

**10th WORLD CONFERENCE OF THE INTERNATIONAL OMBUDSMAN INSTITUTE
WELLINGTON, NEW ZEALAND**

Speaking truth to power-the role of the ombudsman in the 21st century

12-16 NOVEMBER 2012

The role of the Ombudsman in promoting and protecting human rights - should it become a national human rights institution?

***“After all..... what worse kind of maladministration
can there be than a violation of human rights”***

Introduction

Before we can discuss the appropriate role of the Ombudsman in respect of human rights protection, we must have a clear picture of what human rights and human rights principles are. The information which I am going to share with you may be familiar to many, but I believe reiteration thereof will be a good starting point. I will examine the human rights dimension of the Ombudsman. I shall discuss the “*hierarchy of rights*” with emphasis on the “*third generation rights*” and then return to the question of the appropriate role of the Ombudsman in respect of human rights protection, what are effective/efficient and appropriate activities for an Ombudsman to undertake in regard to the promotion and protection of human rights, and examine the pros and cons of Ombudsman pursuing to becoming a National Human Rights Institution (NHRI) in conformity with the Paris Principles.

Human Rights and Human Rights Principles

Human Rights are the rights a person has simply because he or she is a human being and are held by all persons equally, universally and forever. All human rights are universal and inalienable, indivisible, interdependent and interrelated.

They are *universal* because everyone is born with and possesses the same rights, regardless of where they live, their gender or race or their religious, cultural or ethnic background. *Inalienable* because people’s rights can never be taken away. *Indivisible* and *interdependent* because all rights, political, civil, economic, social and cultural, are equal in importance and none can be fully enjoyed without the others. All rights have equal status and cannot be positioned in a hierarchical order. The fulfilment of one right often depends, wholly or in part, upon the fulfilment of others.

Human Rights Dimension of the Ombudsman

Over the years varying views and ideas of the role of the Ombudsman in respect of human rights have emerged:

- ❖ the Ombudsman is primarily viewed as a public defender – defender of human rights and also the defender of the public against bureaucracy.²

- ❖ the Ombudsman's primary task is helping to ensure that the government respect its citizens' human rights.³
- ❖ the Ombudsman is presented as the citizen's defender, champion or protector of human rights and freedoms, guardian of law, redresser of public complaints.⁴
- ❖ the Ombudsman has been said to be a concept entrenched within a democratic system as a safeguard against governmental abuse of individual liberties.⁵
- ❖ the Ombudsman helps individuals by giving them a chance to exercise their right to make a complaint where they would otherwise fear to do.⁶

A Hierarchy of Rights?

The so called first generation rights are civil and political rights; i.e. the right to life, fair trial, family, education, etc. The so called second generation rights are economic, social and cultural rights, i.e. the right to an adequate standard of living, health, work, housing and so forth. Thirdly there are the areas of administrative justice, the domain of the traditional Ombudsman.

With the support of the authoritative voices of some former Ombudsman, scholars and commentators, I make the case that good administration, the right to make a complain and ready access to an Ombudsman, now qualify as rights on their own. On strength of the principle that all rights have equal status and cannot be placed in a hierarchical order, I make the case that the right to eat is as fundamental as the right not be arbitrarily arrested or the citizen's right to complain to the Ombudsman and have that complaint dealt with. It thus follows that the Ombudsman institution needs to expand roles if it must adequately cover the new and emerging dimensions of administrative justice and human rights. It is to these new and emerging dimensions of administrative justice that I now turn.

The Right to Good Administration

Administrative procedures are in many countries comprehensively regulated by law. However, it is quite uncommon for good administration, the right to complain and ready access to the Ombudsman to have the status of fundamental rights in legal systems. Irrespective of whether good administration is a basic human right or not in our countries, proper administration and good governance cut across all public service delivery and as such have a direct bearing on fundamental human rights; promotion of good administration is central to the work of all Ombudsman everywhere. Neglecting or refusing to reply to queries, failure to provide information, failure to give reasons, carelessness, undue delays, harsh or improper treatment, etc are everyday realities in the lives of citizens and Ombudsman.⁷ It is through their work that Ombudsman are developing good administration and raising it to the level of a basic human right.

In the final communiqué issued at the conclusion of the 7th International Ombudsman Institute World Conference held in Durban, South Africa in 2000, the following was noted in regard to good administration as human right.

“To live in a society which pursues good governance, is considered by the Conference today to be a basic human right. The quality of an individual citizen's life is materially affected by both decisions taken by government and the manner in which these decisions are implemented.”

The EU Charter of Fundamental Rights provides the Union and its Member states with a list of fundamental rights binding on the signatories. Very important for this discussion are the fundamental rights of the EU citizens to good governance (article 41)⁸ and the right to complain about maladministration by institutions and bodies of the Union with the European Ombudsman (article 43).

In Finland good administration is a legal concept. In section 21 of the Finnish Constitution the right to protection and good administration is guaranteed.⁹

The inextricable link between administrative justice and human rights is very well established in the Namibian Constitution (Article 18)¹⁰ and the South African Constitution (Section 33)¹¹, among others.

The Right to complain to the Ombudsman

The Ombudsman is somebody to whom citizens may take complaints about actions or omissions of officials in government service; someone who receive complaints from aggrieved person against government agencies, officials and employees....¹²

If good administration is a basic human right that each citizen is entitled to, then aggrieved persons have the right to complain to the Ombudsman.

