

Chapter 27: The Ombudsman and the Environment

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1 Introduction

In 1982, the United Nations General Assembly requested the Lusaka-based United Nations Institute for Namibia (UNIN), to prepare a comprehensive document on all aspects of socio-economic reconstruction and development planning for an independent Namibia.¹ The document recommended the creation of an institution based on the model of the Ombudsman, which has its origin in Sweden.² At the beginning of the nineteenth century, the Swedish Parliamentary Ombudsman was instituted to safeguard the rights of citizens through a supervisory agency independent of the Executive. The tasks of Ombudsmen, making Government accountable, have meanwhile been developed to a sophisticated level. Today, such institutions have been adopted in many countries all over the world and in many countries of southern Africa.³ In some countries there have also been developments of Ombudsman schemes in the private sector. Within the Southern African Development Community (SADC), all member states have institutions that keep an eye on the proper execution of power and the protection of human rights, even though not all these countries use the term Ombudsman.⁴

Usually, the Ombudsman is established per constitutional stipulation as an official, appointed by Government or Parliament. This official is charged with representing the interests of the public by investigating and addressing complaints reported by individual citizens. The major advantage of an Ombudsman is that he/she examines complaints independently of those state institutions charged with irregular conduct. In Namibia, the Office of the Ombudsman was constitutionally established, at Namibian

1 UNIN (1986). UNIN was established in 1976 by the United Nations Council for Namibia. The document was prepared in cooperation with the South West Africa People's Organisation (SWAPO), the Office of the United Nations Commissioner for Namibia and the United Nations Development Programme.

2 UNIN (1986:970).

3 Cf. Kasuto / Wehmhörner (1996).

4 Ombudsmen are established in Angola, Botswana, Lesotho, Malawi, Swaziland, Zambia, Zimbabwe, Namibia, Mauritius, and the Seychelles. In Mozambique, the institution of an Ombudsman was established by constitutional amendment in 2005. 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 public protector (*Défenseur du Peuple*) and the Democratic Republic of Congo constitutionally provides for five institutions to support democracy, including the National Observatory for Human Rights. (*L'Observatoire National des Droits de l'Homme*) as well as a Commission for Ethics and Anti-corruption (*La Commission de l'éthique et de la lutte contre la corruption*).

Independence on 21 March 1990. Since then, three Ombudsmen and one Ombuds-woman have been at the helm of the Office.⁵

2 Legal Foundations

The intention behind this institution, the Ombudsman, is to protect and maintain the respect of the State for the rights of the individual citizen, to promote the rule of law, and to promote and advance democracy and good governance.⁶ The Namibian Bill of Rights in Chapter 3 of the Constitution contains a provision dealing with the enforcement of fundamental human rights and freedoms. Article 25(2), 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 really 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.⁷ They include provisions on the establishment of the office and on his/her political independence, appointment and term of office, functions and powers of investigation, amongst others.

According to Article 91 of the Constitution, the mandate of the Ombudsman in Namibia relates to three widely-defined categories:⁸ Human rights, administrative practices and the environment. Moreover, the Ombudsman contributes proactively towards education and development.⁹ Before the Namibian Constitution Second Amendment Act¹⁰ came into force, the Ombudsman's mandate also included the fight against corruption. However, with the amendment, the word corruption was removed from the list of functions of the Ombudsman in Article 91 in order to avoid a duplication of

5 The Office is headed by Ombudsman Basilius Dyakugha since 2021.

6 Kasuto / Wehmhörner (1996:118).

7 No. 7 of 1990.

8 For more details on the mandates of the Ombudsman see Ruppel / Ruppel-Schlichting (2010).

9 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 afore-mentioned institutions, who together create a forum for dialogue on all aspects of human rights. For more detail on specific awareness campaigns undertaken by the Office of the Ombudsman, see Walters (2008:122f.).

10 No. 7 of 2010.

functions between the Office of the Ombudsman and the Anti-Corruption Commission of Namibia, which was established by the Anti-Corruption Act,¹¹ and inaugurated in early 2006. Thus, corruption-related complaints are now to be followed-up by the Anti-Corruption Commission (ACC).

Generally speaking, the Ombudsman in Namibia investigates complaints concerning violations of fundamental rights and freedoms, and regarding the administration of all branches of Government. Violations are rectified by attempting a compromise between the parties concerned, or by bringing the matter to the attention of the authorities, by referring the matter to the courts or by seeking judicial review.

