

Received: 30.03.2020
Accepted: 17.06.2020
Published: 30.09.2020

Roczniki Administracji i Prawa
Annals of The Administration and Law
2020, XX, z. 3: s. 37-54
ISSN: 1644-9126
DOI: 10.5604/01.3001.0014.4219
<https://rocznikiadministracjiiprawa.publisherspanel.com>

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THE ORGANIZATIONAL MODEL, CONSTITUTIVE FEATURES AND SCOPE OF ACTIVITIES OF POLISH OMBUDSMAN IN PROTECTION OF RIGHTS AND FREEDOMS OF INDIVIDUALS

MODEL ORGANIZACYJNY, CECHY KONSTYTUTYWNE ORAZ ZAKRES DZIAŁAŃ POLSKIEGO RZECZNIKA PRAW OBYWATELSKICH W OBSZARZE OCHRONY PRAW I WOLNOŚCI JEDNOSTKI

Summary: The aim of the article is to describe various organizational models of the institution of Ombudsman and the way it functions. The article also refers to the constitutive features of this authority, distinguishing the most typical and universal ones. At the same time, the article indicates the place of Commissioner for Human Rights within the system of protection of human and civil rights and freedoms, and characterizes his activities as an institution which is a crucial and permanent element of this system. Part of the attention has been paid to the applicable laws in this respect both in the systematic structure of the Constitution of the Republic of Poland of April 2, 1997 as well as the regulations of the Act on the Commissioner for Human Rights of July 15, 1987. The role of the Ombudsman in today's world is becoming necessary and indispensable as well as more and more appreciated alongside the activities of other institutions in the field of protection of rights and freedoms.

Keywords: Commissioner for Human Rights, Ombudsman, organizational model of Ombudsman, Ombudsman's constitutive features

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Streszczenie: Artykuł ma na celu scharakteryzowanie różnych modeli organizacyjnych instytucji ombudsmana oraz zapatrywania na funkcjonowanie tego organu. Nawiązano w nim również do cech konstytutywnych ombudsmana, wyodrębniono te najbardziej typowe, uniwersalne. Jednocześnie wskazano jego miejsce w systemie ochrony praw i wolności człowieka i obywatela oraz scharakteryzowano jego działania jako instytucji, która jest niezbędnym i stałym elementem tego systemu. Część uwagi została poświęcona obowiązującym przepisom w tym zakresie zarówno w systematyce Konstytucji Rzeczypospolitej Polskiej z dnia 2 kwietnia 1997r., jak i regulacjom ustawy o Rzeczniku Praw Obywatelskich z dnia 15 lipca 1987 r. Wskazano na rolę ombudsmana w dzisiejszych czasach, która staje się konieczna i niezbędna i coraz bardziej doceniana obok działań również innych instytucji w zakresie ochrony praw i wolności.

Słowa kluczowe: Rzecznik Praw Obywatelskich, model organizacyjny ombudsmana, cechy konstytutywne ombudsmana

INTRODUCTION

This article presents and discusses the issues related to sorts of organizational models of modern Ombudsman, indicates the constitutive features of this authority and elaborates on the scope of the Commissioner for Human Rights' activities. The article aims to indicate the Ombudsman's place in the system of protection of our rights and freedoms and to characterize his activities as an institution that is an indispensable and permanent element of this system. The legal possibilities of the Polish Ombudsman have been analyzed, which are of huge importance in the area of protection and prevention of respecting human and citizen freedoms and rights. Special attention has been paid to the effective regulations in this regard both in the taxonomy of the Constitution of the Republic of Poland of April 2, 1997¹ (hereinafter: the Constitution of the Republic of Poland), as well as statutory regulations, in particular the Act on the Commissioner for Human Rights of 15 July 1987² (hereinafter: the Act on Ombudsman). It should also be noted here that the creation and implication of numerous legislative solutions to the Polish legal order is based on international standards developed over the years by many countries. It also had a significant impact on the scope and nature of regulations and as a consequence, it influenced the decision to finally adopt specific legal solutions³. The role of the Ombudsman in today's world is becoming necessary and indispensable as well as more and more appreciated alongside the activities of other institutions, the bodies of executive and legislative powers which are to fulfill the task of protection the

¹ The Constitution of the Republic of Poland of April 2, 1997 (Journal of Laws 1997, No. 78, Item 483 with later amendments) (hereinafter: the Constitution of the Republic of Poland).

² Act of July 15, 1987 on Commissioner for Human Rights (Journal of Laws 2018, Item 2179 with later amendments) (hereinafter: the Act on Ombudsman).

³ M. Jabłoński (ed.), *Wolności i prawa jednostki w Konstytucji RP*, Vol. I: *Idee i zasady przewodnie konstytucyjnej regulacji wolności i praw jednostki w RP*, Warszawa 2010 (Wprowadzenie), p. V.

rights and freedoms in Poland to a various degrees⁴. However, the institution of Ombudsman is treated as a special authority, and most importantly, it possesses independence from other state entities and the widest general jurisdiction in the field of civil rights protection⁵.

