

**THE COMMISSIONER FOR CIVIL RIGHTS PROTECTION
OF THE REPUBLIC OF POLAND: 20 FROM 200 YEARS
OF THE OMBUDSMAN'S EXISTENCE IN THE WORLD**

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Summary: 1. The roots of the Ombudsman's office; 2. The institution of the Ombudsman in Poland; 3. The commissioner for civil rights protection as an independent organ of a State; 4. The commissioner as an organ of control of the law; 5. Principles of functioning of the commissioner; 6. The new challenges for the commissioner. Conclusion.

Key words: Human Rights Protection. Ombudsman. Commissioner.

The years of 2008 and 2009 commemorate two very important events in the history of human rights protection in the world. First of all, 60 years ago the Universal Declaration of Human Rights was adopted by the General Assembly of the United Nations. The Declaration has had a significant worldwide impact not only on the development or universalisation but also on codification of human rights. Secondly, in the year 2009 we are to celebrate the 200th anniversary of the establishment of the first parliamentary ombudsman. The office created 200 years ago in Sweden has become a point of reference for the contemporary institutions of this kind all over the world. Finally, and what is crucial from Polish perspective, in 2008 we celebrate the 20th anniversary of establishing the Commissioner for Civil Rights Protection of the Republic of Poland, which remains a constitutional organ of the state, created to protect human and civil rights and freedoms¹.

1 THE ROOTS OF THE OMBUDSMAN'S OFFICE

The development of effective freedoms and rights protection measures has always remained as old process as the sole awareness of individuals' subjectivity that has its roots in a legal culture. This process has not always required elaboration, in a due time, of the

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conception of subjective rights. It was enough to observe that an ordinary individual in a case of a conflict with a public authority, corporation or dominant economic or social entity, even when equipped with formal legal measures, was in fact always in a weaker position.

Probably the oldest way of protection of individual's freedoms was either granting him or her the right to make a complaint to the ruler, who also exercised judiciary powers, or to the regional plenipotentiary of the ruler (and in the course of time to an independent court). However, in some situations, problems with factual possibilities of making a complaint appeared. In other words, one might have been afraid of making the complaint for the social and economic realities of his or her life, like in the case when his or her relatives' security could have been at a stake. The idea of overcoming those factual inequalities was to establish an officer, elected directly by people and responsible for pleading their cases as well as representing their interests.

The institutional implementation of the above-mentioned idea is commonly associated with a Swedish organ established 200 years ago. In 1809 the Instrument of Government, which is known as the first Swedish constitution, was adopted. The constitution besides the Chancellor of Justice office also established the office of the Parliamentary Ombudsman (*Justitieombudsmannen*), as an organ independent from executive and accountable exclusively to the Parliament. Establishment of the latter institution is regarded as the real point of reference to all the modern organs responsible for protection of the freedoms and rights of a human and a citizen. Moreover, the word 'ombudsman', having its roots in Old Swedish, nowadays may be found in legal vocabulary of most of the languages around the world.

Initially, other jurisdictions did not adopt the idea of the ombudsman's office. However, in the course of time the other Scandinavian countries followed the Swedish example and established offices of the ombudsman – Finland in 1919 (after regaining its independence from Russia), Norway in 1952, and one year later Denmark. The first non-European state to introduce that office was New Zealand in 1962. Nevertheless, nowadays in more than 100 states around the world the offices of the ombudsman protect human freedoms and rights. All these institutions have their roots in the events that took place 200 years ago in Sweden.

2 THE INSTITUTION OF THE OMBUDSMAN IN POLAND

The Commissioner for Civil Rights Protection (the Ombudsman) as an organ of state was established in Poland in 1987, i.e. before the final collapse of the communist regime. Although, he remained a part of the political system of People's Republic of Poland, the

Commissioner was in fact a stranger-institution to the totalitarian system. The Polish Commissioner was the first of this type of organ in whole communist countries. The office was designed as the façade of legalism by the communist regime, which hoped to control the appointment of the post as well as the activities of the office. From the constitutional point of view, the Commissioner was established in the form of a monocratic, central organ of state, independent from the government and accountable only to the Sejm (the only chamber of the Parliament and 'the highest organ of state' in constitutional meaning at that time, in fact dominated by communist party). However, mostly due to the substantial personal efforts of professor Ewa Letowska, who was the ombudsman of the first term, the plans of communist government did not fulfil. Half of the year from the beginning of the Commissioner's activity the peaceful change of political system took place in Poland and the office of the Ombudsman became a true mechanism of human and civil freedoms and rights protection.

