

# The independence of the Ombudsman in Namibia

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*The independence of the Ombudsman provides his Office with a strong basis for the exercise of his powers, and ensures that he may insist on complete liberty to investigate and examine incidents of abuse without interference.*<sup>1</sup>

## Introduction

The institution of the Ombudsman has its roots in Sweden and dates to the 19th century, when the Swedish Parliamentary Ombudsman was instituted to safeguard the rights of citizens by establishing a supervisory agency independent of the executive branch.<sup>2</sup> Ombudsmen's application of the technique of making government accountable has since been developed to a sophisticated level.<sup>3</sup> Today, this institution has been adopted in many countries all over the world, including many in southern Africa.<sup>4</sup> Within the Southern African Development Community (SADC), all member states have institutions that keep an eye on the proper exercise of power and the protection of human rights, even though not all these countries use the same terminology for concepts relating to these functions.<sup>5</sup>

- 1 The late MP Tjitendero, former Speaker of the National Assembly in Namibia, in his opening address to the Southern African Conference for the Institution of the Ombudsman held in November 1995 in Swakopmund, Namibia. See Kasuto, E & A Wehmhörner (eds). 1996. *The Ombudsman in southern Africa: Report of a Subregional Conference*. Windhoek: Friedrich-Ebert-Stiftung, p 11.
- 2 With regard to the Ombudsman in Namibia and the protection and promotion of human rights, see Walters, J. 2008. "The protection and promotion of human rights in Namibia: The constitutional mandate of the Ombudsman". In Bösl, A & N Horn (eds). *Human rights and the rule of law in Namibia*. Windhoek: Macmillan Namibia.
- 3 As to the background of the Ombudsman institution in general, see Mumba, FN. 1996. "Development and essential features of the Ombudsman institution". In Kasuto, E & A Wehmhörner (eds). *The Ombudsman in southern Africa: Report of a Subregional Conference*. Windhoek: Friedrich-Ebert-Stiftung, 17ff.
- 4 Cf. Kasuto & Wehmhörner (1996).
- 5 Ombudsmen are established in Angola, Botswana, Lesotho, Malawi, Mauritius Namibia, the Seychelles, Swaziland, Zambia, and Zimbabwe. In Mozambique, the institution of an Ombudsman was established by constitutional amendment in 2005, and is in the process of being realised. In Tanzania, similar functions to those typically held by an Ombudsman are performed by the Permanent Commission of Enquiry. In South Africa, the title *Ombudsman* was changed to *Protector-General*. Madagascar has established an institution of a *Défenseur*

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In Namibia, the Office of the Ombudsman was entrenched when the Constitution of the Republic of Namibia came into operation on 21 March 1990. Since then, two Acting Ombudsmen, one Deputy Ombudsman, two Ombudsmen and one Ombudswoman have been at the helm of the Office.<sup>6</sup> The institution of the Ombudsman stands for the protection of and respect for the rights of the individual, the promotion of the rule of law, and the promotion and advancement of democracy and good governance.<sup>7</sup> Included in the Namibian Bill of Rights in Chapter 3 of the Constitution is a provision dealing with the enforcement of fundamental human rights and freedoms, namely Article 25(2), which reads as follows:

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

However, the most relevant legal provisions with regard to the Ombudsman are to be found in Chapter 10 of the Namibian Constitution as well as in the Ombudsman Act, 1990 (No. 7 of 1990). Even though the formal state system is considered to be functioning well in Namibia,<sup>8</sup> there is a need for informal mechanisms for conflict resolution. The Office of the Ombudsman functions as a watchdog for the people, who will hold government accountable for its actions. The broad mandates of the Ombudsman give the citizen an expert and impartial agent in a wide variety of matters, without personal cost or bureaucratic hurdles to the complainant, without time delay, without the tension of adversary litigation, and without the requirement of professional legal representation.

Broadly speaking, the Ombudsman in Namibia investigates complaints about the violation of fundamental rights and freedoms, and about the administration of

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*du Peuple* (“Public Protector”), while the Democratic Republic of Congo constitutionally provides for five institutions to support democracy, including *L’Observatoire National des Droits de l’Homme* (“the National Observatory for Human Rights”) as well as *La Commission de l’éthique et de la lutte contre la corruption* (“the Commission for Ethics and Anti-corruption”).

6 The Office is currently headed by Ombudsman John Walters.

7 Kasuto (1996:118).

8 Ruppel, OC. 2008a. *Third-generation human rights and the protection of the environment in Namibia*. In Horn, N & Bösl, A (eds). *Human rights and the rule of law in Namibia*. Ruppel, OC. 2008b. *The role of the Executive in safeguarding the independence of the judiciary in Namibia* in this publication.

all organs of government. Violations are corrected by attempting a compromise between the parties concerned, bringing the matter to the attention of the authorities, referring the matter to the courts, or seeking judicial review.

In order to provide an insight into the fields of activity of the institution of the Ombudsman in Namibia, its mandates will be introduced briefly before discussing in more detail the concept of *independence*.

