises the coordination role of the state in governance, through policy networks and the metagovernance of networks (Bevir and Rhodes, 2016).

Generally, governance institutions are designed to respond to complex situations as both the enabler and constrainer of action in order to ensure cooperation (Gabrini, 2010: 210). In the final analysis, governance refers to government's capability to make and impose rules, and to deliver services, regardless of the form of that government (Fukuyama, 2013: 3). This is the essence of the institutional theory of governance.

2.4 Good governance as a normative concept

It is possible to distinguish between bad governance and good governance. Bad governance is the complete antithesis of good governance, and equates to maladministration mandate of ombudsmen, and is generally characterised by the violation of human rights, corruption, cronyism and iniquity, lack of transparency, irresponsiveness, and unaccountability. In order to halt bad governance, academics, researchers and practitioners have motivated for “good governance” in order to achieve the development objectives of society. It is exactly for this reason that this study discusses, through reference to literature, what constitutes good governance, and submits it as the normative function of the Ombudsman.

The normative approach is essentially about the discovery or application of moral notions in the study of politics. It represents theories about “what ought to be” as opposed to “what is” in political systems (Orji, 2009: 11).

Good governance as a concept has come into regular use in political science, public administration and development management. Usually it is used in conjunction with concepts such as democracy, the rule of law, civil society, human rights and sustainable development. It is closely associated with public sector reform (UNESCO–CI, 2005).

The dimensions of good governance

According to Iftimoaei (2015: 311), the concept 'good governance' can be described either by its normative dimension or descriptive dimension.

Normative dimension

The normative dimension of good governance refers to the principles, norms and values that characterise the concept. Iftimoaei (2015: 311) indicates that the key normative principles of good governance arise from the international donor community and its institutions as represented by the World Bank, the International Monetary Fund, the United Nations Development Programme, the Organisation for Economic Co-operation and Development and the public sector, as represented by government and its branches. The arguments against the normative dimension of governance are discussed in paragraph 2.5 below.

Caluser and Salagean (2007: 12), in their report titled *Governance in Multiethnic Communities*, define good governance as a "normative conception of the values according to which the act of governance is realized, and the method by which groups of social actors interact in a certain social context". It is argued that its lack of a universal definition is compensated for by the broad acceptance of principles that characterise it, such as public participation, the rule of law, transparency and openness, accountability, and effectiveness. These principles are generally accepted by the international donor community as contributing to sustainable development (Caluser and Salagean, 2007).

Although there are strong arguments against using the governance concept in a normative sense, mainly due to its conceptual vagueness and its strong focus on economic outcomes (Grindle, 2010; Hardt, 2012), Hazenberg (2013: 39) argues that there is a case to make for normative good governance, in order to understand the 'good' in good governance. Hazenberg (2013) argues that despite its elasticity and discourse as to its meaning, good governance has become an authoritative concept within the international donor community; therefore, even if it is viewed purely from a semantic perspective, it is a normative statement on the ways of the exercise and execution of power. Hence, "Good refers to a statement not only about the quality of exercise or execution from a practical standpoint: is it effective, efficient, accountable and so forth, but also on why these aims and the means to its achievement are

normatively good in relation to the exercise or execution of power” (Hazenberg, 2013: 39). Without this normative basis, good governance is only good for persuasion, rhetoric and political polemics, but less useful as the legitimate and justifiable tool for evaluating government outcomes (Hazenberg, 2013: 39).

Descriptive dimension

The descriptive dimension of good governance, on the other hand, refers to the different forms of policies and regulations that are not implemented exclusively by the government, but also through networks operating at supranational, national, regional, and local levels. It includes the practical implementation of the key principles of good governance (Iftimoaei, 2015: 313). The descriptive approach to good governance combines two variables, namely the type of action areas, such as security, political-administrative, social and economic areas, and the type of intervention, which could be supranational, national, regional or local intervention. The descriptive dimension can also be looked at in terms of gathering all the practical applications of good governance, such as the criterion, objective, instrument, dialogue, capacity building, institutional building and sanctions (Iftimoaei, 2015: 313). For example, good governance previously has been used as a criterion for development assistance and as a means of dialogue between donor communities and developing countries. It has also been used to sanction aid-receiving countries for non-compliance with conditions, through stopping or reducing aid by the donor community (Iftimoaei, 2015).

Therefore, there is international consensus that good governance has become an essential prerequisite for development cooperation and human development by both partner countries and donor agencies. This international consensus includes that the basic components of good governance are effective institutions and processes; the protection of human rights and democratisation; conflict prevention; civil society participation; combating corruption; and socio-economic development (Walter *et al.*, 2011: 4). Bang and Esmerk (2013: 1-2) argue that the notion of good governance does not refer to a scientific theory of governance, but it refers to an empirical politico-administrative mechanism of public policy-making and implementation. Clearly, this is linked to the descriptive dimension of good governance.

Bevir (2011: 26) makes the point that the origin of the notion of good governance was the concerns by economists that market reforms were dependent on the availability of appropriate political institutions. Therefore, this notion initially developed, not from the normative values of democratic government, but it impinged on economic efficiency and the effectiveness of aid in developing countries. Donor and lending organisations, such as the International Monetary Fund (IMF) and the World Bank, used good governance as one of the conditions for aid and loans. The World Bank, for instance, also associated good governance with the notion of New Public Management; hence, it focussed on public sector reforms in the developing world, which included privatisation, opening up markets, staff reduction, fiscal discipline, and outsourcing. The United Nations emphasised aspects of social goals, such as inclusiveness, justice and environmental protection (Bevir, 2011: 26).

Rothstein (2011: 144) echoes these sentiments when he posits that good governance is a recent concept, frequently used since the 1990s, especially linked to agencies supporting a development agenda in developing countries. An example of this is the IMF's position that good governance in all its aspects, including factors such as the rule of law, improving the efficiency and accountability of the public sector, and tackling corruption, are some of the essential elements within which national economies can prosper. Rothstein (2011: 144) further argues that good governance is a concern if a society is in possession of the political, legal and administrative institutions that can enable it to enact and implement policies that can be defined broadly as public goods.

Public goods are numerous and wide-ranging. They include sanitation, social development, protection of the environment, the rule of law and the protection of property rights. In this regard, good governance is associated with concepts such as the quality of government, state capacity, pooling resources, and coordinating the intersection of government with the private sector. While government alone can produce good governance, it is usually the function of collaboration with the private and non-governmental sectors (Rothstein, 2011: 144-145).

2.4.1 Principles of good governance

The international donor community has largely adopted the principles of good governance, as enunciated by the United Nations Development Programme (1997:

14-15) and the United Nations ESCAP (2009: 2). These normative principles are the following:

- **Public participation**

Public participation is an important aspect of good governance and democracy. It goes beyond participation in periodical elections, but has to do with regular citizen involvement in policy-making and decision-making. Indeed, measuring democracy only on electoral terms can be inadequate. Political observers, such as Karl (1986: 34), have described some elected governments as representing “the fallacy of electoralism”; they are simply “electoral regimes”. In other words, they suffer from a democratic deficit in that citizens’ participation in their governance is limited solely to participation during elections. Beyond that, people lack mechanisms to engage in the political life of their polity.

The modern conceptualisation of democracy, argues Diamandouros (2006), is characterised by “a pluralist logic whose overriding preoccupation is the search for optimal balance between institutions alternatively expressive of egalitarian and libertarian principles”. Such an overarching balance relies on the creation of a dense network of institutional checks and balances that are congruent with the mediated structures of power. In this sense, democracy means regular citizen participation in the political life of society, including through *corps intermediaires*. The Ombudsman and other human rights institutions signify these mediators in democratic societies.

However, some political and legal theorists have warned about the development of the so-called counter-majoritarian difficulty posed by the use of *corps intermediaires* in society. A counter-majoritarianism dilemma occurs when the decision of the elected majority is upstaged or set aside by an unelected judiciary (Daniels and Brickhill, 2006: 377). Bickel (1986: 16-17) captured this dilemma as follows:

...when the Supreme Court declares unconstitutional a legislative act... it thwarts the will of representatives of the actual people of the here and now; it exercises control, not on behalf of the prevailing majority, but against it.

An Ombudsman may have a similar effect on public policy and decision-making. As Abraham (2008: 50) points out...

In order to remedy any mischief that is revealed by the investigation, an ombudsman will generally have at his or her disposal a range of devices that will not merely provide for justice between the individual parties to the dispute but, crucially, that will also facilitate systemic change.

Consensus orientation

Consensus-oriented governance or collaborative governance has been defined by Ansell (2008: 544) as:

A governing arrangement where one or more public agencies directly engage non-state stakeholders in a collective decision-making process that is formal, consensus-oriented, and deliberative and that aims to make or implement public policy or manage public programs or assets.

This definition identifies six criteria for consensus-oriented or collaborative governance, namely:

- (1) engagement is initiated by the state organ;
- (2) participants include non-state actors;
- (3) participants engage meaningfully in decision-making – they are not merely consulted;
- (4) engagement is formally constituted and meets as a collective organ;
- (5) the engagement structure aims to make decisions through consensus; and
- (6) the focus of engagement is public policy and public management.

Seeking consensus through consultation prior to policy-making or decision-making is important in a democracy. Consultation must be meaningful for it to be effective. According to the Environmental Safeguard Unit (ESG) of the Inter-American Development Bank (IDB), a US-based international financial institution, meaningful consultation with key participants is the cornerstone of well-versed decision-making and good governance (IDB, 2017: 3). It adds value to development and governance in at least six different ways:

- It considers the views of the people to be affected by the envisaged development: this improves programme design and implementation, and therefore avoids or reduces hostile impacts, and enhances benefits;
- It serves as a significant source of the “validation and verification of data” attained from anywhere, and furthermore, “improves the quality of environmental and social impact assessments”;
- It empowers people to grasp their own rights and responsibilities with regard to the development;
- It improves trust and buy-in due to greater transparency, openness and involvement and a sense of ownership, which are important to sustainable development outcomes;
- Usually it is a requirement for the financing of major development and governance projects by international financing institutions and donor communities, and to ensure compliance with environmental and social policy objectives; and
- It is crucial to the integrity and legitimacy of the implementing agents (IDB, 2017: 4-5).

According to Metz (2011: 555), consensus-oriented governance means not excluding and marginalising minorities in decision-making. Metz (2011: 555) equates it with inclusive power sharing and argues that it is related to the moral theory of Ubuntu.

The mediation approach of for example *Le Mediateur* in France could be described as being based on consensus-oriented governance. To this end, the former Mediator of the French Republic, Jean-Paul Delevoye (2009: 4), at the conference of Ombudsmen in Stockholm, said that legal judgments exacerbate disputes, while mediation bridges differences and ensures win-win outcomes.

- **Accountability**

The World Bank Group defines accountability as one of the cornerstones of good governance that ensures that the activities of a government and its public officials are subjected to oversight in order to ensure that its programmes meet their stated objectives and respond to the needs of the communities they are meant to benefit in the first place. As a concept, accountability entails two distinct stages of

answerability and enforcement. Answerability is about the obligation by public officials to provide information about their actions and decisions to the public and institutions of accountability tasked with holding them accountable. Enforceability suggests that the public or oversight body has the authority to sanction the offending public agency or official, and/or remedy the offending decision or action (World Bank Group, n.d.).

In the old governance theory, public officials were accountable mainly to elected public representatives such as parliaments or municipal councils. However, new governance poses a challenge for public accountability as some of the multiplicity of actors (in the scenario of network governance, for instance) are unelected. Thus, the increase in their role in the public sector raises questions about their accountability (Bevir, 2010: 105). Nonmajoritarian theorists, such as Giandomenico Majone (2001), advocated for nonmajoritarian institutions to protect crucial policy areas, such as banking and budgeting, from democracy. Bevir (2010: 106) criticised the nonmajoritarian theory as a euphemism for “undemocratic”, pointing out that the arguments of non-majoritarians were often more about insulating certain policy areas from democratic accountability.

However, even Bevir (2010: 106), who could be described as a radical democrat, indicated that some social policy areas (such as human rights) should be insulated from democratic processes, precisely because no one wanted to give the majority the power to decide to exterminate minority groups, for instance. Therefore, there is a need for non-majoritarian institutions of accountability, such as the Ombudsman.

- **Transparency**

Transparency implies that the decisions taken and implemented have followed all due processes and regulations, and information is freely available to anyone who is affected by it or needs it to pursue their rights. Transparency means that public institutions should be proactive in publicising the information that the public needs to function as an informed citizenry. This could be done through the publication of annual reports and budgets, indicating the plans as to spending, revenue and borrowing. It also means that public institutions must respond promptly and

positively in case of requests for access to information or documents that have not been made public (Diamandouros, 2006a).

Transparency is about access to information. Transparency International defines the right to access to information as a right by law to access key facts and data from the government and public bodies based on the notion that citizens have a right to obtain information held by the state (Transparency International, 2017). This right to access to information is an international right, which is an instrument of the principle of transparency, recognised in Article 19 of the International Covenant on Civil and Political Rights (ICCPR). It provides for the right of everyone to the right to freedom of expression, inclusive of “freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice” (UN, 1966).

In some classical¹ Ombudsman institutions in countries such as Canada, Hungary, Sweden and New Zealand, the Ombudsman is the intermediary body with the power to issue recommendations relating to enforcement of the right to access to information, as part of their transparency mandate (Neuman, 2009: 8). Furthermore, some hybrid² Ombudsman institutions have jurisdiction regarding access to information and privacy. An example is the Ombudsman institutions in Latin America, such as in Panama, Paraguay and Ecuador, which have the jurisdiction to facilitate access to information as part of their human rights mandate (Lavena, 2011: 22). The right to information is an important instrument of social transformation that aims to achieve the objectives of transparency and accountability in democratic governance (Kedia, 2016: 158).

- **Responsiveness**

Responsiveness means services are rendered to the recipients within reasonable timeframes. Good governance is enhanced when public administration is responsive to the needs of the citizens. In this regard, Friedman³ (2009) refers to

¹ Classical Ombudsman’s mandate checks on maladministration and supervises administrative conduct.

² Hybrid Ombudsman’s mandate encompasses the classical check on maladministration, but includes human rights, anti-corruption, executive leadership codes, environmental protection and access to information, among others.

³ <http://faculty.ung.edu/bfriedman/studies/respon.htm>

responsiveness as a practice in which the citizen, treated as a client, is served helpfully and respectfully by public officials. Frontline staff, for instance, should listen to clients who arrive at the front-desk and connect them with the service they need to access. A study by Sjoberg, Mellon and Peixoto (2015: 1) found a correlation between government responsiveness and an increase in future political participation. It demonstrated that the experience of citizens to government responsiveness to the first reported incident submitted encouraged the trend of all future submissions, thereby increasing public participation.

Responsiveness is important and fundamental because it relates to fundamental human rights. All social systems – health, education and cultural, economic and political systems share responsiveness as a goal. For each system to be successful, it must respond to the legitimate expectations of its respondents (Darby, Valentine, Murray and De Silva, 2000: 3; De Silva, 1999). Therefore, responsiveness is about attendance to the legitimate expectations of the community or citizens. Expectations are defined as a person's belief regarding the desired outcome (Thompson and Sunol, 1995: 127).

However, there may be a gap between the person's expectation and the ability of the public institution to fulfil that expectation, which then results in conflict. In this regard, UNDESA (2015: 27) indicates that responsive governance is about responding efficiently and effectively to the real needs of the public, which "entails a resolve to anchor policies, strategies, programmes, activities and resources, taking into account people's expectations, with particular attention paid to local variations and ambitions".

There is a logical relationship between the concepts of responsiveness, accountability and transparency. If the expectations are legitimate and there has been a failure to meet them, then the public institution has been irresponsible. It then must transparently account for the failure to meet the expectations, and come up with redress for this failure. This process involves building a trust relationship between government and citizens. Hence, when governance is regarded as being irresponsible to the needs of the citizens, trust deficit results. This may even result in political and social instability because of a loss of

confidence in the government's performance, and thereby, discontent with public goods and services delivered (UNDESA, 2015: 31-32).

In order to foster responsiveness Ombudsman institutions in various jurisdictions have developed guidelines to assist public agencies and institutions to handle complaints quickly, efficiently and effectively. For instance, the Ombudsman of New Zealand published the *Effective Complaint Handling* guide (Ombudsman of New Zealand, 2012) and the UK Parliamentary Ombudsman published guidelines titled *Principles of Good Complaint Handling* (Parliamentary and Health Service Ombudsman, 2009).

- **Effectiveness and efficiency**

Good governance is served if public officials meet the service needs of the community, at a least cost to the public purse. Moreover, good governance requires public administration to operate effectively and efficiently. These are well-known principles of public administration. Deva (1985: M-94) points that the success of every organisation is measured by its effectiveness and efficiency. Effectiveness is about achieving the results and efficiency is about the difference between the inputs and the output per unit of input (Florina, 2017: 314). As Manzoor (2014: 1) indicates, one imperative of public administration is to provide goods and services to the public without discrimination as to cost and affordability. In other words, the delivery of public services should not only consider the cost-benefit analysis, but should also generally incorporate the essential element of value to citizens. That is why the National Academy of Public Administration (NAPA) in the United States asserts that effectiveness, efficiency, equity and economy are the four essential pillars of public administration (Pearson, 2016), as together they ensure value to the citizen.

Florina (2017: 317) concludes that efficiency and effectiveness are key elements of good governance, which requires that public administration find ways for the optimal use of public resources. In essence, efficiency relates to the quality of public goods and services, while effectiveness relates to the accomplishment of the eventual result. Florina (2017: 317) furthermore suggests the following activities to improve efficiency in the public sector:

- By the simplification of the rules and procedures of doing public administration; that is, the reduction of red tape;
- By reducing the size of bureaucracy;
- By increasing transparency and accountability in public budgetary and fiscal matters;
- By extending the usage of technology and information systems in the development of the processes, in order to improve the efficiency of performance;
- By continuous training and improvement programmes, relevant to the needs of public administration at local level; and
- By directing the efficiency of the public administration towards high levels of satisfaction of social needs, through social security arrangements for vulnerable groups; improving the quality of public goods and services; and ensuring the protection of the environment and the country's heritage.

Ombudsman institutions promote good governance and service delivery by monitoring the effectiveness and efficiency of public policy. This is done through their oversight and the control over public administration (Husain, 2010; OECD, 2018: 3).

- **Equity and inclusivity**

Equity and inclusivity require that the members of society should feel that they have a stake in and do not feel excluded from the mainstream of society. Hence, these concepts require the recognition of and respect for a diversity of factors, such as “race, ethnicity, gender, sexual identity, sexual preference, national origin and heritage, age, religion, ideology, disability and socioeconomic status, as well as the intersections between them” (Emas, 2018). In this sense, the concepts are related to the right of participation in the social, political and economic life of society, including by minorities, women and other marginalised groups. In this regard, the United Nations Human Rights Council study of 2014 indicated that “the right to participate on a basis of equality in public and political life is a central feature of the concept of inclusive democracy” (UN Human Rights Council, 2014: 3).

Equity is about fairness, impartiality and justice (Herrera, 2007: 323) and inclusivity is about a sense of belonging, feeling respected and valued for who you are; and feeling a level of supportive energy and commitment from others (Miller and Katz, 2002: 147). According to Svara and Brunet (2005: 254), the problem of social equity arises whenever there is an exclusion of or discrimination against people based on factors such as race, ethnicity, gender, age, or income. In order to address the social equity problem, they suggest that public administrators should be committed to:

- Procedural fairness, which is about the provision of due process and the protection of the equal rights of everyone, irrespective of their personal status and characteristics;
- Distribution and access, which is about the equal distribution of social benefits. In case this is not possible, greater benefits should be given to the less advantaged in society;
- Quality, which is about ensuring consistency in the quality of public goods and services made available to all groups of people. Acceptable standards of service must be met for all groups of people;
- Outcomes: Public administrators should seek to attain an equal level of outcomes in the socio-economic conditions for all persons and should seek to reduce differentiation in the outcomes for all groups; and
- Inclusivity, which is about guaranteeing everyone a place at the decision-making table, and making affirmative efforts to include all stakeholders and solicit their feedback (Svara and Brunet, 2005: 256-257).

The rule of law

The rule of law is the principle that governance must happen within the letter of law and legality. Where there is the rule of law no person is above the law and the law enforcement agencies should enforce the law without fear, favour or prejudice. According to Diamandouros (2006a), rule of law describes a condition in which all members of society live under the law, and no one is outside or above the law. Under the rule of law, everyone is subject to the ordinary law, and there may not be special arrangements and exceptions. Another dimension of the rule of law is that it follows from Weberian theories that define the constitution of state

as being effected on legal-rational rules, which serves as the legal foundations of the power of state (Shain and Linz, 1995: 10-14).

It has been argued that the evolution of the notion of the rule of law resulted in social and political arrangements in which the relationship between the rulers and the ruled was not direct and immediate, but was rather mediated by structures and institutions endowed with legal recognition and authority to place limits on the ruler and thus prevent the arbitrary exercise of power. This characteristic of the rule of law is fundamentally Montesquian, which in his *Spirit of Laws* he aptly titled *corps intermediaires* (Diamandouros, 2006a). The Ombudsman and other independent institutions of human rights and accountability are the *corps intermediaires*, designed to ensure the rule of law in society. In this regard, the argument made by Salman is cogent:

...the ombudsman institution comes to serve as a complaint-handling institution from aggrieved citizens and supervising the administrative authorities. In this position, there could be no doubt that the ombudsman is an institutional arrangement of the rule of law; it is one of institutional conditions of the rule of law. From the rule of law perspective, complaint handling by the Ombudsman bolsters the notion that government is bound by rules, and that there can be an independent evaluation of whether there has been compliance with the rules (Salman, 2006: 23).

The traditional model of the Ombudsman, as existed in Swedish and Finish law, can be understood as having the rule of law mandate because of its focus on supervising the compliance of government and the courts with the law (Remáč, 2013: 64). These principles can be understood as normative standards of good governance. In this regard, Remáč (2013: 68) makes a case for establishing normative standards of assessment by Ombudsman institutions, whether they are “good administration, proper administration, or good governance”, including the hybridisation of assessment standards, in order to foster democratic governance.

In the South African context, these principles and the rule of law are encapsulated as important values in SA constitutionalism (see sections 195 and 1(c) of the Constitution, 1996).

2.5 Good governance as a global strategic vision

The above principles of good governance represent strategic vision that must be fostered in order to achieve a well-governed and democratic society. This posits that leaders and the public should have a long-term perspective about the social and economic development of a polity. There should also be awareness of the historical, cultural and social intricacies in which that perspective applies (UNDP, 1997).

However, there is no international treaty that binds all nation-states to adopt good governance as a vision. Although good governance is not categorically well defined in international instruments, there are definite signals in numerous international instruments about its place in an international context. For instance, the United Nations' Universal Declaration of Human Rights in Article 21 recognises the significance of public participation in government processes. Article 28 recognises the entitlement of everyone to an international order where the rights and freedoms set out in the Declaration can be fully enjoyed (UN, 1948). Furthermore, the Declaration of the High-level Meeting on the Rule of Law also reaffirmed that "human rights, the rule of law and democracy" (all principles of good governance) "are interlinked and mutually reinforcing and that they belong to the universal and indivisible core values and principles of the United Nations". The document specifically states, "...good governance at the international level is fundamental for strengthening the rule of law..." (UN, 2012).

In fact, the most cited definition of good governance comes from the United Nations, which defines it in terms of eight characteristics. These are public participation, consensus orientation, accountability, transparency, responsiveness, effectiveness and efficiency, equity and inclusivity, and the rule of law. Furthermore, it pursues the minimisation of corruption and the protection of the rights of minorities and vulnerable groups in society to be heard, and it is responsive to sustainable development (UNDP, 1997: 14-15; UNESCAP, 2009).

It is clear from the above that good governance is part of the global strategic vision that the UN promotes. The donor community also sees good governance as a global strategic vision. In this regard, Michel Camdessus (1998), the IMF Managing Director, addressed the UN Economic and Social Council stating the following:

Good governance is important for countries at all stages of development... Our approach is to concentrate on those aspects of good governance that are most closely related to our surveillance over macroeconomic policies – namely, the transparency of government accounts, the effectiveness of public resource management, and the stability and transparency of the economic and regulatory environment for private sector activity.

In this sense, good governance is the global strategic vision. Good governance is certainly the strategic vision of the African Union (AU), which boldly states the following in its Vision 2063:

Africa will be a continent where democratic values, practices, universal principles of human rights, justice and the rule of law are entrenched and capable institutions and transformative leadership are in place at all levels (AU Commission, 2014: 16).

2.6 Arguments against good governance as the normative approach

It must be noted that while the normative approach to good governance is dominant, there are other schools of thought within Governance Studies that are opposed to the normative agenda of good governance. The basic objection to normative good governance is that it consists of a long bucket list of 'good' things that in the end make it impossible to achieve. According to Brinkerhoff and Brinkerhoff (2015: 22), this bucket list consists of, among others:

Delivering quality services with fewer resources to diverse populations of users, partnering effectively with the private and non-profit sectors, responding flexibly and rapidly to shifts in demands and needs, assuring citizens' safety and security, stimulating widespread and equitable economic growth and opportunity, and coping proactively with transnational threats.

Grindle (2016: 17) surmises that the bucket list is added to continually, when she indicates that:

Two decades ago, governments were primarily challenged to be effective, accountable, and transparent, and to demonstrate the rule of law. Currently, the list of recommended qualities of good governance includes many more conditions to be met - equity, participation, inclusiveness, democracy,

widespread service delivery, sound regulation, decentralization, an open trade regime, respect for human rights, gender and racial equality, a good investment climate, sustainable energy use, citizen security, job creation, and a variety of other ends.

The basic premise against normative good governance is that while no one can fault the arguments in favour of good governance, the conditions, capacity, state of readiness and political environments in different settings where good governance has to be implemented are not the same. Normative good governance is problematic as a guide to development, as it calls for a plethora of reforms that touch virtually all aspects of the public sector. The main criticism is that the normative good governance agenda is too long and varied, making it difficult for it to be implemented uniformly as a normative framework (Grindle, 2002; Grindle, 2005, Grindle, 2010; Grindle, 2016; Hardt, 2012; De Vries, 2013).

As a result of these problems inherent within normative good governance, its critics call for something to be done to make good governance manageable, bearable, strategic and more realistic – even for countries that are deprived of basic capacities to implement all the authoritative changes. They therefore propose something more realistic in the form of good enough governance. This means rather than having a plethora of projects to be implemented at the same time in the area of good governance, it is better to have hierarchical and time-bound projects that can serve the role of a catalyst for better governance (Grindle, 2002: 1, 13; Grindle, 2005: 1; Grindle, 2010: 1; Hardt, 2012: 18).

De Vries (2013: 3) has pointed out, citing the aforementioned authors, that the term ‘good governance’ has been grossly abused by ascribing to it too many indicators, which has made it almost impossible to achieve it. Grindle (2004: 539) argues that while most of the agenda of good governance relates to addressing the political, administrative and financial problems affecting governments, many of these governments not only lack the resources to do these “right things”, but also are locked in a conflict of interest between doing “the right things” and doing the “urgently needed things right”. Hence, there is no guarantee that improving good governance in all its facets will effectively address the complex societal and managerial complexities afflicting those governments (De Vries, 2013: 3).

As Hazenberg (2013: 36) indicates, by referring to critics such as Grindle (2004), the theoretical objection to the concept of good governance is based on the “development” that good governance seeks to foster, which is depicted and measured in economic terms and on the basis of the criteria set by the donor institutions, whose aim remains to extend the reach of institutions of markets to facilitate economic growth. The critique is obvious in that it is clear that good governance is often not measured in terms of the human rights and social well-being of citizens, despite the preference of the UN authorities⁴ to depict good governance in human and sustainable development terms.

The practical critique of good governance manifests in two ways: firstly, it is related to contestation about its conceptual vagueness and brevity, especially the indicators that are used to measure it. For instance, the World Bank indicators that are widely used to measure governance effectiveness lack substance; hence, they are open to many different interpretations – that is, it is not clear what *government effectiveness* entails, but it is measured (Hazenberg, 2013: 36-37). Secondly, the causal link between the economic element and other individual elements of good governance are contested. Hazenberg (2013: 37) analyses authors such as Grindle (2004), and indicates that they question the causal relationship between the economic outcomes and other variables of good governance. For instance, at a conceptual level good governance evaluates the outcomes of development, which are depicted in economic terms; thus, they constitute prescriptive measures and policies to foster economic development. Hence, the argument that the components of good governance are not necessarily good in themselves, but are so, only instrumentally. The question asked is, “If good governance is supposed to foster economic growth, why are indicators such as voice and accountability included in the evaluation?”. The critics further note that there is no clarity as to the belief that democratic governance promotes economic development. For instance, Vietnam has experienced long periods of economic growth without any positive development in democratic governance. This view is further supported by the research conducted on the relationship between good governance and economic growth in the Western Balkans⁵, which showed that

⁴ In this regard, see

www.ohchr.org/en/Issues/Development/GoodGovernance/Pages/GoodGovernanceIndex.aspx

⁵ The study focused on Albania, Bosnia and Herzegovina, Croatia, Kosovo, Macedonia, Montenegro and Serbia.

there was no correlation between good governance, which was negative, and economic growth, which was positive (Pere, 2015: 26, 38).

The other school of thought opposed to the normative agenda of good governance is socio-legal studies. The theoretic premise of the socio-legal school is that law and the social setting within which it functions must be studied together. In essence, the argument is made that “it is the society that controls the law and not the reverse” (Cochrane, 1971 in Chhotray and Stoker, 2008: 120). The socio-legal perspective of good governance is completely at odds with the normative approach and suggests that the World Bank-led discourse of normative approach is a “normative fairyland” (Chhotray and Stoker, 2008). In this sense, the objection of the socio-legal school to normative governance is similar to the objections identified by Hazenberg (2013: 36-37) above regarding the economic measures set by the World Bank to influence economic growth. As argued by Benda-Beckmann (1994: 58), economic, political and legal factors in good governance are not conferred equal status with economics, but are in fact subjected to economic considerations.

The criticism of the normative approach, from a socio-legal perspective, is that good governance is premised on the formal legal rules and principles enshrined in legal and policy frameworks, which may be at odds with informal rules governing access to resources and services. Being overly obsessed with the rule of law detracts from the assessment of the ‘rules-in-use’, which do not only show the capabilities of the people in question but also the ways they can employ them to subvert the formal rules of law (Chhotray and Stoker, 2008: 131). This view accords with the views of Foucault (1991: 95) that paid attention to the “strategic and tactical moves, micro-power techniques and the various movements of power below the radar of sovereignty and the law”. It thus rejected the idea of unified state power exercised through an impartial implementation of the law, in which individuals play no role. This social power dynamic, not law, is one that drives governance.

From this perspective, the socio-legal school of governance departs from the analysis of formal laws, rules and regulations, focuses on the role of the individual in society, and analyses how they are enabled or constrained by the law to further their own individual interests (Chhotray and Stoker, 2008: 143). One can see consonance of this view with the interpretive governance theory, which focuses on the traditions

and practices of elites and how these influences the direction of governance in society (Rhodes, 2011: 43-44).

While these arguments against the establishment of good governance as the normative framework are compelling from a developmental agenda and socio-legal perspective, it must be noted that even Grindle (2016: 19) acknowledges that normative good governance represents values that are universal and aspirational, conceding that:

Aspirations are certainly important – for people around the world, the idea that their countries can be richer, more equitable, more secure, and more sustainable; their politics more democratic and more inclusive; their governments more honest, efficient, effective, accountable, and transparent; their public institutions biased toward pursuit of the common good, is understandably appealing.

The concept of good governance is flexible enough to be domesticated to different national, political and legal habitats. That is why many scholars and practitioners of ombudsmanship agree that the main function of an Ombudsman is to promote good governance. Inversely, good governance is the framework that governs the institution of the Ombudsman (Tyndall, 2014).

2.7 The concept of Ombudsman

Now that the theoretical framework within which the institution of an Ombudsman system finds resonance has been analysed and understood, the study turns to a discussion and analysis of the concept of Ombudsman itself. This is done because to understand the institution of the PP in South Africa, the concept of Ombudsman has to be clarified at the outset. Individuals in dispute with the state, at least in democratic states, should have access to various avenues to have their disputes with the state resolved.

The function of the Ombudsman within the framework of democratic governance is to resolve disputes between the state and the people. A traditional dispute resolution mechanism involved the use of the courts, which could be administrative tribunals or specialist courts. But this mechanism has often proved too expensive and inaccessible to many people due to procedural complexities, which necessitated the creation and use of alternative dispute resolution (ADR) mechanisms to resolve

disputes between the state and its subjects. ADR mechanisms are in place in many democratic states and they include the office of the Ombudsman (Reif, 2004: 16).

It has been argued that the distinctive ADR technique of the Ombudsman is not only the use of investigation, but a unique combination of investigation, judgment and recommendation, and sometimes coupled with the use of mediation and negotiation techniques to find a mutually beneficial remedy (Gregory, 2001: 120). This notion of the combination of techniques has been criticised in South Africa. The Deputy Minister of Justice, John Jeffrey, was quoted as having that “the PP is essentially an investigator, prosecutor and judge all rolled into one. That is quite unheard of in our law” (Manyathi-Jele, 2015)

Below is an analysis of the literature on this concept that was consulted for the purpose of this study to conceptualise the idea of the PP.

There is an argument that the concept of the Ombudsman is not too complicated to grasp. A simplified definition of the Ombudsman concept was sourced from Gellhorn (1965: 1156) who said that the Ombudsman means that an aggrieved citizen should be able to present his/her grievance to an influential functionary who is vested with the power to investigate it and determine solutions. Oyewole (2011: 61) simplified it even further, when he opined that the “Ombudsman constitutes the ‘ears’ of the people”. In other words, it is someone who listens to the complaints of the citizenry in order to redress them. However, this is a simplistic view of the Ombudsman. The institution is complex, with its role, powers and functions often misunderstood. The fact that the institution is impacted upon by its political, constitutional and legal settings. Stuhmcke (2012) informs you that it is a complex institution to understand. Its beauty lies in the eyes of the beholder.

The literature shows that the modern institution of the Ombudsman was born in Sweden in 1809. This officer, appointed by parliament, was in charge of controlling government activities, ensuring the correct application of the law, and denouncing all irregularities and negligence by public servants and administrators of justice, as well as investigating citizen’s complaints. Finland established the institution in 1919, followed by Denmark in 1955, which broadened its mandate to include the entire administration, extending to both civilian and military establishments (Mora, 2015: 185). This Danish model, where the Ombudsman was constitutionalised, popularised

the notion of a public sector Ombudsman. This was adopted by many jurisdictions from the 1960s onwards (Reif, 2004: 6). In 1963, Norway followed suit and in 1967, the United Kingdom adopted its own Parliamentary Ombudsman (Kucsko-Stadlmayer, 2008: 1).

The Ombudsman institution spread all over the world since the late 1960s, but before then it was a regional Nordic phenomenon, and the first country outside Scandinavia to establish an Ombudsman institution was New Zealand in 1962 (Remáč, 2014: 3). However, even this Nordic phenomenon was far from being homogenous. Swedish and Finnish Ombudsmen controlled the entire administrative branch and were vested with the power to arraign judges and civil servants, while the Danish and Norwegian models departed from this practice (Remáč, 2014). The three original Nordic models are discussed below for conceptual clarification.

The Parliamentary Ombudsman of Sweden (*Justitieombudsmannen*)

The first Ombudsman in Sweden, called the Chancellor of Justice, was established to be in the service of the King and to ensure that civil servants, military officers and judges observed the laws of the country (Diaw, 2008: 2). Incidentally, this conceptual understanding of the Ombudsman is how the former PP of South Africa, Adv. Thulisile Madonsela, defined the institution in South Africa. On the release of the so-called Nkandla report on 18 March 2014, she likened her office with the ancient, though still existing, institution of Makhadzi within the Venda chieftaincies in South Africa. Existing to be in the service of the Chief, Makhadzi interceded on behalf of the people and whispers truth to power. The Chief ignored the counsel of Makhadzi to his detriment (Madonsela, 2014: 2-3).

The modern Swedish Ombudsman exercised its role on behalf of the *Riksdag* - the Swedish Parliament (Remáč, 2014: 3). The basis of the Swedish Parliamentary Ombudsmen is founded on the demand of the citizens to be treated lawfully and fairly in every respect by the public authorities. Hence, its emphasis was mainly on the protection of citizens against government's encroachment. Uniquely, even by today's standards, it has the power to control the public administration and judiciary, and to prosecute public officials for their failure to carry out their functions. In essence, the Swedish Parliamentary Ombudsman's mandate is twofold: overseeing

the rule of law in the public administration and the judiciary, and protecting the fundamental rights and freedoms of citizens (Salman, 2006: 18).

The Swedish Ombudsman, as it exists today, is a collective ombudsman, consisting of four ombudspersons elected by the *Riksdag* (Swedish Parliament) for a four-year term. They are eligible for re-election. This special tie with the Parliament does not encroach on the independence of the ombudsman and the ombudsman's supervision of the judiciary does not constitute encroachment on the judiciary's independence because the supervision does not relate to the judicial function of the court, but to the proper conduct and performance of a judge in the exercising of his/her duties (Salman, 2006: 18-19).

The Parliamentary Ombudsman of Finland

As already alluded to above, the ombudsman idea only spread beyond Sweden in the early 20th century when Finland established one in its 1919 Constitution (Mora, 2015: 185). The Parliamentary Ombudsman of Finland is an independent authority elected by the *Eduskunta* (the Finnish Parliament) to supervise, on its behalf, the legality of the performance of public power, including supervising the exercise of powers by judges and other public officials in order to check maladministration in the performance of their duties. These powers of review of legality in Finland include oversight over all public bodies and anyone performing public functions under the law (Salman, 2006: 19). In addition, the Finnish Ombudsman has wide powers and a broad scope. For example, it has the power to order the institution of criminal charges against any public official for misconduct or negligence in the performance of their duties, and oversee the judiciary, within the principle that the independence of the judiciary as guaranteed in the Constitution cannot be violated (Salman, 2006: 20).

The Ombudsman of Denmark

As Salman (2006: 21) indicates, the Danish model differs from its two Nordic forerunners in that the Danish Ombudsman neither has power of prosecution, nor of supervision of the courts. However, the ombudsman supervises, on behalf of parliament, civil and military central government administration, local government and other public administration institutions. The other characteristics of parliamentary

control of the Danish Ombudsman are that parliament appoints and dismisses the ombudsman, and parliament controls the budget of the ombudsman and enacts its implementing provisions. However, it does not mean that the Ombudsman is under the control of the parliamentary majority; this is merely a constitutional construction to enable its accountability (Salman, 2006: 21).

As already referred to above, the Danish Ombudsman model is one that came to spread mainly to Western democracies and came to be the primary point of reference for all subsequent parliamentary ombudspersons in the world (Reif, 2004: 6; Salman, 2006: 20). The Danish Ombudsman has power to control the administration, but this power is confined to only making findings and recommendations, and issuing reports (Kucsko-Stadlmayer, 2008: 3).

In his speech at the inaugural EU Ombudsman, Dr Jacob Söderman (2004) said that the spread of the Ombudsman institution was the results of two main developments in society, namely:

- Firstly, it was linked to the evolution of public administration, which happened in Western democracies and led to demands that public administration should not only be subject to the rule of law, but should also be based on the appreciation that it exists to serve citizens, not the other way around. This principle is often expressed in terms such as 'service-mindedness', 'citizen-friendliness', and treating 'citizen as customer', and the notion of 'public service'. The citizen required free, effective, efficient and flexible avenues to raise their grievances against public officials when they failed to live up to the high expectations of good administration, as the traditional avenues such as the courts were considered inaccessible and too costly (Söderman, 2004).
- Secondly, it came because of the spread of nations' ambitions for democracy and human rights. As part of their transitions to democracy, many polities saw a need to establish Ombudsman institutions with the particular mandate of protecting human rights and promoting public participation in the decision-making processes of government. This latter development occurred mainly in Eastern Europe (former Communist countries), Latin America and some parts of Africa (Söderman, 2004).

Despite the differences in the nomenclature (Public Protector in South Africa, *Defensor del Pueblo* in Spain, *Le Mediateuer* in the Francozone) and conceptual models and theories, the basic idea remains that the Ombudsman is an independent official who receives complaints from the public, who has the power to investigate them and issue reports and recommendations to resolve them (Söderman, 2004). Musuva (2009: ix) captures the hybridity of the Office of the Ombudsman when she argues:

Conventionally, the Office of the Ombudsman is established to protect the people against violations of human rights, the abuse of power by public institutions, error, negligence, unfair decisions and maladministration, in order to improve public administration with a view to making governments responsive to people's needs and public servants more accountable to members of the public. This office has emerged as an important avenue for individual complaints against the actions of public authorities.

Today the concept of an independent body, which is accessible to all and has the power to control the public administration of a polity, is recognised worldwide, and is embedded in many national legal systems. At some point the International Ombudsman Institute (IOI), an international umbrella body for Ombudsmen, counted 147 public sector Ombudsmen who were its members in 87 jurisdictions on all continents of the world (Frahm, 2013: 4). By the 2015/16 performance year, the IOI had recorded 175 voting members and 30 non-voting members, bringing its members to 205 (IOI, 2016: 7).

Most democratic states have established Ombudsman institutions to operate as another check on the power of the executive and/or administrative branch, in addition to the controls exercised by the legislature, the courts, and other public sector organisations. Their most important advantage is their informality, speed and accessibility (Reif, 2004: 2). Remáč (2014: 3) argues that the growth of the Ombudsman institution is associated with its flexibility, which has allowed it to acclimatise to most socio-political and legal habitats.

The strength of the Ombudsman is that it does not seek to replace any institution of accountability and transparency designed to supervise government power. It exists to complement or supplement traditional means of checks and balances.

However, Manning and Gallinger (1999: 4) indicate that to be effective the Office of the Ombudsman must meet certain conditions, namely:

- **Political support** from parliament, government and all stakeholders;
- **Adequate resources**, including budgets;
- **Public perception:** People must be aware and understand the function of the Ombudsman;
- **Functional competence:** The Ombudsman must be effective in receiving, investigating and resolving complaints; and
- **Regulatory value:** The Office must fit within the regulatory framework of the country in which it operates.

Corporate governance is another condition that can make the Office of the Ombudsman effective and efficient. According to the King IV Report on Corporate Governance, effective leadership is the essence of corporate governance in all kinds of institutions as its exercise by a governing body fosters an ethical culture, good performance, effective control and legitimacy (Institute of Directors in Southern Africa, 2016: 11).

2.8 Models of Ombudsman

The literature review showed that many researchers have grappled with the theory and models of Ombudsman. For instance, Gregory (1997: 78) has distinguished two main models of Ombudsman: a “classical ombudsman of mature liberal democracies” and an “ombudsman connected with regime transformations in new or emerging democracies”. Reif (2004: 2), for instance, distinguished between two models of Ombudsman, namely a “Classical Ombudsman”, based on the definition of the Ombudsman proffered by the International Bar Association as adopted in 1978 and a “Hybrid Ombudsman”, vested with additional mandates. Diamandouros (2007: 22-23) spoke of the three historical waves of Ombudsman, namely the first wave: the classical Swedish and Finnish model; the second wave: the Ombudsman with a mandate to check maladministration; and the third wave: those who followed the transitions from authoritarian regimes to democratic governance, with the hybrid mandate. Kucsko-Stadlmayer (2008: 61) distinguished between three models of Ombudsman, defined in terms of their powers: “the basic or classical model”, “the rule of law model”, and the “human rights model”.

As Remáč (2014: 64-66) has stated, the thoughts of these authors can be summarised in the three generations of Ombudsman, namely:

- *The first ombudsman generation:* this is generally connected with legality, as its legislative standard of control. Sometimes referred to as the “traditional model”, the Ombudsman of this generation controls and supervises compliance with the rule of law; thus, promoting legality and lawfulness by the public bodies under their jurisdiction (i.e. the Swedish and Finish Ombudsman) (Remáč, 2013: 64).
- *The second ombudsman generation:* this generation generally controls maladministration. A common characteristic and role of this generation is that it assesses the compliance of administrative behaviour with a general normative concept of good administration, as its legislative standard of control. This generation has been flexible and included assessing aspects such as transparency among the new democratic norms and societal changes. When authors refer to the “Classical Ombudsman”, they refer to this essentially Danish model (Remáč, 2013: 64-65).
- *The third ombudsman generation:* this generation’s legislative standard of control is mainly human rights protection and promotion, as they mostly control and monitor compliance by public administrations with fundamental rights. It is generally associated with the transition to democracy regimes of Eastern Europe, Latin America and Africa. The genesis of this Ombudsman generation can be traced to the evolution of the Portuguese and Spanish models of ombudsman (Remáč, 2013: 65-67).

Remáč (2013: 65 -66) further suggests that most of these theories on the evolution of the Ombudsman institution often ignore the possible *fourth ombudsman generation* – an Ombudsman whose most significant role is fighting corruption in the public administration. The anti-corruption mandate constitutes a robust feature of some Ombudsmen, especially in developing countries in Africa. The ombudsman of this ‘generation’ mostly lacks a clearly demarcated legislative standard of control. An example is the Rwandan Ombudsman whose main role is to combat injustice, corruption and other related wrongdoings, should assist to strengthen good governance, and may identify legislation that hampers good governance. Furthermore, fighting corruption is also visible in the work of the Public Protector of

South Africa and the Inspectorate of the Government of Uganda, whose roles also are related to the standard of administrative justice. This new hybrid generation of ombudsmen is still concerned with the historical standards of control; however, its focus is promoting the anti-corruption agenda (Remáč, 2013).

Although there are features common to all Ombudsmen, there are also distinctive features because of different politico-legal systems and the constitutionalism, culture and history of each polity (Stuhmcke, 2012: 10-13; Diamandouros, 2006a). As the first distinctive feature, distinction can be made between a Classical and Non-classical model of Ombudsman. A Classical Ombudsman has been defined as follows:

An office provided for by the constitution or by an 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 (International Bar Association, 1974).

This definition remains relevant despite the time since it was coined as it sums up all pertinent features of the Classical Ombudsman. The Classical Ombudsman is typically appointed by the legislature, although autonomous from it, and generally empowered to check the conduct of the executive or administrative branch of government through the investigation and assessment of its conduct (Reif, 2004: 2). The Classical Ombudsman is therefore the one who supervises or monitors the public sector. However, Harden (2000: 204) argues that the concept of the Classical Ombudsman is in itself contentious: does it refer to the original Swedish concept, which included powers to supervise the judiciary and to decide on prosecutions or the Danish model that spread worldwide? The contention came about because the Ombudsmen did not have exactly the same functions and powers in different jurisdictions, nor did they always share similar attributes. Therefore, the search for a defining model of the ombudsman is best understood as a normative exercise, seeking to define the characteristics that an ombudsman should possess. Hence, the

Classical Ombudsman is not always the same. Stuhmcke (2012: 2-10) has distinguished between at least three models of the Classical Ombudsman:

- **Reactive Ombudsman Model**

This model describes the traditional complaints-handling role of the ombudsman. While this is primarily a client-oriented model, designed to achieve administrative justice for an individual, it is also concerned with the improvement of government decision-making. Therefore, the reactive model has a dual role in the administrative justice system: firstly, the reactive role of responding to the complaints raised by the citizens, and secondly, a proactive role of ensuring that the administrative failures addressed do not recur.

Therefore, the reactive model does not suggest that the Ombudsman cannot conduct own-initiated investigations. It simply denotes the preference of these Ombudsmen to concentrate on resolving problems between government and individual complainants.

A Reactive Ombudsman may, if shown by an analysis of trends of individual complaints, use his/her own initiative to undertake a systemic investigation where it appears that there may be systemic problems with the agency's systems, procedures or policies.

- **Variegated Ombudsman Model**

This model is characterised by the increasing scope and role of the Classical Ombudsman. The Variegated Ombudsman retains the essential core of the Reactive Ombudsman, but is characterised by the growth in the number and variety of functions performed.

The Commonwealth Ombudsman of Australia is an example of the Variegated Ombudsman. The Commonwealth Ombudsman Act of 1976, from its inception, has established this institution with the twin mandate to handle both individual complaints and to address the issues of reforms and improvements to government administrative systems. Today, the Commonwealth Ombudsman has jurisdiction on varied matters such as taxation, defence, immigration, law enforcement and overseas students. It has also taken on the functions of inspecting, auditing, and monitoring and evaluating compliance with legislative provisions.

A Variegated Ombudsman can also be described as a Hybrid Ombudsman. The nature of a Hybrid Ombudsman is variegated as it deals with allegations on maladministration, corruption and the violations of human rights (Bishop and Woolman, 2013: 24A-3; Frahm, 2013: 14).

Reif (2004: 8) also points out that the Hybrid Ombudsman combines both the Classical Ombudsman and Human Rights Commission roles. Reif (2004) states that the origin of this kind of Ombudsman dates back to the *third wave* democratisation movement in Southern Europe and the creation of hybrid institutions in Portugal and Spain. In 1975, Portugal established its *Provedor de Justica* (Provider of Justice), which was given the power to defend and promote freedoms and human rights, in addition to monitoring public administration. The Spanish Constitution of 1978 included the provision for the creation of *Defensor del Pueblo* to supervise the protection of human rights and government administration.

One trend that influenced the adoption of hybrid institutions was the advent of democratic governance in Latin America, the Caribbean, Central and Eastern Europe, Africa, Asia and Pacific region. The Hybrid Ombudsman became popular in these countries in their transition to democracy (Reif, 2004: 8). Many of these countries were transitioning from colonialism and dictatorships, with dreadful histories of oppression and human rights abuses. Ombudsmen in these environments were instituted as an alternative mechanism to social and restorative justice, and the protection of human rights. That is why some of the mandates of these newly conceived varieties of Ombudsmen encompassed human rights, and environmental and anti-corruption jurisdictions, unlike the Classical Ombudsman whose mandate covered mainly maladministration (Reif, 2004).

- **Proactive Ombudsman Model**

The emphasis of this model is on the review of the systems, policies and procedures of the administrative agencies with a view that individual complaints should not arise in the first place, or should systematically be reduced. For instance, the PP of South Africa undertook the systemic investigation of housing and human settlement in 2012. This is an example of a Proactive Ombudsman.

The researcher's observation is that an Ombudsman is either predominantly a complaint-handler (i.e. the Reactive Ombudsman) or a change agent/system-fixer (i.e. the Variegated Ombudsman). There is no rule of thumb that is either right or wrong; it is just a question of preference, and sometimes design, as in the case of the Commonwealth Ombudsman. An Ombudsman who chooses to be an activist is a Proactive Ombudsman. To enable the Ombudsman to be an activist the national laws must allow him/her to initiate own investigations, including systemic investigations intended to improve governance and administrative systems. Without this power, the Ombudsman is simply a complaint-handler.

- **Monocratic versus Collective Ombudsman**

The vast majority of Ombudsman institutions are monocratic; that is, one incumbent, appointed by the legislature as the Ombudsman, heads them. This relates to the idea that the Ombudsman's effectiveness is based on the incumbent's personal virtues (Kucsko-Stadlmayer, 2014: 11). However, it must be noted that even in a single-person headed institution, there can still be a cooperative element; that is, where the Ombudsman is assisted by deputies.

However, some Ombudsman institutions are of a collective or cooperative type, consisting of more than one incumbent. Usually, the incumbents are specialised in different areas of responsibility (Kucsko-Stadlmayer, 2014: 12). For instance, an Ombudsman can consist of departments responsible for children, women, anti-discrimination, human rights and maladministration, each headed by an Ombudsman. However, even in a collective set-up, cooperative decisions are an exception, limited only to the delegation of responsibilities to the incumbents. Moreover, the collective institution is typically headed by one of the incumbents, who officiates over the others (Kucsko-Stadlmayer, 2014: 12). In the collective-type Ombudsman institution, usually the lead-Ombudsman is appointed as the Chairman or Chief Ombudsman. For example, Sweden appointed a *Chefsjustitieombudsman* (Chief Justice Ombudsman) to preside over the three other Ombudsmen (Reif, 2013: 6).

There are several examples of collective-type Ombudsman institutions. They include Taiwan's Control Yuan and Tanzania's Commission for Human Rights and Good Governance (CHRAGG).

There is no rule of thumb that either a monocratic-type or collective-type Ombudsman is better or worse than the other is. The national, socio-political and legal environment is the determinant of the institutional choice (Stuhmcke, 2012).

2.9 Expanding mandate

Over time, the mandate of the Ombudsman has evolved in similar fashion to the evolution of the institution itself. Nowadays the Ombudsman plays a role in administrative justice and the protection of human rights (Remáč, 2014: 3). A growing number of Classical Ombudsmen are given mandates that go beyond the original conception of the institution, such as freedom of information, privacy, protection of whistle-blowers, anti-corruption and leadership code enforcement (executive codes). The anti-corruption and executive code enforcement usually exist side-by-side with other institutions, but in many countries, instead of establishing specialised anti-corruption units they simply burden the Ombudsman with the mandate of anti-corruption (Reif, 2004: 10). However, this practice has been criticised and discouraged by the United Nations Development Programme, which argued that the Ombudsman is seldom capacitated to uncover large-scale corruption and most do not have prosecuting powers. Therefore, the Ombudsman should only be considered as supplementary to corruption-fighting institutions (UNDP, 1997: 85). Moreover, it has been argued that giving an anti-corruption mandate to an Ombudsman can be counter-productive as this could overshadow the original mandate of investigating poor administration and human rights violations (Ayeni, 2001: 43).

From the literature review, it can be surmised that most Ombudsman institutions have become Variegated or Hybrid Ombudsman with broad mandates that go beyond complaint-handling and supervising public administration. The institution is evolving and the Hybrid and multi-mandate institution is the future of Ombudsmanship.

Despite this broad and ever-broadening mandate of the Ombudsman, a distinction can be made between the Ombudsman and bodies with an overlapping mandate to it, such as the courts, public sector audit bodies and human rights commissions:

- **Differentiation with the courts**

Courts are important independent controllers of administrative action; hence, there is the possibility of an overlap with an Ombudsman because they also control administrative behaviour. However, there are fundamental differences between the two. Firstly, the courts are part of the *trias politica*; therefore, they constitute the indispensable components of the structure of the state. The Ombudsman, on the other hand, is not an indispensable component of the state (Castells, 2000: 396). The general principle is that the question of the legality of the administrative action is generally dealt with by the courts (Manning and Gallinger, 1999: 3), while the Ombudsman generally deals with maladministration. Below (see Table 2.1) is a tabulation of the distinction between the courts and the Ombudsman:

Table 2.1 Features of Courts and Offices of Ombudsman

Feature	Courts	Ombudsman
Definition	Judicial bodies with a mandate to adjudicate questions of law	Non-judicial bodies with a mandate to investigate maladministration
Powers	Can enforce remedies that are legally enforceable and can only rule on a case that is before them	Can only recommend remedies Can investigate beyond a specific complaint; that is, a systemic investigation
Accessibility	Involves legal representation and normally entails high	Easily accessible and is free of charge

	costs	
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Source: Adapted from Manning and Gallinger, 1999

Stuhmcke (2016) states that Ombudsmen are not part of the judicial branch of government; in fact, the legislative branch of government creates them. However, in the conduct of their investigations they resemble some of the characteristics of the judiciary: the Ombudsman resembles a judge – in that he/she possesses special powers and protection to control administrative wrongs, but also serves to protect the reputation and integrity of the public service. Similar to courts, Ombudsmen must be impartial, requiring persuasive answers to questions, and ordering the production of documents. An Ombudsman also shares characteristics of dispute resolution, impartiality and independence with the courts. This similarity promotes public confidence in the institution. Furthermore, similar to the courts, Ombudsmen supervise and control public administration – they are designed as “regulation within government”. Both an Ombudsman and the courts ensure conformity to the rule of law. The Ombudsman’s systematic investigations may prompt systemic reform; hence, it has a vague judicial-style role of setting precedents and they have a quasi-judicial role (Stuhmcke, 2016).

However, Stuhmcke (2016) also points to the dissimilarities between the courts and Ombudsmen: to resolve administrative law disputes, the courts generally look to procedure and the legality of matters, while the Ombudsman checks what is the “fairness and reasonableness” of the decision that gave rise to the complaint. Furthermore, court decisions are peremptory, costly and slow, whereas the decisions of an Ombudsman are generally not peremptory, relatively quick, and free of charge. In addition, the investigative role of an Ombudsman is inquisitorial, unlike the courts’ role, which is adversarial in nature and requires legal representation.

- **Differentiation from audit bodies**

The mandate of the public audit bodies is to inquire into and evaluate the administrative processes of the public bodies in accordance with the set criteria. Like an Ombudsman, they have the mandatory and discretionary power of investigation, and making findings and recommendations. However, the main difference between the two is that audit bodies are not created to handle

complaints (Manning and Gallinger, 1999: 4). The Ombudsman, on the other hand, is a complaint-handling body.

The OECD (2016: 312) has noted that there are some Ombudsman institutions that have an auditing mandate, which gives them the power to supervise public agencies, as well as audit their administrative practices and procedures, regardless of whether they have received a complaint or not. Examples of these are the Ethiopian Ombudsman and some regional Ombudsman institutions in Australia. Control Yuan in Taiwan is also an example of an Ombudsman with an auditing mandate (Gunning, 1996).

- **Differentiation from human rights bodies**

The advent of the Hybrid Ombudsman meant that some Ombudsman institutions also function as human rights commissions. Manning and Gallinger (1999: 4) indicate that while these hybrid institutions are usually classified as Ombudsman offices, the core function of an Ombudsman is but one of numerous functions of the Office. In Eastern Europe, Latin America and Tanzania, Ombudsman's offices typically have a human rights mandate, including the power to investigate human rights violations, conduct inspections, conduct mediation, launch civil and criminal actions, and educate the public and civil servants on human rights issues.

As Pegram (2008: 18) indicates, the Human Rights Ombudsman shares some commonalities and alignment with National Human Rights Commissions (NHRCs). Its mandate is prominently human rights protection, with a robust doctrinal role in spreading human rights norms.

Misunderstanding may arise about the distinctive roles of these two institutions where they exist beside one another. However, Hatchard (2006 in Pegram, 2008: 18) has identified the distinctive features of NHRCs as follows: NHRCs are collective bodies, with specific focus on human rights norms, can investigate private persons, and have an unambiguous mandate to promote human rights (Pegram, 2008: 18). However, the mandate of the Hybrid Human Rights Ombudsman goes beyond human rights issues. It includes anti-corruption, the enforcement of leadership codes, handling complaints against public administration and monitoring the legality and fairness of public administration; it has jurisdiction over the entire public sector; and in some few instances, the

Human Rights Ombudsman may consider human rights complaints emanating from private actors (Reif, 2004: 26).

2.10 The plurality of Ombudsman institutions

Stuhmcke (2012: 10-13) provides three reasons why there has been an increase in the diversity of Ombudsman institutions. Firstly, Ombudsmen adapt to fit their jurisdictions. Each state has its own unique requirements; hence, the model chosen could be a deliberate and considered choice, based on the historical considerations of the state. Secondly, there must be a willingness by the incumbent Ombudsman to take on the added powers and roles. In the end, how the office is managed is a question of style and the working methods of the incumbent Ombudsman. Thirdly, the growth of Ombudsman functions reflects the acceptance and trust of an institution within its jurisdiction (Stuhmcke, 2012).

There is no universal system of Ombudsman worldwide. There is a plurality of these institutions, despite basic similarities, such as that the Ombudsman institutions generally exist to resolve citizens' complaints with regard to administrative acts of the state. Diaw (2008: 2-10) distinguishes four types of Ombudsman, distinguishable also in terms of the system of governance within which they exist. The types are:

- **The parliamentary Ombudsman**

The parliamentary Ombudsman is the basic model propelled by the similarities of the parliamentary systems in Scandinavia and Commonwealth countries. In a parliamentary system, both the legislative and executive arms of government are fused into a unified system of government, in which the legislature reigns supreme. The Prime Minister and other cabinet members are members of parliament, as well as accountable to it. Logically, the Ombudsman is accountable to parliament by virtue of the system of parliamentary supremacy (Diaw, 2008).

The conceptualisation of this model is hereby analysed from its Westminster base in the United Kingdom. The parliamentary Ombudsman is elected by parliament and is its officer (Maer and Everret, 2016: 10). In the United Kingdom's

Westminster system, public access to the Ombudsman is via the so-called “MP’s filter” (Maer and Everret, 2016: 3, 7), making it explicit that the Ombudsman is an instrument in the hands of the British Parliament and its members.

The MP’s filter system, which in the UK was introduced in 1967 to prevent a situation where the constituents could bypass their members of parliament, has been identified for reform to facilitate direct access by the public to the Ombudsman (Maer and Everret, 2016: 13). Should this happen, this will be a major theoretical and conceptual development of the institution in the parliamentary system.

The Ombudsman in the classical parliamentary system is an independent functionary of parliament who investigates maladministration on behalf of parliament. In this sense, the parliamentary Ombudsman is the Officer of Parliament – the designation denotes the special relationship of accountability to parliament and as such signifies independence from the Executive (Maer and Everret 2016: 10). Therefore, conceptually and theoretically, the parliamentary Ombudsman, at least as it exists in the UK, is an aide to parliament, rather than a citizen’s defender (Kirkam, 2007: 5). It is also an intervening body citizens resort to when they have exhausted internal remedies within the government agencies, but remain dissatisfied with the results (Kirkam, 2007).

In the parliamentary system, the Ombudsman is neither an elected authority nor a government agency. It reports to parliament and to the public, but cannot force government agencies to implement its recommendations (Maer and Everret, 2016: 7). In this sense, in the parliamentary system the Ombudsman lacks enforcement powers. The parliamentary Ombudsman relies on cooperation of the public agencies to implement its proposed remedies, failing which it can issue a report to parliament notifying it of the failure of the public agency to comply with its recommendations. However, rather than be seen as a weakness, some commentators see this lack of enforcement powers as a strength. Kirkam (2007: 13), for instance, postulates that public authorities are induced to co-operate with the investigation launched by the parliamentary Ombudsman because they are comfortable with the fact that they retained control over decision-making regarding the remedy that would be proposed and its implementation. Kirkam

(2007) suggests that altering this arrangement could mean that public authorities may desist from or withdraw their co-operation with the parliamentary Ombudsman.

This lack of enforcement powers may partly explain why the parliamentary Ombudsman system is durable and is a model adopted by most countries where the Ombudsman has been established. In fact, Kirkam (2007: 13) indicates that the model has been so effective that only on four occasions since 1967 was there a need to issue a report to the Parliament reporting refusal to comply with the remedy.

- ***Le Mediateur de la Republic***

To understand the conceptualisation of this type of Ombudsman, it is analysed from its origins in France in 1973 and its subsequent developments in 2011.

Delevoye (2009: 2), who was then France's Mediator of the Republic, posited in an address to the Bicentennial Swedish Parliamentary Ombudsman in Stockholm on 12 June 2009 that the theory of the Mediator of the Republic in France was laid down in the Law of 3 January 1973. As elsewhere, where the Ombudsman was created, it was passed as a response to a need to better connect the citizens with the administration and to improve the quality of public services. The 1973 Law granted the Mediator of France three principal mandates:

- handling of individual complaints by informal means;
- the ability to propose reforms to the government and the Parliament; and
- the defence of human rights.

When they adopted the system of Ombudsman in 1973, French politicians brought an important novelty to it: they fashioned it as *Le Mediateur de la Republic* (the Mediator of the Republic), a high administrative official, appointed by the President to the Council of Ministers (Diaw, 2008: 4). The theoretical basis of the *Le Mediateur* system is the resolution of disputes through mediation, dialogue and persuasion. To this end, Delevoye (2009: 4) postulates that legal judgments exacerbate disputes, while mediation bridges differences and ensures win-win outcomes.

Le Mediateur was a member of the Council of Ministers but his/her independence was secured in that it was decreed that he/she could not receive instructions from any authority, served a single tenure of six years, and could not be removed from office. He/she was protected by parliamentary immunity. Public access to *Le Mediateur*, like in the UK, was through the members of parliament. The French *Le Mediateur* was never enshrined in the constitution (Diaw, 2008); hence, two weaknesses can be identified in this model. Firstly, the Ombudsman was a member of Cabinet – even with entrenched safeguards for his/her independence the fact that he/she was colleagues with ministers suggested a lack of independence. Secondly, the institution was not entrenched in the Constitution, which meant that it could be replaced easily through the amendment or repeal of the enabling statute.

However, the new constitutional amendment in France created the *Defenseur des Droits* (Defender of Rights) officer to replace the *Le Mediateur*, who would be accountable to the President first, and then to the French Parliament. For the first time in its history, the French Ombudsman was constitutionalised and was no longer an independent administrative authority, but an independent constitutional authority (Bousta and Sagar, 2014: 77). The Defender is appointed by the President in accordance with procedure set out in Article 13 of the French Constitution, which states that an opinion of the relevant committee of each house of parliament is required and the President cannot proceed to appoint the candidate if the sum total of negative votes is below three-fifths of the votes cast. Upon appointment the Defender can only be removed at his/her own request or in the case of incapacity, confirmed by the body consisting of heads of the three highest courts in France (National Assembly of France, 2012: 77). As an independent authority, the Defender of Rights may not be interfered with in his/her duties, may not be investigated, arrested, held, prosecuted or judged on account of the opinions and the acts committed in the course of his/her duty. To ensure his/her independence, the Defender's duties are incompatible with the elected role, or civil service role, or a professional role, and/or any managerial position within any company (National Assembly of France, 2012: 77-78).

It has been noted that the constitutionalisation of the French Ombudsman does not fundamentally change the *Le Mediateur* theory that much, as the new *Defenseur*

des Droits (Defender of Rights) is still appointed by the President, he/she retains links with the Executive and is certainly not a Parliamentary Ombudsman (Bousta and Sagar, 2014) in the guise of the Spanish, English or the majority of the Central and Eastern European systems. In this respect, Borrillo (n.d.: 2) decries the fact that the Parliament was not granted an enhanced role with regard to overseeing the new institution, as was the case with similar Ombudsman institutions in Scandinavian countries or the *Defensor del Pueblo* in Spain. Hence, the Defender's status and powers are unique by comparison. The Defender has financial autonomy in terms of the applicable financial laws and has total control of the budget allotted (National Assembly of France, 2012: 77).

Even so, the scope of activity of the *Defenseur des Droits* is much broader than that of the *Le Mediateur*. In fact, the new office is an amalgamation of the Children's Ombudsman, Equal Opportunities and Anti-Discrimination Commission, and a commission supervising the police and other security agencies (Bousta and Sagar, 2014: 77-78). Importantly, a constitutional amendment (Article 18.5 of the Organic Law) makes provision for direct access to the Ombudsman (Bousta and Sagar, 2014: 79). These developments make the French Ombudsman fall within the theory or concept of a Hybrid Ombudsman, as well as to make it functionally independent from parliament.

Wider investigative powers have been bestowed on the Defender, and he/she may request a judge to order compliance with his/her recommendation. Furthermore, non-compliance with the Defender's summonses, failure to produce the documents and information requested to the Defender, or denying the Defender access to premises is punishable with imprisonment and a fine (Atwill, 2011).

The Francozone Africa adapted the French *Le Mediateur* in two important ways: firstly, they embedded it in their constitutions, and secondly, they allowed *de jure* and *de facto* direct public access to the Ombudsman. A noteworthy example is Djibouti, where *Le Mediateur* is enshrined in the constitution and there is direct public access to it (Diaw, 2008: 4). By constitutionalising its Ombudsman, France is following the example of its former colonies in Africa.

- ***El Defensor del Pueblo***

The *Defensor del Pueblo* (defender of the people) and its variant, the Human Rights Ombudsman, has been inspired by the revolutionary constitution of Spain adopted in 1978. Sixteen Latin American countries, and some African, Eastern European and Caribbean countries followed suit and included in their constitutions the *El Defensor del Pueblo*. The *Defensor del Pueblo* differs from its classical and Francozone counterparts in that they are parliamentary ombudsmen (i.e. nominated by and reporting to Congresses), but operate within the presidential systems of government (Diaw, 2008: 4). They also have wider powers and mandates than the Classical Ombudsman and, like their influencer Spain, they were born in the aftermath of dictatorial regimes (Mora, 2015).

To understand this type of Ombudsman, it is analysed from its roots in Spain. In Spain, the modern Ombudsman came with an expressly wide mandate, coming in the aftermath of the death of the dictator Francisco Franco in 1975, and ensuing from transition to democracy, including the writing and adoption of the Constitution of 1978 (Mora, 2015: 196). Article 54 reads as follows:

A public general act of Parliament shall regulate the institution of the Ombudsman as the Parliamentary High Commissioner for Administration, appointed for the protection of the rights contained in this Title, for which purpose he may supervise the activity of the administration, informing the Parliament of it.

A thorough reading of Title I of the Spanish Constitution makes it clear that the jurisdiction of the Ombudsman is broad, as it reads that the Ombudsman “may supervise the activity of the Administration”. According to Mora (2015: 197), this wording is indicative that the Ombudsman's mandate covers the entire public administration at all levels, including national, regional, local, military, judicial and other organs of state. According to Castells (2000: 393), the normative framework for the Spanish Ombudsman is provided for in Article 54 of the Spanish Constitution of 1978. The Constitution defines the nature and functions of the *Defensor del Pueblo* as follows:

- He/she is commissioned by Parliament;
- He/she is elected by Parliament;
- His/her mission is to protect the rights acknowledged in the Constitution;

- He/she may supervise activities in the Administration; and
- He/she must inform Parliament of his/her actions.

The juridical nature of the *Defensor* is that it is a body of constitutional relevance, with full functional independence. Bodies of constitutional relevance are those that are constitutionally placed in a pre-eminent position, for although they are not characterised by functions indispensable to the life of the state, they are entrusted with tasks of control, consultation and vigilance of the observance of the Constitution and the law, and are endowed with full functional independence to do so (Castells, 2000: 396).

Therefore, the idea of a parliament-commissioned person should not be misconstrued to mean that the Spanish Ombudsman is the internal body of the Parliament. Castells (2000: 394) dispels this notion by indicating the three fundamental reasons why the *Defensor* is not a functionary of the Parliament:

- The powers of the Parliament to legislate and control government and the powers of the *Defensor* to defend the rights in the Constitution are different;
- The *Defensor* is not subject to an overbearing mandate and does not receive directions from any kind of authority, including the Parliament; and
- The *Defensor* can act against the decision of the Parliament because he/she is constitutionally empowered to lodge an appeal of unconstitutionality against laws passed by the legislative authority.

The Spanish Constitution defines the Ombudsman as a Parliamentary High Commissioner for Administration (Article 54 of the Spanish Constitution), and to ensure his/her independence and avoid political inference the appointment of the *defensor* is “incompatible with any elected office; with any political position or activities involving political propaganda; with remaining in active service in any Public Administration; with belonging to a political party or performing management duties in a political party or in a trade union, association or foundation, or employment in the service thereof; with practising the professions of judge or prosecutor; and with any liberal profession, or business or working activity” (Article 7 of the Organic Act) (*Defensor del Pueblo*, 2016: 17).

This means that it does not only report to the Spanish Parliament, but also that the Ombudsman is independent from it. The Ombudsman's actions are only constrained by the Constitution, which itself provides explicitly that in order to carry its mandate of defending the people's basic rights, the Ombudsman is empowered to enter an appeal of unconstitutionality of any legislation, basically encroaching on the legislative territory of the Parliament, the very body that institutes it (Mora, 2015: 196). The Ombudsman is therefore empowered to challenge the constitutionality of the legislation passed by the Parliament (*ibid.*). This power is unique, as most Ombudsman institutions only have jurisdiction over the executive, and the legislative authority of the Parliament falls outside the powers of the Western Ombudsman.

Therefore, the *Defensor* is a state body, appointed by a majority of three-fifths of the joint houses of Congress and the Senate (Congressional Plenum). It can be removed by the same body, by a majority of three-fifths, on grounds of flagrant negligence of his/her duties, or a non-appealable criminal conviction (in terms of Article 5 of the Organic Act) (*Defensor del Pueblo*, 2016: 16). However, it is neither a functionary nor an auxiliary of the Parliament; hence, he/she enjoys functional independence and his/her work cannot be interfered with (Mora, 2015). Even so, the budget of the Ombudsman is an item of the parliamentary budget (Article 37 of the Organic Act) and the staff of the institution are in the service of the Parliament (in terms of Article 35 of the Organic Act) (*Defensor del Pueblo*, 2016: 31-32). However, the *defensor* is assisted by two Deputy Ombudsmen appointed and dismissible by him/her, following approval by the two Houses of Parliament, as stated in Article 8 of the Organic Act (*Defensor del Pueblo*, 2016: 17-18). This further demonstrates the *defensor's* independence.

