

Ombudsman as a body protecting human rights

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Abstract— The paper begins with an outline of history of the institution of ombudsman and its place in the Polish legal system. The main body of the paper contains the description of the scope of activities of the Polish Ombudsman (in Polish nomenclature ‘the commissioner for the protection of civil rights’). The duties of the Ombudsman include: supporting individuals in their claims, filing petitions to the Constitutional Tribunal, public appearances, filing enquiries to the Supreme Court and to the Supreme Administrative Court. The institution of ombudsman is well grounded in the Polish legal system which fosters the efficacy of this post. Having in mind a big number of successful interventions of the Polish Ombudsmen, Polish organs creating and enforcing law are more vigilant and careful in their actions.

Index Terms— commissioner for the protection for civil rights, ombudsman, citizen rights, protection of human rights.

I. INTRODUCTION

The institution of a government appointee responsible for protection of civic rights called ombudsman goes back to a 17th century Swedish office with the same title (ombudsman), whose task was to supervise the king’s officials with respect to correctness and reliability of their actions (Prusak, and Wielec, 2013). The first ombudsman took his post during the reign of King Charles XII in 1709 [according to other sources in 1713 (Garlicki, 1989)]. With time similar institutions started to appear also in other countries. Nowadays the function dedicated to protection of rights and freedoms of individuals may be encountered even in states where the democratic system is not yet well grounded (Ombudsmeni krajowi. Zbiór regulacji prawnych, 1998). Currently more than 110 countries all over the world declare the existence of the ombudsman institution, which in different countries may come under a different name e.g. ‘the people’s advocate’ in Austria and Albania; ‘the chancellor of justice’ in Estonia, ‘the mediator’ in France; ‘the defender of the people’ in Spain; ‘the commissioner for the protection of civil rights’ in Poland. The legal orders of the European Union and the Council of Europe also have their ombudsmen.

II. OMBUDSMAN AS A CONSTITUTIONAL ORGAN

In Poland this single person state organ emerged pursuant to the act of 1987, and became a constitutional organ in 1989. The place of ombudsman in the Polish political system is defined in the Constitution of the Republic of Poland of 2 April 1997 and in the Act on the Ombudsman for civil rights of 15 July 1987. In the Constitution five articles are devoted to the notion of the Ombudsman i.e. articles 208–212 of Chapter IX ‘Organs of State Control and for Defence of Rights’, which considerably strengthen the position of the Ombudsman. Basic regulations for competences of ombudsman can also be found in articles 80 and 191 point 1 of the Constitution. Article 208 of the Constitution stipulates that the Ombudsman for Civil Rights upholds human rights and freedoms written down in the Constitution and in other legal acts. All activities to be performed by the Ombudsman have one goal: to protect the rights of a human being and of a citizen. The ombudsman examines current events in case they find that due to intentional actions (or lack thereof) by agencies, organizations or institutions which are duty bound to respect freedoms and rights of the people, these freedoms and rights were violated or the rules of coexistence or social justice were breached [article 1 item 3 of the Act on the Ombudsman for civil rights]. The Ombudsman is an autonomous and independent organ which fortifies this post against other state organs [article 210 of the Constitution].

The Polish Ombudsman is appointed by an act of Sejm and has to be accepted by the Senate upon request of the President of the Polish Parliament or a group of 35 MPs. The term of office is five years. This special vacancy can only be filled by a Polish citizen with distinguished knowledge of law, professional experience and high moral authority. Pursuant to article 212 of the Constitution the Ombudsman is obliged to submit to the Polish Parliament annual information on his/her activities and a report of the observance of human rights and freedoms of a citizen in Poland. Currently the seventh term of the Ombudsman is in progress with doctor Adam Bodnar



exercising the role.