3 Basic Characteristics of the Ombudsman in Namibia

To ensure citizens have an avenue, open to report complaints, free of red tape and free of political interference, the Namibian Ombudsman is politically independent, impartial, fair, and acts confidentially in terms of the investigation process.¹² Negotiation and compromise between the parties concerned are the main objective when handling complaints.¹³

Different acts or non-actions can give rise to complaints under the competence of the Ombudsman. They include 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, maladministration, unfairness, unreasonableness, arbitrariness, 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 formal requirements. The Office of the Ombudsman cannot investigate complaints regarding court decisions, however. The Office cannot assist complainants financially or represent a complainant in criminal or civil proceedings. Authorities which may be complained about include Government institutions,¹⁴ parastatals,¹⁵ local authorities and, in the case of the violation of human rights or freedoms, private institutions and persons.¹⁶ In 2009, complaints were brought against

11 No. 8 of 2003.

12 Tjitendero (1996:10). As to the characteristics of a classical Ombudsman in general see Gottehrer / Hostina (1998).

13 Article 91(e) of the Constitution and Section 5(1) of the Act.

14 Including Ministries, the National Assembly, the National Planning Commission, and the Attorney-General.

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

16 Gawanas (2002:104).

several Ministries, the Namibian Police, Prison Service, and others.¹⁷ A statistical analysis of cases taken up by the Ombudsman's office during the period 2007–2009 shows that among those objections against Government institutions, around 65% were directed at the Ministry of Justice and the Namibian Police, and prison-related matters.¹⁸

In order to effectively fulfil his or her functions, the Ombudsman has to be impartial, fair, and independent. Independence is probably the most fundamental and inviolable value for the successful functioning of the Ombudsman's office.¹⁹ This is emphasised in Article 89 of the Constitution, which explicitly provides that “[T]he Ombudsman shall be independent and subject only to this Constitution and the law” and that

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.

The underlying rationale for independence is that an Ombudsman has to be able to conduct fair and impartial investigations, be credible to both complainants and the authorities that may be reviewed by the Office of the Ombudsman.²⁰ There are several determining 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.²¹

In terms of functional and political autonomy, it is essential that the Ombudsman is independent of the institutions or organisations he/she reviews.²² If this were not the case, there would be an increased risk of serving the interests of the reviewed organisation, and complaints would not be dealt with in an impartial manner based on examination and analysis of the facts and the law. Provision for the independence of the Ombudsman from the organisations he/she 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. To have the Ombudsman's independence supported and acknowledged remains a challenge in practice:²³

the ‘battle’ to have the Ombudsman's independence supported and indeed acknowledged, remained a problem; this is mainly attributed to the fact that the Office of the Ombudsman is a directorate situated within the Ministry of Justice and is treated by the Ministry as such.

17 Office of the Ombudsman (2010:29ff.).

18 Ibid:29.

19 See Ruppel-Schlichting (2008:277).

20 UNDP (2006:12).

21 Ruppel-Schlichting (2008:277).

22 Blaauw (2009:18).

23 Office of the Ombudsman (2014:3).

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. The Constitution of Namibia 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,²⁴ the permanence and authority of the institution is underscored, since any constitutional amendment is subject to strict conditions. The aforementioned measure creates stability for the office and lends credibility to it in terms of public perception. The Ombudsman is thus free to investigate cases without fear that the office's activities will be hampered by political considerations, that it will easily be closed or restricted in its tasks.

The Ombudsman is appointed by the President on the recommendation of the Judicial Service Commission.²⁵ The latter consists of the Chief Justice, a judge appointed by the President, the Attorney-General, and two members of the legal profession.²⁶ The appointment process is initiated by the Judicial Service Commission's recommendation and followed by the formal act of proclamation by the President. The two-stage appointment process intends to make sure that the Ombudsman is independent of any agency. If the Ombudspersons were not independent of the agency being reviewed, he/she could be subject to pressures that would reduce the credibility of the institution. All appointments of Ombudsmen to date have observed this constitutional two-stage appointment process.²⁷ With regard to the appointment of an acting or deputy Ombudsman, respective provisions are contained in the Ombudsman Act.²⁸ Strict selection criteria in terms of personal qualifications are applied to 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."²⁹

The Ombudsman enjoys a fixed, long term of office – which is another way of securing independence from actual political developments. Article 90(2) of the Constitution provides that the Ombudsman holds 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 in the Act 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

24 Article 1(6), Namibian Constitution.

25 Article 90(1), Namibian Constitution.

26 Article 85(1), Namibian Constitution.

27 So far, four Ombudsmen have taken office: the late Fanuel J Kozonguizi in 1992, Bience Gawanas in 1996, John Walters in 2004 and Basilius Dyakugha in 2021.