Castells (2000: 395) makes a fundamental distinction between the Ombudsman and constitutional bodies (constitutional bodies are those bodies fundamentally characterised by the exercise of functions indispensable to state life and have repercussions for the structure of the state, i.e. the Legislature, the Executive and the Judiciary). Castells (2000) states that, despite the importance of the work of the defence of human rights that the Ombudsman performs, the Spanish Ombudsman is not a constitutional body (as he refers to Branches of Government or the concept of *trias politica*) and it is not indispensable in the political system

nor does it characterise the structure of the state; at least not in the same manner as the *trias politica*.

While the validity of Castells' (2000) characterisation of the Spanish Ombudsman is accepted, there is no denying that the Ombudsman has come to occupy an important role as an institution of the state, especially in areas of administrative law and administrative justice. Although it exists outside the *trias politica* and it does not characterise the structure of the state, closer scrutiny of its character reveals that the Ombudsman relates to all institutions of state power that constitute the *trias politica*, namely the Parliament, the Executive and the Judiciary, despite the jurisprudential doctrine defining it outside any of these powers. Firstly, it usually relates to the Parliament as a functionary or officer of parliament, appointed by the Parliament, but generally, it does not play a legislative role. However, some Ombudsmen can encroach on the legislative role through their power to challenge the constitutionality of legislation – a power that the Spanish Ombudsman possesses (Mora, 2015: 196). Secondly, it relates to the Executive in that it exists essentially to check it, although it exists outside it. Thirdly, it relates to the Judiciary in that some Ombudsmen control judicial action (although the norm is to exclude the Judiciary from the remit of the Ombudsman), but the original Swedish Ombudsman can review court decisions (Harden, 2000: 204).

- **The Control Yuan**

The Control Yuan is a Republic of China (Taiwan) institution established in 1931. It is comparable with the Ombudsman, but generally, it is not classified as such, due to its powers of enforcement (Diaw, 2008: 5). It is a distinct oversight body, with extensive powers of impeachment, censure, correction, recommendation and audit (Gunning, 1996). Certainly, its investigative powers are larger than those of most Ombudsmen.

It has control of the executive, and may investigate the judiciary and its own members. It is a collegial body of 29 members appointed by the President with concurrence of the Parliament, with its powers exercised following a system of procedures designed to engender fairness and objectivity. For instance, cases are assigned by rotation, deliberation and secret ballots. An example is that cases

of impeachment have to be initiated by at least two members, and must be reviewed by nine other members before the case is decided by secret ballot (Diaw, 2008: 5).

Distinctively, the Control Yuan does not settle the cases it investigates. After its judgment, cases are referred to an employee organisation, a disciplinary committee, or the relevant court or court martial (as the case may be) for a decision (Diaw 2008: 5). The Commission for Human Rights and Good Governance, the Tanzanian Ombudsman, is an example of a commission-type Ombudsman that functions more or less like the Control Yuan.

The International Ombudsman Association (IOA)⁶ distinguishes the following types of Ombudsmen:

- **Advocate Ombudsman**

An Advocate Ombudsman is one who can function in the private or public sectors. Although they are expected to remain objective, an Advocate Ombudsman “is authorized or required to advocate on behalf of individuals or groups found to be aggrieved” (Smith and Howard, 2015). Therefore, this type of ombudsman is not necessarily neutral, but at least at the fact-finding stage he/she should demonstrate neutrality. If the complaint is substantiated, the Ombudsman then advocates for a resolution on behalf of the complainant. The main distinguishing characteristic of this type of ombudsman is that he/she has the power to:

- (i) represent constituents’ interests regarding policies implemented by the establishing entity, government agencies, or other defined organisations; and
- (ii) initiate action when merited in an administrative, judicial, or legislative forum (Smith and Howard, 2015).

The National Consumer Commission and the nine provincial Consumer Protectors are examples of these Advocate Ombudsmen in South Africa, existing as part of the national infrastructure for social justice that advocates on behalf of consumers. They have powers of investigation, mediation and prosecution. If

⁶ <http://www.Ombudsman.org/Resources/Frequently-Asked-Questions.aspx> (Accessed on 25 October 2016).

mediation fails, they can represent the consumer before the Consumer Tribunal or various provincial Consumer Courts (NCC, 2017).

- **Executive Ombudsman**

Some public sector Ombudsmen are both appointed by and accountable to the executive authority. They are called executive or quasi-ombudsman, and can be found at national, sub-national and municipal levels of government (Reif, 2004: 14).

According to Smith and Howard (2015), an Executive Ombudsman is one who functions in the private or public sector and can hear “complaints concerning actions and failures to act of the entity, its officials, employees and contractors”. The Executive Ombudsman is appointed by the executive authority, unlike the Legislative Ombudsman, who is appointed by the legislative authority. A good example of this type of ombudsman is the Municipal Ombudsman. An Executive Ombudsman has the power to:

- (i) conduct investigations;
- (ii) issue reports regarding the investigations conducted;
- (iii) hold the organisation accountable or cooperate with the organisation to improve systems; and
- (iv) have jurisdiction over a subject that affects several agencies, but does not have jurisdiction over more than one public entity.

In South Africa, for instance, the Health Ombudsman, the South African Military Ombudsman and the Independent Police Investigative Directorate (IPID), including the Ombudsman for the City of Johannesburg, the Western Cape Provincial Police Ombudsman and the City of Cape Town Ombudsman are examples of Executive Ombudsmen operating within the public sector. Some of these Ombudsmen are members of the IOI; namely, the Western Cape Provincial Police Ombudsman and the City of Cape Town Ombudsman (IOI, 2016: 7).

- **Legislative Ombudsman**

A Legislative Ombudsman acts as part of the legislative branch of government entity, addresses issues raised by the public, and accounts to the legislative branch in question. According to Howard (2010: 480), the Legislative

Ombudsman should meet the following 12 characteristics, as set out in the 1969 Resolution of the American Bar Association (ABA):

- (i) They must have authority to criticise all public agencies and their officials, except the courts and the legislative bodies;
- (ii) They must be independent from any public officer, except for their accountability to the legislative body;
- (iii) They must be appointed by at least a two-thirds majority of the legislative body or executive body, with concurrence of the legislative body;
- (iv) They must enjoy security of tenure, of at least five years, and can be dismissed only by at least a two-thirds majority of the legislative body;
- (v) They must receive a high salary and be remunerated at a rate equivalent to that of the designated top officer;
- (vi) They must be able to employ his/her assistants and staff, without undue restrictions of civil service rules and regulations;
- (vii) They must have freedom to investigate any act or omission by the public agency and its employees;
- (viii) They must have access to public records that are relevant to the investigation in hand;
- (ix) They must have authority to inquire into the correctness, fairness, adequacy of motivation and reasons, and efficiency and procedural cogency of any action or inaction by the public agency or its employees;
- (x) They must have discretion which investigations to undertake and which criticisms and recommendations to make;
- (xi) They must provide any agency affected by his/her decision a right of reply and to include this in his/her public report; and
- (xii) They must be granted public immunity from civil liability for his/her official conduct (Howard, 2010: 480).

In this regard, Howard and Smith (2015) of the American Bar Association explain that a Legislative Ombudsman works within the legislative branch of government

to address internal complaints brought by members of the public, mainly relating to accountability regarding goods and services delivered by public officials answerable to that legislative branch. The mandate of the Legislative Ombudsman is broadly to:

- (1) Uphold public accountability of the agencies and assist the legislature in its oversight function of those agencies;
- (2) Conduct investigations of complaints and use its power of subpoena to conduct those investigations;
- (3) Release public reports of their findings; and
- (4) Be advocates for change within the agencies and in the public (Howard and Smith, 2015).

- **Media Ombudsman**

The Media Ombudsman's primary objective is to promote transparency within news organisations. The Ombudsman can receive and investigate complaints about news reporting on behalf of members of the public and then recommend the most suitable course of action to resolve issues raised in the complaints. He/she acts as an independent officer acting in the best interest of news consumers and mediates between the expectations of the public and the responsibilities of journalists (The International Ombudsman Association, n.d.).

The importance of media regulation in a democracy is to guarantee, promote, and protect freedom of expression. Hence, the ultimate goal for media regulation should be about the protection and deepening of this fundamental right (Puddephat, 2011: 7). McQuail (2010: 12) argued that the need for media regulation is two-fold: firstly, it is about public or private interests, and secondly, do the media indicate a positive or negative course, judged in terms of their possible benefit or harm. These can be problematised as follows:

Public interest issues

- (i) The protection of security of state and public order;
- (ii) Upholding the respect for public morality (i.e. in matters of taste and decency);
- (iii) Realising benefits to the public with regard to participation, diversity, access

- and free flow of information;
- (iv) Upholding the cultural standards and promoting the identity of a people (i.e. culture and language);
 - (v) Ensuring respect for human rights and protecting people from insult and prejudice;
 - (vi) Averting harm to society in general, and in particular, to children and young people from harmful content;
 - (vii) Complying with international commitments; and
 - (viii) Advancing the economic interests of the nation in media and related industries (McQuail, 2010).

Private or individual interest

- (i) Protecting individuals from reputational damage;
- (ii) Preventing offences to individuals;
- (iii) Averting harm to individuals arising from media content; and
- (iv) Protecting intellectual property rights (McQuail, 2010).

Tomlinson⁷ argues that media regulation mainly happens in six ways:

- (i) Self-regulation – the media’s own internal review mechanism;
- (ii) Voluntary independent non-statutory regulation – the media is accountable to a non-statutory body it does not control, consisting of independent members from outside the industry;
- (iii) Voluntary independent self-regulation with statutory recognition – this is a legislated but voluntary system, in which media houses are free to associate and dissociate;
- (iv) Regulation with statutory underpinning – a model is legislated establishing a media regulator, giving it a remit, and making it independent of government and the industry, and with independent nomination of panellists. Neither the state or industry has control over it;
- (v) Statutory regulation - this model designates a regulatory body operating wholly under statute, funded by the state and accountable to the parliament or to a minister; and

⁷ See Media Policy Project Blog at <http://blogs.lse.ac.uk/mediapolicyproject/2012/12/02/what-is-press-regulation-six-different-models/> (Accessed on 12 November 2018).

- (vi) State regulation - this means direct government control of the media, including allowing pre-publication censorship.

As Puddephat (2011) explains, self-regulation is a norm in democratic governance. Self-regulation is a mixture of mechanisms establishing the codes of conduct and processes to monitor the conduct and hold media houses accountable for conduct deviating from the set norms and standards. The aims of self-regulation are to preserve the independence and protect it from partisan and sectional interests; it can be more efficient as a mechanism of regulation as the media comprehends its own setting better than government; it is cost-effective for government because the media industry bears the cost; it can be more flexible than government regulation; and, as a peer review mechanism it can inspire greater compliance (Puddephat, 2011: 12).

The Press Council of South Africa⁸ appoints the Press Ombudsman for the print media in the country, which is a self-regulation mechanism. In 2010, a debate raged regarding the introduction of the Media Appeals Tribunal, which would be a state-regulation mechanism with the power to discipline media houses (ANC, 2010). If this were to happen, it would be another type of Media Ombudsman, with a mandate to balance the media's freedom of expression with an individual's right to privacy and human dignity (ANC, 2007: 125-131). The Independent Communications Authority of South Africa (ICASA) is the Chapter 9 Broadcasting Media Ombudsman established in terms of Section 181 of the Constitution to "regulate broadcasting in the public interest and to ensure fairness and diversity of views broadly representing the South African society" (see Section 192 of the Constitution).

2.11 The generic functions and normative values of an Ombudsman

There is no international treaty setting out the values, powers and structure of the Ombudsman. Ombudsmen are not always similar and possess different powers and functions in their different jurisdictions. Therefore, the search for a conventional model of an Ombudsman is best understood as a normative exercise, seeking to define the characteristics or traits that an Ombudsman should possess (Harden, 2000: 204).

⁸ See <https://www.doc.gov.za/sites/default/files/PressCouncilPresentation%20DOC%20colloquium.pdf>

It should be said that the Ombudsman is not part of the *trias politica*, and functions merely as a complement to, not a replacement, of the role of the traditional branches of government. Hence, an Ombudsman serves as an additional legal protection for citizens. These traits make the institution unique as an alternative mechanism of democratic control over bureaucracy (Salman, 2006: 16).

It is therefore necessary to analyse the generic functions and normative values of the Ombudsman in order to understand its unique status in the governance framework and its role in the promotion of good governance.

The generic functions of an Ombudsman

Salman (2006: 21) points out that if one evaluates the evolution of the Ombudsman in established democratic countries it becomes clear that its initial conception was to serve as a control function as it was designed to control public administration. However, the evolution of the institution of the Ombudsman in new or transitional democracies tends to serve a redress function.

The study of the modern Ombudsman institution indicates that, despite there being no Ombudsman that is exactly the same as the other and there being no one-size-fits-all approach to the mandate and functions of the Ombudsman, it can be deduced that Ombudsmen generally have the following generic functions:

- *The control function* is a core function of all Ombudsmen, whether Classical, Hybrid or Human Rights Ombudsmen. This function is in fact *complaint handling* in that the Ombudsman essentially oversees public officials through the investigation of complaints. The Ombudsman differs from the audit bodies specifically because of this quality of complaint handling, although it is able to investigate on its own initiative (Remáč, 2014: 4-8). Remáč's view is in support of Gottehrer and Hostina's (1998: 6) who in their *Essential Characteristics of a Classical Ombudsman* indicate that the Ombudsman has the jurisdiction to control the activities of government and semi-government bodies, and may initiate an investigation without a complaint. By supervising government's activities with the aim of improving public administration and therefore making the government's activities more transparent and more accountable to the public, the Ombudsman carries out the control function (Salam, 2006: 16).

- *The protection and the dispute resolution function* is the two-sided general function of the Ombudsman, operating independently of each other. One side relates to the protection of citizens against the administration; that is, with regard to the abuse of power and violation of human rights. The other side relates to the resolution of disputes between the individual and the state. This dispute resolution can take the form of alternative dispute resolution (Remáč 2014: 4-8).

The protection function is the preoccupation of the modern Ombudsman. Mickley (2015: 108) refers to the mission of the Namibian Ombudsman as striving “to promote and protect Human Rights, fair and effective administration, combat corrupt practices and protect the environment and natural resources of Namibia through the independent and impartial investigation and resolution of complaints and through raising public awareness”. As will be demonstrated later in this study, this protection function is the trend of Ombudsmen in Latin America, Eastern Europe and Africa. With regard to the dispute resolution function, Glasl (2015: 68) explains the point of this function of the Ombudsman as follows: “The complainant is focused on their own interests, the authority on their compliance with laws and legal practice – and as for the ombudsman, it is exactly this perceived incompatibility that prompts him (the Ombudsman) to initiate their solution process”. Because of these competing interests in the outcome, mediation becomes apposite.

- *The remedial or redress function* is another generic function of the Ombudsman. The need for Ombudsman institutions arose from the realisation that traditional methods of dispute resolution were hindered by high fees or procedural complexities, or limited by their scope or remit (Remáč, 2014: 4-8). Salam (2006: 16) states that apart from a complaint-handling mechanism that an Ombudsman offers an aggrieved citizen, he/she at the same time supervises the activities of the public administration. Hence, Salam (2006: 16) asserts, “The function of the ombudsman ... is first to protect the people against violation of rights, abuse of powers, error, negligence, unfair decisions and maladministration. In this sense, the Ombudsman serves a *redress function*” (own emphasis).

The biggest limitation for the Ombudsman is that he/she can only “recommend a remedy”, but “cannot grant a remedy” (see Maer and Everret, 2016: 7 with regard to the parliamentary Ombudsman of the UK). However, an Ombudsman can use his/her power of persuasion to ensure that the administration acts in accordance with his/her recommendation (see Kirkam, 2007 with regard to the parliamentary Ombudsman of the UK). There are exceptions to this norm, as there are Ombudsmen whose decisions are binding, for example, the Public Protector of South Africa. In Chapter 3 and 5 of this study, this will be examined.

- *The normative function* relates to the standards or criteria for evaluating administrative conduct. All Ombudsmen assess the administrative conduct against certain normative benchmarks or measures; that is, maladministration, good administration or human rights. Normally, these standards or criteria are decided on by the legislature. However, they can also arise from the Ombudsman himself/herself. These normative standards are designed by the Ombudsman or the *ombudsnorms*, which are not necessarily equivalent to legal rules, but are the standards against which the administrative behaviour is assessed (Remáč, 2014: 4-8).

To this effect some researchers, such as Salman (2006: 23), have suggested that the Ombudsman exists as an institution of some normative benchmark, such as the rule of law. In this sense, the Ombudsman is an “institutional arrangement of the rule of law” and exists within the context of the “democratic rule of law” (Salman, 2006: 9).

- *The educational function* means that the Ombudsman engages in public awareness and educational programmes, to make people aware of the existence and mandate of the Office, the kind of complaints and the processes followed to make those complaints. Most Ombudsman Offices, especially those with a human rights mandate, emphasise this role of education and awareness (Remáč, 2014: 4-8).

In this regard, a survey conducted by the Organisation for Economic Cooperation and Development (OECD) concluded that the majority of Human Rights Ombudsmen have a public research, education, information and

monitoring role regarding human rights. This can contribute to the building of open governance (OECD, 2018: 5).

It is the *normative function*, as described above, that the researcher wishes to discuss further. As already stated, the normative function is connected to the standards or criteria for evaluating administrative conduct. As Remáč (2014) indicates, all Ombudsmen assess the administrative conduct against certain normative standards; that is, maladministration, good administration and/or human rights.

Kucsko-Stadlmayer (2014: 31-32) deduced that the Ombudsman's standard of control entails three principles, namely legal rules, good administration and equity, and human rights. With regard to legal rules, the Ombudsman is responsible for the observance of the "legality of administrative conduct". This would encompass standards, including administrative justice. The standard of good administration is sometimes presented positively as "fair administration" or "sound administration", or negatively as "maladministration" (Remáč, 2013). As Kucsko-Stadlmayer (2014: 31-32) indicates, in some states these norms emanate from the constitutional law or general principles of law evolving from the jurisprudence or as codified; for example, the principles of good administration in the European Union (EU) have been codified in Article 41 of the Charter of Fundamental Rights of the EU. The EU Ombudsman typically oversees these principles. Kucsko-Stadlmayer (2014) further states that the standard of equity, on the other hand, emanated from Aristotelian ethics, which permitted the disregard of law in specific cases, if its application in certain unforeseen circumstances would bring about immoral results. This is the question of individual ethics, as well as serving the rectification of codified law. The importance of equity lies in the supervision of administrative behaviour within the legal scope; that is, within the limits of discretion and the interpretation of the general rules of law (Kucsko-Stadlmayer, 2014: 31-32).

Regarding the standard of human rights, Kucsko-Stadlmayer (2014: 32-38) posits that human rights can be a standard of control in various ways. This includes by establishing human rights as part of the legal order; that is, by applying existing legal rules to enforce human rights standards, or enforcing human rights as part of good administration or equity, even when they are not legally binding, or enforcing human

rights as the explicit standard of control, for example in Portugal, Spain, Eastern Europe and Latin America, as the protection of human rights and fundamental freedoms is the explicit mandate of the Ombudsman.

Normative values of an Ombudsman

Values represent beliefs and desires, and serve as a standard or criteria to guide action (Schwartz, 2012: 3-4). Intrinsically linked to normative values is the normative ethics theory, which is the framework for ethics. It tells us that there are three competing approaches to ethical analysis: virtue ethics – focusing on the agent or actor; deontological ethics – focusing on the act itself; and consequentialist ethics – focusing on the consequences of the act.

The three approaches to ethical analysis are discussed below:

- **Virtue ethics** – in Aristotelian ethics there are three conceptions to define virtue ethics, namely virtue (*arête*), practical wisdom (*phronesis*), and flourishing (*eudemonia*) (Ainley, 2017: 5). These virtues, generally, are considered constant and, once attained, are relatively permanent features of an individual's character that direct his/her actions. For instance, a person with a virtue of kindness will tend to act with kindness in every appropriate situation, irrespective of the costs of doing so, and will always be kind to all sorts of people (Ainley, 2017: 5). These virtues are not innate but are acquired by habituation and socialisation; that is, if one performs virtuous acts regularly, they become a habit to that person. Conversely, the more a person acts immorally or recommends immoral action, the more that behaviour becomes part of the person's character (Mitchel, 2015: 149).

Thus, virtue ethics is about the moral character of the agent. According to the virtue theory, an agent ought to possess certain qualities such as courage, generosity and compassion, and this ought to manifest in the actions of the agent. In this approach, it is not the action or consequence that is judged, but the person who took the action (Kaptein and Wempe, 2002: 19). Part of this study concentrates on the virtues or character traits that the Ombudsman should possess.

- **Deontology** – deontological ethics, also known as ethical formalism or absolutism, is an ethical system mainly focused on a person's duty, developed by Immanuel Kant (1724-1804). He asserted that the result of a decision is not important; rather, the important thing is the moral basis of a decision or action itself (Caldero and Crank⁹, 2004). In other words, deontological ethics is more concerned with the morality of a person's action and not much with the consequences thereof. It also surmises that everyone has imperative duties and that these duties must always be performed, irrespective of the predicted consequence. These duties can be differentiated into two: conditional or hypothetical imperatives (a necessary duty to achieve the result) and categorical imperatives (an unconditional rule or duty that must be observed or performed regardless of the effect of the decision). These duties are peremptory and must be applied equally to everyone (Caldero and Crank, 2004).

According to deontological theories, certain acts are good or bad in themselves; hence, they concentrate on the act that is being performed, not the person performing the act. According to this theory, an action is morally good if it honours a given obligation (Kaptein and Wempe, 2002: 10). Ideally, the actions of the Ombudsman should promote the overall good of the community he/she serves.

- **Consequentialism** – consequentialism is a utilitarian theory of ethics, which is primarily concerned with the consequences of the action – hence, it is also referred to as teleological theory or consequentialist theory (Caldero and Crank, 2004). The essence of consequentialism is that the consequence of an action ultimately determines the morality or immorality of the action. As a result, the means of arriving at the ethical decision is only a secondary consideration, but the primary consideration is the consequence (the result), before one determines the morality of the decision (Caldero and Crank, 2004). Consequentialist theories assert that we should always act in a way that brings the best consequences. According to this theory, the action is morally good if its consequences are desired and bad if its consequences are

⁹ This e-book is not paginated and is distributed online as part of [B.C. Open Textbook project](#).

undesired (Kaptein and Wempe, 2002: 1). Relevant for this study, arguably the best consequence that ought to be brought by the Ombudsman would be good governance and administration.

Therefore, it is important to locate the personal and institutional characteristics of the Ombudsman within this normative values or ethical theory framework to make sense of the institution. This is so because an Ombudsman generally lacks the power of enforcement; therefore, he/she relies on his/her diplomacy, persuasive logic, reasonableness, political intelligence, and acting within the rule of law in order to influence action on his/her reports. Therefore, to be an effective Ombudsman requires one to have moral authority (Levin, 2004: 141).

Levine (2004: 140) states that morality relates to judgment, and it controls action and guides conduct. It involves judgments regarding “value, virtue, and conduct”, and it creates feelings of “fellowship, social responsibility, and justice (fair treatment)” among members of a community. The Ombudsman’s decision-making is “a rationally-based approach to moral evaluation” (*ibid.*). However, it is also reflexive. Hence, early literature on the Ombudsman motivated people of integrity to be selected as an Ombudsman (Levine, 2004: 141).

Levin (2004: 142) argues that the Ombudsman is required to be a moral activist in order to achieve the objectives of his/her office. At a basic level, moral activism in the context of an Ombudsman means a robust “pursuit for administrative justice”. It also denotes having the sincerity to be a change agent, to be worthy of respect, and to serve the public interest. This moral activism entails acting at three levels, namely intellectual action, investigative action, and interpretive action:

- **Intellectual action**

Through public engagement, and publishing and presenting reports the Ombudsman should become an intellectual leader. The Ombudsman must use publicity and media exposure effectively in order to achieve the objectives of his/her Office. Events such as public lectures, conferences, media conferences, speeches and presentations should be used to enforce his/her intellectual integrity (Levin, 2004: 142).

To be effective, an Ombudsman must remain intellectually engaged with the rest of his/her stakeholders, and must use every platform of engagement to promote the ideals of social and administrative justice. The authority of the Office allows him/her to contribute intellectually and pragmatically to the public discourse (Levine, 2004: 142). Therefore, these platforms should be used effectively to establish the Ombudsman as a thought leader in matters of governance and public administration.

- **Investigative action**

A Transformative Ombudsman will not confine himself/herself only to the resolution of individual complaints that have been reported to his/her Office. He/she she will use his/her power of initiating own investigations to investigate the systemic root causes of complaints. This kind of systems approach to investigations will allow for the identification of the systemic root causes of complaints and facilitate findings and reports that can bring about systemic improvements to public administration (Levine, 2004: 143).

- **Interpretive action**

An Ombudsman can be an authoritative source of administrative and social justice by taking seriously his/her ability to interpret and apply the rules. There is a dynamic relationship between investigation and interpretation, as new cases may bring new understanding and may call for the imaginative interpretation of established principles. This dynamism has the potential to spawn new ideas of administrative and social justice. By engaging earnestly with his/her legal and moral obligation to speak out when a wrongdoing is committed, the Ombudsman will contribute to moving the boundaries of “administrative justice through interpretive activism” (Levin, 2004: 144).

DŽANIĆ (2006: i) suggests that the influence that the Ombudsman has in promoting good governance depends on factors such as the minimum level of good governance, the cooperation of government, and the independence of the Ombudsman.

In a speech delivered to the Governance Forum, Peter Tydall (2014), who was an Ombudsman and Information Commissioner of Ireland, asserted that the characteristics of an effective Ombudsman included independence, fairness,

effectiveness, transparency and accountability. Gottehrer and Hostina (1998: 1) suggest that the irreducible characteristics or traits of the Ombudsman are independence, impartiality and fairness, credibility of the review process, and confidentiality. These are discussed below.

- **Independence**

The Ombudsman must be institutionally, functionally and personally independent. The positioning of the institution within the constitutional and statutory framework, the procedures for the appointment and removal of the Ombudsman, accountability mechanisms, funding and staffing issues, enforcement mechanisms, and investigations processes have to be designed in a manner that enhances the independence of the institution (Ruppel-Schlichting, n.d.: 289).

- **Institutional independence** refers to the constitutional and legislative mechanism intended to insulate the institution from political interference. If the establishment, appointment and removal of the Ombudsman are embedded in the Constitution, its permanence is assured and, in that sense, its independence, as it will not be easy for politicians to disestablish the institution. Kucsko-Stadlmayer (2008: 7) argues that embedding the Ombudsman in constitutional provisions largely assures his/her independence from the Executive, including ensuring his/her stability and endurance within the state's institutional framework. Stadlmayer (2008: 7) further argues that elevating these provisions to an upper normative level shields them from being easily changed by fluctuating parliamentary majorities.

Gottehrer (2009: 6) asserts that the Ombudsman's security of tenure and emoluments should be fixed so that they cannot be easily altered. This is another mechanism to ensure the independence of the Ombudsman.

In parliamentary Ombudsman jurisdictions, like Sweden and the UK, the Ombudsman is institutionally linked to the Parliament. In fact, the Ombudsman is the functionary or officer of Parliament. This raises the question of the institutional independence of the Ombudsman. In some jurisdictions, such as Spain, the *Defensor* is a state body, but it is neither a functionary nor an auxiliary of Parliament. He/she enjoys functional independence and his/her work cannot be

interfered with (Castells, 2000: 395). This system contributes to the institutional independence of the Ombudsman.

- **Functional independence** refers to the ability of the Ombudsman to initiate investigations, without interference from the governmental agency. The Ombudsman must not receive instruction from anyone to investigate or not to investigate anyone. He/she should determine and be in control of the complaint-handling system and he/she alone must decide on the remedial action/recommendation to make. However, it must be realised that while the Ombudsman is functionally independent in the UK, for instance, he/she works through the system of a so-called MP filter in terms of which complainants approach the Ombudsman via the agency of a Member of Parliament. In this system, there is no direct access to the Ombudsman (Maer and Everret, 2016: 3, 7). This makes it clear that the Ombudsman is an instrument in the hands of the British Parliament and its members. This calls to question the functional independence of the Ombudsman in this system.

The French system was similar to the UK, in which there was no direct access to the French *Le Mediateur*. However, the French reviewed its system and the new *Defender of Rights* can be accessed directly by the public (Bousta and Sagar, 2014: 77).

- **Personal independence** refers to Ombudsman traits such as probity, being beyond reproach, and being fit and proper for the role. The Ombudsman must not descend into the political arena and should remain aloof of the politics of the day, and should preferably not be a former politician (Council of Europe, 1997: 32). This will safeguard his/her independence and that of the institution he/she leads.

Factors such as *impartiality and fairness* and *credible review processes* signify the independence of the Ombudsman:

- **Impartiality and Fairness**

The Ombudsman must treat complainants and the people being investigated with fairness and without bias. Gottehrer (2009: 6) argues that people respect and bring their complaints to the institution they perceive as impartial and fair. To this

effect, Gottehrer (2009: 6) suggested the following provisions to foster the impartiality and fairness of the Ombudsman:

- i. Setting the qualification criteria that is designed to select an Ombudsman who enjoys widespread respect across the political spectrum and who will be a person of undoubted impartiality and fairness. In other words, as said earlier, the Ombudsman must not descend into the political arena and should remain aloof of the politics of the day;
- ii. Anyone should be able to report a complaint to the Ombudsman, free of charge, and preferably through direct access to the Ombudsman;
- iii. Stating in writing how conflict of interest will be handled;
- iv. Allowing an Ombudsman to be able to publicly criticise, subject to right of reply, any public agency within its jurisdiction and make recommendations to resolve the specific situations and/or prevent their recurrence; and
- v. Specifying that the Ombudsman is not an advocate for any individual or group, although he/she may advocate for recommendations that favour the complainant(s).

- **Credible Review Process**

The essence of the corporate governance or oversight mechanism is to review critically the credibility of the Ombudsman processes. The Ombudsman should adopt a monitoring and evaluation tool designed to assess the effectiveness of his/her review processes. As a minimum, the Ombudsman must adopt the following:

- **Excellent complaint-handling mechanisms**

An important component of a credible review process is credible and trustworthy complaint-handling mechanisms. Gottehrer (2009: 7) suggested that if the Ombudsman's review process is credible, people are more likely to respect its investigations and government agencies are likely to implement its recommendations. To ensure a credible review process, Gottehrer (2009: 7) proposed the following provisions:

- i. The Ombudsman should have a broadly defined mandate, covering the broad spectrum of public administration;

- ii. Authorising the Ombudsman to investigate anyone's grievance about anyone concerning any legal act or omission and also allowing investigation without a complaint (own-initiated investigations);
- iii. Requiring public employees to cooperate with the Ombudsman and ensure access by the Ombudsman to information held by them, including through subpoena powers to compel the production of information it requires;
- iv. Ombudsman review standards should be stated broadly to cover areas such as good administration, fairness, human rights, equity, justice, anti-corruption and environmental protection; and
- v. Authorising the Ombudsman to make findings and publicise them.

➤ **Accountability and transparency**

Part of this credible review process is the principles of accountability and transparency that the Ombudsman should infuse in its processes. By accountability is meant that the Ombudsman has a duty to provide an account; that is, the explanation and justification of one's actions in terms of criteria and sufficient detail. Transparency, for instance, means that reports of the findings, decisions and recommendations of the Ombudsman should be accessible to the public (Diamandouros, 2006b). The Ombudsman must also be accountable to the legislative bodies and must provide regular reports to the legislature.

➤ **Effectiveness**

The Ombudsman must be able to ensure implementation of its recommendations and decisions.

A criticism of Ombudsman systems is that they lack binding and enforcement powers. For instance, the parliamentary Ombudsman in the UK cannot force government agencies to implement its recommendations (Maer and Everret, 2016: 7). The Ombudsman relies on cooperation of the public agencies to implement its proposed remedies, failing which it can issue a report to the Parliament notifying it of the failure of the public agency to comply with its recommendations.

Some commentators, however, see this lack of enforcement powers as a strength. Kirkam (2007: 13) argues that public authorities are able to cooperate with the Ombudsman because they retain control over decision-making regarding the remedy.

In an environment where the Ombudsman lacks binding and enforcement powers, the researcher surmises that to be effective the Ombudsman will need to act with integrity, diplomacy, persuasive logic, reasonableness, political intelligence, and within the rule of law to ensure the acceptance and implementation of his/her recommendations.

➤ **Confidentiality**

Whistle-blowers, complainants or public officials who respond to an investigation by the Ombudsman may fear reprisal or harm because of their participation in the process. The Ombudsman should be able to keep these communications with his/her office confidential. The other mechanism to protect the confidentiality of information held by the Ombudsman is to have provisions that prevent the subpoena of the Ombudsman to testify in courts or tribunals or compel him/her in any way to disclose information in his/her possession (Gottehrer, 2009: 8).

The above-mentioned normative values or characteristics of the Ombudsman are echoed through the United Nations' Resolutions 63/169 of 2008 and 65/207 of 2010, both which emphasise the role that an Ombudsman plays in promoting good governance in public administrations. Furthermore, both the Resolutions recognise the role of an Ombudsman in promoting the rule of law, justice and equality – principles that are consistent with the notion of good governance. The Resolutions require an Ombudsman to operate in terms of the Paris Principles. The Paris Principles (Resolution 48/134 of 1993) require that a national institution such as the Office of the Ombudsman must be given as broad a mandate as possible, codified in the constitutional and/or legislative text with specification of its composition and competence. This clearly talks to the status of the Ombudsman within the polity.

The irreducible characteristics for an effective Ombudsman also found favour with the African Institute of Ombudsman and Mediators' Associations (AOMA). It has

recommended, as a measure to safeguard the independence of the Ombudsman, that the institution of the Ombudsman should ideally be embedded in the constitution, as the threshold for changing the constitution is usually higher and in that way the institution can be better protected. The institution must be characterised by independence, inclusive of institutional, functional and personal independence. Appointment and removal procedures must be transparent, fair and inclusive with the approval of the legislature or another elected body, and the offices must be adequately funded (African Ombudsman Research Centre, 2014: 41).

The researcher proposes for the Public Protector in South Africa a corporate governance framework geared at embedding these character traits of the Ombudsman institution.

2.12 Conclusion

In this chapter, the researcher sought to establish Governance, and Good Governance, in particular, as the theoretical and normative frameworks for Ombudsman institutions. The Ombudsman, as an institution, finds resonance within the democratic governance framework. This democratic governance framework is the global strategic vision that has been adopted by the United Nations, the African Union, and donor organisations.

The reading of literature suggests that Governance is the theoretical framework within which the Ombudsman institution has evolved. The theory of Governance has evolved from Traditional Public Administration, which consisted of the managerial, political and legal approaches to public administration, neoliberal reforms that advocated for New Public Management, and now new governance or Good Governance. There is no universal definition for Good Governance, but the most common definition is the one that emanates from the United Nations, which defines Good Governance in terms of eight characteristics. These are public participation, consensus orientation, accountability, transparency, responsiveness, effectiveness and efficiency, equity and inclusivity, and the rule of law. These characteristics are the ones that are presumed as a normative framework for the Ombudsman institution (see paragraph 2.4.1 above).

Ombudsman institutions exist, as part of democratic institutional mechanisms, envisaged to check the abuse of power by the state, or as facilitators or promoters of

Good Governance within their jurisdictions. Many Ombudsmen have become Hybrid or Variegated Ombudsmen, with broad mandates to promote Good Governance and human rights, and fight corruption (see paragraph 2.8 above).

Although Ombudsmen are varied and there is no one-size-fits-all, there are at least five generic functions of Ombudsmen, namely the control function, the protection and dispute resolution function, the remedial function, the normative function, and the education and public awareness function. In this study, the main concern is with describing the normative function of the Ombudsman. The literature suggests that there is a compelling case to be made for Good Governance as the normative function of the Ombudsman, in addition to traditional ones such as legal rules, good administration and human rights (see paragraph 2.11 above).

Some Ombudsmen are parliamentary functionaries and members of the public have access to them only through members of parliament. This is the case in the parliamentary Ombudsman system in the UK, and the *Le Mediateuer* system in France. However, France has since developed its institution (now renamed the *Defender of Rights*) to include direct access by members of the public, while the UK is considering the review of its MP's filter system (see paragraph 2.11 above).

Many Ombudsmen do not have binding decision-making powers. They only have powers of recommendation. Some authors view this as a weakness, but others view this lack of binding powers as facilitative of cooperation and trust between the Ombudsman and the subjects of investigation. These authors indicate that the persuasive power, integrity and standing of the Ombudsman are the skills that can assist him/her to influence public officials to implement his/her recommendations (see paragraphs 2.10 and 2.11 above).

There is also a strong argument made that Ombudsmen are important institutions for the promotion of Good Governance, the rule of law and democracy (see paragraph 2.7, pages 58-64).

Despite the differences in nomenclature, political contexts and doctrinal conceptualisations, there are identifiable common characteristics for the Ombudsman institution, which can be described as the normative values and ethics of an effective Ombudsman. Tyndall (2014) suggested the values of independence, fairness, effectiveness, transparency and accountability. Clearly these dovetails with

the characteristics of good governance, as developed by UNESCAP, and seem to be universally accepted. Factors such as integrity, uprightness, persuasive power and moral authority are suggested as some of the ethical virtues of the Ombudsman (see paragraph 2.11, pages 92-101 above).

In this chapter, the researcher sought to align, through analysis, both the theory of Governance and the concept of Ombudsman, especially in establishing Good Governance as the normative function of the Ombudsman, as well as defining the normative values for the Ombudsman.

In the next chapter, the status of the Public Protector of South Africa, the genus of the Ombudsman, will be evaluated within the governance framework that exists in the country. Some of the contentious theoretical and conceptual issues, such as the place of the PP in the constitutional framework, especially the *trias politica* and cooperative governance, will be discussed.

CHAPTER 3: THE CONCEPTION OF THE PUBLIC PROTECTOR IN SOUTH AFRICA: AN OVERVIEW

3.1 Introduction

The purpose of this chapter is to understand the status, role, powers and effectiveness of the Public Protector (PP) in South Africa through an analysis of its conception and the macro socio-political-legal context within which it exists. Furthermore, the study will address the conceptualisation of the PP, through the analysis of its powers by discussing selected official reports, relevant statutes, and case law.

The PP of South Africa is one of the macro-institutions mandated by the Constitution, 1996. The political context of its creation is the 1993 negotiated political settlement or a solemn pact, which was formalised in the Constitutional Principles. As part of the multiparty negotiations, it was agreed that the final constitution will be aligned to the 34 Constitutional Principles, which were included in the Interim Constitution of 1993. Constitutional Principle XXIX specifically said:

The independence and impartiality of... a Public Protector shall be provided for and safeguarded by the Constitution in the interests of the maintenance of effective public finance and administration and a high standard of professional ethics in the public service.

The PP was created in terms of Section 181 of the Constitution, as one of the institutions supporting and strengthening the constitutional democracy in South Africa. The hitherto strong position of the Office of the PP is because of a combination of factors, such as good constitutional and legal foundations, a strong PP, the proactive actions of the institution, and a supportive judiciary.

This chapter is essentially about the conception of the PP, the macro socio-political and legal context, and the conceptualisation of the role and powers of the PP of South Africa.

3.2 The conception of the Ombudsman in South Africa

In the era of a complicated governance system and political party discipline in South Africa, which may compromise parliamentarians' independence, some of the Chapter 9 institutions can be understood as having been formed to support and aid parliamentarians in their oversight and accountability functions by providing them

with relevant information that can be used in the proper execution of their duties (Corder, Jagwanth and Soltau, 1999). This is certainly how the PP can be conceived in South Africa.

The predecessor to the PP existed prior to the 1994 democratic dispensation through an institution established in terms of the Advocate-General Act of 1979, called the Advocate-General. This institution was renamed Ombudsman in terms of the Advocate-General Amendment Act of 1991, and in this form began to operate on 22 November 1991 (South African History Online, 2017). The Ombudsman was appointed and could be removed by the State President on report to Parliament or through a request of Parliament, but was essentially an officer of Parliament who was institutionally and functionally independent (Brynard, 1986: 7-9).

The Ombudsman had powers to investigate improper conduct in state affairs, such as maladministration, and could recommend remedies. Section 5 of the Act provided that the Ombudsman could investigate a matter laid before him/her in terms of Section 4 or which he/her had been requested to investigate as provided for in Section 4A(2)(a), determine if the suspicion in question was well-founded, and investigate it and hand a report on his/her findings and recommendations, if any, to the Speaker of Parliament. The Speaker would then hand over the report to the Minister of Justice within seven days of receipt, who would, within 14 days of its receipt by him/her, table it in Parliament (Republic of South Africa, 1991).

This Ombudsman functioned until it was replaced by the PP, which was established in 1994, in terms of the Interim Constitution of 1993. The idea of an Ombudsman for post-apartheid South Africa was mooted as early as 1992 by the ANC in its policy document titled *Ready to govern: ANC policy guidelines for a democratic South Africa*. The ANC said that it

...proposes that a full-time independent office of the Ombud should be created, with wide powers to investigate complaints against members of the public service and other holders of public office and to investigate allegations of corruption, abuse of their powers, rudeness and maladministration. The Ombud shall have power to provide adequate remedies. He shall be appointed by and answerable to parliament.

Consequently, the idea of an Ombudsman for South Africa was unanimously accepted during the multiparty negotiations for the new constitutional order. It was agreed in one of the 34 Constitutional Principles, as part of the political settlement, that it would be vital for the Office to be independent, impartial and bestowed with expanded powers to investigate and review the regularity and legality of administrative actions. Constitutional Principle XXIX specifically said:

The independence and impartiality of... a Public Protector shall be provided for and safeguarded by the Constitution in the interests of the maintenance of effective public finance and administration and a high standard of professional ethics in the public service.

The Ombudsman Office is a profound improvement, both in conception and execution, from its predecessor, the Advocate-General (Ombudsman), whose brief was limited to the investigation of the unlawful and improper use of public finances. The PP, on the other hand, is to “watch the watchers and to guarantee that the government discharges its responsibilities without fear, favour or prejudice” (Bishop and Woolman, 2013: 24A-1-2).

Fundamentally, from an institutional perspective, the previous Ombudsman existed within the Westminster system of parliamentary supremacy. That should have hamstrung its independence, as within the Westminster system that existed in South Africa then, Parliament was supreme and its decision was final. The current PP operates within the system of constitutional supremacy, in which the law or conduct inconsistent with the Constitution is invalid. Even though the PP reports to the Parliament, its independence is constitutionally assured, and no person or organ of state may interfere with its functions (see Section 181(1)-(3) of the Constitution, 1996). The Parliament may only exercise its oversight responsibilities over the PP subject to the Constitution.

Initially the institution of the PP was formed in terms of the 1993 Constitution. In the 1996 Constitution it was conceived and conceptualised as a Chapter 9 institution (State Institutions Supporting Constitutional Democracy), established to ensure government accountability and provide remedies for maladministration and the abuse of authority. This conception and conceptualisation meant that the PP has been assured of its independence (Section 181(2)), and that its removal from office would

be onerous, requiring a two-thirds majority of the National Assembly (Section 194(2)).

Bishop and Woolman (2013: 24A-2) contend that the PP was conceptualised to occupy a middle space in the politico-constitutional landscape. On the one hand, it assists the courts in that it handles those matters of the administration of justice, which fall outside the purview of the courts, such as those matters that lend themselves to unfairness rather than illegality. On the other, it assists the Legislature with the monitoring of the Executive by resolving those issues that the elected representatives are unable to address. This conception is narrow, to say the least. It ignores the fact that the PP, as a Chapter 9 institution, is an institution created to support constitutional democracy. Therefore, it was meant to contribute to South Africa's nascent transformative constitutionalism. Transformative constitutionalism¹⁰ entails an enduring constitutional project of transformation of the country's institutions of governance and power relations towards a participative and egalitarian democratic society (Klare, 1998: 150). In this sense, an argument is made that by its conception, the PP was meant to be a transformative institution, created to be a central pillar in the promotion of good governance and the strengthening of constitutional democracy (Section 181(i) of the Constitution, 1996). It was never meant to plug the gaps left by the Judiciary and the Legislature in overseeing the state administration, and it is a functionary of neither.

Bishop and Woolman (2013: 24A-2) further indicate that the general criticism of the PP, and Ombudsman institutions generally, is that it lacks the powers to make binding decisions. This criticism was based on the misunderstanding of the unique conceptualisation of the PP of South Africa and the constitutional scheme within which it operates. However, the proper reading of the *Certification of the Constitution, 1996* case would have clarified this criticism. The Constitutional Court said the following:

Members of the public aggrieved by the conduct of government officials should be able to lodge complaints with the Public Protector, who will investigate them and take appropriate remedial action.

¹⁰ The concepts of constitutionalism, transformative constitutionalism and constitutional democracy are fully discussed in 3.4.1 below.

The plain and clear language used in this judgment is indicative that, and as clarified by the Constitutional Court in the Nkandla judgment, the PP's decisions are binding unless successfully reviewed by a court of law. This is so, not because the Constitutional Court has decreed it. It is so because the Constitution has decreed it, *ab initio*.

However, it must be emphasised that the purpose of judicial review of the remedial action of the PP is not concerned with the correctness of a decision of the PP, but with whether it performed the function with which it was entrusted, and in which manner. In this sense, judicial review is concerned with the finding and rectification of maladministration. In *Zuma v Democratic Alliance and Others, Acting National Director of Public Prosecutions and Another v Democratic Alliance and Another* (771/2016, 1170/2016) [2017] ZASCA 146; [2017] 4 All SA 726 (SCA); 2018 (1) SA 200 (SCA); 2018 (1) SACR 123 (SCA) (13 October 2017) the Supreme Court of Appeal defined the test of rationality review as follows:

Rationality review is concerned with the evaluation of a relationship between means and ends: the relationship, connection or link (as it is variously referred to) between the means employed to achieve a particular purpose on the one hand, and the purpose or end itself on the other. The aim of the evaluation of the relationship is not to determine whether some means will achieve the purpose better than others but only whether the means employed are rationally related to the purpose for which the power was conferred. Rationality review also covers the process by which the decision is made. So, both the process by which the decision is made and the decision itself must be rational. If a failure to take into account relevant material is inconsistent with the purpose for which the power was conferred there can be no rational relationship between the means employed and the purpose (par.35 of the judgment).

Therefore, judicial review does not entitle the courts to second-guess the findings and remedial action of the PP, but only determines the rationality of those decisions. In exercising its review function, the review court will do well to be careful not to arrogate itself superior wisdom with regard to matters entrusted to the PP, but should evaluate among others the lawfulness and procedural fairness of the investigations,

findings and remedial action of the PP. Chief Justice Mogoeng famously described the PP as the quintessence of scriptural David, defending the public against the well-resourced Goliath of the state (*EFF v Speaker of the National Assembly*, 2016).

The PP is South Africa's version of the Ombudsman, with its own unique characteristics because of its embodiment in the Constitution. According to the report of the parliamentary review on Chapter 9 institutions, the name 'Public Protector' was preferred for South Africa to avoid the gender connotations of the term 'Ombudsman' (Parliament of the Republic of South Africa, 2007: 95). However, it follows conceptually, that there is more from the nomenclature chosen, than only avoiding the gender connotation. In the *Nkandla* judgment, Chief Justice Mogoeng, in par. 52, of the judgment had this to say about the choice of the name for the institution:

The office of the Public Protector is a new institution – different from its predecessors like the 'Advocate General', or the 'Ombudsman' and only when we became a constitutional democracy did it become the 'Public Protector'. That carefully selected nomenclature alone, speaks volumes of the role meant to be fulfilled by the Public Protector. It is supposed to protect the public from any conduct in State affairs or in any sphere of government that could result in any impropriety or prejudice. And of course, the amendments to the Public Protector Act have since added unlawful enrichment and corruption to the list. Among those to be investigated by the Public Protector for alleged ethical breaches, are the President and Members of the Executive at national and provincial levels (*EFF v Speaker of the National Assembly*, 2016).

Thus, the PP is one of the invaluable institutions of this nascent constitutional democracy created to protect the public in the fight against corruption, unlawful self-enrichment by public officials, and wanton illegality and impropriety in public affairs, and it is intended to generally promote Good Governance.

3.3 Classical or hybrid model?

Hence, from the foregoing, the following question arises: What type or model of Ombudsman is the PP of South Africa conceptually?

There is no denying that the PP has the characteristics of a Classical Ombudsman in that it is a body created by the Constitution and law with the mandate in terms of Section 181(1) of the Constitution to do the following: 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; to report on that conduct; and to take appropriate remedial action.

However, from the perspective of the broadly legislated functions of the PP, the researcher can be justified to classify the institution as, at least *de jure*, a Variegated Ombudsman, if not *de facto*. Malunga (2015: 26), the current Deputy PP, has argued that the PP is an institution of manifold mandates, with key focus on the following matters:

- (a) Maladministration jurisdiction and resolution of related disputes as provided for in the Public Protector Act 23, 1994. This goes beyond the classical jurisdiction of investigation of complaints laid by citizens, but it includes the power to conduct own-initiated investigations and provide redress;
- (b) Effecting the executive ethics and conduct under the Executive Members' Ethics Act, 1998 and its Executive Ethics Code;
- (c) Anti-corruption mandate as provided for in the Prevention and Combating of Corrupt Activities Act 12 of 2004;
- (d) Protection of whistle-blowers as provided for in the Protected Disclosures Act 26 of 2000;
- (e) Information regulation as provided for in the Promotion of Access to Information Act 2 of 2000; and
- (f) Review of verdicts of the Home Builders Registration Council as provided for in the Housing Protection Measures Act 95 of 1998.

Therefore, the PP is a Variegated Ombudsman by law and not by choice. Because it is a variegated institution, it can be described as a Hybrid Ombudsman. A Hybrid Ombudsman is one that deals with allegations about maladministration, corruption and violations of human rights (Bishop and Woolman, 2013: 24A-3; Frahm, 2013: 14). The analysis of the PP's well-publicised and politically controversial reports, such as the creatively, if not provocatively, titled *Secure in Comfort* (the Nkandla report), the *State of Capture*, the *Derailed* (a report relating to allegations of

impropriety at the Public Rail Agency of South Africa), and *When Governance and Ethics Fail* (a report relating to allegations of impropriety at the South African Broadcasting Corporation), indicate that the complainants were the influential bodies, such as trade unions and political parties. This may partly explain the publicity that accompanied these reports, but importantly they underlie the hybrid nature of the PP. The comprehensive legislative mandate of the PP is summarised in the table below:

TABLE 3.1: The Comprehensive Legislative Mandate of the PP

LEGISLATION	PROVISION
Constitution of the Republic of South Africa, 1996	Section 182(1) requires 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, to report on that conduct and to take appropriate remedial action. Section 182(4) specifically requires that the PP must be accessible to all persons and communities.
Public Protector Act 23 of 1994	The additional powers of the PP are indicated in Sections 6 to 10. Section 6(4)(b) provides that the PP is competent to endeavour, in his or her sole discretion, to resolve any dispute or rectify any act or omission by mediation, conciliation or negotiation, advising, where necessary, any complainant regarding appropriate remedies; or any other means that may be expedient in

	the circumstances.
Executive Members' Ethics Act 82 of 1998	Section 4 of the Act mandates the PP to investigate allegations of any breach of the Executive Ethics Code on receipt of a complaint by the President, a member of the National Assembly or a permanent delegate to the National Council of Provinces, if the complaint is against a Cabinet member or Deputy Minister; or the Premier or a member of the provincial legislature of a province, if the complaint is against an MEC of the province.
Public Finance Management Act 1 of 1999; Treasury Regulations, 2000.	Treasury Regulation 21.4 issued in terms of PFMA Act provides that when a donor or sponsor requests to remain anonymous, the accounting officer must submit to the relevant treasury a certificate from both the PP and the Auditor-General, which states that the identity of the donor or sponsor has been revealed to them, that they have noted it and have no objection.
Promotion of Access to Information Act 2 of 2000	Section 91 of this Act amends s6(4) the PP Act to give her the power to investigate complaints relating to the operation or administration of the Act, and to endeavour to resolve the dispute by mediation, conciliation or negotiation. NB. This mandate is likely to be transferred to the newly established

	Information Regulator.
Prevention and Combating of Corrupt Activities Act (PRECCA), 12 of 2004	Section 6(4)(a)(iii) of the PP Act mandates the PP to investigate conduct that is improper or dishonest, or omission or offences referred to in Part 1 to 4, or Section 17, 20 or 21 of Chapter 2 of the PRECCA, with respect to public money.
Electoral Commission Act 51 of 1996	Section 6(3) of this Act mandates the PP to be a member of the panel that appoints the Independent Electoral Commission.
Special Investigating Units and Special Tribunals Act 74 of 1996	Section 5(6) of this Act makes provision for the Head of the Special Investigating Unit to provide the PP with a copy of all Section 2(1) proclamations and may refer matters to the PP.
Protected Disclosures Act 26 of 2000	Section 8 of this Act provides that any disclosure made in good faith to the PP is a protected disclosure. Section 10 provides that the Minister of Justice may make regulations regarding matters, which may be referred to the PP.
Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000	Section 25 requires the state consult with the relevant constitutional institutions, including the PP, in developing awareness of, and take measures to promote equality.
National Archives and Record Service Act 43 of 1996	Section 6(4)(d) of this Act provides that the National Archives Council shall consult with the PP on investigations

	into the unauthorised destruction of records otherwise protected under this Act.
National Nuclear Regulator Act 47 of 1999	Section 51(2) of this Act provides that no person is liable or may suffer occupational detriment for disclosing evidence of a health or safety risk or a duty under the Act, if the disclosure was made to the PP.
Housing Protection Measures Act 95 of 1998	Section 22(4)(1) of this Act mandates the PP to review any decision of the National Home Builders Registration Council, its staff or its agents.
Lotteries Act 57 of 1997; Regulations Relating to Distribution Agencies, 2001	Regulation 8 of the Lotteries Act exempts bonafide confidential disclosures made to the PP, Parliament, NPA and SAPS in connection to grants applications.

Sources: The Constitution, 1996; Public Protector Act 23 of 1994; Executive Members' Ethics, Act 82 of 1998; Public Finance Management, Act 1 of 1999; Promotion of Access to Information, Act 2 of 2000; Electoral Commission, Act 51 of 1996; Special Investigating Units and Special Tribunals, Act 74 of 1996; Promotion of Equality and Prevention of Unfair Discrimination, Act 4 of 2000; National Archives and Record Service, Act 43 of 1996; National Nuclear Regulator, Act 47 of 1999; Housing Protection Measures, Act 95 of 1998; Lotteries Act 57 of 1997.

In addition to the legislative mandate enunciated above, the PP is impacted upon by several policy mandates intended to promote Good Governance, both explicitly and implicitly. The table below enunciates these **policy mandates**.

TABLE 3.2: Policy mandates of the PP

POLICY	DESCRIPTION OF MANDATE
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<p>The National Development Plan, 2030</p>	<p>The following suggestions of the NDP impact directly on the mandate of the PP to promote good governance:</p> <ul style="list-style-type: none"> • Strengthening the multi-agency anti-corruption system; and • Strengthening the protection of whistle blowers (NPC, 2011: 447). <p>Explicitly, the NDP makes the following pronouncements on building the capacity of the PP to meet its mandate of promoting good governance:</p> <p>“...competent, skilled institutions like the PP and Special Investigating Unit need to be adequately funded and staffed and free from external interference” (NPC, 2011: 57).</p> <p>Furthermore, the NDP calls for the following: “...strengthening the anti-corruption system requires increasing the agencies’ specialist resources. More capacity should be created for corruption investigations – more funding is required to employ skilled personnel and sophisticated investigative techniques” (NPC, 2011: 448).</p>
<p>Transforming our world: the 2030 Agenda for Sustainable Development – 17 Sustainable Development Goals</p>	<p>Goal 16: Promote peace, justice and strong institutions have several priorities that impact on the mandated areas of the PP, namely:</p>

	<ul style="list-style-type: none"> • reducing corruption; • developing effective and accountable institutions; • ensuring inclusive, participatory and representative decision-making; and • ensuring access to information (UN, 2015).
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Source: National Planning Commission, 2011; United Nations, 2015

The above-mentioned legislative and policy mandates are indicative of the multiple-mandate, variegated and hybrid nature of the PP; hence, the relevance of the question whether the institution is adequately structured, resourced and capacitated to handle these broad mandates.

3.4 The macro socio-political and legal context within which the PP operates

This section of the study focuses on the governance framework at macro-level within which the PP exists. Theories such as constitutionalism, accountability and the rule of law, which inform the socio-political and legal context of governance in South Africa, will be discussed.

3.4.1 Constitutionalism, Accountability and the Rule of Law in South Africa

Constitutionalism, accountability, responsiveness, openness, and the rule of law form the core of the governance framework in South Africa. In this section of the study, the definitions and applications of these concepts in South Africa will be discussed.

(a) Constitutionalism

The PP exists to support and strengthen the constitutional democracy in South Africa. Therefore, to understand this institution in its macro socio-political and legal context, we need to understand the idea of constitutionalism or the constitutional democracy. One of the foremost constitutional jurists in South Africa, Albie Sachs (2018: 18) suggested that the country needed three things, from a theoretical perspective, to make its constitutional democracy work. Firstly, it needed a well-designed constitutional text scripted by the democratically elected representatives of

the people, who are themselves entrenched in the nation's history and subscribe to the universally acknowledged democratic values. Secondly, it needed more than just the text. It needed institutions created by the text (the Constitution) itself to give effect to the text, as it was recognised that the text without institutions that would keep it in check with the values of the text would not be adequate. Thirdly, it required more than just the text and institutions. It required the culture of constitutionalism that allows civil society and media freedom of expression and speech, thereby opening up to a diversity of opinions. When you have these three things, arguably you have constitutionalism (Sachs, 2018: 18).

Former Constitutional Court judge, Justice Yvonne Mokgoro (2015) made the following remark at the late Minister Kader Asmal Memorial Lecture:

The basic principles which underlie our constitutional order include constitutionalism, separation of powers with checks and balances, the rule of law and accountability.

This principle of constitutionalism is contained in Section 2 of the Constitution, which explicitly prescribes that the Constitution is the supreme law, and any law or conduct inconsistent herewith is invalid. Constitutionalism is the notion, mostly connected with the political concepts of John Locke, and connected to the notion of the rule of law, in which it is legally possible to proscribe government's powers, and the government's authority is dependent on its compliance with these restrictions (Constitution Society, 2017).

Constitution is often defined as a body of rules, whether written or unwritten, legal or extra-legal, which describe the government and its operations. This is the wider definition. However, the other definition is one that says the idea of a constitution is the contrivance that seeks not only to describe but also to confine the government. This means devising mechanisms to limit the authority of government through checks and balances, for instance. The proscription of government authority in this manner is called constitutionalism (Wormuth, 1949: 1). The central problem that is addressed by constitutionalism is to form a government with sufficient power to rule, while structuring and controlling that power so that it cannot be misused to oppress (Currie and De Waal, 2005: 8). In this sense, constitutionalism is a normative framework that sets authoritative values to be observed in the course of democratic governance. In

essence, it means that government's powers should derive from the constitution, which must in turn serve to limit those powers.

The argument is made that the South African Constitution is based on the principles of transformative constitutionalism. Transformative Constitutionalism has been defined as "a long-term project of constitutional enactment, interpretation and enforcement committed to transforming a country's political, legal and social institutions, and power relations in a democratic and egalitarian direction" (Klare, 1998: 150). Therefore, transformative constitutionalism envisages a dynamic relationship between the people, the law, and the institutions of democratic governance.

In this sense, transformation is the permanent constitutional project, which does not end with the attainment of egalitarian access to resources and elementary services, or when judges begin to embrace the ethos of justification. Transformative, rather than transitional, constitutionalism is a permanent ideal in which the culture of dialogue and contestation of ideas have true potential to flourish and they are regularly explored, shaped, acknowledged or vetoed, and in which change is not only predictable but is a norm (Langa, 2006: 5). Davis (2007: 45-46) identifies seven provisions of the Constitution that make it a societal transformative text, which it has been described as. The provisions are:

- Section 1 sets the foundational values as the amalgam of equality, dignity and freedom. These values are indivisible and cannot be applied negatively;
- Section 8 provides for the horizontal application of the rights in the Bill of Rights, which means that even private people are barred from discriminating against others. The exercise of power, whether it originates from the state or private organisations is subject to constitutional scrutiny, for as long as it was exercised in the public domain;
- Section 9 supports the principle of substantive equality and contains the anti-discrimination clause that does not only protect citizens against race and gender discrimination, but extends protection against discrimination based on sexual orientation, age, belief, opinion and arguably class;

- Section 23 protects labour rights, including the right to strike, to bargain collectively, to associate, and to fair labour practices;
- Sections 26 and 27 provides for socio-economic rights, such as the right of access to housing and the right of access to health care, food, water and social security;
- Sections 30 and 31 guarantees cultural rights and identity; and
- Section 36 sets out the constitutional procedure to limit the rights in the Bill of Rights, in terms of the law of general application, and only to an extent that is justifiable in an open and democratic society.

However, if one was to paraphrase Woodrow Wilson (1887) it must be realised and comprehended that the period of Constituent Assembly (1994-1996) in South Africa was the period of *constitution-writing*, not of *constitution-making*. The post-1994 democratic breakthrough heralded the period of constitutional development, but did not inaugurate it. It interrupted apartheid, but did not immediately eliminate its legacy of massive inequality and poverty; hence, the continued quest for transformation in order to eliminate the legacy of apartheid. This quest for transformation is the quest for constitution-making, the quest for transformative constitutionalism. Transformative constitutionalism is about embedding the values of the Constitution in all aspects of society, especially its institutions.

One can add that the other indication of the transformative intentions of the constitutional text is the whole Chapter 9 of the Constitution, which created the institutions to support and strengthen the constitutional democracy, and which would serve as additional mechanisms to check and control the exercise of public power and to ensure accountability. These institutions, especially the Office of the PP, have demonstrated their transformative contributions towards the realisation of democratic governance in South Africa.

Furthermore, Currie and De Waal (2005: 2) argued that the post-1994 constitutionalism could justifiably be construed as a “constitutional revolution”, especially in three areas:

- Enfranchisement and related political and civil rights were extended to all citizens regardless of race, for the first time;

- The notion of parliamentary supremacy was substituted with the notion of constitutional supremacy; and
- The centralised system of government was substituted by the notion of cooperative governance.

It is the second of these changes that is relevant for the status of the PP. Pre-1994, effective human rights protection by the judiciary or other intermediaries was almost absent. According to Dicey (1959: xxxiv), in the system of parliamentary sovereignty, a law promulgated by parliament was supreme.

Prior to 1994, constitutional law was based on the principle of parliamentary supremacy, according to which parliament could promulgate any laws it preferred to and no person or institution (inclusive of the judiciary) had the authority to question the law promulgated by the legislature (Currie and De Waal, 2005: 3). Thus, nothing could prevent the Parliament from becoming a tyranny, which in fact it became judging by the oppressive system of apartheid it presided over.

The principle of constitutionalism is strengthened by the requirements of accountability and the rule of law, which are entrenched in Section 1 of the Constitution.

(b) Accountability, responsiveness and openness

Accountability, responsiveness and openness are some of the values that characterise good governance. These are also the foundational values of constitutional democracy (see Section 19(d) of the Constitution), as well as constitute part of basic values and principles that govern Public Administration (section 195 of the Constitution, 1996) in South Africa.

Accountability

Accountability essentially requires government to explain its actions when it is required to do so; to justify its actions (Currie and De Waal, 2005: 17). Writing in the context of the interim constitution, but equally applicable to the 1996 Constitution, Mureinik (1994: 31-32) convincingly argued that the new constitutional order demands “a culture of justification”, in which every exercise of power is justified and

where the case of government is accepted on the basis of the cogency of its reason, not fear of the force at its disposal.

In this regard, the United Nations Department of Economic and Social Affairs' (UNDESA) World Report on Responsiveness and Accountability (UNDESA, 2015: 51) highlights the fact that accountability is two dimensional. On the one hand, it refers to the need to give information about one's actions, in other words, to be answerable. On the other hand, it refers to the need for consequences from the citizenry or authorities who are either displeased with the actions themselves or with the rationale for their justification.

Accountability is about holding public authorities answerable for their actions, and increasingly it involves consequences for those actions. In this sense, accountability is linked to responsiveness (UNDESA, 2015: 51), which is discussed next.

Responsiveness

Responsiveness is the quality of responding quicker and satisfactorily to the demands of the citizenry. Responsiveness requires government to be responsive and accessible to the people it governs (Currie and De Waal, 2005: 17). In this regard, UNDESA (2015: 27) in its 2015 World Report on Responsiveness and Accountability indicates that responsive public governance requires an effective and efficient response to the tangible needs of the people. Furthermore, to be efficient and effective, responsive governance requires collaborative engagements with both civil society and the private sector in order to respond realistically to the needs of the citizenry (UNDESA, 2015: 28). The Report also noted that multisector cooperation brings with it challenges to traditional notions of public governance and institutions. Traditional public institutions in various countries encompass, principally, legislative bodies responsible for law making; specialist government departments and their associated agencies responsible for the execution of government policy; and judiciaries that are tasked with the interpretation of the laws and rules, and adjudication and resolution of disputes. However, these are inadequate for responsive public governance. Hence, the Report indicates that contemporary

administrations should be able to be responsive to the demands for public participation through establishing apposite legal and organisational frameworks, as well as consistent networks and modalities for responsive governance. Additional to their enduring service delivery mandate, they need the capability to promote, regulate and manage collaboration among the levels of government and various sectors. They should have the capacity to implement strategies that integrate social, economic and environmental considerations. All this is intended to foster responsive public governance (UNDESA, 2015: 28).

Openness

A government is open when it follows and applies the principles of transparency, accountability and citizen participation. From this perspective, the Organisation for Economic Co-operation and Development (OECD) defines open government as “a culture of governance based on innovative and sustainable public policies and practices inspired by the principles of transparency, accountability, and participation that fosters democracy and inclusive growth” (OECD, 2016: 1).

As it is clear from this definition, citizen participation (ranging from simple access to information, to consultation and engagement) is a key element of open and transparent governance, the importance and need for countries to craft their open governance and citizen participation framework to be clear about its objectives, the correct measurements, the identification of proper stakeholders, the right mechanisms and tools, and communication to the stakeholders about engagement opportunities and ultimate outcomes. This will require countries to develop a solid and adequate institutional framework and capacitate public servants with skills to implement them (OECD, 2016: 13). Furthermore, in its report on the role of ombudsman institutions in open government, it is indicated that through their complaints-handling, investigating conduct in public administration and submitting regular reports, an Ombudsman gathers and distributes a treasure of information regarding the state of public administrations. Through their recommendations and remedial action, they not only aim to resolve a particular problem but also address the general systemic problems in order to improve public administration and its accountability. Thus, an Ombudsman serves as an important contributor in ensuring open governance and policy-making (OECD, 2018: 22).

In South Africa, these principles together constitute a powerful force for democratic governance, as they form some of the basic constitutional tenets and values of public administration. Section 195 of the Constitution calls for public administration to respond to the needs of the people and for public participation in policy-making (Section 195(e)); as well as for accountable public administration (Section 195(f)); and for the fostering of transparency by providing the public with timely information, and accessible and accurate information (RSA, 1996). These principles are further promoted through the Batho Pele principles, which require public administration to be consultative, service-oriented, accessible, courteous, informative, open and transparent, and redressive, and that ensures value for money when carrying out its mandate of service delivery and good governance (Department of Public Service and Administration, 1997).

(c) The rule of law

The rule of law is also an aspect of good governance in South Africa. It is a foundational value enshrined in section 1(c) of Constitution, 1996. This concept was originally conceived by the British jurist, AV Dicey (1959: xcvi), in order to defend human rights. It requires government to act in accordance with pre-communicated, clear and universal rules that are enforceable by the independent courts according to fair procedure. The Constitutional Court has settled the concept of the rule of law to include the prerequisite that all law and conduct of state must be rationally connected to a legitimate government purpose *President of the Republic of South Africa and Others v South African Rugby Football Union and Others (CCT16/98) [1999] ZACC 11; 2000 (1) SA 1; 1999 (10) BCLR 1059 (10 September 1999)*. This is to ensure that government action is not capricious and arbitrary. To this effect, the Constitutional Court has ruled that:

It is a requirement of the rule of law that the exercise of public power by the executive and other functionaries should not be arbitrary. Decisions must be rationally related to the purpose for which power was given... If it does not, it falls short of the standards demanded by our constitution for such action (*Pharmaceutical Manufacturers Association of South Africa and Another: in re Ex Parte President of the Republic of South Africa 2000 (2) SA 674, at par. 85*).

Furthermore, the Constitutional Court explained the principle of the rule of law thus:

The exercise of public power must comply with the constitution, which is the supreme law, and the doctrine of legality, which is part of that law. The doctrine of legality, which is an incident of the rule of law, is one of the constitutional controls through which the exercise of public power is regulated by the constitution. It entails that both the Legislature and the Executive are constrained by the principle that they may exercise no power and perform no function beyond that conferred on them by the law (see *Affordable Medicines Trust v Minister of Health* [2005] ZACC 3; 2006 (3) SA 247 (CC); 2005 (6) BCLR 529 (CC) (*Affordable Medicines*) at par. 49.).

The World Justice Project¹¹ has developed a working definition of the rule of law, comprising the four universal principles of the concept, namely:

- Accountability, which requires both public and private actors to be answerable for their actions;
- Just laws, which means laws must be clear, made public and in advance (i.e. not apply retrospectively), firm, and unbiased; be applied equally; as well as protect fundamental and human rights, and security of persons and property;
- Open government, which means that the processes by which laws and rules are enacted, administered and enforced are open, transparent, accessible, efficient and fair; and
- Accessibility and impartial dispute resolution, which means justice is made accessible to the public timely, by competent, neutral and independent tribunals.

Bodies like the PP serve to promote the rule of law in compliance with these four universal principles. The constitutional powers and functions of the PP are protected and defined by the principles of constitutionalism, incorporating the values of accountability, responsiveness, openness and the rule of law. Constitutionalism means that interference with the independence and functionality of the office will be inconsistent with the Constitution and therefore invalid. Not even the Parliament can interfere, as made clear in the *Nkandla* judgment.

¹¹ <https://worldjusticeproject.org/about-us/overview/what-rule-law>

The values of accountability, responsiveness and openness (transparency), and the rule of law are double-edged swords for the PP. The Office relies on these values to hold public functionaries accountable for their actions or omissions, while it is also required by the Constitution to account to Parliament based on the same values. Similarly, with the principle of the rule of law, which the Office requires to enforce its remedial actions; it must also comply with the rule of law when it investigates and issues its reports: it must act only within the Constitution and the law.

3.4.2 Multipartyism, one-party dominance and counter-majoritarianism

Section 1(d) of the Constitution sets as one of the founding principles a multi-party system of democratic government in South Africa. In the absence of direct constituency representative system, political parties serve the function of a representative democracy in South Africa, although their activities remain largely unregulated (Currie and De Waal, 2005: 15). Therefore, citizens primarily engage in democratic governance through the agency of political parties represented in Parliament.

Within this multi-party system, there is a phenomenon of one-party-dominance, in which the governing ANC is electorally dominant. In the 2014 election it obtained an overwhelming majority of 62%, and 249 seats in the National Assembly (IEC, 2014). The ANC is also dominant in eight of the provinces, except the Western Cape, which was won by the Democratic Alliance (DA) (IEC, 2014). These election results, however, show a progressive decline in levels of support for the ANC and further signal a realignment of opposition politics, with a significant increase in levels of support for the official opposition, the DA, and an impressive showing by the new kid on the political scene, the Economic Freedom Fighters (EFF) (Botha, Schaks and Steiger, 2015: 262), followed by a plethora of other smaller, but vocal political parties. The consolidated results of the 2016 Local Government elections show the continuing decline of the dominance of the ANC, as it polled 55,68% of the nationally consolidated results (IEC, 2016: 94). However, based on the 2014 results, which allocates the seats in Parliament until the next national and provincial elections in 2019, the phenomenon of one-party-dominance remains the key characteristic of the national body politic in South Africa.

