

REPORT

By the International Ombudsman Institute (IOI)

Following a Fact Finding Mission to Warsaw, Poland from 18 - 20 July 2016

Ombudsman Under Threat

RECOMMENDATIONS

- To acknowledge the internationally renowned Polish Commissioner for Human Rights that has served as a model institution in the region
- To support the Commissioner for Human Rights to independently exercise his mandate, by ensuring access to court, in particular access to the Constitutional Court without (further) undermining the credibility of the courts
- To ensure that the Commissioner for Human Rights is equipped with sufficient financial and staff resources to fulfil his multiple mandates in order to be able to continue to effectively and efficiently carry on his duties
- To oppose and condemn personal attacks against the Commissioner for Human Rights and his deputies
- To emphasize vis-à-vis international and regional organisations, e.g. the European Union, the Council of Europe, the Organization for Security and Cooperation in Europe, the importance of supporting the Commissioner for Human Rights in order to secure his continuing independence.

Vienna, October 2016

THE IOI

The International Ombudsman Institute (IOI), established in 1978, is the only global organisation for the cooperation of currently 175 independent Ombudsman institutions from more than 90 countries worldwide. The IOI is organised in six regional chapters (Africa, Asia, Australasia & Pacific, Europe, the Caribbean & Latin America and North America).

The role of the ombudsman is to protect the people against the violation of rights, abuse of power, unfair decisions and maladministration. Ombudsman institutions play an increasingly important role in improving public administration while making governments' actions more open and administration more accountable to the public.

In most countries around the world parliamentary control bodies are established, which monitor and implement the rule of law, the fight against corruption and good public administration. Although the specific role of the Ombudsman institution may vary, the holder of this office is legitimized by parliament – either through direct elections or through appointment by the head of state or government by or after consultation with parliament.

BACKGROUND - OMBUDSMAN UNDER THREAT

Different international organizations including the United Nations and the Council of Europe, have addressed the need for democratic States to provide themselves with an Ombudsman institution as an independent mechanism for the protection of human rights. The European Union requires that all candidate states should have independent Ombudsman institutions.

Two of the most recent international decisions are: Res. 69/168 (2014) of the UN General Assembly on “The role of the ombudsman, mediator and other national human rights institutions in the promotion and protection of human rights”, and Res. 1959 (2013) of the Parliamentary Assembly of the Council of Europe on “Strengthening the institution of Ombudsman in Europe”. These resolutions, as well as international practice and academic research, delineate a number of features that an Ombudsman or Human Rights institution must meet.

Considering its general configuration, all international texts emphasize the fact that the creation of such institution is necessary, and not just optional. As for the regulatory standard of recognition, the Council of Europe expressly encourages the establishment of the

Ombudsman institution being effected in the Constitution. Its purpose must include the promotion and protection of human rights as well as the more conventional role of supervision of public administration. In this respect many European Ombudsmen have acquired specific competencies in areas such as the prevention of torture, gender and LGBTI rights or transparency and the right to access information in recent years. Needless to say, the defense of the most vulnerable groups, the ones that are most likely to be discriminated against (children, women, LGBTI people, migrants and asylum seekers, etc.), is at the core of an Ombudsman/Human Rights institution. Moreover, the efficacy and impact of the institution's final decisions must be derived not from a binding or coercive mandate, but from persuasion based on the rigor, objectivity and independence with which it conducts its activities.

The international framework also identifies the Ombudsman institution's independence as one of its fundamental traits. For this reason, it is necessary that the legal statute of the mandate-holder as well as the organizational structure provide the institution with the maximum independence and neutrality. This implies strict duties both for the mandate-holder and for the executive power. On the one hand, for instance, a candidate to hold the office of Ombudsman must not be an active member of any political party and his/her training and qualifications must be consistent with the duties of the Ombudsman. Once appointed, the incumbent must not engage in any other remunerated activities or in political activities.

On the other hand, the candidate must be chosen by a qualified majority of a legislative body and can only be forcibly dismissed "for incapacity or serious ethical misconduct", following a transparent procedure that also includes a qualified majority of parliament. Thus, the dismissal of an office-holder, which is absolutely exceptional in practice, must be based on legally assessed grounds of breach of the mandate, within a due-process based procedure, and with a parliamentary majority that exceeds the party supporting the government.

