

# The Ombudsman for Children in Poland<sup>1</sup>: A model for Namibia?

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## Introduction

Even though the Ombudsmen system is difficult to evaluate,<sup>2</sup> the role of ombudsman or other possible independent national human rights institutions in the promotion and protection of the rights of the child is indisputable. States all over the world, encouraged by relevant provisions of the Convention on the Rights of the Child,<sup>3</sup> ensure that the children's issues are not excluded from the scope of interest of the domestic Ombudsman or their collective equivalent. At the same time, it is vital to remember that several states have decided to abandon the model of establishing one universal independent national human rights protection body, which serves all possible groups of individuals, and have instead constituted at least one complementary institution of narrow and specialised character. A good example of a state that decided to introduce an institution focused exclusively on children is the Republic of Poland, a country that in 1978 initiated in the United Nations Commission on Human Rights work on the Convention on the Rights of the Child. There, besides the 'general' Ombudsman, is also the Ombudsman for Children.<sup>4</sup> The institution, which is present in the Polish domestic legal system since 1997 and was primarily modelled on its Norwegian equivalent,<sup>5</sup> has gone long way to the point where it is now – being perceived as one of the most effective Ombudsmen for

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1 The notion *Ombudsman for Children* is an indirect translation of the Polish expression *Rzecznik Praw Dziecka*, used by the body in itself in the international relations. See, inter alia, the European Network of Ombudspersons for Children's website <http://crin.org/enoc/>; last accessed 17 September 2009.

2 Peters (2002:319).

3 Article 4 of the Convention on the Rights of the Child, adopted and opened for signature, ratification and accession by United Nations General Assembly Resolution 44/25 of 20 November 1989, entry into force 2 September 1990.

4 Of course it is possible to enumerate other 'specialised ombudsmen', such as German and Swedish ones, dealing with military affairs, or Canadian ombudsmen such as a Prison Ombudsman, a Transportation Ombudsman, a Commissioner of Official Languages, a Human Rights Commissioner, and a Privacy Commissioner. See Peters (2002:319).

5 The Norwegian Ombudsman for Children (Nor. *Barnembudet*) is the oldest institution of this kind in the world. It was established by the Statute No. 5 of the Ombudsman for Children of 6 March 1981, with subsequent amendments. The instructions for the Ombudsman for Children were laid down by the Royal Decree of 11 September 1981. See the Norwegian Ombudsman for Children's website <http://www.barneombudet.no/english/>; last accessed 17 September 2009.

Children in the world, with high scope of powers, which can possibly even be extended by the domestic Parliament.

In this respect it might be advisable to make short analysis of the above-mentioned institution in order to clarify to what extent this typically North-European concept of safeguarding rights of the child within the national legal system, combined with a unique Polish approach to the scope of the Ombudsman's powers, may serve as model for Namibia.

## History of the Ombudsman for Children in Poland

In order to understand present position of the Polish Ombudsman for Children, its relations with the 'general' Ombudsman and its significance for the legal system one should take a trip back in time and make a few historical comments.

First of all, it should be emphasised that after political transformation in 1989 in Central and Eastern Europe the institution of the Ombudsman became one of the pillars of Polish democracy. It gained its constitutional framework in 1989, after relevant amendments were made to the 1952 Constitution.<sup>6</sup> It also explored all the powers within its broad mandate, deriving from the 1987 Ombudsman Act.<sup>7</sup>

To make this picture complete it should be added that at the time of debate concerning the position of the Ombudsman for Children the institution of 'general' Ombudsman had a strong hold and a well established de facto and de jure position.<sup>8</sup> To illustrate the role of this institution in the Polish society both in 1990s and 2000s one may refer to the statement of J Kochanowski, the Fifth-Term Ombudsman, which reads as follows:<sup>9</sup>

The Polish experience may not be typical of the majority of countries in which the institution of the Ombudsman operates. This is because the range of competencies of the Polish

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6 Namely, on 8 April 1989 the Constitution Amending Act (Pol. *ustawa o zmianie Konstytucji PRL*) of 7 April 1989 entered into force (*Dziennik Ustaw* of 1989, No. 75, item 444), which contained Article 36a, devoted exclusively to the legal position of the Ombudsman.

7 The institution of the Ombudsman, modelled on Norwegian model, was established by the Polish Parliament in 1987. The above-mentioned body was designed as an independent and autonomous one-man institution, responsible exclusively to the Parliament. See the Ombudsman Act (Pol. *ustawa o Rzeczniku Praw Obywatelskich*) of 15 July 1987 (*Dziennik Ustaw* of 2001, No. 14, item 147, with subsequent amendments).

8 Actually, the mandate and scope of powers of the Ombudsman have not changed much since establishment of this institution in 1987. To simplify, it should be added that all the wordings of the Act connected with socialistic regime was replaced by concepts associated with democratic state. However, the basic powers of the Ombudsman, such as its possibilities to interact with the courts of justice, are attached to this body since its very beginning.

9 Statement made by Dr J Kochanowski, the Ombudsman of the Republic of Poland on 11 July 2006 in Vienna during the European Ombudsman Meeting IOI – European Region. See <http://www.ioi-europe.org/news/proceedings.pdf>, pp 51–52; last accessed 17 September 2009.

