

PATIENT'S RIGHTS OMBUDSMAN AS A SPECIALIZED BODY FOR THE PROTECTION OF PATIENTS' RIGHTS

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ABSTRACT

Human rights remain an illusion unless they are secured and protected by adequate mechanisms and bodies to ensure their observance. Nowadays, ombudsmen have been appointed in most European countries to uphold human and civil rights and freedoms. In Poland, this function is performed by the Ombudsman for Civil Rights. In recent decades, however, there has been a noticeable tendency to create specialized advocacy institutions, for example to protect the rights of children and patients. As a result of numerous analyzes and recommendations, recognizing the need for institutionalization of patient's rights and the creation of a body representing the patient and guarding his rights, the Patient Ombudsman was established in 2009. It happened under the Act on Patient Rights and the Patient Ombudsman. The subject of the article is an analysis of the systemic position of the Patient's Rights Ombudsman in terms of the powers granted, as well as independence from other organs and equipping him by the legislator with legal instruments serving the implementation of patients' rights. The purpose of the article is not only to assess the legal status of the institution, but also the actual implementation of the entrusted tasks - on the basis of reports published by the Patient's Rights Ombudsman.

Key words: Patient's Rights Ombudsman, ombudsman, medical law.

1. Introduction

Human rights are a set of rights and freedoms to which every human being is entitled irrespective of his or her race, gender, origin, language, religion or political beliefs. However, they remain an illusion unless they are secured and protected by appropriate mechanisms and bodies that guarantee their observance. Nowadays, ombudsmen have been appointed in most European countries to guard human and civil rights and freedoms. In Poland, this is the Ombudsman for Civil Rights. In recent decades, however, there has been a tendency to create

specialised ombudsman institutions, for example to protect the rights of children or patients. An example of such a body is the Patient's Rights Ombudsman, established in 2009. His tasks include ensuring that patients' rights are properly respected by doctors and all treatment facilities. In its activities, it focuses on ensuring maximum safety and comfort for patients during the treatment process. The research objective of this publication is to analyse the systemic position of the Patient's Rights Ombudsman in terms of the powers granted to him, as well as his independence from other bodies and his being equipped by the legislator with legal instruments for the realisation of patients' rights. The article adopts the research hypothesis that the Patient's Rights Ombudsman, unlike the Ombudsman for Children and the Ombudsman for Civil Rights, has not been equipped with sufficient legal mechanisms to enforce patients' rights, which is indirectly related to its constitutional position. Namely, the manner of its appointment and its statutory empowerment weaken its independence and possible spectrum of action. This hypothesis will be verified through institutional and historical methods, taking into account the relevant legal acts and the genesis of the establishment of the institution of the Patient's Rights Ombudsman.

2. The second section

The institution of the ombudsman, whose name varies from country to country, originated in Sweden. Its prototype was the chancellor of justice (sometimes also called the supreme ombudsman – *högste ombudsmannen*), attached to the crown, established by King Charles XII in 1709 (according to other sources in 1713). The parliamentary ombudsman was not established until a century later after the creation of the office of the Chancellor of Justice in 1809. The next country to establish this office was Finland (1919). In Poland, the office of the Ombudsman for Civil Rights was established on 1 January 1988.

As already mentioned in the introduction, other ombudsman institutions – of a more specialised nature – have also emerged in Poland, an example being the Patient's Rights Ombudsman. The institution of the Patient's Rights Ombudsman functions within the structure of the National Health Fund both at the national level and in the provincial branches. The road to the establishment of this institution began in January 2008, when, as a result of analyses and recommendations, the need arose to institutionalise patient rights and create a body to represent the patient and uphold his or her rights. On 6 November 2008 the parliament passed the Act on Patients' Rights and Patients' Rights Ombudsman, part of the so-called package of health laws aimed at reforming the health care system. The passing of the Act was evidence of patients' support and the need to regulate their rights.