The institution of Ombudsman has been working well in Poland with a history of great achievements in the field of protection of human rights on record. Initially, the institution was only legitimized by means of a legal act which proves that the administration of that time did not expect the Ombudsman would gain in importance and flourish to its present form. T. Zieliński remarked that *political leaders of that time in order to pacify increasing social unrest 'gave to the people' a democratic institution thinking they are only giving them a populist ornament. Little were they aware of its authentic, truly democratic function* (Zieliński, 1996) (Łętowska, 1992). The very first commissioner for civil rights in Poland, professor Ewa Łętowska was only to create space for the post of ombudsman and safeguard its full independence, yet she has left a legacy which at that time was not easy to achieve (Łętowska, 1992) (Łętowska, 1992). T. Zieliński continues: *appointed by Sejm in 1987, Ewa Łętowska turned out to be a competent person making full use of the powers granted to the office of Ombudsman by the Act of 1987* (Zieliński, 1996).

III. SUBJECT AND SCOPE OF THE OMBUDSMAN'S ACTIVITIES

The Ombudsman's duty is to protect the rights of individuals. The scope of the Ombudsman's activities is specified in article 208 of the Constitution. Under protection of the Ombudsman are: the citizens of Poland, foreigners - within the scope of their rights and freedoms [article 1 of the Ombudsman Act], as well as stateless persons, under the jurisdiction of the Republic of Poland. According to Article 80 of the Constitution, everyone has the right to turn to the Ombudsman for help and advice (Zoll, 2006). There is no fee charged for the services of the Ombudsman and no special form of the request is required. From the provisions of article 80 it is clear that anyone who claims that his or her rights and freedoms have been infringed may ask the Ombudsman for help in protecting these values. Moreover, article 8 of this Act stipulates that the Ombudsman may undertake steps provided for in the Act, upon receiving information indicating infringement of rights, it also includes information broadcast by mass media. Thus, the Polish Ombudsman may act on his/her own initiative and upon request of the Children's Ombudsman because the rights of children are, naturally, also under the Ombudsman's protection.

The term 'everyone' in article 80 of the Constitution covers not only natural persons - every citizen as an individual - but also legal persons or social organizations and associations (Trzeciński, 2000). The right to submit a complaint to the Ombudsman is granted to many entities, which results in the Ombudsman receiving thousands of applications each year [only in Q1 2013 the Ombudsman's Office received 1717 citizens in person, answered 10,553 phone calls, sent 17, 298 letters with interventions in 11, 672 cases, registered 221 appeals, open letters and protests; in Q2 2013 there were 1,873 visits to the Office, 9,611 phone calls, 17,201 letters in 11,424 cases and 299 appeals, open letters and protests]. Although the Polish Act on the Ombudsman offers the possibility to appoint field attorneys, it does not solve the problem of a mountain of

complaints that are filed to the Office of Ombudsman on daily basis. It should be pointed out that in other countries, the duties of the national ombudsman are often divided between ombudsmen of particular levels. Thus, an Ombudsman operating at the central level receives an average of 11,700 complaints per year, a regional ombudsman - 3800, a local and municipal ombudsman - 455. While, the British Ombudsman, receives only 700 complaints a year, the Polish Ombudsman is struggling with thousands and thousands (Banaszak, 2012). What is more, the Polish Ombudsman has the right and duty to protect the rights and freedoms of applicants not only from the state organs, but also in relation to non-state subjects who exercise the civil rights and freedoms in their activities [it is also worth mentioning that despite the fact that entities authorized to submit motions initiating proceedings of the Constitutional Tribunal are numerous, most of such motions are usually submitted by the Ombudsman].

From the objective point of view, the Ombudsman enjoys the same rights as the prosecutor, but the cases for the Ombudsman must have a clear indication of infringement of civil rights and freedoms. The mere fact that law has been broken is not sufficient to take the case to the Ombudsman. The civil rights and freedoms are listed in the Constitution and include: the right of succession (article 21); freedom of the person (article 31); the right to equal treatment and non-discrimination (article 32); equal rights of men and women (article 33); right to Polish citizenship by birth to parents being Polish citizens (article 34); freedom for ethnic minorities to maintain and develop their own language, to maintain customs and traditions, and to develop their own culture (article 35); right to protection by the Polish State for Polish citizens while abroad (article 36); legal protection of the life of every human being (article 38); freedom from scientific experimentation, including medical experimentation, without voluntary consent (article 39); freedom from torture or cruel, inhuman, or degrading treatment or punishment as well as corporal punishment (article 40); right to personal inviolability and security (article 41); the right to defence (article 42); the right to a fair and public hearing of his case (article 45); the right to legal protection of his private and family life (article 47); the right to rear their children in accordance with parents' own convictions (article 48); inviolability of the home (article 50); the right not to disclose information concerning his person (article 51); freedom of movement as well as the choice of place of residence (article 52); freedom of conscience and religion (article 53); freedom to express opinions (article 54); freedom of peaceful assembly (article 57); freedom of association (article 59); right of access to the public service (article 60); the right to obtain information on the activities of organs of public authority (article 61); the right to participate in a referendum and the right to vote (article 62); the right to submit petitions (article 63). However, the catalogue of rights and freedoms is not limited to those enshrined in the Constitution. The ruling of the Constitutional Tribunal of 25 February 2002 derives from article 30 of the Constitution, an order of protection of (...) *fundamental human rights, which for one reason or another have not been specified in the detailed provisions of the Constitution of the Republic of*