The multiparty character of the National Assembly means that the PP accounts to a politically diverse, and at times, volatile multiparty Portfolio Committee on Justice. As has been seen, the governing party also uses its almost unfettered majority to bully the office of the PP into submission, second-guessing its findings and reports on Nkandla (National Assembly, 2015: 2021). However, the country experienced the value of multi-party democracy and constitutionalism when the minority political parties were able to act together to defend the powers of the PP in the House, and when the ANC bulldozed them through its unassailable majority, they were able to challenge and successfully review this in the courts, including the Constitutional Court. An example is the *Nkandla* judgment, which effectively overturned the resolution of the National Assembly that adopted the Report of the Ad Hoc Committee to consider the Report of the Police Minister on the security upgrades at the President's private residence (*EFF v Speaker of National Assembly*, 2016). This case has been discussed in detail in 3.6 below.

The counter-majoritarian phenomenon characterising the socio-political and legal environment in South Africa is underpinned by the principle of justiciability of the Constitution. Justiciability of the Constitution means the courts can review and set aside any law or conduct that is unconstitutional or invalid in terms of the Constitution (Currie and De Waal, 2005: 9). The Constitutional Court, the Supreme Court of Appeal, a High Court, or a court of similar status may make an order concerning the constitutional validity of any parliamentary or provincial acts or conduct, or any conduct of the President or executive branches of government (Burns, 2003: 288). Therefore, the effective political strategy of the opposition has been to challenge the decisions of the majority party through judicial review.

However, this creates counter-majoritarianism difficulty, which happens when the decisions of the elected majority are upstaged or set aside by an unelected judiciary (Daniels and Brickhill, 2006: 377). As Bickel (1962: 16-17) argued, when the court interferes with the Parliament's majority in making the laws, for instance, this arguably thwarts the will of the people. This phenomenon is controversial in South Africa, with the Secretary-General of the South African Communist Party and a member of Cabinet, Dr Blade Nzimande, being the outspoken critical voice against the practice of counter-majoritarianism. In fact, he calls it a "counter-majoritarian liberal offensive" against the governing party, which is intended to delegitimise the

ANC and the majority rule principle (Nzimande, 2015). The then ANC's secretary-general, Gwede Mantashe, was even blunter in an interview with the *Mail & Guardian*, when he was quoted as having said that Constitutional Court judges were part of the then "counter-revolutionary offensive" against President Jacob Zuma and the ANC (Letsoalo, Rossouw and Alcock, 2008).

While the judiciary has a role to adjudicate politically sensitive constitutional disputes, its overuse could be detrimental to its independence in the long run. No less a person than the eminent former Deputy Chief Justice, Dikgang Moseneke, has warned against this phenomenon of using the courts to fight political battles. When he delivered the Helen Suzman Lecture in November 2016, he said, "We will over time, I dare to warn, over politicise the courts and thereby tarnish their standing and effectiveness in the long term" (Jack, 2016).

Despite these criticisms, some scholars have noted that counter-majoritarianism is important in a democracy to guard against majoritarian tyranny. When parties abuse their parliamentary majority and executive dominance to pass through unconstitutional or unlawful decisions, then the courts are justified to intervene in order to correct the democratic process. Daniels and Brickhill (2006: 378-379) state that some of the justifications for counter-majoritarianism find their best expression in the expansion of the notion of democracy, which is justified by the view that democracy is not just the rule of the people but the rule of the people within the prearranged procedural strictures. In this sense, majority rule without predetermined constitutional constraints may well be anti-democratic. The other justification, Daniels and Brickhill (2006) note, is that while the legislature will consider the consequences of its legislation, it will usually do so in the abstract, whilst the advantage of the judicial review, on the other hand, is that the judiciary is uniquely placed in a position to consider the impact and consequence of the legislation in the context of actual case before it. Davis (2007: 46) points out that the South African Constitution has sought to attain a balance between constitutionalism and majoritarian rule in that it required of the judges to determine the justification for policy rather than substitute it for their own, which would constitute juristocracy – rule by the courts. The political strength of the minority opposition parties represented in Parliament derives from the principle of counter-majoritarianism that underpins the constitutionalism of South Africa.

It has become a political norm to arbitrate political differences through judicial reviews. This has been an effective strategy used by opposition parties to counteract the ANC's majoritarianism. The following are prominent political matters that ended up in the courts:

- **The Economic Freedom Fighters v Speaker of the National Assembly, 2016**

This case ruled that the powers of the PP are legally binding. The political context of this case is that the President had resisted implementing the findings of the PP on the improvements to his Nkandla compound (Eyewitness News, 2015).

The ANC used its majority in the Justice Committee to second-guess the report of the PP to the effect that the President must pay a portion of costs for the upgrades implemented at his private residence (National Assembly, 2015: 2021). Despite fierce parliamentary debates by all parties and disruptions of proceedings by the EFF, the ANC simply bulldozed the opposition parties. The EFF and the DA took the matter to the Constitutional Court, which ruled in their favour (News24, 2015).

This became a watershed judgment, as it re-affirmed the constitutional powers and status of the PP within the socio-political fabric of South Africa (Tandwa, 2017).

- **The Democratic Alliance v the Acting National Director, Public Prosecutions, 2016**

Through this review in the Gauteng High Court the official opposition, the DA, was able to successfully ask the court to review and set aside the National Prosecuting Authority's decision to discontinue the then President, Jacob Zuma's prosecution for corruption relating to the arms deal procurement (TMG Digital, 2016).

- **Democratic Alliance v the President of South Africa, 2017**

Arguably, the most brazen political judgment was the one that required President Zuma to give reasons for his executive decision to reshuffle his cabinet on midnight of 31 March 2017. This decision by the President was highly criticised

and saw South Africa downgraded to junk status by rating agencies and precipitated hitherto unprecedented political mobilisation against his rule (GroundUp, 2017). The aforementioned cases are some of the implications of the counter-majoritarian character of South Africa's constitutional design, facilitated through the principle of justiciability of the Constitution.

The PP, and perhaps all other Chapter 9 institutions, could be regarded as an array of the counter-majoritarian institutions that are part of constitutionalism in South Africa. If the findings and remedial actions of the PP are binding, it makes sense that even political actors will rush to use the office of the PP to pursue their political objectives. The following are examples of the reports of the PP's findings where political parties represented in Parliament submitted complaints:

- **The *State of Capture* Report**

The request for an investigation into the allegations of state capture was made by the DA leader, Mmusi Maimane, among others. This is the report that probed the allegations of state capture. The remedial action taken by the PP in this investigation was that the President must appoint an independent commission of inquiry to probe these allegations, but that the Chief Justice must nominate a judge to preside over the commission (Public Protector, 2016: 353).

- **The *Secure in Comfort* Report**

This investigation was requested by, among others, a member of parliament. It was about the allegations of impropriety regarding the improvements to President Zuma's private compound in Nkandla, KwaZulu-Natal. The Nkandla matter was debated in the public discourse for a long time and the governing party was able to use its majority to defend the President, despite evidence of wrongdoing. This came to be a watershed case that clarified the question of the binding nature of the powers of the PP (Tandwa, 2017).

The above cases are some of the instances showing how the PP can be approached by political actors to investigate matters with ostensible political implications for the country, which may frustrate the governing party in its decision-making role on any matter in state affairs and public administration.

3.4.3 Good Governance as a normative framework in South Africa

The PP exists within the framework of democratic governance in South Africa, characterised as already alluded to by the principle of constitutionalism, incorporating the values of the rule of law, multi-party democracy, and accountability, responsiveness and openness. Because the fundamental thesis of this study is that the PP must promote good governance in South Africa, this phenomenon is hereby discussed to provide the contextual and theoretical framework within which this mandate is carried out.

South Africa is a constitutional democracy. The concept of constitutional democracy is not defined in the Constitution. This is not surprising as in reality not even the notion of democracy is exhaustively definable, as serious problems of vagueness arise when democracy is defined either by its source of authority or purpose (Huntington, 1991: 6). However, it is argued that the notion of a constitutional democracy underpins the principles of good governance, which are arguably integral to the founding provisions of the Constitution. This constitutional democracy, as a framework for good governance, has to be supported and strengthened. In this regard, Chapter 9 of the Constitution establishes the PP as one of the institutions to support and strengthen constitutional democracy. The Public Protector Act, 23 of 1994 is the enabling statute for the establishment, powers and mandate of the PP. This Act gives the office its mandate to promote good governance in South Africa. Every year the institution hosts a Good Governance Week, as part of its mandate to this effect (South African Government, 2014).

It is argued that notions of good governance, democratisation and development are interlinked and described in the Reconstruction and Development Programme (RDP) (White *et al.*, 2002: 11). This idea suggests that the RDP is the governing party's political vision for good governance, linking good governance to questions of democratisation, service delivery and development. Understood in this sense, good governance has to do with meeting the five key plans of the RDP, which are:

- To meet the basic needs of the people, such as jobs, land, housing, water, electricity, telecommunications, transport, a clean and healthy environment, nutrition and social welfare;
- To develop human resources, through education and training programmes, child care and advanced scientific and technological development;

- To build the economy, ensure inclusive economic growth and redistribution;
- To democratise the state and society, to ensure thoroughgoing democratisation, and link democracy, development and a people-centred approach to pave a new democratic order; and
- To implement the RDP (ANC, 1994).

Already the RDP envisaged complexities in the new governance; hence, it proposed co-ordination and planning arrangements for the implementation of the RDP (ANC, 1994).

South Africa's strategic vision for good governance is best described in Chapter 13: Building a Capable State, and Chapter 14: Promoting Accountability and Fighting Corruption, of the National Development Plan (National Planning Commission, 2011). The NPC (2011: 402-403) proposes the following measures to promote accountability:

- Building a robust anti-corruption system, focusing on a multi-agency approach and capacitating anti-corruption agencies, and improving coordination of these agencies. The multi-agency approach is preferred more than the single-agency approach because if the single-agency is politically captured then the whole fight against corruption is doomed. Multiple agencies, if well-coordinated and resourced, stand a better chance to succeed in the fight against corruption. Another key intervention is the expansion of whistle-blowing mechanisms so that the broader public, and not only persons in employer-employee relationships, can also be able to make protected disclosures, and to ensure the protection of whistle-blowers.
- Strengthening the accountability of public servants by making public servants individually responsible for their conduct with regard to the misuse of public resources. This refers to the state desisting from paying the legal costs of public servants who are embroiled in criminal prosecution for corruption-related charges.
- Creating an open, accountable and responsive public service by making state information freely available to the citizenry and by establishing the information regulator to adjudicate appeals when access to information is denied.

- Strengthening the rule of law and judicial governance by ensuring access to justice, training of judicial officers, and improving the administration of lower courts, among other interventions.

Both the RDP and the NDP do not explicitly use the notion of good governance, but the programmes have important features of the meaning of good governance, such as democratic participation, consulting the people, transparency and building the economy. Similarly, the Constitution does not refer to the notion of governance or good governance, but the Founding Provisions in Section 1 conform to the essence of the universally accepted principles of good governance. The constitutional founding values of South Africa are:

- Human dignity, the achievement of equality and the advancement of human rights and freedoms;
- Non-racialism and non-sexism;
- Supremacy of the Constitution and the rule of law; and
- Universal adult suffrage, a national common voters' roll, regular elections and a multiparty system of democratic government to ensure accountability, responsiveness and openness (Section 1 of the Constitution, 1996).

In addition to the Constitution, good governance in South Africa is regulated through public sector legislation, such as the Public Finance Management Act and the Municipal Finance Management Act, which play an important role in the quest for good governance in the public sector. These laws aim to ensure transparency, accountability and the sound management of revenues, expenditures, and assets and liabilities in the public sector (Fourie, 2009: 1117). Furthermore, good governance is reviewed and monitored by the legislatures (inclusive of municipal councils) and their committees, and by oversight bodies such as the Auditor-General, the PP and the Public Service Commission, and by co-ordinating departments such as the Department of Public Service and Administration (DPSA) and the National Treasury (Fourie, 2009: 1117). Therefore, incontrovertibly, good governance constitutes the strategic vision for South Africa and is the normative framework within which the PP should exercise his/her powers and functions.

3.5 The macro-institutional context within which the PP operates

In Chapter 2 (paragraph 2.7, pages 73-75), it was noted that in a parliamentary model, the Ombudsman is the parliamentary functionary (this model is used in Scandinavia and the UK) and in the *Le Mediateur* (and its successor, the *Defenseur*) model used in France, the Ombudsman is part of the Executive.

In this section, the macro-institutional context within which the PP operates, which determines its status within the political system, is analysed. The table below is a macro-structure of governance in South Africa, from which an analysis is drawn of the macro-institutional context within which the PP operates:

TABLE 3.3: Macro-institutional context within which the PP operates

Legislative authority	Executive authority	Judicial authority	Chapter 9 institutions
<p>In the Republic, the legislative authority –</p> <p>(a) of the national sphere is vested in Parliament, as set out in Section 44;</p> <p>(b) of the provincial sphere is vested in the provincial legislatures, as set out in Section 104; and (c) of local sphere is vested in the Municipal councils, as set</p>	<p>In the Republic, government is constituted as national, provincial and local spheres of government which are distinctive, interdependent and interrelated (Section 40(1) of the Constitution)</p> <p>National:</p> <ul style="list-style-type: none"> • President • Deputy President • Ministers <p>(Cabinet or National</p>	<p>Judicial authority vests in the courts. The hierarchy of the court system is as follows:</p> <ul style="list-style-type: none"> • Constitutional Court • Supreme Court of Appeal • High courts • Magistrates' courts <p>The Judicial Service Commission recommends appointment of judges to the</p>	<p>State institutions supporting democracy</p> <ul style="list-style-type: none"> • Public Protector • Human Rights Commission • Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities • Commission for Gender

<p>out in Section 156 (see Section 43 of the Constitution)</p> <p>National: Parliament</p> <ul style="list-style-type: none"> • National Assembly • National Council of Provinces (NCOP) <p>Provincial: Nine Provincial Legislatures</p> <p>Local: 278 municipalities comprising of:</p> <ul style="list-style-type: none"> • 44 District Councils • 8 metropolitans • 226 Local Municipal Councils 	<p>Executive)</p> <p>Executive Authority vests in President</p> <p>Provincial:</p> <ul style="list-style-type: none"> • Premier • Members of Executive Council <p>Executive Authority vests in Premier</p> <p>Local:</p> <ul style="list-style-type: none"> • Executive Mayors in District and Metro Municipalities • Mayors in local municipalities 	<p>President.</p> <p>The Magistrates' Commission presides over the appointment of magistrates.</p>	<p>Equality</p> <ul style="list-style-type: none"> • Auditor-General of South Africa • Independent Communications Authority of South Africa
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Source: The Constitution, 1996

Now that the macro-structure of governance is understood, one turns to a discussion on the doctrine of the separation of powers and *trias politica* to further analyse the context of the PP's conceptualisation and conception.

3.5.1 Doctrine of separation of powers and *trias politica*

The doctrine of the separation of powers originates from the constitutional theories of the political philosopher, John Locke, who wrote as follows in his seminal second treatise *Civil Government* (first published in 1690):

It may be too great a temptation for human frailty, apt to grasp at powers, for the same persons who have power of making laws, to also have in their hands the power to execute them, whereby they may exempt themselves from the law, both in its making and execution to their own private advantage.

It is unequivocally accepted that Locke had proposed the idea for the separation of powers. However, the contemporary idea of the doctrine is generally attributed to Montesquieu who recognised three distinct functions of state separated into the legislative, executive and judicial functions and importantly recognised that these functions should be performed by the three distinct branches of government, manned by different office bearers. He famously said in his celebrated *The Spirit of the Laws* (originally published in 1748).

All would be in vain if the same person, or the same body of officials, be it the nobility or people, were to exercise these three powers: that of making the laws, that of executing the public resolutions, and that of judging crimes and disputes of individuals.

Within the constitutional democracy, the separation of powers is applied as follows:

- (a) Legislative authority – it has the power to make the rule of law;
- (b) Executive authority – it has the power to implement and execute the rule of law;
- (c) Judicial authority – it has the power, in case of disputes, to interpret and apply the law (Mojapelo, 2013: 37).

The doctrine of the separation of powers is implicit in South Africa's constitutionalism (Mokgoro, 2015). It was the requirement of Constitutional Principle VI of the Interim Constitution, 1993 that there shall be separation of powers between the Legislature,

the Executive and the Judiciary, with appropriate checks and balances to ensure accountability, responsiveness and openness. Consequently, the final Constitution divided the exercise of public power as follows:

- The legislative power is vested in the legislatures: Parliament (consisting of the National Assembly and the National Council of Provinces), provincial legislatures and municipal councils (see Sections 44, 104, 156);
- The executive power is vested in the President and cabinet at national sphere, the Premier and executive councils at provincial sphere, and to the Executive Mayor and executive committees of municipal councils at the local sphere of government (see Sections 83, 125, 156); and
- The judicial authority is vested in the Constitutional Court, the Supreme Court of Appeal, the High Courts, the magistrates' courts, and other tribunals of similar authority (see Section 165).

Together within the doctrine of the separation of powers is the phenomenon of *trias politica*, which requires that there must be a formal distinction between the legislative, the executive, and the judicial components of the state authority (Mojapelo, 2013: 37). One important aspect of the notion of *trias politica* is the principle of checks and balances, which postulates that each of the three branches of government must have special powers designed to ensure that each is able to check on another's exercise of their powers so that the power equilibrium is maintained (Mojapelo, 2013: 38). This notion is supported by Munzhedzi (2017: 81), who stated that the presence of the three branches of government is to guarantee the component of checks and balances in which each branch holds the other accountable. For the doctrine of separation of powers to be effective, there must be a separation of functions and personnel between the branches. Currie and De Waal (2005: 21) state that the separation of functions and personnel without checks and balances is useless. It is indicated that the purpose of the separation of powers is to ensure that the different branches of government control each other internally (i.e. checks) and serve as the counterweight of the power held by another (i.e. balances) – in other words: while the purpose of the separation of functions and personnel is to limit power, the purpose of checks and balances is to ensure the branches of government are accountable to one another (Mojapelo, 2013: 40).

The application of the doctrine in South Africa is not completely Montesquian in that the separation of office-bearers is not absolute. There is overlap of personnel between the legislature and the executive; that is, members of the national executive are appointed by the President from among members of Parliament, who retain their membership of Parliament during their tenure as ministers (Currie and De Waal, 2005: 19). The President also appoints judges in consultation with the Judicial Services Commission (Section 174(3) of the Constitution). To this effect, the Constitutional Court pointed out in the *First Certification Judgment*, that:

There is no universal model of separation of powers ... and in democratic systems of government ... there is no separation that is absolute.

It further held that this overlap of personnel made the executive more directly accountable to the legislature.

It is clear from the above description of the doctrine of separation of powers *and trias politica* that the PP is not part of this scheme. In this sense, it is arguable that the PP is in a similar position as the Ombudsman of Spain. Castells (2000: 395) makes a fundamental distinction between the Spanish Ombudsman (which like the PP is embedded in the Constitution) and the constitutional bodies (he describes “constitutional bodies” as those bodies fundamentally characterised by the exercise of functions indispensable to state life and have repercussion for the structure of the State, i.e. the Legislature, the Executive and the Judiciary), while the Ombudsman is not a structure that is indispensable to state life, although it performs the essential function of protecting human rights in a democracy.

It is clear from the definition of an organ of state that the PP falls within the ambit of Section 239 of the Constitution as it ostensibly performs a constitutional function and exercises a public power in terms of the Constitution, as set out in Section 182(1) of the Constitution. However, the controversial question has been whether the PP is part of government or co-operative government, as described in Chapter 3 of the Constitution. The Constitutional Court in the matter of *Independent Electoral Commission of South Africa v Langeberg Municipality* had occasion to address this controversy, in the context of Section 41(3) of the Constitution, which requires an organ of state involved in an intergovernmental dispute to first seek to resolve the dispute outside the courts. The argument was made that the Independent Electoral

Commission (IEC), a Chapter 9 institution, was an organ of state within the national sphere. Hence, it should not be allowed to litigate against another organ of state, a municipality. The Constitutional Court then ruled, in par. 31:

Our Constitution has created institutions like the Commission that perform their functions in terms of national legislation but are not subject to national executive control. The very reason the Constitution created the Commission - and the other chapter 9 bodies - was so that they should be and manifestly be seen to be outside government. The Commission is not an organ of state within the national sphere of government (*Constitutional Court, IEC v Langeberg Municipality*).

The Ad Hoc Committee on the Review of Chapter 9 and Associated Institutions defined the place of the Chapter 9 institutions, including the PP, as part of *governance*, but they are not part of *government* (Report of the Ad Hoc Committee on the Review of Chapter 9 and Associated Institutions, 2007: 10). Therefore, the PP is conceptually not part of the co-operative government, as defined in Chapter 3 of the Constitution.

The developments in Administrative Law suggest traditional approach to the separation of powers doctrine has evolved from the traditional three branches discussed here above, to include the fourth pillar of Public Administration, within which the principles of good governance and relevance of the PP may find expression. This change can be represented as follows, in terms of the Constitution, 1996.

- I. Legislative authority of the Republic vest in Parliament (s43);
- II. Public Administration governing values and principles are established (s95);
- III. Executive Authority of the Republic vests in the President (s85); and
- IV. Judicial Authority of the Republic vests in the courts (s165).

But in this study, the basic structure of state remains the *trias politica*, with Public Administration forming part of the Executive Branch, and Chapter 9 institutions are defined outside it (see Table 3.3 above).

In this regard the judgment of Plasket JA, in par. 37, in *Minister of Home Affairs v Public Protector of the Republic of South Africa 2018 (3) SA 380 (SCA)*, is instructive:

First, the Office of the Public Protector is a unique institution designed to strengthen constitutional democracy. It does not fit into the institutions of public administration but stands apart from them. Secondly, it is a purpose-built watch-dog that is independent and answerable not to the executive branch of government but to the National Assembly. Thirdly, although the State Liability Act 20 of 1957 applies to the Office of the Public Protector to enable it to sue and be sued, it is not a department of state and is functionally separate from the state administration: it is only an organ of state because it exercises constitutional powers and other statutory powers of a public nature. Fourthly, its function is not to administer but to investigate, report on and remedy maladministration. Fifthly, the Public Protector is given broad discretionary powers as to what complaints to accept, what allegations of maladministration to investigate, how to investigate them and what remedial action to order – as close as one can get to a free hand to fulfil the mandate of the Constitution. These factors point away from decisions of the Public Protector being of an administrative nature, and hence constituting administrative action.

The place of the PP within the *trias politica* and co-operative governance in South Africa is discussed once more in detail in Chapter 6.

3.6 The role and powers of the Public Protector

In the sections above, we set out to analyse the macro-socio-political and legal context within which the PP was conceived and which constitute part of the governance framework in South Africa. In this section, the controversial question of the role and powers of the PP are analysed, as it is relevant to the conception and conceptualisation of the PP in South Africa. This question has occupied centre stage in the public discourse, with the powers of the PP being both politically and legally questioned. The jurisprudential clarification of the powers of the PP has provided the conceptual clarification of its status.

First, the role of the PP in South Africa is discussed. By role is meant the behaviour expected of an individual who occupies a given social position or status, which demonstrates a comprehensive pattern of behaviour that is socially recognised, providing a means of identifying and placing an individual in a society.¹² The overarching role or mandate of the PP is to protect and strengthen constitutional democracy (Chapter 9 of the Constitution). This role involves the promotion of good governance. Part of the mandate of the PP is to promote good governance by ensuring public accountability. Thornhill (2011: 87) refers to two reports published by the PP, namely *Against the rules*, issued on 22 February 2011, and *Report on the breach of Executive Code by the Minister of Cooperative Governance and Traditional Affairs*, which ensured that the National Commissioner of Police and Minister, respectively, were held accountable for their roles in the incidents exposed in the two reports. In this regard, these PP's reports proved that public accountability was not only a cornerstone of democracy, but also reiterated that due process must be followed to ensure accountable public administration (Thornhill, 2011: 87).

"*Quis custodiet ipsos custodes?*" asked Juvenal, a Roman satirist – literally, "Who watches the watchmen?" (Rudolph, 1983: 93). Pienaar (2000) suggests that this ancient quotation can also mean, "Who protects the rights and interests of the individual against possible abuse by persons in public office?". Govender (2013: 82) places this responsibility to check on the exercise of public power on the PP. In analysing the effectiveness of the Office, he mentions that the PP plays a vital role in ensuring the proper exercise of public power. However, Govender (2013: 82) laments the fact that in the investigation of PetroSA, which involved the allegations of diversion of public funds from PetroSA to the ANC through Imvume Holdings, the then PP, Adv. Mushwana, capitulated and surrendered in the face of political power by adopting an irrationally narrow interpretation of the PP's mandate. Similarly, Musuva (2009: 29) decried the "PP's apparent deference to the executive and, as a corollary, the ruling party", when Adv. Mushwana adopted a narrow interpretation of his office's mandate.

There have been suggestions that the PP's mandate is only complementary in the fight against corruption. For instance, Pienaar (2000), a former functionary of the PP, suggests that the PP has a complementary mandate of fighting corruption. The

¹² <https://www.britannica.com/topic/role>

Council for Advancement of the Constitution (CASAC) echoes these sentiments when it argues, in calling for the establishment of a comprehensive anti-corruption agency, that the PP and the Auditor-General of South Africa have an important investigative and monitoring role in fighting corruption, but this is not their primary function (CASAC, n.d.: 15).

The researcher agrees that the PP is not a comprehensive anti-corruption agency, but it has a primary, albeit broad, mandate that can enable it to play a key role in the fight against public sector corruption, as “corruption is an antithesis of good governance” (Fourie, 2009: 1117). To promote good governance, the institution must necessarily fight corruption and promote accountability, transparency, and the rule of law.

Global literature supports the role of the Ombudsman in promoting good governance, both from academic and official sources such as the International Ombudsman Institution (IOI), the European Union (EU), the African Ombudsman and Mediators Association (AOMA), and United Nations (UN) agencies. A true Ombudsman is one named by Parliament for the protection of human rights and to supervise public administration (Mora, 2015: 192). In other words, the Ombudsman promotes good governance.

DŽANIĆ (2006: i) suggests that the influence that the Ombudsman has in promoting good governance depends on certain factors. These include a minimum level of good governance, cooperation of the government with the Ombudsman, and the independence of the institution of the Ombudsman.

Now that the role or mandate of the PP has been defined, the question of its powers is addressed. The PP derives its powers from the Constitution, which in Section 182(1) provides that the PP has the power, as regulated by national legislation, to:

- (a) investigate any alleged improper conduct in state affairs, or in public administration;
- (b) report on that conduct; and
- (c) take appropriate remedial action.

Further, the PP has the additional powers and functions prescribed by national legislation. The national legislation is the *Public Protector Act, 23 of 1994*. Section 6(4) of the Act provides that on his/her initiative, or on receipt of a complaint, the PP shall be competent to investigate:

- i. maladministration in connection with the affairs of government at all levels;
- ii. abuse or unjustifiable exercise of power, or capricious or unfair conduct, or undue delay in the performance of a function by a public functionary;
- iii. improper or dishonest acts in terms of the Prevention and Combatting of the Corrupt Activities Act, 2004;
- iv. improper or unlawful enrichment, or receipt of any improper advantage, or a promise of such advantage or enrichment as a result of any act or omission in the conduct of public administration or in connection with the affairs of government at all levels; and
- v. an act or omission, by any public functionary, which results in an unlawful and improper prejudice to any person.

Furthermore, the PP shall endeavour to resolve any dispute or rectify any act or omission by means of:

- i. mediation, conciliation or negotiation;
- ii. advising a complainant, where necessary, about available remedies; and
- iii. any other means that may be expedient in the circumstances.

Section 7 of the Act is explicit when it states that the PP controls the manner and methods of investigations conducted by his/her office. To assist him/her in the investigation, Section 7A gives him/her wide powers to enter any premises with the purpose to conduct an investigation or inquiry, as he/she deems fit and necessary.

However, what has preoccupied the public discourse as well as the judicial reviews was the question whether the remedial action of the PP was binding. The Law Society of South Africa (LSSA) held a colloquium in 2015 to debate this question and it reached the conclusion that the PP's findings were not binding and were merely recommendations, and that the only exception to this rule was when the government

institution rejected the finding irrationally or for an irrational reason. The colloquium did not address the question as to who should decide that the rejection of the finding was irrational or not (LSSA, 2015: 5).

Before the *Nkandla* judgment, the issue of the binding nature of the PP's findings and decisions was a hotly debated one in the public discourse, showing how many misunderstood the concept of remedial action. At the colloquium referred to above, which was titled *Quo vadis Public Protector? (Where to Public Protector?)*, only Adv. Thuli Madonsela was of the view that her Office's findings were legally binding. Prominent figures such as the Deputy Minister of Justice, Mr Jeffrey, the former Constitutional Court judge Justice Yacoob, Prof. Mhango and other esteemed panellists argued that the powers of the PP were limited to making recommendations, not decisions binding to government institutions (Manyathi-Jele, 2015). This was a politically dominant view held by the government at the time as evidenced by the arguments of the Deputy Minister of Justice at the colloquium, who was quoted as having said, "The Public Protector is essentially an investigator, prosecutor and judge all rolled into one. That is quite unheard of in our law" (Manyathi-Jele, 2015).

This question goes to the heart of the conceptualisation of the PP in South Africa. Is it based on the original Swedish concept, which included powers to supervise the judiciary and to decide on prosecutions, or the Danish model that spread worldwide, which does not have the powers of prosecution and supervision of the judiciary (Harden, 2000: 204)? The modern Classical Ombudsman does not have binding powers; that is, the parliamentary Ombudsman of the UK cannot enforce its recommendations (Maer and Everret, 2016: 7), which makes the PP somewhat unique in that its findings are binding. However, the check on this power is that the findings of the PP can be reviewed by the courts (*EFF v Speaker of National Assembly*, 2016).

Given its controversy and political importance, it was no wonder that this question as to the binding nature of the PP's remedial action ended up in constitutional litigation. In the case of the *Democratic Alliance v South African Broadcasting Corporation*, 2015 the facts were that the Minister of Communications acted contrary to the PP's remedial action to take disciplinary action against the then Acting COO of the SABC,

Hlaudi Motsoeneng, for his dishonesty regarding his qualifications and various charges of abuse of power, and that the Minister must fill the longstanding vacancy of the COO with a suitably qualified person. On the contrary, and without reverting to the PP, the Minister appointed Motsoeneng as the permanent COO. To this effect, the Minister acted on the advice or opinion of the firm of attorneys appointed by the public broadcaster, which cleared Motsoeneng of any wrongdoing and effectively second-guessed the findings and remedial actions of the PP. The court decided that, “The findings of the PP are not binding and enforceable. However, when an organ of State rejects those findings or the remedial action, that decision itself must not be irrational.” This view was based on the classical conception of the Ombudsman, as exemplified by the non-binding powers of the parliamentary Ombudsman in the UK (Maer and Everret, 2016: 7).

However, this judgment added to the conceptual and theoretical confusion about the status, role and powers of the PP, given that it failed to recognise the fact that the PP of South Africa was a creation of the Constitution, operating within the system of constitutional supremacy. Hence, it was appealed to the Supreme Court of Appeal (SCA). In the case of the *South African Broadcasting Corporation Soc Ltd and Others v Democratic Alliance and Others (393/2015) [2015] ZASCA 156; [2015] 4 All SA 719 (SCA); 2016 (2) SA 522 (SCA) (8 October 2015)*, the SCA adopted a different approach to the legal status of the report of the PP. After careful examination of the constitutional status of the PP, and particularly Section 182 (1)(c) of the Constitution, which provides that the PP has the power to take appropriate remedial action, the Court said that it was incorrect to find that the PP’s findings and declaration of remedial action could be ignored, if the SABC had cogent reasons for doing so. The SCA held that the PP’s findings and remedial action were binding, unless they were set aside by a court on review. The SCA observed that:

The Public Protector cannot realise the constitutional purpose of her office if other organs of State may second-guess her findings and ignore her recommendations. Section 182(1)(c) must accordingly be taken to mean what it says. The Public Protector may take remedial action herself. She may determine the remedy and direct the implementation. It follows that the language, history and purpose of section 182(1)(c) make it clear that the Constitution intends for the Public Protector to have the power to provide an

effective remedy for State misconduct, which includes the power to determine the remedy and direct its implementation (par. 52 of the judgment).

This view that the PP has the power to provide effective remedy for state misconduct, which includes the power to determine the remedy and direct its implementation, is contrary to the powers of the Classical Ombudsman. Kirkam (2007: 13) points out that the Classical Ombudsman relies on his/her powers of persuasion and cooperation of the agencies it investigates for the effectiveness of its recommendations. The Classical Ombudsman also refers recommendations to the legislature to direct the implementation of the remedy recommended by the Ombudsman, but the system of persuasive and cooperative reports has been so effective in the UK that generally referral of reports to the Parliament for enforcement rarely occurred (Maer and Everret, 2016: 7; Kirkam, 2007: 13).

This question of the binding nature of the powers of the PP found its way to the Constitutional Court through the matter of *Economic Freedom Fighters v Speaker of the National Assembly and Others; Democratic Alliance v Speaker of the National Assembly and Others* (hereinafter *EFF v Speaker of National Assembly*, 2016). The Constitutional Court, having meticulously assessed and analysed the constitutional status of the PP found that if the remedial action of the PP was not binding, few culprits, if any, would allow it to have effect. The Court questioned if its findings were not to be binding, how the institution was expected to play its role of strengthening the constitutional democracy. The Court then observed that it would be

... inconsistent with the language, context and purpose of sections 181 and 182 of the Constitution to conclude that the PP enjoys the power to make only recommendations that may be disregarded provided there is a rational basis for doing so. Every complaint requires a practical or effective remedy that is in sync with its own peculiarities and merits. It needs to be restated that, it is the nature of the issue under investigation, the findings made and the particular kind of remedial action taken, based on the demands of the time, that would determine the legal effect it has on the person, body or institution it is addressed to (see par. 70).

In short, the Constitutional Court concluded that the PP has the power to take a binding remedial action (see par. 76 of the judgment). However, the Court was

careful to explain that the powers of the PP to take remedial action were wide, but not unfettered (see par. 71 of the judgment). Its findings and remedial action can always be set aside on judicial review.

This question of the power of the courts to review the findings of the PP is contrary to international norm. Gottehrer (2009: 15) points out that to ensure the independence and effectiveness of the Ombudsman one protective provision in the national law should be that no court may review the findings, conclusions, recommendations or reports of the Ombudsman or its staff. Courts should not be able to review the acts of the Ombudsman, except only to determine the jurisdiction.

The researcher opines that it is necessary to balance the binding nature of the findings of the PP (something that is not an international norm) with the power of judicial review, to avoid the situation where the PP will be the unfettered trinity of investigator, prosecutor and judge rolled into one. If the PP could have such unreviewable powers, South Africa could have created an institutional monster in the political system.

The Constitutional Court is the highest arbiter on constitutional matters (see Section 167(1) of the Constitution), and a constitutional matter includes any issue involving the interpretation, protection or enforcement of the Constitution (Section 167(7)). Therefore, its decision settles the constitutional and legal debates on the powers of the PP. In the aftermath of this judgment, the political significance, independence and effectiveness of the PP were enhanced. This should also settle the political debates about the powers of the PP, as the political dispute on this matter has been effectively settled through proper interpretation of the Constitution. It should be accepted as both a political and legal fact that the PP has powers to issue binding findings and remedial actions.

In the case of the *President v Office of the Public Protector and Others* (91139//2016) [2017] ZAPPHC 747; 2018 (2) SA 100 (GP); [2018] (5) BCLR 609 (GP) (13 December 2017) (hereinafter *President v Office of the Public Protector, 2017*), the North Gauteng High Court held as follows regarding the powers of the PP:

- The Public Protector has the power to take remedial action, including by instructing the President to exercise powers entrusted upon him under the

constitution if it will remedy the harm suffered (see par. 82 of the judgment);

- Taking remedial action is not consequent only on the finding of impropriety or prejudice, but the PP has the following separate powers – conduct investigations, report on those investigations, and take remedial action (see paras. 100 and 101 of the judgment);
- The PP may make findings on the basis of preliminary or *prima facie* findings (see par. 104 of the judgment);
- The primary function of the PP is that of an investigator, not an adjudicator, i.e. her role is not to supplant the role of the court (see par. 105 of the judgment);
- Even when there is no finding of wrongdoing, the PP may still take appropriate remedial action, as her observations constitute *prima facie* finding that points to serious misconduct (see paras. 107 and 108 of the judgment);
- Hence, *prima facie* evidence that points to serious misconduct is an adequate and proper basis for the PP to take remedial action (see par. 112 of the judgment).

As a last commentary on this matter, it should be remembered that Section 165(5) of the Constitution provides that an order or decision of court binds all persons and organs of state to which it applies. This is the essence of the rule of law, which is an important ingredient of South Africa's constitutionalism. Everyone who respects the rule of law will abide by these seminal court decisions, which have clarified the legal standing of the remedial action of the PP; hence, its status within the obtaining governance framework in South Africa.

3.7 Conclusion

In this chapter, the macro socio-political and legal context within which the PP was conceived and conceptualised was analysed. It has been demonstrated that the institution was conceived and conceptualised within the context of constitutional supremacy, multi-party democracy and one-party dominance of the governing party, all of which impact on the institution. The principle of constitutional supremacy is set out in Section 2 of the Constitution, which states that law or conduct inconstant with

the Constitution is invalid and that the obligations imposed by it must be observed. This represents the fundamental power and protection of the PP. It performs a constitutional role; hence, everyone is bound by its findings. The multi-party system operates side-by-side with one-party-dominance, in which the governing party, the ANC, had an overwhelming majority of 62,15% or 249 seats in the National Assembly (IEC, 2014). However, this majority of the governing party is fettered by the principles of constitutionalism, separation of powers with checks and balances, the rule of law, and accountability (Mokgoro, 2015).

Within the principle of constitutionalism, there is a phenomenon of counter-majoritarianism, which normally manifests itself through the principle of justiciability of the Constitution and the power of constitutional review granted to the judiciary (Currie and De Waal, 2005; Burns, 2003; Daniels and Brickhill, 2006). The PP, it is argued, is also an instrument of counter-majoritarianism, as it exists to check the power of the state.

The macro-institutional context was also analysed. The notion of separation of powers and its associated notion, *trias politica*, were discussed and it is clear that in South Africa, the doctrine of separation of powers is implicit in the constitutional scheme and that state authority is divided into the Legislative, Executive and Judicial branches of government (Mokgoro, 2015; Mojapelo, 2013). The doctrine emanates from the classical philosophers, namely John Locke and Montesquieu, and its adaption to South Africa was discussed. The PP was created as an additional institution of checks and balances, but exists outside the *trias politica* (Madonsela, 2014). This aspect is discussed further in Chapter 6.

The institutional context within which the PP operates has been compared with those of other Classical Ombudsman institutions. One finds that in the parliamentary system the Ombudsman is the parliamentary functionary, who is an instrument in the hands of parliamentarians (Maer and Everret, 2016: 3, 7). Within the presidential system, the Ombudsman is accountable to the President, as in France (Bousta and Sagar, 2014: 77). In South Africa, the PP functions within the system of constitutional supremacy, and is subject only to the Constitution and the law. It was also established that the PP compares institutionally with the Spanish model, also as

transplanted to Latin America, but the latter is able to institute prosecutions (Reif, 2013: 403), which the PP cannot do.

Finally, the role and powers of the PP were discussed from a constitutional, statutory and case law perspective. It was indicated that the colloquium held by the Law Society of South Africa was of the view that the findings and remedial action of the PP were not binding (LSSA, 2015). This view represented the dominant political view at the time, shown by the comments of the Deputy Minister of Justice at the colloquium that equated the powers of the PP to playing investigator, prosecutor and judge (Manyathi-Jele, 2015). This question was of theoretical and conceptual importance for the institutionalisation of the Ombudsman. The question is whether the PP, which belongs to the genus of the Ombudsman, is conceptualised based on the original Swedish concept, which included powers to supervise the judiciary and to decide on prosecutions, or the Danish model that spread worldwide, which does not have powers of prosecution and supervision of the judiciary (Harden, 2000: 204).

The PP operates within the system of constitutional supremacy, in terms of which the law or conduct inconsistent with the Constitution is invalid. The fact that the PP reports to Parliament does not detract from its independence, which is constitutionally assured, and no person or organ of state may interfere with its functions (see Section 181(1)-(3) of the Constitution, 1996). In this sense, the PP of South Africa is conceptually unique, judged from the perspective of constitutional supremacy, as the Constitution and law can only limit its powers and its findings are binding. This is unlike the UK's parliamentary Ombudsman, based on the principle of parliamentary supremacy, which cannot enforce its recommendations, and that functions as an "instrument in the hands of parliamentarians" (Maer and Everret, 2016: 3, 7).

This view that the PP has the power to provide effective remedy for state misconduct, which includes the power to determine the remedy and direct its implementation, is theoretically problematic and is contrary to the international norm. The international norm is that the Ombudsman has the power to make recommendations, which are not binding, and generally has no power to enforce them. Kirkam (2007: 13) points out that the Classical Ombudsman relies on its ability

to pen persuasive findings and gain cooperation from the agencies it investigates to ensure the effectiveness of its recommendations.

It is understandable that these theoretical and conceptual questions occupied the political and legal thoughts of many South Africans. In the absence of consensus on these matters, the courts were approached to provide jurisprudential clarity. While there was an initial judicial view that the remedial action of the PP was not binding and could be ignored on rational grounds (*DA v SABC*), the SCA overruled this view and indicated that the remedial action of the PP was binding subject to judicial review (*SABC v DA*). However, it was Chief Justice Mogoeng Mogoeng's Constitutional Court (CC) judgment on the matter of Nkandla that settled the debate. The CC held that the PP had powers to make binding findings and remedial actions, informed by the nature of the matter investigated and the finding or remedial action taken. The CC was at pains to point out that this power was fettered, as the findings and remedial actions of the PP could be judicially reviewed (*EFF v Speaker of National Assembly*). However, the researcher argues and points out that the power of the courts to review the findings of the PP is contrary to international norms. One of the fundamental provisions proposed to ensure the independence of the Ombudsman is the provision to the effect that no court should be in a position to review the findings, conclusions, recommendations and reports of the Ombudsman, except to the extent of determining its jurisdiction (Gottehrer, 2009: 15). Given the contradiction that the findings of the PP are binding, it is necessary to provide checks and balances of judicial review, to avoid the situation where the PP will be the unfettered investigator, prosecutor and judge rolled into one. To this effect, the former Deputy Minister of Justice defined the powers of the PP as far-reaching, but not unfettered (De Lange, 2017).

From the Strategic Plan 2017-2022 of the Office of the PP, it is clear that the Office does not have the capacity to enforce and effectively monitor the implementation of its remedial actions. This raises misgivings as to whether the Office, through its reports, is able to leave the institutions it investigates under better governance and systems than before the investigations were conducted. However, the Office has been effective in improving the values of good governance and accountability through high-level investigations at the SABC and PRASA, and into the Nkandla

debacle. This effectiveness was achieved largely because of media and public interest, and also opposition and NGO-sponsored litigation.

Now that an understanding of the institutional context of the PP within the governance framework of South Africa has been established, the environmental context needs to be understood. In the next chapter, the broader political environment within which the PP exists will be considered and the effect of this political environment on the institutional integrity of the Office of the PP will be analysed.

CHAPTER 4: THE CRISIS OF GOVERNANCE AND ITS EFFECTS ON THE INSTITUTIONAL INTEGRITY OF THE PUBLIC PROTECTOR IN SOUTH AFRICA

4.1 Introduction

It will not be alarmist to suggest that the positive political developments that followed the 1994 democratic breakthrough face threats of being reversed, if one studies the weakening or rolling back of the independent institutions built since the advent of democracy in South Africa. The situation is so dire that Coetzee (2014: 415) has described it as a crisis of legitimacy. Sadly, political development is a reversible process and can degenerate into political decay (Huntington, 1965: 392), despite a promising start on the path to greater democratisation. There is empirical evidence that the independent institutions in South Africa are decaying and that the state is being weakened, given the phenomena of State Capture and Grand Corruption.

Political development can be defined as the institutionalisation of political structures and procedures (Huntington, 1965: 393; Sikander, 2015: 145). Usually this movement is forever changing, as institutions may sometimes decay and/or dissolve; other times they may grow and mature (Huntington, 1965: 393; Sikander, 2015: 143). Duvenhage (2003: 44; Venter and Duvenhage, 2008: 633) describes political decay as negative change connected with a failure of the state to provide law, stability, security and good governance to its people. In other words, political decay is an antithesis of political development.

In this chapter, the study will focus on the analysis of the crises of governance in South Africa, as evidenced by the problems of Grand Corruption and State Capture, through the lenses of the theory of political decay. As Venter and Duvenhage (2008: 633) explain, the mere occurrence of political decay does not mean the end of democracy, but rather it signifies the weakening of state. The other focus of this chapter is an analysis of the effect of this crisis of governance or political decay on the institutional integrity of the Office of the PP.

4.2 Challenges threatening constitutional democracy and good governance

There are numerous political challenges threatening constitutional democracy and good governance at this stage of political development in South Africa. It is the thesis of this study that these challenges have morphed into the crises of governance,

which then defines the political environment within which the PP and other state institutions operate. These crises of governance will be explained through the theories of political decay and weak states.

Processes of economic development and transformation include the embedding of comprador and propertied classes, and because access to resources is likely to be through the role played by the state in the economies of developing countries, emerging parasitic national bourgeoisie classes are likely to demand economic inclusion, especially if they are well organised. This may lead to corruption and rent-seeking (Menocal, 2015: 20). Hence, Manzetti (2009: 23) warned that political reforms come with transaction costs, which end up undermining the reform process through corruption, cronyism and political patronage. Manzetti's (2009: 23) thesis is that if reforms happen within the democratic polity, within the context of weak institutions of accountability vices such as corruption, cronyism and patronage can thrive. Conversely, where strong institutions of accountability such as the Ombudsmen, independent prosecution authorities and specialised agencies exist, there will be fewer of these vices (Manzetti, 2009: 23). Therefore, the main objective of weakening the state institutions of accountability is to enable vices such as corruption and state capture.

Weak states usually manifest themselves in a form of web-like networks whereby social control is dispersed among various social organisations, with their own rules, instead of operating within the rules of the state (Migdal, 1988: 40, 177; Muslu, 2013: 8). These patron-client networks are innately corrupt because it means public resources are transferred for the benefit of the elite without following the prescribed official processes of the public administration, while benefiting the few who are politically connected (Menocal, 2015: 21). This is how the phenomenon of state capture has been reported to function in South Africa. A study conducted by an interdisciplinary and interuniversity team of academics, structured as the State Capacity Research Project, found that there had been a parallel authority that had replaced the legitimate decision-making structures of the governing party and the state, creating a shadow state that effectively effected a silent coup d'état (Swilling *et al.*, 2017: 2).

In other words, South Africa has become a weak state in which the state institutions of accountability are weakened and their institutional integrity is eroded, and the rule of law is undermined. This is what one refers to as the crises of governance. A crisis of governance happens when the state power is exercised to serve private interests to the exclusion of the governed, and it generally leads to failed development plans, poorly implemented projects and a crisis of legitimacy (Akinde, 2011: 44). This then morphs into what Duvenhage (2003: 47) calls the politics of survival, characterised by the collapse of institutions of governance and where continuity is replaced by a situation of political instability. The state of politics of survival consists of three stages, namely system stress, dynamic equilibrium, and disequilibrium.

System stress is the first indication of institutional decay (Swanepoel and Duvenhage, 2007: 130). It points to circumstances that negatively affect the functioning of the system of governance. Factors such as the incompetence of state officials, corruption, and inadequate processes and systems are all indicative of system stress. If these symptoms are not quickly redressed and the system is unable to correct itself, it graduates into the stage of dynamic equilibrium, which is one of the prominent patterns of political decay (Duvenhage, 2003: 51-53; Swanepoel and Duvenhage, 2007: 130). The state of dynamic equilibrium is characterised by the advent of an environmental crisis in which an incalculable dynamic surfaces, resulting in anomalous demands on the capability of the system. This dynamic does not necessarily threaten the whole system, but can be specific in terms of focus, space and period (Duvenhage, 2003: 54). If the government fails to arrest this progression and is unable to deliver proper and quality services to the citizenry, such as social justice, it may result in the task of service delivery being arrogated by institutions outside the public sector. When this happens, government loses power and control to the parallel power structure. When government loses its sovereign power in this manner and stands in political conflict with other political actors in society, who then has to replace the functions of government with alternative mechanisms. Then the state enters the phase of disequilibrium, characterised by the survival of the fittest, in which the strongest dominates and government has to continuously adapt to survive (Duvenhage, 2003: 59; Swanepoel and Duvenhage, 2007: 130). In this situation, the state may be afflicted by sudden forms of political change where it lacks sufficient power to consistently provide security and other

social services, and where its own political survival becomes its main preoccupation (Duvenhage, 2003: 57). In the state of disequilibrium, the state is no longer an empirical state. Geldenhuys (1999: 38) elucidates that an empirical state is one that is in control of its institutions in a manner that it is capable of providing the requisite social services within a polity. The breakdown of the state may manifest as a soft state, a weak state, or a collapsed state.

A soft state is characterised by a phenomenon of corruption (Swanepoel and Duvenhage, 2007: 128). Usually in states of rapid transformation, political leaders are placed in positions of extreme temptation, and coupled with their political and administrative ineptitude at the beginning, makes them even more vulnerable to corruption (Geldenhuys, 1999: 42). Hence, political decay usually occurs in a state of rapid modernisation or transformation (Sezgin and Altiner, 2015: 56). The weak state, on the other hand, manifests in a form of serious divisions, system stress and even political violence, characterised by a lack of internal cohesion and administrative expertise or low levels of institutionalisation (Swanepoel and Duvenhage, 2007: 128). Weak states only provide three functions, namely internal order, external defence and basic public infrastructure, while strong states are able to also provide functions such as the administration of justice, as well as the redistribution of socio-economic benefits and comprehensive infrastructure development projects, characterised by unity and high levels of bureaucratic capabilities (Geldenhuys, 1999: 43). Finally, the collapsed state is manifested by collapsed state institutions, a paralysed government, a collapsed state of law and order, general lawlessness and anarchy (Geldenhuys, 1999: 44; Lambach, Johais and Bayer, 2015: 1310). In a collapsed state, the state has no real capacity to make rules, no discernible resources of control over the means of violence, and no ability to collect taxes (Lambach *et al.*, 2015: 1308). States fail because they are riven by internal violence and no longer have the capacity to deliver constructive political goods and services to citizens (Rotberg, 2003: 1).

Duvenhage (2007: 19) provides the following analytical categories of state dysfunctionality:

TABLE 4.1: Categories of state dysfunctionality

<ul style="list-style-type: none">• Soft state	<ul style="list-style-type: none">• The state is tolerant towards corruption and border control.
<ul style="list-style-type: none">• Weak state	<ul style="list-style-type: none">• Competes with other power bases within the society for the authoritative right to determine values (strongmen).
<ul style="list-style-type: none">• Collapsed state	<ul style="list-style-type: none">• The state loses control over state territory with other power bases taking over, such as warlords and vigilante groups.

Source: Duvenhage (2007: 19)

According to Iftimoaei (2015: 311), in order to foster good governance, governments should take the following steps:

- The capacity and capability of the government must be developed and made effective – the centre must hold;
- The legitimacy and credibility of public institutions must be promoted;
- The accountability of political elites, according to public expectations, must be fostered;
- The arbitrary exercise of authority must be removed;
- Accessibility, feedback and access to information must be fostered;
- Corruption must be eradicated to re-establish the credibility of government and its administrative branches;
- Ethics within public institutions must be promoted;
- Productivity of public servants must be improved;
- Responsive public administration must be promoted;

- Best practices, such as cost-benefit analysis, cost-results analysis and risk analysis in formulation and assessing the quality of the public services, must be used; and
- ICT base services must be used to improve the accessibility of the public as an interface between government and citizens should be encouraged.

Generally, the South African state could be defined as meeting all the above criteria and that the state can be defined as still in control, although there are signs that it may have entered a state of dynamic equilibrium or a weak state. The clearest suggestion of the manifestation of the characteristics of dynamic equilibrium or a weak state is the appalling state of local governance in South Africa. A 2018 report of the Auditor-General (AG) themed *Accountability continues to fail in local government* highlighted the three areas that negatively affect the lives of citizens, occasioned by the poor state of local governance, namely, the financial health of municipalities; fruitless and wasteful expenditure; and the poor delivery and maintenance of municipal infrastructure:

- The financial health of municipalities is characterised by high levels of unauthorised and irregular expenditure, and fruitless and wasteful expenditure. Municipalities fail to collect debt and fail to pay creditors, such as Eskom and the Water Boards.
- Fruitless and wasteful expenditure amounts to R1,5 billion (a 71% spike from the previous financial year).
- The failure of the delivery and maintenance of public infrastructure is the result of the “underspending of grants, delays in project completion, poor quality workmanship, and inadequate monitoring of contractors”. These are indicators of the larger problem of local government’s inability to manage its finances, performances and projects, and the general failure to be held accountable for outcomes (Makwetu, 2018: 6-8).

The AG identified the following reasons for accountability failures in local governance:

- Instability and vacancies in key positions undermine systematic and sustained improvements;

- Councillors lack adequate skills to oversee the administrations, and inadequate skills in maintaining financial and performance management systems by the administration.
- Political instability at council level and poor management of the politics-administration interface, characterised by political interference in the administration, weakens oversight, hinders consequence management and makes local government an unattractive employer for professionals.
- A culture of no consequences created by leadership's indecision, or unreliable action, and insufficient performance systems and procedures;
- Blatant disregard for controls and non-compliance with key legislation, thereby enabling an easy environment for committing fraud and corruption;
- Leadership did not follow up on audit recommendations and warnings; no culture of risk management and audit implementation plans;
- Municipalities engrossed themselves in attaining unqualified financial reports at all costs and any price by procuring expensive consultants and auditors, which is generally to the detriment of credible reporting and compliance with relevant legislation; and
- National and provincial governments' interventions were not adequate to assist municipalities with their capacity needs (Makwetu, 2018: 9).

The crisis of local governance has been described by Municipal IQ as a “match in a tinderbox”. The think tank's Municipal Hotspots Monitor showed an increase in service delivery related protests recorded in 2018, 94% of which were violent (up from 76% recorded since 2014). The popular *modus operandi* of protesters is to block public roads in an attempt to gain recognition from the political authorities. If service delivery concerns are not addressed and local governance improved, the country's political stability can deteriorate to a weak state.

The following challenges are indicative that contrary to fostering good governance, there are developments that can only be described as constituting the crisis of governance and are threatening constitutional democracy and good governance. If they are not rapidly reversed, they can lead to the degeneration into a complete weak state or a state of disequilibrium. These negative developments are corruption,

political interference in state institutions, undermining the rule of law, and state capture. These are discussed below:

- **Corruption**

Corruption is a challenge because it undermines good governance and the associated principles of accountability, transparency and the rule of law. It weakens or tends to undermine government bureaucracy. In this sense, corruption is incompatible with political development (Huntington, 1968: 69).

Corruption is, arguably, the greatest threat to constitutional democracy and good governance. Corruption is variously defined as a deviant behaviour of public officials, which is contrary to social norms, intended to serve private ends, and as a misappropriation of power or resources for private benefit (Huntington, 1968: 59; Menocal *et al.*, 2015: 12; Liu, 2016: 171). Furthermore, corruption is one measure of the absence of effective institutionalisation (Huntington, 1968: 59). Political institutions that lack independence, in common terminology, are defined as corrupt (Huntington, 1965: 402). The National Anti-Corruption Forum defines corruption as “any conduct or behaviour in relation to persons entrusted with responsibilities in public office which violates their duties as public officials and which is aimed at obtaining undue gratification of any kind for themselves or for others” (Ramsingh and Dobie, 2006:5). In this regard, Menocal *et al.* (2015: 12-13) distinguish between political and bureaucratic corruption. Political corruption, also called grand corruption, is the misuse of legislative and policy-making power by politicians and senior public administrators, including by tailoring the laws and policies to benefit private sector interests, facilitate awarding of huge public contracts and embezzlement of state funds, in return for bribes or some other private gain. On the other hand, bureaucratic corruption is committed by public servants at the implementation phase of public policies, involving transactions between public servants and appointed contractors; that is, the payment of bribes to negotiate red tape (Menocal *et al.*, 2015: 13).

In South Africa, the Prevention and Combatting of Corrupt Activities Act, 2004 (PRECCAA) defines corruption as the giving and receiving of gratification for

private gain. Section 3 of PRECCAA defines the general offence of corruption as follows:

...an acceptance, agreement or offer of gratification for the benefit of oneself or another, or grant, agree or offer to give gratification for the benefit of the recipient or another person in order to induce or influence that person or another to act in an illegal, dishonest, incomplete or biased manner; or influence the performance of any constitutional, legislative, contractual or any other legal obligation, duties or functions in a manner that amounts to abuse of power, breach of trust and violation of legal duty or set rules.

Corruption is the result of dynamic relationships between various actors in the public and private sectors, civil society groups, organisations and institutions that exist in society (Menocal, 2015: 14). Moreover, corruption is the function of weak governance and weak institutions (Menocal, 2015: 18); hence, one *modus operandi* for corruption is the weakening of independent institutions through subversion and state capture, with the purpose of private gain for oneself or another person. The object of weakening independent institutions is to facilitate the plundering of the state for private ends. The advantage of weak institutions to the corrupt is that these institutions lack the “ability to curb the excesses of personal and parochial desires” (Huntington, 1965: 411).

Cloete (2013), who has correlated the existence of corruption with the state of transformation in South Africa, argues that in a state of rapid transition of society opportunities arise for corruption given the weak institutional and legislative measures in such societies. Hence, corruption generally takes root in societies characterised by a state of political and socio-economic transition (Menocal, 2015: 19). These societies can be called “corrupt societies”. Corrupt societies are often characterised by a lack of law, authority, cohesion, order and consensus, and private interests eclipse public interests (Huntington, 1965: 416).

There is no question that corruption negates good governance. It is the antithesis of good governance; in fact, it is a manifestation of weak governance (Fourie, 2009: 1117). The fact of its existence in South Africa is well documented, as even the government has acknowledged that corruption was a societal problem

that needed to be tackled by all sectors of society (Ramsingh and Dobie, 2006: 1).

Arguably, the genesis of Grand Corruption in post-apartheid South Africa was the Strategic Defence Acquisition of 1999 (colloquially called 'the arms deal'), estimated to be worth R43 billion (Wa Afrika, 2014: 125). Former ANC parliamentarian Andrew Feinstein (2007: 193) documented in his book *After the Party* how the ANC supported the Executive in undermining accountability on this matter.

The allegations of arms deal corruption caused a political storm in South Africa. In its wake, the High Court found that there was a "mutually beneficial symbiosis" (dubbed "generally corrupt" by the media) relationship between the convicted Shabir Shaik and the then Deputy President, Jacob Zuma (*The State v Shabir Shaik*, 2005). The then President, Thabo Mbeki, "released" Zuma from his post as a result of this finding by the Court (South African History Online, 2005). After he won the presidency of the ANC in Polokwane in 2007, Zuma was now able to effect his revenge by "recalling" Mbeki as the President (Zuma, 2008).

In addition to bedevilling national politics, the arms deal saga undermined the integrity of institutions of accountability. The National Prosecution Authority (the NPA) and the Directorate of Special Operations (the Scorpions) are some of the institutions whose integrity suffered in the wake of the arms deal scandal and they are analysed below.

- **Interfering with the institutional integrity of independent institutions**

The fundamental flaw, which affects the institutional integrity and functionality of independent institutions, is the primacy of politics in the appointment of the heads of the institutions, called deployment. Where the appointment process is not subject to a parliamentary or some collective process, political considerations may trump professional considerations. It is the stated policy of the ANC to appoint its loyalists to all strategic centres of state through a policy of cadre deployment (Twala, 2014: 159). Therefore, cadre deployment could be one explanation for the undermining of the institutional integrity of state institutions in South Africa.

Perhaps wary of the negative effects of the cadre deployment policy, the then Deputy Chief Justice Dikgang Moseneke suggested that the powers of the President or the Executive to appoint the heads of independent institutions had to be reviewed as part of mechanisms to mitigate too much concentration of power in the President or the Minister (Moseneke, 2014: 18). While some appointments, such as the PP have prescribed pre-appointment processes, others such as the National Director of Public Prosecutions (NDPP) do not have such prescribed pre-appointment processes. As can be imagined, Moseneke argues, powers of appointment go with powers of dismissal, although these may be subject to prescribed processes (Moseneke, 2014: 18).

Below is an analysis of how the politicisation of independent institutions has undermined their institutional integrity, focusing on the NPA and the Directorate of the Priority Crimes Investigation (the Hawks):

➤ **The NPA**

Since the infamous announcement by the then National Director of Public Prosecutions (NDPP), Bulelani Ngcuka, that there was *prima facie* but unwinnable case against Zuma, the NPA has been embroiled in politics, as Zuma interpreted this as an act calculated to cast aspersions on his integrity and to besmirch his political career (Musgrave and Malefane, 2003). With this decision, Shaik was charged alone, together with his companies.

In the meantime, there were allegations made by Zuma's allies, such as Mac Maharaj, that Ngcuka was an apartheid spy. The Hefer Commission was appointed to probe this allegation, but found it was unfounded. In the aftermath, and despite being vindicated, Ngcuka resigned as the NDPP (Evans, 2016).

In the wake of Shaik's conviction and the finding of the mutually symbiotic relationship between Zuma and him, the NPA charged Zuma with 783 counts of fraud and corruption but later dropped them on the basis that there was improper interference by Ngcuka to re-charge Zuma (Evans, 2016). Eventually, after a protracted DA-led litigation the NPA decided to reinstate the charges against Zuma (Quintal, 2018) and he finally had his day in court, where he was formally indicted for corruption, fraud and money-laundering

(EWN, 2018), although the proceedings were ultimately adjourned for a later date. However, Zuma's formal indictment was a significant stride in the fight against corruption and it signified the supremacy of the principle of the rule of law, in which all are equal before the law. Zuma's lawyers indicated their intention to take the new decision of the NPA on review. Therefore, Zuma's lawfare¹³ and Stalingrad¹⁴ approach to litigation was expected to continue well into the 2019 election year.

The NPA has been a contested state institution ever since it initiated the investigations and charges against Zuma in 2005. After the resignation of Ngcuka, Vusi Pikoli was appointed, but later suspended by then President Mbeki for insisting to charge the then National Commissioner of Police, Jackie Selebi, with corruption (Evans, 2016). A commission of inquiry was set up to probe the fitness of Pikoli to hold office. In that commission of inquiry one Adv. Simelane was found to have lied under oath. Pikoli was relieved of his duties despite the fact that the Ginwala Commission found him to be fit and proper to hold office. The same Simelane was appointed by Zuma as the Head of the NPA, only for him to be found unsuitable for office by the Constitutional Court (*Democratic Alliance v President of South Africa*, 2012).

After Pikoli, Adv. Mokotedi Mpshe was appointed as the acting NDPP. Mpshe was to drop charges against Zuma, alleging undue interference with the decision to charge Zuma by Ngcuka and Leonard McCarthy, the former Director of Public Prosecutions (*Mail & Guardian*, 2009). Both Mpshe and McCarthy subsequently resigned from the NPA. Then there was an acting stint by Nomgqobo Jiba, followed by the permanent appointment of a less known Durban attorney, Mxolisi Nxasana. Nxasana's fitness to hold office was a subject of a putative inquiry given the surfacing of news that he had undisclosed criminal records (Du Plessis, 2014; Bailey, 2014), but this inquiry was terminated when he stepped down in May 2015 (EWN, 2015), following a R17 million settlement between himself, the President and the Minister of

¹³ Euphemism for legal battles between disputing parties; a combination of the words 'law and warfare'.

¹⁴ In law, a legal strategy of wearing down the opponent by tenaciously fighting anything the opponent presents and appealing every ruling in its favour, usually using vexatious and frivolous litigation. It is named after the Russian City besieged by Germany in World War II (see <https://definitions.uslegal.com/s/stalingrad-defense/>) Accessed on 10 April 2018.

Justice. It would seem the fault with Nxasana was that he possessed that rare quality in independent institutions today, an independent mind; hence, there remains allegations that Nxasana was forced to leave by the President. Corruption Watch and Freedom Under Law (FUL) challenged the legality of this agreement in the North Gauteng High Court (Thamm, 2017). The Court subsequently ruled, after the President's legal team conceded that much, that the agreement and the subsequent appointment of Adv. Shaun Abrahams as the NDPP were irregular and must be nullified (*Freedom Under Law (RF) NPC v National Director of Public Prosecutions*, 2017).

In June 2016, Shaun Abrahams was appointed as the NDPP. Abrahams was embroiled in political controversy when he unsuccessfully sought to charge the then Minister of Finance with fraud. The Hawks had investigated Minister Pravin Gordhan for an alleged rogue intelligence unit he had established while he was the Commissioner of the South African Revenue Services. However, in the end, he was charged with "fraudulently" funding the early retirement pension of Ivan Pillay and subsequently rehired him. This was highly criticised by legal experts and, in the end, Abrahams had to rescind the decision to charge Gordhan (EWN, 2016).

The controversial and extraordinary leadership turnover at the NPA is attributable to political interference, thereby undermining the independence of the institution (Mhango, 2014; Du Plessis, 2014). In fact, Omar (2017) posits that the NPA is only quasi-independent because the Constitution prescribes that the Minister of Justice has overall strategic oversight of the institution and that the NDPP is appointed by the President alone, without consultation. Omar (2017) further suggests the manner in which the NDPP is appointed should be reviewed and be done through a multi-stakeholder process.

In 2017, the North Gauteng High Court found that President Zuma acted irregularly when he negotiated the termination of the appointment of Nxasana and appointed Abrahams in his place. For this reason, the Court ordered that Abrahams' appointment be set aside and that the Deputy President must appoint his replacement within 80 days. The Court decided this because the former President had mixed feelings about appointing the NDPP, given the

large number of criminal allegations against him. According to the Court, Section 90 of Constitution provides that should a situation arise where the President was unable to carry out a responsibility, the Deputy President must carry out that responsibility (*Freedom Under Law (RF) NPC v National Director of Public Prosecutions*, 2017). This is a highly controversial proposition, which potentially encroaches on the powers of the sitting President to carry-out his/her constitutional functions, and delegate them to the Deputy President despite the fact that the President is present, able to fulfil his duties, and there is no vacancy in the Office of the President. Hence, Zuma sought to appeal the judgment (News24, 2017). He argued that what was at stake was “the interpretation of the Constitution on a matter as fundamental as the powers of the Head of State and Government and the relationship of the executive branch with other branches” (The Presidency, 2017).

The difficulty with this proposition by the Court is that Section 90(1) of the Constitution applies only when the President is abroad or otherwise is unable to perform his duties; that is, incapacitated due to ill-health, or if the position of president is vacant. In this instance, none of the Section 90(1) conditions is relevant. Section 90 was not intended for performance of a specific presidential task in an acting capacity, on an *ad hoc* basis (Wolf, 2017: 30). The further difficulty is that the Constitution does not provide for guidelines in relation to what ought to happen, in case the President is personally conflicted and must therefore recuse himself from making a specific decision. For instance, ordinarily, when the Minister is conflicted, the deputy minister or another official with the necessary power will take the decision. However, in the case of the Deputy President, who is not a deputy head of state, acting to carry out the duties of the head of state on an *ad hoc* basis may precipitate a constitutional crisis (Wolf, 2017: 30).

During his inaugural State of the Nation Address in 2018, President Cyril Ramaphosa undertook to urgently attend to the current leadership crisis at the NPA to ensure its stability and non-hindrance in performing its mandate (Ramaphosa, 2018). The President was well meaning in his intentions to stabilise the leadership of the NPA. This was evidenced by his decision,

without precedence since the dawn of the new democratic dispensation, to appoint a panel to interview the candidates for the position of NDPP. The interviews of the 11 shortlisted candidates would be broadcast. This is an important departure from the previous practice where the appointment of an incumbent to this important position was left to the sole discretion of the President (*Sunday Times*, 2018: 22; *City Press*, 2018: 2).

➤ **Directorate of Priority Crimes Investigation (the Hawks)**

Prior to the establishment of the Hawks, there was an effective multidisciplinary corruption-fighting unit called the Directorate for Special Operations (the Scorpions), which was linked to the NPA. The Scorpions spearheaded the prosecution of the then Deputy President Jacob Zuma on multiple corruption charges. However, at the ANC's Polokwane Conference in 2007 it was resolved to disband the Scorpions and replace them with a unit, which would operate within the South African Police Service (SAPS) (Hamlyn, 2008).

This decision of the ANC was quickly processed and the Directorate of Priority Crimes Investigation (the Hawks) was established. The decision to dissolve the Scorpions was rammed through with an overwhelming majority vote of 252 votes against 63 votes opposed to the dissolution (Hansard, 2008). This decision was taken by majority vote, despite the Khampepe Commission (2006) having recommended in 2006 to keep the Scorpions under the auspices of the NPA. The Khampepe Commission (2006: 9) found that the location of the Scorpions within the NPA was not unconstitutional and was jurisprudentially sound. Ignoring the Khampepe Commission's recommendations suggests that the governing party acted for political expediency, rather than based on sound legal principles.

Concerned about its independence and lack of insulation from political control the activist, Bob Glenister, organised a 10 000 signature-strong petition in protest against the dissolution of the Scorpions. When the petition route did not stop the process, he then resorted to litigation in the Constitutional Court (Hoffman, 2017), and the Constitutional Court ruled that the sections of the Acts that disbanded the Scorpions and created the Hawks Unit were

unconstitutional, and that Parliament was given 18 months to rectify the legislation (Mataboge and Faul, 2011). This was mainly to ensure that the institution was insulated from political control.

The amendments made to the statues creating the Hawks did not go far enough to ensure the institutional independence of the new entity, as the suggestions, such as one made by Glenister to create it as a Chapter 9 institution in a form of an integrity commission, fell on deaf ears (Hoffman, 2017). Consequently, the institution faced leadership challenges similar to the ones experienced by the NPA. The first head of the institution, Anwar Dramat, was suspended by the Minister of Police in the wake of allegations of his involvement in the rendition of several Zimbabweans in 2010. However, he alleged that he was targeted because he was at the time investigating influential people, including matters related to the Nkandla security upgrades. The North Gauteng High Court ruled his suspension unconstitutional, but he never returned to office and soon thereafter, he resigned after reaching a settlement with SAPS (amaBhungane, 2015).

This opened the door for the appointment of Berning Ntlemeza, first in acting capacity and later in a permanent capacity. In a manner reminiscent of Menzi Simelane's appointment at the NPA, Ntlemeza was found to lack honesty and integrity by the High Court in the Sibiyi case, but the Minister of Police persisted in appointing him. The Helen Suzman Foundation and FUL challenged this appointment and the Court ruled that in the light of Ntlemeza's lies to the court under oath, which was tantamount to defeating the ends of justice, he was not fit and proper for an appointment as the head of the Hawks (Bateman, 2017). The Court ruled that he must vacate his office with immediate effect. However, Ntlemeza, supported by the then Minister Nathi Nhleko, persisted to report for duty. Only after a new Minister of Police in the person of Fikile Mbalula was appointed, following the infamous late-night Cabinet reshuffle,¹⁵ it was insisted that the court decision be implemented. Initially Ntlemeza insisted on reporting for duty while his application for leave to appeal was being heard. In the end, the SCA refused him leave to appeal (Mabuza, 2017).

¹⁵ President Zuma infamously reshuffled the Cabinet on 17 October 2017.

These issues at the Hawks are also a function of the politicisation of state institutions. That is why the call by Corruption Watch and the Institute for Security Studies (ISS) for the review of the appointment processes of the top echelon of SAPS is important and instructive in order to infuse independence into these institutions. Adv. Pikoli, a former NDPP, narrated how he was appointed as the NDPP. He says he received a call from former President Mbeki, who told him of his desire to make him the NDPP, without any pre-appointment process or consultation. Pikoli decried this practice at the public awareness campaign for a transparent and merit-based selection of “top cops”, jointly launched by the Corruption Watch and the ISS (Corruption Watch, 2017).

As demonstrated with the *Simelane* case discussed above, the courts had been called to adjudicate the challenges against the irrationality of some of these appointments by the President or individual members of the Executive. Moseneke (2014: 18) makes a compelling argument that appointment by a deliberative collective is less susceptible to challenges of irrationality than the ones made by an individual functionary. This proposal is echoed by Jameelah Omar (2017) and Corruption Watch and the ISS (Corruption Watch, 2017).

