

**Topic : Presentation of Comparative Analysis of African Ombudsman Legal Systems**

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### A. The African Ombudsman Research Centre (AORC)

#### Establishment and Role

The African Ombudsman Research Centre (AORC) was established in 2011 as the research and training wing of the African Ombudsman and Mediators Association (AOMA). The objectives of AOMA are:

- to encourage the establishment of African Ombudsman institutions,
- to provide information, training and development of Ombudsman offices and staff to enhance their capacity as effective and autonomous institutions
- to promote the independence and autonomy of Ombudsman offices
- to foster affiliation and maintain liaison among Ombudsman offices and other relevant institutions and organizations
- to promote good governance on the African continent.

AORC, which is based at the University of KwaZulu-Natal (Howard College Campus in Durban) is mandated by Article 12 of AOMA's Constitution to promote the study of the activities, obligations and problems of Ombudsman institutions in Africa through research, training, publications and dissemination of information. AORC is governed by a Board comprised of: two representatives of the Public Protector of South Africa (who must Chair); the President and General Secretary of AOMA; two representatives of the UKZN; and, three general members of AOMA.

AORC's role (described as the RICA model) entails:

- **Research:** of Ombudsman functions with a view to enhance understanding of the philosophical underpinnings of the diverse African Ombudsman offices as well as to glean practical best practices. The first study – A Comparative Analysis of Legal Systems Governing Ombudsman Offices in Africa - is described below.

In 2017 we will launch a second Comparative Study of Enforcement and Implementation of Ombudsman Decisions.

In addition, our Strategic Plan includes developing two ongoing electronic databases:

- a Digest of Key Investigations from across Africa
- A global Jurisprudence Database.

- **Information:** generating and providing information and value-add for AOMA members. This includes developing Policy and Practice Briefs from our research, periodic Newsletters, daily updates on Facebook as well as other use of social media.

(Please like us on Facebook: [aoma.aorc](https://www.facebook.com/aoma.aorc); follow us on Twitter: [@aoma.aorc](https://twitter.com/aoma.aorc); website: <http://aoma.ukzn.ac.za>).

- **Capacitation:** of AOMA members through training in order to develop the capabilities of Ombudsman offices and to provide a sounding board or otherwise consult on difficult issues on a just-in-time basis. Training is the key component of AOMA's Strategic Plan.
  - We have an aggressive plan for Regional Training for the next two years including Human Rights Investigations for Ombudsman and Mediation and Negotiation for Ombudsman (from the Harvard Law School Interest-Based Methodology). Regional training normally includes up to five attendees from participating countries.

- Another training model, conducted recently in Malawi, is to train the entire investigation and legal staff in an office. This 'critical mass' approach has the benefit of all colleagues learning the same techniques at the same time.
- We completed a two day training in Complaints Management Systems in November during the biennial General Assembly of AOMA, 1<sup>st</sup> - 4<sup>th</sup> November 2016.
- We will be piloting a month-long study visit for staff from Ombudsman offices throughout the Continent to visit and contribute on projects in the AORC office. Two staff from two different regions will attend at the same time, thereby strengthening inter-regional networking.
- **Advocacy:** includes outreach to regional and international organizations and initiatives that promote good governance and good Ombudsman practices.

## B. Comparative Analysis of Legal Systems Governing Ombudsman Offices in Africa

### Origins and Objectives of the Study

In 2011 the German Development Cooperation (GIZ) conducted a needs assessment with AOMA country members. The findings highlighted the pressing need for research into the various legal systems and laws governing the Ombudsman function amongst AOMA members. Such research, which is the first of its kind in Africa, would support AOMA's mandate to develop effective, accountable Ombudsman institutions throughout the Continent. The research is also envisioned to assist in the development of a proposal for the African Union (AU) on how to move forward on Ombudsman institutions and their role as part of AU Agenda 2063 in ensuring good governance in Africa.