Poland (...). The Polish Ombudsman Act does not contain a provision which would clearly state that the Ombudsman is supposed to defend human rights, however, as mentioned earlier, human rights protection is a specific mission of this Office, because civil rights are in majority included in human rights enshrined in international acts and constitutions of countries all over the world where they appear as civil rights (Łętowska, 1992) (Zieliński, 1993).

The duties of the Ombudsman are based on the Polish Constitution and other normative acts. In the aspect of Polish law, a normative act is understood as an act issued by a public authority. Therefore, not only universally binding acts but also acts of internal law will constitute the source of rights and freedoms subject to protection exercised by the Ombudsman (Garlicki, 1999). However, the notion of a normative act is not limited to legal acts only. The Polish Ombudsman does not act solely on the basis of applicable Polish law, but also on the grounds of law passed by the organs of international organizations and conventions of which Poland is a member. The already mentioned article 208 of the Constitution stipulates that the Polish Ombudsman is to protect the freedoms and rights of a human being and of a citizen, rights which are specified both in the Constitution and other normative acts. International law on human rights is an integral element of the Polish legal order. Thus, the catalogue of human rights to be guarded by the Ombudsman is very wide. The Ombudsman is also responsible for effective implementation of the decisions of international courts or judgments of the European Court of Human Rights in Strasbourg (Wróbel, 2011). The Ombudsman is obliged to take into account international regulations as the source of civil rights and freedoms protected in Poland.

IV. LEGAL INTERNATIONAL INSTRUMENTS FOR THE PROTECTION OF HUMAN RIGHTS, WHICH ARE ALSO BINDING FOR POLAND

Legal acts related to human rights as well as universal standards for the fair treatment of individuals, occupy a special position in the context of the Ombudsman's constitutional tasks in Poland. International Human Rights Covenants (Covenant on Civil and Political Rights and the Covenant on Economic, Social and Cultural Rights), the European Convention on the Protection of Human Rights and Fundamental Freedoms (Łętowska, 2008) and acts of international law - especially those that had been binding before the 1997 Constitution came into force [the previous Polish Constitution did not guarantee full protection of rights and freedoms], are the legal framework and a reference point for the Polish Ombudsman indicating standards of protection. The Polish Ombudsman must refer to international law in the field of human rights protection in order to disseminate the law which is consistent with international standards. The most important is that the provisions of Polish internal law are interpreted in accordance with international standards for the protection of human rights (compare: Trociuk, 2005).

Poland is a signee of a number of international agreements and treaties on human rights: the International Convention on

the Elimination of All Forms of Racial Discrimination (signed in 1968), the International Covenant on Civil and Political Rights and the International Covenant of Economic, Social and Cultural Rights (1977), the Convention on the Elimination of All Forms of Discrimination against Women (1980), and the Convention on the Rights of the Child and the Convention for the Protection of Human Rights and Fundamental Freedoms (1991). The provisions of these international and legal instruments are an important support for the Ombudsman as they set international standards for the protection of human rights. It is worth noting that the Ombudsman is in a position to invoke international customary law, as it is contained in binding international law (compare: Ludwikowski, 2000). Z. Zieliński observed that *In the speeches addressed to the parliament, the government and the Constitutional Tribunal, the Ombudsman recalls that specific actions of the authorities violate not only the applicable constitutional provisions, but also violate Poland's international obligations in respect of human rights* (Zieliński, 1996). However, despite Poland's accession to many international legal instruments whose subject matter is the protection of human rights, the Republic of Poland has not yet signed or ratified many important conventions and additional protocols to international agreements. This problem was raised by the Ombudsman in many general speeches, addressed primarily to the Prime Minister and heads of individual ministries [see for example the Information on Activities of the Polish Ombudsman in 2012 and the report of the observance of human rights and freedoms in Poland; Warsaw 18 April 2013].