Ombudsman is very broad. It does not exclude any public bodies from being monitored. The Ombudsman has the right to appeal against acts of a general nature and also in individual cases to independent bodies, i.e. the Constitutional Tribunal, administrative courts or other courts. Similarly, he can question the legality of court judgments. Obviously this is done exclusively within the binding frameworks of judicial procedures on the principles similar to those affecting parties in the proceedings ... This does not mean, however, that the Polish Ombudsman operates only in judicial trial forms or in administrative proceedings. Like Ombudsmen in other countries he uses the form of appeals (the so-called recommendations) in order to change a state inconsistent with the law or undertake a necessary action (in the case of inactivity) ... The success of the institution of the Ombudsman consists in the following:

- the guarantee of general and free access to his office;
- there is no binding formalised procedure;
- there are no time-limits;
- it can act against the inactivity and tardiness of the monitored bodies;
- it can inspire the undertaking of pro-civic legislation through the appropriate state bodies by appealing for the passing, amending or repealing of defined acts of law;
- its authority and the right to research cases *in situ*, including without prior warning, allow for thoroughness in establishing and revealing shortcomings;
- the right to undertake cases *ex officio*, which allows for the undertaking of various important social issues and also for helping those incapable of coping by themselves and requiring aid;
- the possibility of eliminating flawed administrative acts, court judgements and normative acts, including laws, and of shaping the appropriate practice in the activity of public bodies. ...
- finally, it informs Parliament and public opinion about the state of the observance of freedom and human and civil rights in the country and presents suggestions about undertaking remedial measures if irregularities have been declared.

On the other hand, it must be remembered that there are also limits on the possibilities of the Ombudsman's actions, which must not be underestimated, such as:

- in contrast to tribunals and courts, he does not have in any country, including Poland, the competence to impose his standpoint on the subjects being monitored, to settle disputes or to close a case completely as regards its essence;
- his effectiveness depends on the force of his argument and the reactions of the addressees to the conclusions directed to them by the Ombudsman. It also depends on his authority.

In early 1990s it became obvious that Poland needed a new constitutional order. On 23 April 1992 the Constitutional Act regulating the procedures of preparation and enacting of a new Constitution was adopted.<sup>10</sup> On 30 October 1992, after free elections, the Constitutional Commission of the National Assembly started its work.<sup>11</sup> Then the discussion concerning the creation of the Ombudsman for Children arose. At the same

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10 The Constitutional Act on Preparation and Enacting Procedure of the Constitution of Republic of Poland (Pol. *ustawa konstytucyjna o trybie przygotowania i uchwalenia Konstytucji Rzeczypospolitej Polskiej*) of 23 April 1992 (*Dziennik Ustaw* of 1992, No. 67, item 336, with subsequent amendment).

11 The first Commission of the National Assembly, that is a commission of the combined houses of *Parliament*, started its works after the elections to the First Term Sejm and the Second Term Senate. See Chruściak & Osiałyński (2001).

time it was obvious that the institution of the 'general' Ombudsman would remain the constitutional body. Moreover, its broad mandate and scope of powers was not to be subject to any limitations.

The drafts of the new Constitution reflected only to some extent the disputes over guaranteeing constitutional protection of the rights of the child that were found in national discussion as well as in parliamentary debates in the early 1990s. To summarise this issue it should be stated that almost every draft of the Constitution included provisions regulating the matter. The approach varied from a civil and political rights orientation to a social and economic rights one and depended on the political views of the drafters. The majority of concepts associated the child with its family and was focused on rights of the child protection through safeguarding the rights of the family. Only one draft signed by the parliamentarians representing the major left wing party in Poland contained provisions establishing an institutional protection of the rights of the child, namely the Ombudsman for Children. Despite that fact, the issue of whether to provide Poland with the Ombudsman for Children appeared in the work of the Constitutional Commission of the National Assembly and had been discussed since 1994 until 1997.<sup>12</sup> The parliamentarians, satisfied with the work of the Ombudsman's Office, were not unanimous about whether it was necessary to establish such an additional human rights protection mechanism. One of the recurring ideas was to create a Vice-Ombudsman, that would serve exclusively for children. Another concept was to create a kind of child-oriented administrative institution at the ministerial level, such as the Government's Plenipotentiary for Children. One other idea was to focus on strengthening the child-care administration by creating relevant institutions, similar to the German *Jugendamt*,<sup>13</sup> at the local level.

The discussion crossed the parliamentarian walls and featured into the daily newspapers. However, even though the then Ombudsman, T. Zieliński, was against the idea of establishing an institution of the Ombudsman for Children, claiming that children's issues were covered by his Office's daily work,<sup>14</sup> the press coverage revealed a deep desire by the public for a new child-oriented body that would be based on constitutional provisions.<sup>15</sup> At the same time, there was no consensus at all on the possible relations between the 'general' Ombudsman and the Ombudsman for Children. Consequently, on 21 March 1997 the National Assembly adopted a provision, which composes today's Article 72

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12 Jaros (2006).

13 Jaros (2006:52–57).

14 See statement of T Zieliński, the Second-Term Ombudsman, published on 9 September 1994 in *Gazeta Wyborcza* newspaper, quoted in Jaros (2006:51).

15 The headlines of the articles speak for themselves: “*Dzieci czekają na swego rzecznika*” (“Children are waiting for their Ombudsman”) or “*Spór o rzecznika praw dziecka*” (“Dispute about the Ombudsman for Children”). See, among others, Łopatkowa (1995, quoted in Jaros 2006:51).

(4) of the Constitution,<sup>16</sup> that established the Ombudsman for Children. However, the competence and procedure for appointment of the Ombudsman for Children were left to be specified by statute.<sup>17</sup>

The parliamentary debate over the Ombudsman for Children Act lasted from July 1998 to January 2000. Finally, on 6 January 2000 the Parliament adopted the Ombudsman for Children Act.<sup>18</sup> The text was a compromise between politicians of opposing views. It did not contain any requirements for the candidates. As far as the position of the new Ombudsman was concerned, the Act was meeting half-way a concept of an ombudsman exclusively for children and an ombudsman for children and family.<sup>19</sup> Moreover, the dispute about the relations between the newly established institution and the ‘general’ Ombudsman influenced the scope of its powers. Basically, the Ombudsman for Children was equipped mainly with powers which would follow the approach of alternative dispute resolution, such as the right to make recommendations and requests. However, this institution was not entitled to use the legal powers, such as the ability to initiate proceedings before competent authorities or possibility to make cassation appeals against final court’s judgments and administrative decisions. Those powers remained within the domain of the ‘general’ Ombudsman. It became possible for the Ombudsman for Children, however, to transfer its cases to the ‘general’ Ombudsman, if the Ombudsman for Children was of the opinion that the usage of legal powers was necessary.<sup>20</sup> On such occasions it was compulsory for the Ombudsman to deal with the case.<sup>21</sup>