Bruce Barbour made an important point where he states:

*“All the citizens we serve have a stake in our office. Each of them has a right to complain to us. Each of them deserves to have their complaint dealt with professionally, courteously and effectively.”*¹³

The way in which John McMillan puts the right to complain against government on top of all fundamental rights, is very significant for Ombudsman. He argues:

*“Furthermore, both symbolically and at a practical level, the Ombudsman’s office captures what is arguably the most fundamental of all human rights, namely the right to complain against and to challenge the government in an independent forum. The number of complaints received or handled each year by an Ombudsman office, is significant in two ways. It is an indication of the frequency with which aggrieved persons turn to the Ombudsman for assistance and the number of queries and grievances against government that are addressed each year. Secondly the total signifies that through the mechanism of the Ombudsman, the notion is now embedded in Australia that people have a right to complain against government, to an independent agency, without hindrance or reprisal and to have their complaint resolved on its merits according to the applicable rules and the evidence.”*¹⁴

The EU Charter recognises the right of the EU citizen to complain about maladministration.¹⁵ The European Ombudsman is committed to ensuring that any person or organization who might have a problem with the EU institutions and bodies is aware of the right to complain to him about maladministration.¹⁶

It is thus save to conclude that the Ombudsman helps aggrieved persons by giving them a chance to exercise their right to make a complain where they would otherwise fear to do.

The Right to ready access to the Ombudsman

If an aggrieved person has a right to complain, then he/she is entitled to speedy, free and informal procedures to address the wrongs. The state has a duty to provide aggrieved persons with ready access to an institution such as the Ombudsman to correct the wrongs.

Convinced that the Ombudsman is now more than ever before indispensable in the context of prevailing realities, Prof Ayeni argues that *“it is not far fetched to suggest that ready access to an Ombudsman now qualifies as a right in itself that every citizen is entitled to in a modern democratic state”*. For him the Constitution of the Republic of Namibia probably comes closest to this position with its guarantee of the service of its Ombudsman as a basic right.¹⁷

Article 25 (2) of the Constitution, in its Chapter on Fundamental Human Rights and Freedoms, provides that:

“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”

International law ¹⁸ and the Ombudsman

We acknowledge the fact that national human rights institutions (NHRI's) are the corner stone of national human rights protection systems. We further acknowledge the excellent work done by them and the judicial system in the protection of human rights; however there are opportunities for Ombudsman to complement the work of these agencies and thus render more complete, the protection afforded to individuals against infringement.¹⁹ Therefore Ombudsman and staff need to have regard to international law in addition to relevant national law when examining complaints.²⁰ In this part of the paper, I will enumerate the core international human rights instruments, briefly discuss domestication and the state party's obligations under these instruments.

Most, if not all countries have ratified the core international and regional human rights instruments; they are:

- Universal Declaration of Human Rights;
- International Covenant on Economic, Social and Cultural Rights (ICESCR);
- International Covenant on Civil and Political Rights (ICCPR) and its Optional Protocols;
- International Convention on the Elimination of All Forms of Racial Discrimination (CERD);
- Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) and its Optional Protocol;
- Convention on the Rights of the Child (CRC) and its Optional Protocols;

- Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) and its Optional Protocol (OPCAT);
- International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families ;
- Convention on the Rights of Persons with Disabilities.

Other Regional Instruments

- Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols;
- Charter of Fundamental Rights of the European Union
- American Convention on Human Rights and its Additional Protocol;
- African Charter on Human and People's Rights (ACHPR) and its Protocol.

When states ratify these international and regional human rights instruments, they become state parties and bind themselves to ensure that the rights recognised in these instruments are implemented at national level. This obligation is entrenched in most if not all international law instruments.²¹ State Parties are enjoined to undertake legislative and other measures to ensure the effective implementation of the rights recognised in these international human rights instruments.

The domestication of international law into the national legal system of a particular country requires the adoption of either a monist or dualist approach. The adopted approach will establish how international law will be introduced into the national legal system. Viljoen argues that:

“... for the dualist, international law and national law are fundamentally different and therefore domestic law-making is required to ‘transform’ or ‘incorporate’ international law into national law”²²

Monists on the other hand, argue that these two legal orders are inextricably linked, and that international law becomes part of national law upon ratification.

The Namibian Constitution provides that international instruments binding on Namibia, through ratification, become part of Namibian domestic law.²³

Being a state party to a convention, makes state reporting a state's primary duty. The state party is obliged to submit an initial report and thereafter periodic reports to the Treaty Body setting out the state party's compliance with its obligations under the said convention. This report is the mirror reflecting the state of human rights of the nation.

After considering the state party's report, the Treaty Body will make its concluding observations and recommendations. The state party is then obliged to widely disseminate the recommendations and secondly to implement them. But who will monitor government's compliance with its obligations under international law? I will return to this question later in the paper.

The Ombudsman's role in promoting and protecting human rights

The responsibility to respect, protect and fulfil human rights lies with states. All parts of government are involved, together with national institutions and civil society. By ratifying international and

regional human rights instruments, states are required to create mechanism to safeguard human rights. Among these, Ombudsman institutions occupy a unique position. Recognizing the role of the existing Ombudsman in the promotion and protection of human rights and fundamental freedoms, ²⁴ the General Assembly in its resolution 64/161 encouraged Ombudsman to actively draw on the standards enumerated in international instruments and the Paris Principles to increase their capacity to act as national human rights protection mechanism.

Through its work the Ombudsman becomes the institution for the general promotion and protection of human rights. It is indeed a safeguard of the aggrieved person's right to good administration, which is reinforced by the fact that the Ombudsman services and procedures are informal and free of charge.