THE INSTITUTION OF OMBUDSMAN

In different countries there is various nomenclature used referring to this institution, however, the literature adopts the general term “ombudsman” (literally meaning “representative”), which is reserved for a special entity established in the 18th century in Sweden which controls the compliance with the proper conduct of public administration in relation to the citizen⁶. The Swedish concept began to gain an increasing position in the protection of rights and freedoms of citizens. Unfortunately, in other countries the process of developing new institutions of this kind did not take place promptly, and there were no counterparts of this entity until the end of the 19th century⁷. Only in 1919 after regaining her independence, Finland has appointed her Ombudsman using the Swedish model. Subsequently, after the end of World War II and with a change in understanding and perception of human rights and realizing that every democratic country requires the institutions of control, the awareness of the need to guarantee citizens the already institutionalized possibilities of defending and protecting their rights and freedoms was growing rapidly. Further countries decided to take this step – it was Norway (1952), followed by Denmark (1953)⁸. Following the Scandinavian model and the development of international protection of human rights and freedoms, the institution of Ombudsman became an extremely interesting idea to countries not only in Europe, but all over the world. These institutions were created, among others in New Zealand (1962), Great Britain (1967), Israel (1971), Zambia (1973), France (1973), New Guinea (1975), Portugal (1976), Australia (1976), Trinidad and Tobago (1976), Austria (1977), Jamaica (1978), Philippines (1979), Spain (1981), the Netherlands (1982), Ireland (1984)⁹.

⁴ I. Malinowska, *Rzecznik Praw Obywatelskich w systemie ochrony praw i wolności w Polsce*, Warszawa 2007, p. 8.

⁵ P. Sołtysiak, *Rzecznik Praw Dziecka. Zagadnienia ustrojowo-prawne*, Warszawa 2019, p. 11.

⁶ W. Skrzydło, *Ustrój polityczny RP w świetle konstytucji z 1997 r.*, Warszawa 2014, p. 236; B. Banaszak, *Prawo konstytucyjne*, Warszawa 2012, p. 571; R.M. Małajny, *Polskie prawo konstytucyjne na tle porównawczym*, Warszawa 2013, p.664-665; S. Sagan, *Prawo konstytucyjne Rzeczypospolitej Polskiej*, Warszawa 2001, p. 227.

⁷ W. Skrzydło, *Polskie prawo konstytucyjne*, Lublin 2010, p. 439; L. Garlicki, *Polskie prawo konstytucyjne*, Warszawa 2018, p.440.

⁸ S. Sagan, V. Serzhanova (ed.), *Organy i korporacje ochrony prawa*, Warszawa 2008, p. 97; S. Serafin, B. Szmulik (ed.) *Organy ochrony prawnej RP*, Warszawa 2007, p. 406; J. Kochanowski, *Wstęp*, [in:] M. Zubik (ed.), *Księga XX-lecia Rzecznika Praw Obywatelskich w Polsce. Księga Jubileuszowa Rzecznika Praw Obywatelskich*, Vol. IV, Biuro Rzecznika Praw Obywatelskich, Warszawa 2008, p. 8.

⁹ S. Sagan, V. Serzhanova (ed.), *Organy...*, p. 97; S. Serafin, B. Szmulik (ed.) *Organy...*, Warszawa

The institution of Ombudsman in Poland was established quite late due to political conditions in the country at that time. In the 1960s and 1970s, which was a period of rapid development of this institution, Polish doctrine argued that it was a completely useless entity and not in compliance with the essence of a socialist state. It wasn't until the 1980s that social and political events (the need to expand the field of civil rights and freedoms) were the beginning of discussions on the necessity to reform the legal and institutional order and therefore the shape of the future Ombudsman office. The discussion included, among others, whether it should be a local or central body, whether it was to be appointed by the Parliament or by the Council of State¹⁰. Eventually, it was decided that the body would be of national nature and the Ombudsman would be appointed by the parliament to which he is subordinate. The effect of these activities was the creation of the Act on Commissioner for Human Rights on July 15, 1987 (hereinafter: the Act on Ombudsman)¹¹. This constituted an extremely vital change, especially because Poland was only the second country of the socialist camp after the former Yugoslavia (1974) in which the office of Ombudsman has been introduced¹². It also had an international dimension, because at that time most western European countries introduced this institution into their system, and it was a sign that „Poland chose democratic rule of law and fulfills her obligations in the field of human rights”¹³. It ought to be also mentioned that the establishment of this office was in some sense a complement to other institutions established a few years earlier, such as the Supreme Administrative Court (1980), the State Tribunal (1982) and the Constitutional Tribunal (1982)¹⁴. During the first years of operation (1987-1989) the competences of Ombudsman were significantly limited¹⁵. The office of the Ombudsman has obtained the status of a constitutional body only after the amendment to the Constitution of the Polish People's Republic from 1952 by the Act of December 29, 1989 on the amendment to the Constitution of the Polish People's Republic¹⁶. The amended constitution included the regulations referring to the rules of appointment and the function of Ombudsman¹⁷. As

2007, p. 406; A. Deryng, *Rzecznik praw obywatelskich jako wnioskodawca w postępowaniu przed Trybunałem Konstytucyjnym*, Warszawa 2014, p. 36-37.

¹⁰ W. Skrzydło, *Polskie...*, p. 441; J. Buczkowski (ed.), *Prawo konstytucyjne RP (Instytucje wybrane)*, Rzeszów –Przemysł 2013, p. 464-466; A. Gajda, *Kierunki rozwoju instytucji Rzecznika Praw Obywatelskich w Polsce*, Warszawa 2013, p. 77; M. Bartoszewicz, *Ustanowienie Rzecznika Praw Obywatelskich a problemy administracji państwowej w Polsce w końcu lat osiemdziesiątych XX wieku*, „Komunizm: System – Ludzie – Dokumentacja. Rocznik Naukowy” 2(2013), p. 189 (Retrieved from: <http://komunizm.net.pl/> - accessed March 9, 2020).

¹¹ J. Buczkowski (ed.), *Prawo...*, p. 465-466

¹² M. Bartoszewicz, *Ustanowienie...*, p. 190.

