The process of human rights protection in Namibia

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Abstract
The high value assigned to human rights and liberal values in the Namibian Constitution were the result of a negotiated settlement. At the time of Namibian independence the idea of national human rights commissions to guard over and protect fundamental freedoms and rights of individuals in constitutional democracies gained momentum all over the world. When Namibia launched its initial report as a signatory to the African Charter on Human and Peoples’ Rights at the Banjul sitting of the African Commission, a commissioner from South Africa raised the issue of an independent national human rights commission in Namibia. However Namibia was reluctant to follow its southern neighbour’s example since the Namibian nation explicitly opted for a non-confrontational closing on the past. What has been lacking since independence is a place where human rights violations can be addressed as they are happening. The most significant development was the creation of an advisory committee on human rights in October 2006. While this is a good initiative which undoubtedly helped to bring human rights protection closer to the people, it lacks the structures that will allow meaningful interaction between civil society and the government. The advisory committee of the Ombudsman is a good start, but more action is needed to make it a workable committee in terms of the Paris Principles.

Introduction
The Constitution of the Republic of Namibia is a unique document. It turned the old apartheid and colonial structures upside down. And it was done by a theory of inclusion, rather than an “exclusionary shadow”.

1 The liberal dream of a community of equal people runs like a golden cord throughout the document – especially Chapter 3, the Bill

of Rights, called Fundamental Human Rights and Freedoms. The Chapter is clearly based on the Universal Declaration of Human Rights. The high value assigned to human rights and liberal values were the result of a negotiated settlement. Parties were eager to get the settlement off the ground. And there were also severe international pressure. However, the idea of a Bill of Rights as part of a future Namibian Constitution did not originate with the Eminent Persons Group, neither was it an alien idea to the two major political parties involved in the drafting of the Constitution. Katjavivi remembers that the debate started within SWAPO as early as the mid 1970’s. Similarly, the so-called Transitional Government of National Unity (TGNU) included a Bill of Fundamental Rights and Objectives in its founding proclamation. As we shall see, the Supreme Court of South West Africa approached the Bill of Rights in a liberal, purposive manner. Despite the political pressure of the armed struggle and a transitional government who still operated in the spirit of the colonial masters, the Court protected the rights of citizens in the spirit of a constitutional democracy in the making.

It is unfortunate that the South African Appellate Division, which remained the final legal authority in Namibia, did not deviate from their stance on parliamentary sovereignty. It ignored the challenge of the SWA Supreme Court to evaluate the values and aims of the Bill of Rights and followed the traditional rigid approach by looking primarily to the intention of the legislator and the legal interpretation surrounding the issues. Neither the interim government nor the highest court in South Africa gave any indication to the international world or SWAPO that they were serious about the implementation of a Bill of Rights. The international community had to wait several more years for the interim government and the internal parties to catch up with the insights of the High Court. While the South African Supreme Court of Appeal decisions pleased the Transitional Government and the white minority in Namibia, it did not assist in giving the transitional process and the transitional Constitution credibility.

One can criticize the Transitional Government of National Unity for its short-sightedness, the lack of credibility and the fact that it did not represent the majority of the Namibian people. One can also point to the lack of political will of the South African government to make the Bill of Rights work, and criticise the Appeal Court for its lack of understanding the fundamental values in a constitutional dispensation. The Bill of Fundamental Rights and Objectives was undoubtedly premature, since it lacked SWAPO support, and was

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2 The Eminent Persons Group was an initiative of the so-called Western Five, the USA, the UK, Canada, France and the Federal Republic of Germany. When the negotiations for a peaceful settlement in Namibia became stalemate, the Western Five drew up a four point prerequisite plan for an independent Namibia.

3 Personal interview, Windhoek, July 2003.

4 Proclamation R101 of 1985. The TGNU was a creation of the South African government. Its aim was to work towards a negotiated settlement with the so-called internal parties (mostly those groups who were part of the Turnhalle negotiations). The TGNU operated in the country between June 1985 and March 1989. The real political power and sovereignty, however, remained in the South African hands. In Windhoek, the Administrator-General as representative of the South African government, remained main representative of the sovereign.
consequently rejected by the majority of the population. In that sense it was a failed exercise that did not contribute to an internationally acceptable settlement in Namibia. However, the innovative and brave interpretations of the Supreme Court of SWA gave credibility to this premature, weak action and helped to create a human rights culture amongst the followers of the Democratic Turnhalle Alliance and other internal parties. The Bill of Fundamental Rights and Objectives played a positive role to further human rights in conservative communities both in Namibia and South Africa.