### Methodology

The research was conducted in 2013. Eight (20.5%) of the 39 members of AOMA were chosen to be studied in the first phase: Tunisia, Cote d'Ivoire, Ethiopia, Burundi, Namibia, Mauritius, Tanzania and Mozambique. This was a purposive rather than random sampling method. That is, the countries chosen were selected purposefully, based on the following criteria:

- each AOMA region is represented (North, South, East, West, Central and Indian Ocean)
- the four official languages of AOMA are represented (English, French, Arabic, Portuguese)
- a variety of Ombudsman institutions are represented (multiple and single remits)
- the first established Ombudsman office (Tanzania 1966) and a newly established office (Mozambique 2012) were also included.

The study was conducted in two parts. First, a written Survey was administered via email. Second, in-person interviews were carried out in August and October 2013 with each Ombudsman alone and then with a focus group of senior staff from each of the selected countries.

The Report was presented in Jan 2014 (on website). However, the AORC Board decided to expand the study to include an additional eight countries in order to ensure a wider diversity of Ombudsman offices. These are Angola, Ghana, Rwanda, Libya, Nigeria, Djibouti, Gabon and Madagascar. The interviews for this second phase were conducted in early November. We expect the final report to be completed by March 2017.

### Findings from the First Phase

Key issues analyzed included the evolution of the institution in Africa – what are the unique features, challenges and strengths of the diverse offices. In this and all research undertaken by AORC, we are keen to explore the "African Difference": what are the ways in which African Ombudsman contribute to good governance and cultures of accountability in the context of formidable challenges amidst promising developments in human rights, health, communications, poverty, conflict and the environment.

There are currently 44 national Ombudsman offices in Africa (of which 39 are members of AOMA). Traditional academic analysis used to draw a sharp distinction between complaint-driven Ombudsman

offices that focused narrowly on administrative and good governance issues (termed 'classical') and Ombudsman offices that explicitly had other remits such as human rights or corruption (termed 'hybrid'). In Africa, that distinction was not always clear-cut in practice. Today, with many Ombudsmen around the world being designated as National Human Rights Institutions and National Preventive Mechanisms (to proactively monitor places of detention), a strong argument can be made that such a distinction is no longer even theoretically viable. As of May 2010 some 15 African countries had National Human Rights Institutions that are accredited with "A" status. Three of these are Ombudsman – Ghana, Namibia, and Tanzania. (An additional 17 countries have NHRIs that did not have full "A" status.)

Despite the various permeations of the Ombudsman institution, there are a number of characteristics and best practices common amongst most Ombudsmen in Africa and throughout the world. For example, all countries studied must submit annual reports to their National Assemblies and most may launch investigations in the public interest on their own motion. Yet, within these essential characteristics, there is an "Africa Difference" that is observable even amongst this small sample of eight countries. E.G.:

- All of the countries in the sample had Constitutional provisions for the establishment of Ombudsman:
  - *The Namibian Constitution is a good example of a Constitution that provides for all of the core aspects which define and regulate the Ombudsman institution: the establishment and independence of the Office, appointment, term, functions, powers and removal from office.*
- Typically, candidates for appointment must be nationals of the country and possess relevant (usually law) degrees and professional experience. However, appointment procedures do vary. In most countries in the sample, the Ombudsman is appointed by Parliamentary or Presidential decree after input by advisory bodies or consultation with the opposition and all other political parties:
  - *In Mozambique candidates are voted on by 2/3 majority of the National Assembly; for Burundi, it must be ¾ quarters of the National Assembly and 2/3 of the Upper House*
  - *Appointment recommendations are made in Namibia by a Judicial Services Commission and in Ethiopia and Tanzania by Nomination Committees.*
- All countries sampled provide for strong, statutory well-established bases for removal of the Ombudsman, free from arbitrary Executive action and intimidation:
  - *Burundi requires at least a three-quarters vote and The Gambia and Ethiopia require at least a two-thirds majority vote in Parliament before an Ombudsman can be removed.*
- In most countries around the world, the Executive is excluded from the remit of the Ombudsman. In theory the periodic vote and the role of the Opposition and Parliamentary Questions (in Parliamentary systems) constitute an effective check on the Executive.
  - *It is interesting that of the eight countries in the sample for the first phase of this study, the Executive is included in the remits of five of the Ombudsman (only The Gambia, Tanzania and Mauritius exclude the Executive.)*
- In Europe, it is not uncommon for there to be Ombudsmen with specialized or narrow jurisdiction – such as for Gender, Children and Immigration. The lack of resources constrains most countries in Africa where Ombudsman often have to do double and triple duty. Some with multiple remits, such as human rights, are similar to Latin America and other regions. Some remits are tailored to the particular context of the specific characteristics and challenges of the particular countries.
  - *Namibia is unique in the jurisdiction to oversee conservation of the environment. Section 3(1)(c) of Ombudsman Act 1990 provides that the Ombudsman may investigate and take action regarding: "the over-utilization of living natural resources, the irrational exploitation of non-renewable resources, the degradation and destruction of eco-systems and failure to protect the beauty and character of Namibia".*
  - *Burundi is a singular example of the statutory mandate to contribute to reconciliation and peace-making-essentially functioning in the role of a Peace Commission. Law No. 1/04 of 24 January 2013 (amending Law No. 1/03 of 25 January 2010) provides that the President of the Republic may ask the Ombudsman to*