Since adoption of the above-mentioned statute, three Ombudsmen and one Ombudswoman for Children have been appointed.<sup>22</sup>

The powers of the Ombudsman for Children were obviously weaker than the ones associated with the ‘general’ Ombudsman. Consequently, the dispute about the role and position of this body did not come to an end at the moment of adoption of the Ombudsman for Children Act. After several years, that is in 2008, the Ombudsman for Children Act was amended, in order to meet society’s expectations concerning

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16 The Constitution of the Republic of Poland (Pol. *Konstytucja Rzeczypospolitej Polskiej*) of 2 April 1997 (*Dziennik Ustaw* of 1997, No. 78, item 483, with subsequent amendments).

17 See stenographic record of the Third Meeting of the National Assembly of 21 March 1997, p. 29, quoted in Jaros (2006:54).

18 *Dziennik Ustaw* of 2000, No. 6, item 69, with subsequent amendment.

19 Biuletyn No. 1669/III. Meeting of the Commission of Education, Science and Youth, Commission of Social Policy and Family and Commission of Justice and Human Rights of 22 June 1999, p 2.

20 One may say that the legal position of the Ombudsman for Children originally resembled a little bit the situation of the ones to whom it was designed to serve, as children, generally speaking, execute their rights while being represented by adults.

21 Jaros (2006:60–67).

22 Namely, the previous Ombudsmen for Children were M Piechowiak, P Jaros, and E Sowińska. The Office is currently headed by M Michalak.

the scope of the body's powers.<sup>23</sup> However, it should be stated that even though the Parliament finally decided to equip the Ombudsman for Children inter alia with several new legal powers, elevating its position with the powers of the 'general' Ombudsman, the concept of combining the Office of the 'general' Ombudsman and the Ombudsman for Children was also put forward during the parliamentary debate. The idea of removal of the Ombudsman for Children as an institution separate from the Ombudsman was represented mainly by the Ombudsman's Office. J Kochanowski, the Ombudsman, and M Wróblewski, the Director of the Constitutional and International Law Unit of the Ombudsman's Office, tried to persuade the parliamentarians that children's issues are covered already by the Ombudsman, and that the suggested division into human and civil rights and rights of the child was artificial. Their statements were supported also by presenting financial arguments coming from the assumption that having two bodies of overlapping competencies was expensive for the state's budget.<sup>24</sup>

Therefore, the 2008 Amendment to the Ombudsman for Children Act was adopted, strengthening the position of the Ombudsman for Children. However, it is being still postulated by the Ombudsman for Children as well as by his supporters that the Polish 1997 Constitution should be amended in order to bring into alignment all its powers with the powers of the 'general' Ombudsman.<sup>25</sup> As for now the 'general' Ombudsman remains the only independent human rights protection body that is entitled to make application to the Constitutional Tribunal requesting examination of matters such as the conformity of statutes and international agreements to the Constitution, the conformity of a statute to ratified international agreements whose ratification required prior consent granted by statute, the conformity of legal provisions issued by central State organs to the Constitution, ratified international agreements and statutes and the conformity to the Constitution of the purposes or activities of political parties.<sup>26</sup> Currently, having regard to the 2008 Amendment to the Ombudsman for Children Act, it may be stated, with some slight hesitation, that in future strengthening the child-oriented institution would be more likely scenario than quashing it or attaching it to the 'general' Ombudsman.<sup>27</sup>

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23 The Amendment to the Ombudsman for Children Act (Pol. *ustawa o zmianie ustawy o Rzeczniku Praw Dziecka oraz ustawy o wynagrodzeniu osób zajmujących kierownicze stanowiska państwowe*) of 24 November 2008; (Dziennik Ustaw of 2008, No. 214, item 1345).

24 Biuletyn No. 677/IV. Meeting of the Commission of Education, Science and Youth, Commission of Social Policy and Family, 27 May 2008, p 10.

25 Biuletyn No. 677/IV (op. cit.), p 9.

26 Article 191(1) 1 of the 1997 Constitution.

27 On 25 September 2009 in the Sejm took place the first hearing of the Senate's project of another amendment to the Ombudsman for Children Act (Pol. *senacki projekt ustawy o zmianie ustawy o Rzeczniku Praw Dziecka oraz niektórych innych ustaw*). According to the Senate's proposal the powers of the Ombudsman for Children would be brought into alignment with the powers of the 'general' Ombudsman in respect to the right to stand before the Supreme Court and the Constitutional Court. For the Senate's project of the Amendment of the Ombudsman for Children Act (item no. 2266), see the Sejm website <http://orka.sejm.gov.pl/projustall6.htm>; last accessed 30 October 2009.

## Legal position of the Ombudsman for Children

As it was stated above the Polish Ombudsman for Children is a constitutional body. The legal basis for its establishment is Article 72 (4) of the 1997 Constitution, which is found in the Subchapter “Economic, Social and Cultural Freedoms and Rights” of Chapter II, titled “The Freedoms, Rights and Obligations of Persons and Citizens”.<sup>28</sup> Article 72 of the 1997 Constitution, which deals with the rights of the child, reads as follows:

### Article 72

1. The Republic of Poland shall ensure protection of the rights of the child. Everyone shall have the right to demand of organs of public authority that they defend children against violence, cruelty, exploitation and actions which undermine their moral sense.
2. A child deprived of parental care shall have the right to care and assistance provided by public authorities.
3. Organs of public authority and persons responsible for children, in the course of establishing the rights of a child, shall consider and, insofar as possible, give priority to the views of the child.
4. The competence and procedure for appointment of the Ombudsman for Children shall be specified by statute.