V. PROTECTION OF RIGHTS AND FREEDOMS IN THE ACTIVITIES OF THE OMBUDSMAN

The Ombudsman is an institution providing assistance not only to entities whose rights or freedoms have been infringed. The Polish Ombudsman's duty is protecting the rights and freedoms before the violation occurs. The Ombudsman may perform his/her duties wearing a number of hats e.g. of an investigator, reformer, informer, educator and repairer (Kubiak, 1987).

VI. ACTING IN INDIVIDUAL CASES FOR CITIZENS

The investigative function allows the Ombudsman to help other institutions and state bodies in determination of the actual state of affairs in terms of human and civil rights. For example, in the first quarter of 2018, the Polish Ombudsman acting on behalf of individual citizens addressed, among others: the Minister of Justice, District Prison Service directors, penitentiary institutions, the Management Center of the Prison Service, the President of the District Court, presidents and mayors, chairmen of the city councils and municipalities, the director of the Youth Sociotherapy Center [see the Information on Activities of the Polish Ombudsman January-March 2018, Warsaw 2018, pp. 166-175]. The Ombudsman, while collecting claims from victims of various 'harms', gains awareness of legal shortcomings, inefficiencies of legal solutions and legal

loopholes. Although, the Ombudsman may not independently take any legislative initiatives he can inspire and initiate reforms, and this is already good enough (Interview with professor Irena Lipowicz, the Polish Ombudsman of VI term, 2010). The Ombudsman may bring about more perfect legislation that will fully implement the protection of human and civil rights and freedoms.

VII. FILING MOTIONS TO THE CONSTITUTIONAL TRIBUNAL

In the first quarter of 2018, the Ombudsman filed a motion to the Polish Constitutional Tribunal with respect to article 138 of the Code of Petty Offences and reported participation in the proceedings of the Constitutional Tribunal upon request from the General Prosecutor to examine the compliance of article 138 of Code of Petty Offences with the Constitution. Another case which the Ombudsman took upon request of the President of the Republic of Poland, was to examine the compliance of the provisions of the Amendment to the Act on the Institute of National Remembrance - Commission for the Prosecution of Crimes against the Polish Nation with the Constitution. Moreover, at the same time the judgment of 7 February 2018 ended proceedings of the Constitutional Tribunal. In case of two conclusions from the Polish Chamber of Civil Engineers, the judges of the Tribunal took into account the position of the Ombudsman. In the first quarter of 2018 alone, the Ombudsman participated in five proceedings of the Constitutional Tribunal.

In the second quarter of 2013 for comparison, the Ombudsman of the VI term, professor Irena Lipowicz approached the Constitutional Tribunal with motions relating to the provisions concerning the activities of municipal commissions for solving alcohol-related problems (motion of the Ombudsman of 8 April 2013), article 284 paragraph 2 of the Act of 27 August 2009 on public finance (motion of the Ombudsman of 9 April 2013), article 115 paragraph 3 of the Act of 4 February 1994 on copyright and related rights (motion of the Ombudsman of 11 April 2013), article 94 paragraph 5 and article 95 paragraph 1 of the Law on higher education (motion of the Ombudsman of 24 April 2013), article 54 par. 1 of the Act of March 20, 2009 on the safety of mass events (motion of the Ombudsman of 25 April 2013), article 244 § 2 of Law of Criminal Procedure (motion of the Ombudsman of 17 May 2013), Article 101 § 1 sentence 1 of the Act of August 24, 2001. Code of conduct in offense cases (motion of the Ombudsman of 3 June 2013), article 11 paragraphs 1 and 3 of the Amendment of 7 December 2012 of the act on family benefits and some other acts (motion of the Ombudsman of 24 June 2013), article 49 § 1 of the Code of Petty Offenses (motion of the Ombudsman of 26 June 2013).