¹³ A. Gajda, *Kierunki...*, p. 2; D. Górecki, *Polskie prawo konstytucyjne*, Warszawa 2012, p. 260.

¹⁴ J. Arcimowicz, *Rzecznik Praw Obywatelskich. Aktor sceny publicznej*, Warszawa 2003, p. 41.

¹⁵ B. Szmulik, M. Paździór, *Konstytucyjny system organów państwowych*, Warszawa 2014, p. 257.

¹⁶ Act of December 29, 1989 on the amendment to the Constitution of the Polish People's Republic, „Journal of Laws” 1989, No. 75, Item 444.

¹⁷ P. Sarnecki, *Prawo konstytucyjne RP*, Warszawa 2014, p. 455.

T. Zieliński himself indicates, this amendment was „a breakthrough in the position of the Ombudsman, measured by the effectiveness of his actions in defense of civil rights and freedoms. The most crucial change that the amendment introduced was the formation of the system of the Republic of Poland as a democratic state of law, implementing the principles of social justice”¹⁸.

Certainly one should acknowledge that the establishment of the institution of Ombudsman and its authority during the political changes in the 20th century had an invaluable value in shaping and consolidating the democratic systems of executing power not only in Poland but also in many other countries¹⁹.

THE ORGANIZATIONAL MODEL OF THE INSTITUTION OF OMBUDSMAN

In countries in which the office of Ombudsman has been established, it has been adapted to their political system, the system of executing power, but also to the needs of a particular society. Nevertheless, due to the various concepts of how the office should function and a great flexibility of solutions in this area, some organizational models of this institution can be distinguished²⁰. Two basic models can be identified in the literature on functioning and organization of this institution. As indicated by M.R. Małajny and M. Kowalska: a) the first model - Swedish (Nordic, Scandinavian) an ombudsman is appointed by the parliament (he is independent of the executive and to a large extent from the legislative power); he is elected for a term; he is directly available; he possesses discretionary freedom (as well as its own initiative) in the scope of undertaken matters; the appointed person has an appropriate level of (legal) education, experience and social prestige; he is obligated to submit the annual information to Parliament on the actions taken; the audit covers the judiciary and the activities of state administration; b) the second British-French model is quite distinctive due to the fact that the Ombudsman is appointed by the head of state as well as the participation of Members of Parliament in contacts of interested entities or groups with the Ombudsman (a member of the House of Commons has the right to refuse to submit an application to the Ombudsman if he finds it unjustified, in the event of the application being forwarded to the Ombudsman, he is obliged to inform the Member of Parliament about the manner of settling the matter or about refusal to accept it); c) the third Danish model is characterized by the fact that courts have been excluded from the jurisdiction of the Ombudsman and the complaints submitted by citizens regard-

¹⁸ Report of the Commissioner for Human Rights for the period November 20, 1991 - February 12, 1993, the RPO Bulletin, Issue 16, Warszawa 1993, p. 15 (Retrieved from: www.rpo.gov.pl - accessed on March 9, 2020).

¹⁹ A. Gajda, *Kierunki...*, p. 19.

²⁰ A. Gajda, *Ewolucja modelu ombudsmiana w ujęciu teoretycznoprawnym*, [in:] P. Mikuli (ed.), *Instytucje ombudsmiana w państwach anglosaskich*, Warszawa 2017, p. 11.

ing the operation of courts and judges are examined by a specially appointed Court of Complaints²¹.

Additionally, as A. Deryng points out, another classification consisting of other three models can be found in the resolution of the International Association of Lawyers Council, namely: a) „classical” – which works mainly in the public sphere and focuses on public administration and legislation; b) „organizational” – its activities extend not only to the public but also the private sector (except that this only applies to the matters of specific entities, e.g. corporations); c) „representative” – has limited competences, but with its actions refers to the activities of a classic ombudsman, what is more, it does not have a high political position²².

Concluding, based on the characteristics of the first group of models, it should be noted that the mode of operation and the powers granted to Polish Ombudsman are formed mainly on the Swedish model and although some significant differences can also be found, there are more similarities. The greatest similarity may be noticed in the Ombudsman's quite broad scope of competence covering actually the entire area of the protection of rights and freedoms, however, as indicated by M.R. Małajny, the Swedish model does not stress the exceptionally strong political neutrality, independence and the closeness to the judiciary as it is applied in Polish solution²³. In view of the variety of solutions regarding the systemic legitimacy of this body, the attitude towards public authorities, its competences, models of functioning and organization and the resulting doubts whether a given body can still be treated as an ombudsman, one ought to first consider and analyze whether the appropriate conditions have been created for this institution so that it can fulfill its goals, effectively act for the benefit of citizens and control obeying of rights and freedoms by state organs²⁴.

CONSTITUTIVE FEATURES CHARACTERIZING OMBUDSMAN

Taking into consideration the Nordic model of Ombudsman functioning in many countries, L. Garlicki points to some constitutive typical, universal features of this var-

²¹ B. Banaszak, *Prawo...*, p. 572; R.M. Małajny, *Polskie...*, p. 665; J. Arcimowicz, *Urząd Rzecznika Praw Obywatelskich w Polsce*, Warszawa 2001, p. 9; M. Kowalska, *Instytucja ombudsmana jako czynnik demokratyzacji systemów państwowych w krajach Europy Środkowo-Wschodniej i Południowej*, „Przegląd Politologiczny” 2014, No. 4, p. 172-173; A. Gajda, *Kierunki...*, p. 25; M. Liber, *Dziś i Jutro Rzecznik Praw Obywatelskich*, [in:] J. Iwanak, M. Stolarczyk (ed.), *Studia Politicae Universitatis Silesiensis*, Vol. I, Katowice 2005, p. 216.