McMillan observes that the proponents for greater protection frequently overlook the established and effective human rights role currently played by Ombudsman offices. He further argues that complaint investigation by the Ombudsman is directly concerned with human rights issues, in areas as diverse as law enforcement, withdrawal of social security benefits, detention of immigrants, treatment of young children, imposition of taxation penalties and the exercise of government coercive power. ²⁵

The power to investigation human rights issues and/or individual complaints is central to addressing human rights concerns in a meaningful manner and central to the protection role of the Ombudsman. Link to this, is the role of the Ombudsman as watchdog, reviewing condition in detention facilities, visiting facilities unannounced and meet in private with detainees. Riitta-Leena Paunio argues that *"besides good administrative procedure, defending the rights of persons who have been deprived of their liberty has been an essential part of the Ombudsman's tasks in several countries – and rightly so. Torture and inhuman treatment in both prison and police custody is an everyday reality in many countries and there is a crying need to prevent both"*²⁶

The I.O.I itself has been drawn into the field of human rights and has recognized the need to expand in this direction. The Draft By-Laws setting out the purpose of the I.O.I, as among others *"to contribute to respect for human rights and fundamental freedoms"* and require observance by Ombudsman institutions of the following principle:

"its role should be to protect any person or body of person against maladministration, violation of rights, unfairness, abuse, corruption or any injustice caused by a public authority, or official acting or appearing to act in a public capacity.

However, this proposed amendment is still subject to acceptance by the members of the I.O.I, but I am confident that members will realize that the I.O.I needs also to evolve. It needs to change and adapt in order, to address the challenges faced by its members.

Effective and appropriate activities for an Ombudsman to undertake in regard to the promotion and protection of human rights

Many Ombudsman, scholars and commentators are in agreement that all Ombudsman offices need to evolve. I agree with them and wish to add that the importance of good administration as a human right will continue to strengthen and the Ombudsman's role in promoting and protecting human

rights will simultaneously grow. The Ombudsman must be open and prepared for this expansion in the field of human rights. Therefore:

- ❖ The Ombudsman and staff must have a thorough understanding of the international and national human rights norms and the principles relating to the status of national institutions for the promotion and protection of human rights (“*the Paris Principles*”) ²⁷
- ❖ The Ombudsman should actively draw on the standards enumerated in international instruments and the Paris Principles to strengthen their independence and increase their capacity to act as national human rights mechanism.²⁸
- ❖ The Ombudsman should, as appropriate, operate in accordance with the Paris Principles and other relevant international instruments in order to enhance their capacity to assist states in the promotion and protection of human rights.²⁹
- ❖ The Ombudsman can foster dialogue and facilitate cooperation with government and parliaments by advising government on the ratification of international instruments and the removal of reservations.
- ❖ The Ombudsman can play an important role in advising governments with respect to bringing national legislation and national practices in line with their international human rights obligations.³⁰
- ❖ No national human rights institution (NHRI) can monitor and report on every aspect of a country’s human rights situation; therefore the Ombudsman can act as appropriate agency for the dissemination of international human rights instruments and help to make their contents widely known.
- ❖ The Ombudsman can also perform an important role in the treaty body process by ensuring, in collaboration with relevant stakeholders, that the comments and recommendations of treaty bodies are widely discriminated, considered and implemented by government.
- ❖ The Ombudsman should collaborate with international institutions such as the Office of the High Commissioner for Human Rights (OHCHR), the UN Special Rapporteurs (especially on their country visits), treaty bodies (by filing “*Shadow Reports*” in collaboration with civil society), domestic and regional NHRI’s and courts to ensure that states live up to their international human rights obligations and that trade and mining agreements are implemented in coherence with human rights.
- ❖ The Ombudsman needs to recognise that human rights are indivisible, interdependent and interrelated and if civil, political, economic social and cultural rights are not properly and adequately protected, then there may be difficulties for them in ensuring that their traditional preserve, sound and fair administration, operate in a proper manner.³¹
- ❖ The Ombudsman should therefore take the broadest possible view of their role and see it as encompassing two principle aims; i.e. promoting respect for human dignity and protecting individuals who are depending on public authority.³²
- ❖ The Ombudsman should mainstream human rights into their activities and programmes within the framework of their mandates. Complaint examination should have a human rights based approach. ³³
- ❖ The Ombudsman should develop and conduct outreach activities at the national level, in collaboration with all relevant stakeholders, in order to raise aware of the important role, functions and duties of the Ombudsman.

In this part of the paper, I have highlighted some of the activities for an Ombudsman in promoting and protecting human rights. To conclude it, I wish to draw attention to the fact that cooperation and collaboration are both a requirement and a need. The successful implementation of human rights depends on this. The human rights role of the Ombudsman will greatly benefit from a closer collaboration and cooperation with other human rights institutions. The General Assembly, in its resolution 64/161, encouraged increased cooperation between national human rights institutions, and regional and international associations of Ombudsman.

Should the Ombudsman pursue becoming a NHRI in conformity with the Paris Principles – What are the pros and cons?

The Paris Principles provide benchmarks against which proposed, new and existing NHRI's can be assessed or accredited by the Sub-Committee on Accreditation of the International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights (ICC) .The Paris Principles set out what a fully functioning NHRI is and identify six main criteria that these institutions should meet to be successful:

- ❖ Mandate and competence – a broad mandate based on universal human rights standards;
- ❖ Autonomy from government – includes legal, operational and financial autonomy;
- ❖ Independence – guaranteed by legislation or constitution;
- ❖ Pluralism – including through membership and/or effective cooperation;
- ❖ Adequate resources;
- ❖ Adequate powers of investigation.³⁴

In 2005 the Commission on Human rights accorded:

- ❖ speaking rights to “A” status NHRI's under all its agenda items;
- ❖ dedicated seating to NHRI's;
- ❖ the right to issue documents under their own symbol number.