28 Section 2.

29 Article 89(4), Namibian Constitution.

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. In light of especially the independence of the institution, a fixed term of office, subject to a time limit with the option of reappointment or extension seems to be more acceptable, than an indefinite term of office.

Before the expiry of the Ombudsman's term of office, the Ombudsman can only be removed from his office subject to the tight requirements of Article 94 of the Constitution. The President, acting on the recommendation of the Judicial Service Commission, is empowered to remove the Ombudsman from office only for specified causes, e.g. incapacity, or gross misconduct. 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. 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. The Southern African Conference for the Institution of the Ombudsman in its resolutions and recommendations provides that –

[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.³⁰

Namibia's Ombudsman Act provides for a limitation of liability in respect of anything done in good faith under any provision of the Act.³¹ This applies to the Ombudsman³² as well as to his/her deputy and other office staff. According to Section 2(4) of the Ombudsman Act, the Ombudsman is not permitted to perform remunerative work outside his/her official duties without the permission of the President.

4 The Environmental Mandate of the Ombudsman

Beside the mandates on human rights and maladministration, the environmental mandate is of specific importance regarding the legal implications of environmental concerns in Namibia. This mandate, according to Article 91(c) of the Constitution, *inter alia*, relates to the over-utilisation of natural resources, the protection of ecosystems, and to the maintenance of the beauty and character of Namibia. The power to investigate complaints concerning environmental issues contains unique provisions, which go beyond the traditional powers and functions of an Ombudsman institution. The environmental mandate of the Ombudsman is a progressive and innovative step towards environmental protection, which may have model rule character. However, the

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

31 Section 11 of the Ombudsman Act.

32 The Ombudsman holds a diplomatic passport *ex officio*.

provision could be given a more vital role within the Ombudsman's activities. Two major points may be listed for the fact that the Office of the Ombudsman to date are not dealing with many complaints under the environmental mandate; on the one hand, the imbalance can be traced back to the nature of topics/complaints, with some occurring more frequently than others; on the other hand, despite the fact, that the Office of the Ombudsman endeavours to raise publicity for the institution and to take the office to the grassroots level,³³ the awareness of the potential of the Ombudsman in environmental matters is very low. Many people are still unaware of the availability of the institution in environmental matters.³⁴ The lack of sufficient specifically trained staff³⁵ and financial resources as well as the heavy workload are further challenges for the Ombudsman's activities in environmental matters. Nevertheless, the Ombudsman's environmental mandate is a progressive step towards environmental protection in Namibia and it is hoped that because of the multi-functionality of the Office this mandate can be invested with the much-deserved and needed importance in future. Although the categories of maladministration and violation of human rights play the most vital role in the work of the Office of the Ombudsman,³⁶ environmental concerns deserve equal attention. The imbalance as to complaints by specific mandates can be clearly seen when consulting relevant data of the recent years.³⁷

33 Tours all over the country are recurrently undertaken by the Office of the Ombudsman to expose the office to the population and to enhance publicity; alongside the main Office of the Ombudsman in Windhoek, the institution maintains branches in Keetmanshoop and Oshakati.

34 Many cases of environmental concern do, regrettably, still not find their way to the Ombudsman Office. The case of the Epupa dam might serve as a prominent example. In this case, a hydro-power scheme was proposed by NamPower (the Namibian parastatal for the bulk supply of electrical power) for the lower KuneneRiver in north-western Namibia. The case drew local and international attention, when the Himba community opposed the project in 1998. However, in this case, it was not the Office of the Ombudsman that was approached with a complaint by the communities' Chief. For further reference see Daniels (2003:52).

35 However, several training measures on environmental issues, such as workshops on environmental law in Namibia, have been performed recently in order to train staff of the Office of the Ombudsman in environmental matters. See Ruppel (2009d). Further projects of this kind remain on the Ombudsman's agenda.