### **The main mandates of the Ombudsman**

The Office of the Ombudsman is intended to function as an independent body to ensure that citizens have an avenue open to them, free of red tape, and free of political interference.<sup>9</sup> Despite proactive functions such as to contribute towards educational and developmental issues,<sup>10</sup> the Ombudsman has reactive functions as laid down in the Constitution and the Ombudsman Act. Several types of actions can give rise to complaints under the competence of the Ombudsman, including the failure to carry out legislative intent, unreasonable delay, administrative errors, abuse of discretion, lack of courtesy, oppression, oversight, negligence, inadequate investigation, unfair policy, partiality, failure to communicate, rudeness, maladministration, unfairness, unreasonableness, arbitrariness, arrogance, inefficiency, violation of law or regulations, abuse of authority, discrimination, and all other acts of injustice. Complaints may be submitted to the Office of the Ombudsman by any person, free of charge and without specific form requirements.

The Office of the Ombudsman cannot investigate complaints regarding court decisions, however. Neither can the Office assist complainants financially or represent a complainant in criminal or civil proceedings. Authorities that may be

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9 Tjitendero, M. 1996. "Opening address to the Subregional Conference on the Ombudsman in Southern Africa". In Kasuto, E & A Wehmhörner (eds). *The Ombudsman in southern Africa: Report of a Subregional Conference*. Friedrich-Ebert-Stiftung, p 10.

10 The Office of the Ombudsman provides for outreach programmes and specific human rights education, in order to enhance public education. These programmes are carried out in collaboration with NGOs, community leaders, local authorities, etc. The Office of the Ombudsman has also conducted several awareness campaigns, and continues to do so. Such campaigns take the form of public lectures, community meetings, or the distribution of newsletters and brochures, to name but a few. Furthermore, during April 2006, in collaboration with NGOs, civil society organisations and the Council of Churches in Namibia, the Ombudsman established the Ombudsman Human Rights Advisory Committee. The latter Committee consists of 20 members of the aforementioned institutions, who together create a forum for dialogue on all areas of human rights. For more detail on specific awareness campaigns undertaken by the Office of the Ombudsman, see Walters (2008:122, 129).

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complained about include government institutions,<sup>11</sup> parastatals,<sup>12</sup> local authorities and – in the case of the violation of human rights or freedoms – private institutions and persons.<sup>13</sup> In 2006, complaints were brought against the City of Windhoek, the Government Institutions Pension Fund, several ministries, the Namibian Police, the Namibian Wildlife Resorts, the Public Service Commission, Prison Service, and others.<sup>14</sup> Within the group of complaints against government institutions, a statistical analysis of cases taken up during the period 2004–2006 shows that around 65% of them referred to the Ministry of Justice, the Namibian Police, and prison-related matters.<sup>15</sup>

The Ombudsman has relatively broad mandates and corresponding powers.<sup>16</sup> According to Article 91 of the Constitution, the mandates of the Ombudsman in Namibia mainly relate to four broad categories: human rights, administrative practices, corruption,<sup>17</sup> and the environment. At this stage, an imbalance as to complaints by specific mandates can clearly be pointed out.<sup>18</sup> On the one

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11 Including ministries, the National Assembly, the National Planning Commission, and the Attorney-General.

12 Including NamPower, Telecom, NamWater, NamPost, and the Namibian Broadcasting Corporation.

13 Gawanas, B. 2002. "Office of the Ombudsman 1990–2000". In Hinz, MO, SK Amoo & D van Wyk (eds). *The Constitution at work – 10 years of Namibian nationhood*. Pretoria: VerLoren van Themaat Centre, University of South Africa, p 104.

14 Office of the Ombudsman. 2007. *2006 Annual Report*. Windhoek: Office of the Ombudsman, p 27ff.

15 (ibid.:35).

16 For more details on the mandates of the Ombudsman, see Windhoek: Macmillan Namibia. Ruppel, OC & KG Ruppel-Schlichting. [Forthcoming]. "Between formal and informal justice? The mandate of the Ombudsman in Namibia". In Hinz, MO (ed.). [Forthcoming]. "Traditional and informal justice systems".

17 According to an article in *The Namibian* newspaper on 16 September 2008, however, Cabinet intends to amend the Constitution to remove the word "corruption" from the list of functions of the Ombudsman in Article 91. Government had allegedly been working secretly to change a number of provisions in the Constitution – including criteria for citizenship, reducing the terms of regional councils, and removing the job of fighting corruption from the Office of the Ombudsman, according to a Cabinet letter dated 11 November 2007. For more details, see <http://www.namibian.com.na/2008/September/national/08297C131F.html>; last accessed 21 September 2008. In this regard, the Ombudsman would be stripped of some of his/her constitutional powers to deal with corruption and/or its manifestations. The intention behind this proposed amendment might be to avoid a duplication of functions between the Office of the Ombudsman and the Anti-Corruption Commission of Namibia. The latter was established by the Anti-Corruption Act, 2003 (No. 8 of 2003), and inaugurated early in 2006. Thus, processing of all corruption-related complaints would ideally be centralised with the Anti-corruption Commission.

