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Strengthening protection of human rights in Poland during the crisis

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Commissioner for Human Rights (*Rzecznik Praw Obywatelskich*)

- Polish Ombudsman started operations in 1987
- constitutional body – elected by two chambers of Parliament – five years' term; accountability to Sejm (annual reporting, possible impeachment procedure)
- significant constitutional and moral authority, due to legacy of previous Ombudspersons; constitutional guarantees of independence
- 300 employees, including 200 lawyers with an expertise in different fields of human rights' protection
- Ombudsman – NHRI body, monitoring body under CRPD, National Preventive Mechanism under OPCAT, equality body
- power to review individual complaints (more than 25.000 complaints per year) and to take cases *ex officio*
- Polish model of the Ombudsman institution: bridge to the rule of law state in 1989; other models of the Ombudsman in Western Europe

Ombudsman – international human rights' standards

- United Nations General Assembly Resolution 48/134 on the principles relating to the status of national institutions for the promotion and protection of human rights (“the Paris Principles”) of 20 December 1993
- Recommendation of the Committee of Ministers of the Council of Europe R (85) 13 on the institution of the Ombudsman
- Venice Principles on the Protection and the Promotion of the Ombudsman Institution, 3 May 2019, CDL-AD(2019)005
 - „Ombudsman Institutions have an important role to play in strengthening democracy, the rule of law, good administration and the protection and promotion of human rights and fundamental freedoms. While there is no standardised model across Council of Europe Member States, the State shall support and protect the Ombudsman Institution and refrain from any action undermining its independence.”
- Support to Ombudsman institutions by Global Alliance of National Human Rights' Institutions (GANHRI), International Ombudsman Institute (IOI) and European Network of National Human Rights Institutions (ENNHRI)

Polish Ombudsman and courts: powers

- abstract motions to the Polish Constitutional Court; possibility to join as third-party any case before the Constitutional Court
- civil cases – possibility to join as third-party the civil case; cassation appeals to the Supreme Court
- administrative cases - possibility to join cases as a third-party in administrative proceedings and proceedings before administrative courts
- power to request from the Supreme Court and the Supreme Administrative Court a resolution of 7-judges on interpretation of certain provisions
- criminal cases – only cassation appeals
- power to submit extraordinary appeal (*skarga nadzwyczajna*) to the Supreme Court
- specific Ombudsman practice in 2015-2021
 - not only intervention in individual cases, but strategic litigation regarding selected issues (e.g. local resolutions against LGBT ideology and litigation before administrative courts)
 - use of Ombudsman court powers to delay the process of dismantling independence of judiciary and to empower courts

Ombudsman and international human rights' bodies

- European Court of Human Rights
 - third party interventions (*amicus curiae*) in selected cases
 - Participation in the hearing before the Grand Chamber (*Grzęda v. Poland*)
- Court of Justice of the European Union
 - Joining civil or administrative case at the domestic level – automatic participation in the proceedings before CJEU
- United Nations bodies
 - Shadow reports to the UN Committees (e.g. CAT, HRC, CRPD)
 - Cooperation with Special Rapporteurs
- Council of Europe
 - Cooperation with the Commissioner for Human Rights
 - Committee of Ministers – submission of Rule 9 comments on the ECtHR enforcement
- OSCE ODIHR
 - Requests for legal opinions
 - Joint organization of events

Ombudsman and public administration

- General recommendations on practices of central or local authorities:
 - e.g. on brutality of police and use of tasers; on the use of post-penal isolation measures; on the need to adopt legislation against hate speech
 - more than 200 general recommendations per year issued by the Ombudsman
 - recommendations do not have a binding nature – they initiate or strengthen the discussion on a certain topic; support to civil society and its actions; interest of media in the position of the Ombudsman
- Competence to request explanations from authorities and to investigate any case
- Competence to challenge acts adopted by administration before administrative courts (e.g. decision of the Prime Minister on transfer of personal data for purposes of elections)
- Possibility to verify actions by the state undertaken by secret services (access to “top secret” documents)

Ombudsman and closed institutions

- under the Optional Protocol to the UN Convention Against Torture, the state has to create „National Preventive Mechanism”
- Ombudsman is the NPM for Poland
- tasks: regular monitoring of all places of detention (prisons, arrests, police stations, centres for foreigners, juvenile centres, social Foster homes etc.) in order to **prevent** torture, inhuman or degrading treatment
- Dilemma: how to guarantee independence of the NPM within the structure of the Ombudsman office; how to concentrate on **prevention**, when usually Ombudsman reacts to certain cases

Ombudsman as equality body

- Under national laws implementing EU directives the Ombudsman is the equality body
- Advantage: strong constitutional mandate to intervene in non-discrimination cases; possibility to cooperate with NGOs and to make strategic litigation
- Disadvantage: majority of anti-discrimination cases are horizontal cases (between private individuals), while Ombudsman competences are designed to vertical relations
- Risk for the Ombudsman to be part of the highly polarized debate due to involvement in controversial cases; question of legitimacy
- EU Commission actions towards strengthening of independence of equality bodies in Member States