Initially, the sole legal basis of the Commissioner's functions was the Act of the 15th July 1987 (so-called 'The Ombudsman Act 1987')². The probable reason for providing the office with only statutory, but not constitutional ground, was to make it easier to abandon it in case it was out of control. However, two years later³, in the new political reality, the Ombudsman, still named as the Commissioner for Civil Rights Protection, was finally recognised as an organ of the state by the constitutional regulations. That has significantly strengthened legal position of the office, and most of all its independence.

As far as the Ombudsman Act 1987 is concerned, it was revised several times, often accompanied by changes in Polish political and legal system⁴. The most important amendments of the Act were aimed to broaden and strengthen the protection of the freedoms and rights of a human and a citizen. These revisions remained part of the new political system of the democratic state ruled by law and implementing the principles of social justice (article 1 of the Constitution of 1952 as amended in December 1989⁵, and article 2 of the Constitution of 1997). Further fundamental changes concerning the grounds of the Ombudsman's activity resulted from the adoption and entry into force of the Constitution of 1997 (extension of the term of office from 4 to 5 years, establishment of the Commissioner for Children's Rights⁶), and finally, from changes in the judiciary system⁷.

3 THE COMMISSIONER FOR CIVIL RIGHTS PROTECTION AS AN INDEPENDENT ORGAN OF A STATE

The fundamental element of an effective system of protection of the freedoms and rights of individuals is the independence of the Commissioner in fulfilling his duties. That, in turn, entails equipping the holder of the office with the necessary legal guarantees (an

external independence) as well as requires from him proper attitude and behaviour (an internal independence). Both aspects must be realised in practice to ensure truly independent functioning of the office. The Constitution guarantees that the scope and manner of operation of the Commissioner shall be specified by statute (article 208, section 2), his accountability only to the Sejm (which is the lower chamber of Polish Parliament) in accordance with principles specified by statute (article 210), and the protection resulting from the 5 years term of office (article 209, section 1). Furthermore, according to the Constitution, the Commissioner neither shall be subject to penal liability (a formal immunity) nor shall be deprived of liberty (a privilege of personal inviolability) without the earlier consent of the Sejm (article 211)⁸. Finally, it should be noticed that the Commissioner is not accountable to the Tribunal of State⁹ (compare article 198, section 1 of the Constitution).

Moreover, the Constitution requires from the Commissioner a very high standard of independence, as he or she cannot occupy any other position, with the exception of a university professor, and cannot carry out other professional commitments (article 209, section 2 and 3). In addition, a holder of the office must be politically indifferent (cannot belong to any political party or a trade union) and shall not perform any public activities which could not reconcile with the dignity of the office (article 209, section 3).

However, it is much more difficult to prescribe in the law as well as to ensure in practice the standards and guarantees of the Commissioner's internal independence. In other words, the problem is to assure that a holder of the office while performing his duties is guided by the law and principles of both community life and social justice (as proclaimed in the oath that the Commissioner is required to make before the Sejm – article 4 of the Ombudsman Act) and not by dominant political views or philosophies held by the governmental majority, especially by those who are responsible for appointing him and those he expects to be re-elected by. Moreover, a holder of the office must have the relevant personal predispositions, knowledge and experience to be able to analyse activities of the public authorities, and when it is necessary also to criticise them. The Ombudsman Act 1987 is rather lapidary when it comes to prerequisites that a candidate for the Commissioner shall meet (the Act explicitly does not require a legal education – article 2). Both Chambers of the Parliament responsible for appointing the Commissioner have discretion in assessing whether the candidate fulfils the requirements so generally set forth by the statute. In future, the foregoing legal solutions may cause some problems in practice. However, so far all the Commissioners have been appointed among lawyers with academic experience. For that practice has had a considerable influence on strengthening the authority of the Commissioner, it is worth continuing.