As was articulated above, the relevant statutory provisions that regulate the position of the Ombudsman for Children are included in the Ombudsman for Children Act. According to Article 1(2) of the Act the institution stands for the protection of rights of the child set forth the 1997 Constitution, the Convention of the Rights of the Child and other legally binding provisions, with respect, however, for the rights and obligations of parents. According to Article 3 (2) the Ombudsman acts to protect the rights of the child, such as the right to life and the right to health care, the right to grow up within a family, the right to adequate social conditions and the right to education. The above-mentioned list is illustrative, not exhaustive. It should be also emphasised that according to Article 1 (3) of the Ombudsman for Children Act the body, while executing its powers, should take into account the best interests of child and the fact that its family constitutes the natural environment for the child’s growth. The Act also establishes that the concept *child* is reserved for every human being from its conception until the age of majority.<sup>29</sup> Such a legal construction makes the Ombudsman for Children competent also in matters concerning bio-medical issues related to the beginning of life as well as to the rights of the foetus or the embryo.<sup>30</sup>

The Ombudsman for Children is entitled to take actions, in a manner compatible with the relevant provisions of the Ombudsman for Children Act, that would aim to ensure full and harmonic growth of the child, with respect for its dignity and subjectivity.<sup>31</sup>

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28 Associating the rights of the child with economic, social and cultural freedoms and rights is an effect of the compromise described above. See also Jaros (2006:40–57).

29 Article 2(1), Ombudsman for Children Act.

30 Rzewuski (2007); Żelichowski (2000); Żelichowski (2003).

31 Article 3(1), Ombudsman for Children Act.

The powers of the Ombudsman are similar to those exercised by the other European Ombudsmen for children.<sup>32</sup>

According to Article 9 the office of the Ombudsman for Children may take actions on its own motion, taking into account, particularly, any information coming from citizens or their organisations which indicate the alleged violations of the rights or the welfare of the child. Since the adoption of the Amendment to the Ombudsman for Children Act in 2008 the Ombudsman for Children is obliged to inform individuals and organisations, which served as a source of information, about his standpoint concerning the case, and about the outcome of this performance whenever the Ombudsman decides to perform an action.

According to the relevant provisions of the Ombudsman for Children Act in the amended version, the body has several powers at its disposal. First of all, it is possible for the Ombudsman to investigate, including without prior notice, every case *in situ*.<sup>33</sup> It is entitled to demand from authorities, organisations or institutions both explanation and information as well as providing it with relevant documentation, including documents covering personal data.<sup>34</sup> The Ombudsman is also authorised to institute civil proceedings and to participate in pending proceedings, executing the same powers as the public prosecutor.<sup>35</sup> The Ombudsman for Children may also demand from relevant prosecutors the institution of preparatory proceedings, that is enquiry or investigation, in cases concerning offences.<sup>36</sup> The body is also entitled to initiate administrative proceedings, make complaints to the administrative court and to participate in pending proceedings, executing the same powers as the public prosecutor<sup>37</sup> as well as to make punitive motions

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32 Jaros (2006:108).

33 Article 10(1)1, Ombudsman for Children Act.

34 Article 10(1)2, Ombudsman for Children Act.

35 Article 10(1)3, Ombudsman for Children Act. It should be specified that according to Article 2 of the Public Prosecutor's Office Act (Pol. *ustawa o Prokuraturze*) of 20 June 1985 (Dziennik Ustaw 1985, No. 31, item 138 with subsequent amendments), so-called non-prosecutorial powers of the public prosecutor are present in civil and administrative proceedings, as well as in their mutations (ex. tax proceedings) that derive from the position of this institution as an organ of legality, designed to "preserve the rules of law and to watch over prosecuting offences". As an example one may quote Article 7 of the Code of Civil Proceedings (Pol. *Kodeks Postępowania Cywilnego*) of 17 November 1964 (Dziennik Ustaw of 1964 No. 43, item 296 with subsequent amendments), according to which the prosecutor may demand the institution of proceedings in any case, as well as to participate in any proceedings already pending, if in his assessment, this is required to protect the rule of law, citizens' rights or the interest of society generally. In the non-property cases in the field of family law, the prosecutor may institute litigation only in the cases stipulated in law. Even though it does not transpire from the above-mentioned article, it should be stated that, further regulations empower the prosecutor on a very broad scale. Basically, as far as civil proceedings are concerned, only issuing a divorce or a separation lawsuit remains outside its competences.

36 Article 10(1)4, Ombudsman for Children Act.

37 Article 10 (1) 5 Ombudsman for Children Act.



in cases prosecuted as petty offences.<sup>38</sup> Apart from that, the Ombudsman for Children is empowered to command carrying out of research, preparation of expertise or the making of an opinion for his own purposes.<sup>39</sup> The demand for confidentiality of alleged victims and informers is protected, as the Ombudsman is allowed not to disclose the information that could lead to revealing the identity of the complainant, if it would be necessary to protect freedoms, rights and interests of individuals.<sup>40</sup> The Ombudsman for Children is also empowered to make a request to competent authorities, organisations or institutions for undertaking necessary actions for the benefit of the child that would be within the scope of the authority.<sup>41</sup> It is compulsory for the above-mentioned entities not only to undertake such actions<sup>42</sup> but also to immediately inform the Ombudsman for Children, within no later than 30 days, about their actions or positions taken.<sup>43</sup> In instances when the entities mentioned above failed to take the action requested by the Ombudsman for Children or the Ombudsman for Children does not share their position, it may refer the matter to the competent superior body asking for it to take the necessary action.<sup>44</sup> Moreover, whenever the Ombudsman for Children is of the opinion that the rights or welfare of the child were infringed by the above-mentioned entities he is entitled to demand disciplinary proceedings or imposition of regulatory sanctions.<sup>45</sup> The authorities, organisations and institutions are obliged to cooperate with the Ombudsman for Children by, *inter alia*, providing his office with access to their case-files, and facilitating it with relevant information and explanations, including the ones concerning the factual and legal basis for their decisions.<sup>46</sup> The indicated powers, present in above-mentioned form in the Polish legal system since 2008, make the institution of the Polish Ombudsman for Children unique in comparison to other independent children's rights protection bodies.<sup>47</sup>

The Ombudsman for Children also has at his disposal sufficient non-judicial measures. He is tasked to cooperate with societies, civil society movements, other associations and foundations acting for the rights of the child.<sup>48</sup> He presents to the competent authorities, organisations and bodies his evaluation and conclusions which aim at securing the

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38 Article 10(1)6 Ombudsman for Children Act.