²² A. Gajda, *Ewolucja...*, p.17.

²³ A. Zieliński, *Rzecznik Praw Obywatelskich – przyszłość, teraźniejszość, przeszłość*, [in:] B. Oliwa-Radzikowska (ed.), *Obywatel – jego wolności i prawa. Zbiór studiów przygotowanych z okazji 10-lecia urzędu Rzecznika Praw Obywatelskich*, Biuro Rzecznika Praw Obywatelskich 1998, p. 11-12; R.M. Małajny, *Polskie...*, p. 665.

²⁴ J. Arcimowicz, *Rzecznik...*, p. 40; A. Zoll, *Rzecznik Praw Obywatelskich w Rzeczypospolitej Polskiej*, [in:] M. Matey-Tyrowicz, L. Nawacki, B. Wagner (ed.), *Prawo pracy a wyzwania XXI wieku. Księga jubileuszowa Profesora Tadeusza Zielińskiego*, Warszawa 2002, p. 82.

iant of a state entity, namely: first, it is an independent state entity with constitutional status, clearly separated from the judiciary and administration, but also independent of all political influence and pressure. Second of all, it is usually appointed by the parliament and its tasks fall within the parliamentary function of control. Third of all, Ombudsman performs two main functions: the first is to listen to citizens' complaints regarding matters related to irregularities in the operation of administration (less often the judiciary) and to undertake specific actions in this respect, and the second is to inform Parliament about the condition of the rule of law in the country in the context of respecting human and citizen rights and freedoms. The last feature that is distinctive of this model is the easy access of the individual to this institution, through the implementation of a simple, informal, free procedure, which fundamentally differs from the procedure applied with courts. It should be mentioned, however, that the Ombudsman has been provided with a great amount of freedom in making decisions about initiating actions and interventions in a given case, and at the same time he has been deprived of the power to independently settle the matters he decided to look into as well as of the competences of authoritative nature²⁵. This catalogue might be additionally completed with another feature, namely the term of office of Ombudsman, which is clearly to guarantee its independence by the inability to remove the Ombudsman before the expiry of the period for which he was appointed²⁶.

Analogous features of this office are indicated by P. Kowalski, who mentions: a) connection with the parliament; b) accessory character in relation to administrative and common courts; c) simplified operation and application of sanctions – free from unnecessary formalities; d) controlling state administration as well as government local administration in terms of their compliance with the law; e) the dualistic nature of the goals of Ombudsman, on the one hand strengthening parliamentary control over the activity and functioning of state administration, on the other enhanced protection of subjective and civil rights²⁷.

A. Zoll sees the constitutive features of the ombudsman in a different way, namely: a) he stresses that the fundamental task of the Ombudsman is to ensure that public authorities respect human rights; b) he emphasizes the Ombudsman's inability to make decisions in a legal and administrative sense; c) he indicates the control activities and interventions of Ombudsman in relation to actions or omissions of public authority which are violations of fundamental rights and freedoms of a man and a citizen²⁸.

²⁵ L. Garlicki, *Polskie...*, p. 441; P. Sarnecki, *Prawo...*, p. 454-455; B. Banaszak, *Prawo...*, p. 572; S. Sagan, *Prawo...*, p. 227; W. Skrzydło, *Polskie...*, p. 440; A. Gajda, *Kierunki...*, p. 22.

²⁶ W. Skrzydło, *Polskie...*, p. 40.

²⁷ A. Domańska, *Pozycja ustrojowo-prawna Rzecznika Praw Obywatelskich*, Łódź 2012, p. 29; See: P. Kowalski, *Polski ombudsman – oczekiwania i nadzieje*, „Prawo i Życie” 1986, No. 34.

²⁸ H. Zięba-Załucka (ed.), *Organy państwowe w ustroju konstytucyjnym RP*, Rzeszów 2016, p. 416-417; See: A. Zoll, *Rzecznik...*, p. 83-84.

The constitutive nature of the indicated elements means that failure to comply with any of them precludes recognition of the given body as an ombudsman. As A. Domańska notices, „such a narrow approach may lead to the disqualification of institutions that will perform the proper function for this body”²⁹.

B. Banaszak and M. Jabłoński also referred to the features characterizing the institution of Ombudsman. According to them the features are as follows: free assistance, independence, comprehensiveness of protection, constitutionally guaranteed independence, universality, lack of instantiation, and subsidiarity³⁰. The literature also points to further features, I. Malinowska adds: own initiative to take matters, acting without the time limit, and the influence of authority³¹.

It has to be emphasized that the institution of Ombudsman currently operates in more than 140 countries all over the world which results in a significant diversity of their status and what model of organization and functioning is adopted depends on the country – its needs, the type of political system, mechanisms of exercising power, cultural and historical conditions or tradition³². Modifications most often occur in terms of: a) organization of institutions at various levels of operation – local (Switzerland, Italy), nationwide (Czech Republic, Croatia) or both (Belgium, France); b) the method of appointment – it can be done by the parliament (Estonia), sporadically by governments (France) as well as by the head of state (Cyprus), which is also rare; c) the length of the term of office – most often the term of office is between 4 and 6 years, appointment for one term is rare, it is usually two terms. There are also solutions to hold this function until further notice, until retirement (Great Britain, Ireland); d) control competences – may include within their scope of activities various configurations – the judicial, executive and legislative powers or have only the ability to control the activities of state administration; e) the manner in which the office is empowered – usually, to a small extent, constitutional regulations and laws or only laws are formulated; f) the availability of the office – submission of an application, complaint is carried out through parliament (France, Great Britain) or directly (Poland) and in some solutions the deadline is set after which (counting from the date of issuing a specific act), the ombudsman does not take action (the Netherlands, Sweden, Finland); g) the required qualifications from applicants for this office – the need to have appropriate education, e.g. legal (Denmark),

²⁹ A. Domańska, *Pozycja...*, p. 29.