In 1975 the South African government started preparations for a national conference of internal political parties, to pave the way for an international acceptable independence process without negotiating with SWAPO. The initiative paved the way for the Turnhalle Conference, which later lead to the transitional government. At the time the internal SWAPO movement was part of an internal pro-independence alliance, Namibia National Convention, with SWANU and three smaller parties. In response to the Turnhalle Conference SWAPO released a Discussion Paper on The Constitution of an independent Namibia. The document was a draft constitution and closely resembles the draft that SWAPO eventually took to the Constituent Assembly after the United Nations supervised elections in 1989. In strong reaction to the South African policies, the document opts for a unitary state and rejects any notion of Bantustans masquerading as federalism. The democratic and human rights stance is the point of departure for the rest of the document.

Our experience of persecution and racialism over many years has deepened our unqualified commitment to democratic rule, the eradication of racialism, the establishment of the rule of law and the entrenchment of human rights.

All the proposals that were later proposed by the Eminent Persons Group are embedded in this document. It opts for a parliamentary democracy, with regular elections, an Executive President, a one or two chamber parliament, an impartial public service and

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6 Wiechers points out that since transgressions of the Bill were declared justifiable, both the South West African Courts and the South African Appellate Division made a number of human rights judgments, which “proved to have been a valuable learning process” (Marinus Wiechers, “Namibia: The 1982 constitutional principles and their legal significance”, in: Dawid H. Van Wyk, Marinus Wiechers & Romaine Hill, (eds.), Namibia. Constitutional and International Law Issues, VerLoren van Themaat Centre for Public Law Studies, Unisa, Pretoria, 1991: 1-22 (10).


8 The internal SWAPO and NNC leader, Danny Tjongarero, played a prominent role in the process. See Jan H. Ph. Serfontein, Namibia?, London, Collins, 1976: 170. Serfontein states that Tjongarero drafted the document, which was send to the leadership in exile, who drafted the final document with the assistance of western lawyers, including British lawyer, Cedric Thornberry. Dobell (supra, p. 45) overstates Thornberry’s contribution. He was probably no more than a legal and technical constitutional adviser.

9 Quoted in Dobell, Struggle: 45.
an independent judiciary, an entrenched Bill of Rights and detailed anti-discrimination legislation. While no economic policy is spelled out, the document included a paragraph protecting *vested legal rights and titles in property*. It even states that the pensions of public servants will be preserved after independence.\(^\text{10}\) The only radical aspect of the document was a proposal that the South African Roman Dutch law is to be replaced by a totally new system, incorporating certain elements of customary law.\(^\text{11}\)

The document was released in August 1975, shortly before the Turnhalle conference assembled in Windhoek.\(^\text{12}\) In hindsight, it seems almost tragic that neither South Africa nor its Namibian partners in the Turnhalle deliberations, nor SWAPO understood the significance of the moment. For South Africa, Namibian whites and the Turnhalle groupings, SWAPO indirectly extended a hand of friendship and co-operation. The message was clear: SWAPO is not the Marxist/Leninist demon they are made out to be by South African propaganda. They were at pains to point out that the vested interests of whites will be respected, that expatriate expertise will be welcomed in an independent Namibia – a reference to South Africans in the civil service, the police, the defence forces, banks and other private enterprises – and that national reconciliation will be an integral part of a future constitutional dispensation.\(^\text{13}\)

The document was a clear indication that SWAPO would have been a meaningful and responsible negotiating partner, as observed by the South African press.\(^\text{14}\) Unfortunately, some observers, and the South African government were still preoccupied with the harsh separation between East and West during the cold war. Even the centre-left Rand Daily Mail was sceptical, not so much of what the discussion paper said, but rather of what it did not say. It argued that SWAPO often used the rhetoric of African socialism in their speeches and propaganda. The discussion paper contained nothing that explicitly revoked the pro-communist SWAPO image. In other words, despite the positive elements of the document, the unwritten ghost behind the letters was a socialist demon.\(^\text{15}\)

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\(^\text{10}\) Ibid.: 45 f.

\(^\text{11}\) Ibid.: 46. The reaction against Roman Dutch law is understandable, since it was the instrument used by the South African government to oppress the people. And if the courts confirm the actions of the executive, it is inevitable that the perception will develop that Roman Dutch law is oppressive and unjust *per se*. At the deliberations of the Constituent Assembly SWAPO was advised by among others, Arthur Chaskalson, later to become the President of the South African Constitutional Court, while Gerhard Erasmus, Namibian born Stellenbosch academic, was an advisor of the DTA. It became clear that a total change in the legal system will create uncertainty and involve unnecessary state expenses. The Constituent Assembly eventually opted to maintain the South African Roman Dutch law. See Article 140 of the Constitution.

\(^\text{12}\) Ibid.

\(^\text{13}\) Ibid.: 45.


\(^\text{15}\) Imrie, “Report”.