Accreditation confers international acceptance of the NHRI, opens the door to participate in the work and decision-making of the ICC as well as the work of the Human Rights Council and other UN bodies. Status “A” accredited NHRI's may participate and address the Council in an independent capacity.³⁵

The Office of the Ombudsman: Namibia is “*classic*” Ombudsman with additional mandates of human rights and protection of the environment.³⁶ It received its status “A” accreditation in April 2006 and retains this status after re-accreditation in May 2011. Having a single member at the helm of the institution, complicates the requirement of pluralism. To get around this, we established the Ombudsman Human Rights Advisory Committee and when we started with the development of a national human rights action plan in 2009, we converted it into the Coordinating Committee responsible for the development of the action plan.

Although the General Assembly in its resolution 64/161 encouraged Ombudsman institutions to seek accreditation status through the ICC and in its resolution 65/207 encouraged the Ombudsman to request, in cooperation with the OHCHR, their accreditation by the ICC in order to enable them to

interact effectively with the relevant human rights bodies of the UN System, the process is not so easy.

According to the Vienna Declaration and Programme of Action, it is the right of each state to choose the framework for national institution, including the Ombudsman, mediator, which is best suited to its particular needs at the national level, in order to promote human rights in accordance with international human rights instruments.

Where a country has both an Ombudsman with no human rights mandate and a NHRI, it is obvious that the state has chose the NHRI as the institution best suited to promote human rights in accordance with international human rights instruments.

Another obstacle is found in the General observations of the Sub-Committee on Accreditation. The sub-committee acknowledges and encourages one consolidated and comprehensive national human rights institution in a state. In very exceptional circumstances, should more than one national institution seek accreditation by the ICC, it should be noted that Article 39 of the ICC Statute provides that the state shall have one speaking right, one voting right and if elected, only one ICC Bureau member. There are, however certain requirements mandatory for the application to be considered by the Sub-committee.³⁷

The General Assembly in its resolutions encouraged Ombudsman institutions to seek accreditation by the I.C.C. If an Ombudsman institution meets the criteria required by the Paris Principles and the additional requirements set by the Sub-Committee on Accreditation, there is no reason why it should not apply for accreditation.

CONCLUSION

I can do not better, than to conclude this paper with a quotation from the speech of the United Nations High Commissioner for Human Rights at our 9th I.O.I World Conference in June 2009:

“OHCHR also recognizes the important contribution that Ombudsman institutions can make as another element in the national human rights protection system – even without an explicit mandate of human rights protection – given their role in ensuring Government accountability and strengthening the rule of law. Many human rights abuses are indeed connected with maladministration, administrative malfeasance, or a lack of Government accountability. The essential notion of procedural fairness, which underpins the administrative law that ombudsman institutions are mandated to uphold, is thus key to protecting the rights of individuals in their interactions with public authorities”.



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Endnotes + References

1. Observation made by Dean Gottehrer (former Ombudsman of Alaska) to Clair Lewis, QC (former Ombudsman of Ontario and President of the I.O.I) quoted in his paper: *The role of the I.O.I: situation and outlook; at the 8th I.O.I Conference; 8/09/04.*
- 2 & 4. Abedin, A; *“What should be the primary focus of the Ombudsman Institution? Protecting human rights and redressing public grievances verses fighting corruption: emphasis on South Asia and the Commonwealth Caribbean,”* (2008) Vol 8. The International Ombudsman Yearbook, at 152 +3.
3. Oosting, M; *Protecting the integrity and independence of the Ombudsman Institution: The Global perspective* (2001) Vol 5. The International Ombudsman Yearbook, at 25.
- 5&6. Kajwara, F; *Impact of the Ombudsman on good governance and public service administration* (1997) Vol 1. International Ombudsman Yearbook at 56.
7. Paunio, R-L; *The Ombudsman as human right defender* (2009). A paper delivered at the 9th International Ombudsman Institute World Conference in Stockholm.
8. Article 41: Right to good administration
 1. *Everyone has the right to have his or her affairs handled impartially, fairly and within a reasonable time by the institutions, bodies, offices and agencies of the union.*
 2. *The right includes:*
 - a) *the right of every person to be heard, before any individual measure which would affect him or her adversely is taken;*
 - b) *the right of every person to have access to his or her file, while respecting the legitimate interests of confidentiality and of professional and business secrecy;*
 - c) *the obligation of the administration to give reasons for its decision.*
9. Paunio R.L. (supra)
10. Article 18: Administrative Justice

Administrative bodies and administrative officials shall act fairly and reasonable and comply with the requirements imposed upon such bodies and officials by common law and any relevant legislation, and persons aggrieved

by the exercise of such acts and decisions shall have the right to seek redress before a competent Court of Tribunal.

11. Section 33 (1) provides that:
 - a) *Everyone has the right to administrative action that is lawful, reasonable and procedurally fair;*
 - b) *Everyone whose rights have been adversely affected by administrative action has the right to be given written reasons.*
12. The International Bar Association, quoted by Najmul Abedin (supra) at 151.
13. Barbour, B; *The Ombudsman and today's demographic realities* (2004); A paper presented at the International Ombudsman Institute Quadrennial Conference, Quebec city.
14. McMillan, J; *The Ombudsman and the rule of law* (2004) Vol 8. The International Ombudsman Yearbook at 7&16.
15. Article 43: European Ombudsman