18 Cf. Office of the Ombudsman (2007:37).

hand, the imbalance can be traced back to the nature of topics/complaints, with some occurring more frequently than others; on the other hand, the lack of public awareness on the Office being able to look into complaints relating to other topics, such as the environment, can be seen as another reason for the imbalance. Although the categories of maladministration and violation of human rights play the most vital role in the work of the Office of the Ombudsman,<sup>19</sup> the other categories deserve equal attention. The environmental mandate<sup>20</sup> of the Ombudsman's Office can be regarded as a progressive and innovative step towards environmental protection, as environmental concerns have significantly gained importance within the legal environment for the past few decades.<sup>21</sup> By including the environmental mandate in the functions of the Ombudsman the Constitution provides for unique provisions that go beyond the traditional powers and functions of an Ombudsman institution. The data on complaints by mandate for 2006 reflect that environmental issues could play a more vital role within the Ombudsman's activities.<sup>22</sup> This is why strategies are currently being developed in order to put more emphasis on the environmental mandate.<sup>23</sup>

In 2006, a total of 2,060 complaints were brought to the Office of the Ombudsman.<sup>24</sup> A statistical analysis of complaints according to the Ombudsman's mandates<sup>25</sup> shows that, in 2006, 1,286 of these complaints related to the mandate of maladministration, 177 to human rights violations, 39 to corruption, and only 2 referred to environmental matters. The remaining 556 complaints covered miscellaneous issues. The respective statistics for 2005 present a similar picture. The positive effect of the Office's laudable efforts with regard to the more popular mandates such as maladministration and human rights violations can hopefully be extended in future to those that have so far merely attained little attention in terms of complaints. This was also recently highlighted by the UN Committee on the Elimination of Racial Discrimination (CERD). In its concluding observations on Namibia's periodical reports issued in connection with its obligations under the International Convention on the Elimination of all Forms of Racial Discrimination,<sup>26</sup> the CERD commended Namibia for

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19 Walters (2008:121ff).

20 For a more detailed discussion of the environmental mandate of the Ombudsman in Namibia, see Ruppel & Ruppel-Schlichting [Forthcoming].

21 For further reference, see Ruppel (2008:101ff).

22 Office of the Ombudsman (2007:37).

23 Special workshops are conducted and information leaflets are compiled in order to sensitise the staff of the Office of the Ombudsman with regard to the relevance of environmental concerns.

24 Cf. Office of the Ombudsman (2007:4).

25 (ibid.:37).

26 See concluding observations of the Committee on the Elimination of Racial Discrimination,

the planning to increase the financial and human resources of the Office of the Ombudsman. However, concern was expressed as to the small number of complaints that had been received with regard to racial discrimination, due to victims' lack of information about their rights and of access to legal remedies. CERD therefore encouraged Namibia to sensitise the public about their rights and the availability of legal remedies for victims of racial discrimination.<sup>27</sup>

## **Independence of the Ombudsman: Legal foundations**

Despite the basic characteristics<sup>28</sup> of being impartial, fair, and acting confidentially in terms of the investigation process, the Ombudsman in Namibia is designed to be independent. This can be inferred from Article 89(2) of the Constitution, which provides as follows:

*The Ombudsman shall be independent and subject only to this Constitution and the law.*

One further provision within the constitutional framework which relates directly to the institution's independence is Article 89(3), which reads as follows:

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

However, the Constitution does not specify what the term "independence" means here. It goes without saying that the attribute of being independent is multifaceted. Therefore, the following paragraphs will discuss the components considered to be the most material to the institution of the Ombudsman in Namibia.

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dated 19 August 2008. These observations, as well as a list of issues and Namibia's written responses to them, are available at <http://www2.ohchr.org/english/bodies/cerd/cerds73.htm>; last accessed 20 September 2008.

27 The Office is currently active in giving substance to the recommendations of the Committee by, inter alia, conducting racial discrimination hearings throughout the country. Furthermore, considering that many pre-independence enactments are still in force, the Office of the Ombudsman – in cooperation with the Konrad Adenauer Foundation – intends to launch a project under the human rights mandate with regard to racism, entitled "Creating an apartheid-free Namibia".

28 As to the characteristics of a classical Ombudsman in general, see Gottehrer, DM & M Hostina. 1998. *Essential characteristics of a classical Ombudsman*. Available at [www.usombudsman.org/documents/PDF/References/Essential.PDF](http://www.usombudsman.org/documents/PDF/References/Essential.PDF); last accessed 6 June 2008.

## **Components contributing to the institution's independence**

Independence is probably the most fundamental and indispensable value for the successful functioning of the Ombudsman. Generally speaking, *independence* describes a state of not being controlled by other people or things. The underlying rationale for independence in this context is that an Ombudsman has to be capable of conducting fair and impartial investigations, credible to both complainants and the authorities that may be reviewed by the Office of the Ombudsman.<sup>29</sup>

There are several factors, which, taken as a whole, serve to secure the independence of the institution. These factors are related to –

- the positioning of the institution within the legal framework
- the method of appointing and removing an incumbent from office
- accountability
- funding and personnel issues
- enforcement mechanisms, and
- the investigation process.

The following paragraphs will focus in more detail on each of these factors from a theoretical perspective, and will subsequently determine whether, in practice, the Office of the Ombudsman is in a position to act independently on the basis of the existing legal framework.

### ***Positioning within the legal framework***

The institution of the Ombudsman can only be established in law or by way of a jurisdiction's constitution. With regard to the institution's independence, its anchorage in a jurisdiction's constitution is of greater effect as it underlines the permanence of the institution: the constitutional amendment process is specifically designed so as to prevent frequent amendment.