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When South Africa and the pro-South African parties ignored the hand of negotiations, SWAPO’s attitude hardens. In the years that followed, SWAPO radically opposed the Turnhalle movement and its political and social agenda. In August 1976 an enlarged Central Committee of SWAPO adopted a Constitution and Political Programme in Zambia. Dobell observes that the document had a predominantly internal purpose, to ease the struggle between the old guard and the stream of young people crossing the border to Angola after the fall of Portuguese rule. It also serves as an instrument of negotiations and reconciliation with the then ruling party in Angola, the MPLA. SWAPO was eager to move its headquarters from Zambia, which was under immense pressure from South Africa, to Angola. Where the Discussion Paper maintained a neutral or non-aligned stance on foreign relations, the 1976 SWAPO constitution opts to work with “national liberation movements, world socialist, progressive and peace-loving forces in order to eliminate all forms of imperialism, colonialism and neo-colonialism”. The document is highly critical of Western governments and its support of the “Turnhalle circus”, while it stands for building a classless, non-exploitative socialist state. While the Political Programme was never intended to be a proposal for a future independent Namibian state, it totally overtook the 1975 Discussion Paper. From 1976 onward the Political Programme was seen internationally as a statement of SWAPO’s political ideology and perceived as the foundation of an independent Namibia. The Political Programme did not include any reference to a Bill of Rights. In the international world SWAPO was seen as a hard core Marxist movement intending to transform Namibia into a non-democratic socialist state.

Critics of SWAPO will point to the fact that the liberation movement never included a Bill of Fundamental Rights in the organisation’s own constitution during the exile years, neither did they lay emphasis on a Bill of Rights during the 1970’s and 1980’s. However, Katjavivi, without claiming that SWAPO had a worked-out plan on human rights in the 1990’s, at least points to a process. This process was necessary to pave the way for the recognition of individual rights. It was this process that lead to the acceptance of a Bill of Rights by SWAPO in 1982. History seems to be pointing to a growth in the human rights awareness, which made an enshrined Bill of Rights in the Constitution not only acceptable, but also desirable. The working document of the Constituent Assembly was provided by SWAPO and already contained the Bill of Rights. In the same vein one can criticize the Transitional Government of National Unity for the lack of credibility and

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16 I use the word movement here as a collective name for all the role players who foresaw a possible future in an internal settlement through negotiations of internal political parties without SWAPO.  
17 Dobell, Struggle: 55 ff.  
19 Ibid.: 6 f.  
20 See Dobell, Struggle: 57 for the reaction of the international press and the west in general.  
the fact that it did not represent the majority of the Namibian people and the Bill of Fundamental Rights and Objectives as a premature exercise that did not contribute to an internationally acceptable settlement in Namibia. \(^{22}\) However, even this immature, weak action helped to create a human rights culture amongst the followers of the Democratic Turnhalle Alliance and internal parties. Weichers correctly points out that the Bill of Fundamental Rights and Freedoms is protected to the extent that it is virtually unchangeable. \(^{23}\) Opponents of the pro-South African parties can criticize this protection of and high esteem for human rights as an action driven by fear for the uncertainty of a strong SWAPO government. This criticism is not without foundation, bearing in mind the total onslaught propaganda campaign that South Africa fought against SWAPO, the African National Congress in South Africa, and other liberation movements. \(^{24}\) However, it is nevertheless true that this fragile step was one of the first moves of the conservative, racist white communities in South Africa and Namibia, towards a culture of human rights. Consequently, the Bill of Fundamental Rights and Objectives in the time of the Transitional Government played a positive role to further human rights in conservative communities both in Namibia and South Africa. \(^{25}\)

The Constitutional Assembly wrote a new history. The preamble clearly defines the Namibian state as the conglomerate of a people “emerged victorious in our struggle against colonialism, racism and apartheid”, the emphasis is on the “inherent dignity and the equal and inalienable rights of all members of the human family”. The struggle for independence is not defined as a struggle against groups or people, but rather a struggle against destructive ideas and ideologies: “ Whereas these rights have for so long been denied to the people of Namibia by colonialism, racism and apartheid”. \(^{26}\) Consequently, the victory over the forces of evil is a victory for all the people of Namibia. And the “recognition of the inherent dignity and the equal and inalienable rights of all

\(^{22}\) See O’Linn, Namibia: 173; Namibia Peace Plan Study and Contact Group (NPP 435), Choice: 15.


\(^{24}\) The phrase ‘total onslaughts’ comes from the era of President PW Botha who saw the struggle against apartheid as a total onslaught of the communist bloc against the free world. In this total onslaught the white regime in South Africa was a major target, according to Botha, and other apartheid ideologists, because of its anti-communist stand. See for example: South Africa Online History, “Pieter Willem Botha”, published on http://www.sahistory.org.za/pages/people/bios/botha-pw.htm (accessed on 15 May 2009); Alistair Boddy-Evans, Biography of PW Botha, Apartheid Era President, Part 2, published on http://africanhistory.about.com/od/biography/a/BioPWB Botha_2.htm (accessed on 15 May 2009); Jamie Frueh, Political Identity and Social Change: the Remaking of the South African Social Order, Albany, NY, State University of New York Press, 2003: 97.