Any citizen of the union and any natural or legal person residing or having its registered office in a member state has the right to refer to the European Ombudsman cases of maladministration in the activities of the institutions, bodies, offices or agencies of the Union, with the exception of the Court of Justice of the European Union acting in its judicial role.
16. The European Ombudsman (2008) Annual Report at 79
17. Ayeni V.O; *The Ombudsman in the achievement of administrative justice and human rights in the new millennium* (2000). A paper presented at the 7th International Ombudsman Institute Conference, Durban. Vol 5. International Ombudsman Yearbook at 41 – 42.
18. Dugard, J. *2005 International law: A South African perspective* (3rd Edition) Lansdowne: Juta + Co, at 7-46. *International law refers to the vast body of rules which binds the actions and reciprocal relations of nation states to certain common principles, procedure and standards. These rules are implicit in many international and regional instruments, the decisions of international and regional courts and tribunals, and international customs and practices.*
- 19&20. O'Reilly, E; (2004) *Protecting Rights and Freedom*. A paper presented at the 8th conference of the I.O.I in Quebec City, Vol 7 International Ombudsman Yearbook, at 31&33

21. For example, see the Preamble of the Universal Declaration of Human Rights; Article 2 of the ICESCR; Article 2 (2) of the ICCPR; Article 2 (1) (a)(e) of the CERD, Article 2 (a) – (g) of the CEDAW, Article 4 of the CRC and Article 2 (C) of CAT.
22. Viljoen, F; (2007) *International human rights law in Africa*, New York, Oxford University Press at 22.
23. Article 144: states that:

Unless otherwise provided by this Constitution or Act of Parliament, the general rules of public international law and international agreements binding upon Namibia under this Constitution shall form part of the law of Namibia.
24. General Assembly Resolutions 63/169 dated 18 December 2008 and 65/207 dated 21 December 2010 – *The role of the Ombudsman, mediator and other national human rights institutions in the promotion and protection of human rights.*
25. McMillan, J. (supra), at 16
26. Paunio, R-L (supra)
27. See: <http://www2.ohchr.org/english/law/parisprinciples.htm>
28. General Assembly, resolution 64/161 dated 20 April 2005; *National Institutions for the promotion and protection of human rights.*
29. General Assembly resolution 65/207 dated 21 December 2010; *The role of the Ombudsman, mediator and other national human rights institutions in the promotion and protection of human rights.*
30. General Assembly Resolution 65/207
- 31&32. O'Reilly, E, (supra) at: 29
33. Office of the United Nations High Commissioner for Human Rights (2006), frequently asked questions on a human rights based approach to development cooperation, at 15. *A human rights-based approach identifies rights-holders and their entitlements and corresponding duty-bearers and their obligations and works towards strengthening the capacities of rights-holders to make their claims and of duty-bearers to meet their obligations.*
- 34&35. OHCHR (2010) *National Human Rights Institutions: History, principles, roles and responsibilities* (Series No 4) at 31&46.
36. The Ombudsman Act, No 7 of 1990; section 3 (1) (a) – (e)

37. The conditions precedent for consideration by the sub-committee are the following:

- ❖ *Written consent of the state Government (which itself must be a member of the UN);*
- ❖ *Written agreement between all concerned national human rights institutions on the rights and duties of an ICC member including the exercise of the one voting and one speaking right. The agreement shall also include arrangement for participation in the international human rights system, including the Human Rights Council and the Treaty Bodies.*

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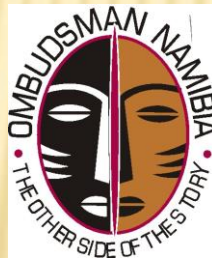
**SPEAKING TRUTH TO POWER-THE ROLE OF THE OMBUDSMAN
IN THE 21ST CENTURY**

12-16 NOVEMBER 2012

The Role of the Ombudsman in promoting and protecting human rights – should it become a national human rights institution

Session D

ADV J R WALTERS



INTRODUCTION

- My presentation will cover:
 - human rights and human rights principles;
 - an examination of the human rights dimensions of the Ombudsman;
 - a brief discussion of the “*hierarchy of rights*”; the emphasis on the “third generations rights”, which are:
 - the right to good administration;
 - the right to complain to the Ombudsman;
 - the right of ready access to the Ombudsman.
 - International Law and the Ombudsman;
 - The Ombudsman’s role in promoting and protecting human rights;
 - Effective and appropriate activities for an Ombudsman to undertake in regard to promotion and protection of human rights; and lastly;
 - An examining of the question whether the Ombudsman should pursue the road of becoming a NHRI in conformity with the P.P.s.

HUMAN RIGHTS AND HUMAN RIGHTS PRINCIPLES

- ❑ Human Rights are the rights a person has simply because he or she is a human being;
- ❑ These rights are held by all persons equally, universally and forever;
- ❑ All human rights are:
 - *universal* because everyone is born with and possesses the same rights,
 - *inalienable* because people's rights can never be taken away;
 - *indivisible* and *interdependent* because all rights, are equal in importance and none can be fully enjoyed without the others; all rights have equal status and cannot be positioned in a hierarchical order; the fulfilment of one right often depends, wholly or in part, upon the fulfilment of others.

HUMAN RIGHTS DIMENSION OF THE OMBUDSMAN

- Varying views and ideas of the role of the Ombudsman in respect of human rights have emerged:
 - the Ombudsman is primarily viewed as a public defender – defender of human rights and also the defender of the public against bureaucracy.²
 - the Ombudsman’s primary task is helping to ensure that the government respect its citizens’ human rights.³
 - the Ombudsman is presented as the citizen’s defender, champion or protector of human rights and freedoms, guardian of law, redresser of public complaints.⁴
 - the Ombudsman has been said to be a concept entrenched within a democratic system as a safeguard against governmental abuse of individual liberties.⁵
 - the Ombudsman helps individuals by giving them a chance to exercise their right to make a complaint where they would otherwise fear to do.⁶

A HIERARCHY OF RIGHTS

- ❑ First generation rights are civil and political rights;
- ❑ Second generation rights are economic, social and cultural rights;
- ❑ Third generation rights are the areas of administrative justice; the domain of the traditional Ombudsman;
- ❑ With the support of the authoritative voices of Ombudsman, scholars and commentators, I make the case that:
 - good administration
 - the right to complain and
 - ready access to an Ombudsman, now qualify as rights on their own
- ❑ On strength of the principle of indivisibility and interdependence, I make the case that:
 - the right to eat is as fundamental as the right not to be arbitrarily arrested or
 - the citizen's right to complain to the Ombudsman and have that complaint dealt with.
- ❑ Vital necessary for Ombudsman to expand roles to cover the new and emerging dimensions of administrative justice and human rights.