The importance of a collective and participatory deliberative process for the appointment of heads of independent institutions is that it has the potential to enhance the institutional integrity of those institutions in the long run. However, it should be considered that this might not be a panacea for good governance and institutional integrity. The successive SABC Boards are an example of boards appointed through an involved multiparty parliamentary process. However, unsuitable persons were still appointed, an example being the former Chairperson of the SABC Board, Ellen Tshabalala, who had allegedly misrepresented her qualifications (SAnews, 2015). Such appointments occur mainly due to the majority dominance of the governing party, which enforces its cadre deployment policy. Prof. Modimowabarwa Kanyane of the Human Sciences Research Council has pointed out that cadre deployment was putting loyalty ahead of merit and competence, and this affected the efficiency and effectiveness of the public service (Areff, 2012). The solution may lie with the infusion of meritocracy in the collective

appointment processes, as the cadre deployment strategy that prizes loyalty over competence is not likely to strengthen the institutional integrity of state institutions.

In 2018, President Cyril Ramaphosa in his inaugural State of the Nation address undertook the following with regard to appointments and the state of governance of state institutions:

We will change the way that boards are appointed so that only people with expertise, experience and integrity serve in these vital positions. We will remove board members from any role in procurement and work with the Auditor-General to strengthen external audit processes. As we address challenges in specific companies, work will continue on the broad architecture of the state-owned enterprises sector to achieve better coordination, oversight and sustainability. This is the year in which we will turn the tide of corruption in our public institutions (Ramaphosa, 2018).

In the same speech, President Ramaphosa undertook to establish the Commission of Inquiry into Tax Administration and Governance of the South African Revenue Services (Ramaphosa, 2018). This inquiry was announced on 23 May 2018, with retired Justice Nugent as its chairperson (Presidency, 2018). Therefore, there appears to be a major agenda to ensure the transformation of governance of public institutions. The appointment of people at the helm of these institutions, who have the requisite expertise and experience and are of unquestionable integrity, is an important starting point to turn them around.

To this effect, the Minister of Public Enterprises has been busy turning around the “captured” public enterprises. As part of this process, the Minister appointed persons of integrity to the Boards of Eskom, Transnet, Denel and SA Express, and the highly recommended Lungi Mnganga-Gcbashe has been appointed as the Chief Executive of Eskom (Kilian, 2018). The Chairpersons of these Boards are individuals of stature and pedigree, who are highly respected, in the persons of Jabu Mabuza for

Eskom, Popo Molefe who was retained for Transnet, Tryphosa Ramano, a chartered accountant for SA Express, and Monhla Hlahla for Denel (Kilian, 2018). While these developments are important and encouraging in the aftermath of the state capture project, it has been argued that the appointment of people to these senior public sector positions must be through a transparent recruitment and selection process, with the participation of various stakeholders (Munusamy, 2018: 24).

➤ **Rule of Law**

According to Judge Madala (2003: 36), it was inevitable that healthy tensions could develop between the three branches of government (the legislative, executive and judiciary), but those should not be elevated to the level of a struggle for power because if the relations between these branches break down the rule of law would suffer and with it the administration of justice. South Africa has experienced serious tension between the executive and judiciary in the recent past, especially when the government undermined the rule of law by not arresting President Omar Hassan al Bashir of Sudan, who was a fugitive from international law. Even when the matter was brought before the South African courts, the government allowed President Bashir to be whisked out of the country, despite a court decision that he should be prevented from leaving South Africa (De Rebus, 2015: 5). In the light of this tension, the National Executive and Judiciary held a first high-level meeting on 27 August 2015 to address concerns on undermining each other's institutional integrity. The meeting agreed, among others, to respect each other's institutional integrity and to respect the principle of the separation of powers (Zuma, 2015).

Despite this meeting, tensions have not dissipated as the attacks on the integrity of judges coming from the senior leaders of the governing party, the ANC, continued. For example, the then Secretary General of the ANC, Gwede Mantashe, launched a stinging attack on the independence of the judiciary, accusing it of a drive to create chaos in governance, and further accusing the Western Cape and Northern Gauteng benches of the judiciary of driving a negative plot (Maughan, 2016).

In recent times, the Speaker of the National Assembly and the then National Chairperson of the ANC, Baleka Mbete, had made utterances that suggest that some judges are anti-ANC or anti-government. She was quoted as having said “When there is a case that affects someone from the ANC, those cases would find their way [into the courts], and if they end up in the hands of certain specific judges, forget it, you are going to lose that case. It has nothing to do with merit, correctness or wrongness. Some names pop up in the head already” (*The Citizen*, 2017). This, coming from the head of another branch of government, is concerning.

These tensions heightened when the North Gauteng High Court ruled in two cases in a manner that suggested the judiciary’s interference with the powers of the President. In one case, the Court held that the Deputy President must appoint the NDPP because the President was conflicted to discharge that duty (*Freedom Under Law (RF) NPC v National Director of Public Prosecutions*, 2017). In another, the Court upheld the PP’s remedial action that stripped the President of his power to nominate the judge who would head the Judicial Commission of Inquiry into State Capture (*President of the Republic of South Africa v Office of the PP*, 2017). These have been criticised by Zuma’s allies as examples of judicial overreach (Raborife, 2017). Wolf (2017: 2) indicates that because the former president was personally implicated in the state capture allegations, the *nemo iudex* (one cannot be a judge in his own case) principle applied; hence, it was correct for the Court to rule for his recusal.

These matters are indicative of the challenges of the rule of law in South Africa, which undermines constitutional democracy, good governance and the institutional integrity of the judiciary.

➤ **State Capture**

The other challenge, perhaps the biggest, facing South Africa now is the whole phenomenon of state capture. State capture is nothing less than Grand Corruption. It is the highest form of corruption in which government agencies and personalities are systematically repurposed for private gain on a much higher scale than normal corruption. It is a form of corruption, to quote Huntington (1968: 61), where “something public (a vote, an office or a

decision) is sold for private gain". What looks like a routine administrative decision is in fact rent-seeking for private purposes. Lugon-Moulin (2010: 38) defines state capture as follows:

State capture occurs when the ruling elite and/or powerful businessmen manipulate policy formation and influencing the emerging rules of the game (including laws and economic regulation) to their advantage.

Netshitenzhe (2018: 9) indicated that while it was true that at macro-level state capture involved capturing critical pillars or nerve centres of the state, it could also happen at micro-level. This was evidenced by allegations of the capture of Departments of Education by trade unions; that is, with allegations of unions taking control of the appointments of school principals, and at various provincial and local government institutions.

While normal corruption is endemic and has the effect of undermining the development agenda of the state, state capture in South Africa is a more formidable threat to constitutional democracy because it is a much more systemic and highly organised political project with a focus on repurposing the state, analogous to a silent coup, and characterised by a conflation of the constitutional state and the shadow state; it is given a façade of legitimacy by invoking the rhetoric of radical economic transformation (Swilling *et al.*, 2017: 2-4). In fact, the call for radical economic transformation is connected to the call to revise the Constitution, justified by the allegations that the current constitutional order is anti-transformation and protective of so-called white monopoly capital (Swilling *et al.*, 2017: 6).

This radical economic transformation rhetoric has been described by the Deputy Secretary-General of the South African Communist Party (SACP), Solly Mapaila, as a programme for radical state looting in the name of the poor (Mapaila, 2017). This is consistent with the argument that fundamental to state capture is the repurposing of the state in ways intended to subvert the constitutional and legal framework established since the dawn of democracy in 1994 (Swilling *et al.*, 2017: 4). Whereas the promise of constitutional democracy was to build a capable state to serve the public good, the emerging evidence suggests that state institutions are being repurposed to

serve the nefarious interests of the small powerful elite, who have grafted a shadow state onto the existing constitutional state (Swilling *et al.*, 2017: 4). What the dominant elite is unable to achieve through a legitimate constitutional state it nevertheless achieves through an illegitimate shadow state and *vice versa* (Swilling *et al.*, 2017: 5).

The *modus operandi* of state capture in South Africa follows four steps, according to the Organisation Undoing Tax Abuse (OUTA) report (2017: 54), which are:

- A new minister is appointed and make changes to the Board composition of the public enterprises;
- A public enterprise announces a major acquisition or major built programme;
- People are brought onto the Boards who have close personal links to some of the bidders; and
- The tender is awarded despite a clear conflict of interests.

In South Africa, state capture has manifested itself through the collapse of corporate governance in public enterprises. The collapse of corporate governance in public entities is a function of the collapse of the institutional integrity of these institutions, facilitated by the manipulation of the appointments of “shady” persons into the Boards of Directors and as the Executive Directors. Once this has been done, these persons facilitate the allocation of big money tenders and contracts to the capturing network, allegedly pivoted around the President of the Republic (SACC, 2017). It would seem the institutional integrity of Eskom, Transnet, Denel and SAA were undermined in this manner. According to the *State of Capture Report*, these entities have allegedly acted improperly and in conflict of interest to benefit Gupta-linked companies (PP, 2016).

A detailed example is the collapse of corporate governance in the SABC and PRASA, which seriously undermined the institutional integrity of these institutions. The PP’s report titled *When Governance and Ethics Fail* dealt with the abuse of power and authority by the then Acting COO of the SABC, Hlaudi

Motsoeneng (PP, 2013). Contrary to the remedial action recommended by the PP that Motsoeneng be subjected to a disciplinary hearing for various failures of corporate governance at the public broadcaster, the then Minister of Communications, Faith Muthambi, ensured his permanent appointment to the position of COO. There were allegations that the public broadcaster, through the activities of this official, bankrolled a rival television channel (ANN7) and hosted a breakfast show of a rival news network (TNA Media), owned by the prominent politically-connected Gupta family, even though the SABC would not benefit from this “business relationship”. Only TNA Media benefited financially from the relationship (OUTA, 2017: 140-141).

Another example relates to the failures of corporate governance at PRASA. The PP’s report was titled *Derailed* (PP, 2015). The later revelations were that this parastatal was used for state capture in the form of systematically granting major contracts in a dubious manner. In the case of PRASA, the Board of PRASA took legal action to recover the monies, which was found by the PP to have been fraudulently lost. The Minister of Transport instructed the Board to halt the legal process. When the Board refused to do so, the Minister sacked the Board of PRASA, but it successfully reviewed their dismissal in the Gauteng High Court. Later it was revealed through the South African Council of Churches’ (SACC) *Unburdening Report* that in fact PRASA had been targeted for state capture (South African Council of Churches, 2017).

The erstwhile PP, Adv. Thuli Madonsela, investigated this phenomenon of state capture and issued a report titled *The State of Capture*. The findings are *prima facie*. For this reason, she issued remedial action that a judicial commission be appointed by the President, on nomination of the judge to head the commission by the Chief Justice, to properly investigate the allegations of state capture (PP, 2016: 353-354)). Former President Jacob Zuma, who believed that the remedial action by the PP usurped his powers to establish the judicial commissions and determine their terms of reference, took the matter to judicial review. The North Gauteng High Court confirmed the remedial action of the PP and effectively instructed the President to institute the Commission of Inquiry into State Capture as determined by the PP because the President was ostensibly conflicted to appoint this

commission of inquiry on his own terms (*President of the Republic of South Africa v Office of the PP*, 2017). Subsequently, the former President announced the appointment of the Commission of Inquiry into State Capture to be headed by Deputy Chief Justice Raymond Zondo. However, he persisted with his appeal against the confirmation of the remedial action by the court and sought legal advice as to the status of his appeal. Another spanner in the works was that he wanted the terms of reference of the commission to be broadened beyond those determined in the *State of Capture Report* (Zuma, 2018). While the establishment of the Commission of Inquiry into State Capture was welcome news, the continuation of Zuma's legal challenge and attempts to tamper with its terms of reference suggested mischief on the side of the former President and those who supported him in this regard, including the incumbent PP, Busisiwe Mkhwebane, who also called for the broadening of the terms of reference of the Commission (Mkhwebane, 2018). While at face value, the suggestions for the broadening of the terms of reference seemed genuine and above board, they in truth sought to obfuscate and complicate the investigation, which would not be concluded within the prescribed 180 days if the scope was increased beyond the areas identified in the *State of Capture Report*. However, the appeal of the former President was scuppered by his resignation and the Commission of Inquiry was set to function unhindered by his appeals. In the final analysis, the Commission was established and the following terms of reference were gazetted: The Commission would:

- investigate whether attempts were made to influence members of the National Executive, office bearers or functionaries employed by the office bearers of any state organ or directors of the boards of SOEs;
- investigate whether there is any truth to claims that the former Deputy Minister of Finance, Mcebisi Jonas, and ANC MP Vytjie Mentor were offered cabinet positions by the Gupta family;
- investigate whether the appointment of the national executive was disclosed to the Gupta family or any other unauthorised person before such appointments were made;

- investigate whether President Jacob Zuma had any role in the alleged offers of cabinet positions to Jonas and Mentor by the Gupta family;
- investigate whether the appointment of any member of the national executive, functionary or office bearer was disclosed to the Gupta family and if Zuma or any member of the executive is responsible for this;
- investigate whether the President or any member of his national executive or public official or employee of SOE breached or violated the Constitution or any relevant ethical code or legislation by facilitating the unlawful awarding of tenders by SOEs or any organ or state to benefit the Gupta family, individual or corporate entity doing business with government or any organ or state; and
- investigate whether any member of the national executive and including deputy ministers, unlawfully or corruptly or improperly intervened in the matter of the closing of banking facilities for Gupta-owned companies (President of the Republic of South Africa, 2018).

Legal representation was to be allowed at the Commission, but the witnesses would not have the right to refuse to answer questions. The Commission would also have powers of search and seizure. Moreover, the Chairman of the Commission would have full powers in terms of appointing staff of the Commission. According to the Chairperson of the Commission, the Commission would be proactive in its investigations. It would not wait for witnesses to come to it, but it would send out investigators to gather evidence (Pijoo, 2018).

The sticky issue of the inadmissibility of self-incriminating evidence given during the inquiry was resolved through an amendment to the Commission's regulations by President Cyril Ramaphosa. Now self-incriminating evidence would be admissible "in criminal proceedings where the person concerned is charged with an offence in terms of section 6 of the Commissions Act, 1947 (Act No. 8 of 1947), or regulation 12". This was an important development as people guilty of corruption could escape criminal liability because they have given self-incriminating evidence to the Commission.

The Commission began its public hearings in August 2018. The Chairperson of the Commission indicated that it would be impossible to complete the work of the Commission within the stipulated 180 days and that they would need to approach the court for the variation of the timeframes (Pijoo, 2018). The realistic period he proposed was approximately 18 months to two years. He indicated that the inquiry into state capture would be lengthy and costly, stating that R230 million had been allocated by the National Treasury to cover the operational costs for the first six months of the inquiry (Hunter, 2018). This application for the variation order was granted, given the magnitude of the issues the Commission had to investigate (Commission of Inquiry into State Capture, 2018).

However, as alluded to above, some sections of civil society have grappled with this phenomenon of state capture before, therefore there is readily available evidence for the Commission to examine, analyse and verify. In 2017, the SACC investigated this phenomenon with its *Unburdening Panel Report* pointing out that these tendencies (of state capture) were not only about corruption or maladministration, but a systemic chaotic design by a powerful elite allegedly pivoted around the person of the former President of South Africa who was systematically siphoning off state assets (South African Council of Churches, 2017).

A similar report was issued by a group of academics, who said that the country had experienced a silent coup whereby the governing ANC had been removed as a primary motive force for transformation in society (Swilling *et al.*, 2017: 2), and was replaced by a power elite centred around the person of President Zuma and the Gupta family. They sat at the apex of this power elite as the controllers of resources, buttressed by the elite group whose role it was to establish and maintain the patronage networks and facilitate the distribution of benefits, which in turn were supported by the brokerage team (entrepreneurs), whose function was to facilitate the movement of funds across the networks and ensure that the networks were functional, and lastly, the dealers, who specialised in moving the money transnationally (Swilling *et al.*, 2017: 56-57). This *modus operandi* conforms to Migdal's Theory of Triangle Accommodation, which asserts that weak states co-exist with the

associations of strongmen in society who exert their own influence by capturing parts of the state on their own terms. This triangle consists of the state officials who formulate government policy, other state officials who oversee the implementation of the policy, and strongmen (Du Toit, 1995: 26).

Swilling *et al.* (2017: 5) are at pains to explain in their well-researched report that institutions are captured for reasons much more ambitious than just looting. They are captured and repurposed for looting and for the consolidation of political power to ensure the long-term survival of the political project, which includes the authentication of an ideology of radical economic transformation in order to obscure the objectives of private enrichment by referencing it to the legitimate demands for genuine economic transformation. This repurposing of the state is pursued in two contexts (Swilling *et al.*, 2017: 7):

- (i) The transition from the trajectory of black economic empowerment (BEE), which was founded on the prospect of transforming and de-racialising the white-dominated economy, to a radical economic transformation agenda driven by nefarious networks disguised as black capitalists shunned by white monopoly capital.
- (ii) The transition was from operating within the strictures of the Constitution and the law, to flagrantly flouting the rules.

This clearly departs from the constitutional transformation agenda that has hitherto dominated the politics of the ANC to the radical transformation agenda that is centred on the repurposing of the state (Swilling *et al.*, 2017: 10-12).

To date the most brazen suggestion of state capture came in the form of the so-called #GuptaLeaks, which is a series of emails published by an investigative journalism outfit, amaBhungane. The emails revealed the following stories (Eyewitness News, 2017):

(i) Transnet locomotive tender

The emails reveal how Transnet's locomotive tender was usurped to benefit the nefarious interests allegedly associated with the Gupta family and their associates:

- Kickback agreements to the amount of R5.3 billion were concluded with the Chinese manufacturer that became Transnet's preferred locomotive supplier.
- Procurement processes were subverted and manipulated with the assistance of Transnet executives.
- An amount of R10 million from each R50 million locomotive that Transnet was buying was taken by them.

(ii) Manipulation of immigration laws

The emails reveal the role played by the Minister of Home Affairs, Malusi Gigaba, in ensuring that the Gupta brothers obtained citizenship of South Africa, despite them not meeting the legal requirements at that stage. In fact, the two immigration officials stationed in India by Minister Gigaba facilitated the whole process. This elevates allegations that Minister Gigaba was appointed as the Minister of Finance to replace the then Minister, Pravin Gordhan, to complete the capture of the National Treasury by nefarious interests (Gules, 2017).

(iii) Tegeta prepayment

The leaks indicate that the erstwhile executive director of Eskom, Matshela Koko, was a stooge of the Gupta brothers and facilitated prepayment of R659 million to them to enable Tegeta Exploitation and Resources, a Gupta-owned company, to fund the Optimum Coal acquisition.

(iv) The Dubai sojourns

The leaks indicate that the Guptas bought a luxurious property in Dubai where they could enjoy anonymity with their South African visitors. It was revealed that Eskom's former acting chief executive, Matshela Koko, the chief financial officer Anoj Singh, Transnet's chief executive Siyabonga Gama, and Denel's chairperson Daniel Mantsha were accommodated at the Oberoi Hotel paid for by Sahara Computers, a Gupta-owned company.

This suggests that these senior public officials were gratified by the Guptas for purposes of their private gain.

In the wake of these leaks and the reports chronicling the evidence to support the veracity of the state capture claims, OUTA (2017: 3-4) presented to the Speaker of the National Assembly and released a dossier that they suggested supported the allegations that state capture pivoted around the person of the President of South Africa. In the dossier they allege that President Zuma:

- allowed himself to be influenced in his task of appointing cabinet ministers;
- appointed incompetent persons to positions of responsibility, and failed to take corrective action when faced with evidence of their poor performance;
- allowed corrupt individuals to raid the public purse, and/or failed to take corrective action when presented with evidence of their corruption;
- mismanaged his executive in such a manner that had detrimental economic consequences for the country;
- used and/or manipulated state resources to prevent his own prosecution for an alleged 783 counts of corruption charges;
- wilfully and maliciously misrepresented facts to the Parliament; and
- unduly enriched himself, his family and friends.

The #GuptaLeaks also revealed that R30 million of the R114 million public funds from the Free State Government, which was meant for the controversial Estina dairy project in Vrede was diverted via Dubai to pay for the luxurious Gupta wedding held at Sun City in 2013. See **Annexure A** for the sketch by amaBhungane showing how the money changed hands as part of this project, which was never put on a tender, as required by law (amaBhungane, 2017).

All these allegations are in the court of public opinion, but they have not been ventilated in a formal tribunal. However, they continue to bedevil the country's

state of governance and politics, and negatively affect the economy. That is why the call for the appointment of a judicial commission to investigate these and other allegations of state capture is apposite. In some quarters, there were calls for a parliamentary inquiry into this phenomenon of state capture (Capazorio, 2017). In fact, Parliament's Public Enterprises Committee in September 2017 began an inquiry into the alleged state capture of Eskom, Transnet and Denel (Eberhard and Godinho, 2017: 1).

Despite the fact that President Zuma took the *State of Capture Report* on review, it is noteworthy that the ANC resolved to support the establishment of a judicial commission of inquiry into the allegations of state capture (ANC, 2017), as well as that the newly elected President of the ANC called for the establishment of this commission in the exact terms set by the erstwhile PP (Ramaphosa, 2018: 8). This was an interesting political development, where the ANC finally decided to check its sitting President and ensured that he complied with the rule of law, especially given that President Zuma was conflicted on the question of state capture (in this regard see the *State of Capture report*).

While setting up a commission of inquiry to investigate the phenomenon of state capture may be plausible, it may not be enough of a measure. Fighting and defeating corruption and insulating anti-corruption institutions from political interference requires political will (Naidoo, 2012: 675). The political will must resonate within the governing ANC as it presides over its deployees in most strategic centres of power in the country. If the ANC is equivocal and does not recall its deployees when they are alleged to have committed acts of corruption, then state institutions created to fight corruption will be demoralised by the lack of political will and many people might be tempted to think that the ANC itself is an impediment to the agenda of renewal championed by President Ramaphosa (Hamill, 2018). Mindful of this, the ANC at its Mangaung Conference in 2012 resolved that its members deployed in government should vacate their public positions if they are confronted by serious allegations of corruption and that the same people must be subjected to its internal integrity commission processes (ANC, 2012). However, the former president of the ANC, who was accused of 783 counts of corruption

charges and was found by the PP to have been unduly enriched with regard to his non-security upgrades at his Nkandla homestead, and was found by the Constitutional Court to have breached the Constitution, was never censored or prevented from continuing to hold party and state positions, despite his alleged complicity in corruption (Bruce, 2014: 49). This failure to hold leaders accountable and to the highest moral leadership standards leads to a situation where “a defective leadership not only holds back the attainment of national objectives. It also presents a difficult conundrum for the former liberation movement: in that, to rationalise its bad choices, the ANC has to embrace those defects of the individual leaders it has chosen as its own defects” (Netshitenzhe, 2012: 2). Furthermore, if the “captured” straddle the party and the state apparatuses, then state capture will be faster and more effective (Netshitenzhe, 2018: 9). The ruling party will do well to heed the call of Chief Justice Mogoeng: “If there ever was a time to embrace ethical leadership, stop spinning, stop manipulating, stop relying on our supporters or sympathisers to do wrong knowing that our own doing will be covered up in some way, that time is now” (EWN, 2016).

The endemic corruption fuels negative perceptions about the country. An example is the reference in Transparency International’s Corruption Perception Index 2016 to President Zuma’s court battles, and media reports on allegations of corruption against him, including the Nkandla matter. South Africa was ranked number 64 out of 176 countries in this survey (Transparency International, 2016). Table 4.2 below is a historical chart of how perceptions have changed over the years to South Africa’s problem of corruption. The table shows that South Africa is the 64th least corrupt country in the world. This places South Africa among those countries with high corruption, despite the fact that the 2016 report shows that the perceptions were stabilising about South Africa, and that South Africa scored far better than all the other BRICS (Brazil, Russia, India and China) countries, but it was outscored by four Sub-Saharan African countries, with Botswana topping the charts (Lindeque, 2017).

TABLE 4.2: Historical chart of corruption perception

Actual	Previous	Highest	Lowest	Periods
64	61	72	23	1996 – 2016

Source: Trading Economics

According to Corruption Watch (2018), the 2017 Corruption Perception Index shows that South Africa has regressed to the levels of 2012, scoring 43 and ranking 71 out of 181 countries, which is a regression from the 45 it scored in 2016. This can be ascribed to the continued impunity of corrupt elements in South Africa who have ensured an alarming lack of progress beyond the low- to mid-40s on the Index since 2012.

On the Index, Sub-Saharan Africa scores an average of 32, with Botswana scoring the highest at 61, and Somalia scoring the lowest at 9. South Africa is at ninth position on the Sub-Saharan African ranking, up from the seventh place in 2016.

Transparency International (2018) in its Corruption Perception Index 2017 states, “The key ingredient that the top performing African countries have in common is political leadership that is consistently committed to anti-corruption. While the majority of countries already have anti-corruption laws and institutions in place, these leading countries go an extra step to ensure implementation.”

In the aftermath of the ill-fated Zuma presidency, the consequences of state capture still bedevil state-owned enterprises. According to the Minister of Public Enterprises, Pravin Gordhan, the recent grounding of SA Express was the direct consequence of state capture. The beleaguered carrier had previously paid a Gupta-linked company, Trillian Capital, R5.7 million without following due process (Kubheka, 2018), even though it was evidently cash-strapped. The impact of state capture malaise in the governance of the country will continue to be a political factor for the near future; hence, reversing the trajectory of corruption in South African public administration requires effective leadership (Kroukamp, 2014: 1413-1414).

This trajectory of state capture has been interrupted by the change of leadership of the ANC occasioned by the outcome of its elective national conference held at

Nasrec in December 2017, and there are signs of a return to constitutionalism. However, all efforts to reverse the trajectory of state capture should be mindful of the fact that the beneficiaries of state capture will not give up without a fight, especially when faced with the possibility of jail time (Netshitenzhe, 2018: 9). Several developments suggest that there are genuine attempts to turn the tide against poor governance and state capture, and other forms of corruption. The following are some of the actions exemplifying these positive developments:

- The Judicial Commission of Inquiry into the State Capture (The Presidency, 2018(a)).
- The Commission of Inquiry into Tax Administration and Governance, to investigate, among others, whether SARS compromised its processes to benefit prominent individuals and their families and/or known associates (The Presidency, 2018(b)).
- The disciplinary inquiry of the SARS boss, Tom Moyane, regarding some of the alleged misconduct that compromised the integrity of SARS (The Presidency, 2018(c)).
- The broad range of proclamations for various investigations into several departments and municipalities in the Eastern Cape and KwaZulu-Natal, to be investigated by the Special Investigating Unit. The investigations relate to procurement irregularities, unlawful conduct by officials, intentional or negligent loss of public money or damage to public property and unlawful conduct, which may cause harm to public interests (The Presidency, 2018(d)).
- The placing of the North West Provincial Administration under administration of the national government in terms of Section 100 of the Constitution (Government Communications, 2018), followed by the resignation of the Premier of North West, Supra Mahumapelo, which in itself is a significant step in restoring good governance in the North West Provincial Administration.

The promise of better governance was recorded succinctly in the Preamble of the Constitution, and it was a solemn promise to:

Heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights;

Lay the foundations for a democratic and open society in which government is based on the will of the people and every citizen is equally protected by law;

Improve the quality of life of all citizens and free the potential of each person; and

Build a united and democratic South Africa able to take its rightful place as a sovereign state in the family of nations (Preamble to the Constitution, 1996).

Hence, state capture and corruption undermine the foundational values of South Africa. These values include the quest for human dignity, equality and the advancement of human rights and freedoms, and to build a democratic state founded on the principles of accountability, responsiveness and openness (Section 1 of the Constitution, 1996).

In the following section, the possible effects of this crisis of governance on the institutional integrity of the PP will be discussed.

4.3 The effects of the crisis of governance on the institutional integrity of the Public Protector

The crisis of governance, as described in this chapter, creates an inhospitable environment for institutions. Esman (1967: 1) defines an institution as a change-inducing and change-protecting formal organisation. However, institutions are not a natural phenomenon; they must be built or be reconstituted by people. The Inter-University-Research Program defines institution-building as “the planning, structuring, and guidance of the new or reconstituted organisations which embody changes in values, functions, physical and/or social technologies; establish, foster, and protect normative relationships and action patterns; and attain support and complementarity in the environment” (Esman, 1967: 1).

Institution-building is a daunting task for any polity, but it is even more so in hostile environments as it must overcome many constraints marked by salient societal and political challenges. Their socio-political landscape is large and unpredictable, and often the state is weak and informal associations have taken root in citizens’ lives edging out the official ones. In such an environment, patronage, rent-seeking and

corruption are common and generally the state-society compact is weak (Barma, Huybens and Vinuela, 2014: 2). However, some institutions take root despite the inhospitable environment they find themselves in, by developing smart strategies of survival and employing suave tactics to negotiate their broader socio-political environments and focus on delivering results and generating legitimacy, developing internal efficiency and creating external constituencies needed to facilitate political support and build resilience to sustain gains even in rapidly changing political environments. All these are often supported by a network of competent technocrats and leaders who drive and sustain the trajectory (Barma *et al.*, 2014: 3-4). These are the group of individuals who are energetically involved in the origination of the doctrine and formulation of the programme and who direct its operations and interactions with the environment. Leadership is the single most critical element in institution-building as the process requires the skills set to manage both the internal organisation and environmental interactions (Esman, 1967: 3).

Institutional integrity means that the organisation defines and acts within the strong code of ethical and positive values, and is intolerant of the deviant behaviour of either its employees or stakeholders (Gurzawska, 2015: 4). In this chapter, the researcher sets out to interrogate some of factors that have impugned or threatened to impugn the institutional integrity of the Office of the PP, namely second-guessing its resolutions, political attacks on the integrity of the institution, contempt and obstruction of the work of the Office, and acrimonious oversight:

➤ **Second-guessing the decisions of the PP**

South Africa has experienced at least two instances of interference by the Executive with the independence of the PP. Both of them took the form of seeking to replace the report of the PP with an alternative one prepared by or on behalf of the Minister.

The first instance of interference happened in the context of the SABC report titled *When Governance and Ethics Fail* relating to the irregularities of governance and appointments at the public broadcaster. The report made damning findings on the actions of the then Acting COO of the SABC, Hlaudi Motsoeneng, and part of the remedial action was that the Minister must fill the post of COO with a qualified and competent person, and that the Acting COO

must be subjected to a disciplinary inquiry for various acts of misconduct that the report had established (see PP, Report No. 23 of 2013/2014). Instead of acting in accordance with the remedial action or taking the report on review if they did not agree with its findings, the SABC Board and the then Minister of Communications, Faith Muthambi, commissioned an alternative report by the firm of attorneys, Mchunu and Associates. The subsequent Mchunu report cleared the SABC and Mr Motsoeneng of any wrongdoing. Within a short space of time after the Mchunu report, the Minister effected the permanent appointment of Motsoeneng as the COO of the public broadcaster (Makinana, 2016).

The second instance of interference happened in the context of the PP's report titled *Secure in Comfort* regarding the non-security features built at the private residence of the then President, Jacob Zuma, in Nkandla. The PP found that the erection of the non-security features unfairly enriched the President and his family and that he should pay back the portion of the costs thereof to be determined by the National Treasury and SAPS (see PP, Report No. 25 of 2013/14). Instead of acting in accordance with the remedial action of the PP, the then Minister of Police commissioned another investigation, which rivalled the findings of the PP. This minister's report found, among other idiosyncrasies, that the swimming pool erected at the President's place of abode was in fact a "fire pool", therefore qualifying as a security feature (Minister of Police, 2015).

This report was adopted by Parliament on 2 June 2015 (National Assembly, 2015: 2021), resulting in Parliament effectively second-guessing the findings of the PP. The unassailable majority of the governing ANC in the National Assembly made this possible. With this action, the Parliament became complicit in the Executive's interference with the institutional integrity of the PP.

Ironically, it is these two acts of unwarranted interferences that led to the clarification of the powers of the PP and elevated its institutional integrity. The Supreme Court of Appeal decision in the matter of the *DA v the SABC* and the Constitutional Court decision in the matter of the *EFF v Speaker of National Assembly* served to exalt the Office of the PP and assured the public that this institution, unlike other independent institutions, was not captured by nefarious

interests and was committed to carry out its mandate of supporting and strengthening constitutional democracy without fear, favour or prejudice.

➤ **Political attacks on the integrity and person of the PP**

As already demonstrated with the institutions discussed above, institutions such as the Directorate for Priority Crimes Investigation, the National Prosecuting Authority and State-Owned Enterprises, the capture of state institutions happens, among others, through the undermining of the independence of those institutions.

It has been clarified in Chapter 3 that the independence and impartiality of the PP are constitutionally guaranteed in Section 181(2) of the Constitution. The Constitutional Court, in the matter of *EFF v the Speaker of National Assembly*, has also pronounced upon this independence. The undermining of the independence of the Office of the PP usually takes the form of political attacks on the integrity and the person of the PP.

Arguably, the worst political attack on the integrity of the PP came from the mouth of the former Deputy Minister of Defence and Military Veterans, Kebby Maphatsoe, who claimed that Adv. Madonsela was a CIA spy. This suggested that her investigations and reports had improper interests of foreign forces (Feketha, 2016). Branding someone a spy or sell-out could be highly dangerous as in the days of the struggle for liberation being a spy was the dastardliest thing a comrade could do. That is why Adv. Madonsela feared for her safety and that of her family, considering that some members of the public could be incited to “protect” their country against the foreign agent and therefore harm her loved ones (Sesant, 2014).

The Deputy Secretary-General of the ANC, Jessie Duarte, accused Adv. Madonsela of populism and thinking of herself as above all institutions, the Constitution and Parliament. Effectively she was calling for her to be reined in when she said, “We all need to work on that to be corrected because we actually need to strengthen the office of the Public Protector” (SAPA, 2014). Ironically, this kind of attack on the person of the PP only serves to weaken the institution.

The ANC Youth League was more scathing in its attack when it repeated the CIA spy accusations against Madonsela, called her a clown and sarcastically offered

to organise her a farewell party to see her go (*City Press*, 2015). The ANC Women's League also got in on the act with its own scathing attack, calling for someone to be appointed as PP who will be "more objective and less populist... who will not campaign against government and its people", effectively suggesting that the investigations and findings of the PP demonstrated that Madonsela was biased and unpatriotic (Quintal, 2016).

All these pointed attacks on the integrity and person of Adv. Madonsela served to undermine the institutional integrity of the PP, with the intention to replace the then incumbent PP with someone obsequious and pliable to political manipulation. These political attacks also served to undermine the institutional integrity of the Office of the PP in the eyes of the public, presenting its findings as biased, politically motivated and legally unsound. In similar fashion, opposition parties have begun to label the current incumbent, Adv. Mkhwebane, as a spy, in a manner reminiscent of the attacks on Adv. Madonsela (Gallens, 2016). This trend is dangerous as it negatively affects the institutional integrity of the Office of the PP.

The PP can resort to Sections 9 and 11 of the Public Protector Act to deal with the insults directed at him/her. Section 9 states that insulting the PP or doing anything that will amount to contempt of court will be contempt of the PP. Section 11 indicates that it is an offence to act as contemplated in Section 9. However, Adv. Madonsela chose dignified silence and civil action to deal with some of these acts of contempt. The personality and leadership qualities of Adv. Madonsela, such as integrity, courage, wisdom and vision, kept the institution afloat during its difficult but highly successful period since its establishment (Crous¹⁶, 2016).

The jury is out as to whether the current PP possesses these qualities and will apply them to protect the institutional integrity of the Office or whether she will allow it to be captured to serve nefarious interests, or be a moribund shadow of its former self. Although it is too early to know, some opposition parties have already called for her head and expressed regret for having supported her to be the PP in the first place (eNCA, 2017; Madia, 2017). One expects these calls to

¹⁶ Article available at <http://www.kr.co.za/blog/knowledge-resources/post/5-reasons-why-thuli-madonsela-is-such-an-extraordinary-leader/> Accessed on 20 November 2018.

intensify and probably morph into fully-fledged political campaigns in the aftermath of the ruling by the High Court that her remedial action regarding changing the mandate of the Reserve Bank was found to be irrational, and that she risked being accused of being a hypocrite and incompetent, who would negatively affect the established legitimacy of her Office (*South African Reserve Bank v PP and Others*, 2017).

Corruption Watch conducted a survey among the staff of the PP to indicate the qualities of the PP they wished to succeed Adv. Madonsela. The survey revealed that the employees of the Office expected their boss to possess the values of integrity, transparency and accountability, and he/she should have the ability to investigate corruption without fear, favour and prejudice (Corruption Watch, 2016). The incumbent PP will do well to fulfil the expected leadership role.

➤ **Contempt and obstruction of the work of the PP**

Section 181(3) of the Constitution states that other organs of state must, through legislative and other measures, assist and protect the PP to ensure its independence, impartiality, dignity and effectiveness. Furthermore, the law empowers the PP to institute contempt proceedings against anyone undermining the Office (see Section 9 of the Public Protector Act, 1994). Over time, there have been instances where other organs of state have sought to obstruct, rather than support, the work of the PP. The instances that threatened the independence of the PP will be analysed.

In the aftermath of the release of the report relating to the unlawful and invalid R500 million SAPS headquarters lease agreement, the Office of the PP was in March 2011 visited by SAPS' Criminal Intelligence in an apparent intimidation and show of power (PMG, 2011). The Portfolio Committee on Justice and Correctional Services condemned this action of SAPS as irregular, tantamount to intimidation, undermining the independence of the PP, and posing a threat to democracy in South Africa (PMG, 2011).

The current Public Protector had reported to the same Committee that the SABC had refused to implement four of the six recommendations of the PP, including taking disciplinary action against the then COO, Hlaudi Motsoeneng. The public broadcaster defied or resisted the remedial actions (Herman, 2016), despite

these matters having been ventilated before the courts of law in favour of the PP's binding remedial action; thus, the defiance by the SABC undermined the effectiveness of the institution.

In another case, the MEC responsible for the Treasury in KwaZulu-Natal refused to implement the remedial action of the PP because she regarded it as defective (TMG Digital, 2016).

The Minister of Defence and Military Veterans, Nosiphiwe Mapisa-Nqakula, refused to implement the remedial action of the PP that found the failure of the military service to reinstate a soldier, as recommended by the Military Ombudsman, was irregular and ordered the reinstatement of the soldier. Despite there being no review application, the Minister refused to comply with the remedial action because she was still contemplating to approach the courts for review (Stone, 2018).

The cases cited above are examples of contemptuous and obstructive tendencies towards the authority of the PP in South Africa. However, the law does allow the PP to act against contempt and obstruction of her Office. Although the PP has stated that her Office does not have the financial resources to pursue contempt proceedings against the defaulters (Stone, 2018), the gazetted *Rules Relating to Investigations by the Public Protector and Matters Incidental Thereto* (Public Protector Rules) provide for the laying of criminal charges against those who commit contempt of the PP (Section 26 of the Public Protector Rules). Contempt of the PP occurs when a person insults the PP or has committed an act relating to the investigation, which, if the investigation in question had been court proceedings, would have been regarded as contempt of court (Section 9 of the Public Protector Act; Section 26(2) of the Public Protector Rules).

➤ **Acrimonious oversight**

The relationship of the previous and current PP and the Portfolio Committee (PC) has been characterised by acrimony, making for a difficult oversight function and undermining the status and independence of the PP. For example, during the presentation of her Office's annual report and strategic plan for 2018/19 in April 2018, the PP focused her presentation on severe financial and capacity

constraints, and low staff morale due to the high workload and requested the Committee to assist her Office to address these matters. The Committee reportedly wanted none of this and accused the PP of creating institutional instability due to the high turnover of senior management staff; public perceptions of staff purges; her inability to balance the needs of the institution with the requisite fiscal discipline that all government bodies must adhere to; her over-reliance on the SA Security Agency; the alleged acrimonious relationship between the PP and her deputy (the PP had indicated that the DPP was busy with overseeing training of PP staff, hence he was not part of the delegation to the PC); the inability of the PP to engage effectively on matters of public concern; her alleged integrity failures, especially the alleged lies relating to the Absa-Ciex matter; the personal cost order in relation to the Absa-Ciex matter; the rising litigation and associated costs defending herself; her omission to investigate politicians allegedly involved in the Vrede dairy farm scandal; and her controversial appointment of the special advisor (PMG, 2018). This set the tone for the acrimonious exchange between the PP and the members of the Committee.

The following are some of the examples of this acrimonious oversight:

- The previous PP bemoaned the fact that the PC treated her like a child and simply dismissed her requests for additional financial resources to perform the functions of her Office. As a result, she had to take the decision to close some of the regional offices, thereby affecting the accessibility of her Office (Evans, 2015).
- There had been a fall-out between the current PP, Adv. Busisiwe Mkhwebane, and the PC regarding her being summoned to explain her reports regarding the Estina dairy project and other public comments (Bornman, 2018). The PP was reportedly disturbed by this development and she issued a media statement to express her displeasure (Eyewitness News, 2018).
- The PP and PC were involved in a public spat relating to the questions asked by the members of parliament to the Minister of Justice, which related to the operations of the Office of the PP. Adv. Mkhwebane resisted this, arguing that this undermined the independence of her Office (Mokone, 2018: 4).

- Adv. Mkhwebane did not attend the PC meeting called to discuss whether to hold an inquiry into her fitness to hold office, and only submitted a 25-page reply to the opposition DA's allegations of her incompetence. In her submission, she indicated that the Committee's displeasure with her performance was not adequate grounds to remove her from office (Herman, 2018).

This worrying trend has its origin in the crises of governance that haunted South Africa between 2009 and 2017, as evidenced by Parliament's inclination to seek to dictate to the PP and second-guess her reports (National Assembly, 2015: 2021). In this environment, the PP may not be able to play its supportive role to Parliament, which role, as suggested by Corder *et al.* (1999), is to aid and support Parliament in its oversight function.

4.4 Conclusion

The central thesis of this chapter is that South Africa is experiencing a crisis of governance and that this crisis can be explained through the theories of political decay (Huntington, 1965) and weak states (Migdal, 1988). Political decay has been defined as negative political development characterised by the failure of state to guarantee, among others, good governance for its citizens (Duvenhage, 2003).

This advent of political decay and the weakening of the state has been characterised by Grand Corruption and the phenomenon of State Capture. These could be explained as the consequences of the politics of transition.

Usually political transformation comes with transaction costs that may undermine the transformation agenda through corruption, cronyism and political patronage. Therefore, strong institutions of accountability are needed to combat vices such as corruption, cronyism and patronage. Such institutions of accountability are ombudsmen, independent prosecution authorities, and specialised agencies. If they exist, there will be fewer of these vices (Manzetti, 2009: 23).

Therefore, in order to enable state capture and grand corruption, the strategy that has been used by political actors and their allies was the weakening of the state institutions of accountability. The characteristic of weak states is that they operate in a form of web-like networks whereby social control is disseminated among various social organisations that have their own rules, instead of operating within the rules of

the state (Migdal, 1988: 40, 177). This is exactly how the phenomenon of state capture has been conceptualised in South Africa. The study by the State Capacity Research Project found that a parallel authority has replaced the ANC as the legitimate decision-making structure. Hence, there is a shadow government operating alongside the constitutional government (Swilling *et al.*, 2017). The study further indicated that one of the strategies for grand corruption and state capture was interference with the independence of state institutions. For instance, the independence of the NPA, the Hawks and other institutions had been so compromised that they could no longer be said to have the capacity and will to prosecute corruption and state capture. In at least one instance the ANC used its unassailable parliamentary majority to bulldoze through legislation that disbanded an effective corruption-buster, the Scorpions, and replaced it with a moribund one in the form of the Hawks (see Parliament of the Republic of South Africa, 2008). The death of the Scorpions represented the end of an effective multidisciplinary corruption-fighting capacity, with dire consequences for the state of governance in South Africa. Even when the Constitutional Court made a ruling that sought to ensure the independence of the Hawks, the reality was that the institution was not completely insulated from political interference as evidenced by the suspension by the Police Minister of its head, Anwar Dramat. Dramat resigned in the aftermath, despite the Court declaring his suspension unlawful (amaBhungane, 2015).

Interference with the independence of state institutions is often achieved through so-called cadre deployment and political destabilisation, which causes high executive staff turnover at those institutions. The ANC's strategy for cadre deployment could be creating fertile ground for the destabilisation of state institutions (Twala, 2014). That is why there have been calls to alter the powers of the Executive to make these appointments, and replace it with the multi-stakeholder approach that will mitigate political deployments in favour of meritocracy (Moseneke, 2014; Omar, 2017). However, while this call is plausible, this approach is not a panacea. The SABC Board is appointed through a multi-party approach, but the governing ANC has been able to deploy unsuitable candidates such as Ellen Tshabalala with dire consequences for the state of corporate governance in the public broadcaster. The key to the stability of state institutions is the resolve by the ANC to appoint on merit, and not based on political expediency.

There are several instances that suggest the deterioration of the rule of law in South Africa, including the failure of the government to arrest the Sudanese President Omar al Bashir (De Rebus, 2015), and the attacks on the integrity of the judiciary by top ANC figures (Maughan, 2016; *The Citizen*, 2017). However, while these instances suggest challenges of the rule of law, the courts have demonstrated independence and have applied the rule of law without fear, favour or prejudice.

The PP of South Africa exists within the political environment, as expounded above. However, some institutions take root despite a hostile environment and manage to achieve institutional integrity by developing working strategies of survival and manage to survive in hostile socio-political environments. They focus on delivering on their stated results and engendering legitimacy, and developing internal efficiency and mobilising broad-based stakeholders in order to ensure political support and build resilience to sustain gains even in rapidly changing political environments. This is enabled by a network of competent technocrats and leaders who move and maintain the trajectory (Barma *et al.*, 2014). Leadership is the key ingredient in the success of such institutions (Esman, 1967).

However, there have been instances that sought to undermine the integrity and independence of the Office of the PP and the holder of the Office. In at least two instances, there have been attempts to second-guess the findings of the PP: the SABC's *When governance fails* and Nkandla's *Secure in comfort* reports were both second-guessed and replaced with the findings initiated by the Ministers. However, both reports by the Ministers were set aside by the courts, vindicating the powers and functions of the PP. There have also been political attacks directed at the person of the PP, where she was called a spy and was accused of political grandstanding and populism whenever she released reports critical of the Executive. However, the leadership, integrity and steadfastness of Adv. Madonsela, in particular, persisted. Furthermore, there have been instances of contemptuous and obstructive attitudes towards the work of the PP, as well as the acrimonious relationship between the PP and the PC. These factors, existing within the context of the crisis of governance, tend to undermine the independence of the Office of the PP as an institution.

Despite the successes that ensured the institutional integrity of the PP in a hostile environment, the recent developments show that the current incumbent PP might be

reversing these gains of independence (De Vos, 2018). Her Ciex report, in which she threatened the constitutional status and role of the Reserve Bank, has been much maligned and the High Court has warned that her conduct could lead to the undermining of the legitimacy of her institution. In *ABSA and Others v PP and others* the court went further to conclude that her conduct of the Ciex investigation demonstrated her bias and lack of credibility. In 2016, Corruption Watch undertook a survey of the staff of the PP, which indicated that the staff expected the PP to have the virtues of independence, integrity and fairness. The jury is still out as to whether the current PP will live up to these high standards or whether she will be the first PP who will be removed on grounds of misconduct, incapacity or incompetence, in terms of Section 194 of the Constitution.

This chapter concludes that the existing crisis of governance in South Africa does have a bearing on the institutional integrity of the Office of the PP, either because of its remedial actions, which frequently put it at loggerheads with those who are central figures in the described state of crisis, or as seen in attempts to capture the Office through political interference and/or second-guessing of its findings. The integrity and independence of the incumbent PP is the shield that can defend the Office from being captured by nefarious interests and be diverted from its role of supporting and strengthening constitutional democracy and promoting good governance.

In the next chapter, a comparative analysis will be conducted of the PP and other Ombudsman institutions in Europe, Latin America and Africa.

CHAPTER 5: A COMPARATIVE ANALYSIS

5.1 Introduction

While in Chapter 2, the popularity and spread of the Ombudsman institution worldwide was discussed and it was explained that despite the differences in the nomenclature (Public Protector in South Africa, *Defensor del Pueblo* in Spain, *Le Mediateuer* in the Francozone), the basic idea remains that the Ombudsman is an independent official who receives complaints from the public, has the power to investigate them, and produces reports and recommendations to resolve them (Söderman, 2004), it must be noted that there is no international treaty for the establishment of Ombudsman institutions. Hence, despite features common to all

Ombudsman institutions, there are also distinctive features as a result of the different politico-legal systems, constitutionalism, culture and history of each polity (Stuhmcke, 2012: 10; Diamandouros, 2006a). Therefore, it becomes apposite to conduct a comparative analysis to understand the unique status, role and powers of the Public Protector (PP) of South Africa. This chapter sets out to do exactly that by comparing the PP with the various European, Latin American and African Ombudsman institutions. The comparison with the Western European Ombudsman institutions will be mainly an institutional analysis, at politico-legal system level. With regard to Eastern Europe and Latin American countries (discussed collectively as regions because of strong conceptual similarities) and African countries (discussed singly because of strong dissimilarities), the comparative analysis will be considerably detailed, considering the following features and comparing them to the PP to discern similarities and dissimilarities, and whether there are best practices that may be learnt by South Africa from these systems:

- (i) Doctrine of the Office – its establishment and embedment
- (ii) Scope and remit
- (iii) Appointment, security of tenure and grounds of removal from office
- (iv) Resourcing – financial and human resources
- (v) Political interference
- (vi) Acceptance and enforcement of decisions and recommendations
- (vii) Accountability, reporting arrangements and oversight.

5.2 Sources of international standards for Ombudsman institutions

Before we can begin to conduct a comparative analysis of the PP vis-à-vis the Ombudsman institutions in Europe, Latin America and Africa, we need to understand the sources of international standards that inform the establishment, structure and the mandate of the Ombudsman institutions the world over.

Despite the ubiquity and popularity of the Ombudsman institution all over the world, there is no international treaty dealing specifically with the establishment, structure and mandate of the Ombudsman. The national legal jurisdictions remain the most important source for the establishment, structure and mandate of the Ombudsman

institution. However, a number of international instruments can be discerned that directly or indirectly can be regarded as sources (or at the very least, influencing factors) for international standards for the Ombudsman institution.

5.2.1 United Nations instruments

The United Nations (UN) General Assembly has adopted various resolutions and instruments that can be regarded as authoritative sources for the establishment, structure and mandate of the Ombudsman, which are discussed below:

- **UN General Assembly Resolution 63/169 of 2008**

In December 2008, the UN General Assembly adopted the Resolution on the Role of the Ombudsman with regards to human rights promotion, the rule of law, and the principles of justice and equality as standards to be observed in the formulation of the mandate of the Ombudsman. The Resolution enacts the standards, such as access to justice, effective remedies, access to courts, and the right to a fair trial, redress, judicial protection, legal certainty, responsiveness and non-discrimination. The Resolution further emphasises the independent and proactive role of the Ombudsman in advising national governments with regard to bringing their legislation and other practices in line with their international human rights obligations. The Resolution also points to the important role of the Ombudsman in promoting and monitoring good governance in public administrations (UN, 2008). While this is not a treaty, it is certainly an international authoritative guide on the establishment, structure and mandate of the Ombudsman. The Resolution has been reaffirmed by the General Assembly in Resolutions 65/207 of 2010, 67/163 of 2012, 69/168 of 2014, and 71/200 of 2016. This means that although there is no international treaty on Ombudsman, the UN pays considerable attention to the role and mandate of the Ombudsman in promoting governance and human rights. These resolutions underline the importance of the autonomy and independence of the Ombudsman, mediator and other national human rights institutions, to enable them to carry out their mandates.

- **UN General Assembly Resolution 2200A (XXI) of 1966**

One of the most significant human rights instruments that can be regarded as an authoritative source for Ombudsman institutions is the International Covenant on Civil and Political Rights (ICCPR). The ICCPR established principles that guarantee both judicial and non-judicial access to redress that is effective, fair and timeous (UN, 1966). The Ombudsman institution falls within the category of non-judicial means of redress that is available to the citizens.

- **UN General Assembly Resolution 48/134 of 1993**

The UN General Assembly adopted the Paris Principles in 1993 to set standards for national human rights institutions. The Principles called for national institutions, such as the Ombudsman, to have institutional, functional and personal independence (UN, 1993). The Paris Principles do not talk specifically to the Ombudsman institution, but sets out standards for national bodies with quasi-judicial competence, which most Ombudsman institutions are.

5.2.2 The IOI bylaws

Both the PP of South Africa and the Ombudsman institutions analysed here are members of the International Ombudsman Institute (IOI), an international association of Ombudsman. In 2012, the IOI passed the bylaws that are applicable to all members of the Association. The bylaws require of Ombudsman institutions to be independent and objective in their handling of complaints; they should also aim to correct the injustices caused to a complainant due to maladministration. They further state that the objective of the Ombudsman is to enhance service delivery by identifying and ensuring correction of system failures (IOI, 2012).

Specifically, Article 2(2) of the bylaws sets out the ten principles that comprise the standards for the establishment, structure and mandate of the Ombudsman. The principles are as follows:

- **Appointment**

The establishment, structure and mandate of the Ombudsman should be provided in a constitution and/or legislation, or by international treaty.

- **Remit**

The Ombudsman's remit should include the protection of any person(s) against maladministration, violation of rights, unfairness, abuse, corruption or any

injustice caused by an organ of state, or official acting in or appearing to act in a public capacity.

- **Confidentiality and impartiality**

The Ombudsman institution must exercise confidentiality and impartiality in its handling of cases, and should encourage the free and open exchange of information.

- **Independence**

The Ombudsman should be independent and should not receive any instruction from any public authority, and should perform its functions independent of any public authority.

- **Powers of investigation**

The Ombudsman should have the requisite powers and means to investigate any complaints by any person(s) within its jurisdiction.

- **Power of recommendation**

The Ombudsman should have the power to make recommendations to redress wrongs, and where applicable to propose administrative or legislative reform to promote good governance.

- **Accountability**

The Ombudsman should be publicly accountable to a legislative body, and by the publication of at least an annual report.

- **Period of office**

The Ombudsman should be appointed by the legislature or with its approval for a finite period, in accordance with the relevant legislation or constitution.

- **Removal from office**

The Ombudsman should only be dismissed from office by the legislature or with its approval, and for reasons stated in the relevant legislation or constitution.

- **Funding**

The Ombudsman should have adequate funding to fulfil its mandate.

The above standards will be used variously to guide the comparative analysis.

5.3 Comparison with Ombudsman within the European Union

The difference between the PP and European Ombudsman institutions is discussed from the perspective of the institutional and political context within which they exist. This part of the comparative analysis is intended mainly for conceptual clarification.

Unlike Latin America and Africa, which have not established a continent-wide Ombudsman, the European Union (EU) established by the Treaty of Maastricht of 1992 the European Ombudsman (EO) (see Article 38e of the Treaty of EU), with the primary purpose of strengthening democracy, and not only the desire to foster the administrative efficiency of EU institutions (Vogiatzis, 2018: 14). This is a unique arrangement that regional organisations such as the African Union (AU) may be advised to emulate.

In terms of Article 38e of the Treaty, the EO is appointed by the EU Parliament for the term of parliament and the term of the EO is renewable. The EO can be dismissed if "he no longer fulfils the conditions required for the performance of his duties or if he is guilty of serious misconduct" (see Article 228 of the Treaty on the Functioning of the EU).

The EO has the power to investigate, on his own initiative or instance of the EU citizen or through a member of the European Parliament, any complaint arising out of maladministration by an EU institution, except where the matter is *sub judice*, or the issue is before legal proceedings. If the EO establishes an instance of maladministration, he/she refers the matter to the affected institution of the EU to resolve the complaint within three months. The EO then refers a report to the European Parliament and the institution concerned. The complainant is then informed of the outcome of the inquiry (see Article 38e of the Treaty). It is worth noting that the EO, like most national Ombudsman institutions, has no binding powers to enforce compliance with his/her resolutions, but depends on his/her power of persuasion and publicity to enforce compliance (Mackie, 2010).

A perusal of the official EO website indicates that the EO coordinates a networking structure for the Ombudsman institutions in the EU, called the European Network for Ombudsmen (ENO). The ENO was originally established in 1996 to share information about EU law and policy between and among the national and regional

Ombudsman institutions and similar bodies of the Member States of the EU, including the candidate countries for EU membership, the other European Economic Area countries, the EO, and the Committee on Petitions of the European Parliament. The collective aim of all members of ENO is to defend citizens' rights and to safeguard the rights of citizens of EU countries to enjoy the services of citizen-friendly, transparent, ethical, and accountable public administrations across Europe (European Ombudsman website).¹⁷ Remarkably, the EO administers the Code of Good Administrative Behaviour that gives effect to the right to good administration and provides general principles of good administrative behaviour that apply to all EU institutions in their relations with EU citizens (section 41 of Charter of Fundamental Rights). Thus, at least high-level Ombudsman institutions in EU have similar objectives.

Below is an analysis of some Ombudsman institutions within the EU with a view to compare them with other Ombudsman institutions in the world, especially the PP of South Africa. In Western Europe, at least, a distinction can be made between two institutional and political contexts that also inform the type of Ombudsman in the political system, namely parliamentary and presidential systems:

- **Parliamentary system**

Parliamentarism is a system in which the executive branch of government (the president or prime minister and cabinet) is elected by and is accountable to the elected legislative body (parliament); thus, creating a centralised locus of authority at national level (Gerring and Thacker, 2008: 38). In Britain, this system is known as the Westminster system, which is defined by Lijphart (1999: 3) as having the following features: one party-control of cabinet; cabinet-domination of parliament; two-party dominant system; majority party forms government; interest groups exerts pressure on government in a pluralist fashion; government is centralised and unitary; legislative power is vested in a lower house of parliament; conventions allow flexibility of governance; there is no judicial review; and the central bank determines monetary policy. The pre-1994 constitutional system in South Africa was generally regarded as the Westminster system (South African Catholic Bishops' Council Parliamentary Liaison Office, 2015: 2-3).

¹⁷ <https://www.ombudsman.europa.eu/en/activities/reforming-the-network.faces>

Moreover, in parliamentarism the authority of parliament is sovereign. The doctrine of parliamentary sovereignty means that parliament's laws are supreme and no person or institution can change the laws of parliament (Dicey, 1959: xxxiv). In other words, there is no judicial review (Lijphart, 1999: 3).

True to the theory of parliamentary supremacy, such as it exists in the UK, the Ombudsman in a parliamentary system is an officer of parliament, who functions as an "instrument in the hands of parliamentarians" and investigates through a system of "MP's filter", in which complainants do not have direct access to the Parliamentary Ombudsman but approaches the Ombudsman via a Member of Parliament (Maer and Everret, 2016: 3, 7).

The Parliamentary Ombudsman (or more appropriately, the Parliamentary Commissioner for Administration) of the UK is not entrenched in a written constitution, but was enacted by the Parliamentary Commissioner Act, 1967 (the PCA), as amended. In fact, the UK does not have a written constitution, but its constitutionalism exists in an abstract purview, consisting of various laws, conventions and practices that have developed over a long period, anchored by the Bill of Rights of 1689, which founded its parliamentary supremacy (Blackburn, 2015).

The Parliamentary Ombudsman is appointed in terms of Section 1(2) of the PCA and can be removed in terms of Section 1(3) on his/her request, or on account of misbehaviour consequence to addresses from both Houses of Parliament or on reaching the age of 65. Significantly, Section 6(3) provides that a complaint will not be entertained unless it is made to a Member of Parliament, through the MP's-filter system.

Section 10 of the PCA directs the Ombudsman to report his/her findings to the MP who received the complaint and to the principal officer of the government agency. If it appears that an injustice has occurred because of maladministration the Ombudsman may, on his/her discretion, table a special report before the two Houses of Parliament.

Section 3 of the PCA regulates the human and financial resources of the Parliamentary Ombudsman. For instance, he/she may appoint any number of staff in consultation with the Treasury. It is clear from the wording of Section 3(3)

that the Parliamentary Ombudsman does not have complete budgetary autonomy, as all expenses of the Office are to an extent sanctioned by the Treasury, and are defrayed from the monies provided by Parliament.

As a result of the enactment of the Health Service Commissioners Act, 1993 the Ombudsman now combines the two statutory roles of Parliamentary Commissioner for Administration and Health Service Commissioner for England (Health Service Ombudsman) – and is called the Parliamentary and Health Service Ombudsman (PHSO). The PHSO is independent from both the government agency and the complainant. It is not part of government or the National Health Service; is it neither a regulator nor a champion for consumer rights. To assure its integrity, the PHSO has innovated the idea of a unitary, decision-making Board composed of both the executive and non-executive members. The non-executive component of the Board comprises of the independent persons of integrity and experience, from diverse backgrounds, who bring external perspective to the Ombudsman’s corporate governance. Chaired by the Parliamentary and Health Service Ombudsman, the Board’s core mandate is “to lead, provide stewardship, and to preserve and build the PHSO’s reputation” (PHSO, 2018). The Board collectively provides vigorous governance oversight and assures Parliament of the efficiency and effectiveness of the Office. The PHSO is accountable to Parliament through the Public Administration and Constitutional Affairs Committee (PHSO¹⁸, 2018). It must be noted that it is the Ombudsman, not the Board, which is appointed and is accountable to Parliament; hence, the Ombudsman may differ from the Board. However, the idea of the Board robustly overseeing the corporate governance of the PHSO is a novelty, which is hereby considered the best practice for the Ombudsman institution with strong powers of enforcement, such as the PP of South Africa.

- **Presidential system**

Presidentialism, in contrast, is the system in which there is a complete separation of powers between the two separately elected political bodies – the legislative body (Parliament) and the President. The President’s election is by direct public vote or sometimes filtered through an electoral college, as in the United States of

¹⁸ <https://www.ombudsman.org.uk/about-us/who-we-are>

America. The President is not accountable to, and usually, cannot be removed by the legislature unless in a situation of impeachment for serious malfeasance (Gerring and Thacker, 2008: 38). In principle, the following characterises the presidential system: the executive power is undivided; it is vested in a President who is both the head of state and the head of government; the President is elected directly by the people; the President freely appoints and removes the members of the executive; neither the President nor the cabinet/executive are accountable to the legislative body; neither the President nor the members of cabinet/executive, as a general rule, can be members of the legislature; the President can be affiliated to a political party different to that constituting legislative majority; and the President cannot dissolve the legislature, but the legislature can impeach the President (Carpizo, 2007).

The French Ombudsman called the *Le Mediateuer* existed within the institutional context of the presidential system that exists in France. The *Le Mediateuer de la Republic* (the Mediator of the Republic) was a high administrative official, appointed by the President to the Council of Ministers (Diaw, 2008: 4). In essence, *Le Mediateuer* was institutionally part of the executive. Even the new *Defenseur des Droits* (Defender of Rights) officer who replaced the *Le Mediateuer* is still appointed by the President, and is accountable to the President first, and then to the French Parliament (Bousta and Sagar, 2014: 77). Therefore, the essence of the French presidential system is retained with regard to the appointment, functioning and dismissal of the Ombudsman.

It must be noted that South Africa, contrary to Western Europe, is neither a parliamentary or presidential system, but has elements of both (Sachs, 2018: 18). The South African political system is characterised by the principle of constitutional supremacy, which will be discussed below.

- **Constitutional supremacy**

Sachs (2018: 18) clarifies that the South African system is neither presidential nor prime ministerial, but has the features of both systems. The President, like in the prime ministerial system, is chosen by Parliament and can be recalled by a simple majority based on a mere loss of confidence in the political leadership of the President. However, in the presidential-type system the President can only be

removed by means of an impeachment process, which requires entrenched majorities and follows a lengthy process based on establishing exact violations of the constitution.

The PP functions within this institutional context and is based on the principle of constitutional supremacy. Constitutional supremacy means that the rules and principles of the Constitution are binding on every branch of government and takes precedence over any rules enacted by the government, the legislatures or the judiciary; and, any law or conduct that is inconsistent with the Constitution either on procedural or substantive grounds, will not be effective (Currie and De Waal, 2005: 8-9).

The PP is established as a Chapter 9 institution, and is subject only to the Constitution and the law (Section 181(2) of the Constitution). Its independence is constitutionally assured and no person or organ of state may interfere with its functions (see Section 181(1)-(3) of the Constitution, 1996).

Unlike in the parliamentary system where the Ombudsman is not directly accessible to Parliament, the PP is accessible to the public (see Section 182(4) of the Constitution; Section 6 of the Public Protector Act, 1994) and Parliament does not have a role to play in the running of the Office. However, the PP is accountable to and must report on its activities at least once a year to the National Assembly (see Section 181(5) of the Constitution, 1996; Section 8(2)(a) of the Public Protector Act, 1994). The report of the PP must also be tabled in the National Council of Provinces in terms of Section 8(2)(a) of the Public Protector Act, 1994.

The Spanish model, the *el Defensor del Pueblo* system (see a discussion of this model in Chapter 2, par. 2.10), like the PP, is not a functionary of Parliament (Castells, 2000: 394), but operates within the parliamentary system. In Latin America, where this system has been transplanted, it functions within the presidential systems with the undercurrents of the parliamentary system (Carpizo, 2007). However, like all Classical Ombudsman, it can only recommend remedial action. Nevertheless, it has the power to institute prosecutions against public officials similar to the Ombudsman of Sweden, Finland, Uganda and the Philippines (Reif, 2013: 403). The PP of South Africa does not have this power of

prosecution, but it can refer cases to prosecuting authorities for a decision to prosecute or not (Section 6(4)(c)(i) of the Public Protector Act). The position in South Africa is similar to the Danish model that has spread worldwide, which, unlike the original Swedish model, does not have prosecutorial powers nor powers of supervision over the courts (Salman, 2006: 21; see the discussion of the Danish model in Chapter 2, par. 2.7, page 61). In South Africa, there is only one prosecution authority, the National Prosecution Authority (Section 179 of the Constitution, 1996).

The institutional difference between the PP and other Classical Ombudsman institutions is made clearer when comparing it to the Ombudsman of Sweden. The Swedish Ombudsman, Elisabet Fura, indicated during her visit to South Africa (where she was hosted by the PP, Adv. Madonsela), that her Office relies on moral persuasion, as well as referring matters to Parliament for a decision on implementation. On the other hand, the PP relies on the constitutionally decreed power to take binding remedial action when maladministration is found (Manyathi-Jele, n.d.).

In Eastern Europe, the advent of Ombudsmanship was the result of transitions to democracy that followed the collapse of the Soviet Union in the late 1980s, which necessitated constitutional reforms with a strong focus on the protection of fundamental rights and freedoms. That is why its nomenclature emphasises the human rights mandate; that is, the High Commissioner for Human Rights (in Russia), the Authorised Human Rights Representative of the Verkhovna Rada (in the Ukraine), and the Human Rights Ombudsman (in Slovenia).

According to Giddings and Sladeczek (2000: 443), the initial philosophical debates on the establishment of the post-Communist Ombudsman centred on two approaches: first, whether to expand on the concept of “socialist procuracy” (*Prokuratura*) and give it the characteristics of the Ombudsman, which was already in existence and handled functions akin to the Ombudsman’s functions. This approach was not favoured because the *Prokuratura* lacked independence, among some of its weaknesses. The second approach was the idea of an Ombudsman embedded in the constitutions of the nascent post-Communist democratic states. This approach became the favoured option. Following the

latter approach, the Ombudsman institutions were constitutionalised as follows: Hungary in 1989; Croatia in 1990; Bulgaria and Macedonia in 1991; Lithuania, Latvia, Uzbekistan, Yugoslavia, Turkmenistan, Slovak, Mongolia, the Czech Republic and Estonia in 1992; Russia in 1993; Armenia and Belarus in 1994; Bosnia and Herzegovina, and Georgia in 1995; Kazakhstan and the Ukraine in 1996; Moldova, Poland in 1997; Albania in 1998; and Azerbaijan and Kyrgyz in 2001. Uniquely, Kosovo's Ombudsman was established by UN Decree 2000/38 (Vangansuren, 2002: 44), rather than by Kosovan law or the constitution.

Vangansuren (2002: 17-20) opined that the advent of the Ombudsman in the former Communist countries had several constructive roles, including:

- (i) Consolidating the democracy and the rule of law through the defence of human rights – like most Ombudsman in countries in transition to democracy, the East European Ombudsman has a strong focus on human rights, democracy and the rule of law.
- (ii) Anchoring public sector reforms – the higher the complaints to the Ombudsman about public sector management practices, the more these issues were brought to the attention of the authorities and donors to intervene; hence, public sector reforms were influenced.
- (iii) Intensifying public participation in the policy-making and law-making processes – in emerging democracies the Ombudsman was a bridge connecting the people and the state.
- (iv) Civil society consolidation – in the former Soviet Union one of the functions of the Ombudsman is to strengthen civil society in the emerging democracies. Civil society also played a constructive role in mobilising for the institution of the Ombudsman in former Communist countries.
- (v) Internationalisation and globalisation of the formerly closed former Soviet Bloc – the role of the Ombudsman was important for the countries seeking to join the EU, which assisted the countries to bring their legislation, institutions and practices in line with the requisite EU standards.

Furthermore, also because they exist in new democracies, the Ombudsman institutions in the post-Communist countries have a more expanded role than those in Western Europe. According to Vangansuren (2002: 20-21), these new roles include:

- (i) They are expected to play a higher role of development of democracy and civil society;
- (ii) While they deal with the normal complaints that the Western Ombudsman deals with, they also deal more with social and human rights complaints;
- (iii) They use their right of initiating and modifying legislation more frequently than do the Western Ombudsman;
- (iv) The majority of them are able to conduct own-initiated (*ex officio*) investigations, which is the power that most of them have unlike the Western Ombudsman.

The post-Communist Ombudsman also faces challenges of effectiveness and independence. The first challenge is that after the Ombudsman has investigated complaints from the public, he/she makes the necessary recommendations to the public institution (Vangansuren, 2002: 23). However, he/she does not have the power to enforce his/her recommendations. This is a challenge shared with most of their Western European counterparts. The second challenge is that to be independent, legal status, competent staff and the personal virtues of the Ombudsman are not enough. Factors such as inadequate resources, budgetary constraints, shortage of staff, office space, and unsuitable locations all play a role in hampering the institution's independence (Vangansuren, 2002: 25). This problem of the inadequacy of resources is prevalent in most developing countries, and it appears it could be used to impede the independence and effectiveness of the institution.

The following features apply with regard to the Ombudsman in Eastern Europe. An example of two countries per sub-heading is given to illustrate the application of the principle in question:

- **Establishment**

Generally, the Ombudsman in Eastern Europe is appointed by the legislature.

For instance, in the Russian Federation the High Commissioner for Human Rights is appointed consequent to Article 103 of the Russian Constitution that authorises the Parliament to appoint and dismiss the commissioner for human

rights. The People's Advocate of Albania is appointed consequent to Article 61 of the Constitution and can be dismissed by a vote of three-fifths of members of the Assembly. The appointment and dismissal procedures are typically entrenched in the constitutions and/or laws.

- **Scope and remit**

Generally, the scope of the Ombudsman in Eastern Europe is a broad human rights mandate, as alluded to earlier. For instance, the Ombudsman of Croatia is appointed as a Commissioner of the Sabor (Parliament) mandated to “protect the constitutional and legal rights of citizens in proceedings before government administration and bodies vested with public powers” (Article 93 of the Croatian Constitution). Similarly, the High Commissioner of Human Rights in Russia in Article 103 of the Russian Constitution is mandated to protect human rights. In contrast, the UK Parliamentary Ombudsman is a representative of neither the government nor the people. However, in the Eastern Europe, the Ombudsman has a representative role and can prosecute the rights of citizens in their constitutional courts and other forums.

Significantly, the Ombudsman in Eastern Europe generally has the power to initiate amendments to the laws pertaining to human rights proclaimed in law and the constitution. For instance, Article 10 of the Croatian Constitution empowers the Ombudsman to initiate changes in laws affecting the protection of citizens' rights. The Classical Ombudsman in Western Europe and PP of South Africa are not explicitly laden with this power. However, as part of her remedial action into the allegations of state capture, the erstwhile Public Protector, Adv. Madonsela, directed Parliament to review the Executive Members' Ethics Act to clarify certain aspects regarding the management of integrity and the conflict of interest of members of the Executive (PPSA, 2018). Commenting on this seeming encroachment on the role of Parliament. Wolf (2017: 8) opined that the remedial action of the PP did not amount to encroachment as he/she left the process in the hands of parliamentarians to implement the remedial action.