36 Walters (2008:121ff.).

37 See the annual reports by the Office of the Ombudsman (2006, 2007, 2008, 2009, 2010, 2011, 2012, 2013 and 2014, 2015, 2016, 2017, 2018, 2019, 2020 and 2021).

Table 1: Complaints to the Office of the Ombudsman by mandate from 2008 to 2019

Year 2008	Year 2009	Year 2010	Year 2011	Year 2012	Year 2013	Year 2014	Year 2015	Year 2016	Year 2017	Year 2018	Year 2019	Year 2020
Maladministration												
872	1064	1,397	1,656	978	1,288	1,332	2,018	1774	2,040	1,845	1,795	1,401
Human rights violations												
138	165	236	221	189	236	199	341	301	459	325	261	263
Corruption												
35	30	14	10	6	8	12	5	7	13			
Environment												
3	6	4	5	6	6	5	4	7	13	11	6	6
Miscellaneous												
494	343	475	659	746	805	886	1,584	1,659	1,637	1,337	1,201	930
Total number of complaints												
1,542	1,608	2,126	2,551	1,925	2,343	2,434	3,952	3,748	4,162	3,518	3,263	2,600

Source: Table compiled by the author based on Office of the Ombudsman (2009, 2010, 2012, 2013, 2014, 2015, 2016, 2017, 2018, 2019, 2020 and 2021).

In the course of 2019 and 2020, various solid and liquid waste sites have been inspected by the Office of the Ombudsman detecting environmental pollution due to poor waste management practices. Major issues revealed with regard to waste sites across the country included the lack of clearance certificates, required environmental impact assessments as well as of environmental management plans. Furthermore, improper fences around waste sites, insufficient recycling and uncontrolled burning of waste causing environmental harm have been reported among others. Another investigation performed by the Ombudsman’s Office during 2019 related to the uncontrolled destruction of flood plains in the Rundu area. Upon respective complaints, uncontrolled cutting of trees, illegal sand mining, deficient introduction of sewage waste, and the illegal dumping of waste within the flood plains have been revealed and reported to the competent Ministries for further action to protect the flood plains and prevent pollution of the Kavango River.³⁸

In 2018, the office of the Ombudsman issued a report on the impact of plastic bags on the environment advocating for a total ban of plastic bags. The report was submitted to the Ministry of Environment and Tourism. Furthermore, some inspections relating to sand mining and sewage flowing have been subject to inspections by the Office of the Ombudsman.

38 Office of the Ombudsman (2020).

Investigations into solid and liquid waste management by all towns and villages covering all 14 regions of the country have been performed in 2017 in addition to some cases of soil and water pollution.

In 2016, investigations into solid and liquid waste management resulted in a report submitted to relevant ministries for the implementation of recommendations including, among others, the following:³⁹

- Local Authorities must ensure that their solid waste sites are approved by the Ministry of Environment and Tourism;
- the needs to apply for an environmental clearance certificate from the Ministry of Environment and Tourism in terms of Section 27 of the Environmental Management Act, 2007 in order to establish and develop a waste disposal site;
- more emphasis must be placed on waste minimisation and recycling; and
- by-laws must be in place and enforced to deal effectively with littering and illegal dumping of waste material at non-designated areas.

One of the environment-related complaints in 2013 was filed by a lodge owner against the Okahandja Municipality. Subject at matter was the alleged noise pollution and environmental destruction caused by a sand mining company who was granted a sand mining permit by the Okahandja Municipality to collect sand from the Okakongo river located next to the lodge owner's camp site. The investigation by the Office of the Ombudsman revealed that no environmental clearance certificate had been issued by the Environmental Commissioner as required by the Environmental Management Act No. 7 of 2007. As a result, the company seized with its sand mining activities while waiting for the required environmental clearance certificate.⁴⁰

Another environmentally relevant complaint brought to the attention of the Ombudsman in 2011 related to the harvesting of Cape fur seals. A complaint alleged illegalities pertaining to the annual seal hunt in Namibia and requesting an urgent interdict preventing the harvest from commencing. Grave concerns about Namibia's annual seal harvest have furthermore been raised by several civil society organisations, NGOs and individuals. In 2012, the Office of the Ombudsman published its report on the matter at hand⁴¹ concluding that the harvesting of seals is lawful and that he does not have adequate and sufficient grounds in law and fact to recommend to the Namibian Government to stop the annual seal harvest. On the question however, of whether, in harvesting Cape fur seals in the manner, which is currently practised, Namibia would use its natural resources unsustainably, the Ombudsman was unable to come to a definite finding. The lack of sufficient evidence in this regard was given as reason. The