In order to guarantee the institution's independence, all levels of government have the duty to cooperate with it and respect its independence, without any political interference. The government must respect its organizational and budgetary autonomy, as ombudsman offices must be adequately resourced in order to be able to conduct the enquiries necessary to follow up complaints. In this respect, PACE Resolution 1959 (2013) urges member states "to make all efforts to avoid budget cuts resulting in the loss of independence of Ombudsman institutions".

The members of the IOI unanimously adopted the Wellington Declaration in New Zealand in November 2012 confirming their mutual understanding that "it is an expression of democratic maturity and the rule of law that governments and parliamentarian majorities shall allow

criticism voiced by independent Ombudsman institutions. As a consequence, an Ombudsman diligently fulfilling his/her mandate shall not be subject to any form of physical, mental or unjustified legal coercion.”

Reports relating to Ombudsmen operating under difficult circumstances or even under threat have come to the attention of the IOI more frequently in the past few years.

Threats, intimidation and reprisals against Ombudsman are often a result of the Ombudsmen’s work, the increasing efforts they make to protect and promote human rights and the fact that they hold governments to account. While the nature of these threats may vary, the reason for them is often the same, namely to affect its very existence and functioning and to undermine its independence and legitimacy.

Any action that is directed towards an Ombudsman institution or an incumbent directly or indirectly and that potentially puts the independent operation and exercise of the Ombudsman’s duties at risk can be seen as such impediment or threat to the Ombudsman.

Concern about these incidents has led the IOI to discuss the question of how it can support and assist colleagues under threat, while still maintaining the necessary distance to avoid interfering in the political affairs of a State.

The IOI Board of Directors acknowledged that the supporting member institutions under threat, facing reprisals or operating under difficult circumstances is one of the IOI’s core tasks. At a workshop held in Barcelona in April 2016, a possible IOI approach to assisting Ombudsmen operating under difficult circumstances was discussed using examples from various regions of the IOI. The very specific and topical situation of the Office of the Polish Commissioner for Human Rights led the present IOI Board members to organize an IOI fact-finding mission and to send a delegation to Poland to evaluate the situation of the Polish Commissioner for Human Rights and to gain more insight into the general situation in the country by meeting representatives of Parliament, of Government, of supreme courts, of NGOs and other stakeholders. In organizing this mission, the IOI also endorsed the opinion of European bodies such as the European Commission or the Council of Europe Commissioner for Human Rights.

The IOI carried out this fact-finding mission with full respect for the values and principles of its member and by applying a “do-no-harm” principle. The delegation took the existing national context as well as other contextual elements into account and exercised full discretion when and wherever necessary. The present report gives an account of the observations made by the IOI delegation.

REPORT

Taking into account

- The International Ombudsman Standard as defined in the Article 2 of the IOI By-Laws
- The IOI Guide on Developing and reforming Ombudsman schemes
- The International Framework of the Ombudsman Institution developed by the Catalan Ombudsman institution and the University of Barcelona
- Reports by the bodies of the Council of Europe and the European Union

The Office of the Commissioner for Human Rights in Poland (OC) was established in 1987, it has provided the model that many other Ombudsman institutions in central and Eastern Europe have followed and it has been regarded as one of the most effective Ombudsman offices in its region.

The OC has been a very active participant in Ombudsman networks and has operated as a model for other institutions as they were established and provided active support to them.

According to the Polish Constitution (Art. 208-212) the Commissioner for Human Rights shall safeguard the freedoms and rights of persons and citizens specified in the constitution. The Commissioner shall be independent in his activities, independent of other State organs and shall be accountable only to the Sejm (the Parliament).

The Polish Commissioner for Human Rights is accredited with “A-Status” at the Global Alliance of National Human Rights Institutions (former: ICC - International Coordinating Committee for National Human Rights Institutions), fulfilling all the requirements set out in the Paris Principles. The Commissioner is also a Voting member of the International Ombudsman Institute.

Following reports that the OC in Poland was facing difficulties, the IOI decided to send a fact finding mission to investigate the situation in Poland and to ensure that the office continues to be independent, continues to carry out its mandate and continues to provide an effective service to the people of Poland.

The IOI fact finding mission had the opportunity to meet a wide range of stakeholders, to understand the context in which the Commissioner for Human Rights is operating. It looked

particularly at the Commissioner's access to courts and the Constitutional Court because that forms an important part of the work of the OC.