THE RIGHT TO GOOD ADMINISTRATION

- Administrative procedures are in many countries comprehensively regulated by law;
- However, it is quite uncommon for good administration, the right to complain and ready access to the Ombudsman to have the status of fundamental rights in legal systems.
- Irrespective of whether good administration is a basic human right or not in our countries, proper administration and good governance cut across all public service delivery and as such have a direct bearing on fundamental human rights;
- promotion of good administration is central to the work of all Ombudsman everywhere.
- Neglecting or refusing to reply to queries, failure to provide information, failure to give reasons, carelessness, undue delays, harsh or improper treatment, etc are everyday realities in the lives of citizens and Ombudsman.⁷
- It is through their work that Ombudsman are developing good administration and raising it to the level of a basic human right.

- *To live in a society which pursues good governance, is considered by the Conference today to be a basic human right. The quality of an individual citizen's life is materially affected by both decisions taken by government and the manner in which these decisions are implemented.*” Final communiqué of 7th World Conference of I.O.I (2000);
- The EU Charter of Fundamental Rights provides the Union and its Member states with a list of fundamental rights;
- Very important for this discussion are:
 - the fundamental rights of the EU citizens to good governance (article 41)⁸
 - the right to complain about maladministration by institutions and bodies of the Union with the European Ombudsman (article 43).
- In Finland good administration is a legal concept. In section 21 of the Finnish Constitution the right to protection and good administration is guaranteed.⁹
- The inextricable link between administrative justice and human rights is very well established in the Namibian Constitution (Article 18)¹⁰ and the South African Constitution (Section 33)¹¹,

THE RIGHT TO COMPLAIN TO THE OMBUDSMAN

- ❑ The Ombudsman is somebody to whom citizens may take complaints about actions or omissions of officials in government service;
- ❑ someone who receive complaints from aggrieved person against government agencies, officials and employees....¹²
- ❑ If good administration is a basic human right that each citizen is entitled to, then aggrieved persons have the right to complain to the Ombudsman.
- ❑ Bruce Barbour made an important point where he states:
- ❑ *“All the citizens we serve have a stake in our office.*
- ❑ *Each of them has a right to complain to us.*
- ❑ *Each of them deserves to have their complaint dealt with professionally, courteously and effectively.”¹³*

- The way in which John McMillan puts the right to complain against government on top of all fundamental rights, is very significant for Ombudsman. He argues:

“Furthermore, both symbolically and at a practical level, the Ombudsman’s office captures what is arguably the most fundamental of all human rights, namely the right to complain against and to challenge the government in an independent forum. The number of complaints received or handled each year by an Ombudsman office, is significant in two ways. It is an indication of the frequency with which aggrieved persons turn to the Ombudsman for assistance and the number of queries and grievances against government that are addressed each year. Secondly the total signifies that through the mechanism of the Ombudsman, the notion is now embedded in Australia that people have a right to complain against government, to an independent agency, without hindrance or reprisal and to have their complaint resolved on its merits according to the applicable rules and the evidence.”¹⁴

- The EU Charter recognises the right of the EU citizen to complain about maladministration.¹⁵
- The European Ombudsman is committed to ensuring that any person or organization who might have a problem with the EU institutions and bodies is aware of the right to complain to him about maladministration.¹⁶
- It is thus safe to conclude that the Ombudsman helps aggrieved persons by giving them a chance to exercise their right to make a complaint where they would otherwise fear to do.

THE RIGHT OF READY ACCESS TO THE OMBUDSMAN

- ❑ If an aggrieved person has a right to complain, then he/she is entitled to speedy, free and informal procedures to address the wrongs.
- ❑ The state has a duty to provide aggrieved persons with ready access to an institution such as the Ombudsman to correct the wrongs.
- ❑ Prof Ayeni argues that *“it is not far fetched to suggest that ready access to an Ombudsman now qualifies as a right in itself that every citizen is entitled to in a modern democratic state”*.
- ❑ For him the Constitution of the Republic of Namibia probably comes closest to this position with its guarantee of the service of its Ombudsman as a basic right.¹⁷
- ❑ Article 25 (2) of the Constitution, in its Chapter on Fundamental Human Rights and Freedoms, provides that:
- ❑ *“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”*
- ❑ The South African Constitution also guarantees the right of ready access to the Public Protector where it provides in Section 182 (4) that;
 - the Public Protector must be accessible to all persons and communities

INTERNATIONAL LAW ¹⁸ AND THE OMBUDSMAN

- ❑ We acknowledge:
 - the fact that NHRI's are the corner stone of national human rights protection systems;
 - the excellent work done by them and the judicial system in protecting human rights;
- ❑ however , the Ombudsman can complement their work; thus render more complete the protection afforded to individuals.¹⁹
- ❑ Ombudsman and staff must have regard to international law in addition to national law when examining complaints;
- ❑ the core international and regional human rights instruments are:
 - Universal Declaration of Human Rights;
 - International Covenant on Economic, Social and Cultural Rights (ICESCR);
 - International Covenant on Civil and Political Rights (ICCPR) and its Optional Protocols;

- International Convention on the Elimination of All Forms of Racial Discrimination (CERD);
- Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) and its Optional Protocol;
- Convention on the Rights of the Child (CRC) and its Optional Protocols;
- Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) and its Optional Protocol (OPCAT);
- International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families ;
- Convention on the Rights of Persons with Disabilities.