Constitutional and rule of law crisis in Poland

- constitutional and economic reforms in 1989
- institutional reforms – building rule of law mechanisms; new Constitution in 1997
- joining the Council of Europe, the NATO and the European Union
- economic growth and stability, but growing disparity in income
- politics of identity and populism vs. tradition of rule of law
- after parliamentary elections in 2015 won by “Law and Justice” – implementation of reforms with absolute parliamentary majority (in both chambers of Parliament and with support of loyal President)
- political subordination of selected institutions (Constitutional Court, prosecutor’s office, public media, secret services); after 2017 attack on judicial independence
- Constitutional Court: marginalization as an instrument of opposition, a legal instrument to achieve political goals (e.g. judgment of 22 October 2020 on access to legal abortion)

The New York Times

In Poland, a Stubborn Defender of Judicial Independence

Judge Igor Tuleya has faced threats, fake anthrax attacks and denunciations in the right-wing news media as he fights the government's campaign to control the courts.



Current situation regarding rule of law crisis

- political subordination of selected judicial institutions vs. individual courage of many Polish judges; support by the civil society
- numerous judgments of the EU Court of Justice and the European Court of Human Rights on judicial independence in Poland; use of interim measures by the ECtHR regarding judicial independence
- suspension of selected judges for the application of the EU law; recent replacement of the Disciplinary Chamber of the Supreme Court with the Chamber of Disciplinary Responsibility
- suspension of payments from the EU Recovery Fund; Conditionality Regulation and CJEU judgment of 16 February 2022 (C-156/22 and C-157/22)
- lack of legal accountability of state officials for abuses due to institutional position of the Prosecutor General
- impact of the war in Ukraine on rule of law discussions
- waiting for elections in 2023: possible political breakthrough

Actions by Ombudsman to counteract rule of law crisis

- abstract motions to the Constitutional Court – fighting against non-democratic changes (until the end of 2016)
- joining cases before the Constitutional Court as a third party – in order to prevent further deterioration of standards (e.g. cases compliance of ECHR with the Constitution or power of the EU Court of Justice to adjudicate on judicial independence)
- general statements and comprehensive legal opinions on reforms concerning judiciary (including speeches in the Parliament)
- support to judges and prosecutors subject to disciplinary proceedings (requesting explanations, public statements)
- the Ombudsman Office as a venue for debate on judicial independence; support to civil society
- public comments on the real need of judicial reforms (effectiveness, and not political subordination)
- cooperation with international organizations and NGOs

Ombudsman under threat

- public calls for dismissal (mostly in 2016 and 2017) – fortunately constitutional guarantees of independence were strong enough to defend the institution; role of the International Ombudsman Institute, ENNHRI and GANHRI
- politics of marginalization; lack of good cooperation with ministries responsible for judicial reform
- parliamentary cuts in the Ombudsman budget
- intimidation: SLAPP lawsuit brought by the Public Television
- judgment of the Constitutional Court of 15 April 2021, K 20/20
 - hidden purpose of the motion brought by "Law and Justice" party - to circumvent Senate's powers in appointment of the new Ombudsman
 - hearing was postponed 10 times; manipulation with judicial composition; participation of "double-judge" in proceedings
 - effect of judgment: leaving office by 15 July 2021
 - Due to international and domestic pressure new Ombudsman Prof. Marcin Wiącek was elected in the end of July 2021, with support of both chambers of Parliament

Strategies developed to protect human rights in difficult times

- Extensive use of all competences by the Ombudsman in order to prove relevance and importance of the institution to citizens
 - Practice of „diversification of risk” – support to causes important for different segments of society
 - creative approach to some competences (e.g. litigation)
- Building direct relationship with citizens
 - presence in media and strategic use of social media
 - cooperation with NGOs – expert groups, regular consultations, local support to actions, protecting NGOs independence; three Congresses on Human Rights
 - regional visits (approx. 200 meetings in small cities during the whole term)
- Protection of institutions responsible for rule of law (courts, independent prosecutors, but also support to public service ombuds institutions, e.g. Financial Ombudsman)
- Constant fight for a proper narrative about human rights
- Team work in the Ombudsman office (e.g. Dr Hanna Machińska, Deputy Ombudsman, recently doctor honoris causa of University of Zurich)
- Barack Obama approach: When they go low, we go high

Conclusions

- Polish Ombudsman is a good model for states under transition, but it may play also an important role in case of illiberal threat (compare practice of Ombudsman of Georgia)
- securing independence is the key issue in operation of the Ombudsman
- between 2015 and 2021 Poland has changed its political system – it is not any longer stable democracy; theory of competitive authoritarianism may apply (S. Levitsky, L. Way)
- Ombudsman could use its powers to defend principles of liberal democracy and independence of institutions responsible for human rights' protection
- Ombudsman's independence and strong constitutional regulation was important to be active in safeguarding rights and freedoms and in defending other institutions
- international cooperation was important to perform Ombudsman's tasks, but also to protect the institution from political and institutional threats
- Ombudsman may be an important stakeholder supporting discussion on traditional understanding of rights in liberal democracy; it may also provide a support to NGOs and other guardians of the rule of law (judges, bar association, academia)
- international trend to strengthen Ombudsman offices should be acclaimed

Thank you for your attention

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