These two examples indicate the norm of the human rights model of Ombudsman in Eastern Europe. A similar norm exists in Latin America. In

Africa, only Tanzania has styled its Ombudsman as a human rights commission. In South Africa, the Human Rights Commission is not an Ombudsman, although it is a national institution with all the characteristics of a national institution envisaged in the Paris Principles. This is also true of the Public Protector of South Africa. The Paris Principles (Resolution 48/134 of 1993) require the national institution to be given a mandate as wide as possible, with its powers, competence, functions and composition codified in the constitution and/or legislation. South Africa is a signatory¹⁹ of the Paris Principles; therefore, it is bound thereby.

- **Resourcing – financial and human resources**

The Ombudsman of Eastern European countries generally have a level of autonomy regarding budgets and staff matters, even though in some cases staff members are appointed through the norms and standards applicable to the general public service. For instance, in Albania the budget of the People's Advocate is a separate line item on the state budget (Article 36 of the Albanian Ombudsman Law). Article 35 of the same law indicates that the staff of the People's Advocate are members of the civil service. This suggests that the People's Advocate does not have full resources' autonomy, although a separate budgetary line item on the state budget suggests some level of financial independence. Article 37 allows the People's Advocate to accept donations in kind or money to augment its own resources, if those donations are unlikely to affect the independence, impartiality or constitutionality of the activities of the Office.

A complicated case of resource allocation is that of Bosnia and Herzegovina. Effectively, the Ombudsman of Bosnia and Herzegovina consists of three equal and independent offices, which suggests the allocation of similar resources to the three distinct components of the institution of the Ombudsman of Bosnia and Herzegovina. Article 1 of the Constitution of Bosnia and Herzegovina allows each of the Ombudsmen to appoint one or more deputies and to appoint any additional staff members they may need within the framework approved by the cabinet or Prime Minister. This is a relatively unhealthy level of autonomy on staff appointments, as appointments

¹⁹ <https://www.icrc.org/en/doc/assets/files/2012/paris-principles-adherents-2011.pdf>

require Executive approval. The complexity of it is that resources have to be allocated to three Ombudsmen as if they are three separate institutions, but they are one institution of the Ombudsman of the Federal Republic of Bosnia and Herzegovina.

In South Africa, the PP has the authority to appoint staff (see Section 3 of the PP Act, 1994). This augurs well for the independence of the institution, but the institution does not have full financial independence in that its budget is allocated through the Department of Justice and Correctional Services (Musuva, 2009: 17).

- **Political interference**

Most of the constitutional provisions and/or laws establishing the Ombudsman in Eastern Europe specify the independence of the institutions. For instance, the Bulgarian Ombudsman is independent and subject only to the constitution and law, and he/she is guided by his/her personal sense of conscience and morality (Article 3 of the Law on Ombudsman). To further assure the independence of the Office, Article 14 of the Law on Ombudsman declares that the Ombudsman is incompatible with any state office, managerial position in private business, or not-for-profit organisation or membership of any political party or trade union. Similarly, Article 3 of the Ombudsman Law of Macedonia provides that the Ombudsman shall be independent and self-governing, subject only to the constitution, laws and international agreements concluded in line with the constitution.

The Ombudsman of post-Communist countries has a political role in that it has the right to initiate the changes in laws affecting human rights. Therefore, the need for their political impartiality is much more pronounced to circumvent accusations of political bias.

- **Acceptance and enforcement of decisions and recommendations**

Like most Ombudsman institutions in the world, the incapacity of the post-Communist Ombudsman is its power of enforcement. However, there are areas where the Ombudsman has considerable powers of redress. For instance, pursuant to Article 2 of the Constitution, the Bosnia and Herzegovina

Ombudsman has power to reverse the effects of human rights violations and ethnic cleansing. This is a far-reaching power, going beyond just investigating and recommending redress. The Ombudsman must take steps to reverse the consequences of these violations of people's rights and freedoms. In contrast, Article 19 of the Law on Ombudsman of Bulgaria is clear that the Ombudsman has the power to suggest and recommend remedial action to responsible authorities in order to reverse the effects of human rights violations.

Arguably, the most cogent power in the hands of the various Eastern European Ombudsmen is their ability to approach the Constitutional Court for interpretation of the law or declaring any law unconstitutional, if it is inconsistent with the spirit and letter of the constitution. For instance, Article 19(7) of the Bulgarian Ombudsman Law permits the Ombudsman this power of constitutional intervention.

However, the lack of enforcement powers is not unique to Eastern Europe and can be mitigated by the same methods used by Western European Ombudsmen who also lack this power – persuasive power and the credibility of the Ombudsman. In Macedonia, for instance, Article 26 of the Macedonian Ombudsman Law gives the Ombudsman the power to summon certain officials, including the President of the Republic, the Speaker of Parliament, the Prime Minister of the Government of the Republic and other officials, and they are obliged to see him/her personally once so summonsed. This power can be used by the Ombudsman to persuade the authorities to comply with his/her recommendation. Similarly, the PP of South Africa has the ability to summon by subpoena any person to appear before him/her or produce by affidavit any documents that can assist in the investigation (Section 75 of the Public Protector Act, 1994). The PP of South Africa is empowered to investigate any untoward conduct in state affairs and/or public administration in any sphere of government (Section 182(1) of the Constitution), including the President and the Executive. In this regard, the court held that the PP has the power to instruct the President to exercise powers entrusted upon him under the Constitution if exercising that power will remedy the harm caused (see *President v Office of the Public Protector, 2017*).

Accountability, reporting arrangements and oversight

Similar to most parts of the world, the post-Communist Ombudsman is accountable to and submits annual reports to the relevant legislative authorities, who have oversight responsibility thereupon. It is noteworthy that there are exceptions to this rule of accountability to the legislature. For instance, the Ombudsman of Bosnia and Herzegovina submits its annual reports to the Prime Minister, the Deputy Prime Minister and the relevant Cantonal president, and to the Commission on Security and Cooperation in Europe (CSCE) (see Article 8 of the Constitution of Bosnia and Herzegovina).

However, the general norm in Eastern Europe is to report to the Parliament. For instance, Article 8 of the Croatian Ombudsman Law provides that the Ombudsman shall annually table a report to the *Sabor* (Parliament) of Croatia, stating the extent to which rights and freedoms were respected during the year under review. Article 9 further states that where the rights in the Constitution have been periled to a high degree the Ombudsman may place before the *Sabor* of Croatia and the relevant ministry a special report detailing this fact and suggesting a recommendation to redress the peril.

The main institutional difference between the PP of South Africa and any of the systems discussed above is that the PP functions within the system of constitutional supremacy with a broad mandate, not the Westminster system's parliamentary supremacy, or the presidential systems of Western Europe, or the human rights models of Eastern Europe and Latin America. As a result, the powers, functions and protections of the institution derive from the Constitution itself. In a constitutional supremacy, the Constitution is a supreme law; law or conduct inconsistent with it is invalid (see Section 2 of the Constitution).

The PP is a genus of the Ombudsman as it originated in Western Europe. However, it has its unique characteristics necessitated by the negotiated constitutional framework in South Africa. While it has jurisdiction on human rights, this is not its main preoccupation, as the South African Human Rights Commission exists for the protection and promotion of human rights. In

Eastern Europe, the main mandate of the Ombudsman is human rights protection.

5.4 Comparison with Latin America

The comparison of the PP with the various Latin American Ombudsmen is key because of the constitutionalisation of these institutions and the fact that there is a common history of transition to democracy in these nations. The PP and Latin American Ombudsman were created with the mandate to promote democratisation in countries with a long history of conflict and social polarisation. In Latin America, where the institution has spread, modelled on its Spanish archetype, the Ombudsman has a strong focus on human rights (French, Saul and White, 2010: 64).

- **Creations of the constitution**

An analysis of literature shows that the institution of the Ombudsman in Latin American countries is a phenomenon of the late 20th century, with the end of the Cold War and the transition to democracy in many of those countries. Only Guatemala had instituted an Ombudsman before this period (Volio, 2003: 222-223). From a constitutional and legal perspective, the modern Latin American Ombudsman has its theoretical underpinnings in the Spanish Ombudsman, created in 1978 (Simoes and Maia, n.d.: 7). Hence, many of them are similar to their Spanish archetype, called the *Defensor del Pueblo* (Defender of the People. Volio (2003: 223) argues that while the Latin American Ombudsman has characteristics of the Classical Ombudsman, it contributed two fundamental improvements to the concept of the Ombudsman: an explicit human rights focus and the ability to refer cases to the relevant ministry for criminal prosecution. Hence, the Latin American Ombudsman can be classified as a hybrid institution. While the PP of South Africa is also a hybrid institution because of the multiplicity of its mandate, it does not have a strong focus on human rights. This mandate in South Africa falls under the South African Human Rights Commission.

As in Spain, the Latin American Ombudsman is created by the various constitutions. The Ombudsman in Latin America was constitutionalised in the stated period, although some of the Ombudsmen were appointed long after

constitutionalisation due to various political factors related to conflict that afflicted the region: for example, Guatemala in 1985; El Salvador and Columbia in 1991; Paraguay in 1992; Peru in 1993; Argentina in 1994; Nicaragua and Honduras in 1995; and Bolivia in 1997 (Volio, 2003: 227). Only Costa Rica, Panama and Ecuador have an Ombudsman that is created by law and that has not been constitutionalised (Volio, 2003: 230).

This constitutionalisation of the Ombudsman in Latin America bears strong similarities to the PP of South Africa:

- **Appointment and selection process**

It has been argued that because the decisions of the Ombudsman are not binding, it is important that the person appointed to the Office must be a “magistrate of conscience” as the effects of their decisions depend largely on the integrity of that person (Volio, 2003: 230). Similarly, Uggla (2009: 4) indicates that the institution is sometimes referred to in Spanish as *la magistratura de la persuacion* (the persuading judge), referring to the persuading powers of the Ombudsman in effecting its resolutions. Pegram (2008: 19) states, citing Latin American experiences, that the personal qualities of leadership have proven to be of paramount importance in negotiating and navigating officialdom and ensuring effective ombudsmanship. This is also true of the PP whose decision is binding, but must still be a person of high integrity and persuasive power.

Most Ombudsmen in Latin America are appointed by their legislatures with varying parliamentary majorities. In Paraguay, Mexico and Venezuela, a two-thirds majority appoints the Ombudsman. In Argentina, Bolivia, Ecuador, Guatemala and Peru, the Ombudsman is selected by a two-thirds majority of those present during the votes. In Costa Rica and Panama, an absolute majority appoints the Ombudsman. In El Salvador, the Ombudsman is elected by a qualified majority, while in Honduras, the majority of the votes in the House is enough to secure an election. Argentina elects the Ombudsman by a healthy 60 percent of the vote of the National Assembly. The Ombudsman in Colombia and in Panama are selected with the participation of the Executive; that is, the President (Volio, 2003: 231).

From the foregoing, one surmises that the Ombudsmen of Latin America are generally, like the PP, appointed by their legislatures through an entrenched majority vote. The PP of South Africa is elected by a resolution of the National Assembly, supported by at least 60 percent of the members of the Assembly (Section 193(5)(b)(i) of the Constitution). This is important as it ensures that only people of great political credibility can be selected as the Ombudsman (see Chapter 2, par. 2.11, pages 94-95) for the discussion on the moral and credibility requirements of the Ombudsman).

- **Independence**

Most of the jurisdictions in Latin America guarantee their Ombudsman's independence, in either the law or the constitution. However, Volio (2003: 234) and Ugglia (2004: 435) indicate that inventive and erudite obstacles, such as limited budgets, intimidation and structural impediments, are placed in the way of the independence and autonomy of these institutions. Hence, there was the need to add a safeguard that states that public authorities may not use the budgetary process in a manner that interferes with the independence of the institution of the Ombudsman (Venice Commission, 2011: 15).

Lack of resources is the key similarity between the Latin American and African Ombudsman, which affects their independence and effectiveness. This is also the main restraint for the PP of South Africa, as evidenced by her presentation of the annual report in April 2018 in which she lamented her Office's lack of human and financial resources, in the midst of huge case backlogs (PMG, 2018). In this regard, the OECD survey into the role of the Ombudsman in promoting open governance indicates that a third of the Ombudsman institutions surveyed raised the lack of human and financial resources as an impediment to achieving their objectives (OECD, 2018: 10). Volio (2003: 234), however, suggests that the worst enemy of the Ombudsman's independence and effectiveness is the lack of political will to ensure the development of the full potential of this institution. This view is supported by Vasavada (2014: 207), who argues that the lack of political will results in a government that is unresponsive to the needs of the Ombudsman, who will suffer resource constraints as a result.

- **Removal from office**

The majority of countries in Latin America state, in either law or their constitution, the reasons for the removal of the Ombudsman from office. These generally include the expiry of his/her mandate, resignation or death. Usually violation of the law or the constitution is cited as a reason for the removal from office, while Guatemala and El Salvador add factors such as political participation (Volio, 2003: 236). It is generally recommended that the Ombudsman must only be removed for incapacity or serious ethical misconduct (Ribó, Castells, Seijo and Figueras, 2014: 16). The PP of South Africa can only be removed on grounds of misconduct, incapacity and incompetence, and by a resolution of a two-thirds majority of the members of the National Assembly (Section 194 of the Constitution).

The normal practice in Latin America is that once appointed the Ombudsman continues in office until his/her term of office is completed. Some countries, such as Argentina, Bolivia, Mexico, Panama, Paraguay, Peru, Guatemala and Nicaragua have fixed term of five years and all, except Guatemala and Nicaragua, allow for re-appointment for the same period. In Columbia, Costa Rica and Ecuador, the term of office is four years and it is renewable in the latter two countries. Honduras fixes the term at six years, with the possibility of renewal. El Salvador established the term at three years, while Venezuela set the term at a non-renewable seven years (Volio, 2003: 221). It is noteworthy that Venezuela has the exact conditions of the PP of South Africa – a seven-year tenure without the possibility of renewal (Section 183 of the Constitution). This accords with the Venice Commission (Section 5.1. CDL [2011] 079), which advocates, for the sake of the independence of the institution, for a lengthy, but non-renewable term, to avoid any prospect of the Ombudsman compromising himself/herself to seek re-election.

- **Budget**

Latin America contains diverse practices when it comes to the budgetary autonomy of the Ombudsman. For instance, Argentina, Panama, Guatemala, Costa Rica and Bolivia include the budget of the Ombudsman in the budget of the Legislative branch, while Paraguay includes it in the budget of the Senate.

In El Salvador, there is a special budget, while Mexico has a direct budget in the name of the Ombudsman. In Colombia and Peru, the Ombudsmen are allowed to present and motivate for their budgetary needs to their respective authorities (Volio, 2003: 236-237). However, as alluded to earlier, Volio (2003: 237) points out that there has been a tendency in Latin America to weaken the institution by cutting budgets, which led to an outcry against using budgets as instruments of political control to weaken the institution. For instance, this has been the experience of the Ombudsman in El Salvador, where the Ombudsman institution was weakened through budget cuts, legislative reforms and the appointment of unsuitable persons, as punishment for demonstrating political independence (Dodson, 2006: 44).

The budget of the PP of South Africa is part of the Ministry of Justice and Correctional Services. This arrangement presents a challenge for the independence of the institution (Musuva, 2009: 17). Reliance of the PP on political organs for its budget might compromise its integrity and independence in the long run (Mbiada, 2017: 10).

- **Competencies, resolutions and limitations**

Ombudsmen in Latin America have a strong focus on human rights, which include the investigation and mediation, and awareness and education programmes. They are also competent to investigate any matter that falls within the public administration that affect the basic rights of citizens, based on the constitution, the law and international treaties (Volio, 2003: 238). Volio (*ibid.*) further indicates that their investigations must meet certain prescribed requirements, including:

- (i) They must be free of charge, prompt and without too many formalities;
- (ii) Their resolutions do not replace administrative action and are not of jurisdictional nature;
- (iii) Their remit is limited to the public sector;
- (iv) Their decisions are not binding; and
- (v) Their reports must be publicised.

All the countries in Latin America, except Ecuador and Guatemala, expressly provide that the Ombudsman can only make recommendations and suggestions, which are not binding and sometimes very limited, such as in Colombia and Venezuela, where the recommendations are restricted to human rights issues (Volio, 2003: 245; Arceneaux, 2016: 163). This lack of enforcement power, Ugglá (2012: 274) calls the defining characteristic of a Human Rights Ombudsman. Hence, this has been one of the reasons Ugglá (2009: 2) has questioned whether the Ombudsman can contribute to accountability. Moreno and Shugart (2003: 81) have argued that without the power to effect sanctions it cannot be said that the Ombudsmen are effective in contributing to accountability. Mainwaring (2003: 12) is however of the opinion that it is not really necessary for the Ombudsman to have enforcement powers as he/she can always ensure accountability by referring matters for decisions by the relevant authorities.

Despite these restrictions and the non-binding nature of the resolutions of the Ombudsman, there are still consequences for not obeying or not cooperating with the Ombudsman. All countries in Latin America, except Guatemala, prescribe varying crimes and misconduct of disobedience for not cooperating with the Ombudsman or not considering his/her recommendations (Volio, 2003: 246). This gives the Ombudsman some power of enforcing cooperation with its processes, although its resolutions are not legally binding.

It must be remembered that the remedial action of the PP of South Africa is binding. This is one of the biggest differentiating factors between the Latin American version of the Ombudsman and South Africa. In addition, the PP has the power to institute contempt proceedings (Public Protector Act, Section 9), which can be a powerful tool of enforcement if utilised.

5.5 A comparison with African Ombudsmen

A comparative analysis of seven African countries, who are members of AOMA, will be provided hereafter. The countries are The Gambia, Cote d'Ivoire, Ethiopia, Burundi, Namibia, Mauritius and Tanzania. The countries were chosen for their geographic spread and regional representivity, cutting across the Anglophone and Francophone regions of Africa.

Akpomuvire (n.d.: 8) argues that the institution of the Ombudsman has been spreading in Africa to promote both good governance and service delivery but very few countries, with the possible exception of South Africa, has been able to handle the politico-administrative organisational problems confronting these institutions on the continent. The problems include inadequate resources, bureaucratisation, denial of the freedom of these institutions to operate independently, and over-centralisation of the political instruments in these countries (Akpomuvire, n.d.: 8).

Before a detailed comparative analysis can be done, a discussion is needed on the African standards or principles that inform the establishment and functioning of Ombudsmen on the continent. The African Union (AU) and African Ombudsman and Mediators' Association (AOMA) standards will be discussed and then a detailed comparative analysis, based on these and other international standards, will follow.

5.5.1 African Union Standards

The African Union has through the African Charter on Democracy, Elections and Governance (AU, 2007) adopted the following standards for institutions supporting democracy in African polities. These were stated in peremptory terms that:

- State Parties shall establish public institutions that promote and support democracy and constitutional order;
- State Parties shall ensure that the independence or autonomy of the said institutions is guaranteed by the constitution;
- State Parties shall ensure that these institutions are accountable to competent national organs; and
- State Parties shall provide the above-mentioned institutions with resources to perform their assigned missions efficiently and effectively (Article 15 of the AU Charter on Democracy, Elections and Governance).

Article 15(4) of this document also requires Ombudsman institutions to be adequately resourced in order for them to perform their duties effectively and efficiently.

These are the minimum standards for the establishment, structure and mandate of the Ombudsman on the African continent.

5.5.2 AOMA Standards

Both the Public Protector of South Africa and the Ombudsman institutions analysed here are members of AOMA, an Association of African Ombudsman and Mediators. Following Article 15 of 2007 of the African Union (AU) Charter, AOMA adopted the OR Tambo Minimum Standards for Effective Ombudsman Institutions and Cooperation (AOMA, 2014). Article 1 of the document states that the independence of the Ombudsman institution must be guaranteed in the constitution and that the Ombudsman must be immune from being sued or prosecuted in their personal capacity relating to their work as an Ombudsman. The document further recommends that the establishment of the Ombudsman should be guaranteed in the constitution (Article 2). This is significant because some of the Ombudsman institutions are only guaranteed in legislation, which is usually easier to amend than if the institution is embedded in the constitution. It is usually more difficult to amend the constitution, than legislation.

The document also states that the minimum mandate of Ombudsman institutions in Africa should be the investigation and mediation of maladministration, which terms must be interpreted broadly to cover all public offices, institutions executing public functions, and institutions administering public funds (Article 4). Importantly, the document stresses that the Ombudsman should be a person who is suitably qualified with knowledge of constitutional law and administration of justice. The Ombudsman must have a fixed term of office, be appointed with the participation of the legislative body and be dismissed only for a just cause after following a fair, transparent and constitutionally regulated process, preferably involving an independent body (Article 3). To ensure independence, the remuneration of the Ombudsman should be commensurate with that of a Judge of the High Court (Article 7). This is to ensure that the Ombudsman is not financially vulnerable and dependent on political bargaining for his /her remuneration, which may compromise his/her independence. The document further cements the values of accessibility, impartiality, confidentiality and transparency, which the Offices of the Ombudsman in Africa should espouse in carrying out their duties.

Below is a detailed comparative analysis of the selected African Ombudsmen:

- **Doctrine of the Office – its establishment and functioning**

Similar to the Public Protector of South Africa, the Ombudsman of the comparator countries are established in their national constitutions and legislation.

The Gambia's Office of the Ombudsman is established by the National Assembly as provided for in Articles 163-165 of the Constitution of The Gambia, 1997. The powers, duties and functions of the Ombudsman are provided for in the Ombudsman Act 3 of 1997.

In Cote d'Ivoire, the Mediator was originally an organ of mediation within the Presidency, which functioned in terms of the Presidential Decree No. 95-816 of 29 September 1995, with a limited mandate of dealing with the mediation of complaints addressed to the President. Subsequently, the Presidential Decree No. 96-PR/12 of 13 August 1996 nominated the Mediator. With the adoption of the Constitution in 2000, the Ombudsman of the Republic was established as an independent administrative authority, with a mandate for public service, and would receive no instruction from any authority. This has been retained in Title XII, Article 65 of the Constitution of Cote d'Ivoire, 2016. The Organic Law No. 2007-540 of 1 August 2007 provides for the powers, functions and duties of the Mediator. It is clear that Cote d'Ivoire retained the French tradition of styling the Ombudsman as the mediator, appointed by the President with the recommendation of the Presidents of the National Assembly and the Senate (Article 166 of the 2016 Constitution of Cote d'Ivoire).

In Ethiopia, the provision for the establishment of the institution is contained in Article 55(15) of the Constitution of the Federal Republic of Ethiopia and in Proclamation No. 211 of 2000, which further provides for the establishment, powers and functions of the Ombudsman. The House of People's Representatives establishes the institution of the Ombudsman and has the power to select and appoint its members. Article 8 of Proclamation No. 211 of 2000 establishes the Ethiopian Ombudsman as a council that consists of the Chief Ombudsman, the Deputy Chief Ombudsman, the Ombudsman for children and women affairs, the and Ombudsman heading branch offices.

In Burundi, the Office of the Ombudsman is detailed in the Constitution Post-Transition de la Republique du Burundi of 2005. Article 237 establishes the office to investigate civil rights violations by state functionaries. Article 239 is explicit

that the Ombudsman is appointed by the National Assembly with a three-quarters majority and must be ratified by the Senate with a two-thirds majority. Law No. 1/04 of 24 January designates the Ombudsman as an independent authority and provides that within the limits of its powers, the Ombudsman is not subject to instruction of any authority.

In Mauritius, the Ombudsman's establishment, the investigations procedure, the disclosure of information, proceedings after the investigations, and the performance of functions are detailed in Articles 96-102 of the Constitution of 1968. The Ombudsman Act of 1969 and the Public Service Commission Act, read with the Public Service Commission Regulations of 2010, provide the enabling legislation for the operation of the Ombudsman in Mauritius.

The advent of an Ombudsman in Tanzania began with the establishment of the Permanent Commission for Enquiry (PCE) whose mandate was to deal with allegations of maladministration and to recommend the appropriate steps to remedy it. The PCE was established on 28 January 1964 by the founding president of Tanzania, the late Julius Nyerere. It came in the aftermath of the transformation from a multiparty state to a one-party state, with the realisation that a single party regime may lead to the possibility of the abuse of power by public officers; hence, the PCE was formed to counteract these possibilities (Oluyede, 2006: 100-102). The PCE, in terms of Article 129 of the Constitution of the Republic of Tanzania, could inquire into the conduct of any person in respect of their exercise or abuse by them of their functions or authority of the office. It could do this at the behest of the President or its own initiative or to make an enquiry in respect of any allegation or complaint made. Irrespective of the aforementioned mandate, the PCE had weakness that included its dependence on the intervention of the President in most of its activities; it was only an advisory body and could not enforce its own recommendations; it could not control other state organs as it was part of the Executive, and it came into being before the enshrining of the Bill of Rights and the Constitution of the United Republic of Tanzania (Oluyede, 2006: 100-102). Given these weaknesses, the Commission for Human Rights and Good Governance (CHRAGG), was established to replace the PCE.

CHRAGG functions as a commission and is established in terms of Article 129(1) of the Constitution of the United Republic of Tanzania of 1977, as amended by Act 3 of 2000. CHRAGG consists of the chairperson, vice-chairperson, five commissioners and two assistant commissioners, as provided for in Articles 129(2)-(4). The Human Rights and Good Governance Act, 7 of 2001 provides for the functions and powers of the Commission. Akpomuvire (n.d.: 14) identifies five mandates of the CHRAGG, namely protective and investigatory services, promotive and educative functions, advisory functions, mediation services, and a quasi-adjudicative function.

In Namibia, the Ombudsman is established in terms of Article 90 of the Constitution of the Republic of Namibia, which in Article 89(2)-(3) guarantees its independence from political interference by the cabinet, legislature or any other person. The Office is subject only to the Constitution and the law. The powers and functions of the Ombudsman are further articulated in the Ombudsman Act of 1990.

It is clear from the above sample that the Ombudsman is normatively embedded in the constitutions of various countries in Africa. This is the best practice that should be encouraged because if the Ombudsman's powers, functions and mandates are embedded in the Constitution it will be difficult for them to be changed arbitrarily, as it is usually not easy to amend the constitution (AOMA, 2014: 59).

Apart from Cote d'Ivoire, which has an executive-type Ombudsman, all the Ombudsmen in the sample are appointed by the legislative body. This complies with best practice recommended by the international bodies for Ombudsmen; that is, the IOI and AOMA.

Most of the Ombudsmen in the sample function as a single-person headed institutions, more like the PP of South Africa where the Ombudsman is both the incumbent and the office, except Tanzania and Ethiopia, which have a commission-type and a council-type Ombudsman, respectively. The Bosnia and Herzegovina Ombudsman in Eastern Europe is also an example of an Ombudsman consisting of more than one Ombudsman – it consists of three Ombudspeople.

While the Tanzanian and Ethiopian models may be sound for populous countries where each commissioner can be assigned specific responsibilities, sight should not be lost of the advantages of the monocratic structure as the implicit truth is that many times the effectiveness of the institution does not lie only in the formal powers of the Ombudsman but also in the reputation, integrity and fitness of the particular Ombudsman (AOMA, 2014: 58). This complies with the definition of an Ombudsman as a “magistrate of conscience” (Volio 2003: 230) or *la magistratura de la persuacion* (the persuading judge) by Ugglá (2009: 4), both referring to the Latin American experience. By introducing corporate governance standards in its operations, the PHSO of the UK also enhanced both the institutional and personal integrity of the Ombudsman.

- **Scope and remit**

Scope is one of the indicators that can indicate whether the Ombudsman is a classic or hybrid institution, and whether it is independent and can effectively contribute to the promotion of good governance and service delivery on the continent. Sometimes the reach of these institutions is limited by law so that they cannot investigate certain government functionaries. In this section, the researcher investigates these aspects in the comparator countries. Mubangizi (2012: 325) argues that the effectiveness of the Ombudsman is dependent principally on its independence and anything that undermines that independence can compromise its credibility and effectiveness. The fundamental logic for independence is that an Ombudsman has to be empowered to conduct fair and impartial investigations, which will be seen as credible by both the complainants and the authorities subjected to the review by the Office of the Ombudsman (UNDP, 2006: 12). This aspect of independence and effectiveness is assessed through studying the scope and remit of the Ombudsman under review.

All the countries in the analysis are hybrid institutions, with the exception of Ethiopia and Mauritius, which still are modelled on a maladministration-only mandate (AOMA, 2014: 61). The PHSO and the Parliamentary Ombudsman of Sweden are examples of Classic Ombudsmen in the Western world; certainly, this is the model that Ethiopia and Mauritius followed. However, the trend in Latin America, Eastern Europe and Africa has been to follow hybrid models (Reif,

2004: 35) with human rights, maladministration and corruption mandates incorporated. The Eastern European and Latin American countries have chosen to focus on human rights. The researcher argues that this focus on human rights makes these institutions from countries in transition to democracy hybrid human rights models because they will handle a maladministration complaint if it affects civil rights and freedoms.

In The Gambia, the Office of the Ombudsman has one of the broader mandates. The constitutional mandate includes the investigation of citizens' complaints regarding maladministration, mismanagement and unfair discrimination (including with regard to recruitment practices) in the public sector, and failure of public officials to observe the prescribed code of conduct (AOMA, 2014: 62). The Office has the power to investigate grievances of injustice, corruption, misuse of power, maladministration and mistreatment of any person by any public official in the course of exercising official duties. The Gambian Ombudsman does not have the power to query or review court decisions, decisions of any tribunal established by law, any *sub judice* matter, any matter in relation to the exercise of prerogative of mercy, and any matter relating to the affairs of the President (Section 9 of the Ombudsman Act 3 of 1997).

In Burundi, the functions of the Ombudsman are described in Article 237 of the Constitution Post-Transition de la Republique du Burundi of 2005 as follows:

- To receive and investigate complaints of administrative faults and violations of civil rights made by public officers and the judiciary, and to make recommendations to the competent authorities; and
- To assure mediation between the Administration and citizens and the ministries and the Administration and observe the operations of the Administration.

Burundi has the most complex and extensive of the mandates. While there is still a strong focus on maladministration in the form of mediating between the government and the people, observing the functioning of public entities, complaints handling and investigating mismanagement and the violation of human rights by public functionaries, and making recommendations to competent authorities, the institution also has the competence to control the functioning of

the administrative entities in terms of Article 2 of the 2013 Law, as well as local government, public institutions and any public service organisation (Article 6 of 2013 Law). The Office also has competence to investigate the violation of the rights of citizens committed by the judiciary. While this is conceptually aligned to the original Swedish model (Harden, 2000: 204), supervision over the judiciary is typically excluded from the remit in most polities (AOMA, 2014: 63). In fact, in South Africa the opposite applies – the judiciary controls the action of the PP through its power of review (*EFF v Speaker of the National Assembly*, 2016). Uniquely, the Burundian Office of the Ombudsman has the role of reconciliation and peace promotion, which could be a function of its recent past of civil war (AOMA, 2014: 63). Article 6 of the 2013 Law provides for the Office, on a request of the President of the Republic, to partake in undertaking acts of reconciliation and peace between various political and social forces, and internationally. This function is similar to the mandate of Bosnia and Herzegovina’s Ombudsman with regard to their history of ethnic conflict. Bosnia and Herzegovina’s Ombudsman play a role in reversing the effects of ethnic conflict, which can lead to healing and reconciliation.

In Cote d’Ivoire, the body referred to as the Mediator of the Republic is retained in Title XII of the 2016 Constitution as an independent administrative authority. This institution is further regulated by the Organic Law No. 2007-540 of 1 August 2007, which outlines its powers, organisation and operations (Ministry of Human Rights and Freedoms, 2012: 12). The mandate of the Mediator is also broad, with a focus on the protection of citizens from economic and social discrimination, the violation of human rights and the promotion of dialogue between citizens and among communities (AOMA, 2014: 62). In addition, it has a function of settling disputes and conflicts submitted to the President without arrogating the powers vested by law in other state organs (Article 7 of the Organic Law). This is typically a French *Le Mediateuer* model, emphasising the role of mediation.

In Ethiopia, the Preamble of Proclamation No. 211 of 2000 states that the Ombudsman is one of the parliamentary institutions instrumental in controlling the manifestation of maladministration. Its mandate and focus are provided for in Article 5 of Proclamation No. 211 of 2000 as involving bringing about good

governance of high quality, which is efficient and transparent, and founded on the rule of law and ensures that citizens' rights and benefits, provided for in law, are respected by the organs of the Executive. Furthermore, Article 6 provides that the Ombudsman has the powers and duties of ensuring that administrative decisions do not violate citizens' rights, receives and investigates citizens' complaints, supervises and oversees the prevention of maladministration, seeks remedies where maladministration has taken place, conducts research to curb maladministration, and makes recommendations with regard to the review of existing laws, practices or directives and for the formulation of new laws and policies, with a view to bring about good governance in Ethiopia. Article 7 of the Institution of the Ombudsman Establishment Proclamation limits the scope of the Ombudsman. In terms of the Proclamation, the Ombudsman cannot investigate the decisions of the elected councils, *sub judice* matters, matters being investigated by the Auditor-General, and decisions of security forces regarding matters of national security.

The Mauritian Ombudsman's mandate and focus is limited to investigating matters and complaints of maladministration regarding any commission or omission that causes injustice to any member of the public by any public officer in the course of exercising their administrative duties (AOMA, 2014: 61). Moreover, the Ombudsman of Mauritius cannot investigate the President and his staff (Article 97 (1)(i) of the Constitution of the Republic of Mauritia). Furthermore, he/she may not investigate any complaint in respect of any action if he/she is "given notice in writing by the Prime Minister that the action was taken by a Minister in person in the exercise of his own deliberate judgment" (Article 97(7) of the Constitution of the Republic of Mauritia).

CHRAGG of Tanzania focuses on both the promotion of awareness of human rights and the investigation of violations, although its work is more of a type of Ombudsman, similar to the human rights ombudspersons of Eastern Europe and Latin America. The mandate of CHRAGG is to receive and investigate complaints about human rights violations and maladministration, and conduct public hearings on those issues, as well as propose redress or compensation where applicable; educate the public and conduct research on human rights and governance issues and monitor compliance with human rights and good

governance standards; advise government, its organs and the private sector on human rights and administrative justice issues; and resolve disputes through mediation and conciliation (AOMA, 2014: 64). CHRAGG has powers of arrest and prosecution, although it prefers to settle matters out of court (Electoral Institute of Southern Africa (EISA), 2009). This is significantly different from the PP, who does not have arrest and prosecutorial powers. In terms of Section 6 of the Public Protector Act, he/she may refer matters to the NDPP for prosecution. The position in Tanzania is similar to the original Swedish model, where the Ombudsman possesses powers of prosecution. South Africa, in this regard, follows the Danish model, which does not grant the Ombudsman prosecutorial powers (Salman, 2006: 21; see generally the discussion in Chapter 2, par. 2.7, page 61).

In Tanzania, there are several limitations placed in the scope of CHRAGG. Section 30 of the Tanzanian Constitution establishes CHRAGG as an autonomous department, which, in exercising its powers in terms of the Constitution, cannot be bound to comply with any directive or order of any person, or any department of government, or any opinion of any political party, or of any public or private sector institution. However, these provisions do not restrict the right of the President to give a directive or orders to CHRAGG, nor do they grant the right to CHRAGG to not comply with a directive or order, if the President is of the opinion that the directive or order is, with regard to any matter or any state affair, in the public interest. The Commission will also conduct an inquiry whenever the President directs it to conduct an inquiry. Unless the President directs the Commission not to conduct the inquiry, the Commission may conduct the inquiry whenever it deems it necessary in respect of the violation of human rights and the principles of good governance. This ability of the President to interfere in the decisions of CHRAGG to conduct or not conduct inquiries is considered a weakness and a limitation as it goes to the heart of the lack of independence of the institution in Tanzania (EISA, 2009; Mallya, 2009: 17).

CHRAGG has a further vested limitation placed on its powers and functions by Section 16 of the Commission of Human Rights and Good Governance Act, 2001 (CHRAGG Act). In terms of the Section, the Commission cannot investigate the

President of Tanzania or the President of Zanzibar, matters of international relations and prerogative of mercy, and any matter that the President decides presents a real and substantial risk of prejudicing the national defence and security (Mallya, 2009: 17).

In 1990, Namibia established a new type of Ombudsman with arguably a wider mandate than before, including maladministration, administrative injustice, corruption, and human and environmental rights protection (Ayeni, 2000: 4). The Namibian Ombudsman has a mandate to investigate cases of maladministration and corruption by any public authority at both the national and local spheres, inclusive of the powers to investigate:

- human rights violations;
- abuse of power and unfair treatment of citizens;
- apparent injustice or corruption by government officials;
- human rights infringement by private persons/entities;
- grievances against the Public Service Commission, other administrative organs of state, the defence force, the police force and the prison service with regard to their failure to achieve equal opportunities and fairness in recruitment and other matters of administration; and
- Environmental degradation and destruction of ecosystems in Namibia (Article 91 of the Constitution of the Republic of Namibia).

In this sense, the Namibian Ombudsman is a hybrid institution with a broad mandate, scope and remit. This is further evidenced by its discretionary power to provide legal assistance and advice to aggrieved persons (Article 25(2) of the Constitution of the Republic of Namibia). In addition, the Constitution gives the Ombudsman discretionary power to provide legal assistance and advice to persons engaging in litigation to uphold their constitutionally held human rights. This is a unique feature of the Namibian Ombudsman, which recognises that many Namibians do not have access to justice due of a lack of resources, legal aid programmes, and the shortage of trained lawyers (EISA, 2009). In this representative sense, the Namibian Ombudsman is similar to some of the Eastern

European ombudspeople who can represent people in courts. For example, Article 93 of the Croatian Constitution allows the Ombudsman to “protect the constitutional and legal rights of citizens in proceedings before government administration and bodies vested with public powers”. The Public Protector of South Africa, unlike her Namibian counterpart, does not provide legal aid and representation to citizens. This function is performed by Legal Aid South Africa²⁰. With regard to approaching the courts to enforce the people’s right the PP of South Africa has, in principle, the *locus standi* in terms of Section 38(1)(d) of the Constitution. However, the PP has not yet acted in this manner.

The scope and remit vary from country to country, informed by the political and legal dispensation in those countries; although they generally provide for the investigation of maladministration, corruption and human rights violations. Exclusions from the remit usually include the executive, judiciary and matters that are before the courts (*sub judice*). The Gambia, Tanzania and Mauritius in the sample exclude the executive from the remit, while most do include it in the remit. With regard to the exclusion of the judiciary from the remit, Burundi is an exception in that its Ombudsman has the jurisdiction to investigate the decisions of the judiciary. This is typically excluded from remit in most jurisdictions, including South Africa.

If one analyses these exclusions from the remits of many Ombudsman jurisdictions, one immediately sees the qualitative difference between the PP of South Africa and other Ombudsman jurisdictions. The PP of South Africa is able to investigate any improper conduct in state affairs and/or public administration in any sphere of government (Section 182(1) of the Constitution), and the executive (including the President) is not excluded from this scope. This ability to investigate and summon anyone is similar to Article 26 of the Macedonian Ombudsman Law, which gives the Ombudsman the power to summons certain officials, including the President of the Republic, the Speaker of Parliament, the Prime Minister of the Government of the Republic, and other officials; they are obliged to see him/her personally once so summonsed.

- **Appointment, security of tenure and grounds of removal from office**

²⁰ Legal Aid South Africa is a statutory body established in terms of the Legal Aid South Africa Act 39, 2014.

The IOI By-Laws state the following with regard to the appointment, tenure and removal of the Ombudsman:

- The Ombudsman should be appointed by the legislature or with its approval for a finite period, in accordance with the relevant legislation or constitution.
- The Ombudsman should only be dismissed from office by the legislature or with its approval, and for reasons stated in the relevant legislation or constitution.

In this section of the analysis, the compliance of the various Ombudsmen in the sample will be compared to these by-laws.

The Gambia's Ombudsman and Deputy Ombudsman are appointed for a five-year term, with the right of renewal and without restriction as to the number of terms, by the President in consultation with the Public Service Commission, and with the concurrence of the National Assembly. Although the National Assembly may reject the person nominated by the President, it cannot reject the replacement candidate (Article 164 of the Constitution of The Gambia). This latter aspect is problematic as it means that the replacement candidate is not appointed subject to confirmation by the legislature. The Ombudsman or his deputy may be removed in terms of Article 164(6) of The Gambian Constitution by the President only on account of inability to perform the functions of the Office or misconduct, and after the tribunal appointed by the National Assembly has heard the case and the Ombudsman has the right to make legal representation in these hearings. A two-thirds majority of the National Assembly must support the removal of the Ombudsman or his deputy.

In Cote d'Ivoire, the Mediator of the Republic is appointed for a non-renewable term of six years by the President upon the recommendation of the President of the National Assembly and the President of the Senate and is replaceable within eight days by the President in case of death, resignation, or absolute incapacity established by the Constitutional Council (Article 166 of the Constitution of Cote d'Ivoire). It should be noted that the processes for the appointment and qualification for the Mediator are not provided for in law; hence, they fall within the

discretion of the President (AOMA, 2014: 70). This is problematic as this situation can open the process of the nomination and appointment of the Ombudsman to political whims. It would appear that there is no involvement of the legislature in the appointment and dismissal processes of the Ombudsman, although dismissal on grounds of absolute incapacity is subject to recommendation by the Constitutional Council, which is an independent constitutional body established in terms of Article 129 of the Constitution of Cote d'Ivoire.

In Ethiopia, Article 10 of Proclamation 211 of 2000 provides that the Chief Ombudsman, the Deputy Chief Ombudsman, and other members of the Ombudsman Council are appointed for renewable, but unspecified terms of five years. The House of Peoples' Representatives appoints all of them after the nominations committee compiles the list. They are appointed in terms of Article 11 of the Proclamation. The nominations committee consists of the Speaker of the House as the chairperson, the Speaker of the House of the Federation, seven members elected by the House of Peoples' Representatives (two of them elected based on joint agreement of political parties) and the President of the Federal Supreme Court. The Ombudsman can be removed from office on grounds stipulated in Article 15(1)(b-d), which includes resignation on three months' notice, proven incapacity, proven corruption or unlawful conduct, and manifest incompetence. The removal follows the investigation of the matter by a Special Inquiry Tribunal formed under Article 17 of the Proclamation, consisting of the Deputy Speaker of the House of Peoples' Representatives as the chairperson, the Deputy Speaker of the House of the Federation, four members elected by the House of Peoples' Representatives (one of which is elected by virtue of joint agreement by opposition parties and the Vice-President of the Federal Supreme Court). The House of Peoples' Representative, based on a recommendation submitted to it, as supported by the majority vote of the Special Inquiry Tribunal, and if it finds the report to be correct, may remove the Ombudsman by upholding the same, by a two-thirds majority vote.

This Ethiopian model is unique on the continent in that there is no single instance of Executive involvement in the appointment and removal of the Ombudsman. The process is institutionalised, and facilitated and controlled throughout by the legislative authority. This can be regarded as the best practice for the continent.

In Burundi, the National Assembly appoints the Ombudsman by a three-quarters majority vote, and the Senate should make the approval of the appointment by a two-thirds majority vote. The Ombudsman is appointed for a non-renewal term of six years (Article 239 of the Constitution of Burundi). The Ombudsman can be removed by the National Assembly on his/her request, because of ill health, revocation, or for very serious reasons identified by a Special Investigation Commission (AOMA, 2014: 73). The Burundian dispensation, similar to the Ethiopian, is unique in that there is no Executive involvement in the process of appointing or dismissing the Ombudsman. The processes are controlled by the legislative bodies – from nomination, appointment, to termination.

Section 129 of the Constitution of the United Republic of Tanzania provides that the Chairperson, Vice Chairperson and all other Commissioners (together with CHRAGG) are appointed for renewable term of three years, which can be renewed only once. They are appointed by the President on recommendation of a nomination committee that consists of the Chief Justice of the Supreme Court of Appeal, the Chief Justice of Zanzibar, the Speaker of the National Assembly, the Speaker of the House of Representatives, and the Deputy Attorney-General as the secretary of the committee. This is a hybrid committee consisting of heads of the judiciary and heads of the legislative bodies. However, it is still concerning that there is no provision for a vote by the legislature in the appointment process of the commissioners. The important non-statutory innovation in the appointment process of the Tanzanian Ombudsman is the public participation that is built into the process (Peter, 2009: 364-365).

At the time of CHRAGG's establishment, on insistence of civil society, government conceded that civil society should have a say in the nomination process, which resulted in a transparent process of appointing commissioners who are not only independent but also competent and qualified (Peter, 2009: 364-365). Under this arrangement, the nominations are received by a committee consisting of organs of civil society and specialists who screen them and draw up a shortlist of the best potential candidates. The names of the qualifying candidates are then publicised in the media for members of the public to comment on and/or raise objections on the suitability of the candidates. The names of the shortlisted candidates and the views of the public are placed before the

nomination committee who make a recommendation to the President. The President is obliged to appoint commissioners only from the shortlisted candidates, considering the public's contribution (Peter, 2009: 364-365).

The Chairperson and Vice Chairperson of CHRAGG are appointed based on the principle that if one is from the mainland, the other must come from Zanzibar, and vice versa. This unique requirement is the function of the semi-autonomous status of Zanzibar within the loose federation of United Tanzania (AOMA, 2014: 72). A commissioner or assistant commissioner may be dismissed from office only on grounds of failure to perform their duties or owing to ill health or any other reason, or for misconduct based on the code of conduct for commissioners (Article 129(7) of the Constitution of Tanzania). The President can remove the commissioner on recommendation of the special tribunal, consisting of the chairperson and not less than two other members (the chairperson and at least half of the members should be judges of the High Court or Court of Appeal), set up by him/her to investigate and advise him/her within 90 days of the veracity of the allegations against such a commissioner. If the special tribunal advises the President to remove the commissioner, the President shall so act (Article 10 of the CHRAGG Act). It is clear from the wording of this article that the President does not have discretion to disregard the advice of the special tribunal. While this is an independent process conducted by pre-eminent persons, the fact that it is done without the involvement of the legislature is non-compliant with the recommended best practice in terms of the IOI by-laws.

In Namibia, the Ombudsman is appointed by the President following the recommendation of the Judicial Service Commission, consisting of the Chief Justice, a judge appointed by the President, the Attorney-General, and two members of the legal profession (Article 90(1) of the Constitution of the Republic of Namibia). The appointment process is a two-stage process: in the first stage, it is the recommendation by the Judicial Service Commission and in the second stage, it is the formal appointment by proclamation, made by the President. Although this two-stage process, as argued by Ruppel-Schlichting (n.d.: 278), achieves two important pillars for the Namibian Ombudsman: in the first place, it secures wide respect by diverse political groups of the incumbent as fair and impartial, and secondly, there is a division of roles in the appointment process so

that the appointment is not a function of one institution (*ibid.*), it should be noted that it is not an appointment made with the involvement of the legislature. This does not comply with the IOI by-law that requires the appointment of an Ombudsman to be done with the involvement of the legislative body.

The security of tenure of the Namibian Ombudsman, like that of the UK, is only limited by age. Article 90(2) of the Constitution allows the Ombudsman to hold office until the age of 65, or to the age of 70 by extension of the President. This provision is an important safeguard against the dismissal of the Ombudsman based on political developments. Article 94 of the Namibian Constitution provides that the Ombudsman can be removed only on a recommendation of the Judicial Service Commission and only for specified grounds, such as incapacity or gross misconduct. Although this is important as it guarantees that the Ombudsman will not be dismissed for political reasons or be victimised because their investigations have outraged the powers that be (Ruppel-Schlichting, n.d.: 279), it must be said that the dismissal of the Ombudsman of Namibia can be done without the involvement of the legislative body. In this sense, the IOI by-laws are not complied with.

In South Africa, while the legislature is involved in the appointment of the Public Protector through an *ad hoc* committee established to recommend the appointment and that this recommendation must be approved with a vote of at least 60 per cent of the National Assembly, the appointment must still be signed-off by the President of the Republic to be effective (Section 193(4) of the Constitution). The impeachment of the Public Protector is by an *ad hoc* committee, unlike in the Ethiopian model where the composition of the committee is entrenched in the Constitution, and can create difficulties should there be a need to institute impeachment processes against the sitting PP. Section 194 of the Constitution provides that the PP may be removed on grounds of misconduct, incapacity and incompetence on a recommendation of a committee of the National Assembly, with the support of a two-thirds majority of the National Assembly. The President of the Republic of South Africa does not have the discretion not to remove the PP, once the National Assembly has passed the resolution calling for such a removal.

- **Resourcing – financial and human resources**

Article 15 of the AU Charter on Democracy, Elections and Governance provides that state parties to the Charter shall provide the Ombudsman institutions with resources to perform their functions efficiently and effectively. The power of the Ombudsman to control its own financial and human resources is usually indicative of the independence of that institution. In this part of the analysis, the researcher sets out to analyse the resourcing of the Ombudsman and how it is empowered to independently manage and control its resources, specifically financial and human resources.

The Gambia's budget of the Office is not directly allocated by the Legislature, but requested through the Ministry of Finance and Economic Affairs for approval (AOMA, 2014: 81). This does not indicate adequate budgetary autonomy. According to Article 19 of the Ombudsman Act, 1997 all expenditure of the Office is derived from the Consolidated Revenue Fund and is paid at the beginning of the financial year.

The Ombudsman assisted by his deputies have the autonomy of making staff appointments, as empowered by Article 16 of the Ombudsman Act, 1997. The staff of the Ombudsman become public officers on their appointment. In other words, they are subject to public service laws and regulations. The recruitment process is generally thought to be fair, transparent and inclusive (AOMA, 2014: 85). The appointment of staff is not subject to political oversight of any Ministry, which augurs well for the independence of the Office (AOMA, 2014: 85).

In Cote d'Ivoire, the budget is appropriated directly by the Parliament and is part of the state budget. The Mediator of the Republic has the autonomy to manage the budget subject to the rules applicable to all public institutions (AOMA, 2014: 81). This direct appropriation of the budget by the Parliament is the best practice and it ensures independence of the Ombudsman.

The issue of the appointment of staff is complex. Article 10 of the Organic Law makes provision that the Regional Mediators are appointed by the President on advice of the Mediator and the Minister responsible for relations with Republic Institutions. The General Secretary of the Office (the head of administration) is

appointed in terms of Article 10 of the Organic Law by a decree issued by the Council of Ministers on advice of the Mediator and the Minister of Republic Institutions. The other staff members are appointed at the discretion of the Mediator in accordance with public service laws and labour practices. Therefore, there is some level of autonomy to appoint staff, although the Mediator can only recommend the appointment of the head of administration, the General Secretary. This lack of autonomy in this regard is concerning and does not accord with the recommended best practice.

In Ethiopia, the budget of the Ombudsman is regulated by Article 36 of the Proclamation, which provides that the budget of the Office consists of a budgetary allocation from the government and grants/assistance from other sources. This means that it is possible for the budget to be derived from the donor sources. The risk of this is that donor funding could come with conditions that may compromise the independence of the Ombudsman. Yohannes (2011) writes that the budget of the Ethiopian Ombudsman, as provided for in Proclamation 211/2000, has created favourable conditions for the Office not to be thwarted from its mission due to financial difficulties, as it made the Office independent with regard to how it utilises its budget. However, despite this relative budgetary autonomy, the institution is financially constrained by the fact that Ethiopia, as a poor country, is never able to allocate adequate resources to its public institutions, including the Ombudsman. Hence, the institution is required to carry out its functions only to the extent of the availability of resources (Ali, n.d.: 9-10).

According to AOMA (2014: 86), in Ethiopia, the Council of Ombudsman appoints the top executive and senior management of the Ombudsman. The other staff is appointed in terms of the normal civil service process that conforms to the Federal Civil Service Laws. They are civil servants. This Ethiopian model gives the Ombudsman autonomy when it comes to the recruitment and appointment of staff.

In Burundi, Article 238 of the Constitution provides that the Ombudsman has the power of resources necessary to perform his/her duties. In this regard, the funds for the operation of the Office are largely derived from the state, although it can obtain donations and legacies (AOMA, 2014: 82). The same risk as identified with

the Ethiopian Ombudsman applies. In August 2017, the Ombudsman of Burundi reported to the members of parliament that the greatest problem that faced the Office was a lack of money and this was exacerbated by the suspension of international cooperation by the Swiss government that financed some of the Office's operations. Edouard Nduwimana reported that the institution was indebted to the value of BIF 300 million, which meant that many projects could not be undertaken due to a lack of finance (Nnininahazwe, 2017). This is indicative of another risk posed by international donor funding. Its suspension can obstruct progress of key projects made possible by it.

The Ombudsman of Burundi appoints, manages and dismisses staff, in terms of the statute and framework of staff decreed by the Ombudsman in consultation with the National Assembly issued in terms of Article 19 of the Law No. 1/04 of 2013. Therefore, one can say the Ombudsman has autonomy to appoint, manage and dismiss staff without interference.

In Mauritius, the budget of the Ombudsman is derived directly from the consolidated fund, appropriated by the Parliament as provided for in Article 8 of the Ombudsman Act, 1969. This means that the Office is not dependent on any government department for funding. This enhances its independence and budgetary autonomy.

The Ombudsman of Mauritius does not have autonomy and jurisdiction in the appointment of staff of the Office. The function of appointing staff falls within the competence of the Public Service Commission (AOMA, 2014: 86). In addition, the Ombudsman does not have the power to determine the structure of the Office. In this regard, Article 96(4) of the Constitution provides that "the offices of the staff of the Ombudsman shall be public officers and shall consist of that of a Senior Investigations Officer and such other officers as may be prescribed by the President, acting after consultation with the Prime Minister". This political role of the President and Prime Minister in determining the organisational structure and staff complement of the Ombudsman is too invasive and does not augur well for the independence of the Office.

In Tanzania, the budget of CHRAGG is a specific vote in the budget (AOMA, 2014: 82). Article 29 of the CHRAGG Act provides that funds for the Commission

shall consist of the monies appropriated by Parliament for the purpose of the Commission, accruing to the Commission from any other source and/or donations from any other internal or external source. Article 31 of the CHRAGG Act provides that the Commission shall annually submit the proposal for its budget to the Minister responsible for Human Rights and the Minister shall table the report in the National Assembly for appropriation. The Commission must take into consideration the advice of both the responsible Minister and Minister of Finance. Despite this requirement to consult with the responsible Minister and Minister of Finance, CHRAGG seems to have adequate budgetary autonomy. However, according to a prominent professor of law at the University of Dar es Salaam, controlling budgetary allocations remains the tool that the government uses to exert control on the Commission. Since its inception, CHRAGG had been underfunded by the state and has relied on donor funding, especially from the Royal Danish Embassy. With dwindling donor funds, the Commission has been operating with meagre financial resources, apart from its ability to finance typical operational costs (Peter, 2009: 368).

The Executive Secretary (Chief Executive Officer) of CHRAGG is appointed by the President after consultation with the Commission in terms of Article 11(1) of the CHRAGG Act. Article 11(6) provides that other staff of the Commission may be appointed, controlled, disciplined and dismissed by the Commission within the stipulations of the civil service laws. Article 11 (7) provides that public servants may be seconded to the Commission, at its request. Although it is concerning that the Commission does not have the autonomy to appoint its Executive Secretary, it can be said that the Commission has adequate autonomy in appointing, managing and dismissing the other staff of the Commission.

In Namibia, the Ombudsman lacks budgetary autonomy. This is not in accordance with the recommended best practice. The budget of the Office is linked to the Ministry of Justice, which is charged with managing it. If there is a need for extra funding, this can be requested by the Justice Ministry (AOMA, 2014: 82). Section 9 of the Ombudsman Act provides that operational expenditure for the Ombudsman shall be paid from monies appropriated for this purpose. This definitely restricts the Office from obtaining funds or augmenting its budget from any other source.

Furthermore, the Ombudsman of Namibia does not have autonomy in terms of staff appointment. The staff of the Ombudsman are ordinary public servants appointed in terms of public service prescripts who, in terms of Section 7(1) of the Ombudsman Act shall be made available to assist the Ombudsman in the performance of his duties. This provision is vague and suggests that staff of the Ombudsman are there by assignment and not appointment, in which case any public servant can be assigned to the Office of the Ombudsman without participation of the Ombudsman in that decision. Although the Ombudsman can manage the processes for the appointment and dismissal of staff, he/she can only recommend these actions. The Ombudsman considers these restrictions as negatively affecting the independence of the Office (AOMA, 2014: 86).

It can be said that several countries do not have adequate autonomy to determine and manage their resources needs. This affects the independence of the operations of the affected Ombudsman Offices. It is advisable that the budgets of the Offices be appropriated by the legislative authority and be directly managed by the Ombudsman, as this will enhance the independence of the Office. Three countries in the sample (Ethiopia, Burundi and Tanzania) have the ability to source donor funding to augment their national allocations. Some Ombudsman Offices in Eastern Europe can also raise donations; for example, in Albania Article 37 allows the People's Advocate to accept donations in kind or money. While this practice can be useful during a funding crisis, the researcher cautions against it as it could negatively affect the perception of the independence of the Offices.

In terms of the autonomy to appoint and dismiss staff the different jurisdictions are diverse. In at least two countries, the heads of administration are not appointed by the Ombudsman (Cote d'Ivoire and Tanzania). It is submitted that these are not good examples of staff autonomy. Moreover, in at least two other countries the Ombudsman has no jurisdiction regarding staff matters (Mauritius and Namibia) – it is also submitted that this practice is not in accordance with the recommended best practice.

The best practices are found in three countries, The Gambia, Ethiopia and Burundi, who have significant autonomy with regard to human resources matters

of their Ombudsman Offices. The Bosnia and Herzegovina Ombudsman is also a good example of an Ombudsman who has full autonomy on staff appointments.

How do these compare with the PP of South Africa? The funding model for the Office of the PP is less than ideal. As early as 1999, the Constitutional Court grappled with the question of the budgetary autonomy of Chapter 9 institutions. In *New National Party v The Government of the Republic of South Africa and others*, the Constitutional Court held that there were two conditions that need to be met to assure the independence of these institutions. Firstly, the institution must have sufficient funding, and secondly, the funds must be appropriated directly by Parliament. However, both these conditions are still contentious with regard to the PP. As seen in 2017, the PP requested her budget to be increased from the R626 million to R1.2 billion in order to perform her mandate as the current budget was inadequate to meet the Office's operational needs (Ferreira, 2017). In the Estina dairy investigation report, the PP indicated that she could not follow up on some key aspects of the investigation due to a lack of capacity and financial constraints (Public Protector 2018: 8-10). The Office is funded through the Department of Justice and Correctional Services, which hinders the Office in the way in which it motivates for its needs. This arrangement does not augur well for the independence of the institution (Musuva, 2009: 17). South Africa shares this kind of arrangement with The Gambia and Namibia. South Africa can learn a valuable lesson from the arrangements applicable to Cote d'Ivoire, Mauritius and Tanzania where the budgets of the Ombudsman are a direct charge from the consolidated funds (fiscus) and are directly appropriated by their parliaments for use by the Ombudsman. Donor funding for the Office of the PP has caused consternation in the charged political environment of recent times. The US Embassy spokesperson, Cynthia Harvey, acknowledged that USAID donated money following discussions with Treasury and the Department of Justice to offer technical assistance to the Office of the PP based on its five-year strategic plan (Gallens, 2016). The then Public Protector, Thuli Madonsela, explained that such funds are never directly received by any state institution, but are received by the Department of Justice to allocate to Chapter 9 institutions (Gallens, 2016). However, the incumbent PP, Busisiwe Mkhwebane, has vowed to never receive and use foreign donations in the operations of the Office as she is of the view that

this could negatively affect the independence of her Office (Nicolaidis, 2017). It is submitted that this is a plausible stance, provided that technical assistance in the form of capacity building should not be regarded as a threat to the independence of the institution, especially if the institution does not directly negotiate it. If central government negotiates donor funding, it mitigates the risk of undue influence by the donor on the ultimate recipient institution.

The PP of South Africa has full autonomy to appoint and dismiss staff in her Office. Section 3 of the Public Protector Act, 1994 provides that the PP shall have the power to appoint the Chief Administrative Officer of the Office and such number of staff as seconded or appointed by the PP to enable him/her to perform the functions of the Office. This compares well with the autonomy of the Ombudsman in The Gambia, Ethiopia and Burundi. It also compares well with the autonomy of the Ombudsman in the UK, in Western Europe, and in Bosnia and Herzegovina in Eastern Europe.

- **Political interference**

The IOI by-Laws state, “The Ombudsman should be independent and should not receive any instruction from any public authority, and should perform its functions independent of any public authority”. The provisions of the African Charter on Democracy, Elections and Governance (AU, 2007) further state, “State Parties shall ensure that the independence or autonomy of the said institutions is guaranteed by the **constitution**” (own emphasis). In this section, the researcher will analyse and compare the adherence of the Ombudsman under review with this principle.

The Gambia’s Ombudsman’s independence is provided for in Article 165(1) of the Constitution, which states, “Subject to the provisions of this chapter, in the exercise of his or her functions, the Ombudsman and a deputy Ombudsman shall not be subject to the direction or control of any other person or authority but subject only to the Constitution and the law”. However, this supposed constitutionally guaranteed independence from political interference is significantly diluted by Article 13 of the Ombudsman Act, 1997, which provides for the submission of reports and recommendations to the President. Article 14 of the said Act allows the President to decide on the report as he/she may deem fit. This

allows for interference of the Executive in the work of the Ombudsman, which dilutes the independence of the Office. However, it appears that interference is not a problem experienced by the Ombudsman of The Gambia. The Gambian Ombudsman, Fatou Njie-Jallow, indicated that her Office had stayed independent, with no outside interference experienced (Baldeh, 2016). This may be so, but the threat of interference due to the permissive Article 14 is always there. For instance, during the dictatorship of the then President, Yahya Jammeh, the rights groups alleged that those who defied him ended up in the country's notorious Mile Two prison, where, according to the UN in 2014, there was evidence of exposure to torture and executions by the National Intelligence Agency, which answered directly to Jammeh. This state of affairs was accompanied by interfering with the independence of the judiciary, denying people due process of law, protracted pre-trials and incommunicado detention of people (AFP, 2017). In this kind of political environment, it is not inconceivable that the President could undermine the independence of institutions that reported directly to him, like the Ombudsman in this case. Therefore, leaving the Office of the Ombudsman to directly report to the President and allowing the President the power to veto the recommendations of the Ombudsman exposes the Ombudsman to potential political interference.

In Cote d'Ivoire previously there were no formal constitutional and legal provisions that dealt with political interference in the work of the Mediator of the Republic (AOMA, 2014: 94). In March 2003, the Committee on the Elimination of Racial Discrimination recommended that government should strengthen the guarantees of independence of the Office to ensure its credibility (United Nations, 2007: 9). Today Article 165 of the Constitution of 2016 provides that the Mediator does not accept instruction from any authority. Article 167 of the Constitution makes the Office of the Mediator incompatible with the holding of political function, public office, and any professional capacity. Furthermore, Article 168 protects the Mediator against arrest, prosecution, being searched, detained or tried in connection with the work of his/her Office.

Given these new constitutional developments in Cote d'Ivoire, one can safely conclude that there are now formal provisions that insulate the Mediator of the Republic from political interference. However, problems that were more

fundamental remained in the political environment, such as political interference in the judiciary, corruption, protracted pre-trial incarcerations and prison congestion (Human Rights Watch, 2018). In this toxic political environment, political interference in the work of independent institutions is an ever-present threat.

The Ombudsman of the Federal Democratic Republic of Ethiopia (FDRE) is an independent parliamentary Ombudsman institution, established after an international conference was held in Addis Ababa in May 1998, which considered and made findings regarding the best international practices that provided the basis for the establishment of the Ethiopian Institution of the Ombudsman as one of the core democratic institutions of the FDRE (FDRE, 2011). Article 55(15) of the Constitution of the Federal Republic of Ethiopia only provides for the establishment of the Office of Ombudsman, but it makes no mention of the guarantees for its independence or insulation from political interference. According to AOMA (2014: 94), there have not been any known cases of political interference with the functions, duties and investigations conducted by the Ombudsman. In terms of Article 35 of the Ombudsman Proclamation, the Ombudsman or any of its appointees or investigators may not be arrested or detained without the consent of the House of Peoples' Representatives or the Chief Ombudsman, respectively, unless he/she has been caught in *flagrante delicto* (caught red-handed) for a serious offence. Article 40 of the Ombudsman Proclamation provides for the non-answerability of the Ombudsman for defamation arising from his/her reports or correspondences. It is submitted that these are noble protective measures against interference with the functions and independence of the Ombudsman in Ethiopia. However, Reif (2000: 14) warns, "Institutions usually cannot fulfil their functions effectively in states that do not have some minimum level of democratic governance". Ethiopia is a politically unstable country with an inclination towards undemocratic governance; a fact that may affect the independence of the Ombudsman despite its strong institutional foundation.

In Burundi, the independence of the Ombudsman is guaranteed in the Constitution and law. According to AOMA (2014: 94), the Office of the Ombudsman under the then Muhamed Rukara demonstrated proof of effective

independence, which mitigated the possibility of manipulation and political control. Three cases of political interference with the work of the Ombudsman were cited in the AOMA report of 2014, namely, a land dispute involving the President of Burundi and the community of Gasenyi, who demanded fair compensation for expropriation of their land intended for the building of the presidential palace; a case involving the demolition of a citizen's house by the local authority; and a case of expropriation of land without compensation and demolition of houses involving the residents of Buterere. All these three disputes are about land, which in Burundi is important given the situation of internally displaced peoples in that country due to civil war. The fact that the Ombudsman was able to intervene despite instances of political interference was a good sign of independence. However, the US State Department's Bureau of Democracy, Human Rights and Labour (2016: 1) reported that Burundi still experienced major human rights abuses such as torture, extrajudicial executions of detainees, and lengthy pre-trial detention often without charges; harsh prison conditions; and a lack of judicial independence. Human Rights Watch (2018) has indicated that impunity for serious crimes remains the norm. The justice system is manipulated by the ruling party and intelligence authorities, and judicial procedures are routinely contravened. In this environment, and in order to avoid international scrutiny, Burundi became the first country in Africa to withdraw from the ICC on 27 October 2017.

The Ombudsman should not be politically prominent as this could convey the possibility of him/her being biased, especially in a politically volatile country such as Burundi. Yet this is exactly what Burundi did in November 2016 when its legislature elected the former Minister of Home Affairs and then serving Member of Parliament, Edouard Nduwimana, as the Ombudsman despite his prominence in the ruling party and his known divisive political past (Habonimana, 2016). These factors do not augur well for the non-interference and independence of the Burundian Ombudsman.

Article 129(6) of the Tanzanian Constitution provides for the political independence of the Commissioners of CHRAGG in that it requires the Commissioners to resign from political office when elected to serve in the Commission. Article 30(2) establishes the Commission as an autonomous

department and it provides that the Commission is not bound to comply with the orders or directives of any person, or government department, or political party, or any public or private institution. However, this seeming independence and insulation from political and other interference is undermined by Article 130(3), which grants the powers to the President to intervene in the work of the Commission. In terms of this provision, the President can direct the Commission to terminate an investigation, if he/she determines that regarding any matter or any state of affairs, it is in the public interest to do so. Article 130(4) gives the President the powers to direct the Commission to conduct an inquiry, but the Commission can conduct an inquiry into any person or institution, unless the President directs otherwise. Article 130(5) is a usual non-jurisdiction in the affairs of the judiciary and statutory tribunals. Article 130(6) prohibits the Commission from investigating the President of the United Republic and the Leader of the Revolutionary Government of Zanzibar. Therefore, one can characterise Articles 130(3)-(6) of the Tanzanian Constitution as limitation clauses on the powers and functions of CHRAGG.

In Namibia, the Office of the Ombudsman is designed to be independent. This can be discerned from Article 89(2) of the Constitution, which reads, “the Ombudsman shall be independent and subject only to this Constitution and the law”. It can further be inferred that Article 89(3) of the Constitution insulates the Ombudsman from political interference as it provides that “no member of the Cabinet or 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”. Mostly, it would seem that the Ombudsman of Namibia functions within a conducive political and legal environment that insulates it from possible political interference. This augurs well for the independence of the Ombudsman in Namibia.

By comparison, one can argue that the PP of South Africa is comparatively well insulated from political interference by virtue of it being a Chapter 9 institution whose independence is constitutionally protected. However, we have seen instances where senior political figures sought to interfere with the reports of the PP. For instance, instead of simply acting in accordance with the remedial action

of the PP, the then Minister of Police, Nathi Nhleko, commissioned another investigation that sought to rival the findings of the PP (Minister of Police, 2015). In adopting the same report on 2 June 2015, the National Assembly made itself complicit in interfering with the work of the PP (National Assembly, 2015: 2021), resulting in Parliament effectively second-guessing the findings of the PP. Despite the fact that the Constitutional Court in *EFF v the Speaker of National Assembly* clarified the status of the reports and findings of the PP and that those can only be set aside through a judicial review, we have recently seen the Portfolio Committee on Justice and Correctional Services summoning the PP, Adv. Mkhwebane, to explain her reports on the Estina dairy project (Bornman, 2018). While it is true that the PP is accountable to the National Assembly at least once a year, to be called any time to appear before the Parliamentary Committee to explain her reports and utterances related thereto seems to be going overboard. These kinds of meetings, intended to force the PP's hand, may have the effect of interference with the independence of the Office in the long run.

The principle of immunity from personal liability is intended to protect the Ombudsman and ensure that he/she perform their functions without fear, favour or prejudice. If an Ombudsman fears personal repercussions for the matters arising in the course of their duties as the Ombudsman, they are not likely to act with the requisite level of independence. To this effect, the Southern African Conference for the Institution of the Ombudsman held in Namibia in 1995 resolved the following: "Ombudsman and members of his/her staff should not be personally liable for anything that they do in the due course of their duties, provided that liability be attached to the Institution for the Ombudsman and his/her staff for wilfully committing or omitting anything in bad faith" (Kasuto and Wehmhörner (1996: 6).

It is with this in mind that the researcher found the decision of the Northern Gauteng High Court in *Absa Bank Limited and Others v Public Protector and Others* to saddle the Public Protector with personal costs worrisome, and a form of judicial interference in the independence of the PP as it *prima facie* flouts Section 5(3) of the Public Protector Act. The Act protects the PP from being held liable with respect to any matter revealed in the report, finding, point of view or recommendation made in good faith during the course of exercising his/her

powers and functions. Because of this decision, the PP now purports to fear defending her reports in courts because she wants to avoid personal liability (Maughan, 2018). While one appreciates that the court was correcting the purported untoward behaviour of the PP, the unintended consequence is that the PP no longer carries out her functions without fear, favour or prejudice as mandated by the Constitution. However, one appreciates that in this instance, the court decided that the PP acted *mala fide* when she processed the Absa-Ciex report (*Absa Bank Limited and Others v Public Protector and Others*, 2018).

- **Acceptance and enforcement of decisions and recommendations**

The Ombudsman must be able to ensure implementation of its recommendations and decisions. However, Bishop and Woolman (2013: 24A-2) indicate that the general criticism of the Ombudsman system is that it generally lacks the powers to make binding decisions. In this section of the study, the researcher will investigate the powers of enforcement and the acceptance of the decisions and recommendations of the Ombudsman under review in this chapter.

The Gambia has one of the most effective enforcement systems compared to the rest of the countries under review. The Ombudsman Act of 1997 provides that the orders, writs and directives issued by The Gambian Ombudsman have the force of law equivalent to High Court decisions. Once the Ombudsman has made a determination, a notice is sent to the public agency to urge compliance (AOMA, 2014: 65). Article 17 of the Act provides that the investigation, proceedings, process or report of the Ombudsman cannot be held in bad faith for any error in law or irregularity, or be challenged or reviewed or called to question, except based on a lack of jurisdiction. The High Court of The Gambia is the final court of appeal in this regard (Article 18 of the Act).

The fact that the Ombudsman rulings in The Gambia have the effect of court orders means that compliance or acceptance of the rulings is very high. It was reported to be almost 100% in 2014 (AOMA, 2014: 92). There is also too narrow a point of appeal, namely the jurisdiction. This means that the Ombudsman cannot be challenged on the merits of its reports and findings.

The Mediator of the Republic in the Cote d'Ivoire uses mediation to resolve disputes amicably between the parties. This method by its nature is not coercive and relies on the amenability of the parties involved, and the personality of the mediator can play an influential role (AOMA, 2014: 65). Article 7 of the Organic Law provides that the Mediator must resolve the disputes through mediation. Mediation requires the agreement of the parties, which is usually in writing and signed in good faith, and therefore increase the chances of compliance. However, the Mediator does not have the power to enforce the agreements, although AOMA has reported that the compliance rate is between 80 and 85% (AOMA, 2014: 92).