Patients are the foundation and purpose of the health care system in Poland. One of the tasks of the health system is to guarantee patients their basic rights

related to the use of medical care. Patients' rights apply to both the public and private sectors of the medical services market. The basic legal act regulating patients' rights is the already mentioned Act of 6 November 2008 on Patients' Rights and Patients' Right Ombudsman. The Act primarily regulates issues such as the rights of the patient, the rules for making medical records available and the obligations of healthcare providers related to patient rights. The Act also defines the proceedings in cases of practices infringing the collective rights of patients.

Chapter 12 of the Act on Patients' Rights regulates the legal status of the Patients' Right Ombudsman in particular by indicating the principles of his appointment, dismissal, competence, as well as his position in the structures of state authority. The legislator has given the Patients' Right Ombudsman the status of a single-person public administration body, according to Article 42, "the Patients' Right Ombudsman is the central organ of government administration responsible for the protection of patients' rights as defined in the Act under consideration and in separate regulations." We are referring here, for example, to the Mental Health Protection Act or the Act on the Profession of Physician and Dentist. The Patients' Right Ombudsman, unlike the Ombudsman for Civil Rights or the Ombudsman for Children, does not find its legitimacy in the Constitution. It is not a constitutional body and is not subject to the Parliament in its activities. Supervision of the Ombudsman's activities is exercised by law by the Prime Minister.

Pursuant to Article 43 of the Act on Patients' Rights, an applicant for appointment to the position of Patients' Right Ombudsman must meet the following criteria together:

- 1) have at least a university degree and a master's degree or equivalent,
- 2) not have been validly convicted of an intentional crime,
- 3) his/her state of health allows him/her to properly perform the function of Patients' Right Ombudsman,
- 4) have the knowledge and experience necessary to perform the function properly.

These are standard and fairly general conditions. The first, concerning education, should be considered too general, since, for the benefit of patients and their rights, it should be specified by indicating specific fields of study, which could certainly include law, medicine or public health. The condition of not having a criminal record should be considered standard and justified as it stands, as should the one relating to health status. On the other hand, the possession of knowledge and experience adequate for the performance of the Patients' Right Ombudsman's duties is another over-general and vague requirement, which should be made more precise, if only by indicating the relevant training and the length (years) and type of experience required. It may be noted that the relatively

easy to fulfil and vague prerequisites are hardly conducive to a fair selection and choice of a candidate who could genuinely act in the interests of patients.

Unlike classic ombudsmen, who are appointed by the legislative body (in Poland by the parliament), the Patients' Right Ombudsman is appointed by the Prime Minister from among persons selected through an open and competitive recruitment process. Such a mode of appointment definitely weakens the constitutional position of the Ombudsman and does not promote his independence. The law does not specify the term of office of the body. It seems that it would be appropriate to adopt a 5-year term of office with a possible prohibition on reapplying (more than 2 times) for the position, in order to strengthen and stabilise the position of the Patients' Right Ombudsman and relate this function to the classic ombudsman. The stability of the office of the Patients' Right Ombudsman is also not favoured by the possibility of the Prime Minister to dismiss the Patients' Right Ombudsman at any time and without specific reasons. The recalled Patients' Right Ombudsman must perform his duties until the date of appointment of his successor.

The Patients' Right Ombudsman performs his/her tasks with the help of no more than two deputies. The Prime Minister appoints and dismisses the deputies of the Ombudsman at the request of the Ombudsman. A deputy Patients' Right Ombudsman may be a person who meets the following criteria together:

- 1) has at least a university degree,
- 2) he/she has not been validly convicted of an intentional offence,
- 3) his/her state of health allows him/her to properly perform the function of deputy Patients' Right Ombudsman,
- 4) has the knowledge and experience to be able to discharge properly the functions of deputy Patients' Right Ombudsman.

These are essentially identical criteria to those for a candidate for Patients' Right Ombudsman, however, the educational criterion has been "lowered" by not requiring a master's degree, allowing a person who has only completed a bachelor's degree to be a deputy Patients' Right Ombudsman. Interestingly, with regard to one of the deputies, the legislator has "higher" requirements. For, according to Article 46, "One of the deputies of the Patients' Right Ombudsman shall have at least a university degree in medical sciences and a master's degree or equivalent."