Potentially, the possibility of re-election of the same person for another term of office, although no one may act as the Commissioner for more than two terms of office, may constitute a threat to the independence of performing his duties. It may affect a holder of the office to take into account expectations of the majority of the Sejm in his activities, especially in a close perspective of re-election. Nonetheless, during 20 years of the existence of the office, the above-mentioned threats have been avoided due to the fact that none of previously chosen Commissioners was formally designated as a candidate for a second term of office. Perhaps, it should be deliberated to repeal the article 5, section 2 of the Ombudsman Act 1987 by ruling out the possibility of re-election. That might be accompanied by the extension of the Commissioner's term of office to 6 or 7 years, however, the latter one would require amending article 209, section 1 of the Constitution.

The Ombudsman Act 1987 prescribes conditions and manner of discharging the Commissioner prior to the end of his term of office. One of those conditions may be potentially dangerous to the principle of the independence of the office. The problem is that according to the article 7, section 2 of the Act, the Sejm may discharge the Commissioner if he acts against his oath. That may be processed by the resolution of the Sejm, on the motion of the Speaker or a group of at least 35 deputies, passed by the majority of at least 3/5 of votes with at least the half of the regular number of present deputies (article 7, section 5 of the Act).

Undoubtedly, the Sejm cannot use the foregoing clause in order to realise the political accountability of the Commissioner. This form of exercising his responsibility before Parliament would not be consistent with the principle of independence of the office. For this reason, the statutory regulations concerning the possibility of discharging a holder of that office must be understood as an exception to the presumption of the independence of the Commissioner during the whole 5-year term of office.

4 THE COMMISSIONER AS AN ORGAN OF CONTROL OF THE LAW

There are major difficulties while trying to classify the institution of the Commissioner for Civil Rights Protection within the traditional doctrine of separation of powers. The Constitution sets forth the basic regulations on the Commissioner in Chapter IX entitled 'Organs of state control and for defence of rights'. At the same time, the Constitution in the article 80 vests every individual with the right to apply to the Commissioner for any assistance needed in protection of his or her freedoms or rights that might be infringed by any organs of public authority. All the above-mentioned regulations emphasise the basic scope of Polish ombudsman's activities. The main aim of the establishment of the

Commissioner is to guard the protection of the freedoms and rights of an individual (see also article 212¹⁰ of the Constitution), as well as, in case of finding these values infringed, to provide individuals with any necessary assistance.

As far as the entitlement to apply is concerned, *e v e r y o n e* has the right to apply to the Commissioner for assistance. The meaning of 'everyone' in the Constitution encompasses the broadest possible range of entities. It includes individuals – citizens and foreigners (including stateless persons) as well as associations of individuals, legal persons and other entities¹¹, as long as they are able to prove that the law vests them with freedoms or rights (compare article 208, section 1 of the Constitution). The Constitution does not provide any exceptions or limitations to that principle. However, it allows restricting, by the way of statutory regulation, the exercise of freedoms and rights by foreigners in Poland (article 37, section 2)¹². The article 9 of the Ombudsman Act 1987 might be treated as a restriction of the right to make complaints to the Commissioner by foreigners, stipulating that the Ombudsman shall take measures, *inter alia*, on citizens' or their organisations' request (point 1). That could indicate that the right of foreigners to make complaints to the Commissioner is limited. However, article 18 of the Ombudsman Act 1987, in its current wording, sets forth that provisions of the Act should also apply to persons who are not Polish citizens. Furthermore, the same article 9 stipulates that the Commissioner may take the relevant measures, on his own initiative, without the necessity of lodging a petition (point 3). As a result, present wording of the article 9, point 1, as long as it omits the foreigners (and stateless persons), does not reflect the full sense of the entitlement to apply prescribed by article 80 of the Constitution. However, having in mind the regulation of article 37, section 2 of the Constitution, that kind of legislation is permissible. Nevertheless, in the light of article 9, point 3 and article 18 of the Ombudsman Act 1987, as well as in the established practice, the access to the Commissioner, who is a mechanism of the protection of freedoms and rights, remains open to foreigners.