\(^{25}\) Weichers points out that since transgressions of the Bill were made justifiable, both the Namibian Courts and the South African Appellate Division made a number of human rights judgments, which “proved to have been a valuable learning process” (Weichers, “Namibia”, South African Year Book, p. 10.)

\(^{26}\) Preamble of the Namibian Constitution, Act 1 of 1990.
members of the human family is indispensable for freedom, justice and peace."\(^{27}\) Even in dealing with the construction of an independent, post colonial, post apartheid state, the fathers and mothers of the Constitution approached the demons of the past with great caution. While the Constitution makes provision for affirmative action, it does so in a restrained manner. Rather than using racial language, the Constitution speaks of "persons within Namibia who have been socially, economically or educationally disadvantaged by past discriminatory laws or practices", and goes on to include all women, irrespective of race in the category of the disadvantaged.\(^{28}\) The first Namibian government chose not to have a truth commission in the tradition of Chile or Argentina (or later South Africa) to deal with the atrocities of the past. Consequently, the only 'political truth' that existed after March 1990 was the Constitution.\(^{29}\)

Eventually, Namibia boasted possibly the most liberal constitution on the continent. The Constitution includes a Bill of Rights based on the Universal Declaration of Human Rights, and among other things, provided for a division of power between the legislative, executive and judicial powers. It also included an independent judiciary and an independent, non-political Prosecutor-General (Article 88) and prohibited the death penalty.\(^{30}\) The judiciary consists of lower courts, the High Court and the Supreme Court. Competent Courts have the authority to test the constitutionality of both the common law (inherited from the old South African colonial powers) and codified law – both the law as it were on Independence Day, 21 March 1990, and new acts and regulations. The High Court is a competent court. Consequently, even a court with a single judge on the bench, have jurisdiction to decide on constitutional issues.

The creation of an independent Ombudsman was another major step by the Constitutional fathers and mothers to guarantee the fundamental freedoms and rights guaranteed by the Bill of Fundamental Human Rights and Freedoms in Chapter 3 of the Constitution. Article 91 gives the Ombudsman the mandate to protect citizens against the violation of fundamental rights and freedoms. The mandate of the Ombudsman to protect and uphold human rights and fundamental freedoms is broad. He/she is empowered to begin proceedings against human rights violators by:

1) Referring investigated abuses to the Prosecutor-General where the abuses amount to criminal offences, which will often be the case;\(^{31}\)
2) Bringing proceedings in a competent Court for an interdict or some other suitable remedy to secure the termination of the offending action or conduct;\(^{32}\)

\(^{27}\) Ibid.
\(^{28}\) Article 23 (2) and (3).
\(^{29}\) The term ‘political truth’ is used here in the sense of an ideological foundation. Foucault calls it parrhesia, the ancient Greek word.
\(^{30}\) Article 6 of the Constitution.
\(^{31}\) Article 91(a) (cc).
\(^{32}\) Article 91(a) (dd).
3) Bringing proceedings in a competent Court for the abandonment or alteration of the offending procedures;\textsuperscript{33}

4) Bringing proceedings to interdict the enforcement of such legislation or regulation by challenging its validity if the offending action or conduct is sought to be justified by subordinate legislation or regulation which is grossly unreasonable or otherwise \textit{ultra vires}.\textsuperscript{34}

5) To review laws which violate the spirit of the Constitution and refer it to the President, Cabinet or Attorney-General.\textsuperscript{35}

With such a wide mandate, one can ask if a human rights commission is really needed. Should it not be left to the Ombudsperson to protect human rights in whatever manner he/she finds fit within the constitutional mandate of its office? The rest of the paper will attempt to answer this question.

\textbf{Independent Namibia and the concept of a national human rights commission}

On 21 March 1990 Namibia became the last African state to gain independence, at a time when the idea of national human rights commissions gained momentum.\textsuperscript{36} The history of the development of the principle of national human rights commissions is well documented.\textsuperscript{37} Suffice to say that by 1991 the Human Rights Commission and the United Nations in general were ready to take decisions and resolutions on national human rights commissions to a higher level. Despite all the efforts of the Human Rights Commission and several resolutions of the General Assembly of the UN,\textsuperscript{38} by 1980 only France, New Zealand and Canada had national commissions.\textsuperscript{39} In the next ten years only Australia, the Philippines and Denmark followed suit.

