

The protection and promotion of human rights in Namibia: The constitutional mandate of the Ombudsman

John Walters

Introduction

The meaning of the word *ombudsman* is derived from old Nordic or Scandinavian languages and literally means “representative”. In general, an ombudsman serves as a representative of the people, necessary in bridging the gap which oftentimes exists between formal state institutions (for example the judiciary and executive) and the citizenry. In particular, an ombudsman has the duty to represent citizens through the investigation of individual complaints which are brought before him or her.

The Constitution and the Ombudsman Act, 1990 (No. 7 of 1990) spell out the key mandate areas and powers of Namibia’s Ombudsman in regard to human rights violations, which includes the protection, promotion and enhancement of respect for human rights in the country. The Office of the Ombudsman has been given a unique mandate as a Human Rights Commission, therefore, demanding that the Ombudsman reports on the status of human rights in the country. It is clear, therefore, that the state wishes to submit itself to public scrutiny as regards human rights.

Chapter 3 of the Constitution of the Republic of Namibia contains the Bill of Rights, in which 15 fundamental human rights and 10 fundamental human freedoms are enshrined. Both the Constitution and the Ombudsman Act impose a duty on the Ombudsman to investigate allegations concerning the breach of fundamental human rights. In addition to those provisions, the Bill of Rights provides for the enforcement of fundamental human rights and freedoms. Article 25(2) states that –

[a]ggrieved persons who claim that a fundamental right or freedom guaranteed by this Constitution has been infringed or threatened shall be entitled to approach a competent Court to enforce or protect such a right or freedom, and may approach the

Ombudsman to provide them with such legal assistance or advice as they require, and the Ombudsman shall have the discretion in response thereto to provide such legal or other assistance as he or she may consider expedient.

Fulfilling the mandate

In dealing with the human rights mandate, the Ombudsman has a two-pronged approach. In the first approach, a complaint will be received from an aggrieved person and investigated. If satisfied that a violation of a fundamental right or freedom has occurred, the Ombudsman may provide suitable remedies, including those provided for in the Ombudsman Act and in Article 25(2) of the Constitution. Because the Ombudsman strives to be seen as responsive to the needs of the public, the emphasis is on solving the problem rather than adopting a legalistic approach to it. We also strive not only to resolve complaints, but also to do it in a manner that would include educational and preventative elements.

The second approach is through outreach programmes and public education. This approach has not really received the necessary prominence, probably because of the multifunctionality of the Office. It has become apparent, though, that the low level of human rights complaints received could be due to a lack of public awareness about the Ombudsman's functions as well as about constitutional rights.

Selected case summaries

The number of complaints received for 2006 decreased to 2,060 compared with 2,257 the previous year. An analysis of the type of complaints shows that a small proportion comprise human rights matters: 177 complaints related to basic human rights violations. The category covers racial discrimination, wrongful arrest and detention, assaults, ill-treatment of prisoners and loss of their property, and undue delays in finalising appeals to the High Court.

Cases of racial discrimination

From 1996 to the time of writing, the Office of the Ombudsman received only three substantive racial discrimination complaints. These cases varied from minor disagreements between certain people, to ones that necessitated the Ombudsman

to provide detailed reports. One of these more serious cases culminated in the Ombudsman providing detailed recommendations which had the specific aim of fostering good human and interpersonal relations, and of creating a necessary precedent. It was recommended that –

- managers be exposed to a new way of thinking and accept that the past is over and that a new society is in the making where mutual respect, tolerance and acceptance are the benchmarks for good management practices
- induction courses be offered to all employees at institutions in order to ensure that theory (what is on paper) becomes practice (internalised and personalised in the minds of all), as it may help to foster better human relations
- it may be equally necessary to organise courses, involving all managers and staff, in human relations, labour relations and human rights, as some of the problems experienced by the staff hinge upon the working relationship with supervisors and between the different racial groups. Trust needs to be harnessed and credibility restored if the morale at the organisation is to be uplifted
- investment in people and managing diversity within organisations are new management concepts that need to be applied within the organisation concerned
- people of all races and sexes need to be appointed at all levels to reflect the diversity within the organisation, and to avoid situations of ‘us’ and ‘them’
- the concept of Affirmative Action needs to be fully explained and understood, since it seems there are still many staff members at the organisation concerned – especially on senior levels – who do not or do not want to understand or follow the letter and spirit of the Constitution
- an internal complaints mechanism, if non-existent, be established, and that staff be allowed to air their grievances without fear of victimisation
- management deal timeously with grievances within the organisation and with the culprits, and
- disciplinary hearings are conducted in such a manner that the employees feel they are fairly and justly treated. In addition, the composition of disciplinary committees (which are currently composed of white managers at the organisation concerned) need to become representative to avoid any perception of bias.

