

The Ombudsman before the Polish Constitutional Tribunal

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On 9th September 2020, the 5-years term of the current Polish Ombudsman (*Rzecznik Praw Obywatelskich*, Commissioner for Human Rights) Adam Bodnar, has ended. The Parliament did not select a new person for this position yet. Thus, following the Article 3.6 of the Law on the Commissioner, Professor Bodnar stays in the office until the appointment of the new Commissioner for Human Rights. However a group of MPs demands the Constitutional Court to delete this legal basis, leaving the office without its head. The Court wants to decide on this case on 20th October.

Non-judicial institutions to protect human rights exist in many European countries, but in extremely diversified ways: Some (like Finland) have quite a large number of them, some have none at the national level (like Italy). Only 16 out of 27 EU member states cherish NHRI fully compliant with UN *Paris Principles*¹⁾ UN General Assembly 1993 Resolution A/RES/48/134; the rest of EU countries have B status NHRI, 2 EU countries lack any national human rights institution.. Some of those institutions are collective bodies (commissions, institutes), others are single persons – HR Defenders, HR Advocates, HR Commissioners – with a rich variety of their titles. Those colorful brands notwithstanding, the roots of those institutions are located in Sweden: The Swedish *Riksdag* established a Parliamentary Ombudsman (*Riksdagens ombudsmän*) in order to ensure that courts of law and other agencies, as well as the public officials, are acting with accordance with laws and fulfil their obligations properly. Since then Denmark and other Scandinavian countries, and even so distant countries as New Zealand and Australia²⁾ See: M. Wróblewski, *First Anglosaxon Ombudsman: case of New Zealand and Ombudsmen in the political system of Australia*, [in:] “Ombudsman institutions of Anglosaxon countries. A comparative study”, ed. P. Mikuli, Warsaw 2017, pp. 65-88 and 179-230., have introduced similar bodies. The ombudsman model become especially influential for East-Central European countries with the end of the communist regimes, including Poland as a first country in the East to establish an NHRI as such.

Ombudsman-type institutions played a vital role in the transition from a real-socialist system to a democratic market-oriented socio-economic polity³⁾ See: E. #towska, *Baba na #wieczniku*, Warsaw 1992.. Assuming a “shock absorber” role in the transformation, they eased the path to capitalist realities. When governments did not pay sufficient attention to social problems, they reminded them of basic human rights standards, more often than not in vain. 30 years after, the liberal mainstream often regards those NHRI as a rather awkward legacy of the transformation. Therefore it came as a surprise that a second new life was breathed into ombudsman institutions with a new wave of illiberal governments, which tend to treat human rights as

a suspect ideology and therefore – consequently – rarely welcome institutional protection thereof. Illiberal governments generally dislike critics, particularly when expressed from a legal and fundamental rights perspective. As NHRI fought for rule of law protection, principled defense of the independence of the judiciary, or the rights of minority groups such as refugees and LGBT people, they met with different forms of retaliation like budget cuts – even in times of generous financial expenditures – or lawsuits aimed at creating freezing effect, addresses personally against the head of the NHRI (TVP S.A. (Polish public television) civil lawsuit of 2019 against Adam Bodnar, the Commissioner of Human Rights, see [here](#))).

The latest act in this drama is the motion of the group of MPs of the currently ruling party in Poland, directed on September 15th to the Constitutional Court questioning Article 3.6 of the Law on the Commissioner for Human Rights (CHR)⁴⁾ Journal of Laws of 2020 item 627 as amended.. This provision states that the current CHR performs his/her duties until the new CHR takes up his/her position. According to Article 209.1 of the Polish Constitution the Commissioner is elected by the Sejm with the consent of the Senate for 5 years term. The Article 3.6 plays a bridging role – when the parliament is unable to elect new CHR, the “old” Commissioner shall stay in the office, waiting for MPs decision, for the sake of the continuation of the office work. This provision thus not only safeguards the normal functioning of the human rights institution, but is addressed also to citizens – they have to be sure they will get effective aid also in the time of CHR change period.