³⁰ I. Malinowska, *Rzecznik...*, p. 55; See: B. Banaszak, M. Jabłoński, *Wewnętrzne systemy ochrony wolności i praw jednostki*, [in:] B. Banaszak, A. Bisztyga, K. Complak, M. Jabłoński, R. Wieruszewski, K. Wójtowicz, *System ochrony praw człowieka*, Zakamycze 2003, p. 344-345.

³¹ A. Domańska, *Pozycja...*, p. 30; See: I. Malinowska, *Rzecznik...*, p. 57.

³² J. Arcimowicz, *Urząd...*, p. 8; A. Domańska, *Pozycja...*, p. 29; R.M. Małajny, *Polskie...*, p. 664-665; European Commission for Democracy through Law (Venice Commission), Principles for the Protection and Promotion of the Ombudsman (‘Venice Rules’) adopted by the Venice Commission at the 118th plenary session (Venice March 15-16, 2019), Opinion no. 897/2017, CDL-AD (2019) 005, Strasbourg, March 18, 2019, p. 2 et seq. (Retrieved from: www.venice.coe.int – accessed on March 8, 2020).

appropriate legal knowledge (Poland) or lack of specified requirements regarding education, experience, professionalism (Latvia); h) organization of the office – as a collective body (Austria, Belgium) where the competences are divided between them or monocratic (Poland); i) possible actions to be taken by the Ombudsman – universal, where he deals with all matters (Poland), or specialized, in this case he takes actions in an enumerated way or in specific cases (Germany)³³.

Taking into account all the indicated differences, the multitude of solutions in the functional and organizational scope, the distinct specifics of actions resulting from the systemic solutions of a given country, some common features may be indicated as mentioned by A. Domańska. First of all, legal solutions make this institution self-reliant, in addition, constitutional legitimacy in many countries strengthens its position and thus independence. Secondly, his activity is based on the recommendations of a specific action, corrective solutions, focusing on certain solutions and despite the lack of imperious powers, he acts with the strength of his own authority. Thirdly, control proceedings are conducted based on the principles of good administration but also on the basis of the criteria of justice, equity or legality. Fourth, in most cases it is an independent office, separated from other state organs, in particular the executive power. Fifthly, in the field of judicial protection of human and civil rights and freedoms, it complements the institutional solutions understood as standard. Sixth, it is commonly available. Seventhly, ombudsman's activities are undertaken in two ways: at the request or ex officio – in the case of actions or violations of rights and freedoms on the part of bodies subject to Ombudsman's control. Eighth, this body is characterized by simplified procedures and unpaid assistance³⁴.

It has to be emphasized that while analyzing differences in the functioning, organization and competences of Ombudsman in the countries where the institution has been established, the Polish regulations seems to give him a relatively strong political position and a wide range of powers in the activities undertaken by him.

THE SCOPE OF PROTECTION OF RIGHTS AND FREEDOMS OF INDIVIDUAL IN THE ACTIVITIES OF OMBUDSMAN

Currently, the basis for the functioning of the Commissioner for Human Rights in Poland is the Constitution of 1997 as well as the aforementioned Act of 1987³⁵. In the Constitution of the Republic of Poland, in chapter IX entitled „Authorities for State Control and Law Protection”, the legislator included the institution of Ombudsman in a separate group of bodies, next to the Supreme Audit Office and the

³³ J. Świątkiewicz, *Rzecznik Praw Obywatelskich w polskim systemie prawnym*, Warszawa 2001, p. 18-23; J. Arcimowicz, *Urząd...*, p. 8; I. Malinowska, *Rzecznik...*, p. 60-64; A. Domańska, *Pozycja...*, p. 34.

³⁴ A. Domańska, *Pozycja...*, p. 30-31.

³⁵ S. Bożyk (ed.), *Prawo konstytucyjne*, Białystok 2014, p. 392.

National Broadcasting Council. This means a special character of these bodies and a specific function of the Ombudsman, although it should be noted that this is an institution with a slightly different character than the other two, because its tasks are aimed at protecting the citizen³⁶. As indicated by A. Deryng, "it is difficult to place the Ombudsman in the traditional power division, because his interests are in the activities of the executive, he is also associated with the legislative power and his forms of activity bring some similarities to those of the judiciary"³⁷. This opinion is also shared by A. Zoll since he believes that it is difficult to characterize this institution because it is not strictly associated with executing power. It does not issue a decision, but it is the body controlling certain state activities and the body initiating certain actions aimed at removing or preventing violations of human rights and freedoms³⁸. J. Świątkiewicz, however, emphasizes that apart from this "traditional division specified in the constitutional principle of separation of powers as per article 10 of the Constitution of the Republic of Poland, another (fourth) separate category has been created, namely the bodies for control and protection of law, where the Ombudsman occupies the position of the supreme constitutional body"³⁹. The Constitution devotes several resolutions to the institution Ombudsman. In chapter IX, there are articles 208-212 regarding his powers, appointment procedure, term of office, order of formal apoliticism, the principle of independence, immunity and his duties towards parliament. Additionally, in another part of the Constitution, there are some more regulations regarding organization (article 103) and the functioning (article 80 and 191) of the institution of Ombudsman⁴⁰. Clarification and further details of the regulations of the Constitution in respect of the Ombudsman are elaborated on in the Act on the Ombudsman of 1987. This legal act, which has been amended several times presents in details the tasks, qualifications, appointment and dismissal as well as the Ombudsman's rights and obligations.