Other Regional Instruments

- Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols;
- Charter of Fundamental Rights of the European Union
- American Convention on Human Rights and its Additional Protocol;
- African Charter on Human and People's Rights (ACHPR) and its Protocol.

- Domestication of international law into the national legal system requires a monist or dualist approach;
- For the dualist, domestic law making is required to transform or incorporate international law into national law;
- For the monist, the two orders are inextricably linked, therefore international law becomes part of national law upon ratification;
- Namibian Constitution provides that international instruments binding on Namibia through ratification, become part of Namibia's domestic law;
- A state party is obliged to submit an initial and periodic reports to Treaty Bodies (TB);
- Reports must cover the state party's compliance with its obligations under conventions;
- After considering the report, the T.B will make its concluding observations and recommendations;
- State party is obliged to disseminate the recommendations and implement them;
- State's compliance with its international obligations must be monitored, but by who?

THE OMBUDSMAN'S ROLE IN PROMOTING AND PROTECTING HUMAN RIGHTS

- ❑ The responsibility to respect, protect and fulfil human rights lies with states.
- ❑ All parts of government are involved, together with national institutions and civil society.
- ❑ By ratifying international and regional human rights instruments, states are required to create mechanisms to safeguard human rights.
- ❑ Among these, Ombudsman institutions occupy a unique position.
- ❑ The General Assembly (GA) recognizes the role of the existing Ombudsman in the promotion and protection of human rights and fundamental freedoms, ²⁴
- ❑ In its resolution 64/161 the GA, encouraged Ombudsman to actively draw on the standards enumerated in international instruments and the Paris Principles to increase their capacity to act as national human rights protection mechanisms.
- ❑ Through its work the Ombudsman becomes the institution for the general promotion and protection of human rights.
- ❑ It is indeed a safeguard of the aggrieved person's right to good administration,
- ❑ It is reinforced by the fact that the Ombudsman services and procedures are informal and free of charge.

- ❑ McMillan observes that the proponents for greater protection frequently overlook the established and effective human rights role currently played by Ombudsman offices.
- ❑ For him such a complaint investigation by the Ombudsman is directly concerned with human rights issues; in areas of:
 - law enforcement,
 - withdrawal of social security benefits,
 - detention of immigrants,
 - treatment of young children,
 - imposition of taxation penalties
 - and the exercise of government coercive power. ²⁵
- ❑ The power to investigate human rights issues and/or individual complaints is central to addressing human rights concerns in a meaningful manner.
- ❑ It is central to the protection role of the Ombudsman.
- ❑ Link to this, is the role of the Ombudsman as watchdog, reviewing conditions in detention facilities, visiting facilities unannounced and meet in private with detainees.

- ❑ Riitta-Leena Paunio argues that *“besides good administrative procedure, defending the rights of persons who have been deprived of their liberty has been an essential part of the Ombudsman’s tasks in several countries – and rightly so. Torture and inhuman treatment in both prison and police custody is an everyday reality in many countries and there is a crying need to prevent both”*²⁶
- ❑ The I.O.I itself has been drawn into the field of human rights and has recognized the need to expand in this direction.
- ❑ The Draft By-Laws setting out the purpose of the I.O.I, as among others *“to contribute to respect for human rights and fundamental freedoms”*
- ❑ It requires observance by Ombudsman institutions of the following principle:
“its role should be to protect any person or body of person against maladministration, violation of rights, unfairness, abuse, corruption or any injustice caused by a public authority, or official acting or appearing to act in a public capacity.
- ❑ However, this proposed amendment is still subject to acceptance by the members of the I.O.I, but I am confident that members will realize that the I.O.I needs also to evolve.
- ❑ It needs to change and adapt in order, to address the challenges faced by its members.

EFFECTIVE AND APPROPRIATE ACTIVITIES FOR AN OMBUDSMAN TO UNDERTAKE IN REGARD TO THE PROMOTION AND PROTECTION OF HUMAN RIGHTS

- ❑ Many Ombudsman, scholars and commentators are in agreement that all Ombudsman offices need to evolve.
- ❑ The importance of good administration as a human right will continue to strengthen and the Ombudsman's role in promoting and protecting human rights will simultaneous grow.
- ❑ The Ombudsman must be open and prepared for this expansion in the field of human rights. Therefore:
 - The Ombudsman and staff must have a thorough understanding of the international and national human rights norms and the principles relating to the status of national institutions for the promotion and protection of human right ("*the Paris Principles*")²⁷
 - The Ombudsman should actively draw on the standards enumerated in international instruments and the Paris Principles to strengthen their independence and increase their capacity to act as national human rights mechanism.²⁸
 - The Ombudsman should, as appropriate, operate in accordance with the Paris Principles and other relevant international instruments in order to enhance their capacity to assist states in the promotion and protection of human rights.²⁹
 - The Ombudsman can foster dialogue and facilitate cooperation with government and parliaments by advising government on the ratification of international instruments and the removal of reservations.

