



COMMISSIONER FOR HUMAN RIGHTS  
COMMISSAIRE AUX DROITS DE L'HOMME



CommDH/Speech(2017)3  
*English only*

## ***Populism? Human Rights Regression and the Role of the Ombudsman***

IOI Europe Conference  
3-4 April, Barcelona

### **Keynote speech by Nils Muižnieks**

Commissioner for Human Rights of the Council of Europe

Excellencies, ladies and gentlemen, dear colleagues!

It is a great pleasure to be back in Barcelona – I was last here as a student 36 years ago. I am particularly pleased to be among so many friends and comrades-in-arms. Today, I would like to address three issues: 1) the human rights crises, backsliding and broader challenges to the European human rights system that have characterised the five years since I began my mandate; 2) how the recent upsurge in populism has exacerbated these challenges; and 3) the role of the ombudsman in this mess.

Since I took up office five years ago, I have had numerous crises to contend with.

My first crisis was the economic crisis and the social destruction it left in its wake. While many countries were and still are suffering the human rights consequences of austerity, the most dramatic case study is that of Greece, where for some time a Nazi party threatened to upend the system. The economic crisis continues to take its human rights toll on the situation of persons with disabilities, older persons, children, refugees and other groups.

My second crisis was the Ukraine crisis, which started in late 2013, when endemic corruption and brutal police violence sparked the Maidan revolution. However, the crisis also occasioned Russia's actions in Crimea, where a crackdown continues, and the onset of conflict in the East, which has led to some 10,000 deaths and more than a million displaced.

My third crisis was the migration crisis, which had been percolating for some time, but exploded onto Europe's agenda in 2015 and 2016. What have we seen? Large numbers of deaths at sea, regular reports of pushbacks at land and sea borders, attempts to enshrine pushbacks in legislation, the building of fences, the highly problematic EU-Turkey statement, the lack of solidarity with front-line countries, and now, a race to the bottom to make one's country less attractive for migrants.

These Europe-wide crises have been accompanied by significant human rights backsliding in individual Council of Europe member states. While backsliding has taken place in many countries, especially in migration and asylum policy, five emblematic cases stand out for the broader regression that has taken place.

Since 2011-2012, the Russian Federation has progressively restricted freedom of association, freedom of assembly, and freedom of expression. Two initiatives are emblematic: the tarring of advocacy NGOs receiving funding from abroad as "foreign agents" (i.e., spies) and the broad campaign against LGBTI persons carried out under the umbrella of banning "homosexual propaganda". Rather than accept the pejorative label of being a "foreign agent" and submit to onerous administrative requirements, many human rights NGOs have shut down operations. LGBTI persons not only have an extremely difficult time in organising Prides and other events, they have reported a spike in hate crimes.

In Hungary the same period witnessed efforts by the government to encroach upon the independence of the judiciary and the media, while implementing smear campaigns against NGOs and harassing them with inspections. Most pointedly, in what I have said amounts to “institutionalised xenophobia”, the government has organised regular anti-migrant propaganda campaigns and implemented a harsh policy against irregular arrivals.

Since summer 2014 the government in Azerbaijan has carried out a broad crackdown targeting many of the country’s main human rights defenders, who were imprisoned on trumped-up charges. While some have been released, many remain under travel bans and continue to face a very hostile environment for human rights work, including as a consequence of highly restrictive NGO legislation. As a result, a number of defenders have discontinued their human rights work or gone into exile.

Since late 2015, the Polish government appears to have drawn inspiration from Hungary and has undermined the independence of the Constitutional Tribunal and implemented a purge of the public service broadcaster. It has also instituted new restrictions on freedom of assembly.

Since the Gezi events in 2013, the Turkish government has demonstrated increasing intolerance of criticism and dissent. Efforts to restrict media freedom and encroach on the independence of the judiciary have gone hand-in-hand with the resumption of a brutal counter-terrorist operation in the South East, which has left hundreds of thousands displaced. The deterioration of the human rights situation accelerated after the failed coup attempt in summer 2016 and the broad crackdown that followed.

In addition to backsliding in individual member states, we have witnessed the accumulation of indirect and direct challenges to the functioning and very existence of the European human rights system. The most significant indirect challenge to the system is the long delay in implementing judgments of the European Court of Human Rights. According to the Court the average time overall is 5.5 years, while in some countries the lag is significantly longer. I was taught that justice delayed is justice denied.

Direct challenges to the system come in a variety of forms. One is defiance of the Court or attempts to subvert or avoid implementing judgments. The United Kingdom has been a prominent “trailblazer” in this realm, refusing to implement judgments on prisoners’ voting rights for many years, claiming the Court has no right to adjudicate on such matters.

Russia has posed another type of direct challenge, amending its legislation such that its Constitutional Court may rule on whether it is possible to implement judgments of the Strasbourg Court. Not surprisingly, it found it “unconstitutional” to implement a Strasbourg Court judgment on prisoner’s voting rights. Next came a decision finding it “impossible” to implement a Strasbourg Court judgement in the Yukos case, in which the government was found liable for 1.5 billion euros for having unlawfully nationalised the country’s largest private oil company.

While the Strasbourg Court is increasingly being challenged, so are other bodies of the Council of Europe. In recent years, we have witnessed a multiplication of cases of non-cooperation with the monitoring mechanisms, expert bodies and my Office. Rapporteurs from the Parliamentary Assembly have been barred entry to a country, the Venice Commission has received a letter from a government fuming about its alleged incompetence and “political” and “partisan” opinions. The whole system is creaking.