However, MPs argue that remaining in the position of the Commissioner after the expiry of the 5-year term of office is inconsistent with the article 2 of the Constitution (principle of a democratic state ruled by the law, the principle of the protection of legitimate expectations) and Article 209.1 of the Constitution (specifying the term of office of the Ombudsman). The applicants indicate that this provision was not amended after the 1997 Constitution entered into force and the actual duration of the term of office of CHR goes beyond the constitutional five-year term of office. This, in their view, violates the prohibition of creating a law that would introduce so-called deceptive legal institutions. Moreover, the applicants underline that the Constitution does not foresee the possibility of specifying the length of the Commissioner’s term of office by means of a statute and does not state *expressive verbis* the need to ensure the continuity of the HRC’s work. The acting commissioner, according to their argument, performs his duties beyond the constitutional term of office and thus acts not as a constitutional body but as a *falsus procurator*, exposing citizens to unforeseeable negative effects, all of which violates the “dignity of the office”.

The Commissioner for Human Rights took the advantage of joining the case before the Constitutional Court. On 30 September the HRC presented its position, claiming that the Law on the CHR is in compliance with the Constitution. Selection and appointment rules, such as Article 3.6, aim to ensure continuity of the institution and independence from the government. It is the responsibility of the appointing authorities (the parliament) to ensure a proper and timely appointment of the new Commissioner. According to *Paris Principles* and *Venice Principles*⁵⁾ Principles on the [Protection and Promotion of the Ombudsman Institution](#) (“The Venice

Principles”), adopted by the Venice Commission at its 118th Plenary Session (Venice, 15-16 March 2019), CDL-AD(2019)005-e. such arrangements should be in place so that the post of the head of any National Human Rights Institution does not stay vacant for any significant period of time. What is more, a lot of European countries apply similar legal prorogation mechanism as regards the NHRIs in the transition period, ranging from Albania, Azerbaijan, Bosnia and Hercegovina, Czech Republic, Denmark, Georgia, Kosovo, Latvia, Lithuania, Macedonia, Montenegro and North Macedonia, up to Portugal, Russia, Sweden, Spain, Romania and Ukraine. Similar mechanisms are also applied in Poland as regards the President of the Central Bank, the President of the Supreme Audit Chamber and the Commissioner for Children Rights.

Interestingly, the case K 20/20 will be decided by the Constitutional Court on 20th October – just a month after the MPs lodged their complaint (other cases wait years to be adjudicated), without an obligatory 30-days notice about the hearing, with one of the persons not entitled to adjudicate, according the previous Constitutional Court case law and repeated objections from the HRC, in the panel.

If the Constitutional Court is to declare Article 3.6. of the HRC Law unconstitutional, what will be the consequences? Declaring the provision unconstitutional means that the current HRC will not have a legal basis to perform his duties until a new Commissioner is elected in a constitutional way. The results of such a judgment may however be even more serious, affecting the ability of Polish NHRI to protect fundamental rights. In a positive scenario the public authorities will cooperate with the office even when vacant, allowing it to conduct business as usual. In a more pessimistic scenario, however, the actions of the CHR office may be deemed legally unfounded. This may negatively affect citizens expecting prompt and effective intervention of the CHR office in cases of a violation of their human rights. One should also remember that the CHR in Poland performs additional functions: it is an independent national equality body under the EU Anti-Discrimination Directives, a monitoring body under the UN CRPD and the National Preventive Mechanism under OPCAT.

Some see the motion to the Constitutional Court and later possible consecutive amendment of the on the HRC a “shortcut” to fill the Commissioner position, to decrease its status and to circumvent the Senate in the process of nomination of the new head of the HRC office. However there is still clear, transparent and fully constitutional way to nominate a new Commissioner for Human Rights – its election by the Sejm with the consent of the Senate. Just on Sunday, the Polish tennis champion Iga ~~#wi#~~tek won the French Open. She united nearly all Poles by her great success. One may still hope that there is room for a success in the area of human right protection – a nomination of the Commissioner who will unite people at least in part so effectively as she did.

References

- 1. UN General Assembly 1993 Resolution A/RES/48/134; the rest of EU countries have B status NHRI, 2 EU countries lack any national human rights institution.
 - 2. See: M. Wróblewski, First Anglosaxon Ombudsman: case of New Zealand and Ombudsmen in the political system of Australia, [in:] "Ombudsman institutions of Anglosaxon countries. A comparative study", ed. P. Mikuli, Warsaw 2017, pp. 65-88 and 179-230.
 - 3. See: E. #towska, Baba na #wieczniku, Warsaw 1992.
 - 4. Journal of Laws of 2020 item 627 as amended.
 - 5. Principles on the Protection and Promotion of the Ombudsman Institution ("The Venice Principles"), adopted by the Venice Commission at its 118th Plenary Session (Venice, 15-16 March 2019), CDL-AD(2019)005-e.
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