The most important and basic task of Polish Ombudsman specified in article 208 of the Polish Constitution is „to guard human and citizen freedoms and rights established in the Constitution and other normative acts”⁴¹. One ought to pay attention to the differentiation between the Constitution of the Republic of Poland and the Act on the Ombudsman in terms of „human” freedom and law, which apply to everyone and „citizen”, which will be addressed only to people possessing the citizenship⁴². The Commissioner for Human Rights, as the name suggests, is

³⁶ P. Sarnecki, *Prawo...*, p. 456; L. Garlicki, *Polskie...*, p. 442.

³⁷ A. Deryng, *Rzecznik Praw Obywatelskich jako wnioskodawca w postępowaniu przed Trybunałem Konstytucyjnym*, Warszawa 2014, p. 54.

³⁸ I. Malinowska, *Rzecznik...*, p. 57.

³⁹ J. Świątkiewicz, *Rzecznik...*, p. 39.

⁴⁰ The Constitution of the Republic of Poland, articles: 80, 103, 191, 208-212; P. Sarnecki, *Prawo...*, p. 455.

⁴¹ The Constitution of the Republic of Poland, article 208; L. Garlicki, *Polskie...*, p. 444.

⁴² P. Chmielnicki, *Konstytucyjny system władz publicznych*, Warszawa 2010, p. 278.

a monocratic body (it does not mean that he performs all his tasks himself since he has deputies and plenipotentiaries at his disposal) and his activities cover the entire territory of the Republic of Poland. This article does not indicate competence or the possibility of its action, it only generally indicates the elementary function of "guarding". In doctrine, this term means the total of the functions that the Ombudsman can fulfil, i.e. control, prevention and protection⁴³. Such a broad formulation of the scope of tasks proves its universal and general competence⁴⁴. The term „in Constitution and other normative acts” indicates that the scope of the Ombudsman's activities is not limited to the protection of rights and freedoms established in Chapter II of the Constitution in articles 30-76, but also to legal acts of lower level, i.e. laws, regulations, international agreements (article 9 of the Constitution of the Republic of Poland states that Poland shall comply with international law binding her, thereby it is not only about ratified international agreements, but also about customary international law in a broader context), as well as acts which are not generally applicable however being the internal provisions established by local or central authorities⁴⁵. As per the aforementioned documents, it seems that these are all rights and freedoms that have been determined by regulations in national and international legal acts of normative nature⁴⁶. Article 208 section 1 of the Polish Constitution generally defines the basic task of the Ombudsman, the Act on the Ombudsman in Article 1 section 1 duplicates this decision, adding that Ombudsman also „guards the implementation of the principle of equal treatment”⁴⁷. Hence the Commissioner for Human Rights also became a guarantee of the implementation of the constitutional principle of equality and the prohibition of discrimination as per article 30 of the Polish Constitution. This is an important change in the activities of Ombudsman which took place on January 1, 2011 – the same day as the Act of December 3, 2010 became effective – the act on the implementation of certain European Union regulations on equal treatment⁴⁸. This means that public authorities are obliged to respect and observe the right to equal treatment and to prohibit discrimination in social and economic as well as political life⁴⁹. Also as part of his activities in matters

⁴³ P. Tuleja (ed.), *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, Warszawa 2019, p. 611.

⁴⁴ B. Banaszak, *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, Warszawa 2012, p. 1018; M. Safjan, L. Bosek (ed.), *Konstytucja RP. Komentarz*, Vol. II; Art. 87-243, Warszawa 2016, p. 1423; L. Garlicki (ed.), *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, Warszawa 2003, Chapter IX, art. 208, p. 1.

⁴⁵ W. Skrzydło, *Konstytucja Rzeczypospolitej polskiej. Komentarz*, Warszawa 2013, p.277-278; J. Buczkowski (ed.), *Prawo...*, p. 472; B. Banaszak, A. Preisner (ed.), *Prawa i wolności obywatelskie w Konstytucji RP*, Warszawa 2002, p. 792; The Constitution of the Republic of Poland, article 9.

⁴⁶ W. Skrzydło, S. Grabowska, R. Grabowski (ed.), *Konstytucja Rzeczypospolitej Polskiej. Komentarz encyklopedyczny*, Warszawa 2009, p. 519.

⁴⁷ Act on Commissioner for Human Rights, article 1 section 1; H. Zięba-Załucka (ed.), *Organy państwowe w ustroju konstytucyjnym RP*, Rzeszów 2016, p. 421.

⁴⁸ Act of 3 December, 2010 on the Implementation of Certain European Union Regulations on Equal Treatment (Journal of Laws 2010 No. 254 item 1700).

⁴⁹ W. Skrzydło, *Konstytucja...*, p. 46.

of protecting the rights and freedoms of children, the Act on Ombudsman in article 1 section 2a obliges him to cooperate with the Ombudsman for Children. In conclusion, the Commissioner for Human Rights has the task of examining whether there was any violation of law, as well as the principles of coexistence and social justice, as a result of an action or omission of organizations and institutions that are obliged to observe and implement human and citizen freedoms and rights”⁵⁰.