To this add what many are calling a resurgence of populism on the European continent. “Populism” is not a human rights term, but a social science term. I am not particularly fond of the term, as it is often used in a less than rigorous way to describe a vast array of movements and political parties or even styles of politics. There seems to be agreement that “populists” can be on the far-left of the political spectrum, such as Podemos in Spain or Syriza in Greece. The programmatically eclectic 5 Star Movement in Italy is also often termed “populist”.

Most often, however, commentators use the terms to describe right or far-right movements and parties, such as Marine Le Pen’s Popular Front, Austria’s FPÖ, Geert Wilders’ Party for Freedom in the Netherlands, Viktor Orbán’s Fidesz in Hungary, Law and Justice in Poland, and UKIP and the

militant Brexit wing of the British Tories. More recently, the Trump phenomenon in the United States is also cited as an instance of the populist moment.

What do these groups have in common, if anything? Do they share any common root causes? Most of them represent a revolt against “politics as usual” and the dominant role of mainstream centre-left and centre-right parties. Their programmes and rhetoric often rail against the corruption of those parties. Their success appears to be fuelled by a broad rejection of globalization and the inequality, insecurity and sense of powerlessness it has engendered. All of these parties share an anti-elitist ethos, even if the anti-establishment rhetoric is being used by billionaires and Oxbridge-educated politicians. They all claim to speak for the “common people” and have a fondness for referenda – “letting the people decide”.

From a human rights perspective, an anti-elitist stance is not problematic per se, as a human rights prism would direct one’s attention to the most vulnerable in any context. However, the targets of populist rhetoric are occasionally (not always) liberal, European human rights elites and the system they represent. Moreover, referenda are not problematic per se, unless the people are being asked to support measures which run clearly counter to international human rights norms, such as the ban on minarets in Switzerland, or constitutional amendments severely restricting the independence of the judiciary in Turkey. Similarly, the Hungarian government organised a “consultation” asking the public loaded questions linking migration to crime and terrorism, thereby reinforcing false, negative stereotypes.

While populists claim to represent the people, they often defend a crude majoritarianism which denies the legitimacy of minority or opposition viewpoints and checks and balances more broadly. Thus, when populists turn against constitutional courts and watchdog NGOs, human rights alarm bells should ring. When the “people” defended by populists are an imagined homogeneous community, migrants and minorities may come under threat. If, in addition, this homogenous community is portrayed as one appropriately dominated by traditional patriarchal families, then LGBTI and women’s rights tend to suffer as well.

What is the role of the ombudsman in this mess? Ombudsmen are in a unique position, as they are meant to be defenders of the people as well, even against those who would lay claim to represent the people. Ombudsmen are ideally situated to build bridges between civil society and the authorities, between the vulnerable and dispossessed and decision-makers. Ombudsmen are also meant to be a check on the unbridled power of governments. Thus, if ombudsmen do their jobs well, they will become the target of populists.

One important role ombudsman can play is addressing the root causes of populism by tending to the needs of the dispossessed and combatting bad governance. There are many examples of ombudsmen doing excellent work in the context of the economic crisis to help the most vulnerable. Here, I have in mind the work of the Spanish ombudsman with persons unable to pay their mortgages and that of the Portuguese ombudsman on the rights of children, persons with disabilities and older persons. I have in mind the work of the Scottish and UK human rights commissions on austerity budgets and that of the Latvian ombudsman on social and economic rights.

While all ombudsman deal with improving government administration, some have directly addressed the issue of corruption, which is often a populist focus. Thus, the previous Armenian ombudsman issued a very hard-hitting report on corruption in the judiciary. The European Union ombudsman recently drew attention to ethical questions surrounding the former European Commission president’s professional pursuits upon leaving office.

A second important role ombudsmen can play is to stand up for those who fall outside the scope of the “people” populists claim to represent – especially migrants and minorities. In this realm, the four Central and East European ombudsman stood in sharp contrast to their governments when they adopted a joint statement on migrants’ rights. The Croatian ombudsman did excellent awareness raising work during the huge transit of migrants through her country. The French ombudsman has highlighted the risks of stigmatizing Muslims during the state of emergency.

The Georgian ombudsman plays a very important role in facilitating dialogue between minorities and the government. Also noteworthy is the work done by all those Ombudsmen that as 'equality bodies' work systematically against ethnic, religious and other forms of discrimination.

A third role for the ombudsman in facing the populist challenge is to be a check on the government when it seeks to encroach on the powers of the judiciary or parliament. Here, the Polish ombudsman and his many applications to the Constitutional Tribunal challenging laws exemplifies what can be done in this regard. In a different context, one where there is significant public demand for a "strong hand" against terrorism, the French ombudsman has played a useful role in monitoring and mitigating excesses under the state of emergency.

The aforementioned tasks of the ombudsman are difficult to implement in the best of circumstances, but particularly challenging when populists have seized the initiative and human rights crises abound. I have tried to support and help ombudsman throughout Europe. I look forward to continuing to do battle with you and for you. Our small human rights armies are scattered across Europe, we have many wounded, and some of our friends are under siege. We must regroup, tend to our wounded, think strategically and prepare for a long war.