The Ombudsman presents annually to the Council of Ministers, no later than by 31 July of the following year, a report on the observance of patients' rights in the territory of the Republic of Poland. In turn, the Council of Ministers shall present the above report to the Sejm of the Republic of Poland, no later than 31 August of the following year, together with its position on the report.

The Patients' Right Ombudsman shall perform his tasks through the Office of the Patient Ombudsman. The organisation of the office and its detailed modus operandi shall be laid down in the statutes granted by order of the Prime Minister.

Chapter 12 and particularly Chapter 13 of the Act on Patients' Rights indicate the scope and manner of performance of the tasks of the Patients' Right Ombudsman. Article 47 of the aforementioned Act contains a catalogue of the Patients' Right Ombudsman's scope of action. Firstly, the scope of the Patients' Right Ombudsman's activities includes conducting proceedings in cases of practices that violate the collective rights of patients. Proceedings in cases of practices violating the collective rights of patients are regulated by Chapter 13 of the Patients' Rights Act (Articles 59–67). Article 59 of the Patients' Rights Act provides a legal definition of practices that violate the collective rights of patients, which are defined as:

- 1) unlawful organised acts or omissions of health care providers,
- 2) organisation of a protest action or strike by the organiser of the strike, as established by a final court decision, contrary to the provisions on the resolution of collective disputes, aimed at depriving patients of their rights or limiting those rights, in particular undertaken for the purpose of financial gain.

Examples of such practices include the unjustified charging of fees in a health care facility or the failure to collect consent for an operation. Practices that infringe the collective rights of patients are prohibited by law. In an investigation into practices that infringe the collective rights of patients, the Patients' Right Ombudsman has the right to request documents and any information concerning the circumstances of practices that are reasonably suspected of being practices that infringe the collective rights of patients, within no more than 30 days of receiving the request. The Patients' Right Ombudsman shall issue a decision to initiate proceedings in respect of practices infringing the collective rights of patients and shall notify the parties thereof. The Patients' Right Ombudsman shall, by way of decision, refuse to initiate proceedings if an act or omission clearly fails to meet the conditions set out in Article 59 or if the applicant for a decision to consider a practice as infringing the collective rights of patients has not substantiated the deprivation of patients' rights or the restriction of those rights. The Patients' Right Ombudsman may also refuse, by way of decision, to initiate proceedings if he considers it justified to do so. If the Patients' Right Ombudsman issues a decision declaring a practice to be in breach of patients' collective rights, he orders it to be discontinued or indicates the actions necessary to remove the effects of the breach of patients' collective rights, setting time limits for such actions. The Patients' Right Ombudsman's decisions in cases of practices infringing the collective rights of patients are final. The Patients' Right Ombudsman's decision may be appealed to the administrative court. The administrative court shall examine the complaint without delay. Significantly, to the extent not regulated in the provisions of the Act on Patients' Rights, the provi-

sions of the Code of Administrative Procedure apply to the proceedings on the application of practices that violate the collective rights of patients. It is also worth noting that proceedings on the application of practices that violate the collective rights of patients are not initiated if one year has elapsed since the end of the year in which they ceased.

The Patients' Right Ombudsman is empowered to impose fines up to the amount indicated in the Act and in the cases mentioned therein (Articles 68–69). Firstly, the Patients' Right Ombudsman shall, by way of a decision, impose a fine of up to PLN 500,000 on the entity providing health services or the organiser of a strike in the event of failure to take the actions specified in the decision to recognise a practice as infringing the collective rights of patients within the period specified therein. Secondly, in the case of failure to provide, at the Patients' Right Ombudsman's request, the documents and information referred to in Article 61 (concerning the circumstances of the application of practices which are reasonably suspected to be in breach of patients' collective rights), the Patients' Right Ombudsman shall impose, by way of a decision, on the entity to which the request was addressed, a financial penalty of up to PLN 50,000. The funds derived from the aforementioned fines shall constitute income to the state budget. The pecuniary penalty is subject to collection under the provisions on enforcement proceedings in administration.