As far as the scope of the protection is concerned, the Commissioner is responsible for protection of *a l l* the freedoms and rights. The source of those freedoms and rights is irrelevant. It is only necessary to point out a normative act (the Constitution, a statute, a ratified international treaty etc.), which prescribes some specific freedoms or a subjective right. All of those, without any exceptions, are in the Commissioner's scope of operation. It should be indicated that this scope of the protection is much broader than in case of the constitutional complaint, which is the other measure of freedoms and rights protection prescribed in the Constitution (article 79). In case of the constitutional complaint, the Constitution restricts the applicability of that instrument to the protection of only constitutional freedoms and rights. Furthermore, the Constitution explicitly exempts from the applicability of the constitutional complaint the right of asylum and the possibility of granting the status of a refugee, which are the constitutional rights of foreigners.

The Constitution also seems to adopt a principle that the protection and assistance realised by the Commissioner has an individual character. Article 80 sets forth that everyone may apply 'for assistance in protection of his freedoms or rights...'. However, and what is a well-thought solution, the mechanism of the protection of freedoms and rights by the Commissioner was defined in a broader way in the statute. The entitled person may apply for assistance in protection of his own rights and also on behalf of other people when their rights might have been violated (article 10 of the Ombudsman Act 1987).

Finally, an individual may apply for the Commissioner's assistance in protection of his freedoms and rights infringed by the public authorities, regardless of a manner in which that violation took place. This includes all the factual forms, as an activity or inactivity of public bodies, as well as all the forms of violation resulting from the state's authority, like constitution and application of laws and unlawful factual actions.

5 PRINCIPLES OF FUNCTIONING OF THE COMMISSIONER

From the very beginning, the Ombudsman Act 1987 rejected the idea of initiating the Commissioner's actions only by a complaint. At the same time, the construction of a common access of individuals to the office was adopted. As a consequence, the article 9 of the Act defines the entitled to apply to the Commissioner for assistance, who are citizens or their organisations (point 1), local government organs (point 2) and the Commissioner for Children's Rights (point 2a). The Commissioner is also allowed to take measures on his own initiative, though (point 4).

The above-mentioned common access to the Commissioner's office is realised by far-going informality in applying for the protection of the freedoms and rights, as well as by the fact, that submitting an application is free of charge (compare article 10 of the Act). An application may be lodged in any form (including via the phone or an e-mail), however, the anonymous ones are not allowed. Furthermore, there are no problems with applications being lodged by an attorney on behalf of his client. In that case, it should be expected from the motion, drafted by a legal professional, to focus on those aspects of presumed violation of his client's freedoms and rights, protection of which is beyond the legal means available to a professional attorney.

The foregoing way of defining an access to the Commissioner, combined with the wide range of the entitled to apply to the office, could have easily resulted in a paralysis in functioning of the Ombudsman. For this reason, the Act granted the Commissioner discretion as to the methods of dealing with applications, especially in deciding whether to take up a case. This solution prevents the office from the possible paralysis in its functioning and from taking over a basic duty of every citizen, i.e. to act rationally to protect his own

rights. Hence, according to the article 11 of the Act, having become acquainted with each application received, the Commissioner may: take up the case (point 1), instruct the applicant as to what action the person is entitled to take (point 2), convey the case according to competence (point 3), and finally, abandon the case (point 4). However, in every case, the Ombudsman is obliged to notify the applicant and the person whose freedoms and rights are involved about the manner of dealing with the application.

Moreover, it is also worth to point out, that the Commissioner is entitled to carry out his constitutional duties not only by considering the applications¹³, but also by making so-called general motions, which may be addressed to 'the agency, organisation or institution whose activity has been found to have caused an infringement of the freedoms and right of a human and a citizen' (article 14, point 2 of the Act). The entity to which such motion has been addressed, must without any unreasonable delay and no later than within 30 days, inform the Ombudsman of every taken action or view (article 15, section 2 of the Act). The use of the measure of general motions is reasonable not only in cases when the Commissioner has independently found the circumstances justifying the suspicion that an infringement of the freedoms and right of a human and a citizen has taken place. It may also be crucial, in cases in which from the Commissioner's point of view, the character of the application makes the general motion the most adequate and rational form of dealing with the problem.

Furthermore, a very important power that the Commissioner is equipped with, from the very beginning of the office's existence in Poland, is the general entitlement to apply to the Constitutional Tribunal¹⁴. In other words, he has a right to question before the constitutional court a hierarchical conformity of all normative acts, regardless of any matters they regulate. As a result, the Tribunal, which cannot act on its own initiative, thanks to applications of the Commissioner, has some possibilities to formulate its own opinions.