\begin{flushleft}33\textsuperscript{ Article 91(a) (dd).}
34\textsuperscript{ Article 91(a) (ee).}
35\textsuperscript{ Article 91(a) (ff).}
38\textsuperscript{ See for example \textit{Resolutions 33/46 of 1978 and 34/49 of 1979}, quoted in: Lindsnaes & Lindholt, \textit{\textquotedblleft National Human Rights\textquotedblright}: 6.}
39\textsuperscript{ France’s first commission was established back in 1948 under the auspices René Cassin as an advisory body to General Charles De Gaulle. In 1993 it gained constitutional authority when a Constitutional Decree reactivated it.}
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When Namibia entered the international family of nations, the General Assembly of the United Nations has accepted the need for national human rights commissions. However, the lack of international assistance (and in some instances a lack of political will) slowed down the process. In Africa the first generation post-colonial leaders were not known for their democratic credentials. Consequently, a human rights commission that would scrutinize the activities of government was not a popular idea. The real impetus for the implementation of national commissions was a workshop on national institutions organised by the Human Rights Commission in Paris, France in October 1991. Namibia was one of only five sub-Saharan African countries attending, the others being Togo, Uganda, Benin and Senegal. After the Paris Conference, human rights commissions mushroomed all over the world, including in Africa. The Namibian attendance was taken further when two delegates of the Ministry of Justice visited France in the mid-nineties to observe the workings of the French national human rights commission.

When Namibia launched its initial report as a signatory to the African Charter on Human and Peoples’ Rights at the Banjul sitting of the African Commission, a commissioner from South Africa, Dr. Barney Pityana, at the time Chairperson of the South African Human Rights Commission, raised the issue of an independent national human rights commission in Namibia to replace the Inter-ministerial Technical Committee on Human Rights. Dr. Pityana’s emphasis underlines the fast differences between the Namibian and South African paths to liberation. The South African Transition was in many ways much more confrontational than the Namibian process. The hard negotiations took place directly between the apartheid government and the major liberation movement, the African National Congress. There were also other parties, both traditional white and liberation movements, involved but major confrontation was between the ANC and the government. Furthermore, South Africa opted for a truth and reconciliation commission to deal with the atrocities and human rights abuses of the past, whereas Namibia chose to let bygones be bygones. The fact that South Africa chose for a highly confrontational model for its human rights commission, possibly contributed to the Namibian adversity to the idea of an own national commission. In South Africa, like Namibia, the constitutional era was preceded by a period of oppression and severe human rights violations.

The South African Interim Constitution of 1994 laid the foundation for the human rights commission, while the Human Rights Commission Act regulates the operations of the

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41 Personal conversation with Mr. Tristan De Lafond, Counselor for French Service for Co-Operation and Cultural Affairs, Namibia, March 2003; personal conversation with Mr. Utoni Nujoma, chairperson of the Namibian Inter-Ministerial Technical Commission on Human Rights, March 2003.


43 Conveyed to the author by a representative of the Namibian delegation, April 2003.

commission. The commission is a strong bureaucratic organization with several human rights commissioners. It has a wide mandate to promote respect for human rights and a culture of human rights.\textsuperscript{46} The commission has often been engaged in severe conflict situations with the government\textsuperscript{47} and it has embarrassed officials by subpoenaing ministers and members of the executive councils of the provinces.\textsuperscript{48} Since the Namibian nation explicitly opted for a non-confrontational closing on the past, one can understand why the South African model did not encourage the Namibian government to establish its own national commission.

There is also another reason why the government has not established a national commission. Since the Ombudsman has a wide mandate to promote and protect human rights, people in government felt that an independent Human Rights Commission can only be established if the constitution is changed, an action that the executive is reluctant to take, and rightly so.\textsuperscript{49} It might be that Namibia will get much closer to a national commission if it can be shown that such a commission can be reconciled with the mandate of the Ombudsman, and even strengthen its office.

The absence of a human rights commission in Namibia

Despite the broad mandate of the Office of the Ombudsman, Namibian society never really saw it as a remedy for human rights violations. The annual reports of the first fifteen years hardly refer to human rights violations. The public saw the Ombudsman more in the traditional role of a functionary dealing with administrative malpractices. Two other organisations became the places where ordinary people sought assistance when their human rights were violated: The Legal Assistance Centre (LAC) and the National Society for Human Rights (NSHR).

The LAC started off as a human rights law firm in the late 1980’s in reaction to the human rights violations of the South African occupation forces. After independence the focus changed from a predominantly advocacy orientated organisation to a project focus. While the LAC still takes one-off human rights violations to court, the emphasis is on research of human rights and constitutional issues. In the minds of the Namibian public, the LAC remains a major source of assistance whenever a constitutional or human right is violated. National Society is a somewhat misnomer for the NSHR. Whereas the word national is usually used to describe a statutory body, the NSHR is a

\textsuperscript{45} Act 5 of 1994.
\textsuperscript{46} Section 184 (v) of the final Constitution.
\textsuperscript{47} It assisted aggrieved citizens in court cases against organs of the state (see State versus Twala 2000 (1) Butterworths Constitutional Law Reports 106 (CC) and Minister of Justice versus Ntali 1997 (3) SA 772 (CC).
\textsuperscript{49} Discussions with several government officials during 2003.
non-governmental organisation. Its founder Phil Ya Nangolo started the organisation after independence as a human rights watchdog. The NSHR has never been involved in legal advocacy. It reports all rumors of human rights abuses, especially cases of power abuse by public servants, corruption and political intimidation. The abused citizen can find consolation in the fact that the abuse of power has been exposed, and sometimes the government may even react.