In Namibia, the establishment of the Office of the Ombudsman rests on two pillars. The first of these, the legal authority, is found in the Constitution. Nonetheless, the Constitution also authorises the legislative body to enact statutory law to amplify the Ombudsman's powers and responsibilities. This law has duly taken the form of the Ombudsman Act. By integrating the institution of the Ombudsman into the Constitution, which is the supreme law of the land,<sup>30</sup> the permanence of the

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29 United Nations Development Programme. 2006. *Guide for Ombudsman institutions: How to conduct investigations*. Bratislava: UNDP, p 12.

30 Article 1(6), Namibian Constitution.

institution is underlined – since any constitutional amendment is subject to strict conditions. This creates stability for to the office, and lends credibility to it in terms of the public’s perceptions. Thus, the Ombudsman is free to investigate cases without fear that the office will easily be closed down or restricted.

### ***Method of appointment and removal from office***

Another aspect which is relevant to the independence of an Ombudsman is the method of his/her appointment and removal from office. In order to guarantee independence, the Ombudsman is to be appointed or confirmed, preferably by a majority of a legislative body or entity. Political appointments should be prevented in order that the Ombudsman can act independently. Therefore, the appointing institution should not be one subject to the Ombudsman’s review.

In Namibia, the Ombudsman is appointed by the President on the recommendation of the Judicial Service Commission.<sup>31</sup> The latter consists of the Chief Justice, a judge appointed by the President, the Attorney-General, and two members of the legal profession.<sup>32</sup> The appointing process consists of the Judicial Service Commission’s recommendation and the subsequent formal act of proclamation by the President. This process secures, firstly, that the appointed incumbent is widely respected by diverse political groups as fair and impartial, and secondly, that the appointment is not the responsibility of one particular institution. The composition of the recommending institution, consisting of various professional branches, strengthens the independence of the Ombudsman at the early stage of appointment.

Furthermore, the two-stage appointment process intends to make sure that the Ombudsman is independent of any agency under the office’s jurisdiction. Were the Ombudsperson not independent of the agency being reviewed, s/he could be subject to pressures that would reduce the credibility of the institution. In all the instances of appointment of an Ombudsman that have taken place to date,<sup>33</sup> the constitutional two-stage appointment process has been observed. With regard to the appointment of an acting or deputy Ombudsman, respective provisions are contained in the Ombudsman Act.<sup>34</sup>

The Ombudsman’s independence is additionally supported by the conditions of the removal process. Before the expiry of the Ombudsman’s term of office, the

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31 Article 90(1), Namibian Constitution.

32 Article 85(1), Namibian Constitution.

33 So far, three Ombudsmen have taken office: the late Fanuel J Kozonguizi in 1992, Bience Gawanas in 1996, and John R Walters in 2004.

34 Section 2.

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President, acting on the recommendation of the Judicial Service Commission, is empowered to remove the Ombudsman from office.<sup>35</sup> The Ombudsman can only be removed for specified causes, e.g. incapacity, or gross misconduct.<sup>36</sup> This guarantees that the Ombudsman will not be removed for political reasons or just because the results of investigations have offended those in political power in the legislative body. The provision that the Ombudsman is not permitted to perform remunerative work outside his or her official duties without the permission of the President<sup>37</sup> is another supportive provision safeguarding the Ombudsman's independence.

Other relevant safeguards comprise the selection criteria as well as matters related to the Ombudsman's term of office. The stricter the selection criteria for the Ombudsman are, the less control is required – since strict selection criteria guarantee that the candidate is highly qualified for the position. Were the Ombudsman subject to the control of another institution, the degree of independence enjoyed by the office would accordingly decrease. In Namibia, the strict selection criteria<sup>38</sup> in terms of personal qualifications warrant that the Ombudsman is not subject to further control:

*The Ombudsman shall either be a Judge of Namibia, or a person possessing the legal qualifications which should entitle him or her to practise in all the Courts of Namibia.*

The Ombudsman also enjoys a fixed, long term of office – which is another way of securing independence from acute political developments. Article 90(2) of the Constitution provides that the Ombudsman hold office until the age of 65. However, the retiring age may be extended by the President to the age of 70. No further provision is contained as to the term of office, which implies that, regardless of the age at the time of appointment, the Ombudsman theoretically holds office until the age of 65 or 70, respectively. The Ombudsman Act, however, states that the appointment of the Ombudsman is required to be in accordance with such terms and conditions as the President may determine. Many legal systems providing for the establishment of the institution of Ombudsman have a time restriction on the term of office, combined with the possibility of an extension. Especially in the light of the independence of the institution, a long, fixed term of office subject to a time limit with the option of reappointment or extension seems to be relatively more acceptable than an indefinite term of office. However, experience has shown that the possibility of one person holding the office for decades remains theoretical.

35 Article 94(1), Namibian Constitution.

36 Article 94(2) and (3), Namibian Constitution.

37 Section 2(4), Ombudsman Act.

38 Article 89(4), Namibian Constitution.

### ***Funding, remuneration and personnel issues***

It is essential for the independence of the Ombudsman that the office is equipped with a budget that is sufficient to carry out the functions as set out by the law. If this is not the case, the Ombudsman would be incapable of carrying out the necessary investigations – resulting in a lack of independence. In this regard, the Southern African Conference on the Institution of the Ombudsman<sup>39</sup> resolved that the institution should receive adequate funding in keeping with good governance and easy accessibility, and that the matter of funding should not militate against the institution's independence.