A wide range of the Commissioner's duties and a preferential access to the protection of freedoms and rights offered by the office, resulted in citizens' factual interest in the assistance provided by the institution¹⁵. During 20 years of the existence of the Polish Ombudsman, the office has received almost one million of motions¹⁶. The Commissioner took up 42% of those cases, and in almost 53% of cases applicants were instructed as to whatever action they are entitled to take. On the other hand, the Commissioner decided not to take any measures in slightly more than 2% of cases.

Among the cases taken up by the Commissioner, more than 22% of them were dealt with and finished successfully - from the applicant's point of view. In about 65% of cases, the Commissioner was not successful. Finally, in 13% of them, the Commissioner resigned from any further support. In most instances, that was a result of the situation, where the Commissioner exhausted all the possible legal means of action.

Taking into consideration traditional classification of branches of law, in most cases the applications received by the office concerned problems of penal law (17,1%), economic law, public levies and protection of consumer rights (13,1%), administrative law and housing issues (11,9%), civil law and real estate management (10,2%), and penal executive law (8,5%). However, the most common cases were those concerning labour law and social insurance (26,2%).

6 THE NEW CHALLENGES FOR THE COMMISSIONER

The Republic of Poland, especially after 1989, has accepted a significant number of international obligations concerning human rights. A lot of international agreements were ratified (including the European Convention on Human Rights). Moreover, obligations arising from the law of the European Union appeared. Many of these international commitments require establishing some sort of control mechanisms on the national level, or indicating the independent entities, institutions and organs, which would be responsible for some activities in the field of human freedoms and rights protection¹⁷.

The Ombudsman Act 1987, although amended in the course of time, does not address the problem of the new international status of Poland in the field of human rights protection. Particularly, there are no regulations directly indicating that the Commissioner is an independent organ of state, which is acting at least subsidiarily (if not exclusively) as a part of the national mechanisms of human rights protection. Those regulations are presently required by the international law binding Poland. It seems that legislators should assume, while implementing obligations resulting from the binding international law (including the secondary law of the EU) into the Polish legal system, that the Commissioner is an organ responsible for the protection of freedoms and rights. This should happen if a ratified international agreement or the law established by an international organisation defined in article 91, section 3 of the Constitution, requires to designate or maintain at the domestic level an independent body responsible for human rights protection. That assumption would not interfere with the possibility of establishing by statutory means a new independent body, in cases where it is justified due to the character and scope of the requirements provided by the international law. However, even in those cases, the Commissioner should be included in that kind of mechanism of human rights protection. It would reflect the constitutional character of the Commissioner's office, as an independent organ, having its regional structures, and guarding protection of all the human and civil freedoms and rights, without any exceptions.

Furthermore, there are no statutory regulations vesting the Commissioner with the right to act before the international courts and tribunals as *amicus curiae*. That kind of the Ombudsman's assistance could help Polish citizens in protecting their rights and freedoms before international organs, on the same basis as it takes place e.g. in case of the constitutional complaint at the domestic level. Nowadays, it can be clearly observed that Polish citizens are increasingly more eager to apply to international courts and tribunals with problems concerning human rights protection. As a consequence, it seems that the Commissioner should be explicitly equipped by a statute with a right to express a material opinion in the proceedings before the international judicial organs. Particularly for the fact, that the rules of these courts - in most cases - allow presenting that kind of opinions by different sorts of national entities. However, to provide this type of assistance for Polish citizens, further changes in national legislation are required.

7 CONCLUSION

In conclusion, the Commissioner for Civil Rights Protection remains a fundamental part of Polish system of organs of the state. In the whole 20-year-old history of the office, the Commissioner, very often following experiences of ombudsman's offices worldwide, has proven to be an effective mechanism of protection of the freedoms and rights of a human and a citizen. And although some obstacles in functioning of the office might have been encountered, on the whole it has always been possible to maintain an independent character of the institution and its very high social prestige¹⁸.