A case of unlawful detention

Mr X was convicted in the Magistrate's Court on 7 September 2005 on a charge of driving a motor vehicle with an excessive blood alcohol level and was sentenced to a N\$4,000 fine or one year's imprisonment. He could not pay the fine, so he had to serve the prison sentence. The matter was sent for review and, on 19 January 2006, the High Court set aside the conviction and sentence and ordered that the Magistrate dispose of the case according to law. Mr X should have been released from prison. However, on 2 February 2006, the Clerk of Court issued a summons for Mr X to appear in court on 28 March 2006. The summons was served on him in prison by a police officer on 9 February 2006. On 24 February 2006, the Ombudsman visited the said prison and was approached by Mr X who showed him the summons. After the Ombudsman had established that Mr X was not serving sentences on other cases, he approached the Clerk of Court to immediately issue a warrant of liberation. That was at about 11:00 on that day. When the Ombudsman visited the prison again at 16:00 that day to see whether Mr X had been released, he discovered that he had no. After further enquiries, Mr X was released at 17:00. The Office of the Ombudsman then assisted Mr X with an application for legal aid in order to institute a civil claim.

A case of wrongful arrest

Mr Y was arrested on 10 July 2007 without, according to him, being informed of the reasons for his arrest. He was booked in the registers of the police under his nickname, and charged under a certain criminal record (CR) number. However, somebody else had already been booked under that CR number. Besides this, Mr Y was detained for 47 hours and was released because he could not be linked to the commission of the offence. Our investigation revealed that, because there was no charge against Mr Y, he was booked under the CR number of another detainee. Mr Y applied for legal aid, but the Directorate of Legal Aid referred him to the Legal Assistance Centre instead. The Office of the Ombudsman intervened and the Directorate of Legal Aid then decided to grant him legal aid to institute a civil claim against the Ministry of Safety and Security.

Cases of justice delayed – justice denied

An example of how justice delayed can result in justice denied is that of Mr W, who was sentenced during May 2003 in the High Court to a term of imprisonment. He petitioned the Supreme Court for leave to appeal against his conviction and

sentence. His petition was granted on 29 July 2004. According to him, he struggled to get the matter enrolled at the Supreme Court. We received his complaint on 15 August 2006 and, with our intervention, the matter was eventually placed before the Supreme Court. On 15 October 2007, the Supreme Court set aside the conviction and sentence and Mr W was released from prison.

A second example is that of Mr Z and others, who were convicted on 11 March 2002 by the Regional Court and sentenced to different terms of imprisonment. They filed their notices of appeal and, on 15 March 2004, the matter was removed from the roll. Mr Z complained to the Office of the Ombudsman about the delay and, again with our intervention, the matter was set down for a hearing on 8 February 2006. Nearly five years after their conviction, the High Court set aside their convictions and sentences and released Mr Z and his co-accused. There are many more examples of similar incidents, but to record all of them will not serve the focus of the current paper.

Cases against the Namibian Police and Prison Services

For the period 2005–2007, the highest number of complaints received was against the Namibian Police and the Prison Services. The complaints included loss of prisoners' property by members of the Police, loss of prisoners' money by members of the Prison Service, unlawful arrest and detention, and assaults on prisoners – to mention but a few. When the Office of the Ombudsman receives a complaint from a prisoner of an assault on their person by either the Police or a prison warder, the matter is referred to the relevant Inspector-General for investigation. The Complaints and Discipline Unit of the Namibian Police is responsible for such investigations. Whenever the relevant Inspector-General refers such matters to the Unit, a copy of the referral letter is sent to the Office of the Ombudsman. However, after that, we struggle to obtain any progress reports or information relating to the matter from that Unit, even though we need to relay such information to the complainant. The slow process of investigation and failure to respond not only make our job difficult, but it also creates the perception that the Office of the Ombudsman is ineffective and has no relevance. For this reason, a meeting with the Police is on 2008's programme of activities so that the problems can be discussed and permanent solutions sought.