Constitutional Court:

The Commissioner for Human Rights (the Ombudsman) has far-reaching responsibilities vis-à-vis the **Constitutional Court**, that are enshrined in the Constitution of the Republic of Poland (Art. 188 and Art. 191). From the early inception of both institutions all Ombudsmen made use of the possibility to file abstract motions with the Constitutional Court as a way of shaping jurisprudence concerning different issues, e.g. criminal law, civil law, taxation etc. These motions can be filed on the basis of actual cases or complaints brought before the Ombudsman or on his own motion, i.e. *ex officio*. On average 20-25 motions per year are sent to the Constitutional Court. Additionally, the Ombudsman can join constitutional complaints, which was done in the past in 15-20 cases per year. Since an amendment of the Act on the Constitutional Tribunal in June 2015 the Ombudsman can also join proceedings in which preliminary questions are put to the Constitutional Court by regular courts and he can join abstract motions by other actors.

In the current situation, it is of concern that the Constitutional Court has been hampered by delays in having its judgments published, with some judgments not being published for extended periods, and by not having the three elected judges sworn in. There is a concern that the effort which goes into preparing motions to the Constitutional Court by the Ombudsman's Office may be in vain, if they cannot be dealt with effectively by the Court.

We were told that the Ministry of Justice intends to reform the judiciary. While no proposals had been put forward at the time of the inquiry, many of those we spoke to expressed grave concern about the future independence of the judiciary and the possible politicization of appointments.

The National Council of the Judiciary (NCJ), a body that is comprised of judges as well as representatives of parliament, and the Minister of Justice, plays an important role in the process of nominating and selecting judges. According to the Polish Constitution (Art. 179) the NCJ presents a candidate to the President of the Republic, who will then nominate the candidate. Recently the President refused to nominate 10 judges without giving any justification to the NCJ. This fact in combination with proposed amendments to the Act on the NCJ stipulating that the President would obtain the right to choose from among the candidates has the potential of leading to a damaging erosion of the separation of powers.

Equally the potential reduction of the retirement age of Supreme Court judges from currently 70 years to 65 years might lead to a large scale replacement of judges, because it would

affect approx. 40% of all the Supreme Court judges, who are currently 65 years of age or older.

Immunity:

We were also informed that a law establishing a procedure for waiving **immunity** of various independent institutions in Poland, such as the Ombudsman, the Ombudsman for Children, the Inspector General for Personal Data Protection, the Head of the Institute of National Remembrance, was introduced and entered into force¹. Many of the persons we met were concerned that the new law does not provide sufficient guarantees protecting the Ombudsman and other independent institutions from arbitrary criminal prosecution by the executive power.

Funding:

As to the **funding** of the Ombudsman office the IOI fact finding mission found that the OC has the power to submit his budget to the Minister of Finance, who transfers it to Parliament. Parliament is then free to decide how to go along with the budget. For 2016 the OC asked for an increase of approximately 16% (from 9 million EUR to 10.5 million EUR), because important renovation works were scheduled in order to make the office building accessible for persons with disabilities and also because the OC staff has not seen an increase in salaries since 2008, whereas civil servants have. The procedure in Parliament is that one deputy is the rapporteur and checks the feasibility of the proposed budget and reports on it. Despite the fact that the rapporteur agreed with the proposal, the budget was neither increased nor maintained at the same level, but cut by 8%. Other institutions saw quite substantial increases in their budget, suggesting the drastic cut in the Ombudsman's budget was not due to general austerity measures in Poland.

To properly fulfil all the important duties of the Polish Commissioner for Human Rights his office is dependent on access to court and sufficient resources. The Fact Finding mission therefore notes with great concern that by limiting the Ombudsman's access to court, reducing his budget, limiting competences, changing immunity provisions are symptomatic of a lack of respect and support for accountability mechanisms, the Polish Constitution, international best practice and the rule of law.

¹ Law of 18 March 2016 amending the Law on the Commissioner for Human Rights and some other laws (Journal of Laws, item 677). The law entered into force on 31 May 2016.