The Constitution provides for a competent court, i.e. the High or Supreme Court, to redress any violation of a citizen’s fundamental rights or freedoms. The article further suggests that aggrieved citizens may approach the Ombudsman who is compelled to give legal advice and assistance that may even include legal appearance before the High Court. However, unless the ordinary citizens understand that the Ombudsman is there to assist them when their freedoms and rights are violated, a constitutional provision does not help. The Namibian government has expressed its opposition on different occasions to the idea of an independent human rights commission. The government correctly sees the protection of human rights as the constitutional mandate of the Ombudsman. And unlike South Africa, Namibia opted at independence to deal with human rights abuse in a less confrontational manner than South Africa. While the South African Human Rights Commission developed partly as a result of the Truth and Reconciliation Commission, Namibia opted not to have a truth commission.

Since the highly confrontational South African model is generally not appreciated in Namibia, a different model might also ease the concerns that a commission will create tension and conflict. And if the Office of the Ombudsman can be the main role player in a non-confrontational commission, it will not be necessary to amend the Constitution. If a model can be developed where tension between government and civil society can be relieved, a national commission can become an exciting option.

The Paris Principles and the constitution of a national commission

The Paris Conference adopted a set of principles for the implementation of credible national commissions. In 1995 the commission published the UN Handbook, which

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50 Article 25 (2).
51 Art. 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."
52 See for example the unpublished paper of Mr. Utoni Nujoma at the launch of the Human Rights Advisory Committee of the Ombudsman, Oct 2006.
included the principles and recommendation of the Paris Conference. The so-called
Paris Principles found its way to the documents of the prepcom of the world conference
on Human Rights in Vienna in 1993. Since then the Paris Principles has become a
major guideline in establishing national Human Rights Commission.

The Paris Principles laid down the following foundational principles for the effectiveness
of National Human Rights Commissions:

1) Independence,
2) Constitutional or legislative foundation,
3) Credible processes to appoint and dismiss members and to determine the
   composition of the commission,
4) An independent budget capable of meeting the needs of the commission and
5) A wide enough mandate to address the problems of a specific country.

Independence

Matshekga observes that independence is always a relative concept, manifested in three
ways: Firstly, if the commission is the result of an act of Parliament, the Legislator (and
in Namibia also the Executive) can determine the parameters of the commission’s
independence; Secondly, the requirements of commissions to report to parliament limit
their powers and generally prevent action; Lastly, financial incapacity can also limit
commissions to act fully independently. However, the Namibian legislator and
executive have in general always acted in a constrained and responsible manner
towards the independent organs of the State, including the Office of the Ombudsman. It
can be assumed that the first two points above will not threaten either the present
Ombudsman’s office or future extensions of the office.

Legislative basis and credible process of appointment

Some may argue that it is a questionable act to appoint a second independent body with
the same mandate as the Ombudsman. However, nothing in the Constitution or the
Ombudsman’s Act prevents the legislator implementing a Human Rights Commission as
part of The Office of The Ombudsman. If the Ombudsperson or his/her delegate is the
Chairperson of such a committee, it will neither affect the Human Rights mandate of the

54 See the discussion of Lindsnaes & Lindholt, “National Human Rights”: 10-12.
55 The ministers and deputy-minister are a majority in Parliament. (+/- 42 of the 72 voting members of
   Parliament).
56 Matshekga, “Toothless Bulldogs”: 71.
57 See Ex Parte Attorney – General: In Re the Constitutional Relationship Between the Attorney-General and
   the Prosecutor-General, 1998NR 282 (SC) (1). Also reported in Butterworths Constitutional Law Reports
   1995 (8), Namibia Supreme Court, p. 1070.
58 Act 7 of 1990.
office, nor the independence of the commission or the person. While the Namibian Constitution mandated the Ombudsperson to protect and promote human rights, no constitutional amendment is needed to create a national human rights commission, provided that the commission operates as part of the Ombudsman’s Office. The commission will still have its foundation in law if the Ombudsman’s Act merely needs to be amended to make provision for it as part of the Ombudsperson’s office and within the framework of the constitutional mandate.

Another way to go about this would be for the Ombudsman to simply appoint a commission to advise him/her on issues of human rights. However, such an advisory committee would fall far short of the requirements of the Paris Principles. Without a basis in law, the Ombudsman could dismiss the advisory body in the same way that he appoints it. Lindsnaes and Lindholt point to the negative effect that an ad hoc appointment has on the independence of a National Commission. The criteria for appointment can be determined by legislation, provided that members come from as wide a cross-section of society as possible.