In this context, it is imperative that, even though the Ombudsman might account directly to the legislative body, the available funds can be spent by the Ombudsman at his/her discretion without the approval of any higher authority.

The budget of the Office of the Ombudsman is proposed by the Ombudsman and tabled in Parliament through the Ministry of Justice. Together with external financial support,<sup>40</sup> the Office of the Ombudsman at this stage has adequate means to perform the functions required by law.<sup>41</sup>

The Office of the Ombudsman currently has a staff establishment of about 25. Ten investigators are assigned to the Windhoek Office.<sup>42</sup> The Office's subdivisions currently work with one investigator in Keetmanshoop, and two in Oshakati; additional staff will be recruited in due course. The size of the Office is such that the Ombudsman can be cognisant of the Office's affairs at all times, and that it can during the ordinary course of business meet performance standards with regard to such factors as speed, accuracy of results, and quality communication.

As to the salary of an Ombudsman, since an Ombudsman makes certain recommendations to government officials, amongst other persons, during his/her investigations, the remuneration associated with the office should be commensurate with the responsibility and the required qualifications. Many legal systems have, therefore, adjusted the Ombudsman's salary to equal that

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39 The Conference was held in November 1995 in Swakopmund, Namibia. For further details see Kasuto & Wehmhörner (1996).

40 Such as financial support granted by the Embassies of Finland and France, as well as by institutions such as the Konrad Adenauer Foundation; see Office of the Ombudsman (2007:3).

41 Interview by OC Ruppel with J Walters, Ombudsman of Namibia, on 12 August 2008.

42 A significant number of vacancies will hopefully be filled in due course. The recent appointment of a new Director of the Office of the Ombudsman, Eilene Rukow, is a step in this direction.

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of judges or Ministers. This top salary bracket not only reflects the level on which the Ombudsman eventually conducts investigations, it also guards against corruption and justifies the rule that, generally, an Ombudsman is not allowed to generate income other than the remuneration which is granted in his/her function as an Ombudsman. All the aforementioned factors have high relevance in terms of working independently. In order to avoid the Ombudsman being indirectly punished for politically difficult reports or inconvenient recommendations, it should not be permissible to reduce the Ombudsman's salary during his/her term of office, unless the salaries of all government officials are subject to such reduction.

Currently, the same conditions of service of a High Court judge apply to an Ombudsman. Thus, the Ombudsman's salary may generally not be reduced during a term of office. Respective provisions are contained in the contract between the President of the Republic of Namibia and the Ombudsman.<sup>43</sup>

In the light of the nature of investigations conducted by the Office of the Ombudsman, which are frequently confidential, it is imperative that the Ombudsman has full confidence in his/her staff members. True independence can only prevail if the office is not politicised, and if the Ombudsman has the sole discretion to appoint and remove staff from his/her office and to distribute specific responsibilities among the staff. The de facto situation in Namibia, however, reflects a different reality. Generally, the Ombudsman is assisted by officers in the public service who are appointed by government at the recommendation of the Public Service Commission.<sup>44</sup> However, provision is made that the Ombudsman may also obtain the services of any other person.<sup>45</sup>

Where the Ombudsman is not in a position to perform his/her duties for any reason, or if the office is vacant, section 2 of the Ombudsman Act provides for a deputy or acting Ombudsman to be appointed to exercise the Ombudsman's powers in order not to paralyse the work flow. No such deputy currently serves, although one had been appointed in the past.<sup>46</sup> Nonetheless, the establishment of new Ombudsman subdivisions, e.g. in Swakopmund, are expected to create new needs in regard to the appointment of new staff. The work flow is currently safeguarded by the remaining staff members, especially by the Office's Director and the investigators, who step in whenever the Ombudsman is temporarily not in a position to perform his/her duties.

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43 Interview with Ombudsman J Walters by OC Ruppel, 12 August 2008.

44 Section 7(1), Ombudsman Act.

45 Section 7(2), Ombudsman Act.

46 Ephraim K Kasuto was appointed as Deputy Ombudsman in 1993.

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Following the principle of immunity from liability and criminal prosecution that is granted to heads of state, it is considered appropriate to grant immunity to an Ombudsman for acts performed under the law for the following reasons:

- It is highly likely that people subject to investigations could sue the Ombudsman for acts carried out under his/her mandate.
- Immunity from criminal prosecution guards against all forms of political control, and
- Immunity from liability and criminal prosecution allows the Ombudsman to concentrate on his/her tasks rather than on defence strategies for warding off lawsuits.

In its resolutions and recommendations, the Southern African Conference for the Institution of the Ombudsman provides that –<sup>47</sup>

*[t]he 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.*

In this regard, Namibia's Ombudsman Act provides for a limitation of liability in respect of anything done in good faith under any provision of the Act.<sup>48</sup> This applies to the Ombudsman<sup>49</sup> as well as to his/deputy and other Office staff.

### ***The investigation process***

The independence of an Ombudsman can be measured by the extent of his/her discretion in an investigation process. Various single steps within the investigation process contain elements that are indispensable to the institution's independence.