39 Article 10(1)7 Ombudsman for Children Act.

40 Article 10(2) Ombudsman for Children Act.

41 Article 10a(1) Ombudsman for Children Act.

42 Article 10a(2) of the Ombudsman for Children Act.

43 Article 10a(3) of the Ombudsman for Children Act.

44 Article 10a(4) of the Ombudsman for Children Act.

45 Article 10a(5) of the Ombudsman for Children Act.

46 Article 10b of the Ombudsman for Children Act.

47 Before the 2008 Amendment the Ombudsman for Children, according to former Article 10 of the Ombudsman for Children Act, was entitled to ask authorities, organisations or institutions for explanations and information as well as to provide it with relevant documentation, including documents covering personal data. It could also ask the competent authorities, including the 'general' Ombudsman, organisations or bodies for undertaking necessary actions for the benefit of the child that would be within their scope of the authority.

48 Article 11a, Ombudsman for Children Act.

effective protection of the rights and welfare of the child and to improve the procedures adopted by the above-mentioned authorities, organisations and bodies.<sup>49</sup> He is also entitled to make a referral to the competent authorities demanding execution of their legislative initiative powers as well as to encourage them to pass new laws or to amend existing laws.<sup>50</sup> The above-mentioned authorities are supposed to state their attitude towards the Ombudsman's request within a 30 day period.<sup>51</sup> Moreover, the Sejm and the Senate are annually, no later than 31 March each year, to be provided by the Ombudsman for Children's with information concerning his activities as well as with his remarks regarding observance of the rights of the child.<sup>52</sup> The Ombudsman's report is distributed to the public.<sup>53</sup>

## **Independence of the Ombudsman for Children**

The Polish Ombudsman for Children is designed to be independent, which can be inferred from Article 7(1) of the Ombudsman for Children Act. According to this provision the body shall be independent from other state authorities and responsible exclusively to the Sejm on terms prescribed by law. The rule indicated above also arises from other provisions constituting the position of this body within the legal framework, method of the Ombudsman's appointment and removal from office, funding, remuneration and personnel issues as well as accountability.

First of all, with regard to the institution's independence, even though the majority of the provisions concerning the Ombudsman for Children are of statutory character, its anchorage in the 1997 Constitution is of great effect as it underlines the permanence of the institution: the constitutional amendment process is specifically designed so as to prevent frequent amendment.<sup>54</sup> One may observe the impact of the institution's establishment based on the constitutional provision while examining the outcome of the 2008 debate concerning possible amendments to the Ombudsman for Children Act.<sup>55</sup> As stated above, even though the view was expressed that the body could possibly be combined with the 'general' Ombudsman, making the Ombudsman for Children the first Vice-Ombudsman that would serve exclusively for the purposes of preserving the rights of the child, the concept of quashing this institution was not subject to parliamentary debate. Furthermore, this argument was in fact ignored, as parliamentarians were aiming to strengthen the powers of the Ombudsman for Children and voted for the Amendment.

Another aspect which is relevant to the independence of the Ombudsman for Children is the method of his/her appointment and removal from office. In Poland, the Ombudsman

49 Article 11(1), Ombudsman for Children Act.

50 Article 11(2), Ombudsman for Children Act.

51 Article 11(3), Ombudsman for Children Act.

52 Article 12(1), Ombudsman for Children Act.

53 Article 12(2), Ombudsman for Children Act.

54 For an identical opinion concerning the institution of Namibia's Ombudsman, see Ruppel-Schlichting (2008).

55 Biuletyn No. 677/IV (op. cit.), p. 3-13.

for Children is appointed by the Sejm with the approval of the Senate on the proposal of the Sejm Martial, the Senate Martial, a group of no fewer than 35 Members of Sejm or a group of no fewer than 15 Senators.<sup>56</sup> The Sejm votes over the the procedure of proposing candidates,<sup>57</sup> and subsequently over proposed candidates. After appointment of the Ombudsman for Children the Sejm Martial sends promptly, that is without undue delay, the Sejm's resolution to the Senate Martial.<sup>58</sup> From that moment the Senate has one month to give its consent by resolution to the appointment of the Ombudsman for Children elected by the Sejm. Lack of adoption of such a resolution by the Senate means its silent consent.<sup>59</sup> In instances where the Senate opposes the choice made by the Sejm, the Sejm is supposed to repeat the whole procedure and appoint another person.<sup>60</sup>

Another safeguard for the Ombudsman for Children independence is the construction of its term of office. It lasts 5 years,<sup>61</sup> which does not overlap with the 4 year term of the Parliament.<sup>62</sup> The same person may serve a maximum two subsequent terms.<sup>63</sup> The term of office of the Ombudsman is terminated in case of his/her death or removal from office.<sup>64</sup>

The Ombudsman for Children's independence is also supported by the conditions of the removal process. Before the expiry of the Ombudsman for Children's term of office, the Sejm, acting with the approval of the Senate, is empowered to remove him/her from the office for specified causes set out by law, such as the Ombudsman's formal resignation, his/her incapacity on health grounds confirmed by the relevant medical certificate, gross misconduct or conviction for an intentional offence.<sup>65</sup> The voting procedure concerning the Ombudsman's removal from the office resembles the process of his/her appointment.<sup>66</sup>