Article 208 of Polish Constitution corresponds to its article 80 which states that “Everyone has the right to apply to Ombudsman for help in protecting their freedoms or rights violated by public authorities on the basis of the principles established in the Act”⁵¹. The group of entities that may submit a request to Ombudsman for assistance has not been specified in this article and therefore is not limited. Hence it may be acknowledged that this is not a right addressed only to Polish citizens⁵². Thus “everyone” means not only Polish citizens (issues related to Polish citizenship as the sole sovereign domain of Polish law are regulated, among others, in the Constitution of the Republic of Poland⁵³, the Act on Polish Citizenship⁵⁴, the Act on Repatriation⁵⁵ and the Act on the Pole’s Card⁵⁶)⁵⁷, but also in accordance with article 37 of the Polish Constitution which elaborates on making use of constitutional freedoms and rights of everyone who is under the authority of the Republic of Poland, persons whom no country recognizes as its citizens within the scope of its law (stateless people⁵⁸) and foreigners (according to Article 3 of the Act on Foreigners – it is anyone who does not have Polish citizenship)⁵⁹. In the case of the latter group mentioned, the only limitation is the provision of article 37 section 2 of the Polish Constitution, which states that only an act may introduce certain exclusions or restrictions for foreigners from using a certain scope of rights and freedoms. This prevents, in some cases, the help of Ombudsman⁶⁰. In the case of natural persons, it is irrelevant whether they have capacity for legal action⁶¹. According to current interpretation, all those “legal entities that may benefit from constitution-

⁵⁰ Act on Ombudsman, article 1 section 3.

⁵¹ The Constitution of the Republic of Poland, article 80.

⁵² W. Skrzydło, *Konstytucja...*, p. 96.

⁵³ The Constitution of the Republic of Poland, article 34.

⁵⁴ Act of 2 April, 2009 on Polish Citizenship (Journal of Laws 2012, item 161).

⁵⁵ Act of 9 November, 2000 on Repatriation (Journal of Laws 2000, No. 106, item 1118).

⁵⁶ Act of 7 September, 2007 on the Pole’s Card (Journal of Laws 2007, No. 180, Item 1280).

⁵⁷ M. Jabłoński (ed.), *Wolności i prawa jednostki w Konstytucji RP. Idee i zasady przewodnie konstytucyjnej regulacji wolności i praw jednostki RP*, Vol. I, Warszawa 2010, p.472.

⁵⁸ Convention relating to the Status of Stateless Persons adopted on August 28, 1954. by the Conference of Plenipotentiaries convened in virtue of the Resolution No. 526A (XVII) of the Economic and Social Council of April 26, 1954, Article 1 point 1.

⁵⁹ Act of 12 December 2013 on Foreigners (Journal of Laws 2013, Item 1650, Article 3); M. Haczkowska (ed.), *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, Warszawa 2014, p. 192.

⁶⁰ R.M. Małajny, *Polskie...*, p. 668.

⁶¹ S. Bożyk (ed.), *Prawo...*, p. 394.

ally guaranteed freedoms and fundamental rights”⁶² may also apply to Ombudsman for assistance, which means that in addition to natural persons this group includes also legal persons and an organizational unit without legal personality. Local government units may also have such an opportunity to protect their rights violated by central public authority (parliament, government)⁶³. As indicated by A. Zoll, Polish Constitution regulates this issue in the most widely possible manner and the introduction of any subjective restrictions under ordinary legislation would constitute a solution contrary to Constitution and would be excluded from the legal system by a judgment of the Constitutional Tribunal⁶⁴. To sum up, it is any entity that can demonstrate and substantiate that public authorities (as well as private ones that perform public tasks) have violated or threaten to violate its rights or freedoms as well as the principles of coexistence and social justice⁶⁵. It has to be emphasized that Ombudsman is not competent to take action in a situation in which the request for assistance concerns entities that do not belong to the categories of entities indicated above, e.g. the action or omission of other natural persons or when the applicant’s rights have been violated by the actions or omissions of foreign country. In this case, the courts will be the authority of the most appropriate competence⁶⁶.

It should also be noted in the context of article 80 of the Polish Constitution, that the possibilities of Ombudsman’s actions following the request submitted to him were not indicated. However, one may find the provisions of the Constitution of the Republic of Poland from which these competences have been defined to a small extent, it is article 191 section 1 point 1 indicating the entities authorized to submit an application to the Constitutional Tribunal (including Ombudsman among other) and article 212, which presents Ombudsman’s obligation to the Sejm and the Senate to submit annual information on his activities and the status of compliance with human and civil rights and freedoms⁶⁷. Regulations regarding the possibility of taking action by Polish Ombudsman as a result of an application submitted to him have been presented outside the text of the Constitution, in the Act on the Ombudsman.

One ought to take into consideration that whether interventions undertaken by the Ombudsman will have the intended effect and to what extent depends on the means of action he has been equipped with. They can be systematised, and T. Zieliński has differentiated between the following groups: „a) judicial (appeals

⁶² H. Zięba-Załucka (ed.), *Organy...*, p. 421; L. Garlicki, M. Zubik (ed.), *Konstytucja Rzeczypospolitej Polskiej. Komentarz II art. 30-86*, Warszawa 2016, p. 918.

⁶³ A. Zoll, *Rzecznik...*, p.85.

⁶⁴ Ibidem.

⁶⁵ M. Haczkowska (ed.), *Konstytucja...*, p. 193; B. Banaszak, *Konstytucja...*, p. 475; S. Bożyk (ed.), *Prawo...*, p. 395.