39 Office of the Ombudsman (2017).

40 Office of the Ombudsman (2014:31).

41 Office of the Ombudsman (2012).

Ombudsman in his report⁴² stated that despite several oral and written requests, he could not obtain the information requested by the Ministry of Fisheries and Marine Resources, namely the 2011/12 aerial survey of seals by the Benguela Current Commission and other related information.

The few investigations on environmental issues in 2009 touched on waste disposal at the Windhoek Central Prison, and the oxidation pond system and the management of the solid waste disposal side in Okahandja.⁴³ In an earlier case in relation to a Malaysian textile company, Ramatex, which allegedly had failed to maintain sound environmental practices and contaminated some soil and groundwater in Windhoek, a complaint was brought to the Office of the Ombudsman by Earthlife Namibia, an environmental NGO.⁴⁴

The above cases show that the Office of the Ombudsman is committed to carry out the environmental mandate as enshrined in the Namibian Constitution. But still, many cases of environmental concern do not, regrettably, find their way to the Ombudsman's Office. The Namibian Constitution, as well as a multitude of statutory enactments and policies underline the importance of environmental matters and the Ombudsman is endowed with the constitutional power, to play a significant role within the wide field of environmental protection. Hopefully, the importance of the Ombudsman's environmental mandate will be reflected in a higher number of environmentally relevant complaints sometime in future.

5 Investigation, Enforcement and Reporting Procedures

Section 4(a) of the Ombudsman Act provides that

[w]hen the Ombudsman performs his or her duties and functions in terms of the Act the Ombudsman may in his or her discretion determine the nature and extent of any inquiry or investigation.

The investigative powers and procedures are described in Article 92 of the Constitution and Section 4 of the Act.⁴⁵ The Ombudsman may 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.

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

42 Office of the Ombudsman (2013).

43 Office of the Ombudsman (2010:20ff.).

44 See in this regard Ruppel (2008b:116ff.).

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

conducting an investigation on the basis of a complaint, may also conduct proactive investigations. Such competence would indeed contribute to the independence of the Ombudsman in that he/she would not be tied down by incoming complaints only. Proactive investigations may 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.⁴⁶

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 proactive investigation if such an investigation concerns issues and involves authorities which would be within the institution's competence if they had been brought by a complainant.⁴⁷ Own-motion investigations are acceptable and are indeed being conducted.⁴⁸ After having received a complaint, and after having decided on the question of jurisdiction, and whether to investigate, investigations are undertaken through fact-finding by collecting all 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. Generally, the Ombudsman raises requests in order to obtain relevant information. To have enquiries answered by offending institutions has proven difficult, as expressed by the Ombudsman in his recent annual report:⁴⁹

Regarding responses from offending institutions in a timely fashion, it saddens me to have to report that there has not been any improvement whatsoever; on the contrary, the situation seems to have worsened and I had to subpoena more persons than ever before to force institutions to answer enquiries from the Ombudsman. I am at my wits end as to how this problem should be addressed, but one can only hope that Permanent Secretaries will accept responsibility for this and perhaps designate focal persons to deal with enquiries; such a small gesture will go a long way in addressing this particular problem.

In the event the Ombudsman is of the opinion that any instance investigated by him or her can be rectified or remedied in any lawful manner, he or she gives notification of his or her findings and the manner in which the matter can, in his/her opinion, be rectified or remedied.⁵⁰

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

46 UNDP (2006:25).

47 For further reference see Ruppel-Schlichting (2008:283).

48 The recent investigation with regard to waste disposal at Windhoek Central Prison was initiated on the Ombudsman's own motion in the course of a routine visit at the prison; see Office of the Ombudsman (2010:20). Especially in cases of human rights violations, own-motion investigations have repeatedly been conducted.