REFERENCES AND NOTES

- ¹ According to provision of art. 208 para. 1 of The Constitution of the Republic of Poland of 2nd April, 1997, The Commissioner for Citizens' Rights shall safeguard the freedoms and rights of persons and citizens specified in the Constitution and other normative acts.
- ² The original text of the Act was published in Dz. U. No. 21, item 123. Formally this Act is until today a binding law in Poland.
- ³ The Constitution of People's Republic of Poland Amendment Act of 7th April 1989 (Dz.U. No. 19, item 101) - so-called 'the amendment of April').
- ⁴ E.g. the Act Amending the Act on the Commissioner for Civil Rights Protection, the Act on Code of Civil Procedure and the Constitutional Tribunal Act, of 24th August 1991 (Dz.U. No. 83, item 371).
- ⁵ The Constitution of People's Republic of Poland Amendment Act of 29th December 1989 (Dz.U. No. 75, item 44, with further amendments – so-called 'the amendment of December').
- ⁶ The Act on the Commissioner for Children's Rights of 6th January 2000 (Dz.U. No. 6, item 69).
- ⁷ See e.g. the Act Amending the Act on the Commissioner for Civil Rights Protection, the Act on the Code of Civil Procedure and some other Acts, of 12th May 2000 (Dz.U. No. 48, item 552).

- 8 What is interesting, until today, the detailed regulations concerning this procedure are not enacted.
- 9 The organ of judiciary power, created to justified violations of Constitution or of a statute by the highest officials.
- 10 Art. 212 "The Commissioner for Citizens' Rights shall annually inform the Sejm and the Senate about his activities and report on the degree of respect accorded to the freedoms and rights of persons and citizens".
- 11 Compare the Judgment of the Supreme Court of 5th April 2002 (III RN 133/01), published in OSNP 2002, No 12, item 281. Judgements of the Supreme Court are published on web site www.sn.pl.
- 12 On the meaning of article 37, section 2 of the Constitution see e.g. the Judgment of the Constitutional Tribunal of 15th November 2000 (P 12/99), published in OTK ZU 2000, No 7, pp 1299-1306. All judgements of the Constitutional Tribunal are published on web site www.trybunal.gov.pl.
- 13 In accordance to the Act when a motion is granted and a decision for conducting a case is reached, the Commissioner may e.g.: appeal to a superior organ to an institution infringing freedoms or rights for adoption of legal correcting or disciplining procedures; claim for instituting the investigation in criminal cases by an entitled prosecutor in cases prosecuted by a public prosecutor; claim for instituting legal proceedings in civil cases; participate in any proceeding on the rights of a prosecutor/with the same rights as a prosecutor; claim for instituting an administrative proceeding; bring an action to an administrative court; participate in such a proceeding on the rights of a prosecutor; file a petition for punishment; file a petition for quashing a legal binding verdict in cases concerning misdemeanors, appeal for cassation in all of these proceeding before a court.
- 14 Other entities having the general entitlement to apply to the Tribunal are: the President of the Republic of Poland, the Marshal of the Sejm, the Marshal of the Senate, the Prime Minister, 50 Deputies, 30 Senators, the First President of the Supreme Court, the President of the Supreme Administrative Court, the Public Prosecutor-General, the President of the Supreme Chamber of Control (article 191, section 1 of the Constitution).
- 15 It should be indicated that the population of Poland is about 39 million of citizens.
- 16 At the end of 2007 the Office of the Commissioner for Civil Rights Protection received a total sum of 916 971 of cases. See *Informacja o działalności Rzecznika Praw Obywatelskich za rok 2007 oraz o stanie przestrzegania wolności i praw człowieka i obywatela, Warszawa 2008*, p 10. The following data is taken from: *Księga XX-lecia Rzecznika Praw Obywatelskich w Polsce*, M. Zubik (red.), Warszawa 2008, pp 129-150.
- 17 Compare e.g. article 3 of the Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, adopted by the General Assembly of the United Nations in New York on 18 December 2002 (Dz.U. of 2007, No. 30, item 192).
- 18 In the last decade the percentage of positive opinions on the functioning of the Commissioner is between 57% (December 1998) and 37% (June 2006). As far as negative opinions are concerned, the figures are between 11% (December 1998) and 21% (October 2005). See *CBOS, Opinie o działalności instytucji publicznych, Warszawa, May 2008*, p 11.