In Ethiopia, the findings of the Ombudsman are mostly advisory and recommendatory; thus, its decisions do not have the force of law. The decisions are enforced through negotiation; a special report to the Delegates' Committee of the House; suing the non-compliant person or government agency; media exposure; and the persuasive power of the Ombudsman (AOMA, 2014: 65). AOMA reports that about 75% of the findings are accepted, although the implementation rate was 60% in 2014 due to the non-acceptance of the findings, the effluxion of time, and an alleged lack of funds when compensation was awarded (AOMA, 2014: 92). In July 2017, the Ombudsman reported that numerous institutions failed to improve on maladministration practices and wrongdoings despite corrective action recommended by the Office (Abiye, 2017).

In Burundi, the Ombudsman adopted the mechanism of mediation to resolve the dispute between the parties with the signing of the agreement made before the Ombudsman and the media, although non-compliance with the agreements can be referred with recommendation to the relevant authorities. This on its own signifies the acceptance of the mediation awards of the Ombudsman. What is unique with the Burundian Ombudsman is that through an ad hoc monitoring and implementation committee they follow up on the implementation of the settlement agreement, as an enforcement mechanism (AOMA, 2014: 65). The acceptance rate of the recommendation has been rated between 70 and 75% due to the unwillingness of the parties to accept mediation as an opportunity to negotiate in the spirit of give and take (AOMA, 2014: 92).

The Ombudsman of Namibia, as a hybrid, has extensive powers of enforcing his/her recommendations (Reif, 2013: 236-237), even though these are not direct powers of enforcement. For instance, in cases of non-compliance with his/her recommendation the Ombudsman can make a special report to the Parliament in order for it to take action against the non-compliant department (AOMA, 2014: 65). Article 91(e) of the Constitution grants the Ombudsman of Namibia the power to resolve disputes through negotiation and mediation; report the non-compliance to the officer's superiors; refer the matter to the Prosecutor-General; approach the competent court for an interdict to compel the offending party to comply with his/her recommendation; and he/she may bring proceedings to interdict the offending legislation used to justify the offending action or behaviour. Article 25(2) of the Constitution also provides for the possibility of civil claims to be pursued on behalf of citizens by the Ombudsman where fundamental rights and freedoms have been violated.

Moreover, AOMA (2014: 92) reported that there was a general acceptance of the outcomes of the reports of the Ombudsman in Namibia. This was mainly due to the persuasive powers of the Ombudsman and the realisation that he/she operates for the good of everybody, including ensuring that the departments better achieve their mandates.

In Mauritius, the Ombudsman does not have direct enforcement powers. Once the recommendation is made, the Ombudsman gives the defaulting person or department a specified period within which to comply. If there has been no compliance within the stipulated time, the Ombudsman can escalate the matter to the relevant minister or prime minister, and ultimately to the National Assembly where it will be debated and a resolution made. However, the Ombudsman does not have the power to take any legal action against public officers (EISA, 2009). The law does not make provision as to what should follow if the recommendation remains unimplemented or inappropriately implemented (AOMA, 2014: 66). Despite this weakness, the acceptance levels and the rate of implementation have been reported to be near 100% due to the general acceptance of the Office by the people. Hence, whatever the Ombudsman decides is usually accepted and acted upon (AOMA, 2014: 92).

In Tanzania, CHRAGG has various mechanisms of enforcing its remedial actions. It can send a letter of request to the public body to comply, and if this fails, a summons will be served on the offending public body (AOMA, 2014: 66). Article 28(3) of the CHRAGG Act grants the Commission the power to bring proceedings before any court or recommend to any relevant authority to bring such an action to seek any appropriate remedy for the enforcement of any remedial directive issued by the Commission. In addition, the Commission has powers of arrest and prosecution, but prefers arbitration and alternative conflict resolution (EISA, 2009). AOMA (2014: 92) reported that with regard to maladministration, there is more than 90% compliance with the remedial directives of the Commission. Non-compliance is usually due to a lack of funds, where financial awards are made, or where there is a disagreement with the findings.

According to the comparative analysis of these jurisdictions, it was established that decisions are generally implemented through mediation, negotiation and persuasion. Notably, the Namibian and Tanzanian Ombudsman can approach the courts to enforce their recommendations. In addition, the Tanzanian Ombudsman has the power of arrest and prosecution. The most effective system is in The Gambia, where the Ombudsman's remedial action has the status and effect of an order of the High Court and can be challenged only on jurisdictional grounds. From the point of view of the finality of the matters, The Gambia is unmatched. The PP of South Africa compares favourably with The Gambian Ombudsman in that his/her decisions are final, but it differs markedly in that the remedial action of the PP is susceptible to judicial review on certain grounds, including legality and rationality (see a discussion on this aspect in par. 3.2, Chapter 3, page 108), not only jurisdiction, as in The Gambia (AOMA, 2014: 65).

Generally, in Western and Eastern Europe and Latin America, the Ombudsman does not have powers to make binding resolutions; they can only recommend remedies. However, the power of some Ombudsman institutions in Eastern Europe to challenge the constitutionality of laws is a cogent tool in the hands of an Ombudsman, which can be effective in meeting the mandates of the Ombudsman. In principle, if acting in the public interest, the PP should have *locus standi* to approach the courts to challenge the constitutionality of laws and the conduct of public administrators. Section 38(1)(d) of the Constitution allows

anyone, who acts in the public interest, to have *locus standi* regarding the Bill of Rights' litigation. However, the PP of South Africa has not enforced rights in this manner yet; hence, this potentially potent constitutional power of the Office has not been judicially tested.

- **Accountability, reporting arrangements and oversight**

The IOI bylaws recommend that the Ombudsman ought to be accountable to a legislative body, and through the publishing of at least an annual report. By accountability is meant that the Ombudsman has a duty to provide an account, explanation and justification of his/her actions in terms of set criteria and in sufficient detail (Diamandouros, 2006b). In this section of the study, the researcher will discuss the accountability, reporting arrangements, and oversight in each of the countries under review.

The Gambia's President and the National Assembly have an oversight role over the Ombudsman. In terms of Article 13(1) of the Constitution of The Gambia, the Ombudsman is required to submit a detailed report, usually in the form of an annual report, to the President with regard to every investigation conducted. This report to the President must contain a brief summary of evidence, conclusions and recommendations made, and the statement of any action taken by the public authority whose conduct is under review. In addition, in terms of Article 15 of the Constitution, the Ombudsman is required to submit an annual report of its operations to the National Assembly, within six months of the following year, without the personal details of those been investigated being publicised.

According to AOMA (2014: 78), in Côte d'Ivoire, the annual report of the Mediator is submitted to the President of the Republic and a copy thereof is submitted to the President of the National Assembly. It may also be published in the Official Journal. Essentially, the President exercises oversight over the report. The report should detail:

- Statistics of all cases received, grouped into categories;
- Reports of all meetings held;
- Difficulties encountered by the Mediator; and

- Recommendations by the Mediator regarding his/her proposed improvements.

In Ethiopia, Proclamation No. 211 of 2000 regulates the reporting arrangements of the Chief Ombudsman. Article 13 of the Proclamation provides that the Chief Ombudsman is accountable to the House of Peoples' Representatives. Article 19 of the Proclamation requires the Chief Ombudsman to submit a report to the House on matters of maladministration and the activities of the Office. According to AOMA (2014: 78), the Chief Ombudsman submits quarterly reports to the Standing Delegates' Committee, and the Chief Ombudsman is required to appear before the House to make a *viva voce* presentation and engage in a question and answer session with the House. Public participation is allowed during this session and special reports can be submitted to the Delegates' Committee.

In Burundi, the Ombudsman submits the annual report to the three oversight authorities, namely the President, the National Assembly and the Senate, and may submit interim quarterly reports if he/she deems it necessary. The annual report is published in the Official Bulletin of Burundi. The report should contain the recommendations that the Ombudsman considers necessary and may include the outline of difficulties that the Ombudsman encountered in carrying out his/her function. The identity of complainants and that of administrative staff of the administrative authorities cannot be disclosed in the reports. It is not a compulsory requirement for the Ombudsman to appear before the National Assembly, but he/she may appear at his/her request or on request of the National Assembly (AOMA, 2014: 78).

In Namibia, as provided for in Section 6(3) of Ombudsman Act, the Ombudsman submits his/her annual report to the Parliament through the Office of the Speaker on 31 March of each year. According to AOMA (2014: 78), the annual and special reports should detail the scope of activities of the Office, major activities, investigations, and the public awareness and outreach programmes undertaken. The Parliament exercises oversight of the Ombudsman.

In Mauritius, Article 101(3) of the Mauritian Constitution provides for the Ombudsman to submit his/her report to the President regarding the discharge of

his/her duties. This report is tabled before the National Assembly. According to AOMA (2014: 78), there is no formal provision that speaks to the accountability of the Ombudsman, although it can be assumed that the President and the National Assembly have such an oversight function. If the National Assembly requires any further information arising from the report, Members of Parliament may address such requests to the Ombudsman directly.

Tanzania's CHRAGG is accountable to the National Assembly, and as provided for in Article 33 (1) of the CHRAGG Act, it reports to the National Assembly within six months of the end of the financial year through the relevant Minister. The Executive through the relevant Minister has an oversight function over CHRAGG; hence, the report is tabled before the National Assembly for debate (see Article 33 (1)(c) of the Act). Article 33(2) requires the annual report to be submitted to the President of the United Republic and the President of Zanzibar. According to AOMA (2014: 78), it is customary that annual reports, special reports and other kinds of reports must be tabled before the Parliament through the Minister of Constitutional and Legal Affairs, although such reports are not customarily discussed by the Members of Parliament.

In South Africa, the PP is accountable to the National Assembly and must report on his/her activities and the performance of the Office's functions at least once a year (Section 181(1)(5) of the Constitution). In practice, he/she reports to the National Assembly quarterly through the Portfolio Committee on Justice and Correctional Services. In 2018, Members of Parliament questioned the Minister of Justice regarding the PP's international trips, and the senior and executive staff complement in her office. Adv. Mkhwebane, who has a frosty relationship with the Committee, objected to filing answers to the legislature through the Minister of Justice, arguing that this undermined the independence of her Office and was contrary to Section 181(5), which regulated her reporting arrangements (Mokone, 2018: 4).

From the analysis above, it is clear that most jurisdictions provide for at least parliamentary reporting but not necessarily accountability and oversight, except Côte d'Ivoire where the reporting is not to the legislative authority but directly to the President. Some of these jurisdictions also allow for joint reporting to the

legislative bodies and executive, for example The Gambia. Tanzania reports to the National Assembly through the Minister responsible for Constitutional Affairs. This kind of indirect reporting has caused serious controversy in South Africa when the Members of Parliament asked the PP to account through the Minister of Justice and Correctional Services. Adv. Mkhwebane refused to do this, demanding to reply directly to the parliamentary questions (Mokone, 2018: 4). The researcher is of the opinion that the PP's stance is correct and needs to be respected in order to preserve the independence of the institution.

Below is a comparative table of the different ombudsman systems in Western Europe, Eastern Europe and Africa:

Table 5.1: Comparative table of ombudsman systems

Name	Doctrine and establishment	Scope and Remit	Appointment, selection, security of tenure and removal	Resourcing – financial and human resources	Political interference and independence	Acceptance and enforcement of decisions	Accountability, reporting arrangements and oversight
United Kingdom	The doctrine is based on the Westminster, parliamentary supremacy system, statutory body – established by an Act of Parliament. The Ombudsman is the officer of Parliament.	Supervision of Public Administration and Public Health Services <ul style="list-style-type: none"> - Maladministration mandate only - No mandate in Scotland and Wales 	Appointed by Parliament for a non-renewable term of up to seven years. Three grounds of removal: own request, on account of misbehaviour following addresses to in both Houses of Parliament, or reaching the age of 65.	Full control of human resource function, no complete budgetary autonomy – expenditure subject to Treasury approval.	Access by public is through the so-called MP-filter – making it possible for political interference. The Ombudsman is an officer of Parliament – has no institutional independence.	No enforcement powers. May refer matters to Parliament for enforcement; relies on power of persuasion and reason.	Reports to Parliament
France	Defence of rights and promotion of equality. Recently enacted in the Constitution, formerly established by an Act of Parliament.	Has competence in four areas: <ul style="list-style-type: none"> - The rights of the users of public services (as a national Ombudsman) - Defence of children’s rights - Equality Commissioner - Security services 	Appointed by the President, confirmed by the Parliament.	Has budgetary autonomy of the Defender of Rights; total control over the finances allotted to him/her and presents his/her accounts to the National	<i>Defenseur des Droits</i> is part of the executive, calling to question his/her independence. Previously accessible through the agency of the MP, but now public has direct access.	Recommendations not legally binding; but relies on mediation and agreement. Can intervene before the courts, as <i>amicus</i> .	Reports to the President first and then to Parliament

		ethics – both the Police and private security.		Court of Accounts for verification.			
Spain	Styled as <i>Defensor del Pueblo</i> – Defender of the People. Established in terms of the Constitution; powers defined in the Constitution.	Supervision of Public Administration: <ul style="list-style-type: none"> - Maladministration - Constitutional litigation for rights enforcement; and - Legislative role. 	Appointed by Congress and Senate (Congressional Plenum), by a three-fifths majority vote, removed by three-fifths of parliamentary votes, on account of flagrant negligence or non-appealable criminal conviction.	Budget forms part of the parliamentary budget. Staff are in the service of Parliament. Appoints and dismisses Deputy Ombudsmen, with consent of the joint Houses of Parliament.	Independence guaranteed in legislation – Article 6.1 of the Organic Act. Ombudsman is Parliamentary High Commissioner, but independent from Parliament – institutional independence.	Has the capacity to institute cases at the Constitutional Court to enforce compliance; can initiate review of legislation;	Reports to Parliament
Eastern Europe	Doctrine based on ‘transition to democracy’; strong human rights mandate.	Protection of human rights: <ul style="list-style-type: none"> - Hybrid models – strong human rights focus; - maladministration affecting human rights; - can initiate human rights legislation, i.e. Article 10 of the Croatian Constitution allows the Ombudsman to initiate human rights legislation. 	Generally appointed by legislature, i.e. Russian Ombudsman appointed in terms of Article 103 of the Constitution; Peoples’ Advocate of Albania is appointed in terms of Article 61 of the Constitution.	Generally, has a level of autonomy regarding the budget and staff matters, i.e. in Albania the budget of the Peoples’ Advocate is a separate line item of the state budget, but staff of the Advocate’s office are civil	Most countries provide for independence in the Constitution and/or legislation; i.e. the Bulgarian Ombudsman is subject only to the Constitution and law and guided by his/her personal sense of conscience and morality. The Ombudsman of Macedonia is	Generally, has power of recommendation; can approach the Constitutional Courts to interpret any law or declare any law unconstitutional.	Generally, reports to Parliament annually

			Removed by various parliamentary majorities.	servants. Ombudsmen can receive donor funding; if it does not impact its objectivity and independence.	independent and self-governing, subject only to the Constitution and the law, and international agreements.		
Latin America	Result of 'transition to democracy'. Generally followed the Spanish model; strong human rights mandate; and creations of their constitutions.	Protection of human rights: <ul style="list-style-type: none"> - Hybrid models – strong human rights focus, - maladministration affecting human rights, and - can initiate human rights legislation. 	Generally, appointed by entrenched majority of two-thirds; i.e. Paraguay, Mexico and Venezuela; generally removed by similar entrenched majorities.	Generally, not financially autonomous. Budgets used as instruments of political control. Lack of budgets mean they do not have adequate human resources to do their work.	Independence guaranteed in the constitution and/or law.	Has power of recommendation only; no power of enforcement; relies on power of persuasion.	Generally, reports to Parliament
Africa	Diverse doctrines – Francophone Africa follows French doctrine, i.e. Côte d'Ivoire; and Anglophone Africa follows variants of Western Europe models, i.e. Tanzania; establishment generally	Supervision of Public Administration, with expanded mandates: <ul style="list-style-type: none"> - Mostly hybrid models, except Ethiopia and Mauritius, which are styled on a maladministration mandate only. Namibian Ombudsman has some of the widest 	Generally appointed by legislatures by means of an entrenched majority. Burundian and Ethiopian models do not have executive involvement. Dismissal is also through	Generally, no budgetary autonomy: in The Gambia and Tanzania the budget is requested through the ministry. But the Mediator of Cote d'Ivoire has relative	Generally, independence is guaranteed in the Constitution. But sometimes diluted, e.g. in The Gambia the Ombudsman must submit reports to the President, who has the power to decide on the	Generally, have the power of recommendation; relies on moral authority and persuasion to enforce recommendations. There are some exceptions, e.g. The Gambian Ombudsman's remedial action is	Generally, reports to Parliament. But Ethiopia, Mauritius and The Gambia report to the President.

	provided for in their constitutions and/or by legislation.	scopes and remits in the world, which includes environmental protection.	entrenched majorities.	financial autonomy – the budget is appropriated directly by Parliament and it has the power to manage the budget subject to general laws governing public finances. Staff management mostly done through normal public service laws, e.g. Namibia, and Mauritius.	recommendations. Political interference made possible by the law in some instances, e.g. in Tanzania the President can legally sanction or prevent investigation.	equivalent to a High Court order and can be reviewed only on jurisdictional grounds.	
RSA	Constitutionalism, constitutional supremacy, and protection of constitutional democracy.	Supervision of Public Administration, with an expanded mandate: <ul style="list-style-type: none"> - Investigation of wrongdoing in state affairs and public administration at all spheres; - executive members' ethics; and - wide powers of 	A Chapter 9 body: <ul style="list-style-type: none"> - appointed by the President on recommendation of Parliament; - Can be removed on grounds of misconduct, incapacity or 	Budget allocated by Parliament via the Department of Justice and Correctional Services.	Independence constitutionally and statutorily guaranteed.	Remedial action binding, but can be judicially reviewed.	Constitutionally required to account and report to Parliament once a year; but reports every quarter.

		investigation.	incompetence by the President on recommendation of Parliament, voted for by two-thirds of the members.				
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Source: Researcher's own design

5.6 Conclusion

The study of the constitutions of different countries indicate that it is the norm in the countries surveyed that the Ombudsman is entrenched in the constitutions, which is a best practice that should be encouraged. The literature is replete with examples of countries in Europe, Latin America and Africa where the Ombudsman is embedded in the Constitution. Britain is an exception in Western Europe because its constitution is unwritten (Blackburn, 2015), but there is no denying that its Ombudsman is embedded in its constitutional culture. The constitutionalisation of the French Ombudsman is a recent phenomenon, but has not changed its main characteristic as an institution answerable to the President (Bousta and Sagar, 2014: 77). Therefore, the institution of the Ombudsman in Western Europe is influenced by the institutional and political context: the parliamentary and presidential system. In UK, the institution exists within the Westminster system, and the Ombudsman is a parliamentary officer who is not directly accessible to the public, but is accessed only through the system of the MP filter, with the complaint submitted to the Parliamentary Ombudsman through the agency of a Member of Parliament (Maer and Priddy, 2018: 4). The incorporation of corporate governance principles, such as the appointment of the unitary Board, with an Audit, Risk and Assurance Committee, a Remuneration and Nominations Committee, and a Quality Committee, is an innovation of the Parliamentary Ombudsman that assures robust governance and oversight over the Office.

The Ombudsman of France exists as part of executive within the strong presidential system. Like in the UK, the French Ombudsman is not directly accessible to the people.

In Eastern Europe and Latin America, the Ombudsman is generally modelled around the human rights model. In this model, the Ombudsman has the power to challenge the laws before the Constitutional Court, is vested with protective powers, which gives him/her the ability to influence the political process, advises state organs on the implementation of human rights, reports on the state of human rights, conducts public awareness, education and research on issues of human rights, and may cooperate with civil society and international organisations (Kucsko-Stadlmayer, 2009: 12).

Like the Westminster Ombudsman, the Ombudsman in Eastern Europe and Latin America is answerable to legislative authority. However, unlike the Westminster and French traditions, these Ombudsmen are not parliamentary or executive officers. They are both answerable to and independent from the legislatures. For example, Article 26 of the Albanian Ombudsman Law makes provision that the People's Advocate reports annually to the National Assembly, which discusses his/her report in the plenary.

Similar to Europe and Latin America, all the surveyed Ombudsmen in Africa are embedded in their constitutions. Embedding the institution in the constitution is the best protective mechanism because constitutions are not easily amended, and usually require entrenched majorities to amend (AOMA, 2014: 59). South Africa is on par with its peers in this regard because the doctrine and establishment of the Public Protector is embedded in the Constitution.

The comparative study indicated that the scope and remit of the Ombudsman institutions vary from country to country, and are mostly regulated in the constitutions and legislation. They generally provide for the investigation of maladministration, corruption and human rights violations. In Eastern Europe and Latin America, the Ombudsman is mostly a Human Rights Ombudsman, modelled on the Spanish and Portuguese models. Exclusions from the remit usually include the executive, the judiciary and matters that are before the courts. The exclusion of the Executive, especially the President, is something that is prevalent on the continent. In his critique of the limitations of the jurisdictional remit of the Ombudsman of Botswana, Tonwe (2013: 15) mentions that although exclusions from the remit are a norm for all Ombudsman institutions and similar institutions worldwide, he warns that some of these exclusions may be counter-productive for a modern institution designed to strengthen and support good governance and counteract injustice emanating from maladministration.

In their analysis of the role of the Ombudsman in Nigeria, Osakede and Ijimakinwa (2014: 123) surmise that the Ombudsman exists in one of the three forms distinguished by their modes of appointment: the first is the Parliamentary Ombudsman appointed by Parliament and responsible to it. Most of the Ombudsman institutions in Western Europe, Eastern Europe, Latin America and Africa can be

described as Parliamentary Ombudsmen because they are largely appointed by the parliaments in those countries. However, their relationship with their parliaments are not exactly the same – in some countries, like the UK, the Ombudsman is a functionary of parliament and in countries, such as Spain, the Ombudsman is appointed by the Parliament but operates independent of it. This Spanish model is one that has spread to Latin America and many African states, including South Africa. The second is the Executive-type Ombudsman appointed and removable by the Executive. The French *Le Mediateur* was this kind of Ombudsman. However, the reformed *Defenseur des Droits* (Defender of Rights) officer, who has substituted the *Le Mediateur*, is still appointed by the President, and is accountable to the President first, and then to the French Parliament (Bousta and Sagar, 2014: 77), thereby retaining its executive-type character with some level of parliamentary accountability. The third is the Ombudsman who is appointed jointly by the Executive and the Legislature, and controlled by both. It is surmised that the best appointment and dismissal processes of an Ombudsman is where there is an independent process, followed by the ratification or approval of the Legislature. In some polities, such as Namibia and Ethiopia, there are institutionalised independent selection and impeachment processes and these are followed by ratification of some legislative body. In Burundi, there is no executive involvement in the appointment and dismissal of the Ombudsman – something that is noteworthy.

The power of the Ombudsman to control its own financial and human resources signifies the independence of the institution (AOMA, 2011: 18). Many polities under review, at least on face value, indicate budgetary autonomy for their Ombudsman institution. However, polities such as Tanzania, South Africa and Namibia still receive their budgets through the votes of the ministers responsible for the justice or constitutional affairs portfolios. This lack of direct budget votes for an Ombudsman is worrisome and must be addressed. The Ombudsman's funds must be voted directly for by parliaments and must be directly accounted for by the Offices of the Ombudsman. As Volio (2003: 237) has observed, there has been a tendency in Latin America to weaken the institution by cutting budgets, as a mechanism of political control. Directly voted budgets can redress this concern. This budgetary model is prescribed in Article 48 of the Decree Proclaiming the Ombudsman Law in

Macedonia, which states, “The Parliament shall separately vote on the section in the Budget of the Republic of Macedonia for the purposes of the Ombudsman”.

De jure most jurisdictions surveyed indicate that their Ombudsman is independent and does not receive any instruction from any public authority, and performs its functions independent of any public authority. *De facto* grounds for political interference exist, including political instability and the lack of a culture of democratic governance. Countries, such as Ethiopia and Burundi, often experience war and there are reports of interference with the judiciary. In such environments, it is unlikely that the Ombudsman will be completely independent, despite an enabling constitutional and legislative framework. The lesson here is that the Ombudsman requires minimum democratic governance to take root and be effective (Reif, 2000: 14). As already alluded to, in the UK, the Parliamentary Ombudsman receives complaints via the MP of the constituency in which the complainant resides. This calls to question the independence of the Ombudsman in this instance.

Some decisions of an Ombudsman are implemented through mediation, negotiation and persuasion (see Public Protector, 2017: 6). It is noteworthy that in some jurisdictions, such as Namibia and Tanzania, the Ombudsman can approach the courts to enforce its recommendations. In addition, Tanzania has the power of arrest and prosecution. In The Gambia, remedial action of the Ombudsman has the effect of an order of the High Court and can be challenged only on jurisdictional grounds. The PP of South Africa and The Gambian Ombudsman both provide for finality of decision, but they differ significantly in that the remedial action of the PP is vulnerable to judicial review on certain grounds, including legality and rationality, not only jurisdiction, as in The Gambia.

However, in Western Europe, Eastern Europe and Tanzania the Ombudsman can only recommend a remedy. The Ombudsman institutions in these countries also rely on their persuasive power, based on their integrity, to enforce their resolutions (Volio, 2003; Ugglá, 2009; Delevoye, 2009). The ability of some Ombudsman institutions in Eastern Europe to litigate in the public interest is a cogent power, which in principle the PP of South Africa also has, considering Section 38(1)(d) of the Constitution, which permits anyone to litigate in the public interest.

This study has shown that the international best practice is that the accountability, oversight and reporting arrangements of the Ombudsman are best vested in the legislative authority, not the executive authority. South Africa is in good company in this regard, as the PP of South Africa is constitutionally required to report to the National Assembly, at least once annually (Section 181(5) of the Constitution). While it is true that there is no universal Ombudsman model because each Ombudsman has its own political context, legal order and history (Stuhmcke, 2012), it is possible to draw lessons and best practices from the different Ombudsman systems.

This chapter, as a comparative study, links with Chapter 2 in that the theories of Ombudsman discussed in Chapter 2 have been tested through a comparative analysis undertaken in this chapter. What becomes clear is that no two Ombudsman institutions are exactly the same, hence the political context, constitutional framework and legal culture of the polity within which the Ombudsman exist provide important nuances.

In the next chapter, the contribution of the study to the science of Governance will be evaluated.

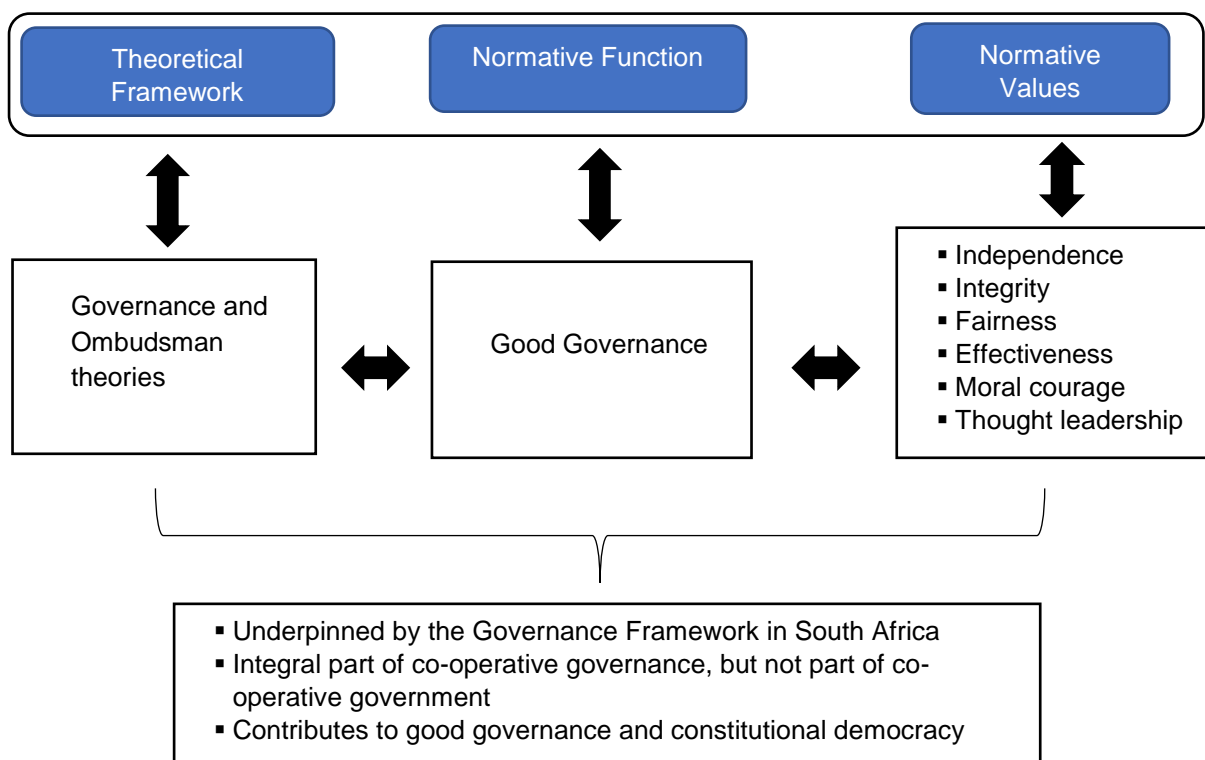
CHAPTER 6: EVALUATION

6.1 Introduction

In this chapter, the researcher will evaluate the contribution of the study to the theory and practice of the science of Governance, by evaluating what has been presented in the previous chapters regarding the status of the PP within the Governance Framework in South Africa.

This study is a normative exercise seeking to establish the place of the Ombudsman generally, and of the PP, in particular, within the various normative frameworks, namely within the governance theoretical framework, and Good Governance as the normative function of the Ombudsman, and the normative values of the Ombudsman. The purpose of this evaluation is to determine the status of the PP within the Governance Framework in South Africa. See Figure 6.1 below for an illustration of the normative framework within which the PP finds resonance:

Figure 6.1: Overview of the Public Protector's Normative Framework



Source: Researcher's own design

The status of the PP will be evaluated from the perspective of the *trias politica*, co-operative governance, and the notion of the organ of state. The evaluation of the notion of Good Governance as the normative function of the PP in South Africa will be based on the consideration of constitutional, legislative and case law, and any applicable policy framework. Furthermore, the study evaluates the distinction between the PP, other Chapter 9 institutions, and other Ombudsman-like institutions. Understanding this differentiation will help elucidate the status of the PP within the Governance Framework. The evaluation will show that the PP is a distinct and a special-type of Chapter 9 institution, and different from the other Ombudsman-like institutions.

The institutional governance and capacity of the PP is evaluated with a view to understand the effectiveness and independence of the institution. The nature and importance of parliamentary oversight is evaluated, including the human and financial resources constraints are discussed with a view to understand the capacity constraints besetting the institution.

In South Africa, the PP is both the institution and the person; therefore, we discuss the normative values and ethics of the PP, as these have an influence on the effectiveness and integrity of the institution. Factors such as leadership virtues, independence and impartiality are discussed as some of the values that the PP should possess. These are discussed through the analysis of the legacies of the four PPs South Africa has had up to this point in time.

6.2 Governance Framework in South Africa

Applying the concept of Governance in the constitutional framework in South Africa is met with a definitional challenge. The Constitution does not refer to the concepts of Governance and/or Good Governance and does not even define the concept of constitutional democracy, which is referred to only once in Chapter 9 of the Constitution as the value that all the Chapter 9 institutions, including the PP, must protect and strengthen. Therefore, this study needs to develop a definition of Governance and Good Governance that is relevant to South Africa and that can be aligned to the Constitution.

It has been demonstrated through a comprehensive literature review that Governance is a theoretical framework within which the institution of the Ombudsman has developed and spread. Therefore, Ombudsmanship is linked intrinsically to the concept of Governance. In the context of South Africa, Governance is a normative theory that guides the democratic and accountable functioning of government and other organs of state. By 'normative' is meant the way something ought to be done according to a value proposition. In the context of South Africa, the value proposition is the attainment of constitutional democracy, in which there is a better life for all citizens. Constitutional democracy means the democratic system founded on the founding values (Section 1 of the Constitution) of the Constitution, in which there is constitutional supremacy (Section 2 of the Constitution), and where all citizens enjoy the rights defined in the Bill of Rights (Chapter 2 of the Constitution). In this sense, 'constitutional democracy' has the same philosophical meaning as 'constitutionalism' and especially "transformative constitutionalism", as defined by Klare (1998) and expanded upon by Chief Justice Pius Langa (2006) and Davis (2007). The ideas of 'constitutionalism' and 'democracy' are equiprimordially linked in that constitution both enables and constrains democracy (Bellamy, 2015: 1); hence, 'constitutional democracy' is a government both enabled and constrained by the constitution. In this sense, the essence of constitutional democracy is the legitimate consent of the governed (Ferioli, 2015: 94).

Therefore, Governance Framework is the structured mechanism to operationalise the advancement of the ideal of constitutional democracy. Governance is not an end but a means to an end. That end is constitutional democracy in which there is a better life for all. 'Better life for all' can be defined as effective management and the redress of the triple challenge of poverty, inequality and unemployment. No other outcome can demonstrate the effectiveness of the Governance framework, linking it back to the Reconstruction and Development Programme (see the discussion in Chapter 3, par. 3.4, page 130).

In Chapter 3 (see par. 3.5.1, pages 134-138), the doctrine of the separation of powers in South Africa was discussed. This doctrine characterises the governance structure in South Africa. Governance in South Africa is structured as the legislative, executive and judicial authorities. These three branches of government constitute the

indispensable structures of state and they exist within the system of the separation of powers in fulfilment of the Constitutional Principle VI of the Interim Constitution. Furthermore, the Constitution in Chapter 3 establishes government in three spheres existing co-operatively and interdependently, namely the national, provincial and local spheres of government. Then the Constitution establishes Chapter 9 and other constitutional institutions, and defines Organs of State in Section 239. All these constitute the structure of governance. The Constitution, the statutes, the common law, and the rules and regulations constitute the legislative framework. The Governance Structure, plus the legislative framework, constitutes the Governance framework in South Africa. Therefore, the PP, the constitutional provisions and legislation, the rules and regulations and case law that regulate it are part of the Governance Framework.

6.3 The status of the Public Protector within the Governance framework

The overarching objective of this research project is to locate the status of the PP within the Governance Framework in South Africa. The evaluation of the conception of the PP shows that this institution is the product of the constitutional principles²¹ that were part of the political settlement that ended apartheid and ushered in the new democratic dispensation. The precursor to the institution was the Advocate-General (renamed Ombudsman in 1991), but as Chief Justice Mogoeng indicated in the *Economic Freedom Fighters v The Speaker of the National Assembly* the conception of the PP was fundamentally different from the Advocate-General. The name Public Protector was chosen, not necessarily to avoid the gender connotations of the word 'ombudsman', but to denote the essential role of the institution; namely, the protection of the people against powerful actors in the state affairs and public administration. This aligns to the nomenclature in Spain where the Ombudsman is called *El Defensor del Pueblo* (Defender of the People), and in France where the Mediator has been renamed the *Defenseur des Droits* (Defender of Rights) (Bousta and Sagar, 2014: 77). These nomenclatures emphasise the protective role of the Ombudsman, usually going beyond a Classical Ombudsman who checked only maladministration. This also theoretically departs from the Westminster system where the Ombudsman styles himself/herself as neither being on the side of the

²¹ See Interim Constitution, 1993

executive or the citizen.²² The British Ombudsman serves the Parliament. In South Africa, the PP exists to protect the rights of the people (see Chapter 2, page 74-75, par. 2.10, for the discussion of the place of the British Ombudsman).

To be effective the independence of the institution had to be assured. To this effect, Constitutional Principle XXIX specifically said:

The independence and impartiality of... a PP shall be provided for and safeguarded by the Constitution in the interests of the maintenance of effective public finance and administration and a high standard of professional ethics in the public service.

To this effect, the PP was conceived and conceptualised as a Chapter 9 institution in the Constitution, thereby ring fencing its independence and existence outside the legislative, executive and judicial authorities.

The status of the PP within the governance framework is hereby evaluated from the perspectives of *trias politica* and co-operative governance:

- **The Public Protector within the *trias politica***

In Chapter 3 (see par. 3.5.1, pages 134-138), the concept of *trias politica* was defined as the separation of powers between the legislative, executive and judicial branches of government (Mojapelo, 2013; Mokgoro, 2015). This universal governance structure of state has implications for the Ombudsman in various polities. For instance, the Ombudsman must hold the Executive accountable by investigating and resolving complaints, but it must also support the Executive with suggestions for the improvement of service delivery. Again, the Ombudsman must assist the legislature to hold the Executive accountable, while it is subject to oversight by the very same legislature. The Ombudsman has a complementary relationship with the courts in terms of providing redress mechanisms for injustice, while the courts provide scrutiny of the Ombudsman through judicial review (Stuhmcke, 2016).

In Chapter 2 (see par. 2.10, pages 74-75 for a discussion of the UK Parliamentary Ombudsman), it was indicated that in the UK the Parliamentary

²² <https://www.ombudsman.org.uk/about-us/who-we-are>

Ombudsman is inextricably linked to the Parliament (Maer and Everret, 2016). The Parliamentary Ombudsman is a functionary of the Parliament; therefore, it exists within the *trias politica*, as part of the legislative branch. It was further indicated that the French Ombudsman is an example of an Executive Ombudsman, who sits in the Executive (Diaw, 2008). This also means that the French Ombudsman exists within the *trias politica*, as part of the Executive branch.

However, some Ombudsman institutions are constitutional institutions whose independence from the Parliament, the executive or the judiciary is assured in the constitution. Castells (2000: 396) explains the place of the Spanish Ombudsman in the constitutional scheme as a body that is not indispensable to the functioning of the state. This means that while the legislature, executive and judiciary constitute indispensable branches of government, an Ombudsman is not an indispensable component of the state.

The constitutional status of the PP is akin to that of the Spanish Ombudsman. The PP is not an indispensable branch of government, like the Parliament or the executive or the judiciary. South Africa can still be classified as a state (and a democratic state, for that matter) even if the PP as an institution disappears from the face of the political earth (see Chapter 2, pages 78-81, par. 2.10 for a discussion of the place of the Spanish Ombudsman within the political system).

Section 193(4) of the Constitution provides that the President, on recommendation of the National Assembly, appoints the PP. However, while the PP of South Africa is appointed with the participation of these two branches of government, he/she is not a functionary of the Parliament, or part of the executive or the judiciary. It is a constitutional institution conceived to be independent from the three branches of government, although its decisions can be reviewed by the judiciary (*EFF v Speaker of National Assembly*, 2016). In principle, the PP can also check the non-judicial functions of the Office of the Chief Justice and courts' administrations. Hence, the relationship between the PP and the three branches of government requires "an independence dependent upon balance and delicate care" (Stuhmcke, 2016).

As elucidated in Chapter 3 (see par. 3.5.1, pages 134 - 138), it is clear from the reading of Constitutional Principle VI that only the Legislative, Executive and Judicial Authorities form part of the doctrine of the separation of powers, therefore *trias politica*.

That the legislature and the President participate in the appointment of the PP is similar to the exigencies of the application of the doctrine of the separation of powers. South Africa does not have a strict Montesquian conception of the doctrine of the separation of powers. For instance, the President also appoints the Chief Justice and other judges but this does not violate the doctrine of the separation of powers. The Chief Justice swears in the President, Cabinet Ministers and Members of Parliament without violating the doctrine of the separation of powers. In fact, members of the Executive, except the President, are also Members of Parliament, although the President is entitled to appoint not more than two members of the Executive from outside the ranks of the legislature (Seedat, 2015: 9).

Therefore, similarly the participation of the legislature and the Executive in the appointment of the PP does not violate the constitutional detachment of the institution. Even the requirement of parliamentary oversight and accountability does not make the PP a functionary of parliament, but it is a constitutional injunction that is necessary in a democratic society. This is similar to the intricacies of checks and balances within the *trias politica*, where each branch of government has the capacity to check one another within the limits of the constitution and the rule of law (Currie and De Waal, 2005).

In a public lecture delivered to honour the late Minister of Justice, Dr Dullah Omar, the former PP, Adv. Madonsela, postulated that the PP and other Chapter 9 institutions fall outside the *trias politica* and that they serve as additional constitutional institutions, independent from the three traditional state authorities, designed to further check the power of the state (Madonsela, 2014). That is why their independence is constitutionally protected and they are subject only to the Constitution and the law (see Section 181(2) of the Constitution).

- **The Public Protector within the co-operative governance framework**

Governance is a steering activity in which the government coordinates stakeholders to achieve the goals of public policy (Rhodes, 2011: 37). Thus, co-operative governance can be defined as the action of steering activities of organs of state co-operatively towards the achievement of the goals of constitutional democracy and a better life for all (researcher's own definition). This definition is key to the evaluation of the place of the PP within the co-operative governance framework in South Africa.

It has been argued that the PP, like all Chapter 9 institutions, is not part of government, but is an integral part of governance (see *IEC v Langeberg Municipality*, 2001). Put differently, the PP is not part of co-operative *government*, but part of co-operative *governance*. This is a politically controversial proposition; hence, the powers of this constitutional institution supporting constitutional democracy have been politically questioned, and legally challenged.

Chapter 3 of the Constitution regulates co-operative government in South Africa. Section 40 of the Constitution postulates that government in the Republic is constituted as the national, provincial and local spheres of government, which are distinctive, interdependent and interrelated. The Section binds all organs of state within the spheres to be governed by the provisions of Section 41(1), which sets out the binding co-operative government and intergovernmental relations principles. The concept of intergovernmental relations in this section refers to relations between the spheres of government and organs of state within those spheres. The common goals of every sphere of government and every government within a sphere are set out as to “preserve the peace, national unity and indivisibility of the Republic”, “secure the well-being of the people”, and “provide effective, transparent, accountable and coherent government for the Republic as a whole”. Section 41(1)(h) specifically requires government at all spheres to cooperate with each other by “fostering friendly relations”, “assisting and supporting one another”, “informing one another of, and consulting one another on, matters of common interest”, “co-ordinating their actions and legislation with one another” and “avoiding legal proceedings against one another”. Organs of state within the spheres of government are also bound by these principles of co-operative government and intergovernmental relations. Below the status of the PP is evaluated within this framework, and its role in

fostering cooperation between itself and all the spheres of government and other organs of state.

The PP is an organ of state within the meaning of Section 239 of the Constitution because it performs a constitutional function and exercises public powers in terms of the Constitution. These powers are set out in Section 182(1) of the Constitution. The question therefore is whether the PP falls within the ambit of Chapter 3 of the Constitution, because it is an organ of state, arguably within the national sphere.

This question was addressed by the Constitutional Court in the matter of *Independent Electoral Commission of South Africa v Langeberg Municipality*, in the context of Section 41(3) of the Constitution that required an organ of state involved in an intergovernmental dispute to first try to resolve the matter amicably before it could consider litigation. In the first place, it was argued that the Independent Electoral Commission (IEC), a Chapter 9 institution, was an organ of state within the national sphere, and secondly, that Section 41(3) did not require an organ of state to be within the sphere of government before the provision could apply.

After considering all constitutional facets and imports of the Chapter 9 institutions, the Constitutional Court made this pronouncement:

Our Constitution has created institutions like the Commission that perform their functions in terms of national legislation but are not subject to national executive control. The very reason the Constitution created the Commission - and the other chapter 9 bodies - was so that they should be and manifestly be seen to be outside government. The Commission is not an organ of state within the national sphere of government (par.31). (*IEC v Langeberg Municipality*).

Therefore, by constitutional and institutional design, the PP, like all other Chapter 9 bodies, is manifestly outside government. The *Ad Hoc* Committee on the Review of Chapter 9 and Associated Institutions came up with an apt and profound phrase to define the place of the Chapter 9 institutions within the broader political system. It said they are part of *governance*, although they are not part of *government* (Report of the *Ad Hoc* Committee on the Review of

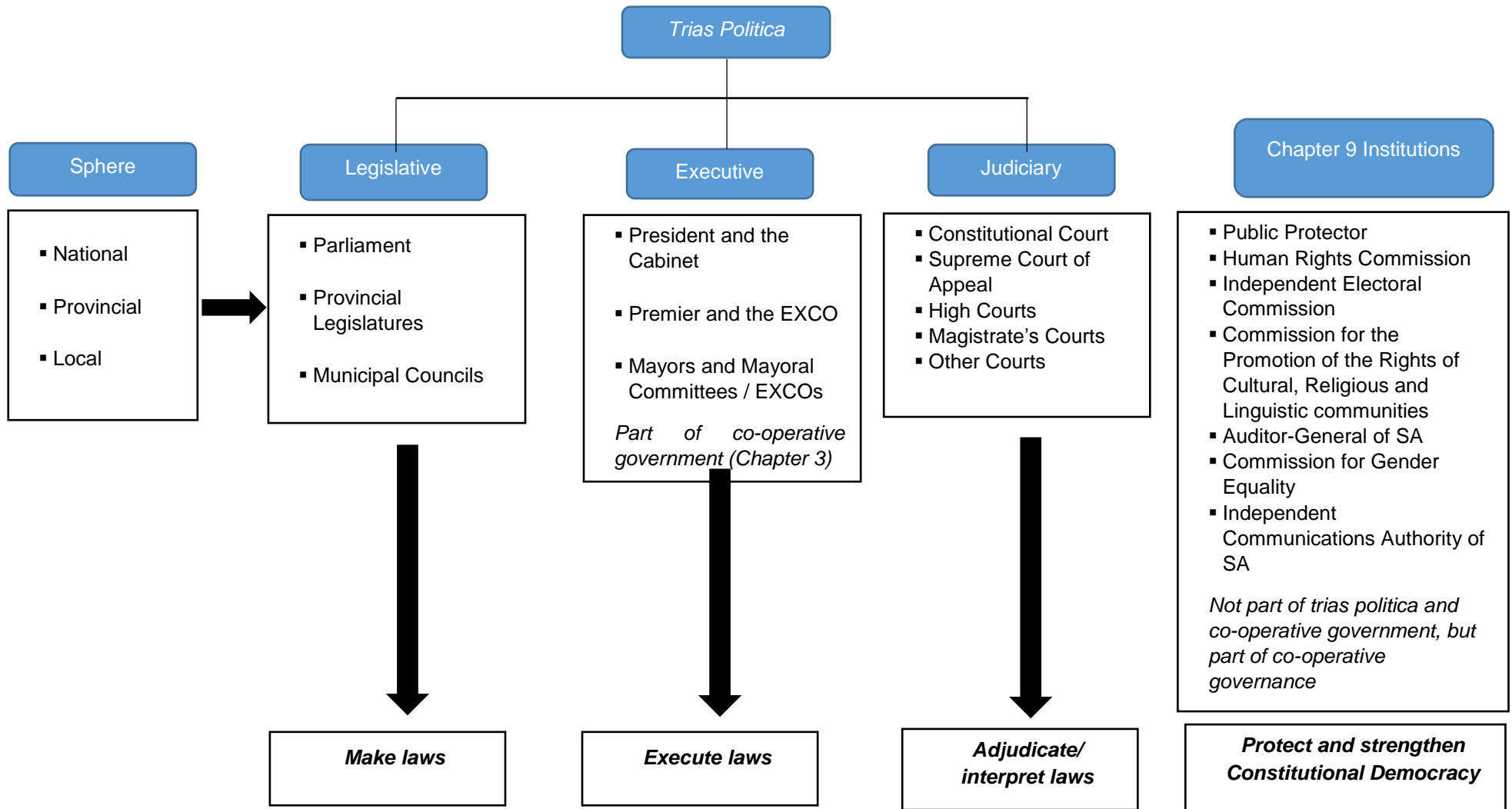
Chapter 9 and Associated Institutions, 2007: 10). Therefore, these institutions are not part of co-operative government, as defined in Chapter 3 of the Constitution.

This therefore means that the PP is not bound by the intergovernmental legislative framework that discourages litigation between the organs of state and encourages intergovernmental dispute resolution without resorting to judicial processes (see Section 40 of the Intergovernmental Relations Act, 2005). In principle, the PP is free to litigate against any state institution and, in fact, other state institutions, including former President Jacob Zuma, have litigated against the PP. However, the broader concept of co-operative *governance* requires the PP to cooperate with all organs of state. One derives this from Section 181(3) of the Constitution, which requires other organs of state to take legislative and other measures to support the PP. Certainly, this requires a reciprocal cooperation. Furthermore, alternative dispute resolution (ADR) mechanisms are inherent in the work of the Ombudsman, and the PP (Public Protector, 2017: 6). For instance, Delevoye (2009), the erstwhile French Ombudsman, argued that the mediation approach is about consensus-orientation to governance, as legal judgments have a tendency to exacerbate disputes, while mediation bridges differences and ensures win-win outcomes.

The intergovernmental relations framework in South Africa serves a useful purpose of promoting co-operative governance and the avoidance of litigious relationships. It can be deduced that while it is true that the PP is not part of a *co-operative government*, the spirit and the principle of co-operative governance binds it. If the PP is part of governance (see *Ad Hoc* Committee on the Review of Chapter 9 and Associated Institutions, 2007), how it cannot be part of co-operative governance? The PP is also required to cooperate with other organs of state to achieve good governance. In fact, Section 181(3) of the Constitution binds other organs of state to support the PP in his/her work through legislative and other measures. This suggests the need for cooperation between the PP and all these organs. It would seem, therefore, that the PP may well not be part of *co-operative government* but is part of *co-operative governance*, in the sense that the PP needs to ensure cooperation with all organs of state and other stakeholders to achieve its mandate, but it is not bound by the structural strictures of such cooperation.

Figure 6.2 below illustrates the Governance Framework and the place of the PP
in it:

Figure 6.2: Governance framework in South Africa



Source: Researcher's own design

6.4 Good governance as a normative function of the Public Protector

Good governance can be theorised or conceptualised as the pursuit, strengthening and supporting of constitutional democracy in South Africa, through a collaborative approach to governing, with government coordinating the interface between and within itself, other organs of state, communities, the private sector, the non-governmental sector and other stakeholders in a manner that is participatory, consensus-orientated, accountable, transparent, responsive, effective and efficient, equitable and inclusive, and based on the rule of law. Good governance counteracts *bad governance*, which involves the inculcation of vices such as human rights abuses, maladministration, corruption and poor service delivery, all of which are the antitheses of constitutional democracy. Good governance promotes the importance of regulatory institutions (*corps intermediaires*) with a mandate to monitor, evaluate and regulate compliance with its standards (Fransen and LeBaron, 2018: 1).

Section 181 establishes Chapter 9 institutions, as *corps intermediaires*, to protect and strengthen constitutional democracy. The PP is one such an institution. While the mandate of promoting good governance is not mentioned in the Constitution and the Public Protector Act, and given the definition of good governance preferred in this study, good governance is an instrument through which the PP protects and strengthens constitutional democracy. In fact, on its website the PP defines its vision as “an effective and trusted constitutional institution that remedies administrative injustices and promotes *good governance* in state affairs”²³ and its purpose as “a catalyst for change in pursuit of *good governance*.”²⁴ Its core principles are presented as the pursuit of accountability, integrity, responsiveness, justice and *good governance*; while its values are presented as Ubuntu, impartiality, transparency, efficiency, professionalism and redress.²⁵ These principles are consistent with the objectives of PAJA of fostering efficient administration and good governance and creating culture of accountability, openness and transparency in the public administration or in the exercise of public power or the performance of a public function in order to give effect to the right to just administrative action. Furthermore, the core principles and values of the PP align with the characteristics of good

²³ <http://www.pprotect.org/?q=content/our-vision>

²⁴ <http://www.pprotect.org/?q=content/our-purpose>

²⁵ <http://www.pprotect.org/?q=content/our-principles-and-values>

governance as developed by UNESCAP in 2009, which has become the universal definition of good governance.

The PP annually observes Good Governance Week through seminars in all nine provinces (South African Government, 2014). When the PP investigates complaints, either on receipt of the complaints or on its own initiative, and/or recommends or issues a remedial action, which is a method through which it promotes good governance, it strengthens constitutional democracy.

It has been demonstrated that good governance is the normative function of the PP. This includes fighting vices such as human rights abuses, maladministration, corruption and poor service delivery. In Chapter 3 (par. 3.6, page 140), it was argued that the Ombudsman should be given a comprehensive mandate against corruption. The most important advantage of the PP in the fight against corruption is however that it is independent and makes binding findings and decisions, unlike executive organs that are not similarly endowed with the efficient power to resolve allegations of corruption promptly. For instance, the Hawks and the NPA must, after investigating corruption, place cases before the criminal courts for verdict and sanction. By their nature, criminal prosecutions are time-consuming and laden with procedural and evidentiary problems.

The PP is not burdened with such difficulties and its processes can be efficient and effective in holding public officials accountable. The PP is best suited to handle incidents of corruption involving “dishonesty or improper dealing with respect to public money”, “improper enrichment”, and the “receipt of improper advantage”²⁶. Some of these incidents may be unethical but not illegal; hence, criminal prosecution may not be an effective solution; but the remedial action of the PP may provide satisfactory redress in such situations.

The literature is replete with arguments in favour of the role of the Ombudsman in promoting good governance. In Chapter 3 (see par. 3.6, page 138-146), the role and powers of the PP in South Africa were reviewed. If these powers are evaluated, one sees that the essence of the role and powers of the PP is to promote good governance.

²⁶ <http://www.pprotect.org/?q=content/what-we-can-help>

As discussed in Chapter 5 (par. 5.3, page 205), the PP does not have the power of prosecution, unlike the Swedish Ombudsman and CHRAGG of Tanzania. The PP's fight against corruption, for instance, is not necessarily aimed at putting culprits in jail, although he/she may refer cases to the NPA for its decision to prosecute or not (see Section 6(4)(c)(i) of the Public Protector Act, 1994). The essence of the PP's investigative powers is to support constitutional democracy and promote good governance, mainly through remedial action and/or mediation.

This lack of power of prosecution is probably one of the reasons that some commentators suggested that the PP's role in fighting corruption is only complementary. For instance, Pienaar (2000) and CASAC (n.d.: 15) are of the opinion that the PP only plays a complementary role in the fight against corruption. But corruption is an antithesis of good governance' hence, the PP has a key role to play in combatting it. The PP has been a bulwark against corruption, probably the most successful in the last eight years or so, as already demonstrated through the discussion of reports such as *When Governance and Ethics Fail, Derailed, Secure in Comfort and State of Capture*.

The power of the PP in the fight against impropriety, maladministration, corruption and unethical conduct lies in its binding remedial action. The fact that the decision of an unelected body, which the PP is, that exists outside the *trias politica* is binding understandably brings the question of counter-majoritarian challenge to the fore. This counter-majoritarian challenge occurs when the decision of the elected majority is set aside by an unelected *corps intermediaires* (Daniels and Brickhill, 2006: 377). This has been the primary reason why the binding effect of the remedial action of the PP has been a subject of litigation and political controversy. However, the legitimacy of the PP to question and set aside unlawful or unethical conduct in the affairs of state is bestowed by the legitimate constitution, itself a mechanism to check the abuse of power by the elected majority. Unchecked, unfettered and unassailable majority rule may result in majoritarian tyranny. This is especially so in the case of a one-party dominant democracy like South Africa, where the governing party is extremely dominant and its public representatives are expected to toe the party line. In South Africa's dispensation, the public representatives serve the party interests rather than the public interests – it is *partyocracy* (see Mangu, 2003: 44), not democracy. Two examples of this come to mind: firstly, the second-guessing of the

PP in which the ANC majority in the National Assembly rammed through the report that exonerated the former President from any responsibility with regard to the Nkandla non-security upgrades; therefore, effectively second-guessing the PP report that held the President accountable (see National Assembly, 2015: 2021). Secondly, the ANC insisted that its MPs toe the party line in a motion of no confidence tabled by the opposition parties, instead of allowing them to vote in accordance with their moral conscience as required by their oaths of office (Maharaj, 2017). Both these examples were about the governing party refusing to hold its President accountable in the face of various allegations of unethical conduct by him and enforcing its stance through voting along party lines. This indicates the importance of counter-majoritarian checks and balances to restore the democratic dividend in the face of majoritarian domination. The PP is one such institution created to check the majoritarian abuse of power.

The Constitutional Court in the matter of *Economic Freedom Fighters v the Speaker of the National Assembly* provided jurisprudential clarity about the status and powers of the PP and clarified that the remedial action of the PP was binding, unless reviewed by the competent court of law. Binding remedial action is the tool through which the PP checks the majoritarian abuse of power; therefore, vetoing the political desires of the elected majority. Remedial action is discussed later in this chapter under Comparative Analysis, but in another context.

The evaluation of the remedial action of the PP suggests that its essence is that it is not only an effectiveness tool, but it is also an instrument for enforcing public accountability, transparency and openness, and the rule of law. Below is an evaluation of the role of the PP in these areas:

- **Public accountability**

One result of the PP's remedial action is **public accountability**. Thornhill (2011) refers to two reports, namely *Against the rules*, issued on 22 February 2011, relating to the leasing of South African Police Service buildings and the *Report on the breach of Executive Code by the Minister of Co-operative Governance and Traditional Affairs*, both of which dealt with impropriety, maladministration and corruption. In the aftermath of both reports, there were consequences. The National Commissioner of Police was subjected to a disciplinary inquiry and was

later dismissed and the Minister of Co-operative Governance and Traditional Affairs was relieved of his post. In this sense, public accountability was fostered.

- **Transparency and openness**

Through its reports, the PP also fosters **transparency and openness**. For instance, the *State of Capture Report* revealed information about the allegations of state capture, which were hidden from the public eye. The publication of PP reports in itself is an exercise in transparency, openness, access to information and accountability. The publication of these reports is required by the Constitution and Section 2(A) of the Public Protector Act, 1994, which requires that every report of the PP be made public, unless exceptional circumstances in the opinion of the PP, such as:

- (i) endangering the security of the citizens;
- (ii) prejudicing any other investigation or pending investigation;
- (iii) disturbing public order or undermining the public peace or security of the country;
- (iv) prejudice to the national interests of the Republic; and
- (v) the report would have a bearing on the effective functioning of the Office of the PP.

- **The Rule of Law**

The **Rule of Law** is another value of good governance that the PP promotes through its remedial action. Some of the reports of the PP have demonstrated this principle; for example, the investigations involving the President have demonstrated the principle that all are equal before the law, irrespective of rank and status in society. The *Secure in Comfort* report spawned the Judicial Inquiry into State Capture and several parliamentary inquiries. These include the Eskom, Transnet and Denel inquiries (Eberhard and Godinho, 2017).

The remedial action of the PP must be logical and rationally related to the matter being investigated. The evaluation of the *ABSA v Public Protector* case in which the original complaint was never about the entrenched powers of the South African Reserve Bank (SARB), but the remedial action was about the powers of SARB, is a case in point. The court could not comprehend the logic and rationality for the

remedial action. This then called into question the correctness and legality of the remedial action (see *Absa Bank Limited and Others v Public Protector and Others*; De Vos, 2018).

6.5 The Public Protector and other Chapter 9/10 institutions

The PP shares a mandate to protect and strengthen constitutional democracy with other Chapter 9 institutions. It shares the specific mandate of promoting good governance with the Auditor-General of South Africa (AGSA) and the human rights mandate with the Human Rights Commission of South Africa (SAHRC). It further shares a mandate of good governance with the Public Service Commission (PSC). The complementary mandates of these institutions are compared below:

- **The Public Protector and the AGSA**

In Chapter 2 (see the discussion under par. 2.9, page 72), the similarities and dissimilarities of the functions of the Ombudsman and audit bodies were discussed. Manning and Gallinger (1999) indicate that the main difference between the Ombudsman and the audit bodies is that the Ombudsman is a complaints institution, while the audit bodies audit public bodies in accordance with set audit criteria. However, there are Ombudsmen, like the Control Yuan institution in the Republic of China (Taiwan), who also perform an audit function (Gunning, 1996). Therefore, there are exceptions to the general rule that distinguish between the Ombudsman and audit bodies. In the next section, an evaluation will be provided of the differentiation between the PP and the AGSA.

The basic similarity between the PP and the AG is that although they both control the public sector; they exist outside it. They are both Chapter 9 institutions, charged with the mandate to protect and strengthen constitutional democracy. The Constitution and the law assure their independence. However, the financial independence of AGSA is more pronounced as it generates an income by charging government institutions for the audits it conducts.²⁷ The audit fees are set and charged as provided for in Section 23 of the Public Audit Act. On the other hand, the services of the PP are free of charge, as provided for in Section 2 of the Public Protector Act.

²⁷ <https://www.agsa.co.za/AboutUs/OurVision.aspx>

The two institutions are both accountable to the National Assembly (NA). The AG reports to the NA through a special committee, called the Standing Committee on the Auditor-General (SCoAG), which was established as an oversight mechanism envisaged in Section 10(3) of the Public Audit Act and Section 55(2)(ii) of the Constitution. SCoAG oversees the performance of AGSA, as well as ensures its independence, impartiality, dignity and effectiveness.²⁸ The PP does not have this special mechanism and reports to the Justice and Correctional Services Committee in the same fashion as the Department of Justice and Correctional Services.

The PP and the AG are both the *institution* and the *person*, appointed in terms of Section 193 of the Constitution. In other words, they are monocratic-type of institutions. The incumbents of the two offices serve for non-renewable terms (seven years in the case of the PP, and five to ten years in the case of the AG – the President determines the term of the AG on appointment in terms of Section 6 of the Public Audit Act, 2004). They can be dismissed in terms of Section 194, with support of a two-thirds majority of the NA, unlike the members of collective-type institutions, who can be removed by a simple majority (Section 194(2) of the Constitution).

The PP is accessible directly to the public and its services are free of charge. The AG is not a complaints' body and is generally inaccessible by the public. However, public officials can approach the PP and AG to make protected disclosures as whistle-blowers in terms of the Protected Disclosures Act, 2006 (as amended). However, the approach to handling this could be different. The PP might handle the whistle-blower as a complainant and follow its complaints' handling process to resolve the matter. The AG may decide to deal with the matter in the course of its normal auditing process. The NDP has identified as a weakness the absence of a public body tasked with public awareness, and advisory and monitoring functions relating to whistle-blowing (NPC, 2011: 405). Of all the Chapter 9 institutions and the PSC, the PP is best suited as a public body for comprehensive promotion of a culture of whistle blowing in the fight against corruption.

²⁸ . <https://www.agsa.co.za/AboutUs/OurVision.aspx>

The AGSA is a mandatory audit authority and it audits all government departments at national and provincial levels, as well as all municipalities. In this sense, it enables oversight, accountability and good governance (Parliamentary Monitoring Group, 2014). The AGSA and the PP play complementary roles in terms of promoting good governance and public accountability. In fact, we have seen these two institutions collaborate to present together to the Joint Committee on Ethics and Members' Interests on their respective roles in promoting ethics in the public sector (PMG, 2013). This collaboration also manifested itself when the two institutions conducted joint, but delineated, investigations into the affairs of the Commission on Gender Equality (Parliamentary Monitoring Group, 2010).

However, while the two institutions share a similar mandate in terms of promoting good governance and accountability, they are conceptually different. The AGSA is the supreme audit institution, with a limited mandate to produce and publish annual audit reports containing a conclusion about financial statements and financial position, and compliance and adherence to predetermined objectives by the auditee, namely a department, municipality or public entity (Parliamentary Monitoring Group, 2014). It does nothing more than that, although its findings are persuasive and are generally followed up through relevant legislatures' committees to ensure compliance. Legislative review is afoot to change this and enable the AGSA to take remedial action as well (SCoAG, 2018).

The PP, on the other hand, is a "supreme administrative oversight body"²⁹, who has much more wider powers of investigation and enforcement of its remedial action. The PP, like the AGSA, has control over organs of state. Its focus, however, is on the resolution of complaints of improper prejudice suffered due to, among other things, the "abuse of power; unfair, discourteous or other improper conduct; undue delay; decisions taken by the authorities; maladministration; dishonesty or improper dealing with respect to public money; improper enrichment; and receipt of improper advantage"³⁰. The findings of the PP are binding and can be reviewed only by the High Court.

The PP's remedial action is binding on the public institution it investigated, but the recommendations of the AGSA only have persuasive power to the auditee.

²⁹ <http://www.pprotect.org/?q=content/our-mandate>

³⁰ <http://www.pprotect.org/?q=content/what-we-can-help>

Usually the relevant parliamentary, provincial legislatures and municipal councils' committees take up the reports of the AG and use them to hold public officials to account. However, this mechanism is not always effective, as evidenced by the 2016/17 municipal audit report, which showed further deterioration of local governance and administration, and that in most municipalities there was no adequate consequence management (Makwetu, 2018: 5). With the envisaged amendment to the Public Audit Act, 2004, the AG will also have the powers of investigation and remedial action; thus, it will be able to refer cases for criminal investigation (Makwetu, 2018: 10). The PP already has this power of referring cases for criminal prosecution in terms of Section 6 of the Public Protector Act, 1994. The PP, however, does not report to the provincial and municipal legislatures.

In a nutshell, it can be argued, that the PP focuses on good governance, i.e. counteracting maladministration and the AGSA focuses on corporate governance, i.e. compliance with financial prescripts.

The PP and the SAHRC

Many hybrid Ombudsman around the world have a human rights mandate (Bishop and Woolman, 2013: 24A-3; Frahm, 2013: 14). In fact, the Commission for Human Rights and Governance of Tanzania is the official Ombudsman of that country (African Ombudsman Research Centre, 2014:53). However, in South Africa, the constitutional founders decided to separate the human rights function from the work of the PP. The SAHRC, like the PP, is a Chapter 9 institution whose independence is assured in terms of Section 181(2) of the Constitution, and is appointed by the President on recommendation of the NA. A simple majority, as opposed to the requirement of a two-thirds majority to remove the PP or the AG, can remove its members. However, Section 3 of the South African Human Rights Commission Act, 1994 has increased the removal majority to at least 75% of members of the NA present and voting, thereby contradicting the Constitution.

Like the PP, the SAHRC is a national institution along the lines of the UN's Paris Principles (Resolution 48/134 of 1993), established to promote constitutional democracy and good governance through the promotion and protection of human

rights by addressing and redressing human rights violations; monitoring and assessing the observance of human rights; raising awareness of human rights issues; and educating and training people on human rights issues (South African History Online, 2017). While the PP is a monocratic institution, the SAHRC is a collective-type commission, consisting of a mixture of full-time and part-time commissioners, headed by the Chairperson appointed in terms of the South African Human Rights Commission Act, 54 of 1994. The term of office is fixed by the President, in terms of Section 3 of the SAHRC Act.

The PP has not been expressly assigned the human rights mandate. However, as Madonsela (2011) has indicated, the PP has a role to play in the protection and promotion of human rights because the mandates of human rights and good governance are inextricably connected – one cannot exist neatly outside the other. In fact, the PP has previously investigated matters of human rights violations, such as Sarafina II; the then Deputy President Jacob Zuma's complaint against the NDPP regarding the latter's statement that Zuma had a *prima facie* case to answer to, but would not be prosecuted; and an investigation into the homophobic statements made by the then Premier of the Western Cape, Peter Marais (Bishop and Woolman, 2013: 24A-30).

Given the importance of access to information to exercising human rights, these two Chapter 9 institutions have been given responsibilities for the regulation of access to information in terms of the Access to Information Act (PAIA). With the establishment of the Information Regulator in terms of Section 39 of the Protection of Personal Information Act, 4 of 2013, there is a third independent body, albeit not a constitutional body, which functions in the area of the regulation of access to information.

Therefore, these two bodies have complementary and sometimes overlapping mandates, especially on human rights issues and access to information. This complementarity of mandates can also be seen in their focus on housing. For example, in 2012 the PP began a systemic investigation into inadequate housing (PP, 2012), while the SAHRC had a similar programme in 2015, as it realised that

access to housing facilitates other rights, such as public participation, access to information, human dignity and equality.³¹

Vices that the PP is responsible for investigating and providing remedial action thereto, such as maladministration and corruption, often affect human rights. For instance, corruption can divert much-needed resources away from education needs, thereby affecting children's right to education. Once people's human rights are violated, the SAHRC will become involved. The two Chapter 9 institutions have complementing and overlapping mandates, but do not compete with each other. The words of Adv. Madonsela are instructive in this regard, "The Public Protector as Ombudsman institution does not compete with the Human Rights Commission in the protection of human rights" (Madonsela, 2011).

The SAHRC, like the PP, has the power to take remedial action and that remedial action is binding. The powers of the SAHRC are set out in Section 184(2) of the Constitution as follows:

- (i) to investigate and report on the observance of human rights;
- (ii) to take steps to ensure appropriate redress where human rights have been violated;
- (iii) to conduct research; and
- (iv) to educate people on human rights issues.

The wording of Section 184(2)(ii), which grants the SAHRC the power of redress where human rights have been violated, is written in peremptory terms in a similar fashion to the wording of Section 182(1)(c) of the Constitution, which provides for the remedial powers of the PP. There is no reason why the redress powers of the SAHRC cannot be interpreted as binding in a similar fashion as the remedial powers of the PP. However, thus far the Commission has preferred to issue reports of its investigations with recommendations, followed up by monitoring of the recommendations to ensure compliance; for example, the report of the Commission on Water and Sanitation Rights, issued in 2014 (SAHRC, 2014). This is the approach followed by many Ombudsman institutions internationally.

³¹ <https://www.sahrc.org.za/index.php/focus-areas/access-to-justice-adequate-housing/access-to-adequate-housing>

The other approach favoured by the Commission in fulfilling its mandate is litigation. In the *Residents of Arthurstone Village v Amashagana Tribal Authority and Others* the North Gauteng High Court cemented the justiciability of socio-economic rights and found in favour of the residents who were victims of evictions from the Arthurstone Farm in Bushbuckridge, Mpumalanga Province. The eviction order and the eviction process were carried out, contrary to the Prevention of Illegal Eviction from Unlawful Occupation of Land Act and Section 26(3) of the Constitution. The Commission litigated on behalf of the residents.

The other litigation was in the Seshego Equality Court (Limpopo). The case involved the conduct of a school that related to its humiliating treatment and harassment of a learner based on the learner's gender identity, which created a hostile environment for the learner. The Court ordered the Department of Education to pay compensation and to issue a written apology; the Principal was also ordered to undergo a gender sensitivity programme (SAHRC, 2017).

Furthermore, the Commission intervened as *amicus curiae* in the *University of Stellenbosch Legal Aid Clinic and Others v Minister of Justice and Correctional Services and Others*, which dealt with the need for judicial oversight in the granting of emoluments attachment orders. In this case, the court struck down Section 65J of the Magistrates' Court Act 32 of 1944, which bound the employers of the judgment debtors to deduct and pay the instalments to the judgment creditor or his attorney. This usually happened without the judgment debtor knowing and was issued by the clerks of the court.

The PP, on the other hand, uses her powers of remedial action to fulfil her Office's mandate. The researcher hereby argues that the PP, in principle, may also use the courts to litigate in the public interest (see Section 38 of the Constitution).

The PP and the Public Service Commission

The similarity between the PP and the Public Service Commission (PSC) is that they are both independent and impartial constitutional institutions, with a mandate to ensure effective and efficient public administration and promote high standards of professional ethics in the public sector. The PSC is not a Chapter 9 institution and its scope and remit are limited to the public service (Section 196(1) of the

Constitution), and its independence is not as entrenched as that of the PP; for example, PSC commissioners may be removed by a simple majority.

The PSC was established to oversee the promotion of the values of Public Administration in Section 195 of the Constitution and has powers to investigate and evaluate any personnel and public administration practice and employee grievances, and to recommend appropriate remedies (Chapter 10 of the Constitution). The PSC fashions itself as a “custodian of good governance” and a “champion of public service excellence in democratic governance” in South Africa.³² The *Certification judgment* underlies the mandate of the PSC to promote high standards of ethical values in the Public Service, contrasting its mandate with that of the PP and the AG, whose independence required stringent protection in the Constitution. The Constitutional Court noted that the functions of the PSC, which are of a routine advisory nature, are materially different from those of the PP and the AG in that the PP is expected to investigate sensitive and potentially embarrassing affairs of government, while the AG’s role is to ensure that there is openness, accountability and propriety in the use of public funds (Constitutional Court, 1996: 40).

Therefore, while the Constitutional Court (1996: 40) noted the importance of the supervisory and watchdog role of the PSC, it indicates that this role differs from the roles of the PP and AG who perform highly sensitive functions, which necessitate that their independence and impartiality be set beyond question, and needed to be protected by rigorous provisions in the Constitution. The PSC’s main function is to uphold “high standard of professional ethics in the public service” (Section 196(2) of the Constitution). While this function is important, it cannot be likened to the PP or the AG.