The report of the observance of human rights and freedoms in Poland that the Ombudsman must submit each year to both chambers of the Polish Parliament is the manifestation of the educating function of the Ombudsman. In this way public authorities and the society becomes aware of the difficulties the Ombudsman is struggling with. The Ombudsman's activity in itself is extremely instructive, and studying different cases the Ombudsman deals with can be an invaluable experience. The

efforts and the attitudes of the Polish Ombudsmen towards protection of human and civil rights deserve highest appreciation.

VIII. GENERAL MOTIONS

Although, the Act on the Ombudsman does not provide for this body the possibility of using ad hoc measures ending the case such as self-assessment of punishments or resolving cases, the Ombudsman may, by means of relevant legislation in force, affect the entities responsible for the infringement of freedoms and rights. Article 14 of the Ombudsman Act includes a catalogue of resources available for the Ombudsman after examination of a case: 1) explain to the movant that infringement of rights or freedoms was not detected, 2) direct an address to the relevant organ, institution or organisation in which an infringement was detected; such address must not violate the independence of the judiciary, 3) turn to an organ supervising the entity mentioned in point 2 with a motion to apply measures stipulated by law, 4) demand initiation of proceedings in civil cases, as well as take part in each ongoing proceedings – on the same rights as the prosecution, 5) demand initiation of preparatory proceedings in offences prosecuted ex officio by an entitled prosecutor, 6) demand initiating administrative proceedings, file complaints to the administrative court, take part in proceedings – on the same rights as the prosecution, 7) file a motion to punish or to repeal a final judgement in proceedings in petty offence cases upon principles set forth in separate provisions, 8) to appeal to a court of cassation or extraordinary appeal from the final judgement upon principles set forth in separate provisions.

The activity of the Ombudsman in the first quarter of 2018 confirms that he is predominantly busy with filing motions to state institutions and bodies. In the period quoted, Adam Bodnar filed sixty such motions to, among others: the Prime Minister to ensure that a detained person could contact the defender from the very beginning of the detention (motion of 8 January 2018), to the General Director of the Prison Service on the issues of marriage of persons deprived of liberty (motion of 9 January 2018), to the President of the Supreme Audit Office on the low effectiveness of enforcement of alimony (motion of 10 January 2018), to the Minister of Science and Higher Education on the definition of 'a young scientist' (motion of 11 January 2018) or to the Minister of Family, Labour and Social Policy on the access of single parents to the educational provision of 500+ (motion of 6 February 2018).

And so, for comparison, in the previously quoted, II quarter of 2013, the Polish Ombudsman filed motions to, among others: the Minister of Labour and Social Policy on the system of safekeeping of a child deprived of their parents' custody (motion of 2 April 2013), the Head of the Chancellery of the Prime Minister on the provisions governing the obligation to submit statements of means (motion of 2 April 2013), the Minister of National Education on the criteria for choosing textbooks in public schools (motion of 2 April 2013), the Minister of Administration and Digitization for information of the Inspector General for Personal Data Protection regarding

the reform of the personal data protection system in the European Union (motion of 2 April 2013), the Minister of Environment regarding the participation of social organizations in administrative proceedings regarding the issue of a water law permit (motion of 4 April 2013), the Minister of Justice on the application of personal control measures and the control of property of persons entering the court (motion of 4 April 2013), the Minister of Health on the medical and psychological examination of security staff (motion of 4 April 2013), the Minister of Transport, Construction and Maritime Economy and Government Plenipotentiary for Disabled People on the obligation of disabled persons to provide a sign language interpreter for the needs of driving test (motion of 5 April 2013), the Government Plenipotentiary for Disabled People regarding the composition of the Polish Council of Sign Language (motion of 17 April 2013).

The Ombudsman using the institution of address by means of a motion, not only works for the subject of the case who initiated the address, but in this way also acts preventively, because these motions are also aimed at preventing future infringements in a given area. For the effectiveness of the Ombudsman's intervention, not only legal arguments matter but also his or her (as the case may be) social and moral authority. That is why such high requirements are put for the candidates for the post of ombudsman in Poland. The candidates are supposed to display 'high level of authority due to their moral values and social sensitivity' [article 2 of the Ombudsman Act].

