



CELEBRATING OMBUDSMAN MONTH: OMBUDSMAN UNDER THREAT – A FACILITATED DISCUSSION

27 October 2020

1. **Introduction**

I will begin with borrowed phrases from very eminent persons which I will contextualized.

- 1.1 *".....it is inconceivable for an Ombudsman to exist, and perform his task properly, within any system other than a democracy governed by the rule of law".*

Marten Oosting

- 1.2 *" The Public Protector is a critical and indeed indispensable factor in the facilitation of good governance and keeping our constitutional democracy strong and vibrant"*

Mogoeng, CJ

- 1.3 *" Ultimately, every Ombudsman has some room to maneuver and so cannot entirely blame its weaknesses and shortcomings on a lack of insufficient cooperation from the government in power"*

Victor O Ayeni

- 1.4 Before we can discuss the role of the I.O.I in supporting colleagues in times of crises, we must first examine the question:" *who is to protect the protectors?"* What constitutes the first and second line of protection before the IOI can intervene? My colleague I.O.I Secretary General will speak about the I.O.I's role.

2. **Who is to Protect the Protectors?**

If the Ombudsman presupposes a political and administrative system that is and wants to be a democracy, governed by the rule of law, with all the appropriate mechanisms of external accountability this entails, then the Ombudsman can safely rely on the protection afforded by the democratic institutions created by the political and administrative systems. For me, they are the first line of protection of the Ombudsman; and the second line of protection is external bodies.

3. **First Line of Protection:**

3.1 The Constitution - under a constitutional democracy, the Constitution is the supreme law. It is binding on all branches of government. The supremacy of the Constitution requires that the obligations imposed by it must be fulfilled. The Constitution entrenches the Ombudsman, guarantees its independence and prohibits interference with the Ombudsman in the exercises of his or her functions. The Constitution requires that all organs of state and persons must assist and protect the Ombudsman. The language, context and purpose of these constitutional provisions require strict compliance. However, we all know that a Constitution is not self-executing. Its principles must be brought to life by those entrusted to uphold it.

3.2 The Government – establishing an Ombudsman institution and continuously creating and maintaining the requirements for its effective functioning and its protection, are the responsibility of all branches of government.

3.3 The Executive – is required to refrain from interference with the Ombudsman in the exercise of his or her functions and must assist and protect the Ombudsman against any threat or intimidation. The best way to protect the Ombudsman is refraining from interference, influence or threats to the Ombudsman.

3.4 Parliament – has the obligation to hold the executive accountable and plays an important role in creating safeguards for the Ombudsman when he or she comes under threat. It must ensure that the Ombudsman is free from outside pressure.

The Ombudsman's - integrity and effectiveness depend on the backing that Parliament gives to him/her.

3.5 Judiciary – courts are required by the Constitution to ensure that all branches of government act within the law and fulfill their constitutional obligations. The courts have the responsibility of being the ultimate guardian of the Constitution, and bear the initial responsibility of providing protection to the Ombudsman against threat, intimidation and reprisals.

3.6 Ombudsman – he or she must protect him or herself by abstaining from personal motives and interest. He or she must be seen to be unprejudiced and impartial. The Ombudsman is responsible to attain the highest standard of performance and his or

her integrity must be beyond doubt. The Ombudsman must not only be seen as independent, but he or she must "*live out*" that independence

The Ombudsman is not an island and does not operate in isolation; its efficiency can best be assessed in terms of how it interacts with domestic institutions and regional and international associations of Ombudsman.

- 3.7 *Institutions supporting a constitutional democracy* – civil society organizations, the media, legal fraternity and sister bodies, like the National Human Rights Institutions, play an essential role in any democratic society. An open and constructive relationship with these institutions will ensure solidarity and support in times of need. The media may, for example widely publish the threats, intimidation and reprisals against the Ombudsman and the legal fraternity may assist the Ombudsman to institute legal action to stop these threats or intimidation.

4. **Second line of Protection**

- 4.1 *United Nations (UN)* – most, if not all of our countries are members of the UN and must fulfill all obligations flowing from ratified international human rights instruments and adopted resolutions. Paragraph 11 of the General Assembly Resolution 70/163 of 17/12/15 is equally applicable to Ombudsman. The General Assembly stresses that "*National Human Rights Institutions (NHRIs) and their staff should not face any form of reprisal or intimidation, including political pressure, physical intimidation, harassment or unjustified budgetary limitations And calls upon states to promptly and thoroughly investigate cases of alleged reprisal and intimidation...*"

Cooperation between the Ombudsman and NHRI becomes vitally necessary; where the Ombudsman comes under threat or intimidation, the NHRI can assist by bringing these cases of alleged threats or intimidation to the attention of the UN.

5. **Challenges**

- 5.1 First the good news: The Ombudsman of Namibia experiences no threats from whatever corner and no member of the Cabinet or the Legislature or any other person ever interfered with the Ombudsman in the exercise of his duties or functions.

- 5.2
 - Outdated Ombudsman legislation: in existence since 1990 without any amendment for the past 30 years.
 - New Ombudsman Bill went through Cabinet Committee on Legislation and is now with legal drafters to fine tune it. It took us five years to reach this stage.
- 5.3 Budget of the Ombudsman still forms part of the budget of the Ministry of Justice. The Bill addresses this shortcoming and others.
- 5.4 The sheer size of the country ±824 000km² makes it difficult to reach all people all the times. Established 5 regional offices to bring office closer to the people in order for them to exercise their right to complain and right of access to the Ombudsman.
- 5.5 The right to complain and ready access to the Ombudsman do not have the status of fundamental rights in our legal system. Through our work we raise these rights to fundamental rights.
- 5.6 No review or response to the Ombudsman's annual or special reports by the National Assembly.
- 5.7 No working relationship between Ombudsman and Parliamentary Standing Committee on Constitutional and Legal Affairs. Of late the Committee sent us two reports and requested Ombudsman to implement its recommendations. Ombudsman responded with two reports.
- 5.8 Ombudsman does not have enforcement power – relies on the National Assembly for the needed authority and potential support to secure the implementation of his opinions and recommendations Ombudsman latest special report (Sept 2020) submitted to National Assembly was referred to the Parliamentary Standing Committee on Public Accounts.
- 5.9 Extremely broad mandate of the Ombudsman; without the required resources, e.g no human rights education officer, or environmental specialist to assist in the environmental mandate of Ombudsman.

5.10 No or very slow response from individuals, ministries, public enterprises and even Cabinet Ministers on Ombudsman enquiries.

Conclusion

I wish to acknowledge the commitment and courage of fellow Ombudsman throughout the world. It is expected of many of them to do a good job with little or inadequate resources, and many of them are subjected to threats and intimidation with no internal support or assistance. Yet, to their credit, they have survived against all odds and they are still with us. We should commend them as they are "*indispensable factors in the facilitation of good governance and keeping their constitutional democracies strong and vibrant*"

**J R WALTERS
OMBUDSMAN**