The PP is a monocratic institution, appointed by the President on recommendation of the legislature, while the PSC is a collective-type commission consisting of 14 commissioners: five nominated by the NA and one commissioner for each province nominated by the Premier after recommendation by the committee of the provincial legislature (Section 196(7-8) of the Constitution). The PP’s term is non-renewable (see Section 183 of the Constitution), while the

³² <http://www.psc.gov.za/about/mission.asp>

PSC's term is five years and can be renewed once (see Section 196(10) of the Constitution).

In the final analysis, the mandates and functions of the PP and the PSC overlap. The only distinguishing factor is that the PSC can only monitor the public service and recommend corrective action, while the PP can investigate maladministration in the broader state affairs and public administration, and can enforce corrective action.

6.6 The PP and other Ombudsman-like independent investigative bodies in South Africa

Within the Governance Framework in South Africa, there are other executive Ombudsman-like investigative bodies who are not national institutions within the meaning of the Paris Principles (Resolution 48/134 of 1993). Below is a discussion of these bodies, and how they overlap or co-exist with the PP.

- **Special Investigative Unit**

The Special Investigative Unit (SIU) is established in terms of Section 2 of the Special Investigative Unit and Tribunals Act, 1996 by the President in terms of a proclamation in the Gazette. The wording of the Section suggests that the President has the discretion to establish or not establish the SIU; further, the President may establish more than one SIU. Section 2(2) indicates that the President may withdraw or amend the proclamation that establishes the SIU at any time. It currently exists as an independent statutory body with a mandate to investigate and report on government corruption, malpractice and maladministration (SIU, 2017: 6). The President may exercise the powers under Section 2(1) of the SIU Act on the grounds of any alleged -

- Serious maladministration in connection with the affairs of any state institution.
- Improper or unlawful conduct by employees of any state institution.
- Unlawful appropriation or expenditure of public money or property.
- Any unlawful, irregular or unapproved acquisitive act, transaction, measure or practice that has a bearing on state property.

In a nutshell, the President may by proclamation order the SIU to investigate the above-mentioned matters as enunciated in Section 2(2) of the Act. The SIU cannot initiate investigations by receipt of complaints, but may investigate only by means of proclamation by the President. This calls to question its independence.

According to the SIU Interim Report of 2017, the SIU sees itself as offering a unique and integrated service focusing on:

- Conducting forensic audits and investigations.
- Instituting legal action, such as civil, criminal and disciplinary or other remedial action. Recommending and facilitating the implementation of improved systems.
- Intentional or negligent loss of public money or damage to public property.
- Corruption in connection with the affairs of any state institution.
- Unlawful or improper conduct by any person who has caused or may cause serious harm to the interest of the public.

The SIU, in terms of the Section, may investigate matters listed therein where they fall within the competence of the Province only after the President has consulted with the Premier concerned. The wording of the Section does not suggest that the President needs agreement or permission of the Premier, but merely requires consultation with the latter.

By law the SIU reports twice a year directly both to the President and the Parliament on its activities (SIU, 2017: 6). The reporting to the President is indicative of the executive nature of this institution, while reporting to the Parliament is a norm for state entities. The significant advantage of the SIU is that it has the power to institute civil proceedings to recover the losses to the state, in special tribunals or high courts (Section 5 of the SIU Act).

Therefore, arguably, the functions of the SIU are a duplication of the functions of the PP. In fact, there have been many instances where both institutions dealt with the same investigations. The following are investigations of the same matters conducted separately by the PP and the SIU:

- Allegations of the irregular and improper installation of non-security upgrades at President Zuma’s residence in Nkandla (PP, 2014; Proclamation R59 of 20 December 2013);
- Allegations of impropriety in leasing police offices in Durban and Pretoria (PP, 2011; Proclamations R42 of 10 August 2010 and R73 of 22 December 2011);
- Allegations of wrongdoings by the former COO of the SABC, Hlaudi Motsoeneng (PP, 2013; Proclamation 58 of 29 Oct. 2010); and
- Allegations of impropriety by the former Minister of Communications, Dina Pule, regarding the ICT Indaba (PP, 2013; Proclamation 21 of 23 March 2012).

Another example of duplication between the PP and SIU is the investigation into the irregularities at the SABC, in terms of the proclamation issued by the former President in 2017. The findings of the SIU confirmed the PP’s findings of 2014 that Hlaudi Motsoeneng irregularly received a R11 million bonus for the deal with the Multichoice relating to the SABC archives (Thamm, 2018).

Below is a table of the differences/similarities between the SIU and the PP.

TABLE 6.1: Differences/similarities between the SIU and the PP

SIU	PP
<p>Recover and prevent financial losses to the state resulting from incidents of corruption, fraud and maladministration through:</p> <ul style="list-style-type: none"> ▪ Investigating serious malpractices, maladministration and corruption in the state administration. ▪ Take appropriate and effective civil action against wrongdoers. ▪ Bringing offenders to account, 	<p>To support and strengthen constitutional democracy by:</p> <ul style="list-style-type: none"> ▪ Investigating and redressing improper and prejudicial conduct and maladministration and abuse of power in state affairs. ▪ Reporting on the conduct and take appropriate remedial action. The remedial action is binding. ▪ May refer evidence of criminal conduct for criminal prosecutions.

<p>through referral for disciplinary proceedings and criminal prosecutions.</p>	
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Source: SIU Act, 1996; PP Act, 1994 and Constitution of RSA, 1996

There are no fundamental differences in the mandate of the SIU and the PP, except that the SIU enforces its findings through civil litigation and recommendations of disciplinary action, while the remedial action of the PP is directly binding on everyone, unless reviewed by the competent court.

- **PP and other Executive Ombudsman and/or similar bodies**

Within the public sector, a further distinction can be made between a general and specific Ombudsman. The former deals with complaints of the entire administration, while the latter has a specific jurisdiction, for example the Ombudsman for Gender Equality in Finland (Van Roosbroek, 2006: 1-2).

In South Africa, the Ombudsman for Health Services, the Information Regulator³³, the Military Ombudsman, and the Independent Police Investigative Directorate (IPID), including the Ombudsman for the City of Johannesburg, are examples of a specific Ombudsman operating within the public sector. These are executive institutions, reporting to the relevant executive authority and NA provided for in their respective statutes, while the PP is a general Ombudsman with an entire public administration jurisdiction, whose powers and independence are entrenched in the Constitution.

A specific Ombudsman is created in terms of the various statutes and performs specialist investigative functions. It is best described as an executive Ombudsman institution, with a specific mandate and powers of recommendation intended to resolve complaints regarding that specific organisation and its employees (Smith and Howard, 2015). The PP, on the other hand, is a creation of the Constitution with a general mandate to redress complaints that arise from

³³ In some jurisdictions the Ombudsman is also an Information Regulator i.e. the Ombudsman of the EU, Emily O'Reilly, was the Ombudsman and Information Commissioner in Ireland as well as the Commissioner for Environmental Information. See <https://www.ombudsman.europa.eu/en/atyourservice/about-eo.faces>

state affairs and public administration, in all spheres of government (see Section 182 of the Constitution).

The conceptual similarity between the PP and these other bodies is that they are organs of state as defined in Section 239 in that they exercise a public power or perform a public function in terms of a legislation, with the PP also exercising a constitutional power. To this effect, Justice Prinsloo supposed that the PP, performing her functions in terms of the Constitution and the Public Protector Act, can properly be described as an organ of state in the sense of Section 239 (*Minister of Home Affairs v the PP of South Africa*, 2016).

The conceptual difference between the PP and other investigative bodies is that these investigative bodies are not national institutions within the meaning of the Paris Principles (Resolution 48/134 of 1993), which requires that a national institution such as the Office of the Ombudsman must be given as broad a mandate as possible, codified in the constitutional and/or legislative text with specification of its composition and competence. The mandate of the PP is broad and the mandate of the other bodies is specific.

These specific Ombudsman and similar investigative bodies are important and can serve as additional measures of accountability. We have seen the importance of the Health Ombudsman during the Life Esidemeni debacle, in which the Gauteng Health Department ineffectively dealt with the transfer of mentally ill patients from Life Esidemeni to various unsuitable and unlicensed institutions. The Health Ombudsman was the first to hold the officials accountable, and recommended the much-publicised arbitration hearings chaired by the retired Deputy Chief Justice Moseneke (see generally Moseneke, 2018).

6.7 The institutional governance and capacity of the PP

The PP cannot realise its constitutional purpose if it is not capacitated with adequate financial and human resources. Without these resources, the institution cannot be effective. In this section of the study, the researcher considers two important aspects of the institutional capacity of the PP: the financial and human resources, and an analysis of its effectiveness in terms of enforcement or implementation of its remedial action.

- **Financial and human resources**

The funding model for the Office of the PP is less than ideal, as the Office is funded through the Department of Justice and Correctional Services, which hinders the way it motivates for its needs. This arrangement does not augur well for the independence of the institution (Musuva, 2009: 17). Furthermore, the Parliamentary Portfolio Committee was not supportive of the requests of the previous PP, Adv. Madonsela, for a budgetary increase. In fact, the requests for funding have often been refused (Gqirana, 2015), with the Justice Minister and Portfolio Committee arguing that the PP must prioritise the cases she investigates, and refer other cases to other bodies, such as the SAHRC and PSC, rather than seek more resources to do more investigations (Ndenze and Germaner, 2014).

As early as 1999, the Constitutional Court grappled with the question of the budgetary autonomy of the Chapter 9 institutions. In *New National Party v The Government of the Republic of South Africa and others* the Constitutional Court held that there were two conditions that needed to be met to assure the independence of these institutions. Firstly, the institution must have sufficient funding and secondly, the funds must be appropriated directly by the Parliament. However, both these conditions are still contentious with regard to the PP. In 2017, the PP requested its budget to be increased from R626 million to R1.2 billion in order to perform its mandate as its current budget was inadequate to meet its operational needs (Ferreira, 2017). In the Estina dairy investigation report, the PP indicated that she could not follow up on some key aspects of the investigation due to a lack of capacity and financial constraints (PP, 2018: 8-10).

With regard to staffing, the current PP during her Annual Report for 2016/17, indicated to the Portfolio Committee on Justice and Correctional Services that her office needed R846 million over the medium term to fully fund the organisational structure. The Office had a staff establishment of 707 posts, with only 392 (just over half) of them funded in the 2017/18 financial year. The Office further needed additional funds of R26.9 million for the support and maintenance of the case management system in the 2018 Medium Term Expenditure Framework (MTEF) (Parliamentary Communications Service, 2017).

Certainly, from a financial and human resources point of view, the Office of the PP is chronically under-funded and under-staffed. If this state of affairs continues unabated, the Office cannot be effective in terms of meeting its constitutional mandate of promoting good governance. As a consequence of this, the PP in 2016/17 only completed 10 787 cases out of 16 397 cases lodged, although it managed to reduce the backlog of cases older than two years by 61%. This left the Office with a huge backlog of 6000 cases. In its Strategic Plan 2017-2022, the Office indicated that its approved organisational structure had never been fully funded, which impeded its capacity to thoroughly investigate and timeously finalise cases (Public Protector, 2017: 21).

Despite these resources' challenges, the Office has a national footprint of nine provincial offices and regional offices, making it relatively accessible. The researcher suggests that the Office needs to be represented at municipal level, like IEC, with each municipality having at least an outreach capacity, considering that in 2016/17 the Office was able to conduct only 803 community outreach clinics across the nine provinces where the public was educated on the work of the Office of the PP (Parliamentary Communications Service, 2017). Expanding the footprint of the Office to municipal level will achieve the objective of the PP to "expand into the deep rural areas to raise awareness about the services of the office by engaging people in their own languages so as to broaden access" (PP, 2017: 8).

- **Effectiveness in enforcing and monitoring implementation of its remedial action**

In the preface of the Office's Strategic Plan 2017-2022, Adv. Busisiwe Mkhwebane reported that based on their monitoring of the implementation of the 55 reports they had issued, only seven had been fully implemented. The remainder had either been partially implemented or implementation was in progress, and the Office achieved only 33% of its set targets by the end of the third quarter in 2016/17 (PP, 2017: 6).

This report points to the reality that the PP is not effective in enforcing and monitoring the implementation of its remedial actions. The issuing of reports does not, in itself, improve good governance. The remedial action of the PP has to be

implemented for it to have the effect of achieving its constitutional mandate. Despite this signification of ineffectual monitoring and implementation of the remedial actions of the PP, it can be stated that at least the following four reports, namely *When Governance and Ethics Fail*, the *Derailed*, *Secure in Comfort* and *State of Capture*, particularly the court cases associated with them, have been effective in promoting recognition of the role of the PP in enforcing good governance and accountability in South Africa (Law Society of SA, 2016: 8).

When Governance and Ethics Fail (2013) is the report on the governance and ethical failures at the SABC. The report sought to hold the former Chief Operating Officer (COO), Hlaudi Motsoeneng, accountable for various acts of financial mismanagement and abuse of power, which included the unfair dismissals of employees of the SABC. Part of the remedial action of the PP was that the former COO must be subjected to a disciplinary hearing. The then Minister of Communications, Faith Muthambi, and the then Board of Directors of the SABC resisted the findings and actually second-guessed the report with their own-commissioned report, the so-called *Mchunu* report (Sapa, 2014).

The lasting effect of this report is that the litigations that followed it have assisted to clarify the status of the remedial action of the PP (see *DA v SABC*; *SABC v DA*). It will not be an exaggeration to suggest that the report inspired the parliamentary inquiry into the affairs of the SABC, which process eventually restored good corporate governance at the public broadcaster, including the establishment of a new Board of Directors, redressing irregular tender processes, and addressing irregular appointments and dismissals (Parliamentary Monitoring, 2017). As a result, there are measures afoot at the SABC geared at ensuring that the SABC is a better-governed state-owned enterprise (SABC, 2018: 15).

Derailed is a report of the PP, which dealt with the “complaints that Mr. Montana, then Group Chief Executive Officer (GCEO) of PRASA, and/or PRASA, improperly awarded tenders; appointed service providers without following proper tender processes and allowed maladministration, corruption, conflict of interest and financial mismanagement, in the procurement of goods and services and managed human resources irregularly, including nepotism and the improper handling of whistle-blowers” (PP, 2015). The remedial action taken was stringent,

as it required the Transport Minister and the PRASA Board to institute disciplinary action against officials who committed acts of maladministration and improper conduct, as well as further recommended an overhaul of internal systems, relating to tenders and recruitment, to prevent the recurrence of the malfeasance. The report further recommended that the National Treasury should conduct a forensic investigation into all contracts valued at more than R10-million since 2012 (PP, 2015). The National Treasury commissioned Phukubje Pierce Masithela Attorneys (PPM) to conduct the forensic investigation, as recommended by the PP. PPM issued this report and recommendations for improvements in PRASA's systems (PPM, 2017). The effectiveness of the report was that the then CEO of PRASA, Lucky Montana, resigned in the aftermath, despite his initial protestations and threats of legally reviewing the report, and the Treasury investigation recommended criminal charges against the then PRASA chairperson, Sfiso Buthelezi. A reconstituted Board under the leadership of Popo Molefe worked with Treasury to implement the findings of the PP. It further implemented other findings of the PP, while the Treasury investigations continued into the 216 contracts of over R10 million. It acted swiftly on corruption, wherever it could be found (#UniteBehind Metrorail Monitoring Project, 2017: 3). Hence, the turnaround plans at PRASA were geared at the restoration of good corporate governance and accountability at the rail parastatal, through effective Board oversight (Public Rail Agency of SA, 2018: 15).

Secure in Comfort (2014) is a report of the PP into the non-security upgrades at the Nkandla residence of the former President, Jacob Zuma. The report signified, arguably more than any other report, the independence and integrity of the Office of the PP during the tenure of Adv. Thuli Madonsela. This seminal report led to political consequences, the effects of which resonate to this day. The report led to a popular opposition campaign that called for the President to 'pay back the money'. In the end, the President was held accountable for paying back a portion of the costs expended at his household. The litigation that followed the ill-fated executive and parliamentary efforts to second-guess the PP findings led to the clarification of the status of the PP within the political milieu (see *EFF v the Speaker of the National Assembly*, 2016).

The *State of Capture* (2016) is a report of the PP into the allegations of state capture. The full implications of the report are yet to be revealed because its main remedial action was the deference of the investigation of this phenomenon of state capture to a judicial commission of inquiry. However, one recognises this report as effective in that it inspired not only the judicial commission of inquiry into state capture, but also a litany of parliamentary inquiries into state capture focusing on state-owned enterprises, such as the Eskom inquiry. The Portfolio Committee on Public Enterprises decided to subpoena former SAA chairperson Dudu Myeni, the Gupta brothers, and the son of former President Jacob Zuma, Duduzane Zuma, to appear before the Eskom Inquiry (Omarjee, 2018). These people failed to honour the inquiry with their attendance, having ignored the summonses to appear. In this regard, the Parliamentary Committee recommended to the Speaker of the National Assembly to institute action against them for failing to honour their invitations to appear before the Inquiry. The Parliamentary Committee further recommended to the Zondo Commission into the allegations of state capture to summons these persons to appear before it (Portfolio Committee on Public Enterprises, 2018: 142).

In the aftermath of this report by the PP, the alleged rogue elements in Eskom's executive management were either pushed out or jumped ship, including the former CEO Brian Molefe, the former CFO Arnold Singh, and head of engineering Matshela Koko. The appointment of a new Eskom Board under the chairmanship of the highly regarded Jabu Mabuza signifies the restoration of good corporate governance at the electricity parastatal (Steyn, 2018).

The Parliamentary Committee on Public Enterprises confirmed the findings of the PP in her *State of Capture* report (Portfolio Committee on Public Enterprises, 2018: 134). It further recommended that its report and all documentary evidence be passed on to the Zondo Commission of Inquiry into the allegations of state capture for further probing (Portfolio Committee on Public Enterprises, 2018: 142). This is another demonstration of the continuing legacy of the *State of Capture* report.

However, despite the effectiveness of these high-level cases (usually on the back of opposition-sponsored and NGO-sponsored litigation to enforce the remedial action),

the PP remains largely ineffectual in enforcing its remedial action after it issued its reports. This was acknowledged by the PP in her foreword to the Strategic Plan 2017 (Public Protector, 2017).

6.8 The normative leadership virtues, values and ethics and the Public Protector

The PP is both a person and an institution. In this part of the study, we focus on the leadership virtues of the *person* that, arguably, can protect or destroy the institutional integrity of the Office. The well-known and controversial cartoonist, Jonathan Shapiro, who goes under the pseudonym Zapiro, has drawn apt but descriptive cartoons of the four PPs to date (see Annexure B). The cartoons suggest that the first PP, Selby Baqwa, saw nothing – represented by his eyes closed with his hands. The second PP, Adv. Lawrence Mushwana heard nothing – represented by his hands closing his ears. The third PP, Adv. Thulisile Madonsela is shown screaming, making everyone aware of her presence, and the fourth one, Adv. Busisiwe Mkhwebane appears out-of-sorts and overwhelmed (Shapiro, 2017).

- **Leadership philosophy and style**

The success of Ombudsman institutions can also be ascribed to the personality and the leadership style of the incumbent Ombudsman (Stuhmcke, 2012: 10-13). Esman (1967: 3) argues that leadership is the single most critical factor in institution building. Effective leadership is the essence of corporate governance in all kinds of institutions as its exercise by a governing body fosters an ethical culture, good performance, effective control and legitimacy (Institute of Directors in Southern Africa, 2016: 11). The truth is that institutional success hinges on the quality of institutional leaders, but the converse is also true – poor leaders can cause their organisations to decline (Meyer, 2017: 7). Therefore, arguably, the Office of the PP has been influenced by the leadership philosophies and styles of its successive incumbents, since the establishment of this institution after the advent of the 1994 democratic dispensation. These leadership philosophies, qualities and styles will be analysed with a view to understand how they fostered the institutional integrity of the Office. However, the argument is made that it was the leadership philosophy and style of Adv. Thulisile Madonsela that raised the public profile of the PP and asserted the institutional integrity of the Office, more

than any other incumbent of the Office (Crous³⁴, 2016). The King IV Report stated that effective leadership is an important characteristic for the success of any institution (Institute of Directors in Southern Africa, 2016). Immediately below we discuss in detail this important characteristic in order to understand its value in assuring institutional integrity.

Burns (2003: 27) approaches the question of the complex definition of leadership by asking a terse question, “Was Adolf Hitler a leader?”. This question seeks to understand whether leadership is a neutral mechanical process or power characteristic available to a Hitler or a Gandhi, or whether it should be defined as a good thing. Burns (2003) proceeds to answer the question by indicating that Hitler ruled his people, but he never led them. In other words, Hitler was not a leader, as his control approach did not encompass standards such as virtue (i.e. sobriety), ethics (i.e. integrity) and values (adherence to principles such as liberty and equality) (Burns, 2003: 29). Therefore, a leader must be virtuous, ethical and oriented to positive values (Caldwell, Hasan and Smith, 2015: 2).

According to Kant’s Supreme Principle of the Doctrine of Virtue, leaders must act in accordance with the maxim of ends that can be generalised as everyone’s universal law, which then justifies the specific duties of right, and of ethics and virtue. The duties of right are narrow and perfect as they clearly forbid certain conduct by a leader, while the duties of ethics and virtue are wide and imperfect as they allow for ample discretion in how those duties may be fulfilled (Johnson and Cureton, n.d.). This is why in virtue ethics the emphasis is on the moral character of the leader. According to the virtue theory, an agent ought to possess certain qualities such as courage, generosity, compassion, integrity and honesty, and this ought to be apparent in the actions of the leader. Therefore, virtue ethics is not about judging *per se* the action or consequence, but considering the person who took the action (Kaptein and Wempe, 2002: 19).

In this sense, leadership can be understood as both a pattern of behaviour and a personal attribute. As a pattern of behaviour, leadership is about the influence of a leader to direct a larger group of people towards the attainment of the desired

³⁴ Article available at <http://www.kr.co.za/blog/knowledge-resources/post/5-reasons-why-thuli-madonsela-is-such-an-extraordinary-leader/> (Accessed on 20 November 2018).

outcomes. As a personal characteristic leadership is about the capacity of the leader to enforce his/her influence on others (Heywood, 2002: 348).

Leadership theorists distinguish between transactional and transformational leadership. Transformational leaders are those leaders with vision and who are able to take people along with them to achieve the set vision (Khoza and Adam, 2005: 51; Heywood, 2007: 377). Transactional leaders, on the other hand, are focused on keeping things the same and are managerial in their approach (Khoza and Adam, 2005: 51; Odumeru and Ifeanyi, 2013: 358). Heywood (2007: 377) asserts that transactional leadership is about playing a hands-on, active and positive role in leading and managing an institution. It must be noted that none of these leadership styles is prescribed as more preferable to the other; it really depends on the personality and management style of an incumbent PP which style to adopt informed by the obtaining situation at that particular time (Odumeru and Ifeanyi, 2013).

However, the virtues that the PP must possess are pretty much settled. The Ombudsman's irreducible traits are independence, impartiality and fairness, and credibility of the review process, and confidentiality (Gottehrer and Hostina, 1998: 1). Therefore, these factors must inform the leadership philosophy and ethics of the PP. Below is an examination of the leadership legacies of the four PPs:

- **Selby Baqwa**

Selby Baqwa, now a Judge of the High Court, was the first PP appointed in 1995 by the then President, Nelson Mandela. He is credited with setting up the Office of the PP and ensuring its accessibility by establishing provincial and regional offices. He is credited by at least one former staffer to have been articulate, urbane, inspiring confidence and have expanded the investigative skills of the staffers, and promoted awareness of the existence of the Office. By April 1996, the Office was so well-known that it received an average of 200 complaints a week (Corruption Watch, 2016a).

His investigations, such as the one against the former Director-General of Home Affairs, Albert Mokoena, who was accused of running his basketball club from the offices of the Department, and the one against the former Premier of Mpumalanga, Ndaweni Mahlangu, who had said it was not wrong for politicians to

lie, were beacons of hope for accountability early on in the life of South Africa's democracy (Corruption Watch, 2016a). Although he was a member of the ANC before his appointment as the first PP, his sense of professional ethics and commitment to clean administration checked whatever inclination he might have had to be politically biased in his investigations (Corruption Watch, 2016a).

Adv. Baqwa was also part of the Joint Investigation Team, together with the Auditor-General and the National Prosecuting Authority, who succumbed to political pressure to amend their own report regarding the Arms Deal. The amended version was because of placing too much trust in the credibility of the president, which then meant that evidence of wrongdoing could not be pursued in order to apportion responsibility (Corruption Watch, 2016a). This submissive nature could be explained by Baqwa's understanding of the institutional context of his Office. In the Sarafina II report, he described himself as the "Officer of Parliament" (Baqwa, 1996). This can lead a narrow interpretation of his status as the PP; perhaps the function of his careful navigation of the political environment during the early stages of the establishment of his Office. According to Kirkam (2007: 5), an Ombudsman who is an Officer of Parliament is an aide to parliament, rather than the defender of people's right. Calland (2006: 12) described the leadership style of Adv. Baqwa as canny, cautious and careful not to upset too many political apple carts too early in the embryonic stages of the institution, with prudence being his watchword when he approached investigations.

Lawrence Mushwana

When Adv. Lawrence Mushwana was appointed as the second PP of a democratic South Africa in 2002, this was met with criticism as immediately before his appointment he was a prominent politician and a Member of Parliament, having previously served as the Deputy Chairperson of the National Council of Provinces. Despite this, his appointment was passed by the 60% needed in the National Assembly (Corruption Watch, 2016b), thanks to the ANC's unassailable majority.

He is credited for expanding the outreach programme began by his predecessor and now-judge Selby Baqwa. He was also acknowledged by Adv. Thuli

Madonsela, his successor, as having been the first PP to introduce concrete remedies, rather than mere recommendations. However, despite these innovations he was widely regarded as the obsequious PP who was executive-minded and biased in favour of ANC personalities (Corruption Watch, 2016b). The following are stated as examples of such bias:

- (a) His finding that the appointment of former ANC operative Robert McBride was above board, when in fact McBride was at that time not suitable for appointment as the head of metro police at Ekurhuleni Municipality;
- (b) His finding that the statements of the National Director of Public Prosecutions, Bulelani Ngcuka, and Justice Minister Penuell Maduna were unfair to the then Deputy President Jacob Zuma, which asserted that there was a prima facie case of corruption against him. Mushwana found that the statements were damaging to the integrity of Zuma;
- (c) His finding that Deputy President Phumzile Mlambo-Ngcuka had not violated the Executive Code of Ethics when she travelled with her family on a military aircraft to go on a private holiday. He merely recommended that the Presidential Handbook be approved;
- (d) His soft findings with regard to the conflict of interest against Mlambo-Ngcuka in 2005, regarding her alleged influence of PetroSA to advance payment to Imvume Management, which money found its way into the coffers of the company owned by her brother. This finding was set aside by the court and the court ordered a new and thorough investigation (Corruption Watch, 2016b).

The Public Law expert, Prof. Richard Calland observed that while Lawrence Mushwana was a genial and decent person, he lacked backbone and intellectual rigour, and was swayed by political pressure (Calland, 2006: 12). Other academics have been similarly critical of the leadership style of Mushwana, such as Musuva (2009: 29) and Govender (2013: 82), who criticised him for having been too executive-minded and of defining the powers of the PP too narrowly.

- **Thulisile Madonsela**

Adv. Thuli Madonsela was appointed as the third PP in October 2009. Her appointment was received with cautious acclaim, with journalists questioning whether she would be an improvement on the uninspiring tenure of Adv. Mushwana (Grootes, 2009). However, it is arguably Adv. Madonsela who raised the public profile of the Office of the PP to hitherto unparalleled heights. She will be remembered for tackling high-profile political and executive personalities without fear, favour or prejudice (Crous, 2016).

Her leadership legacy will be prominently associated with the clarification of the powers of the PP, arising out of her seminal report titled *Secure in Comfort*. The political ramifications of this report led to a popular opposition campaign that called for the President to 'pay back the money'. The litigation that followed the ill-fated executive and parliamentary efforts to second-guess her findings led the Constitutional Court to rule that her findings were binding; thereby drastically raising the status of the Office within the political milieu (see *EFF v Speaker of National Assembly*, 2016). Therefore, it remains of great symbolic importance to have the PP pursue and hold the President accountable (Corruption Watch, 2016). The following are instances where the PP pursued investigations that ultimately forced the President, the highest-ranking politician in the land, to account:

- Her finding that the submission of the declaration by President Zuma on 10 March 2010 did not fully comply with Section 5 of the Executive Ethics Code, and that the President's failure to comply with the requisite timelines, as set out in the Executive Ethics Code, and his conduct constituted a breach of Section 5(2) of the Code. This report directed the President and the Executive to correct the systemic problems with regards to the submission of the declaration of interests by members of the Executive. The report also made recommendations to Parliament to consider an amendment to the Executive Members' Ethics Act to correct the anomalies she had pointed out. Significantly, the President set a good example by publicly accepting this finding (Presidency, 2010).
- Her finding that the President should pay back the portion of costs relating to the non-security related improvements at his Nkandla homestead. The

background to this case was that the PP had issued a report that found that some of the features erected at the private residence of the President were non-security features, by which inclusion the President had improperly benefited from state resources. She also found the President, by failing to guard against the excesses made to his unfair benefit, had violated the Executive Ethics Act and Executive Ethics Code, thus violating Section 96(1) of the Constitution.

The PP (2014: 442) issued remedial action to the effect that the President must:

- (a) Take steps, with the assistance of the National Treasury and SAPS, to determine the reasonable costs of the measures implemented by the Department of Public Works (DPW) at his private residence that did not relate to security, and which included the visitors' centre, the amphitheatre, the cattle kraal and chicken run, and the swimming pool;
- (b) Pay a reasonable percentage of the cost of the measures as determined with the assistance of the National Treasury, also considering the DPW apportionment document;
- (c) Reprimand the Ministers involved for the appalling manner in which the Nkandla Project was handled and state funds were abused; and report to the National Assembly on his comments and actions on this report within 14 days.

While the President complied with the directive on providing a report to the National Assembly within 14 days, he did not comply with other remedial actions. This is because the National Assembly, having received and accepted the reports of its two *ad hoc* committees on the Nkandla findings, had absolved the President of any wrongdoing. This decision of the National Assembly effectively second-guessed the PP, as found by the Constitutional Court (see *EFF v the Speaker of National Assembly*, 2016).

Adv. Madonsela's fearless investigations saw the situation where prominent political and senior public officials were held to account; some of them even lost their jobs as a result. Here are some of the cases as narrated in *Corruption News* (2016c):

- Her finding of improper conduct and maladministration, with regard to the leasing of police headquarters to the tune of R500 million, against Bheki Cele. Following this, Cele was subjected to an investigation and was subsequently relieved of his position as the National Commissioner of Police. This investigation also implicated the then Minister of Public Works in wrongdoing and she was removed from Cabinet in the aftermath.
- Her investigation and finding of misuse of taxpayers' money by the former Minister of Co-operative Governance, Sicelo Shiceka, who spent more than R1 million on private sojourns. Shiceka was removed from Cabinet in the aftermath.
- Her finding of irregularities regarding the appointment and tenure of Hlaudi Motsoeneng as the COO of the SABC. He was subsequently charged with misconduct and dismissed.
- Her finding that the former CEO of PRASA, Lucky Montana, should be held personally liable for the systemic failures of supply chain management practices and inappropriate awarding of tenders. Montana was dismissed before this report was issued.
- Her report titled *State of Capture*, which elaborated on various allegations of state capture implicating the Gupta family and former President Zuma's family. In this report, she directed that President Zuma should appoint a judicial commission of inquiry, headed by a judge appointed by the Chief Justice. This was done ostensibly to manage the apparent conflict of interest of the former President in this matter.

The profile of the PP Office under Adv. Madonsela rose dramatically during her tenure. Corruption Watch Legacy Project reported that the prestigious and internationally acclaimed magazines, the *Financial Times* and the *Times*, commended her for raising the public profile of the Office and ranked her among the top 100 influential leaders in the world, respectively. She was also acknowledged as an exemplary African leader worthy of being emulated (Corruption Watch, 2016c).

Remarkably, a biography titled *No Longer Whispering to Power: The Story of Thuli Madonsela* was penned by an equally feisty woman, author and journalist, Thandeka Gqubule. The biography chronicles Madonsela's life, her childhood, and her highly successful tenure as the third PP (Davis, 2017).

Madonsela deserved these accolades because throughout her tenure she was a paragon of virtue and ethical leadership, an epitome of what a head of an independent institution should be. This brings us to the analysis of her successor.

- **Busisiwe Mkhwebane**

The fourth PP was appointed in October 2016 after active public interest. All political parties, apart from the Democratic Alliance, supported her appointment. It is too early in her tenure to judge her impact on the institutional integrity of the institution, especially its independence.

However, a disquieting development was observed with her first report (PP, Report 8 of 2017/18) regarding the alleged maladministration, corruption, misappropriation of public funds and failure by the government to implement the CIEX Report and to recover public funds from Absa Bank. The report carried a remedial action that instructed the Parliament to amend Section 224 of the Constitution in order to change the mandate of the South African Reserve Bank (SARB) from being the protector of the currency to that of addressing the socio-economic challenges of the country's citizens. What is even more distressing is that this remedial action was not based on any constitutional or legal considerations. It was based on an ostensible ideological consideration, as enunciated in paragraphs 5.3.24 to 5.3.27 of her report (PP, Report 8 of 2017/2018), which were that:

- I. Leading authors advocating and promoting the ideology of state banks and the nationalisation of monetary currency believe that the notion of a lender of last resort's status, which is inherent to central banks internationally, would cease to exist if governments take sole power in creating money through the establishment of state banks.
- II. It is in this belief that once the state takes control of creating money and credit, numerous benefits aimed at alleviating the economic ills of ordinary

economically disadvantaged people may be achieved, unlike the current purely commercial transaction system, which only seeks to improve a particular financial sector.

- III. The debate on the nationalisation of the monetary currency and the creation of state banks is one that has found its way into our democratic society and is a debate that must reach its conclusion by the people of South Africa.
- IV. The Republic has an obligation in terms of the Constitution and international instruments to improve the socio-economic conditions of its citizens through legislative and other measures to alleviate poverty and ensure social justice for all. The South African Government must realise economic rights to its people (Public Protector, 2017: 51).

The Court in *South African Reserve Bank v PP and Others, 2017* was seized with the review arising from this report. The original complaint filed by Adv. Hoffman was only concerned with whether the Reserve Bank had recovered monies owed relating to the financial assistance package advanced to Bankorp (which later merged into Absa Bank). It was never about the entrenched powers of SARB. Consequently, the Court could not fathom the exact logic for the remedial action. This then called to question the correctness and legality of the remedial action.

The Court in *South African Reserve Bank v PP and Others, 2017* quoted with approval the reply of the Speaker of the National Assembly to this shocking report. The Speaker said the following:

The Public Protector's order that the Reserve Bank be stripped of its primary function of protecting the currency seems little more than a personal predilection wholly unrelated to the improper conduct that she found in this case.

The Public Protector's order is thus beyond the scope of her remedial powers because it is not designed or intended to remedy the improper conduct that she found in this case. If, in fact, she designed and intended it to be such a remedy, her order would in any event be wholly irrational. Nobody can rationally suggest that the failure by the South African Government and the

Reserve Bank to recover money from a bank is appropriately remedied by stripping the bank of its primary object of protecting the value of the currency (see par.40 of the judgment).

Perhaps horrified by this level of “personal predilection” by the new PP, the Court in *South African Reserve Bank v PP and Others, 2017* felt obliged to chastise her when it said the following:

...the PP’s explanation and begrudging concession of unconstitutionality offer no defence to the charges of illegality, irrationality and procedural unfairness. It is disconcerting that she seems impervious to the criticism, or otherwise disinclined to address it. This court is not unsympathetic to the difficult task of the PP. She is expected to deal with at times complex and challenging matters with limited resources and without the benefit of rigorous forensic techniques. It is easy to err in informal alternative dispute resolution processes. However, there is no getting away from the fact that the PP is the constitutionally appointed custodian of legality and due process in the public administration. She risks the charge of hypocrisy and incompetence if she does not hold herself to an equal or higher standard than that to which she holds those who are subject to her writ. A dismissive and procedurally unfair approach by the PP to important matters placed before her by prominent role players in the affairs of state will tarnish her reputation and damage the legitimacy of the office. She would do well to reflect more deeply on her conduct of this investigation and the criticism of her by the Governor of the Reserve Bank and the Speaker of Parliament (see par. 59 of the judgment).

If this impugned report is anything to go by, there are perturbing signs that the current incumbent PP may be a threat to the institutional integrity of the Office of the PP: elements such as independence, impartiality and fairness, credible review processes and the effectiveness of her Office could be compromised by her seeming overzealousness and voluntarism. This view is supported by SARB’s affidavit, in its application to set aside her CIEX report, that she had met with President Zuma’s legal advisers and securocrats of the South African State Security in an apparent conspiracy to attack the independence of the central bank (Bateman, 2017).

Although the Court was sympathetic with her Office when it said that sometimes it was expected of her to handle complex investigations, without the benefit of rigorous forensic techniques, it must be remembered that early in her assumption of duty one of the changes she rang was the eschewing of donor funding and the use of forensic consultants (Pather, 2016), resources that evidently her Office cannot do without.

- **Independence and impartiality**

As already demonstrated with the institutions discussed in Chapter 4 above – institutions such as the Directorate for Priority Crimes Investigation and the National Prosecuting Authority – the capture of state institutions happens through the undermining of the independence of those institutions. Independence and impartiality are duties imposed on the adjudicator and are necessary conditions of law to allow for the peaceful regulation of social interactions (Papayannis, 2016: 19). Hence, Regla (2009 in Papayannis, 2016: 19) has indicated that independence and impartiality are sincere duties and not mere institutional conditions or simply the absence of bias based on kinship, friendship or enmity, or other patrimonial interests. The independence and impartiality of the PP are constitutionally guaranteed in Section 181(2) of the Constitution. The Constitutional Court in the matter of *EFF and Speaker of National Assembly* has also pronounced upon this independence.

The Constitutional Court has determined that the criteria for the independence of an institution is an objective test judged from the perspective of the reasonable and informed person (*Van Rooyen v S*, 2002). Impartiality, in another sense, relates to the state of mind and attitudes of the tribunal regarding the matters and parties in dispute and implies lack of bias (Currie and De Waal, 2005: 724; Papayannis, 2016: 10-11).

These definitions emphasise the public perception of independence and impartiality in the resolution of public disputes with the state. People must have confidence that their cases will be decided fairly, independently and impartially.

It is not only the actual bias that is impugned in the politico-legal environment of South Africa. Section 6(2)(a)(iii) of the Promotion of Administrative Justice Act (PAJA) provides for the judicial review of an administrative action if it was biased or reasonably suspected of bias. This statute codifies the well-known common

law rule called *nemo iudex in sua causa* (no one may be a judge in his or her own case), which requires the administrator to be reasonably seen as impartial (Burns, 2003: 167). Burns (2003: 168) examines the elements of bias as follows:

- Actual bias – the root of the rule is that not only justice must be done, but also, it must be seen to be done. Therefore, the administrator must desist from acting in an unfair or self-interested manner even if no injustice will manifest;
- Institutional bias – sometimes the person's bias is associated with their professional or personal membership. Especially with the PPs, their previous institutional or political associations may influence their biases;
- Perception of bias – this happens when there is a reasonable apprehension that the administrator is likely to be biased, but the facts that lead to such conclusion must be relevant to the matter at hand. A general allegation of bias will not pass the test; and
- Personal interest – this relates to the situation where the administrator has a personal interest that affects personal or familial relations. The interest can also be pecuniary or be in the form of a premediated judgment of a matter.

The test to find bias was set forth in *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* as follows:

...whether a reasonable, objective and informed person would on the correct facts reasonably apprehend that the Judge has not or will not bring an impartial mind to bear on the adjudication of the case (see par. 48 of the judgment).

It is hereby argued that this test is likewise applicable to public functionaries, such as the PP, who perform constitutional functions.

Previously, the media had alleged political bias in some of the politically sensitive investigations by the PP. It was alleged that Adv. Mushwana was politically biased in his investigation of the so-called Oilgate scandal (Murray, 2006: 124). The scandal involved the diversion of public money from the state-owned PetroSA to the coffers

of the governing ANC, towards the 2004 general elections. PetroSA had irregularly paid R15 million to Imvume Management, a company allegedly with close ties to the ANC, and the monies found its way into the coffers of the ANC (Brummer, Sole and ka Ngobeni, 2005). Subsequently, this transaction was investigated by the PP who did not find wrongdoing. This report was regarded as a whitewash and was litigated against, both at the Gauteng High Court, which ordered the PP to redo the investigation, and the Supreme Court of Appeal (SCA) on appeal by the PP. The SCA upheld the ruling of the High Court and dismissed the appeal by the PP (Bauer, 2011). These kinds of politically biased reports undermined the independence of the institution.

Significantly, by the time of this ruling there was a new sheriff in town, Adv. Thuli Madonsela, and she wisely decided not to contest the appeal initially entered by her predecessor (Bauer, 2011). The other publicised event that resulted in accusations of political bias against the PP was the attendance by Adv. Madonsela of a Democratic Alliance's Women's Day event in 2012. The ANC MP Mathole Motshekga who, as the chairperson of the Parliamentary Oversight Committee on Justice, was to become Adv. Madonsela's nemesis throughout her tenure, picked up on this apparent lack of judgment by the PP. He argued that by attending and addressing political events, Adv. Madonsela was compromising the values of independence and impartiality that the Constitution demanded of her institution (Sapa, 2012). It is indisputable that these perceptions of bias undermined the independence of the Office of the PP in the eyes of many people.

In 2018, the judgment of the North Gauteng High Court in *Absa Bank Limited and Others v PP and Others* found that the current PP, Adv. Busisiwe Mkhwebane, was biased in her investigation and finding relating to the Absa-Ciex report. The Court even slammed her with punitive costs, 15% of which she is liable *de bonis propriis* (i.e. personally liable). The Court, in the most damning judgment yet against the sitting PP, found that "the PP does not fully understand her constitutional duty to be impartial and to perform her functions without fear, favour or prejudice". This impugned the conduct of the incumbent PP and certainly caused a dent in the independence and credibility of the high office of the PP; hence, the increasing calls for her to resign or face impeachment (Mabuza, 2018). At least one constitutional expert agrees that this court ruling against the PP warrants her removal from the

high office. Prof. Pierre de Vos opines that it will be undesirable to retain in the high office of the PP someone who has been found by the court to be biased and dishonest. He cautions that failure to impeach her in terms of Section 194 of the Constitution would eventually compromise the high office of the PP (De Vos, 2018).

Biased conduct borders on dishonesty, untrustworthiness and unlawfulness. Certainly, such conduct will undermine, not only the personal integrity of the PP, but also the institutional integrity. As indicated in Chapter 2, the Ombudsman requires normative values of independence, fairness, effectiveness, transparency and accountability (Tyndall, 2014). Therefore, in order to assure the institutional integrity of her Office, the PP must appear to have personal attributes such as high levels of integrity, uprightness, persuasive power and moral authority. If there is doubt about her qualities in this regard, she must heed the calls for her resignation or she must be impeached.

6.9 Parliamentary oversight

"Quis custodiet ipsos custodes?" ("Who watches the watchmen?") (Rudolph, 1983: 93) – earlier in this chapter it was indicated that the PP of South Africa styles itself as a "supreme administrative oversight body", which means it is a watchdog institution overseeing the entire public administration. However, who watches over the PP to ensure that he/she acts only in accordance with the Constitution, law and ethics of her office – that he/she conducts himself/herself with integrity and carries out his/her duties without fear, favour or prejudice.

Section 55(2)(ii) of the Constitution requires the National Assembly to set up accountability mechanisms for the organs of state. The body tasked with overseeing the PP is the National Assembly through its Portfolio Committee (PC) on Justice and Correctional Services, and he/she reports on his/her activities and performance of his/her functions at least once a year (Section 181(1)(5) of the Constitution). However, in practice he/she reports quarterly to the PC on Justice and Correctional Services.

There is, however, a thin line between oversight and interference. The relationship between the PP and the PC has been acrimonious, making for a difficult oversight function. The following examples are indicative of this acrimonious oversight:

- When the previous PP, Adv. Madonsela, requested the support of the PC for an increased budget, the PC was not supportive (Gqirana, 2015), and told her to reduce the number of cases she investigates rather than seek more resources to do more investigations.
- In 2018, the PC summoned the incumbent Public Protector Adv. Mkhwebane to explain her reports regarding the Estina dairy project (Bornman, 2018). Although it is correct that the PP must account and explain her activities to the National Assembly at least once a year, to be summoned before the PC to explain her reports and related utterances is taking the principle of oversight too far. These kinds of summonses, intended to take the PP to task whenever there is a disagreement with her findings or public utterances, may have unintended effects of interference, rather than oversight.
- Another spat in 2018 between the PP and the PC related to the questions asked by the Members of Parliament to the Minister of Justice regarding the PP's international trips, and the senior and executive staff complement in her Office. Adv. Mkhwebane objected to filing answers to the legislature through the Minister of Justice, arguing that this undermined the independence of her Office and was contrary to Section 181(5), which regulated her reporting arrangements (Mokone, 2018: 4).

The PP does not account to Parliament as part of the Executive, with the Minister of Justice as her political superior, nor as a department of state or administration, but it is an independent body accountable only to Parliament (see *Minister of Home Affairs and Another v Public Protector of the Republic of South Africa*, 2018). Hence, the stance of Adv. Mkhwebane to resist reporting to Parliament through the agency of the Minister of Justice is understandable.

6.10 Comparative analysis

In Chapter 5 (see Table 5.1, pages 256-260), a detailed comparative analysis was conducted on the Ombudsman institutions in Europe, Latin America and Africa. Some of the elements of this comparative analysis have been evaluated above. Hence, this section sets out to evaluate a few of the comparative factors because they elucidate the position of the PP with the governance framework and compare it to the position of other Ombudsman institutions worldwide.

From the analysis it was learnt that there is no international treaty that governs the Ombudsman institution and that there is no universal Ombudsman model. Each country is guided by its constitution, laws, culture and history to fashion a suitable model of the Ombudsman. However, the international instruments, such as the UN General Assembly Resolution 2200A (XXI) of 1966 (International Covenant on Civil and Political Rights); the UN General Assembly Resolution 63/169 of 2008 (the Role of the Ombudsman with regards to human rights promotion, the rule of law and the principles of justice and equality); the UN General Assembly Resolution 48/134 of 1993 (the Paris Principles); and the African Union's African Charter on Democracy, Elections and Governance provide international guidance. Furthermore, the Ombudsmen are members of both the International Institute of Ombudsman (IOI) and the African Ombudsman and Mediators' Association (AOMA). These bodies expect Ombudsmen to comply with their standards before accepting them as members. Therefore, internationally there are guidelines that Ombudsmen should abide by (see Chapter 5, par. 5.2, pages 196-199). In this study, the researcher set out to evaluate the PP against these international guidelines.

- **Constitutionalisation**

A common guideline from the international instruments and associations of Ombudsman is that the establishment and the independence of the Ombudsman must be embedded in the Constitution (see OR Tambo Minimum Standards for Effective Ombudsman Institutions and Cooperation issued by AOMA in 2014). The phenomenon of the constitutionalisation of the Ombudsman institution followed the example of Spain, which constitutionalised its Ombudsman in 1978. This constitutionalisation also spread in Latin America and Eastern Europe in the late 1980s and the 1990s with the advent of democratisation in these regions. It is clear from the analysis that countries that opted for constitutionalisation were emerging from the fraught political histories of dictatorships and human rights abuses (Mora, 2015: 188-189).

South Africa shares this history of oppression and human rights abuses with some of these emerging democracies; hence, it followed these regions' example of constitutionalising its Ombudsman, the PP. As already indicated in this chapter (see page 266), the PP is a product of political settlement and its establishment and independence was a condition of Constitutional Principle XXIX. In the final

analysis, it was embedded in Chapter 9 of the Constitution as one of the institutions supporting and strengthening constitutional democracy. Constitutionalisation of the PP satisfies the requirements of the international instruments and associations, for example the IOI by-Laws.

- **Appointment and removal from Office**

As the decisions of the Ombudsman are generally not binding, it is important that the person appointed to the Office must be a magistrate of conscience and a persuading judge as the effects of his/her decisions depend largely on the integrity of that person (Volio, 2003: 230; Uggla, 2009: 4) (see Chapter 5, par. 5.4, page 214 for a discussion of this issue).

Most international instruments require the Ombudsman to be appointed by or with the participation of the legislature (see IOI By-Laws). Most Classical Ombudsmen are typically appointed by the legislature (Reif, 2004: 2) (see Chapter 5, paras. 5.3, 5.4 and 5.5, pages 197-258 for a discussion of this issue). South Africa complies with this requirement as the PP is appointed through a selection process spearheaded by the National Assembly, and appointed by the President on recommendation of the Parliamentary Selection Committee. In Chapter 5 (see discussion in par. 5.5, page 230-231), reference is made to Ethiopia and Burundi whose Ombudsman is appointed by the legislative authorities, without the participation of the executive. However, this Ethiopian and Burundian example is an exception to the rule.

The PP can be removed by the recommendation of a two-thirds majority, on account of misconduct, incompetence or incapacity, after an investigation by the Ad Hoc Committee of the National Assembly. The President may suspend the PP pending this investigation by the NA (see Section 194 of the Constitution). This complies with the condition in the IOI by-Laws that requires the following: “the Ombudsman should only be dismissed from office by the legislature or with its approval, and for reasons stated in the relevant legislation or constitution”.

- **Independence**

Article 15 of the African Charter on Democracy, Elections and Governance provides that the “State Parties shall ensure that the independence or autonomy of the said institutions is guaranteed by the constitution” (African Union, 2007: 7).

South Africa complies with this requirement as the independence of the PP is provided for in Chapter 9 of the Constitution. However, this is a formal independence. The Ombudsman must also be functionally and personally independent.

The juridical nature of the PP is that it is a body of constitutional import, with full functional independence. As Castells (2000: 396) argued, bodies of constitutional relevance are placed in a distinguished position of trust endowed with tasks of control, consultation, and vigilance of the observance of the Constitution and the law, and are endowed with fully functional independence.

Functional independence refers to the allocation of resources to the Ombudsman institution to enable it to do its work without hindrance. Volio (2003: 237) has observed that there has been a tendency in Latin America to weaken the institution by cutting budgets, as a mechanism of political control. In this chapter, the researcher has discussed the budgetary constraints of the PP, which places the PP at the mercy of the PC on Justice and Correctional Services. The PC at one stage responded to the request by the PP for more financial resources by arguing that the PP must rather reduce its investigations rather than ask for more money (Gqirana, 2015).

The other aspect relevant to functional independence is the security of tenure and conditions of service of the Ombudsman. In South Africa, the PP's tenure is a non-renewable term of seven years, as set out in Section 183 of the Constitution and his/her conditions of service, including that the remuneration is determined by the National Assembly on advice of the Committee, but his/her salary shall not be less than that of the judge of the High Court and shall not be reduced or other terms of service be adversely varied during his/her term of office (Section 2(2) of the Public Protector Act, 1994). The non-renewal term and fixed terms of conditions means that the PP does not have to bargain with Parliament about his/her contract of employment and conditions of service. In this sense, he/she will not be at a beck and call of Parliament.

A key component of the functional independence of the Ombudsman is corporate governance. In Chapter 5 (see discussion in par. 5.3, page 202-203), reference was made to the infusion of corporate governance standards into the operations

of the Parliamentary and Health Services Ombudsman of the UK, which assured the independence and credibility of the institution. The Institute of Chartered Secretaries and Administration (ICSA) defines corporate governance as “the system of rules, practices and processes by which a company is directed and controlled”³⁵. It refers to the manner in which organisations are governed and for what purpose. The King IV Report on Corporate Governance suggests that corporate governance is about effective leadership as it ensures that the governing body fosters an ethical culture, good performance, effective control and legitimacy (Institute of Directors in Southern Africa, 2016: 11).

The crisis of governance, as described in Chapter 4, creates an inhospitable environment for institutions, and the PP is no exception. The Inter-University-Research Program defines institution-building as “the planning, structuring, and guidance of the new or reconstituted organisations which embody changes in values, functions, physical and/or social technologies; establish, foster, and protect normative relationships and action patterns; and attain support and complementarity in the environment” (Esman, 1967: 1). In a monocratic Ombudsman institution, such as the PP of South Africa, there is no discernible distance between the institution and the person; therefore, institution-building or instilling corporate governance is the sole function of the head of the institution. The integrity and ethics of the head of the institution consumes the whole institution. Therefore, in such institutions there is always a risk of corporate governance standards collapsing precisely because of the leadership and ethical weaknesses of the head. This is true of the PP. Leaders with a sense of individual integrity are reliable and predictable in relating to others and handling issues, and they defend what is fair, just, and right and acceptable (Duggar, 2009: 2).

An institution that oversees the good governance in other organs of state should itself be run in accordance with the high standards of corporate governance, which talks to integrity, independence, transparency, responsiveness and lawfulness in the operations of the institution concerned. It was with this realisation in mind that the previous PP established the Governance Advisory Board (GAB) to advise her on governance matters (Makinana, 2018). The Board

³⁵ <https://www.icsa.org.uk/about-us/policy/what-is-corporate-governance>

consisted of three non-executive members who met at least twice a year; and at least once a year they met with the PP to give her advice on governance and strategic matters affecting the Office of the PP and to ensure that all decisions are taken in the best interests of the Office. The Board also served to attend to the Protected Disclosures against the Public Protector and the Deputy Public Protector (Public Protector, 2016: 53). Unfortunately, this progressive governance arrangement has been discontinued by the current PP, which means that there is no longer external governance advice available to the Office (Makinana, 2018).

Both the PHSO and the PP are monocratic Ombudsman appointed institutions and accountable to their respective parliaments. However, these institutions approach corporate governance, therefore institution building, differently. The PHSO has a unitary Board of Directors, consisting of non-executive and executive directors, and has committees that assist it in its oversight and governance functions. The Board is chaired by the Ombudsman himself/herself and is appointed by him/her.³⁶ This infusion of corporate governance principles by the PHSO is unique and worth emulating. The PP, on the other hand, does not have a unitary board and no longer even has a corporate governance advisory structure. The PP is the executive authority supported by the Deputy PP, who is also appointed by the President as recommended by the NA, and the Chief Executive Officer (together they constitute the Executive Committee). This means that all corporate governance functions reside in the person of the PP, and that the PP is the embodiment of corporate governance in his/her Office. The danger of having a weak and incompetent person at the helm of the Office of the PP is that the entire institutional and corporate governance culture of the organisation may be damaged, with dire consequences for institutional capabilities (Grootes, 2019).

Personal independence refers to the personal virtues, values and ethics of the Ombudsman. These have been adequately addressed in this chapter (see par. 6.8, pages 299-313), therefore they are not evaluated further here. To be fully independent, the Ombudsman must be a person of moral authority and conscience, and a thought leader in his/her field (Levine, 2004). This aspect has been addressed in some detail in Chapter 2 (see par. 2.11, pages 87-101).

³⁶ <https://www.icsa.org.uk/about-us/policy/what-is-corporate-governance>

- **Competencies, resolutions and limitations**

In South Africa, like in most countries discussed in Chapter 5, there is prescribed competencies for the PP. Section 1A (3) of the Public Protector Act, 1994 requires that the PP shall be a fit and proper citizen of the Republic, who meets one or more of the following requirements:

- (i) Be a Judge of the High Court;
- (ii) Be an admitted Advocate or Attorney or a teacher of law of cumulative ten years' experience, who is qualified to be admitted as an Advocate or attorney;
- (iii) Has cumulative experience of ten years as a member of parliament; or
- (iv) Has cumulative experience of ten years in the administration of justice, public administration or public finances.

The requirement of a cumulative ten years' experience as a Member of Parliament potentially opens the door for political appointments. In fact, Adv. Mushwana was elected the PP, while immediately before his appointment he was an MP of the governing party. Throughout his tenure he was accused as being executive-minded and defining his powers too narrowly (Musuva, 2009: 29; Govender, 2013: 82).

Most Ombudsmen do not have enforcement powers, but rely on their powers of recommendation and persuasion (see Volio, 2003 and Uggla, 2009). However, the PP's remedial action is binding, unless it has been successfully reviewed. The binding remedial action of the PP is what distinguishes it from most Ombudsman institutions worldwide. However, the remedial action of The Gambia's Ombudsman is equivalent to a court order and can be reviewed only on jurisdictional ground (AOMA, 2014: 92). This means that The Gambia's Ombudsman's remedial action is much more qualitatively effective and final than the PP's remedial action, which is only final subject to a wider right of review. However, according to the PP's Annual Report of 2015/16, review applications have declined substantially since the clarification of the binding nature of the PP's remedial action (Public Protector, 2015: 5).

Some review applications, such as the *DA v the SABC* (relating to the shenanigans affecting the COO of the SABC) and *EFF v Speaker of National Assembly* (relating to the Nkandla upgrades), have confirmed the PP's remedial action, while *ABSA v Public Protector* (relating to the CIEX report and the mandate of the SARB) has set aside the PP's remedial action. This means that the success or failure of the review application is dependent on factors such as jurisdiction, rationality and legality of the decision of the PP. This ability of the courts to review the decisions of the Ombudsman is not universally supported as it can undermine the independence of the institution. Gottehrer (2009: 15) asserts that, in order to ensure the independence and effectiveness of the Ombudsman, no court should be able to review the findings, conclusions, recommendations or reports of the Ombudsman or its staff, except only to determine the jurisdiction.

It is necessary to balance the binding nature of the findings of the PP with the power of judicial review, to avoid the situation where the PP will be endowed with unfettered powers of investigation and remedial action. The Constitutional Court held that the remedial power of the PP was not unfettered (*Economic Freedom Fighters and Others v the Speaker of the National Assembly*, 2016).

In Chapter 5 (see paragraphs 5.3, 5.4, 5.5 and Table 5.1, pages 199-260 above). It was indicated that some countries have variously set legal limitations on the scope and remit of their Ombudsman institutions, but generally provide for the investigation of maladministration, corruption and human rights violations. Many Ombudsman institutions, especially in Africa, are excluded from investigating the executive, the judiciary and *sub judice* matters (Tonwe, 2013: 15).

It has been shown that with regard to the exclusion of the judiciary from the remit, Burundi is an exception in Africa in that its Ombudsman has the jurisdiction to investigate the decisions of the judiciary. While this aligns with the original Swedish model, this is generally excluded from remit in most countries of the world, including South Africa, following the Danish model that came to be popular after its advent in the 1960s (Reif, 2004; Salman, 2006).

In Macedonia, Article 26 of the Ombudsman Law gives the Ombudsman power to summon certain officials, including the President of the Republic, the Speaker of Parliament, the Prime Minister of the Government of the Republic and other

officials, and they are obliged to see him/her personally once so summonsed. This aligns with the PP's remit, who is free to investigate any improper conduct in state affairs and/or public administration in any sphere of government, as required by Section 182(1) of the Constitution, and the Executive (including the President) is not excluded from this remit.

If one evaluates the exclusions from the remits of many Ombudsman jurisdictions, one realises that the PP has a broad scope, which excludes only the judicial decisions of the courts. In principle, the scope of the PP is broad enough to investigate the non-judicial administrative activities of the Office of the Chief Justice and the courts' administrations.

- **Political interference**

In terms of the IOI By-Laws, "the Ombudsman should be independent and should not receive any instruction from any public authority, and should perform its functions independent of any public authority". Many countries have formalised and ensured political insulation and independence of the Ombudsman in their respective constitutions. However, for this to be effective, each country requires a semblance of democratic governance (Reif, 2000: 14). The PP is relatively well insulated from political interference by virtue of it being a Chapter 9 institution whose independence is constitutionally protected. Notwithstanding this, there have been instances of political interference in the work of the PP. For instance, the then Minister of Police, Nathi Nhleko, commissioned another investigation with the purpose of rivalling the findings of the PP (Minister of Police, 2015). The National Assembly adopted the report of the Minister of Police (National Assembly, 2015: 2021); thereby it effectively second-guessed the findings of the PP. Moreover, the PC on Justice and Correctional Services summoned Adv. Mkhwebane to explain her reports regarding the Estina dairy project (Bornman, 2018), thereby interfering with the work of the PP. This kind of summons is different from the regular annual accountability by the PP to the PC. In this instance, the PP was called to defend the contents of her report, which did not satisfy the political role-players.

The evaluation of these three instances cited indicates that while it is true that the PP is formally insulated from political interference and he/she is constitutionally,

legally and jurisprudentially independent, politicians will try everything in their power to politically influence the direction and investigations of the PP. Political interference is a constant threat and risk that the PP must always manage if he/she is to carry out his/her functions without fear, favour and prejudice, and with moral courage and integrity.

6.11 Conclusion

Governance has been defined as a normative theory that guides the democratic and accountable functioning of government and other organs of state. Governance framework, on the other hand, refers to the structure, legal framework, processes and systems of operationalising governance. Good governance is the normative function of the PP, with a long-term ideal of protecting and strengthening constitutional democracy (see the discussion in par. 6.2 above, pages 277-282).

The place of the PP within the governance framework has been evaluated from the perspectives of *trias politica*, co-operative governance and organs of state within the meaning of Section 239 of the Constitution. It has been argued and is conclusive that the PP (like all other Chapter 9 institutions), while it is an organ of state within the meaning of Section 239 of the Constitution, it manifestly exists outside executive control. While it accounts to the legislature, it is not its functionary, and while the courts can review its remedial action, it is not part of the judiciary. Therefore, it is part of governance, but not part of government (*Ad Hoc Committee on the Review of Chapter 9 and Associated Institutions*, 2007). The PP is not part of co-operative government as structured in Chapter 3 of the Constitution, but as an organ of state, it is part of co-operative governance. In this sense, it is required to cooperate with other organs of state to achieve its objectives. Similarly, other organs of state are required to take legislative and other measures to support the PP in its objectives. This reciprocal relationship calls for cooperation between the PP and other organs of state.

The Ombudsman requires the normative values of independence, fairness, effectiveness, transparency and accountability and needs to have the virtues of integrity, uprightness, persuasive power and moral authority. These are some of the normative values and ethics of the PP. The list is not exhaustive, though (see Chapter 2, par. 2.11, pages 92-101).

While the tenure of Adv. Madonsela demonstrated the resilience and fortitude of the Office in safeguarding its integrity, independence and effectiveness, the jury is out as to whether the current PP, Adv. Mkhwebane, will similarly safeguard these values. It is worrisome that the North Gauteng High Court has already indicated that she does not seem to understand her constitutional responsibilities and her conduct could tarnish the image and independence of the Office. Perhaps to defend the integrity of the Office, the Court has deemed it fit to saddle her with the personal costs with regard to her Absa-CIEX report. It is no wonder, in the light of these developments, that there have been numerous calls for her resignation or impeachment as she is now regarded as an unfit and improper person to hold the high office of the PP. As at the time of the conclusion of this analysis, the jury was still out as to whether she would survive the pressure for her to resign or be impeached. At least one constitutional expert suggested that there were valid grounds for her impeachment (De Vos, 2018).

Parliamentary oversight over the PP is a constitutional requirement and an international norm. However, there is a thin line between oversight and interference, which Parliament's Portfolio Committee on Justice and Correctional Services will do well to realise. The acrimonious relations between the Committee and the PP do not enable effective oversight, but the sessions become mudslinging exercises, which do nothing to hold the PP accountable. In this regard, the PP in 2018 missed a meeting of the PC on Justice and Correctional Services convened to question her on the policy on the appointment of the special adviser in her Office and to consider the request by the DA to conduct an inquiry into her fitness to hold office. Mkhwebane allegedly submitted a late apology, citing a family emergency. This angered the members of the PC, with some of them suggesting that the late submission of an apology by the PP indicated that she had never intended to appear (Politicsweb, 2018). It must be noted that the PP does not account to Parliament as its functionary or a member of the Executive. She appears by constitutional injunction and should not be forced to account about the cases she has investigated or about the internal human resources practices, but must account about the integrity and credibility of her Office's processes, the use of allocated resources, and whether she meets with difficulties in carrying out the mandate and achieving the strategic objectives of her

Office (see par. 6.9, pages 313-315 of this chapter for a discussion on parliamentary oversight).

This criticism of the conduct of the PC does not suggest that the PC does not have the right to initiate an inquiry into the conduct of the PP. It can do so on the strength of the High Court remarks about the integrity of the PP. In fact, De Vos (2018) has suggested that the PP's impugned conduct calls for the impeachment processes against her.

The PP uses the ADR process, especially mediation, to settle most disputes between the organs of state and the complainants (Public Protector, 2017). In addition, the PP essentially uses his/her power to take remedial action to ensure good governance. Through this tool, he/she enforces public accountability, transparency and the rule of law, among other key principles of good governance. By contrast, the SAHRC uses its power of recommendation and litigation to achieve the same results. The AGSA uses mainly its persuasive power of recommendation to achieve its objectives of promoting good governance, while the SIU uses the power of litigation and reference of disciplinary inquiries to the organs of state. In principle, all these other avenues are available to the PP. He/she can make recommendations where appropriate, settle disputes by means of ADR, or refer matters for criminal prosecution or disciplinary inquiries, for instance, like the PP did with Hlaudi Motsoeneng at the SABC, or he/she can litigate to enforce rights. But all these instruments, except making recommendations or settling disputes by means of ADR methods, may be superfluous as the PP's remedial action can be equally or more potent and effective in ensuring public accountability and good governance in general (see *Economic Freedom Fighters and Others v The Speaker of National Assembly*, 2016).

This tells us that the remedial action of the PP can be a powerful and effective tool of facilitating public accountability and good governance, if it is well founded and formulated, like in the *SABC*, *PRASA*, *Nkandla* and *State of Capture* reports. But it can also undermine the intellectual and moral integrity of the PP if it is unfounded and poorly formulated, like in the case of the *Absa/Ciex* report, which saw her been censured by the courts (see in this regard *Absa Bank Limited and Others v the Public Protector*, 2018). Hence, the importance of the fettered remedial action of the

PP that can be reviewed by a competent court of law. In this regard, the Supreme Court of Appeal held that the power of the PP was reviewable based on the principle of legality, founded on the constitutional value of the rule of law (*Minister of Home Affairs and Another v Public Protector of the Republic of South Africa*, 2018).

Institution-building and corporate governance is important for the effectiveness of the Ombudsman. The researcher has made reference to the unique manner in which the Parliamentary Ombudsman of the UK approaches this issue and infuses corporate governance in its operations. The PHSO has introduced a Board of Directors to assist him/her in overseeing corporate governance. By contrast, the current PP has discontinued the GAB that was introduced by the previous PP, leaving her as the executive authority supported by the executive committee consisting of only herself, the Deputy PP and the CEO, which means she is a complete embodiment of the institutional and corporate governance culture in the institution. The danger of the failure to institutionalise an institutional and corporate governance culture means the institution rises or falls on the personal integrity of the PP, and if the PP is a person of weak character and less integrity, the whole organisation may collapse as a result (Grootes, 2019).

CHAPTER 7: SUMMARY, FINDINGS, RECOMMENDATIONS AND CONCLUSION

7.1 Introduction

Precisely because this was meant to be a theoretical study, it adopted deductive methods of analysis by discussing the relevant theories and then locating the question of the status of the PP within these theoretical frameworks.

The main conclusion of the study is that the PP is located within the trilogy of normative frameworks. Governance Theory was established as the theoretical framework within which the institution of the PP found resonance; Good Governance

was established as the normative function of the PP in South Africa; and the normative values of the PP were determined.

The study further contributed to understanding of the conception of the PP as the genus of Ombudsman by locating it within the concept of Ombudsman, as it originated in Sweden and came to spread all over the world. Diaw (2008: 1) argued that the Ombudsman institution has been an integral part of state transformation and has become an important feature and standard of the modern democratic state. The study has determined that this is true of the PP in South Africa.

The study sought to define the place of the PP within the governance framework as a constitutionally guaranteed body that stands outside the *trias politica* and co-operative *government*, but is part of the broader co-operative *governance*. From this detached position, it protects and strengthens constitutional democracy and promotes good governance by overseeing conduct in state affairs and public administration in all spheres of government. The distinction between co-operative *government* and co-operative *governance* is that the former relates to the structured relationship between governments in all spheres of government and organs of state within those spheres and exists within the restrictive intergovernmental relations framework that discourages litigation against each other. Co-operative *governance*, on the other hand, is the action of steering activities of organs of state co-operatively towards the achievement of the higher ideals of constitutional democracy and a better life for all (researcher's own definition). Co-operative *governance* is steered by a higher ideal; that is, the promotion of good governance, and is not hampered by structural constraints.

This chapter will summarise the chapters of the study, indicate the findings, and make recommendations.

7.2 Summary

Chapter 1 of the study concentrated on defining the research problem, research objectives, research paradigm and research methodology for the study.

The research problem arose because the status and powers of the PP have been politically questioned in the political milieu, and its remedial actions have been regularly legally challenged calling into question its independence, and acceptance of its decisions, findings and remedial action. Therefore, the researcher identified the

need to clarify, through scientific inquiry, the status of this important institution within the governance framework. Hence, the following research questions were formulated to guide the study (see Chapter 1, par. 1.3, pages 5-7 for a discussion of the problem statement and research questions):

- (i) What is the status and powers of the PP within the governance framework that exists in South Africa?
- (ii) How is the PP empowered constitutionally, legally, institutionally and resources-wise to promote good governance in South Africa?
- (iii) What is the PP doing to support constitutional democracy and promote good governance?
- (iv) Is good corporate governance promoted or is it the end result in the aftermath of the investigations, decisions, findings and remedial actions of the PP considering how these have been perceived, received and effected by the affected public institutions?
- (v) What are the requisite qualities for a PP and what has been the legacy of
of
the successive PPs to date?
- (vi) How does the PP compare with similar institutions in Africa, Europe and Latin America in terms of the status, powers and functions with a view to evaluate the international normative guidelines for similar institutions.

The study had four objectives:

Objective 1 intended to establish the normative theoretical frameworks and working governance theory for the conceptualisation of the PP, as a genus of Ombudsman with a view to contribute to the interdisciplinary science of Governance and Political Transformation in South Africa. The objective was to discuss the theories and perspectives of Governance and Ombudsman, in order to locate the concept of the PP within these theoretical frameworks (see Chapter 2, paras. 2.2-2.6, pages 18-57 for the discussion of Governance theories and paras. 2.7-2.11, pages 58-101); the objective of Chapter 3 was to deal with the conception of the PP and the constitutional framework within which it finds institutional expression (see Chapter 3, paras. 3.1-3.7 pages 104-144 for the discussion on the conception of Ombudsman in

South Africa, as well as the status, role and powers of the PP within the governance framework in South Africa). Chapter 6 intended to elucidate the status of the PP of South Africa through a detailed comparative analysis (see para. 6.1 and 6.11, pages 266-327 for the comparative analysis of the PP of South Africa with Ombudsman institutions in Europe, Latin America and Africa). These chapters were intended to broadly address Objective 1.

Objective 2 intended to locate the status of the PP within the governance framework through the analysis of its conception and the macro socio-politico-legal context within which it exists, and to analyse its powers and functions within the constitutional setting in South Africa. This was achieved in Chapter 3, which dealt with the conception of the PP, within the constitutional framework in South Africa (see Chapter 3, paras. 3.1 – 3.7, pages 104-144).

Objective 3 intended to focus on the state of governance in South Africa, especially how this affects the position of the PP. This was discussed in Chapter 4 (see Chapter 4, paras. 4.1 to 4.4, pages 149-192) of the study, which dealt with the crisis of governance and its impact on the PP in South Africa. The study has indicated that South Africa was in danger of becoming a weak or failed state due to the phenomena of State Capture and Grand Corruption that besieged the country. State Capture has weakened state institutions and sought to repurpose governance in South Africa for the nefarious interests of a few comprador elites, at the helm of which were allegedly the Zuma and Gupta families, and supported by the extensive network of dubious political role-players and unscrupulous business associates (Swilling *et al.*, 2017). Chapter 4 was an environmental study, elucidating the political environment within which the PP has been operating, especially during the Zuma administration. During this period, the Office of the PP was politically vilified and its powers second-guessed, and the incumbent PP was subjected to political attacks and hostile political oversight (see Chapter 4, par. 4.3, pages 184-189). However, it was also the period in which it gained greater public recognition and its powers were jurisprudentially acknowledged (see a discussion of this in Chapter 3, par. 3.6, pages 138-146).