49 Office of the Ombudsman (2014:3).

50 Section 5(1)(b) of the Act.

techniques such as negotiation and compromise.⁵¹ The powers of investigation described in Article 92 of the Constitution and Section 4 of the Ombudsman Act warrant self-determined investigation procedures.⁵²

The Ombudsman, furthermore, has the right to access all documents relevant to the investigation, as well as the right to seize anything that he/she deems necessary in connection with the investigations.⁵³ The investigative 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.⁵⁴ These far-reaching powers of investigation and their anchorage in the afore-mentioned 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.

The investigation generally ends once the Ombudsman is satisfied that it has yielded all the relevant facts. As soon as the investigation process is completed, the Ombudsman notifies the person who laid the matter before him/her, and takes appropriate action or steps to call for or require the remedying, correction and reversal of matters such as: negotiation and compromise between the parties concerned; reporting the findings to the superior of an offending person; referring the matter to the Prosecutor-General or to the Auditor-General or both, or bringing proceedings in a court.⁵⁵

The Ombudsman may in general not make binding orders. It could be argued that without such power, the Ombudsman cannot protect the rights under his or her mandate efficiently and the lack of such power might be interpreted as a weakness of the Ombudsman institution. On the other hand, the Ombudsman has extensive powers to inquire and investigate. If the Ombudsman would have the power to make binding orders, the institution would take the function of a court of last instance, which would – despite the fact that much more financial resources would be needed – not meet the basic rationale of such institution.⁵⁶ In case that complaint shows that the complainant

51 Article 91(e)(aa), Namibian Constitution.

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

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

54 Article 92(a), Namibian Constitution.

55 Article 91(e), Namibian Constitution and Section 5 of the Act.

56 See UNDP (2004:3). This Report on the Fourth UNDP International Round Table for Ombudsmen institutions in the ECIS Region makes the point convincingly, that the lack of power of making binding orders, considered by some as a weakness, in fact is the institution's strength for "[w]here 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

was justified in bringing the complaint, the Ombudsman's main instrument is rather to make recommendations in order to solve problems or prevent them from reoccurring.⁵⁷ By using this method, Government agencies are persuaded rather than forced to act, which in many cases may lead to more effective and efficient solutions.

The Ombudsman is not endowed with the coercive powers typical of formal justice systems. 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 he/she deems it necessary;⁵⁸ 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.⁵⁹

Indeed, several arguments favour alternative dispute resolution above court proceedings. Normally, such alternatives are faster and less expensive. Generally, they also 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 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 cases.

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 were given by the European Ombudsman, Diamandouros (2006).

57 For these reasons, the sub-regional *Conference on the Ombudsman in southern Africa* in its concluding resolutions and recommendations held that "[T]he Ombudsman should not have enforcement mechanisms and/or powers". See Kasuto / Wehmh rner (1996: 5).

58 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).

59 Ruppel (2007:1).

While the most common forms of alternative dispute resolution are mediation and arbitration, there are many other techniques and procedures applied by Ombudsman institutions. 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.

Due to the fact that the Ombudsman may not issue binding orders, he/she cannot be taken to court to appeal the findings; neither can the findings and reports be subject for review or modification. However, courts may decide upon the question, whether or not the Ombudsman has jurisdiction in specific cases. 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 party to choose between the option to submit a complaint to the Ombudsman and the possibility of taking the alleged offender to court.

According to the Constitution and the Act, the Office of the Ombudsman is obliged to draft reports on his/her investigations.⁶⁰ These reports can be divided into two main categories: those drafted for single complaints, and those containing all the activities of the Office within a specific period. When investigations are completed, the Ombudsman drafts a report containing findings on the complaint, as well as recommendations to solve the problems or to prevent them from happening again. Despite the final recommendations, the report summarises the complaint, the facts found, 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.⁶¹ An annual report containing the Ombudsman's activities during the period ending on 31 December of the previous year has to be drafted and submitted to the Speaker of the National Assembly and subsequently to the National Assembly.⁶² The annual reports contain information as to the scope of activities, complaints, investigations, management services and administration, outreach activities and public education. The reports impressively reflect that the Office of the Ombudsman takes the task to protect and promote the values under his mandate seriously through independent and impartial investigations, as words are not minced in these annual reports. The annual reports contain specific case summaries and statistical breakdowns, which draw a clear picture of the work performed by the office in several respects.

60 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.

61 UNDP (2006:21).

62 Article 91 (g) of the Constitution and Section 6(2) of the Act.