As was stated above, it is possible for the Sejm to remove the Ombudsman for Children from office in cases of his/her conviction for an intentional offence. In this respect it should be added that the Ombudsman enjoys immunity, as he/she cannot be subject to

56 Article 4(1), Ombudsman for Children Act.

57 Article 4(2), Ombudsman for Children Act.

58 Article 4(3), Ombudsman for Children Act.

59 Article 4(4), Ombudsman for Children Act.

60 Article 4(5), Ombudsman for Children Act.

61 Article 6(1), Ombudsman for Children Act.

62 Prof. K Działocha, persuaded the parliamentarians to adopt the above-mentioned provision in order to separate the term of office of the Ombudsman for Children and the Parliament, by saying:

If we equip the Ombudsman for Children with attribute of independence and autonomy, it is an argument against 4 year term, that would overlap with the term of the Parliament. This is an argument for 5 year term of office, as in case of the Ombudsman.

See Biuletyn No. 1776/III, (op. cit.), p. 7.

63 Article 6(3), Ombudsman for Children Act.

64 Article 6(2), Ombudsman for Children Act.

65 Article 8(1), Ombudsman for Children Act.

66 Article 8(2)–(4), Ombudsman for Children Act.

criminal proceedings or deprivation of liberty without the formal consent of the Sejm. It is forbidden to detain or arrest the Ombudsman for Children, except if he/she is caught red-handed and under the additional condition that his/her detention would be necessary to secure the proper conduct of the proceedings. The Sejm Martial, who should be informed about such an arrest immediately, is entitled to release the detainee.<sup>67</sup>

To ensure that professional considerations do not influence the Ombudsman for Children's impartiality the body is also subject to *incompatibilitas* regulations. According to Article 7(3) of the Ombudsman for Children Act a person holding this position is not allowed to occupy any other position or post, except for holding a position of university professor. It is also forbidden for the Ombudsman to be a member of any political party or to undertake public work that would be contrary to his/her duties and responsibilities.

Other relevant safeguards of the Ombudsman for Children's impartiality and his/her pro-child approach are the provisions concerning the selection criteria. According to Article 1 (4) of the Ombudsman for Children Act a person appointed should be the Polish citizen, exercising full capacity to undertake legal transactions and enjoying all public rights, without a prior criminal record concerning intentional offences. Moreover, the Ombudsman for Children is expected to have a masters degree, with at least 5 years' experience in working with or for the benefit of children. A candidate should be also of blameless character. He/she is expected to be exemplary in moral character and social concerns.<sup>68</sup>

The above-mentioned requirements were specified in the 2008 Amendment to the Ombudsman for Children Act. Prior to the Amendment the Polish law lacked criteria for the selection of candidates. However, even before the entering into force of the 2008 Amendment the Parliament tended to use similar criteria for the purpose of selecting the best candidate. It may be observed, however, that according to both prior and current regulations, the Ombudsman for Children does not have to possess any legal qualification.<sup>69</sup> The emphasis is more on moral values and a pro-child approach than on the professional background of the candidate. In terms of management, the Ombudsman for Children is supposed to play the role of leader rather than manager within his/her Office. That is fully understandable as management is a function that must be exercised in any business, whereas leadership is a relationship between leader and the led that

67 Article 7(2), Ombudsman for Children Act.

68 In comparison, the 'general' Ombudsman is expected to be a citizen who distinguishes himself/herself with his/her legal knowledge, professional experience and his/her prestige deriving from his/her moral values and social sensitivity. See Article 2 of the Ombudsman Act.

69 Prof. M Piechowiak, the First Ombudsman for Children is a philosopher, senior lecturer of the Zielona Góra University and the Poznan Adam Mickiewicz University, with excellent human rights background. P Jaros, the Second Ombudsman for Children, is a lawyer and former judge, lecturer of the Cardinal Stefan Wyszyński University in Warsaw. E Sowinska, the Third Ombudswoman for Children is a medical doctor. M Michalak, the current Ombudsman for Children, is a pedagogue and rights-of-the-child activist.

can energise an organisation.<sup>70</sup> In case of dealing with children's issues child-oriented leadership is vital for gaining acceptance and trust of the body in the eyes of children. Otherwise it could easily remain paternalistic institution governed by adults for adults.

The Ombudsman for Children's Office operates on the foundation of the Statutes set out by the Sejm Martial.<sup>71</sup> The Ombudsman's expenditure and other expenses regarding its Office is financed by the State Budget, which has its basis in the Budgetary Statute.<sup>72</sup>

It should also be stated that according to the 2008 Amendment the Ombudsman for Children is finely entitled to have a deputy.<sup>73</sup> which could be helpful in case of business trips and work overload. The Vice-Ombudsman for Children may be appointed by the Sejm Martial at the request of the Ombudsman for Children. However, it is up to the Ombudsman for Children to decide on the scope of responsibilities of his/her deputy.<sup>74</sup>

Bearing in mind the above considerations one may say that the Polish Ombudsman for Children meets all the necessary requirements for an independent national human rights institution promoting and protecting the rights of the child, as enumerated in the General Comment No. 2 of the UN Committee on the Rights of the Child.<sup>75</sup> The body is also recognised as a full member by the European Network of Ombudspersons for Children (ENOC), an organisation that links independent offices which have been established in European countries to promote the human rights of children. The organisation recognises two categories of member institution – full and associate. Full members are those which fully meet the standards of independence, whereas associate membership may be offered to institutions that demonstrate that they are actively seeking to meet the criteria.<sup>76</sup>

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70 Maccoby (2000).

71 Article 13(1)–(2), Ombudsman for Children Act.

72 Article 14, Ombudsman for Children Act. According to Article 219 of the 1997 Constitution, the Sejm adopts the state budget for a fiscal year by means of a budget (*ustawa budżetowa* - budgetary statute).