Objective 4 intended to locate the status of the PP within the governance framework through a comparative analysis with other Ombudsman institutions in Europe, Latin

America and Africa. If the place of other Ombudsman institutions could be understood in their frameworks, the status of the PP could be analysed within South Africa's governance framework. The comparative analysis was done in Chapter 2 for theoretical and conceptualisation purposes, and in more detail in Chapter 5 to analyse the similarities and dissimilarities between the PP and Ombudsman institutions of other countries. What is unique about South Africa is the binding remedial action of the PP. Only The Gambia, whose remedial action is equivalent to a court order, has a stronger power of remedial action (see a discussion of this in Chapter 5, par. 5.5, page 248).

Chapter 1 defined as the problem statement the fact that in the political milieu the status and powers of the PP have been questioned and second-guessed. Its remedial actions have consistently been taken on judicial review, challenging the independence of the Office, and the effectiveness of its findings and its remedial action. This signalled that there was a problem with understanding the status of the PP within the governance framework in South Africa. Hence, the importance and appositeness of this study (see Chapter 1, par. 1.3, pages 5-8 for a discussion on the problem statement and research questions). Furthermore, in this chapter, the researcher defined the research methodology and design. The study adopted the interpretive research paradigm because of its flexibility. The researcher's goal with the interpretive approach was to focus attention on an aspect of Governance and Political Transformation in South Africa, which has generally gone under-researched, namely the status of the PP within the country's governance framework. This resulted in new insight into the theoretical and normative framework, which informs the functions and the status of the PP (see Chapter 1, par. 1.6, page 10-14).

By utilising qualitative document analysis (QDA), the researcher thoroughly examined and interpreted the data contained in the secondary data consulted. This process is called content analysis. QDA was the preferred method because it was more efficient than other methods of data collection as it involved mainly data selection, and not necessarily data collection (see Chapter 1, par. 1.6, page 10-14).

In **Chapter 2**, the theoretical framework within which the Ombudsman was conceptualised was discussed. Governance Theory was understood as the genesis

of the conceptualisation of the Ombudsman, which necessitated the discussion of this theory.

Governance theory has a long history of conceptualisation and development. Traditional Public Administration, which describes public administration from the management, political and legal perspectives, provided the initial context for the development of the institution of the Ombudsman. Traditional Public Administration was followed by the neoliberal reforms, which emphasised the New Public Management (NPM) theory (managing public services as business units) and the commercialisation of public services. The commercialisation and privatisation of public services meant that vices such as corruption, rent-seeking, cronyism and political patronage emerged. This created conditions for bad governance as these reforms failed to take root (see Chapter 2, par. 2.2, pages 18-30 for a discussion on the Theories and Perspectives of Governance).

Further reforms, which Bevir called a second wave of reforms, were necessitated by the failures of the first wave of reforms, such as the NPM and commercialisation. The second wave of reforms included a number of overlapping trends, which were brought together under the label of new governance, or simply the governance approach (Bevir, 2010: 75) (see Chapter 2, par. 2.2, pages 18-30).

Irrespective of the paradigms that existed at any stage of the development of the theories of Governance, historically there was always a need to redress the complaints of the citizens. In democratic societies, the disputes between the state and its citizens are generally resolved through the courts and other tribunals. However, this mechanism is mostly expensive, slow and inaccessible, and often focused on individual cases; hence, the need to develop a dispute resolution mechanism that was effective, efficient and free of charge (Beqiraj, Garahan and Shuttleworth, 2018: 7). The Ombudsman is such an institution, with specific focus on informal access to justice, complementing formal access to justice through the courts (see Chapter 2, par. 2.7, page 58 for a discussion on this issue). That is why in this study it is argued that Governance is the theoretical framework within which the institution of the Ombudsman, as an alternative dispute resolution mechanism, finds resonance.

The literature shows that the modern institution of the Ombudsman originated in Sweden in 1809, and then it was established in Finland in 1919, followed by Denmark in 1955, which broadened its mandate to include the entire administration, extending to both civilian and military establishments (Mora, 2015). It is the Danish model, where the Ombudsman was constitutionalised, which was to popularise the idea of the public sector Ombudsman and that came to be adopted by many polities from the 1960s onwards (Reif, 2004: 6). In 1963, Norway followed suit, and in 1967, the United Kingdom adopted its own Parliamentary Ombudsman (Kucsko-Stadlmayer, 2008: 1). Today the institution of the Ombudsman is a worldwide phenomenon, and a rule, rather than an exception. However, each country has modelled the institution based on its own different politico-legal systems, constitutionalism, culture and history (Stuhmcke, 2012: 10-13; Diamandouros, 2006a). Therefore, there is no one-size-fits-all approach to Ombudsmanship (see Chapter 2, par. 2.7, pages 58-62).

Chapter 3 focused on the conception and conceptualisation of the PP in South Africa, as a genus of the Ombudsman. The Ombudsman in South Africa originated as the Advocate-General (renamed Ombudsman in the 1990s) in 1979. This body, however, existed within the system of parliamentary supremacy, had limited powers of investigation of administrative irregularities, and could only recommend remedial action. The idea of the independent Ombudsman for the new South Africa, with full remedial powers, was mooted by the ANC in its Ready to Govern document (ANC, 1992). Subsequently, the political settlement that followed provided for the establishment of the PP based on Constitutional Principle XXIX.

While there have been suggestions that the nomenclature 'Public Protector' was chosen to avoid the gender connotations of the word 'Ombudsman' (*Ad Hoc* Committee on the Review of Chapter 9 Institutions, 2007), Chief Justice Mogoeng has suggested that there is much more to the name 'Public Protector' as the institution was created to protect the public against the scourge of corruption and maladministration and to promote good governance. It was conceptually, institutionally and constitutionally designed to be qualitatively different from its predecessor 'the Advocate-General'. According to Mogoeng, the PP is the embodiment of the biblical David standing against the Goliath of maladministration

and corruption. Therefore, the promotion of good governance is the normative function of the PP (see Chapter 3, par. 3.2, pages 104-109).

The researcher also analysed the institutional context within which the PP exists as this assisted in elucidating the place of the PP within the governance framework. The governance framework in South Africa exists within the context of constitutionalism, in which the Constitution is the supreme law and is facilitative of the democratic transformation agenda of the nation. According to this principle, law and conduct that violate the Constitution is invalid. The PP exists within this constitutional framework; hence, its independence and integrity as a constitutional institution is guaranteed. The institution is also conceptualised as a Chapter 9 institution, tasked to protect and strengthen constitutional democracy. Its powers of remedial action are also defined in the Constitution (Section 182 of the Constitution) (see Chapter 3, paras. 3.4-3.5, pages 116-138).

The notions of the separation of powers and its associated notion, *trias politica*, were discussed. It is clear that the doctrine of the separation of powers is implicit in the constitutional scheme of South Africa and that the state authority is separated into the Legislative, Executive and Judicial branches of government (Mokgoro, 2015; Mojapelo, 2013). The PP has been created as an additional institution of checks and balances, and it exists outside the *trias politica* (Madonsela, 2014) (see Chapter 3, par. 3.4, pages 115-131).

The question as to whether the findings and remedial action of the PP were binding occupied the public discourse during the tenure of Adv. Thuli Madonsela. Political actors, academia and the legal fraternity contended that the findings and remedial action of the PP were merely recommendations (Law Society of South Africa, 2015). In the aftermath of the findings against the COO of the SABC, the Western Cape High Court suggested that the remedial action of the PP was not binding and could be ignored on reasonable grounds (see *SABC v DA*). This created much confusion and the SABC commissioned a private legal firm to second-guess the remedial action of the PP. On appeal, the SCA rejected the contention of the Western Cape High Court and held that the remedial action of the PP was binding, unless successfully reviewed by a competent court (see *DA v SABC*) (see Chapter 3, par. 3.6, pages 143-145).

In the aftermath of the Nkandla debacle, the PP issued the report titled *Secure in Comfort*, which found that the President and his family were unduly enriched with the erection of non-security improvements at their Nkandla homestead. The report directed SAPS and the National Treasury to determine a reasonable amount of the costs unjustifiably spent on the private residence of the President, and required the President to pay back the amount, as determined, to the state. However, the then Minister of Police, Nathi Nhleko, commissioned an investigation, which reached different conclusions to the findings of the PP, and furthermore, the Parliament adopted the report of the Minister of Police. Effectively, by adopting this report the Parliament second-guessed the findings of the PP and exonerated the President from any liability. This was made possible by the ANC's dominance in Parliament, which enabled it to ram through such an unjust decision, in defence of its party president (see Chapter 3, par. 3.4.2, pages 125-129).

The opposition parties, having lost the debate and contest in Parliament, took the matter to the Constitutional Court for review. The Court returned a finding that was to restore the integrity and establish the powers of the PP within the governance framework. In the case of the *Economic Freedom Fighters and others v the Speaker of the National Assembly and others* it held that the findings and remedial action of the PP were binding, unless successfully reviewed by a competent court (see Chapter 3, par. 3.6, pages 143-145).

This issue of the binding nature of the PP's remedial action makes it conceptually different from the Classical Ombudsman. Kirkam (2007: 13) points out that the Classical Ombudsman relies on his/her powers of persuasion and cooperation of the agencies he/she investigates for the effectiveness of his/her recommendations. The Classical Ombudsman also refers recommendations to the Legislature to direct the implementation of the remedy recommended by the Ombudsman (Maer and Everret, 2016: 7; Kirkam, 2007: 13) (see Chapter 2, par. 2.7, pages 74-75).

The other problem with the binding nature of the PP's remedial action is the question of counter-majoritarian difficulty. This phenomenon manifests itself through the principle of justiciability of the Constitution and the power of constitutional review granted to the Judiciary (Currie and De Waal, 2005; Burns, 2003; Daniels and Brickhill, 2006). The PP, it is argued, is also an instrument of counter-majoritarianism

as it exists to check the power of the state and through its remedial action can veto the decisions of the elected majority (see Chapter 2, par. 2.4, pages 43-44 for a discussion of the concept of counter-majoritarian difficulty).

Chapter 4 of the study has shown that the law enforcement institutions, such as the NPA and the Hawks, have been destabilised through leadership turnover and the appointment of persons who are not fit and proper; therefore, weakening their capacity to take on the corrupt elite. The power of the President to effect these appointments without following any consultative processes has been flagged as one of the weaknesses of governance in South Africa (Moseneke, 2014) (see a discussion in this regard in Chapter 4, par. 4.2, pages 160-162).

Good Corporate Governance at State-Owned Entities (SOEs) has been eroded through the manipulation of the appointment of members of the Boards of Directors. These members then manipulate tender processes to benefit the 'business' interests of the parasitic elite (Swilling *et al.*, 2017) (see Chapter 4, par. 4.2, page 170-172) for a discussion on this issue). The PP existed within this political environment. The PP was affected by this state of affairs and was called upon to investigate some of these shenanigans. Reports such as *When Governance and Ethics Fail* (the SABC), *Derailed* (PRASA), *Secure in Comfort* (Nkandla) and *State of Capture* (State Capture) are some of the examples of how the PP grappled with crises of governance in South Africa. As a result, the PP was subjected to character assassination, threats and insults, which undoubtedly were intended to undermine the integrity and independence of the institution (Feketha, 2014; Sesant, 2014). Ironically, this crisis of governance helped clarify the role, powers and status of the PP within the governance framework (see Chapter 4, par. 4.3, pages 181-188).

In **Chapter 5** (see paragraphs 5.3, 5.4, 5.5 and Table 5.1, pages 199-260 above), the researcher undertook an extensive comparative analysis of the PP with Ombudsman institutions in Europe, Latin America and Africa. The research found that the main difference between the PP and other Ombudsman institutions is the PP's binding remedial action. Only The Gambian's Ombudsman has a comparable power of remedial action, which is equivalent to a High Court order, but unlike the PP's remedial action, it can be reviewed on jurisdictional grounds only. In Europe, Latin America and other African countries the Ombudsman only has powers of

recommendation and they rely largely on their power of persuasion to enforce their remedial action (Mackie, 2010; Volio, 2003; Uggla, 2009).

The other difference is that the PP, like the Spanish Ombudsman, is not a functionary of the Parliament or the Executive, or part of the Judiciary. The PP is an independent constitutional body, which is subject only to the Constitution and the law. The Parliamentary Ombudsman of the UK, on the other hand, is a parliamentary functionary. For instance, within the British Westminster system, the public can only approach the Ombudsman through the so-called “MP-filter” system. In other words, a member of the public must first approach his/her constituency’s Member of Parliament, who must then report the complaint to the Ombudsman (Maer and Everret, 2016). The French Ombudsman exists as part of the Executive, even with the new constitutional developments in France that now allows direct access to the Ombudsman (Bousta and Sagar, 2014). The Ombudsman in Eastern Europe and Latin America, like the Tanzanian Ombudsman, focus mostly on a human rights mandate. In South Africa, the human rights function and the ombudsman functions are separated: the South African Human Rights Commission carries the human rights mandate and the Ombudsman’s functions are carried by the PP, although the PP’s mandate is broad enough to cover some aspects of the human rights mandate. Moreover, the PP of South Africa is a hybrid institution. This is a general trend in Latin America, Europe and Africa where the hybrid models have been followed with human rights, maladministration and corruption mandates incorporated (AOMA, 2014: 61; Reif, 2004: 35) (see a detailed comparative study in Chapter 5, paras. 5.3-5.5, pages 199-260).

In **Chapter 6** (see par. 6.3, pages 269-276), the researcher evaluated and interpreted the contribution of the study to the theory and practice of the science of Governance and the status of the PP within the governance framework in South Africa.

The study has been a normative exercise that established the place of the Ombudsman generally, and of the PP in particular, within various normative frameworks. Its main contribution is that it successfully determined the theory of Governance as a theoretical framework within which the institution of the Ombudsman finds resonance, determined Good Governance as the normative

function for the Ombudsman, and determined the normative values of the Ombudsman. Applied to South Africa, these normative frameworks have been successful in clarifying the status of the PP within the governance framework in South Africa (see Chapter 6, Figure 6.1., page 276 for the Overview of the Public Protector's normative framework).

The evaluation indicated that the PP exists outside both the *trias politica* and the co-operative government framework. However, the PP is an organ of state, within the meaning of Section 139, and therefore has to co-operate with other organs of state to achieve its mandate of promoting good governance and strengthening constitutional democracy. Hence, it is argued that while it is true that the PP is not part of co-operative *government*, it is part of broader co-operative *governance*, but it is not bound by the intergovernmental relations framework that discourages litigation between organs of state. The Ad Hoc Committee on the Review of Chapter 9 Institutions and the *IEC v Langeberg Municipality* has described the status of Chapter 9 institutions as “not part of government, but an integral part of governance” (see in this regard Chapter 6, par. 6.3, pages 272-276).

The PP share mandates with other constitutional institutions, especially the Auditor-General, the South African Human Rights Commission and the Public Service Commission. Other institutions with a similar mandate as the PP are the Special Investigative Unit (SIU), the Independent Police Investigative Directorate (IPID), the Health Ombud, and the Municipal Ombudsmen of Cape Town and Johannesburg. However, the PP is also different from all of these institutions because of its broad mandate and power of a binding remedial action (see Chapter 6, paras. 6.5-6.6, pages 278-290).

In the evaluation, the researcher makes the point that the PP cannot realise its constitutional purpose if it is not capacitated with adequate financial and human resources. Without these resources, the institution cannot be effective. Hence, the evaluation highlighted the financial and human resources difficulties of the PP. The effectiveness of the PP in monitoring and enforcing the implementation of its remedial action is hampered by these resource constraints (see Chapter 6, par. 6.7, pages 296-299).

The evaluation also highlighted the virtues of independence, impartiality and fairness, the credibility of the review process, and confidentiality (Gottelher and Hostina, 1998: 1) as the normative values of the Ombudsman. In this regard, the leadership qualities, virtues and conduct of the previous and incumbent PPs were evaluated against these normative values with a view to craft the normative values for the PP. The conclusion was clear: a PP who espouses the values of independence, integrity, moral courage and thought leadership, among others, is able to vindicate the independence and status of the Office of the PP within the governance framework (see Chapter 6, par. 6.8, pages 299-313).

Parliamentary oversight is a constitutional requirement and international norm for the Ombudsman. In South Africa, the PP reports to the Parliament through the Portfolio Committee on Justice and Correctional Services. The evaluation indicated that a fine line existed between oversight and interference, with examples of acrimonious relations between the current PP and the Committee. This must be arrested to ensure a smooth process of accountability by the PP to the Committee (see Chapter 6, par. 6.9, pages 310-311).

The evaluation also concluded that institution-building and corporate governance are important for the effectiveness of the Ombudsman; hence, the infusion of corporate governance standards by the PHSO of the UK is flagged as the best practice for the PP. The current PP has done away with external governance and advisory mechanisms established by her predecessor. There is a need for the restoration of such a mechanism to assure governance and operational integrity of the Office of the PP, especially with the negative court findings regarding her understanding of her constitutional duties and mandate (see *Absa and Others v PP and others*). Currently, as a monocratic institution, the PP is the sole assurer of governance and operational integrity of the institution. In this situation, the success or failure of governance and institution building relies on the integrity and effectiveness of the incumbent PP (see Chapter 5, par. 5.3, page 202 for the discussion of the need for corporate governance).

7.3 Findings

From the research conducted in this study, the researcher has made the following findings:

- The PP exists as part of the broader governance framework, even though it is not part of the *trias politica* and co-operative government. This means that while the PP exists outside the *trias politica* and co-operative government, it remains an integral part of the governance framework that exists in South Africa. Governance theory, as analysed in Chapter 2 of this study, is the overarching theoretical framework within which the Ombudsman institution, including the PP, finds resonance. What gives credence to the establishment of the PP is the democratic ethos of good governance, which essentially calls for a free or inexpensive mechanism to resolve disputes between the government and its subjects. As alluded to in Chapter 2, par. 2.7, page 58 of this study, traditional approaches to dispute resolution have proven to be too expensive and inaccessible. Modern governance theory supports alternative dispute resolution (ADR) mechanisms as part of democratic governance (Stuhmcke, 2016). The PP is such a mechanism within the governance framework in South Africa, providing a free, participatory and deliberative complaint-handling and dispute resolution service that holds public authorities accountable for their improper acts and omissions. By playing this role, the PP succeeds to enhance the democratic governance dividend.

The PP is part of broader co-operative governance. This means that the PP depends on co-operation with other organs of state within the governance framework to achieve its objectives of constitutional democracy and good governance. As the researcher indicates in Chapter 6, par. 6.3, page 272 - 275, co-operation between the PP and other organs of state is a constitutional injunction. Section 181 of the Constitution requires all organs of state to adopt positive measures to support the PP. It is the researcher's argument that this requires the PP to be co-operative and not be aloof just because he/she is independent. The ultimate goal of this co-operation is to promote good governance.

- The PP lacks monitoring and evaluation capacity. This undermines its ability to enforce its remedial action and monitor systemic governance issues. This means the PP needs to improve its monitoring and evaluation capacity to

enforce its remedial actions and promote good governance. In par. 6.6, page 296, the researcher stated that the current PP indicated in her Strategic Plan 2017-2022 the ineffectiveness of the current monitoring and evaluation activities. Therefore, it is clear that this capacity has to be built and improved. The idea with building this capacity is to forge the PP as the comprehensive Good Governance monitoring and evaluating institution, with regular scorecards to check compliance with the approved normative standards.

- The PP lacks institutionalisation of corporate governance (see Chapter 6, par. 6.10, pages 319-320 for a discussion of this aspect). As a monocratic-type institution (see a discussion of this concept in Chapter 2, par. 2.8, page 69), the PP requires an external corporate governance and advisory capacity, which would be key to assuring the integrity and quality of its strategic operations and processes. The threat of an unscrupulous individual at the head of an all-powerful institution, such as the PP, abusing their power is real and not far-fetched. In fact, the court has already said the incumbent PP has misused her powers with regard to the Absa-Ciex investigation (see *Absa v the Public Protector* judgment). Therefore, additional checks and balances are necessary to check the possibility of the abuse of power by the PP, and to assure the integrity of the Office.
- Good Governance is the normative function of the PP (see arguments in this regard in Chapter 2, par. 2.4, pages 39-52; also, Chapter 6, par. 6.4, pages 277-282), with its remedial action as the potent arsenal at its disposal to enforce and promote good governance and constitutional democracy. This means that good governance is the key mandate of the PP, even though this mandate is not defined or described in the Constitution and the PP Act. Whatever power it exercises and whenever it takes remedial action, the PP does so implicitly to promote good governance. This also means that the PP is the premier good governance institution, with the responsibility to lead all concerted efforts to build the culture of good governance, anti-corruption and integrity within the governance framework in South Africa.

- While it is true that the PP's remedial action (see discussions on the remedial action of the PP in Chapter 6, par. 6.4, pages 279-282) can be effective on its own, litigation and alternative dispute resolution (especially the use of arbitration) are some of the methods that can support its remedial action. This means that the PP must be careful not to overuse or abuse the power of binding remedial action. The PP must recognise that each case must be dealt with on its own merit, which may require the use of different methods to resolve litigation, prosecution and/or alternative dispute resolution mechanisms.
- The PP requires adequate financial and human resource capacity to achieve its strategic objectives. The inadequacy of its financial and human resources was discussed in Chapter 6, par. 6.7, pages 294-296. It is important that the PP is adequately resourced to attend to its very important mandate in the democratic governance of the country. Inadequate resources could mean that the Office cannot realise its full potential and therefore its value in democratic governance may not be fully realised.
- The reporting arrangements of the PP have shortcomings; that is, the PP reports to the Portfolio Committee to which the Executive reports (see Chapter 6, par. 6.5, pages 283 for a discussion on this subject), and does not report to the provincial legislatures and municipal councils despite the fact that many of its investigations take place at these spheres of government (Chapter 6, par. 6.5, page 285). The implication of the PP and the Justice Department reporting to the same parliamentary committee is that the independence of the PP could be undermined, as already happened when the parliamentary committee wanted the Minister of Justice to report to the committee on aspects of the Office of the PP (see Chapter 4, par. 4.3, page 190-191). The other limitation in the current reporting arrangements is that the PP does not have access to the provincial and municipal legislatures, depriving it of a potentially effective assistive mechanism to monitor compliance with its remedial actions and recommendations.
- The multi-stakeholder participatory process of appointing the PP could enhance the integrity and independence of the institution (see Chapter 4, par.

4.2, page 192-193-, for a discussion on the problems of political appointments of the heads of independent institutions). At present, the PP is appointed by the President on the recommendation of the National Assembly. Although the researcher has noted some level of public participation in the appointment of the current PP, this needs to be increased and institutionalised.

- Irrespective of the nomenclature and its unique powers, the PP is a genus of the Ombudsman; hence, its conceptual and theoretical basis is the Ombudsman institution as it originated in Sweden in 1809. Arising from this conceptual framework, the Ombudsman is an independent officer, appointed by the Parliament or with its participation, who has the power to receive complaints or grievances from the country's citizens, investigate them and recommend remedial action to resolve them (see Chapter 2, par. 2.7, page 58-63 of this study for a discussion on the concept of the Ombudsman). Locating the PP as an Ombudsman immediately places the PP within this classical definition. In Chapter 2, par. 2.7, page 62-63, the researcher refers to the different nomenclatures used for referring to the Ombudsman in different countries. In South Africa, the name 'Public Protector' was preferred, not only to address the gender connotations of the name 'Ombudsman', but also to reflect the fact that it exists to protect the people against all sorts of malfeasance by the powerful ruling elite (see Chapter 3, par. 3.2, page 108 for a discussion on this issue). But, unlike the Classical Ombudsman that originated and spread in Western Europe and whose primary mandate is to check maladministration, the PP is a hybrid institution, which developed in a similar fashion to how the institution developed in Eastern Europe, Latin America and Africa, with multiple mandates. The meaning of this for South Africa is that the mandate for the PP covers broad areas, including some aspects of human rights, corruption, maladministration and environmental protection (see Table 3.1 and 3.2 for the legislative and policy mandates of the PP, pages 111-115). This has implications for the structure, resourcing and reach of the Office. The structure of the Office needs to be expanded to include more than one deputy PP and the Office must be adequately resourced to attend to this broad mandate. The other unique feature of the PP is that, unlike the Classical Ombudsman whose remedial action is non-

binding, the PP's remedial action is binding, although its decisions can be reviewed by a competent court of law. This power of binding remedial action makes the PP one of the most powerful institutions within the governance and political framework in South Africa, calling for mechanisms to check this power because the unfettered power of the PP can inadvertently create an unaccountable institutional monster. Parliamentary accountability and the instrument of judicial review are there to check this power, but there is a need for other mechanisms such as the institutionalisation of the corporate governance framework within the Office of the PP, as a measure of self-regulation (see Chapter 6, par. 6.10, in pages 319-320 for a discussion of the need to institutionalise corporate governance for the Office of the PP).

- The normative values (see a discussion of these values in Chapter 2, par. 2.11, pages 87-101) of independence, integrity, moral courage, thought leadership, fairness, effectiveness, transparency and accountability, among others, are key to the proper functioning of the PP. These normative values are themselves important tenets of good governance. If the PP is not driven by these values, it is unlikely to add value to the culture of good governance. The implication for prescribing these positive values for the PP is to ensure that he/she actually walks the talk, which shows exemplary leadership.

All the above findings describe the current state of affairs with regard to the status of the PP within the governance framework in South Africa. These findings have been flagged because addressing their implications can further reinforce the status of the PP within the governance framework.

7.4 Recommendations

Based on the research and findings made in this study, the researcher makes the recommendations below aimed at fortifying the status of the PP within the governance framework in South Africa.

7.4.1 Governance theory and co-operative governance

In Chapter 6 (par. 6.2, page 267-269) of this study the argument is made that applying the concept of governance in the constitutional framework in South Africa

meets with definitional challenges as the Constitution does not define the concepts of governance and/or Good Governance, and constitutional democracy. Therefore, there is a need to develop a definition of governance and Good Governance that is relevant to South Africa and that can be aligned to the Constitution.

The conclusion is that in the context of South Africa, governance is a normative theory that guides the democratic and accountable functioning of government and other organs of state. In this sense, by 'normative' we mean the manner in which something ought to be done based on a particular value proposition. The value proposition is the realisation of constitutional democracy, where there is a better life for all. Constitutional democracy is defined as the democratic system based on the founding values (Section 1 of the Constitution) of the Constitution, constitutional supremacy (Section 2 of the Constitution), and the Bill of Rights (Chapter 2 of the Constitution). In this sense, 'constitutional democracy' has the same philosophical meaning as 'constitutionalism' and especially 'transformative constitutionalism', as defined by Klare (1998) and expanded upon by Chief Justice Pius Langa (2006) and Davis (2007). In this sense, governance is not an end, but a means to an end. That end is constitutional democracy, in which there is a better life for all. The concept 'better life for all' can be defined as effective redress of the challenges of poverty, inequality and unemployment. No other outcome can demonstrate the success of democratic governance and political transformation in South Africa (Chapter 6, par. 6.2, page 267-269).

The researcher also defines the concept of 'governance framework' as the structured mechanism to operationalise the advancement of the ideal of constitutional democracy. It is the researcher's thesis that this theory aligns the concept of governance to the constitutional framework in South Africa (Chapter 6, par. 6.2, page 267-269).

The PP exists within the context of the broader democratic governance theory that essentially calls for the establishment of *corps intermediaires* in society to mediate between the government and the people in case of disputes or complaints. The PP as an institution provides a free and deliberative mechanism to resolve disputes between the government and the citizens. Traditional dispute resolution institutions, such as the courts and other tribunals, are too expensive and inaccessible; hence,

the importance of the PP within the governance framework is to give people access to justice and a platform to exercise their rights to social and administrative justice within constitutional democracy (see a discussion on this issue in Chapter 2, par. 2.7, page 58).

One of the findings is that the PP is not part of co-operative *government* (within the meaning of Chapter 3 of the Constitution), but is part of the broader co-operative *governance*. The researcher, however, suggests that it will be in the interest of broader co-operative governance if the PP is not aloof, but actively seeks co-operation with other organs of state to achieve its mandate (see a discussion on the place of the PP within the governance framework in Chapter 6, par. 6.3, pages 269-275).

Even though the intergovernmental relations framework does not bind the PP, he/she should be encouraged to explore mediation to resolve disputes between the institution and other organs of state. It is suggested by the researcher that the PP should participate in intergovernmental forums, as an invitee, for purposes of high-level interaction with these stakeholders. Participating in these structures, as an invitee, will not compromise the independence and impartiality of the PP, but will give the PP a strategic platform to enhance the educative, deliberative and participative democratic role of the Office. It will give the Office access to the strategic stakeholders who are required by law to take measures to protect the independence of the PP.

Furthermore, the PP should ensure co-operation with the following institutions to avoid duplication:

- **Cooperation with the AGSA**

Both the audit bodies and the Ombudsman bodies inquire into and evaluate the administrative processes of the public entities in accordance with the set criteria, and, similarly, have powers of investigation and to make findings and recommendations. However, the main difference is that audit bodies are not created to handle complaints (Manning and Gallinger, 1999: 4). Ombudsmen, on the other hand, are designed as complaint-handling bodies.

In South Africa, the two bodies, the Public Protector and the Auditor-General, have complementary mandates, but do not perform the same functions or exercise the same powers. However, both were created to protect and strengthen constitutional democracy (Constitution, Section 181). Furthermore, the Public Audit Act, 2018 as amended, gives the AG powers of remedial action and the power to refer material irregularities to the relevant authorities, such as the PP, to investigate, including the power to recover monies lost as a result of the irregularities, such as non-compliance with laws, fraud, theft, and breach of fiduciary duty that caused or is likely to result in a material financial loss, or the misuse and/or loss of a material public resource, and/or substantial harm to a public institution or the general public (Public Audit Amendment Act, 5 of 2018). This development substantially aligns the remedial powers of the PP and the AGSA; hence, the need for co-operation between these two institutions has become even more pronounced.

Moreover, the researcher would like to see more collaborative investigations conducted by the multi-skilled teams from these bodies. Their effectiveness in strengthening constitutional democracy and promoting good governance will be enhanced if they cooperated regularly (see Chapter 6, par. 6.5, pages 282-290 for a discussion on the comparison between the PP and the AGSA).

- **Cooperation with the SAHRC**

The two institutions share overlapping mandates and there is a potential for duplication in their functions. For instance, the PP has not been expressly assigned the human rights mandate, but its remit is broad enough to encompass this mandate. Some incidents of poor governance and maladministration may have human rights dimensions. The mandates of human rights and good governance are inextricably connected, so that one cannot exist neatly outside the other. In fact, the PP has previously investigated matters of human rights violations, including Sarafina II; the then Deputy President Jacob Zuma's complaint against the National Director of Public Prosecutions regarding the latter's statement that Zuma had a prima facie case to answer to, but would not be prosecuted; and an investigation into the homophobic statements made by the then Premier of the Western Cape, Peter Marais (Bishop and Woolman, 2013: 24A-30). The SAHRC has handled aspects of service delivery, such as housing,

water and sanitation in the context of the right to dignity and socio-economic rights.

The researcher would like to see more collaboration between these two institutions, especially with regard to systemic investigations, and the monitoring and evaluation of governance and human rights (see Chapter 6, par. 6.5, pages 288-290 for a discussion on the comparison between the PP and the SAHRC).

- **Cooperation with the PSC**

The PSC has the potential to do much more and in a streamlined fashion conduct inspections and inquiries that can improve the performance and ethical standards in the Public Service. Its mandate³⁷ regarding labour relations, human resources and leadership reviews, governance monitoring, compliance and service delivery monitoring, investigations and audits of public administration practices, and the promotion of professional ethics can play a complementary role with the PP towards ensuring efficient and effective public service. The researcher will not propose the usurpation of the PSC's mandate by the PP, but will suggest much more collaboration between the two institutions (see Chapter 6, par. 6.5, pages 285-286 for a discussion on the comparison of the PP and the PSC).

- **Cooperation with the SIU**

It is the researcher's finding that the SIU and the PP share a mandate, in its entirety, and represent a duplication of resources. These institutions must cooperate and share resources and expertise. In light of this, the researcher proposes that the SIU, with its forensic investigative capacity³⁸, should be established as a specialised unit within the Office of the PP, with its current mandate adapted into the mandate of the PP *mutatis mutandis*, and its *modus operandi* retained. The combination of the binding remedial action of the PP with the specialised forensic investigations capacity, which the SIU has built, could immediately transform the Office of the PP into the supreme anti-corruption and integrity agency in the country. This will also eliminate the duplication of mandates and resources and help fortify the anti-corruption and integrity function in the state affairs and public administration. The current mandate of the PP is

³⁷ see http://www.psc.gov.za/about/key_performance.asp

³⁸ The SIU prides itself on its forensic investigative capacity. See <https://www.siu.org.za/our-expertize/>

broad enough to accommodate the SIU within its fold (see Section 182(1)(a) of the Constitution for the broad mandate of the PP) (see Chapter 6, par. 6.6, pages 290-293 for a discussion on the comparison of the PP and the PSC).

- **Cooperation with Ombudsman-like institutions**

The Ombudsman-like and similar institutions have a role to play in public sector governance; they can add value in promoting accountability and good governance. They should be created as one way of institutionalising and fostering ADR in the public sector, in pursuit of deliberative and participative governance. At present, there is a specific executive Ombudsman for the City of Johannesburg, an Ombudsman for the City of Cape Town, a Health Ombudsman, the IPID, and the Western Cape Police Ombudsman, all existing side by side with the PP. The PP should cooperate with all these to coordinate their activities and refer cases to each other.

The Ombudsman for the City of Johannesburg and the City of Cape Town are a novelty in the South African context. Therefore, the researcher proposes the establishment of similar institutions, especially at other metro and district municipal levels. The problems of billing and poor service delivery can best be addressed by a Municipal Ombudsman, who will develop the capacity to deal with disputes and complaints affecting the residents of specific municipalities. These local Ombudsmen do not have to usurp or replace the role of the PP, but will complement it. They can assist in fostering accountability at local level and play an ADR role, especially in the mediation of service delivery disputes, which often end up in violence and the destruction of public property. Local government must invest in this kind of ADR infrastructure (see Chapter 6, par. 6.6, pages 282-285 for a discussion of the comparison between the PP and the other ombudsman-like bodies).

It is the researcher's considered view that the PP should play the role of the coordinator of these bodies to encourage cooperation and the sharing of experiences, and to manage duplications. Therefore, the **Network of Institutions Supporting Constitutional Democracy and Promoting Good Governance** should be established under the auspices of the PP. It should submit a report at least once a year and produce an annual report, sharing lessons, experiences and areas of

cooperation. Its annual conference should converge the Chapter 9 institutions, all public sector ombudsmen and investigative institutions, and other stakeholders. This would place an intellectual spotlight on the role of these bodies in democratic governance, which in turn could enhance their collective standing and thought leadership within the governance framework.

7.4.2 Monitoring and Evaluation of Good Governance

Based on the literature analysis in Chapter 6 (par. 6.7, pages 296-299), the researcher found that the PP does not always achieve his/her purpose of enforcing good governance principles. Thus, in his/her report, the PP must always require the investigated institutions to develop an implementation plan for the award. The PP should develop, as part of its monitoring and evaluation (M&E) arsenal, a reporting template in order to monitor the extent of compliance with its remedial action. This would require the PP to improve its M&E capacity in order to be effective.

The PP should not rely only on his/her remedial action to achieve good governance, but must also carry out systemic investigations to improve good governance. One tool that can assist the PP in this is the development of a systemic monitoring and evaluation tool/good governance scorecard to assess compliance with the standards or principles of good governance. Precisely because the PP's mandate on good governance is not defined in the Constitution and legislation, and therefore its content is unclear, the researcher suggests that the PP should develop a monitoring and evaluation template or metrics to evaluate the performance of the organs of state on good governance. The metrics must contain good governance indicators, sourced from various good governance instruments, such as Section 195³⁹ of the Constitution, the Batho Pele Principles⁴⁰, and the Protocol on Corporate Governance in the Public Sector.⁴¹ Annually, the PP should send the metrics to the organs of state to provide the PP with the information on the measures they have taken in the

³⁹ Basic values and principles governing public administration: professional ethics; efficiency, economy and effectiveness; development-orientation; responsiveness and participation; accountability; human resources development; and representivity. Section 195(2) states that these principles apply to administration in all spheres of government, organs of state, and public enterprises.

⁴⁰ See White Paper on Service Delivery improvement: consultation, service standards, access, courtesy, information, openness and transparency, redress, and value for money.

⁴¹ As issued by the Department of Public Enterprises in 2002.

previous year towards the improvement of good governance. The PP can assess and then publish the analytical report every year during Good Governance Week. In time, this will prove to be an authoritative guide to the state of good governance in South Africa and will place the PP at the intellectual apex of the robust public engagement with the theory and practice of good governance in South Africa. Scholars, researchers and students of Governance and Public Administration can also use the guide to enhance the science of Governance and Political Transformation in South Africa.

7.4.3 Corporate governance

The King IV Report on Corporate Governance suggests that corporate governance is about effective leadership as it ensures that a governing body fosters ethical culture, good performance, effective control and legitimacy (Institute of Directors in Southern Africa, 2016: 11).

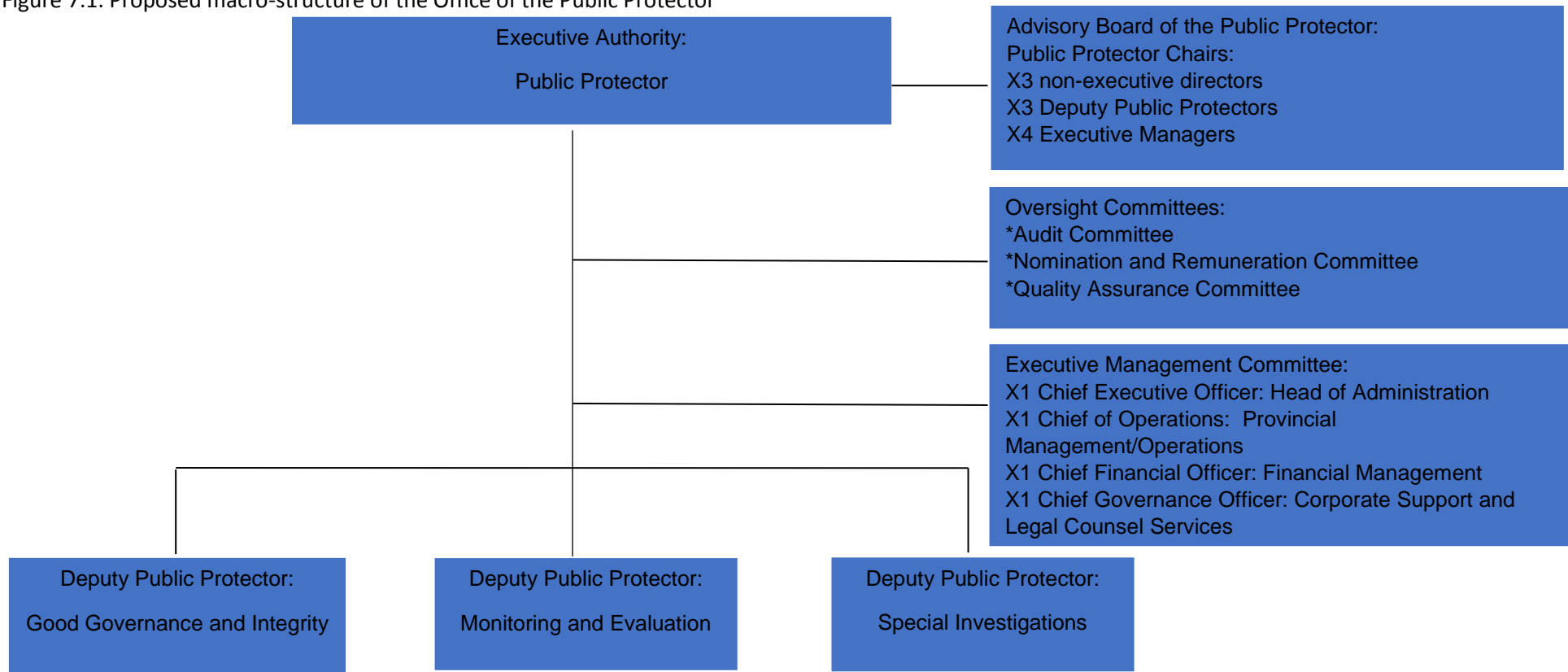
In a monocratic Ombudsman institution, such as the PP of South Africa, there is no discernible distance between the institution and the person. The integrity and ethics of the head of the institution consume the whole institution. Therefore, in such institutions, there is always a risk of corporate governance standards collapsing precisely because of the leadership and ethical weaknesses of the head. This is true of the PP as well. The credibility of Ombudsman institutions will be enhanced by the adoption and implementation of corporate governance standards in running the offices of the Ombudsman, including through the establishment of an oversight body; that is, a board or audit committee whose role will be to assure the public and the legislative authorities of the integrity, credibility and quality of the Ombudsman processes (see Chapter 5, par. 5.3, pages 202-203 for a discussion on this issue).

In Chapter 5 (see par. 5.3, pages 202-203), the researcher indicated that the Parliamentary and Health Service Ombudsman (PHSO) in the UK has incorporated corporate governance practices in its Office, without undermining its parliamentary nature. It is suggested that the PP should follow the example of the PHSO and establish an Advisory Board (consisting of non-executive and executive directors), assisted by the Audit Committee, Remuneration and Nominations Committee, and a Quality Assurance Committee, among others, to oversee corporate governance of the Office of the PP. The Advisory Board of the PP must be chaired by the PP and

should follow the King Principles on Good Governance (see various King Reports). This Board should have a specific responsibility to act where it believes the PP has acted unlawfully or contrary to his/her duties and responsibilities; thus, inform the Parliament of the irregularity. This responsibility is not intended to replace the oversight responsibilities of Parliament, but should serve to provide it and the public with assurances that the PP and his/her Office observe the highest standards of integrity, professionalism and fairness in carrying out their responsibilities. The Board should have a specific responsibility to regularly review the credibility of the processes of the PP and its ethics and integrity implementation plans, and recommend improvements. Moreover, the PP, not the Board, should remain accountable and subject to parliamentary oversight. Because of this fact, the PP must retain the right of veto and have a casting vote as the Executive Chairperson of the Board, but should be required to provide reasons of his/her deviation from the recommendations of his/her Board. The PP, not the Parliament or the Executive, should select and appoint the non-executive Board members following a transparent recruitment process. The purpose of this innovation is to assure the PP's normative values of independence, fairness, effectiveness, transparency and accountability. The PP will not become a collective-type Ombudsman, but will remain a monocratic institution with an infusion of proper corporate governance principles in its strategic operations. Furthermore, in the light of the researcher's proposal below for the expansion of the capacity of the PP to cover extensive monitoring and evaluation, integrity and whistle-blowing handling, it is suggested that the PP's macro-structure be expanded by two more Deputy Public Protectors (DPPs), organised into three specialised service centres. One DPP should be responsible for governance and integrity, including matters such as executive ethics, lifestyle audits, and whistle-blowing mechanisms. Another DPP should be responsible for monitoring and evaluation, including systemic investigations of good governance compliance; and the third DPP should be responsible for Special Investigations, including the forensic investigation of grand corruption and fraud. This kind of structure will allow for continuity and succession planning when the PP's term of office comes to an end or he/she is suspended, or resigns, or his/her appointment is otherwise terminated. This does not suggest that the pool of talent for succession will be limited to the three DPPs, but it will definitely provide for a smoother succession and transition, and the retention of institutional memory. The DPP(s) should be appointed by the

NA, following a process similar to that of appointing the PP, and they should also form part of the advisory board. Figure 3 below illustrates the proposed macro-structure for the PP:

Figure 7.1: Proposed macro-structure of the Office of the Public Protector



Source: Researcher’s own design

NB. The PP and the three DPPs constitute the Executive Committee (the EC). The EC is administratively supported by the Executive Management Committee (EMC).

7.4.4 Good governance as the normative function: anti-corruption and integrity agency

The NDP proposes a multi-agency approach to fighting corruption and promoting accountability (NPC, 2011). This approach is supported as it will ensure that if one institution is weak, there is still a coterie of others to fight on. This approach will require high level co-ordination and co-operation between and among institutions. The PP should play this role, as the supreme good governance institution.

Furthermore, the researcher suggests that the PP should be mandated as an integrity agency with the broad mandate to raise public awareness, and advise and monitor a wide range of anti-corruption and whistle-blowing mechanisms. It is the researcher's view that the PP will be best suited as a public body for the comprehensive promotion of integrity, including by conducting lifestyle audits of senior public officials and by promoting a culture of whistle-blowing in the fight against corruption. This will effectively eliminate the weakness identified in the NDP; namely that South Africa does not have a public body tasked with this mandate (see a reference to this in Chapter 6, par. 6.5, page 283).

The PP must be capacitated in order to play this comprehensive integrity and anti-corruption role. It is in light of this that the researcher proposed above that the SIU, with its forensic investigative capacity, should be incorporated as a specialised unit within the Office of the PP, with its current operational methods retained. The combination of the binding remedial action of the PP and the forensic expertise of the SIU will immediately transform the Office of the PP into the supreme anti-corruption and integrity agency in the country.

Finally, the researcher strongly recommends that the mandate of the PP as a supreme good governance institution must be legislated, with its coordinating role, powers and functions clearly delineated.

7.4.5 Remedial action, litigation and alternative dispute resolution

In theory, the PP has the power to litigate against the state on behalf of complainants, and also to recover state monies (see Section 38 of the Constitution). This also is the *modus operandi* preferred by the SAHRC and the SIU. The PP

should consider strategic litigation on certain issues, to create a precedent that it will follow when determining some of its remedial actions.

It was also indicated in Chapter 6 (par. 6.11, page 325) that the PP mostly uses ADR processes to resolve some of the disputes. The instrument most used by the PP is the settlement of disputes through mediation and conciliation (Public Protector, 2017: 6).

It is suggested here that arbitration could also be a satisfactory form of deciding on the remedial action, as it will allow disputants to place evidence before an independent arbitrator, who may be the PP himself/herself, or someone appointed by the PP or from the Office of the PP who will listen to the evidence and independently decide the dispute. The decision of the arbitrator then becomes the remedial action. This method could be effective in cases where a dispute of facts arises between disputants; it could also address the concern that the PP is the investigator, prosecutor and judge rolled into one. As an arbitrator, the PP sits as a judge. However, because this will still be in the realm of administrative justice, legal representation should not be allowed or should at least be restricted in the PP's arbitration proceedings (see Chapter 6, par. 6.3, page 268 for a discussion on the use of ADR processes by Ombudsman institutions).

7.4.6 Financial and human resource capacity

One of the weaknesses of the PP is that its budget is not directly voted for by Parliament, but is linked to the budget vote of the Department of Justice and Correctional Services. This means that the institution is not completely independent and its budgets must be motivated through the Department, as if it is its entity. Based on the analysis of literature in Chapter 5 (par. 5.5.2 pages 236-242) and Chapter 6 (par. 6.7, pages 294-296) of this study, clearly this arrangement is not consistent with the independence of the institution. Therefore, the researcher suggests that the budget of the PP must be voted for directly by the NA, and that it should be delinked from the budget vote of the Department. This will be consistent with the decision of the CC in *New National Party v The Government of the Republic of South Africa and others*, which held that there were two conditions that needed to be met to assure the independence of Chapter 9 institutions – firstly, the institutions must have

sufficient funding, and secondly, the funds must be appropriated directly by the Parliament.

Therefore, the researcher recommends two actions to further assure the independence of the Office of the PP. Firstly, the funds for the Office of the PP must be directly appropriated by the Parliament. Secondly, the PP must be adequately financed and staffed in order for it to carry its mandate without let or hindrance.

7.4.7 Reporting arrangements of the PP

Constitutionally, the PP reports to the NA in terms of Section 181(5) of the Constitution. In practice, this is done through reporting and accounting to the Portfolio Committee on Justice and Correctional Services. Based on the discussion in Chapter 6 (par. 6.9, pages 313-315), it is clear that the same body that oversees the Department of Justice and Correctional Services oversees the PP. However, the AG has a special mechanism of reporting to the NA through the Standing Committee on the Auditor-General (SCoAG). It is the researcher's suggestion that a similar special accountability arrangement should be devised for the PP and other Chapter 9 institutions, to denote their independence from the Executive. The Standing Committee on Institutions Supporting Constitutional Democracy could be created in terms of Section 155 of the Constitution to create a common accountability mechanism for Chapter 9 institutions.

As already indicated, the PP is a national body, with tentacles reaching into all provinces of the country; it also has regional offices. It will be valuable and beneficial to the citizenry that this reach is extended to municipal level, with each municipality having a representative and staff of the PP, in a similar fashion as the IEC does (see Chapter 6, par. 6.7, page 296).

In many cases, the PP investigations come from the provincial administrations and municipalities. The anomaly of reporting only to the NA is that even matters, which fall within the competence of the provincial and local spheres, have to be accounted for to the national legislature and not to the relevant provincial legislatures and municipal councils. To address this anomaly, the researcher suggests that the PP should be able to report to the provincial legislatures and municipal councils that have a direct interest in the investigations conducted, in a similar fashion as the AG does in terms of Section 188(3) of the Constitution. This reporting arrangement

should not be about the accountability of the PP to these legislative bodies, because constitutionally it cannot happen, but it should be seen as an additional mechanism to ensure that officials who work within the scope of these legislative bodies are held accountable in the normal course of their interaction with these legislative bodies; that is, reporting to the portfolio committees. The committees can incorporate these reports of the PP in their oversight functions and, in that way, assist the PP to monitor and enforce the PP's findings and remedial action (see discussion of the comparison between the PP and the AGSA in Chapter 6, par. 6.5, pages 279-282).

7.4.8 Nomination, selection and appointment of the PP

The position of the PP is too important to be left only to the political whims of dominant party political-players in the NA. The public and civil society must be given a stake in the process of appointing the PP (see the discussion on the appointment process of the PP in Chapter 5 (par. 5.5, page 235-236) and Chapter 6 (par.6.3, pages 271-272)).

The PP must at all times be a person of high stature, moral courage and integrity. A person of these high qualities and ethical standing will enhance the status of the institution within the governance framework. That is why the recruitment and selection process of the PP must be robust and transparent to ensure that only persons who are fit and proper are appointed. To achieve this, the researcher suggests the three-part multi-stakeholder participatory process for the appointment of the PP. Firstly, the public and civil society must be invited by the NA to nominate the person(s) who meet the above-stated criteria as candidates for the high office of the PP. Secondly, the Judicial Services Commission (itself a multi-stakeholder body consisting of the representatives of the judiciary, executive and legislature) should conduct the interviews and select candidate(s) for recommendation to the NA. The relevant committee of the NA should process the name(s) and submit them for debate in the House. Then, the NA must vote for or against the candidate(s) and the name that carries a two-thirds majority must be appointed without further ado. In other words, the role of the President in the appointment of the PP should be eliminated. This will require a minor constitutional amendment, as currently the Constitution provides that the President must appoint the PP on the recommendation of the NA. This is so in order that the ultimate appointing and dismissing authority for

the PP should be the NA, to which the PP reports. In Chapter 4, par. 4.2, pages 160-161, the researcher discussed the issue of the President possessing too much power in the appointment of government functionaries. Furthermore, in Chapter 5, par. 5.5, page 232-233, the examples of Ethiopia and Burundi were discussed, in which the executive plays no role in the appointment of the Ombudsman. These two issues informed the researcher's recommendation, firstly, to remove the power of the President in the appointment of the PP and, at the same time, to limit the involvement of the Executive in the process of appointing the PP. This will effectively align the PP with the Danish model where the Parliament has the power to appoint and dismiss the Ombudsman (Salman, 2006: 21) (see Chapter 2, par. 2.7, page 61-62 for a discussion of the Danish model).

The impeachment of the PP should be aligned to that of judges, with the JSC conducting investigations and the Parliament voting for or against the removal of the PP on grounds of proven misconduct and/or incapacity only. Even in this instance, the President should play no role (see Chapter 5, par. 55, page 235-236 for a discussion on the impeachment of the PP).

7.4.9 Nomenclature and hybridity

The name Public Protector is appropriate for the South African Ombudsman, as it reflects the history of its conception and purpose. As the protector of the people, the PP intercedes on behalf of the people. As Chief Justice Mogoeng opined, the PP is an exemplification of biblical David against the Goliath of bad governance (see *EFF v the Speaker of the National Assembly*). This is conceptually different from the Classical Ombudsman who represents neither the state nor the people (in this regard, see the discussion of the UK's Parliamentary Ombudsman on page 202, par. 5.3 of this study). This means that the PP must always be proactive and advance the course of good governance, including by means of own-initiated investigations and systemic investigations. The PP should not only rely on the receipt of complaints, but must proactively pursue good governance. This will require the PP to be an activist change agent within the governance framework, not a reactive Ombudsman. If the PP is not to be an activist change agent, he/she will only be as good as any other complaint-handler, but not the promoter of good governance and the protector of constitutional democracy.

The finding that the PP is a genus of the Ombudsman, but unlike the Classical Ombudsman, it is a hybrid institution with a broad mandate. This has implications for the structure, resources and capacity needed to operate at an optimal level. All these will have a bearing on the institutional design and budgetary requirements of the institution. Because of this hybrid mandate of the PP, the researcher proposes the macro-structure of the chief PP, supported by three deputy PPs, organised into three specialised service centres (see Figure 7.1, page 352 above for the proposed institutional structure). The Office of the PP should at least comprise the departments of governance and integrity, monitoring and evaluation, and special investigations for it to begin to carry out its basic mandates in an effective manner. This means South Africa will still have a monocratic-type institution, with elements of a collective-type institution, exercised through the executive committee consisting of the PP and three deputy PPs.

7.4.10 Normative values and ethics

In order to promote and maintain the independence, integrity and prestige of the institution, the incumbent PP must personally demonstrate the normative values of independence, fairness, effectiveness, transparency and accountability. This means that the PP is required to be a moral activist in order to achieve the objectives of his/her office (see a discussion of the literature on this aspect in par. 2.10, pages 92-101). Moral activism means that the PP must robustly pursue social and administrative justice, through ethical thought and intellectual leadership, fair and credible investigative processes, as well as the interpretation and application of rules without fear, favour or prejudice. The PP must be a fit and proper person of character and moral courage. Hence, the PP must always be impartial and unbiased in his/her investigations and only be guided by the Constitution, the law and his/her moral conscience.

It is important that any person considered for appointment as the PP should be tested and evaluated according to the criteria of these normative values and ethics, in addition to their adherence to the values of constitutionalism, and social and administrative justice.

7.5 Contribution of the study

This was a deductive study, discussing and analysing the relevant theories, and then locating the question of the status of the PP within these broad theoretical frameworks. The two relevant theories analysed were the Governance Theory and the Ombudsman concept. The study is significant in that it made a scientific link between these two theoretical contexts within which the PP finds resonance.

Most studies of governance and political transformation in South Africa are focused on the elements that are essential to the foundation of the state; that is, *trias politica* – the separation of powers between the executive, the legislature and the judiciary, with some attention paid to the transformation of the public service. This focus has largely ignored the status and significance of constitutional institutions supporting democracy that form part of the governance framework (Musuva, 2009: vii). Other studies of governance tended to focus on political decay, corruption and the crisis of governance, from the perspective of radical political transformation or transition (see Duvenhage, 2003; Coetzee, 2014). This study sought to contribute to the science of Governance and Political Transformation and the depository of knowledge on the state of governance in South Africa. The study was a normative exercise, which sought to locate the place of the PP within the established normative frameworks relevant to the institution of Ombudsman. Hence, one of its objectives was to locate the PP within the normative frameworks of the Governance Theory and the Ombudsman Theory, as well as to establish the case that Good Governance is the normative function of the PP in South Africa; and that the PP should function in accordance with certain normative values that all Ombudsman institutions must subscribe to in order to be effective (see Chapter 6, Figure 6.1, page 276). Therefore, from the perspective of the science of Governance the PP does not exist in a vacuum, but within some established normative frameworks, ascertainable through basic scientific research. From this perspective, the science of Governance and Political Transformation in South Africa has been enriched.

With the intense study of the background of the concept of Ombudsman, the study has contributed to the understanding of the conception of the PP as a genus of the Ombudsman, as it originated in Sweden and spread worldwide. The Ombudsman, as the study shows, is an important instrument of democratic governance and state transformation (Diaw, 2008: 1). The PP has become an integral part of the

transformation of governance in South Africa; hence, the scientific study of its role within the governance framework is of necessity an important contribution to the multidisciplinary science of Governance and Political Transformation.

The original contribution of the study is that it described the status of the PP within the governance framework as a constitutionally protected body that stands aloof of the *trias politica* and co-operative *government*, but is part of the wider concept of co-operative *governance*. From this vantage point, it protects and strengthens constitutional democracy and thereby promotes good governance by supervising conduct in state affairs and public administration in all spheres of government. The study contrasts co-operative *government* and co-operative *governance* in that the former relates to the structured relationship, as regulated in Chapter 3 of the Constitution and Intergovernmental Relations Act, between governments at all spheres of government and organs of state within those spheres and exists within the restrictive intergovernmental relations framework that discourages litigation against each other. Co-operative *governance*, on the other hand, is the action of steering activities of organs of state co-operatively towards the achievement of the higher ideals of constitutional democracy and a better life for all (researcher's own definition). Co-operative *governance* is steered by higher ideals; that is, everyone within the governance framework aspires to achieve the higher ideal of democratic governance and a better life for all. This then becomes the basis for co-operation. In this sense, co-operation is not hampered by structural and legal constraints.

Furthermore, the study contributes specifically to the study field of Political Transformation in South Africa, precisely because it focused on the importance and relevance of the PP, as one of the institutions charged with the transformation of governance within the country's political system. The constitutionalisation and establishment of Chapter 9 institutions, of which the PP is one, is in itself an exercise in political transformation and institutional development. One of the key aspects of political development is institutionalisation. In Chapter 4, par. 4.1, page 151, the researcher refers to Huntington's definition of political development as the institutionalisation of political structures and procedures, and how these are constantly changing. The positive change in political transformation indicates maturity or growth and the negative change indicates political decay (Huntington, 1965: 393). By studying the impact of the crises of governance from the theoretical

perspectives of the weak states and political decay contributed to the scientific study of Political Transformation in South Africa since the post-apartheid democratic breakthrough of 1994, defined as the state of transformative constitutionalism (see Chapter 3, par. 3.2, page 107 for a discussion of the concept of transformative constitutionalism). The study transmits this theory of Constitutional Law and applies it to the field of Governance and Political Transformation.

By focusing on the normative values of the PP, this study contributes to the science of Governance and Political Transformation because it defines transformative leadership values that are important in the course of transformative constitutionalism and governance. The institutionalisation of these values can assist other independent institutions to counteract and resist the political tendencies that seek to undermine their independence within the political and governance framework, and in this way make them resilient to vulnerabilities, such as state capture and political decay.

Based on the need identified through this study, it is suggested that an academic course or module be established within schools of Governance and Law at universities in South Africa, focusing on the role, relevance and importance of Chapter 9 institutions within the governance framework or body politic in South Africa. If this happens, the study will have lastingly contributed to the general scientific endeavours within the scientific community of Governance and Administrative Law of enhancing the understanding of students and practitioners of this multi-disciplinary science in order for them to make a tangible difference in their quest for the progressive transformation of governance and politics in South Africa.

7.6 Conclusion

As indicated under the problem statement (see Chapter 1, par. 1.3, pages 5-8), what informed this study is that the PP's status and powers have been politically questioned in the public discourse; moreover, the question on whether the PP's remedial action was binding was highly contested, both politically and legally. This brought uncertainty about the status, independence and powers of this institution within the governance framework. At some point it was thought that the PP's findings could be ignored on rational grounds (see Chapter 3, par. 3.6, in page 143-146 for a discussion on the case law to this effect). These controversies led to several

research questions, which assisted the researcher to gain greater insight in and understanding of the state of the PP within the governance framework in South Africa.

From the first research question, the researcher gained insight into the status and powers of the PP within the governance framework existing in South Africa. Researching this question led the researcher to the conclusion that the PP exists outside the *trias politica* and co-operative government, but it forms an integral part of broader co-operative governance. This means that the PP, itself an organ of state, must necessarily co-operate with other organs of state to achieve its normative mandate of promoting good governance and constitutional democracy.

From the second research question, the researcher gained insight regarding the constitutional and legal status of the PP and understood that its independence and powers were constitutionally guaranteed. However, a number of factors undermine this independence: the political environment (crises of governance), reporting arrangements, funding and resource limitations, and other capacity challenges. Recommendations were made above to resolve these challenges, including ensuring the financial independence of the PP through the direct appropriation of its budget by the Parliament and granting the institution adequate financial and other resources.

With regard to the third research question, the researcher gained greater insight into the role of the PP in supporting constitutional democracy, through the promotion of accountability, transparency and the rule of law. In South Africa, unlike in most countries where similar institutions have rooted, the most potent power of the PP is its binding remedial action. With this power, the PP is able to ensure accountability, transparency, and the rule of law. Precisely because it is possible to abuse this power, the researcher has suggested that the PP must have moral courage and an upright stature in order to be able to effect credible remedial actions. In addition, because the capacity to monitor its remedial action has been lacking, the PP must be supported with the human resources, and monitoring and evaluation capacity, in order to effectively follow up on the implementation of its remedial action. Furthermore, while the PP can be judicially reviewed, the researcher suggested a further measure to assure his/her credibility and integrity: the institutionalisation of corporate governance. This will enhance the ability of the PP to promote good

governance; in other words, to promote accountability, transparency, the rule of law, public participation, responsiveness, effectiveness and efficiency, equity and inclusivity, and consensus orientation. Linked to this is the question whether the remedial action of the PP does result in good corporate governance as a consequence. The research has shown that in various entities investigated by the PP, corporate governance was not immediately improved by the remedial action, but protracted opposition- and civil society-led litigation assisted the PP to enforce his/her remedial action. The reports on the SABC, PRASA, State Capture and Nkandla all indicate that in the aftermath of the PP reports there is massive political fightback against the remedial action, leading to attempts to second-guess the findings and remedial action of the PP. Therefore, it is the researcher's conclusion that the remedial action of the PP, on its own, does not immediately leave the investigated institutions in a better state of good governance. That is why the researcher has suggested monitoring and evaluation capacity, additional reporting to provincial and municipal legislatures, and litigation and alternative dispute resolution as some of mechanisms to enforce the remedial action. The PP may also need to effectively use the power of mass media to name and shame those who ignore or second-guess his/her remedial action, as part of the thought and intellectual leadership the researcher has suggested is part of the PP's arsenal of values. This will involve the public in the discourse regarding the status of the PP within the governance framework.

The fourth research question dealt with the qualities of the PP and evaluated the legacy of the successive PPs to date. The researcher gained insight into the requisite qualities for the PP, as demonstrated through the extensive discussion of the normative values and ethics that the PP requires to succeed in this role. The study established the Ombudsman's function within the normative values of independence, integrity, fairness, effectiveness, moral courage and thought leadership, among others. The researcher concluded that the four PPs to date have all contributed in varying degrees to the political and moral standing of the institution, but that Adv. Madonsela has been the greatest beacon of moral courage and her demonstrable values of independence, thought leadership, integrity and courage assured the independence and stature of the institution during the debilitating period

of state capture. The jury is out as to the contribution of the current PP, Adv. Mkhwebane, to the moral integrity of the institution.

The fifth research question related to a comparative analysis of the status, powers and functions of the PP in comparison to the Ombudsman in Europe, Latin America and Africa, with a view to understand the international normative guidelines for similar institutions. This comparative analysis gave the researcher insight and assisted him in confirming his point of departure that the PP is theoretically and practically a genus of the Ombudsman, established within the normative guidelines of Ombudsman institutions worldwide. However, there is no international treaty, nor a one-size-fits-all approach to Ombudsmanship. Each country and region is informed by its history, political and governance system, and constitutional and legal framework, among others, to fashion its institution of Ombudsman. The PP's institutional model can be compared and distinguished with the two institutional models, namely the parliamentary model and the presidential model. Within the parliamentary model, the Ombudsman is the parliamentary officer to whom complaints are not directly directed, but via a Member of Parliament (see Chapter 2, par. 2.10, pages 74-75 for the theoretical discussion of this issue). In the presidential model, the Ombudsman is appointed by the President and is part of the executive branch of government (see Chapter 2, par. 2.10, pages 75-78 for the theoretical discussion). The PP, on the other, even though she is selected by the Parliament and appointed by the President, is neither a part of the legislative or executive branches, but exists within the system of constitutional supremacy, and therefore is beholden only to the Constitution and the law. This constitutional status of the PP is similar to the Spanish and Latin American models, the *Defensor del Pueblo* (see Chapter 2, par. 2.10, pages 78-82 for the theoretical discussion). Generally, the Latin American Ombudsman institutions are fashioned along the lines of the Spanish model.

Despite the institutional differences and similarities, one important distinguishing factor between the PP and other Ombudsman institutions worldwide is its power of binding remedial action. Most Ombudsman institutions only have the power of recommendation and rely on their moral authority to enforce their recommendations. However, the PP's remedial action is binding, unless it is successfully reviewed by a court of law. Only The Gambian Ombudsman has a stronger power of remedial

action in that his/her remedial action is equivalent to a High Court order and can be reviewed only on limited grounds of jurisdiction (see paragraphs 5.3, 5.4, 5.5 and Table 5.1, pages 199-260 for a comparative analysis). The researcher supports the ability of the courts to review the remedial action of the PP as the unfettered power of remedial action could be abused and lead to an unaccountable institutional monster, especially if an unscrupulous PP is appointed.

The PP is a genus of the Ombudsman and it exists within the trilogy of normative frameworks: Governance as its theoretic framework; Good Governance as its normative function; and the normative values of the Ombudsman. Its status within the governance framework in South Africa is constitutionally guaranteed as a Chapter 9 institution. The status of the PP within the governance framework is that it exists outside the *trias politica* and co-operative government, as defined in Chapter 3 of the Constitution, but it is an integral part of broader co-operative governance. In other words, it must co-operate with other organs of state to achieve the objective of constitutional democracy and good governance. The purpose of transformation of governance in South Africa is to achieve a better life for all through redressing the legacy of apartheid and eliminating the triple challenge of poverty, inequality and unemployment. By fighting vices such as corruption, maladministration, bad governance and the mismanagement of public funds, the PP advances the aims of transformative constitutionalism. The PP is not part of the intergovernmental relations framework, but it is advisable that he/she should be invited to the strategic intergovernmental bodies, such as the President's Council for improving stakeholder relations.

In Chapter 3 (par. 3.6, pages 139-140), the researcher discussed the debate against the Ombudsman being given a comprehensive mandate against corruption. The researcher argued that the PP should be the strategic, if not comprehensive, anti-corruption and integrity agency. It must form part of the arsenal of anti-corruption bodies in pursuit of good governance and administrative justice – that is why one of the recommendations is that the SIU should be incorporated as a specialised unit within the Office of the PP. The most important advantage of the PP in the fight against corruption is that the PP is independent and makes binding findings and decisions, unlike executive organs who are not similarly endowed with the efficient power to resolve allegations of corruption. For instance, the Hawks and the NPA

must, after investigating corruption, place cases before the criminal courts for verdict and sanction. By their nature, criminal prosecutions are time-consuming and laden with procedural and evidentiary problems (Beqiraj, Garahan and Shuttleworth, 2018: 7). The PP is not burdened with these problems.

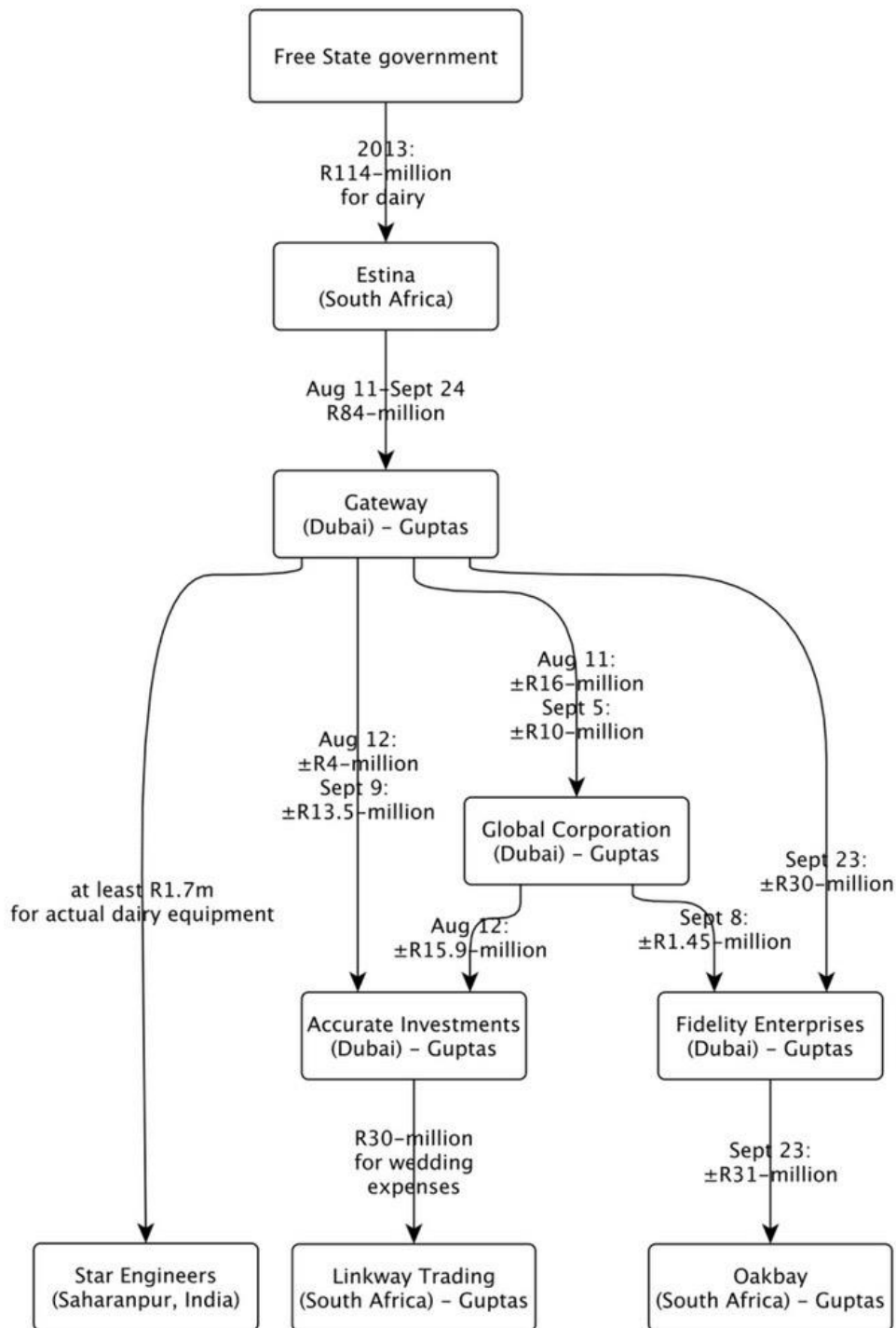
The institution is important for constitutional democracy and the promotion of good governance. It is important that all organs of state take measures to support the PP in this mammoth task. Firstly, every organ of state must cooperate with the PP during the investigation of allegations or systemic investigations. Secondly, they must co-operate with the findings and the remedial actions taken. Moreover, the PP should be invited to the provincial legislatures and municipal councils to present his/her findings; this could be one of such measures taken by the relevant organs of state to assist the PP. The provincial legislatures and municipal councils could incorporate the findings of the PP in their regular accountability mechanisms and in this way assist the PP to monitor and enforce its remedial actions. The institution must be adequately resourced and supported in order for it to function optimally and to fulfil its mandate. Its budget must be appropriated directly by the Parliament. This should be done to ensure its complete independence from the Executive.

Finally, the high office of the PP is too important to be left to politicians alone to appoint and dismiss as they choose. The PP must be appointed by the NA based on the open nominations made by the public and civil society, and the recommendation of the Judicial Services Commission (JSC). The suspension and dismissal of the PP must be made by the NA, on recommendation of the JSC. The President must play no role in these two processes.

Through this study, the researcher has elucidated the status of the PP within the governance framework in South Africa. It is the researcher's conclusion that the institution is part of the broader co-operative governance and that it is key to protecting and strengthening constitutional democracy. However, its mandate of promoting good governance must be defined, clarified and legislated further.

Annexure A

Illustration by amaBhungane indicating how monies were swindled from the controversial Estina dairy project in the Free State



#GuptaLeaks
by amaBhungane & Scorpio

with NEWS24

Annexure B

Cartoon images of the leadership attitudes of PPs in South Africa by the cartoonist, Zapiro



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