Tribute is paid to this independence in section 4 of the Act, which provides that –

*[W]hen the Ombudsman performs his or her duties and functions in terms of the Act –*  
(a) *the Ombudsman may in his or her discretion determine the nature and extent of any inquiry or investigation ...*

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47 The Conference was held in November 1995 in Swakopmund, Namibia. For the resolutions and recommendations, see Kasuto & Wehmhörner (1996:6).

48 Section 11, Ombudsman Act.

49 The Ombudsman holds a diplomatic passport ex officio.

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Usually, the investigation process is started by a complaint brought before the Ombudsman by an individual. In this context and with regard to the Ombudsman's independence, consideration needs to be given to whether the Ombudsman, apart from conducting an investigation on the basis of a complaint, may also conduct own-motion investigations. Such competence would indeed contribute to the independence of the Ombudsman in that s/he would not be bound by incoming complaints. One can well imagine that the Ombudsman comes across situations which, in his/her eyes, would justify an investigation, but which were not brought before him/her by way of a complaint from outside the Office. This may be so either because the persons aggrieved may be intimidated and, therefore, unwilling to hand in a complaint, because the observed or known misconduct is not public, or for other reasons. Own-motion investigations can also be appropriate in cases where the persons affected are unable to make a complaint themselves, e.g. if affected persons would endanger themselves by submitting a complaint.<sup>50</sup>

Although neither the Constitution nor the Ombudsman Act contains an explicit provision allowing the Ombudsman to conduct an investigation without having received a complaint, the Ombudsman may decide to undertake an own-motion investigation if such investigation is about issues and authorities that would be within the institution's competence if they had been brought by a complainant. The wording of the Constitution attaches investigation procedures to complaints brought before the Ombudsman. The Act, however, which defines and describes the functions of the Ombudsman<sup>51</sup> as required by Article 91 of the Constitution, is broader in the sense that inquiries or investigations are to be undertaken upon "any request or complaint". Even if this wording does not contain an explicit mandate to investigate violations on the Ombudsman's own motion, it would be completely against the object and rationale of the institution if the Ombudsman were unable to take action in cases where s/he obtains knowledge about violations of rights under his/her mandate. Moreover, there is no restriction on the question as to who is allowed to bring a complaint before the Ombudsman. Therefore, there is no reason why a complaint or request from out of the Office itself should not be permissible. Accordingly, the Southern African Conference on the Institution of the Ombudsman resolved as follows:<sup>52</sup>

*IN RESPECT OF OWN MOTION (MERO MOTU), that:  
The Ombudsman should also initiate investigations in his/her own motion.  
Under mero motu investigations, an Ombudsman should take up matters reported in the media or other sources.*

50 UNDP (2006:25).

51 Section 3(1), Ombudsman Act.

52 Kasuto & Wehmhörner (1996).

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The de facto situation in Namibia underlines that own-motion investigations are acceptable and are indeed being conducted.<sup>53</sup>

After having received and channelled the complaint, and after having independently decided on the question of jurisdiction and whether to investigate, investigations are undertaken through fact-finding by collecting all the necessary information with the goal to resolve complaints where possible, and to achieve a remedy for the complainant and/or a restoration of rights that have been violated. Where the Ombudsman believes that an instance investigated by him/her can be rectified or remedied in a lawful manner, s/he gives notification of his/her findings and recommends how to rectify or remedy the matter.<sup>54</sup>

The Ombudsman is not endowed with the coercive powers typical of formal justice systems. Rather, the institution follows the approach of alternative dispute resolution: an informal process in which conflicting parties revert to the assistance of a third party who helps them resolve their dispute in a less formal and often more consensual way than would be the case in court. The methods for dealing with grievances underline the Ombudsman's independence in terms of the broad variety of options available for conflict resolution. On the one hand, the Ombudsman can bring proceedings before competent courts if s/he deems it necessary;<sup>55</sup> on the other, the Ombudsman can opt for various alternative methods to resolve the disputes in question. Compared with the rights-based traditional adversarial attitude towards dispute resolution, the alternative interest-based approach to dispute resolution has expanded significantly within the past few years, not only in the field of human rights and administrative justice, but also in the private sector.<sup>56</sup> Indeed, several arguments favour alternative dispute resolution above court proceedings. Normally, such alternatives are faster and less expensive. They also generally allow greater and more flexible control over the dispute. Moreover, the process is based on more direct participation by the disputants, rather than being run by lawyers, judges, and the state; and finally, in most processes, the disputants outline the process they will use and define the

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53 Especially in cases of human rights violations, own-motion investigations have repeatedly been conducted; interview with Ombudsman J Walters by OC Ruppel, 12 August 2008. See also Walters, J. 2006. *Special Report on conditions prevailing at police cells throughout Namibia*. Windhoek: Office of the Ombudsman.

54 Section 5(1)(b), Ombudsman Act.

55 Article 91(e) of the Constitution provides for specific instances in which the Ombudsman can bring proceedings before the courts, e.g. in order to obtain an interdict to secure the termination of the offending action or conduct (Article 91(e)(dd)), or to seek an interdict against the enforcement of legislation by challenging its validity (Article 91(e)(ee)).