73 Article 13(3), Ombudsman for Children Act.

74 Article 13(4), Ombudsman for Children Act.

75 General Comment No. 2 (2002) of the UN Committee the Rights of the Child of 15 November 2002 on the role of independent national human rights institutions in the promotion and protection of the rights of the child, adopted at the Thirty-second Session of the Committee on 13–31 January 2003.

76 According to Article 4 of ENOC Statutes –

[t]here are two categories of membership of ENOC – full and associate. Full membership of ENOC is open to independent children's rights institutions within Council of Europe member-states which meet all of the following criteria: (1) The institution is established through legislation approved by parliament, which provides for its independence; (2) The institution has the function of protecting and promoting children's rights. This function is established through legislation; (3) There are no provisions in the legislation which limit the institution's ability to set its own agenda in relation to this function, or which prevent it carrying out significant core functions suggested in the Paris Principles and ENOC's Standards; (4) The institution must include or consist of an identifiable person or persons concerned exclusively with the protection and promotion of children's rights; (5) Arrangements for appointment of ombudspersons, commissioners and members of a commission must be established by legislation, setting out the term of the mandate

## **The Ombudsman for Children in Poland as possible model for Namibia**

The Polish Ombudsman for Children is a good example of a well designed and effective institution that was recently improved by making the 2008 Amendment to its legal framework. The advantages of having such a body within the legal system have been acknowledged by other states. For example, the Polish Ombudsman for Children, P. Jaros, served as consultant for the purposes of creation analogical institutions in other European states. On 9 July 2003 he consulted the Parliament of the Italian Republic, whereas on 25-26 September 2003 he took part in the discussion with the ministers responsible for children's issues among the European Union Member-States and the then Candidate States.<sup>77</sup> On 25 May 2004 he also consulted the Government of the Republic of Hungary.<sup>78</sup> Currently, after the entering into force on the 2008 Amendment, the Ombudsman for Children, M Michalak, is also involved in a consultation process with several European states.

On the other hand, as it was stated above, the institution of the Polish Ombudsman for Children was originally modelled on the Norwegian model; however, it did not survive even a decade in this form. The Parliament, making the 2008 Amendment adjusted the institution to the needs and expectations of society. Poland became familiar with other national human rights institutions and legal organs, executing various judicial powers, such as the 'general' Ombudsman or the public prosecutor. That created a demand to empower the Ombudsman for Children and to close the gap between his position and the position of the 'general' Ombudsman. The lesson is clear – while designing new legal institution it is advisable to adjust it to local demands and expectations, taking into account the existing legal framework. However, this finding should not be interpreted as prohibiting the duplication of good practices confirmed by the practice and experience of other states.

In this context it may be stated that there are three pillars that make the Polish Ombudsman for Children unique, namely its independence, its autonomy and the scope of its powers.

It is vital to emphasise that having an independent human rights protection body dealing with the rights of the child is not a standard either in Europe or in the world. For example, as far as European institutions are concerned, of 35 ENOC members only 25 enjoy full membership. The rest lack the quality of independence.<sup>79</sup> It should be seen as an enormous advantage of the Polish legal system that it managed to develop a child-oriented

and arrangements for renewal, if any.

See ENOC's website, <http://crin.org/enoc/>; last accessed 17 September 2009.

77 *Informacja Rzecznika Praw Dziecka o działalności za rok 2003*, Warsaw 2004, p. 126.

78 Jaros (2006:99).

79 See again the ENOC's web-site <http://crin.org/enoc/members/index.asp>; last accessed 17 September 2009.

independent human rights institution, rather than adopting one of the ideas that would involve establishment of an administrative authority dealing with children's matters.

The issue of Namibia creating its own independent human rights institution for children is worth considering. The Polish example shows that such institution has its unique value to securing preservation of human rights in the context of child-related issues. The manner, however, of securing the Ombudsman for Children's independence should be adjusted to the local context and should be compatible with the legal system of Namibia.<sup>80</sup> An excellent domestic example exists already, as the institution of the Namibian Ombudsman enjoys the necessary foundations for its independence that have been built by many legal and constitutional provisions.<sup>81</sup>

The other asset of the Polish Ombudsman for Children is its autonomy, understood as its functional and organisational separation from any other institution, organisation or authority, such as the 'general' Ombudsman.

Of course, according to the General Comment No. 2 of the UN Committee on the Rights of the Child designing the independent human rights institution for children as autonomous body is not compulsory, as rule No. 6 reads as follows:

Specialist independent human rights institutions for children, ombudspersons or commissioners for children's rights have been established in a growing number of States parties. Where resources are limited, consideration must be given to ensuring that the available resources are used most effectively for the promotion and protection of everyone's human rights, including children's, and in this context development of a broad-based NHRI that includes a specific focus on children is likely to constitute the best approach. A broad-based NHRI should include within its structure either an identifiable commissioner specifically responsible for children's rights, or a specific section or division responsible for children's rights.

Also according to the ENOC Statutes, "institutions may be constituted separately or may form part of an independent national or regional human rights institution".<sup>82</sup>

To support the argument that children deserve their own institution, one may quote the preamble to the Convention on the Rights of the Child that –

... children's rights require special protection and call for continuous improvement of the situation of children all over the world, as well as for their development and education in conditions of peace and security.

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80 The remark refers, inter alia, to term of office, method of appointment and removal process, as well as the possibility to appoint proxies and the basic requirements for being appointed to the post.

81 Ruppel-Schlichting (2008:289).

82 Article 4, ENOC Statutes.

One may also argue that the 'general' Ombudsman is, from its very nature, associated with the world of adults, and naturally lacks children's trust.<sup>83</sup> Indeed, separation of the Ombudsman for Children may bring many non-judicial and non-economic advantages.

First and foremost it mainstreams children's issues and emphasises the pro-child approach present both in the legal system and the Government's policy.