- The Ombudsman can play an important role in advising governments with respect to bringing national legislation and national practices in line with their international human rights obligations.³⁰
- No national human rights institution (NHRI) can monitor and report on every aspect of a country's human rights situation; therefore the Ombudsman can act as appropriate agency for the dissemination of international human rights instruments and help to make their contents widely known.
- The Ombudsman can also perform an important role in the treaty body process by ensuring, in collaboration with relevant stakeholders, that the comments and recommendations of treaty bodies are widely disseminated, considered and implemented by government.
- The Ombudsman should collaborate with international institutions such as the Office of the High Commissioner for Human Rights (OHCHR), the UN Special Rapporteurs (especially on their country visits), treaty bodies (by filing "*Shadow Reports*" in collaboration with civil society), domestic and regional NHRI's and courts to ensure that states live up to their international human rights obligations and that trade and mining agreements are implemented in coherence with human rights.
- The Ombudsman needs to recognise that human rights are indivisible, interdependent and interrelated and if civil, political, economic, social and cultural rights are not properly and adequately protected, then there may be difficulties for them in ensuring that their traditional preserve, sound and fair administration, operate in a proper manner.³¹

- The Ombudsman should therefore take the broadest possible view of their role and see it as encompassing two principle aims; i.e. promoting respect for human dignity and protecting individuals who are depending on public authority.³²
- The Ombudsman should mainstream human rights into their activities and programmes within the framework of their mandates. Complaint examination should have a human rights based approach.³³
- The Ombudsman should develop and conduct outreach activities at the national level, in collaboration with all relevant stakeholders, in order to raise aware of the important role, functions and duties of the Ombudsman.
- Cooperation and collaboration are both a requirement and a need.
- The successful implementation of human rights depends on this.
- The human rights role of the Ombudsman will greatly benefit from a closer collaboration and cooperation with other human rights institutions.
- The General Assembly, in its resolution 64/161, encouraged increased cooperation between national human rights institutions, and regional and international associations of Ombudsman.

SHOULD THE OMBUDSMAN PURSUE BECOMING A NHRI IN CONFORMITY WITH THE PARIS PRINCIPLES – WHAT ARE THE PROS AND CONS?

- ❑ *The Paris Principles provide benchmarks against which proposed, new and existing NHRI's can be assessed or accredited by the Sub-Committee on Accreditation of ICC.*
- ❑ The P.Ps set out what a fully functioning NHRI is and identify six main criteria that these institutions should meet to be successful:
 - Mandate and competence – a broad mandate based on universal human rights standards;
 - Autonomy from government – includes legal, operational and financial autonomy;
 - Independence – guaranteed by legislation or constitution;
 - Pluralism – including through membership and/or effective cooperation;
 - Adequate resources;
 - Adequate powers of investigation.³⁴

- ❑ In 2005 the Commission on Human rights accorded:
 - speaking rights to “A” status NHRI’s under all its agenda items;
 - dedicated seating to NHRI’s;
 - the right to issue documents under their own symbol number.
- ❑ Accreditation confers international acceptance of the NHRI, opens the door to participate in the work and decision-making of the ICC as well as the work of the Human Rights Council and other UN bodies.
- ❑ Status “A” accredited NHRI’s may participate and address the Council in an independent capacity.³⁵
- ❑ The Office of the Ombudsman: Namibia is “*classic*” Ombudsman with additional mandates of human rights and protection of the environment.³⁶
- ❑ It received its status “A” accreditation in April 2006 and retains this status after re-accreditation in May 2011.
- ❑ Having a single member at the helm of the institution, complicates the requirement of pluralism.

- ❑ To get around this, we established the Ombudsman Human Rights Advisory Committee and when we started with the development of a national human rights action plan in 2009, we converted it into the Coordinating Committee responsible for the development of the action plan.
- ❑ The General Assembly in its resolution 64/161 encouraged Ombudsman institutions to seek accreditation status through the ICC.
- ❑ In its resolution 65/207 the GA encouraged the Ombudsman to request, in cooperation with the OHCHR, their accreditation by the ICC in order to enable them to interact effectively with the relevant human rights bodies of the UN System,
- ❑ However, the process is not so easy.
- ❑ According to the Vienna Declaration and Programme of Action, it is the right of each state to choose the framework for national institution, including the Ombudsman, mediator, which is best suited to its particular needs at the national level, in order to promote human rights in accordance with international human rights instruments.

- ❑ Where a country has both an Ombudsman with no human rights mandate and a NHRI, it is obvious that the state chose the NHRI as the institution best suited.
- ❑ Another obstacle is found in the General observations of the Sub-Committee on Accreditation.
- ❑ The sub-committee acknowledges and encourages one consolidated and comprehensive national human rights institution in a state.
- ❑ In very exceptional circumstances, should more than one national institution seek accreditation by the ICC, it should be noted that Article 39 of the ICC Statute provides that the state shall have one speaking right, one voting right and if elected, only one ICC Bureau member.
- ❑ There are, however certain requirements mandatory for the application to be considered by the Sub-committee.³⁷
- ❑ The General Assembly in its resolutions encouraged Ombudsman institutions to seek accreditation by the I.C.C.
- ❑ If an Ombudsman institution meets the criteria required by the Paris Principles and the additional requirements set by the Sub-Committee on Accreditation, there is no reason why it should not apply for accreditation.

CONCLUSION

“OHCHR also recognizes the important contribution that Ombudsman institutions can make as another element in the national human rights protection system – even without an explicit mandate of human rights protection – given their role in ensuring Government accountability and strengthening the rule of law. Many human rights abuses are indeed connected with maladministration, administrative malfeasance, or a lack of Government accountability. The essential notion of procedural fairness, which underpins the administrative law that ombudsman institutions are mandated to uphold, is thus key to protecting the rights of individuals in their interactions with public authorities”.

QUESTIONS

1. Who should be designated as the national preventative mechanism in terms of OPCAT – the Ombudsman, NHRI, another independent body or a combination of them?
2. Should the Ombudsman be designated as one of the focal points for matters relating to the implementation of the Convention on the Rights of Persons with Disabilities?
3. Who should be designated as the mechanism to combat racism, racial discrimination and xenophobia in terms of the Durban Declaration and Programme of Action – the Ombudsman, NHRI or a special body?