⁶⁶ B. Banaszak, *Konstytucja...*, p. 475; M. Kruk, M. Olszówka, M. Godlewski, M. Jarosz, M. Laskowska, J. Zaleśny, *Ochrona praw i wolności: system instytucjonalny w Rzeczypospolitej Polskiej*, Warszawa 2019, p. 414.

⁶⁷ P. Tuleja (ed.), *Konstytucja...*, p. 265-267.

to the Supreme Court with extraordinary revisions and requests for interpretation of regulations, as well as requests to the Constitutional Tribunal; b) parliamentary (annual reports and a request for legislative initiative; c) administrative and means of control (these are appeals to extra-judicial authorities, e.g. prosecutor, government)”⁶⁸. J. Świątkiewicz and K. Nalaskowski also point out the nature of legal measures of Ombudsman and mention in this respect: “a) measures of demand; b) appeals; c) measures to ensure the correct and consistent application of law; d) as a separate group, restrictive measures aimed at prosecuting those responsible for violation or breaking the law”⁶⁹.

Finally, a catalog of Ombudsman’s tasks can be presented, which was divided by Z. Witkowski into five main groups: a) the obligation to submit annual information to parliament and the public regarding the status of observance of rights and freedoms of the man and the citizen; b) taking specific actions aimed at eliminating violations in specific cases and examining individual citizens’ complaints; c) in the event of hierarchical inconsistencies between legal acts, he may take the initiative to remove them; d) he may give direction and influence the interpretation of the law relating to civil rights and freedoms; e) he can make proposals to the relevant authorities in order to take the legislative initiative⁷⁰.

All these tasks and measures in which Ombudsman undertakes activities, have the only and sole purpose of „repairing the action or omission of other entities in terms of freedoms and rights of the man and the citizen”⁷¹.

CONCLUSION

The institution of Ombudsman not only in Poland but also all over the world world commands great authority and has become a symbol of a democratic country. The best proof is the number of countries that decided to establish this institution and permanently enter it into the political landscape⁷². Despite the fact that nowadays there are various models of organization of this institution and some solutions may raise some doubts and be subject to criticism, such as the lack of direct access

⁶⁸ T. Zieliński, *Ombudsman – możliwości i granice skutecznego działania*, [in:] M. Zubik (ed.), *Księga XX-lecia Rzecznika Praw Obywatelskich w Polsce. Księga Jubileuszowa Rzecznika Praw Obywatelskich*, Vol. IV, Biuro Rzecznika Praw Obywatelskich, Warszawa 2008, p. 48.

⁶⁹ J. Świątkiewicz, *W piętnastą rocznicę ustanowienia instytucji Rzecznika Praw Obywatelskich*, [in:] *Godność człowieka a prawa ekonomiczne i socjalne. Księga Jubileuszowa wydana w piętnastą rocznicę ustanowienia Rzecznika Praw Obywatelskich*, Biuro Rzecznika Praw Obywatelskich, Warszawa 2003, p. 12; K. Nalaskowski, *Sposób wykorzystania kompetencji przez rzeczników w latach 1987-2007*, [in:] M. Zubik (ed.), *Księga XX-lecia Rzecznika Praw Obywatelskich w Polsce. Księga Jubileuszowa Rzecznika Praw Obywatelskich*, Vol. IV, Biuro Rzecznika Praw Obywatelskich, Warszawa 2008, p. 152.

⁷⁰ Z. Witkowski, A. Bień-Kacała (ed.), *Prawo konstytucyjne*, Toruń 2015, p. 626-627.

⁷¹ K. Nalaskowski, *Sposób...*, p. 152-153.

⁷² J. Świątkiewicz, *Rzecznik...*, p. 149; A. Gajda, *Kierunki...*, p. 20.

to Ombudsman, they have both advantages and disadvantages. What seems indisputable are the mechanisms for the protection of human and citizen rights and freedoms developed by the Ombudsmen over the years which allow them to effectively implement the basic assumptions of this institution. It should also be emphasized that the position of the Polish Ombudsman in comparison to solutions undertaken in other countries is extremely strong and momentous. The extensive range of competences and legal measures he is equipped with means that the scope of his activities covers the entire area of the national legal order. Thanks to the instruments of action granted to him, his functioning as a constitutional body of legal protection is extremely effective⁷³. His strong position among other bodies dealing with the protection of rights and freedoms is demonstrated by the number of requests for assistance submitted to the Ombudsman's Office, for comparison in 2011 – 58 thousand; 2012 – 62 thousand; 2013 – 70 thousand; 2014 – 57 thousand; 2015 – 57 thousand; 2016 – 52 thousand; 2017 – 52 thousand; 2018 – 57 thousand⁷⁴. Therefore, it is the body that shows the most activity among other offices in Poland⁷⁵. It should be mentioned that apart from actions to protect our rights, the institution of Ombudsman also fulfills another role – it is to improve and enhance the work of public administration and thus act to develop its functioning and image⁷⁶. That is why, despite giving the Ombudsman such broad competences, his position should be further strengthened as a self-reliant, independent, separate constitutional state body, as it guarantees that public authorities respect our rights and freedoms⁷⁷.

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⁷³ K. Nalaskowski, *Sposób...*, p. 165.

⁷⁴ Information on the Ombudsman's activities in 2011, 2012, 2013, 2014, 2015, 2016, 2017, 2018 (Retrieved from: www.rpo.gov.pl, accessed on February 11, 2020).

⁷⁵ T. Zieliński, *Ombudsman...*, p. 48.

⁷⁶ A. Gajda, *Kierunki...*, p. 20.

⁷⁷ A. Deryng, *Rzecznik...*, p. 83.

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