Secondly, the specialisation focusing exclusively on the rights of the child may be perceived as an asset itself. It reduces reaction time and also influences the body's conduct, including the manner of dealing with individual cases.

Thirdly, autonomy of the institution may influence the way of perceiving the child-related issues by the Ombudsman for Children itself and the staff within the Office, making their approach the least paternalistic. That should indicate an increase of level of the children's trust in their 'own' human rights institution and, subsequently, that could encourage them to turn to it in crisis situations. The Polish experience shows that such trust can be gained by using certain child-oriented techniques, such as making social campaigns, writing letters to children that could be distributed at certain school events, establishing a children-friendly web-site or a hot-line or eventually even by blogging.<sup>84</sup> Such activities, if conducted by any respectful lawyer, preferably with an academic background and/or impressive judicial experience, appointed for the position of the 'general' Ombudsman, could be perceived as silly and childish, both in Poland and Namibia.<sup>85</sup> Whereas such acts while performed by the separate body seem to be acceptable, or even preferable, as they serve as tools for gaining the children's trust.

The third advantage of the Polish Ombudsman for Children is the scope of its powers. As it was stated above, the range of its competencies is very wide and unique in world terms, especially as far as its judicial powers are concerned. At the domestic level, however, it is neither wide nor unique, as the Ombudsman for Children shares similar powers to other national human rights institutions and legal bodies.

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83 Such an argument was used *inter alia* by Senator M Łopatkowa in her article "Spór o Rzecznika Praw Dziecka" of 10 February 1995, published in the *Rzeczpospolita* newspaper, quoted in Jaros (2006:52).

84 It should be stated that in Poland blogging is rather a domain of the 'general' Ombudsman, whereas the Ombudsman for Children addresses children *via* regular post, sending his personal greeting on certain occasions, such as the beginning of the school year. See the Ombudsman for Children's website: <http://www.brpd.gov.pl/>; last accessed 17 September 2009. See also the Ombudsman's official blog: <http://blog.brpo.salon24.pl/>; last accessed 17 September 2009.

85 Reference is made to Namibian law and practice, as according to Article 89(4) of the Namibian Constitution, the selection criteria for the Ombudsman are rather restrictive. The candidate for the position should be either 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. See Ruppel-Schlichting (2008:229).



There is no doubt whatsoever that executing such powers increase the effectiveness of its actions. As was stated by J Kochanowski, <sup>-86</sup>

[i]n those countries, including Poland, where the Ombudsman has the right to direct his legal measures to independent bodies – courts and tribunals – his role, position and effectiveness are greater. This effectiveness in Poland, in the case of cases ending at the level of administrative bodies, is around 20-25%. In cases, however, in which the Polish Ombudsman appeals against acts or administrative actions and court judgements to the appropriate courts and the Constitutional Tribunal, this effectiveness is around 85-88%.

The question is, whether Namibian legislators, accustomed to the Ombudsman following more the approach of alternative dispute resolution, would be eager to empower any independent human rights protection body with the coercive powers typical of formal justice systems.

## Concluding remarks

National and international human rights protection mechanisms are present in every-day existence of modern societies all over the Globe, including Namibia and Poland. The question of whether the states should or should not respect their obligation to protect and promote human rights within their jurisdiction is no longer an issue. It is rather the segmentation and specialisation of the human rights protection system within the states that are a challenge in the world of today.

However, taking into account the developments in the field of human rights protection mechanisms that have occurred during the last decades at the international, regional and national level worldwide, it may be presumed that the process of segmentation and specialisation of such protection will continue. It is quite likely that one day not only children, but also women, persons belonging to vulnerable groups,<sup>87</sup> or even certain occupational groups as well as other sub-populations extracted on any possible grounds will be entitled to turn to bodies focused exclusively on their needs and expectations.

In this respect one may say that in 1997 Poland made its first move towards reaching a post-modern approach to the Ombudsmen system of human rights protection by establishing an institution designed exclusively for the protection and promotion of the rights of the child. In other words, within the national legal framework a body has been created to serve one, defined group within the population. In 2009 the Ombudsman for Patients, a central organ of patient's rights protection, executing similar powers to the 'general' Ombudsman and to the Ombudsman for Children, supervised by the Committee of Ministers, was established, in order to improve the level of state health care system.<sup>88</sup>

86 Statement made by Dr J Kochanowski on 11 July 2006 in Vienna, p. 52.

87 Basically the notion of persons belonging to vulnerable groups may be associated with children, minorities, indigenous people, migrant workers, disabled persons. See Lawson & Bertucci (1996).

88 See the Rights of the Patient and the Ombudsman for Patients Act (Pol. ustawa o prawach

However, from today's perspective, it is still quite hard to judge whether the state would be eager to make further steps towards the break-up of the 'ombudsmen market', as national debate concerning possible establishment of the Ombudsman for Women and Equality<sup>89</sup> or Ombudsman for the Army<sup>90</sup> is, so far, at the very initial stage.

Another question is whether the Namibian legislator would be interested in the splitting of the domestic ombudsmen system. Should the answer be "Yes", it would be advisable to look for inspiration to other legal systems. Perhaps one day the Republic of Namibia will follow, at least to some extent, the Polish pattern, having adapted foreign ideas to the local situation.

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89 See the outcome of the Polish Women's Congress (Pol. Kongres Kobiet Polskich), held on 20–21 June 2009 in Warsaw. L Kaczyński, President of the Republic of Poland; D Tusks, Prime Minister; B Komorowski, Sejm Marial; as well as other parliamentarians have already been acquainted with the idea by the Congress representatives. See the Congress website <http://www.kongreskobiet.pl/index.php/postulaty/parytety/47-parytet-i-rzecznik-oczami-politykow>; last accessed 17 September 2009.

90 See the project of the Ombudsman for the Army Act, prepared by the Social Democratic Party of Poland; available at the Party's website <http://www.sdpl.pl/index.php/ida/608/>; last accessed 30 October 2009.