To comply with the Ombudsman's duty of oversight over Police conduct, the Office will soon start with an investigation, which will culminate in a report, to determine how many criminal charges were laid against police officers or prison

warders, how many the Prosecutor-General declined to prosecute, how many were prosecuted, how many are still pending, and the reasons for the delay in finalising the relevant investigation or prosecution.

It has become apparent that police officers need human rights training in order to prevent them from the potential to abuse their power, which usually results in a human rights violation. The Office of the Ombudsman, with the assistance of donors, is in the process of compiling and printing a comprehensive manual on human rights training for the Police. Each police station will have the full manual once they have been printed, and each police officer will receive a condensed version in the form of a pocket-sized booklet. The manual will consist of the following topics, amongst others:

- The Namibian Bill of Rights
- International Human Rights Standards and Policing
- Human Rights and Police Ethics
- Arrest
- Detention
- Use of Firearms
- Search and Seizure, and
- Human Rights Violations.

The Office of the Ombudsman also intends holding human rights training workshops in country's 13 Regions, where the manual will be distributed and discussed.

Special report on conditions prevailing at police cells throughout Namibia

During August and September 2006, the Ombudsman and Office staff visited police cells throughout the country, which culminated in a comprehensive Special Report that was submitted to Parliament on 23 November 2006. The visits to the police cells were prompted, *inter alia*, by the following:

- The constitutional and statutory duty to investigate matters in regard of which the Ombudsman has reason to suspect that fundamental rights and freedoms are being diminished or violated.
- During May 2006, a magistrate found that the conditions in which detainees were being kept at the Wanaheda cells were shocking and horrendous, and constituted a contravention of the spirit of the Constitution of the

Republic of Namibia. The condition which he saw persuaded him to release the accused on bail.

- Statements by the Minister of Safety and Security in the National Assembly in his 2005/6 budget speech, and
- A meeting between the Ombudsman, representatives of the magistracy, the Office of the Prosecutor-General and the Namibian Police held on 30 May 2006, to discuss ways to reduce the number of detainees in police cells.

As a result, several findings were made and subsequent recommendations were submitted to the National Assembly in a Special Report by the Office of the Ombudsman.²⁶⁵

High on the agenda of the Office's annual programme of activities are follow-up visits to Police holding cells to determine whether and how the Ministry of Safety and Security has complied with the recommendations contained in the Special Report. It is a fearful day when all detainees who were detained in such horrendous conditions approach "the Ombudsman to provide them with such legal assistance or advice"²⁶⁶ in order to institute civil claims against government for violation of their constitutional rights. In this regard, it should be mentioned what Acting Judge Angula said in an unreported judgment, delivered on 12 July 2007 in the matter of *Malcolm McNab & Others v Ministry of Home Affairs NO & Others*:

An arrested person has a right to be held in conditions which are not degrading. It is a violation of an arrested person's constitutional right to be held in such horrendous conditions. It is plainly unconstitutional and unlawful. We all have accepted the Constitution as our Supreme Law. We are all parties to this sacred contract. As a judge, I am oath-bound to uphold the Constitution for the benefit of all who live in Namibia. It is of no consequence to me that those who are responsible for the upkeep of holding cells say that they have no resources to maintain the holding cells in a clean and hygienic condition in compliance with the dictates of the Constitution. It has been held by this court that a lack of financial resources should not be a factor to be taken into account by a court in enforcing the fundamental rights enshrined in the Constitution. The State is constitutionally bound to find and make resources available, failing which it will be held liable for violation of the person's fundamental rights.

265 Walters, JR. 2006. *Special Report on Conditions prevailing at Police Cells throughout Namibia*. Windhoek: Office of the Ombudsman.