56 Ruppel, OC. 2007. *Interdisziplinäre Schlüsselqualifikation Mediation*. Hamburg: p 1.

substance of the agreements. This type of involvement is believed to increase people's satisfaction with the outcomes, as well as their compliance with the agreements reached. By avoiding court proceedings, the relationship between the disputing parties is often less afflicted, which is a key advantage in situations where the parties need to continue interacting after settlement has been reached, such as in labour management cases.

While the most common forms of alternative dispute resolution are mediation and arbitration, there are many other techniques and procedures applied by Ombudsman institutions. However, dispute resolution techniques applied by the Office of the Ombudsman are not comparable to those applied by courts or tribunals within the framework of formal justice. Typically, the Ombudsman explores options and attempts to achieve equitable solutions for all parties. The Ombudsman works through alternative dispute resolution methods such as negotiation, mediation, consultation, influence, shuttle diplomacy, and informal investigation. These methods, techniques and procedures of investigation applied by the Ombudsman appear to be more informal than formal.

One further aspect in favour of the independence of the Ombudsman within the investigation process is the fact that, although the Ombudsman obviously has to adhere to the provisions of the Constitution and the Ombudsman Act, strict rules of procedure such as those that apply to court proceedings do not have to be applied by the Ombudsman. Instead, the Ombudsman uses his/her discretion to generate a speedy and informal resolution by applying techniques such as negotiation and compromise.<sup>57</sup>

The powers of investigation described in Article 92 of the Constitution and section 4 of the Act are additional essential tools to secure the Ombudsman's independence, as they warrant self-determined investigation procedures.<sup>58</sup> The Ombudsman may, at his/her discretion, determine the nature and extent of any inquiry or investigation and has –

*... the right to enter at any time ... any building or premises ..., except any building or premises or any part thereof used as a private home, and to make such enquiries therein or thereon, and put such questions to any person employed thereon ... in connection with the matter in question ... .*

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57 Article 91(e)(aa) of the Constitution.

58 As to the adequacy of powers given to the institution, see Gawanas (2002:105).

The Ombudsman furthermore has the right to access all sorts of documents relevant to the investigation, as well as the right to seize anything that s/he deems necessary in connection with the investigations.<sup>59</sup> The investigation powers of the Ombudsman also imply the right to require any person to appear before him/her in relation to a specific inquiry or investigation. Individuals may be compelled to appear and give testimony, or to produce information determined to be relevant to the investigation. In this regard, the Ombudsman even has the right to issue subpoenas.<sup>60</sup> These far-reaching powers of investigation and their anchorage in the aforementioned legal instruments emphasise the basic approach that the Ombudsman is empowered to conduct investigations without being dependent on any other body. However, litigation might become necessary to enforce the powers granted to the Ombudsman by the Constitution and the Ombudsman Act.

### ***Enforcement mechanisms***

The investigation generally ends once the Ombudsman is satisfied that it has yielded all the relevant facts. His/her findings and reports are final. Generally speaking, the Ombudsman is not permitted to make binding orders. As a consequence, the Ombudsman's findings are not subject to judicial review, except where the Ombudsman's jurisdiction has been questioned. However, a claimant can still take the case to the courts after having submitted a respective complaint to the Ombudsman for one objective of establishing the office is to offer an alternative to litigation but not to force an aggrieved to choose between the option to submit a complaint to the Ombudsman and the possibility of taking the alleged offender to court.

As the Ombudsman's role is to recommend an administrative response to grievances instead of issuing binding orders, it could be argued that, without such issuing power, the Ombudsman cannot effectively protect the rights under his/her mandate; moreover, the lack of such power might be interpreted as a weakness or even a lack of independence in the institution, since the Ombudsman – without the assistance of the judiciary – cannot actually compel a person or institution under investigation to rectify or remedy the subject of the complaint. On the other hand, the Ombudsman has extensive powers to enquire and investigate. If the Ombudsman had the power to make binding orders, the institution would assume the function of a court of last instance, which would – apart from the fact that greater financial resources would be needed – not meet the basic rationale

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59 Section 4(1)(b), Ombudsman Act.

60 Article 92(a), Namibian Constitution.

of the institution of the Ombudsman.<sup>61</sup> Where an investigation results in a determination that the complainant was justified in bringing the complaint, the Ombudsman's main instrument is to make recommendations in order to solve problems or prevent them from reoccurring.<sup>62</sup> By using this method, offenders are persuaded rather than forced to act, which in many cases may lead to a more effective and efficient solution. Also, if an Ombudsman were granted the power to issue binding orders, they would be subject to judicial review – again preventing the Ombudsman from fully concentrating on the complaints brought before him/her.

### ***Accountability***

In terms of functional and political autonomy, it is essential that the Ombudsman is independent of the institutions or organisations s/he reviews.<sup>63</sup> If this were not the case, there would be an increased risk of serving in the interests of the organisation being reviewed, and complaints would not be dealt with in an

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61 See UNDP/United Nations Development Programme. 2004. *Report on the Fourth UNDP International Round Table for Ombudsmen institutions in the ECIS Region*, p 3. Available at [europeandcis.undp.org/files/uploads/kaplina/RoundtableReport\\_ombudsman.doc](http://europeandcis.undp.org/files/uploads/kaplina/RoundtableReport_ombudsman.doc); last accessed 19 June 2008. It is argued that the lack of power of making binding orders, considered by some as a weakness, is in fact the institution's strength:

*Where any institution has the power to order others to do its bidding, another institution must have to power to review the decisions of the first institutions. In this case, if Ombudsmen were to have the power to issue binding orders, the courts would be the place where the Ombudsman's orders would be reviewed. Having the power to order that recommendations be implemented would change dramatically the dynamic of an Ombudsman institution ... What was created to be a less formal and faster way of solving problems would likely become more formal and slower. The cost to the Ombudsman, the people and the state would be greater and the benefits would be fewer.*

Similar arguments in favour of not granting an Ombudsman the power to issue binding orders were spelled out by the European Ombudsman NP Diamandouros. Diamandouros, NP. 2006. *The institution of the ombudsman as an extra-judicial mechanism for resolving disputes in the context of the evolving European legal order*. Available at <http://ombudsman.europa.eu/speeches/en/2006-04-14.htm>; last accessed 15 June 2008.

62 For these reasons, in its concluding resolutions and recommendations, the Subregional Conference on the Ombudsman in Southern Africa held that (Kasuto & Wehmhörner 1996:5) –

*[t]he Ombudsman should not have enforcement mechanisms and/or powers.*

63 An example of the independence of the Ombudsman in Namibia is associated with a government directive that exists with regard to its offices, ministries and agencies not being permitted to advertise in specific newspapers. The Ombudsman, however, does not follow this directive, amply demonstrating his independence. To reach the public, the Ombudsman considers it necessary to approach the public in all newspapers. Interview with Ombudsman J Walters by OC Ruppel, 12 August 2008.

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impartial manner based on examination and analysis of the facts and the law. Provision for the independence of the Ombudsman from the organisations s/he reviews is made in Article 89(2) of the Constitution. Legislative control is only permissible by way of the Ombudsman's appointment, reappointment or removal from office, with strict preconditions attached to the latter – as regulated by Article 94.

According to the Constitution and the Act, The Office of the Ombudsman is obliged to draft various reports on his/her investigations.<sup>64</sup> These reports can be divided into two main categories: those that are drafted for single complaints, and those that contain all the activities of the Office within a specific period.<sup>65</sup>

When investigations are completed, the Ombudsman drafts a report containing his/her findings on the complaint, as well as recommendations to solve the problems or to prevent them from happening again. Apart from the final recommendations, this report summarises the complaint, the facts found in the investigation, the law governing the situation, an analysis of the facts in light of the law, as well as a finding on what the complaint alleged.<sup>66</sup>

An annual report containing all the Ombudsman's activities during the period 1 January to 31 December is to be drafted and submitted to the Speaker of the National Assembly, and subsequently to the National Assembly.<sup>67</sup> These annual reports include information as to the scope of activities, complaints, investigations, management services and administration, as well as details on outreach and public education programmes. The reports impressively reflect that the Office of the Ombudsman takes the task of protecting and promoting the values under his/her mandate through independent and impartial investigations very seriously, as they do not mince words. Inter alia, the reports contain specific case summaries referring to complaints against several government and other institutions, and statistical breakdowns draw a clear picture on the work performed by the Office in several respects.

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64 Provisions for reports to be furnished by the Office of the Ombudsman are contained in Article 91(g) of the Constitution as well as in section 6 of the Ombudsman Act.

65 Such as Office of the Ombudsman. 2008. "Ombudsman Report to the Parliamentary Committee on Constitutional and Legal Affairs in regard to human rights violations in Namibia". Unpublished.

66 UNDP (2006:21).

67 Article 91(g), Namibian Constitution; section 6(2), Ombudsman Act.

## **Concluding remarks**

Through investigations and the resolution of complaints, the institution of the Ombudsman in Namibia promotes and protects human rights, and fair and effective public administration; it combats corrupt practices, and protects the environment and natural resources. In order to effectively fulfil these functions, the Ombudsman has to be impartial, fair, and independent. Independence is considered to be one of the most fundamental and indispensable values for the institution to function successfully. The necessary foundations for such independence have been built by a bundle of legal provisions within the constitutional and statutory regime. Thus, the Namibian Constitution as well as the Ombudsman Act can be regarded as suitable tools for safeguarding the Ombudsman's independence.

The positioning of the institution within the constitutional and statutory framework, the method of the Ombudsman's appointment and removal from the office, accountability provisions, funding and personnel issues, enforcement mechanisms, and the investigation process: all these elements have to be designed in a manner that promote the institution's independence.

It has been shown that the existing legal provisions provide a solid legal basis for the Ombudsman to perform his/her mission, independent from any other institution or authority. The Ombudsman is able to take decisions in an autonomous manner without fear of reprisal by the subjects under review. In summary, therefore, it can be stated that, at least theoretically, independence is firmly embedded in the existing legal regime.

The second stage, however, is to put these underlying legal provisions into practice. In this regard, the annual reports issued by the Office of the Ombudsman serve as vital evidence that the institution can indeed act independently. The reports not only show that complaints are directed against a broad range of institutions, including the highest in government, local authorities, parastatals and others; they also clearly speak out on specific complaints as well as on difficulties in the execution of the Office's duties, which are caused principally by bad governance in the offending institutions.

In all, it can be concluded that, in being independent, the institution of the Ombudsman in Namibia significantly contributes towards the protection of the rights of the individual, the promotion of the rule of law, and advancement of democracy and good governance.