- *Participate in acts of reconciliation between the public administration and “social and professional forces” (Article 6, para 3)*
  - *Deal with special missions of settlement and reconciliation on general issues concerning relations between “the political and social forces” (Article 6, para 4)*
  - *Undertake specific tasks relating to issues of reconciliation and peace internationally (Article 6, para 5)*
- *Accordingly, the Ombudsman for Burundi actively convenes inter-religious conferences to promote cooperation in preventing identity and religious conflict. The Ombudsman is widely supported by diverse religious groups, senior government officials, diplomats and civil society.*
- As with many countries around the world, ensuring compliance with recommendations and remediation is essential. One of the often cited weaknesses of the Ombudsman institution is the non-binding nature of recommendations. The debate around the world between the need for flexible persuasion and judicial enforcement continues to evolve. Jamaica, for example amended its legislation to transform the Ombudsman into the Public Defender to permit enforcement of recommendations in the Courts.

The UK Bradley cases of 2007 (High Court) and 2008 (Court of Appeal) came close to asserting that Findings (not Recommendations) of the Ombudsman are binding: *“the [Minister] acting rationally, is entitled to reject a finding of maladministration and prefer his own view on rational grounds; it is necessary that his decision to reject the Ombudsman’s findings in favour of his own view is, itself, not irrational having regard to the legislative intention which underlies [the Ombudsman’s legislation]”*.

It is the recent decision of the Constitutional Court of South Africa that is making waves. The Court held that the President and National Assembly had failed to defend, uphold and protect the Constitution by not complying with the remedial action taken by the Public Protector against them in her 2014 Nkandla Report on spending for “security” enhancements by the President on his personal property. (*Economic Freedom Fighters v Speaker of the National Assembly and Others; Democratic Alliance v Speaker of the National Assembly and others* [2016] ZACC). This case goes a long way in establishing that, the very nature of the Ombudsman institution itself implies that recommendations must be followed absent a constitutional rationale for not doing so.

### Going Forward

The findings of AORC’s Comparative Legal Analysis to date revealed that Ombudsman institutions on the continent are making progress in promoting awareness among citizens and governments, and in terms of improved efficiency in dealing with complaints and the establishment of new offices. However, they continue to face a number of challenges, including lack of public accessibility, difficulties with decentralization, inadequate financial resources, government resistance to findings, and inadequate office space, infrastructure and staffing. The research on best practices in how to navigate these challenges is helpful as Ombudsmen determine tactics in specific instances and negotiate with their governments for structural and legal capacity.

It is the vexing issue of and strategies for enforcement of recommendations that will be the subject of our next major comparative study that will commence in February 2017. (A 2009 UNHCR Study of NHRIs indicated that only 20% of respondents in Africa and the Americas rated the responsiveness of government bodies as good – compared with under 40% in Europe. It will be interesting to compare the rating for responsiveness to Ombudsman recommendations.)

AORC’s overall plan and hope is that the research into the “African Difference” will not only enhance the sharing of strategies for practical effectiveness but will also yield lessons of global interest and import.