IX. LEGAL QUESTIONS TO THE SUPREME COURT AND MOTIONS TO THE SUPREME ADMINISTRATIVE COURT

It should also be noted that the Ombudsman's activities are to lead to the uniformity of judicial decisions. In view of the existing discrepancies in the jurisprudence of common courts, the Ombudsman asks legal questions to the Supreme Court and requests to settle legal uncertainties to the Supreme Administrative Court. With such a conclusion, the Polish Ombudsman asked the Supreme Administrative Court on 14 March 2018 to resolve a legal issue regarding the discrepancy in administrative court decisions regarding the preparation by the authority, at the request of a party, of a copy of the documentation in the file (question of 14 March 2018). In addition, on 4 January 2018, Adam Bodnar took part in proceedings of the Supreme Court regarding the resolution of a legal issue in the case for compensation for unlawful placement of a juvenile in a shelter for juveniles (motion of 4 January 2018).

In 2013, the Ombudsman also took part in two cases concerning legal uncertainties, addressing a question to the Supreme Court and an application to the Supreme Administrative Court. On 4 January 2013, he submitted a legal question to the Supreme Court regarding discrepancies in the case-law concerning the admissibility of the use of the abuse of subjective right to assess the effects of the expiry of the deadline referred to in the provision of article 568 paragraph 1 of the Civil Code providing for a temporary limitation of the execution of rights under the warranty for physical defects in

the sale of goods, on 6 June 2013, he turned to the Supreme Administrative Court with the motion on the implementation of the rights of retired Police officers to a monetary equivalent for the renovation of the occupied dwelling.

It should also be added that the Ombudsman has the right to lodge cassation appeals to the Supreme Court and the Supreme Administrative Court, to lodge complaints with provincial administrative courts and to access court proceedings both in common and administrative courts.

X. COOPERATION OF THE OMBUDSMAN WITH CIVIC ORGANISATIONS

In his activities aimed at protection of rights and freedoms of citizens, the Ombudsman is obliged to collaborate with various civic organizations, associations, grassroots movements, foundations and voluntary initiatives engaged in the protection of human and civil rights also in the equal treatment. This obligation is imposed by article 17a of the Ombudsman Act. This article was added in 2000, and amended in 2010. Working closely with such organisations throughout the country the Ombudsman is able to counteract negative social occurrences and contribute to the creation of a modern type of civil society. The benefits of such collaboration are bilateral. Its beginnings can be traced back to the IV term when the Office was held by professor Andrzej Zoll who developed and implemented a series of collaboration projects (Kochanowski, 1996).

XI. CONCLUSIONS

The Office of the Ombudsman in the Polish system of state organs is, as stipulated in the Constitution, a fully independent institution. It is a very active non-judicial legal protection body which deals with a great number of complaints from ordinary people and from various institutions and organisations. Therefore, the Ombudsman's Office has a deep insight in the level of observance of civic rights and freedoms demonstrated by public authorities, and can give a true account to Sejm and the Senate on the current situation in this matter. Moreover, the Ombudsman has a real impact on the evaluation of the condition of the Polish legal system.

Also with respect to basic human rights, the role of the Ombudsman in Poland cannot be overestimated. There are three main international legal acts enforcement of which is also in the capacity of the Polish Ombudsman: the International Human Rights Covenants (Covenant on Civil and Political Rights and the Covenant on Economic, Social and Cultural Rights), the European Convention on the Protection of Human Rights and Fundamental (Łętowska, 2008). These very acts had been the reference point for any human rights protection activities in Poland before 1997. Today the validity of these acts remains strong because international standards of human rights protection must be upheld and disseminated in Poland.

As indicated before, the position of the Ombudsman in Poland is deeply rooted in the Polish legal system. Polish

Ombudsmen are laborious and efficient which means that all organs creating and enforcing law must keep guard and observe civil as well as human rights and freedoms. As the first Polish Ombudsman professor Ewa Łętowska said: *The Ombudsman advocated, advocates and will advocate close and strict observance of the law, its letter as well as its spirit by everyone: the authorities and citizens alike.*

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