An independent budget capable of meeting the needs of the commission

In a farewell interview the outgoing Namibian Ombudsman Adv. Bience Gawanas refers to the inadequate budget of her office. The lack of funds was one of the major reasons why the Ombudsman did not do its human rights mandate justice. The other reason was the high amount of complaints raised against administrative actions of governmental and parastatal organs. A good, credible budget should be a priority for government, even if no human rights commission is established.

The broad mandate

The mandate of the Ombudsman has already been referred to. Since it is a constitutional mandate, it will give a commission as part of the Ombudsperson’s office more than enough space to operate.

The desirability of a human rights commission

While it is possible to implement a human rights commission in Namibia without amending the Constitution or taking away part of the constitutional mandate given to the Ombudsman, it does not necessarily mean that the creation of a national commission will

60 The Namibian, 12 September 2003.
61 The two major human rights programs of the Ombudsperson, the Integrity Program and the Human Rights Awareness Week, were funded by foreign donors. See Office of the Ombudsman, Annual Report, Windhoek, Office of the Ombudsman, 2001: 28-30.
be good for the country or the advancement of a human rights culture. It may be argued that the Ombudsperson is adequately equipped and mandated to deal with human rights issues as they occur. A study of the 2001 annual report of the Office of the Ombudsman makes it clear that human rights violations did not get much attention. Notably, the report does not minute any human rights complaints or investigations into human rights abuses.\(^{63}\) Adv. Bience Gawanas-Minnie stated in a farewell interview in The Namibian that the human rights mandate did not get the required attention.\(^{64}\)

The lack of complaints does not reflect a lack of confidence in The Office of the Ombudsperson, as is clearly illustrated by the high amount of complaints against governmental and parastatal offices.\(^{65}\) Rather, The Ombudsperson Office is not generally seen as the forum to raise human rights violations. Namibians still have a fair amount of trust in the police and the courts. Since independence the rights of the citizens vis-à-vis the organs of the state have been established in both the High and Supreme Courts.\(^{66}\)

Some NGO’s, notably the LAC and the NSHR, have over the years gained a reputation for taking up the cause of victims of human rights abuses.\(^{67}\) It is doubtful whether The Office of The Ombudsperson will change the perceptions of the office without a specific effort by the Ombudsperson. An independent Human Rights Commission under the Chairpersonship of the Ombudsperson and using the investigative expertise of its office might do the job. If people at grassroots level, whose rights and freedoms are violated, know that The Office of The Ombudsperson has the capacity to investigate their complaints and bring results, they will come forward and report their complaints.

This does not mean that all human rights advocacy bodies and watchdogs will seize to exist when a National Human Rights Commission is established. On the contrary, bodies like the LAC will always have an important role to play, both as a public law firm, a research unit and a role player in talking human rights violations to the treaty bodies and the international community, once all local remedies have been exhausted. And while an organization like the NSHR has a role to play, a real National Human Rights

\(^{63}\) Ibid.: 13 ff.
\(^{64}\) The Namibian, 12 September 2003.
\(^{66}\) See for example judgments that established the right to a fair trial: State v Heidenrich 1998 NR 228; State versus Scholtz 1998 NR 207; Kauesa versus Minister of Home Affairs and Others 1996 (4) SA 965 (NMS); State versus De Wee 1999 NR 122 (HC). The list goes on.
\(^{67}\) Both institutions have fought human rights abuses vigorously. However, the mode of operation of the NSHR has frustrated not only government, but also other human rights organizations. A careful reading of the 2003 report reveals that most of the alleged abuses are not violations at all. Further, a scrutiny of the footnotes reveal, that the sources of the violations are often the employees of the NSHR. In other words, the complainant and the investigator is the same person. This is not the place to evaluate the work of other human rights bodies. Suffice to say that both government and civil society can only benefit from a more balanced human rights body.
Commission will be able to investigate the hundreds of uncorroborated allegations recorded in the annual report of the NSHR.68

The model of a human rights commission

One issue still needs attention. Will a highly confrontational institution such as a human rights commission serve the greater aims of the Namibian society such as reconciliation, peace and stability? It is true that any human rights commission will always work on the tensions within a society and that confrontation is almost inevitable. However, the forum of this confrontation does not have to take on the form of a “quasi-judicial” process.69

The father of the French national commission, René Cassin, had a very different institution in mind, possibly influenced by the fact that the initial commission was advisory rather than a problem-solving institution. I suggest that a broad commission representing both the important line ministries such as home affairs, foreign affairs, justice, Office of the Attorney General, defence, etc. and other independent organs such as the Office of the Prosecutor-General, the judiciary, etc. as well as a broad representation from civil society (legal and human rights NGO’s, the churches, the business community, the workers, etc.). Like the Cassin-model (by lack of a better name), such a commission could be run on a relatively low budget, since all the commissioners will be unpaid, voluntary participants. The necessary investigative powers can rest in the hands of commissioners especially appointed for that role. The present investigators of the Office of the Ombudsman can be transformed into specialist investigator/commissioners. However, the commission does not have to be a toothless bulldog. The Ombudsman already has investigative, subpoena and other strong powers to expose abuses or irregularities.