CONCLUSIONS

1. The Polish Commissioner for Human Rights is a renowned institution that meets the requirements and criteria established by international law to be considered an Ombudsman institution.
2. We have been impressed by the work of Dr Bodnar and his office, and we look forward to seeing that work continuing into the future to build on its success to date and to extend it to all to provide greater opportunity for the people of Poland to receive redress when things go wrong. The work of the Ombudsman can also continue to help to improve public services by identifying problems affecting multiple service users and recommending changes to service delivery, regulations and legislation.
3. The independence must not be compromised by legislative, administrative or political measures.
4. It is of paramount importance to ensure that the Ombudsman's Office has a sufficient budget to enable it to undertake its work on behalf of the people of Poland.
5. The powers of the Ombudsman should be extended and not diminished, because it needs a wide mandate in order to properly fulfil its duty to make sure that the people using public services and living in Poland have access to a truly independent office which is properly resourced and has the power which enables it to deal with their complaints in an effective and efficient manner.
6. The office should continue to have access to the Constitutional Court and courts and we are concerned that measures are being taken which are limiting this access. We are also concerned that there are problems with the functioning of the Court that make it more difficult for the Commissioner for Human Rights to do its work.
7. Upon our return from the fact-finding mission, we have learnt about a petition by Foundation *Ordo Iuris* to dismiss Mr. Adam Bodnar from his position as Commissioner for Human Rights, i.e. the mandate-holder of the Polish Ombudsman institution, based on his positive stand concerning LGBTI rights. In this respect, as stated in the open letter issued by the IOI, we believe that:

- It would be entirely unacceptable for such a petition to take effect, as the defense of LGBTI rights can in no way be considered to be a breach of Mr.

Bodnar's mandate, according to international standards. Moreover, the European Union has consistently established, including in Article 21 of the Charter on Fundamental Rights, the right to non-discrimination based on sexual orientation. It is worth to underline that the Polish Parliament nominated, by the virtue of law as of 3 December 2010, the Commissioner for Human Rights to fulfill the tasks of the independent equality body according to the European Union anti-discrimination directives. The Commissioner's mandate, broadened by the Parliament, includes the protection of LGBTI people.

- Any future decision in this respect must be made by a qualified majority of the Parliament, within the framework of a pre-determined procedure and including a hearing with the Ombudsman himself.

8. We strongly urge the Parliament and Government of Poland to behave in accordance with these international principles, as set out in the first section of this report.
9. The IOI is ready to help with all available means to ensure the independence of the Polish Commissioner for Human Rights and his staff.
10. The IOI will deliver this report and its conclusions to the Polish authorities, while also providing copies to the above mentioned international institutions.

PARTICIPANTS OF THE FACT FINDING MISSION

Rafael Ribó – Regional President IOI Europe

Peter Tyndall – IOI 2nd Vice President

Günther Kräuter – IOI Secretary General

Ülle Madise – IOI Europe Board Member

Ulrike Grieshofer – IOI Executive Director

Judith Macaya – Secretariat IOI Europe

ANNEX:

LIST OF INSTITUTIONS/STAKEHOLDERS MET (IN CHRONOLOGICAL ORDER)

Ambassador Dr. Thomas M. Buchsbaum, Ambassador of Austria

Dr. Adam Bodnar, Commissioner for Human Rights

Dr. Sylwia Spurek, Deputy Commissioner for Human Rights

Ms. Katarzyna Kacperczyk, Undersecretary of State, Ministry of Foreign Affairs

Prof. Tadeusz Ereciński, President of the Civil Chamber of the Supreme Court

Katarzyna Gonera, Judge at the Supreme Court

Waldemar Płóciennik, Judge at the Supreme Court

Mateusz Kijowski of the Committee for the Defence of Democracy (KOD)

Wojciech Kaczmarczyk, Government Plenipotentiary for Civil Society and Equal Treatment

Prof. Andrzej Rzepliński, Chairman of the Constitutional Tribunal of Poland

Prof. Michał Seweryński, Chairman of the Commission for Human Rights, Rule of Law and
Petitions of the Senate of the Republic of Poland and additional
members of the Commission

Dariusz Zawistowski, Chairman of the National Judiciary Council

Krzysztof Wojtaszek, Vice-Chairman of the National Judiciary Council

Waldemar Żurek, spokesman of the National Judiciary Council

Dr Marcin Walecki, Head of Democratization Department, OSCE/ODIHR

Omer Fisher, Deputy Head, Human Rights Department, OSCE/ODIHR

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Mr Marek Michałak, Ombudsman for Children Rights