266 (ibid.).

Human rights awareness campaigns

Ombudsman Human Rights Advisory Committee

Having realised that –

- it is fundamentally important to communicate to the public in simple terms what rights are and where to complain should these rights be violated
- work in the formal education sector is an important long-term investment, but media campaigns, posters, brochures and other public awareness tools may have a more immediate effect
- the Office of the Ombudsman will benefit from collaborating with civil society organisations which are ‘closer to the ground’ and a source of knowledge and expertise, especially in the field of education and training activities and public awareness campaigns, and
- civil society organisations may greatly assist in channelling or directing complaints to the Office from the most remote areas,

in April 2006 the Ombudsman, in collaboration with NGOs, civil society organisations and the Council of Churches, established the Ombudsman Human Rights Advisory Committee. The purpose of this move was to create a forum for exchange and dialogue regarding all areas of human rights that could make a difference in the lives of Namibian citizens. The Committee, consisting of 20 members, meets once a month under the Chairpersonship of the Ombudsman, and comprises the founding parties as well as certain government ministry representatives. One of the highlights of the Committee’s activities thus far was to organise the *16 Days of Activism Against Gender Violence Campaign* from 25 November until 10 December 2006.

In its pursuit of cooperation with other national human rights institutions (NHRIs), on 15 February 2006 the Ombudsman applied for accreditation to the International Coordinating Committee of National Human Rights Institutions for the Promoting and Protection of Human Rights (ICC). The ICC is a representative body of NHRIs established for the purpose of creating and strengthening NHRIs which conform with the Paris Principles, which provide the basic requisites NHRIs need to have to ensure the fulfilment of their mandates in an independent and effective manner. These Principles have become the benchmark against which NHRIs are measured. The Paris Principles fall into four parts, as follows:

- Competence and responsibilities
- Composition and independence
- Methods of operation, and
- Authorisation to hear and consider complaints.

The disregard for civil and political rights are regularly denounced by human rights organisations, and the courts have progressively interpreted the provisions of the Constitution in such matters as the right to a fair trial, the right to legal representation, and the right to dignity. Through their regular covering of civil and political rights matters, the general media promotes awareness of those rights. The protection of human rights depends on people knowing about the rights they have, and about the mechanisms to enforce them.

Other awareness campaigns undertaken by the Office of the Ombudsman

Apart from the Ombudsman Human Rights Advisory Committee programme, the Office of the Ombudsman undertakes various other activities in order to educate the public about the rights applicable to them. One such initiative is the Constitution Day celebration, which was held on 9 February and 2006 and 2008, respectively. The theme for the 2006 event was “Ensuring that the Constitution remains a living document”, while its 2008 counterpart was “The citizens’ right to a living Constitution”.

The Office of the Ombudsman has also embarked upon a campaign to provide a platform where citizens can speak out. The platform comprises a series of public lectures under the theme of “The citizens’ right to accountability and transparency: Giving a voice to the people of Namibia”.

In addition, the first-ever *Ombudsman Newsletter* appeared in November 2006, coinciding with the 16 Days of Activism against Gender Violence Campaign, ahead of International Human Rights Day on 10 December 2006. The newsletter was distributed as a newspaper insert, with the purpose of making the general public aware of the programme for the 16 Days as well as other related information. The publication is intended to be a regular feature and a mechanism by means of which to inform and educate all citizens of their human rights and freedoms as enshrined in the Constitution, and how the Office of the Ombudsman can assist in protection and enforcing these rights.

Finally, as a result of the realisation that –

- violence against women and children has reached alarming heights and that no female is safe from becoming a victim of gender violence
 - the time has come to address this extreme form of abuse and find ways to stop it, and
 - the Ombudsman should interact with all communities and try to find ways for greater community-based prevention and better protection services,
- the Ombudsman decided to visit various communities to hold meetings with them and to address learners at schools.

Conclusion

Namibia is a dynamic society, with various issues constantly coming to the fore which it has to deal with. In this regard, the need for a vigilant office that can assist ordinary citizens is an indispensable necessity. As is clear from what has been mentioned above, in Namibia, the Office of the Ombudsman serves a vital and active role in being a representative of the people.