One possible model for Namibia (and there might also be others) could be a combination of the Cassin-model, with the extensive powers of the Ombudsman. In such a model the commission can be both a French type of think tank, but with investigative powers and a mandate to act against human rights violators. The great advantage of such a commission, however, will be that the general public will see the Ombudsman for what it is: a protector of human rights. As long as the public do not see the Ombudsman’s office as the place for complaints, the wide and strong mandate will be

68 The name ‘National Society’ is somewhat ambitious. It created the perception with the public that ‘national’ describes some kind of official status.

69 Lindsnaes and Lindholt (“National Human Rights”: 11) have correctly pointed out that in the headline of the original Paris Principles the problem-solving procedures of human rights commissions were described as “quasi-jurisdictional” (E/CN 4/1992/43) whereas possible later reproductions the word used is “quasi-judicial”. While the texts refers to a quasi-judicial process, i.e. a process involving the typical judicial functions of “deciding a dispute and ascertaining the facts and any relevant law” (The Concise Dictionary of Law, Oxford University Press, 1986, quoted in: ibid), the word quasi-jurisdictional possibly describes a more relaxed, non-judicial process. The word “quasi-jurisdictional” still appears in later UN documents (ibid).
worth very little and eventually, as far as human rights protection is concerned, the constitutionally strong Ombudsman will become a paper tiger.

Recent developments in the Office of the Ombudsman

The Office of the Ombudsman has been involved in several human rights projects since 2005. Among other things the Ombudsman launched an investigation into the conditions in the holding cells at police stations in 2007, and presented a report to Parliament. In 2008 he conducted public hearings on the role, if any, racism still plays in the Namibian society.

The most significant development was the creation of an advisory committee on human rights in October 2006. In November 2005 the Ombudsman visited France to study the French human rights protection framework. The advisory committee shows resemblance of the French commission: Its members are drawn from all the human rights role players in Namibia: the churches, civil society, especially the human rights organisations, academics, government ministries and agencies.

The advisory committee organised the Ten Days of Activism in 2006 and 2007 and conducted several meetings during 2007 and 2008, discussing human rights issues. While this is a good initiative which undoubtedly helped to bring human rights protection closer to the people, it lacks the structures that will allow meaningful interaction between civil society and the government. It is also still too much of a discussion forum rather than a committee with a clear mandate not only to discuss human rights issues, but to bring specific cases of human rights violations to the table.

Conclusion

The history of Namibian human rights is part of the history of the struggle for independence. And the idea of a Constitution that will protect fundamental rights and freedoms did not originate from the Eminent Persons group or any other foreign pressure group. The entrenched Bill of Rights in the Namibian Constitution was also not part of a settlement plan to impress the international Community. The final Constitution does not differ substantially from the 1975 Swapo proposal. And the South West African Supreme Court enforced the constitutional principles of Proclamation 181 throughout the 1980's. After independence the Namibian superior courts developed a constitutional jurisprudence with strong protective judgments enforcing the freedoms and fundamental rights of the Namibian people.

What has been lacking since independence is a place where human rights violations can be addressed as they are happening, a process where aggrieved persons do not have to go through the long, expensive processes of litigation. While the Cassin-model does not make provision for a confrontational quasi-judicial process where individuals lay complaints before a commissioner, it has its own process to confront abuses. The representatives of civil society need the opportunity to bring their complaints, coming
from their own constituencies, to the table and confront the government representatives with it.

The advisory committee of the Ombudsman is a good start, but more action is needed to make it a workable committee in terms of the Paris Principles. The following steps can be taken to bring the advisory committee of the Ombudsman in line with the Paris Principles:

1) The committee can be made a statutory body by including it in the Ombudsman Act.
2) The amendment to the Act must determine who will be the members of the committee. The present broad representation of civil society, academics and representatives of government and government agencies must be maintained, while the Defense Force, the Police and the Prison Services should also be included.
3) The rules of the Committee meetings must make provision for members representing civil society to put complaints on the agenda.
4) The rules must make provision for complaints to be referred to the representative of government on the committee to address the issue and report back to the committee. If the committee is not satisfied that a reported violation has been addressed, the committee should be able to refer the issue to the Ombudsman to deal with it in terms of his/her constitutional mandate.
5) The committee must conduct an awareness campaign to bring the existence and the deliberations of the committee to the attention of the public.
6) The general public must be able to request the Ombudsman to place complaints on the agenda.

Bibliography