The competence of the Patients' Right Ombudsman includes investigating violations of individual patients' rights (Articles 50–53). This is the competence that is most relevant in practice. The Patients' Right Ombudsman initiates an investigation if he becomes aware of information that at least plausibly indicates a violation of patient rights, including in particular:

- 1) the designation of the applicant,
- 2) an indication of the patient whose rights are affected,
- 3) concise description of the facts.

A request addressed to the Patients' Right Ombudsman is free of charge and, importantly from the point of view of patients, there are no formal requirements for this request. The Patients' Right Ombudsman may also initiate inquiries on his own initiative, taking into account, in particular, information obtained which makes it at least plausible that a violation of patients' rights has occurred. After reviewing the request addressed to it, the Patients' Right Ombudsman may: take up the case, stop at pointing out the applicant's or the patient's legal remedies, refer the case according to its jurisdiction, or not take up the case. The Patients' Right Ombudsman must notify the applicant and the patient concerned of taking one of the above actions. The Ombudsman, when conducting an investigation, has two options of action, he may conduct the investigation himself or he may request the investigation of the case or part of it to the competent authorities,

in particular the supervisory authorities, the public prosecutor's office, state, professional or social control, in accordance with their competences. In the case of conducting the proceedings on its own, the Patients' Right Ombudsman may:

- 1) examine, even without prior notice, any case on the spot,
- 2) demand explanations, submission of files of any case conducted by the chief and central bodies of state administration, bodies of government administration, bodies of non-governmental, social and professional organisations, and bodies of organisational units with legal personality, as well as bodies of local self-government and self-governing organisational units and self-governments of medical professions,
- 3) request the submission of information on the status of the case conducted by the courts, as well as the public prosecutor's office and other law enforcement bodies, and request the inspection at the office of the court and public prosecutor's office and the files of other law enforcement bodies, once the proceedings have been completed and the decision has been made,
- 4) commission the preparation of expert reports and opinions.

When considering the issue of both proceedings for practices infringing the collective rights of patients as well as investigations, it should be borne in mind that the Patients' Right Ombudsman is not competent to assess the diagnostic and treatment process itself. Such a view was first of all expressed by the Voivodship Administrative Court in its judgment of 25 April 2019 (ref. VII SA/Wa 2357/18), according to which "the Patients' Right Ombudsman has no competence to assess the diagnostic and therapeutic process applied to the patient. For this reason, he is obliged to take into account the opinion issued by specialists in a given field of medical knowledge."

Unlike the Ombudsman for Civil Right, the Patients' Right Ombudsman only has competence in civil court proceedings, but cannot request the initiation of pretrial proceedings for offences prosecuted *ex officio* by an authorised prosecutor, as well as request the initiation of administrative proceedings, file complaints before an administrative court, and participate in these proceedings with the rights of a public prosecutor.

In addition to the competences described above, the Patient's Right Ombudsman's scope of action includes:

- preparing and submitting to the Council of Ministers draft legal acts concerning the protection of patient rights,
- submitting motions to competent authorities to undertake legislative initiative or to issue or amend legal acts in the field of patient rights protection,
- preparing and issuing publications and educational programmes popularising knowledge on the protection of patient rights,
- cooperating with public authorities to ensure that patients' rights are respected, in particular with the minister responsible for health,

- presenting evaluations and conclusions aimed at ensuring effective protection of patients' rights to competent public authorities, organisations and institutions, as well as self-governments of medical professions,
- cooperation with non-governmental, social and professional organisations whose statutory objectives include protection of patient rights,
- analysis of patients' complaints in order to identify threats and areas in the health care system that need to be remedied.

Thus, it can be seen that the above activities are primarily related to the monitoring of legal regulations concerning patients' rights and education on their subject.

3. Conclusions

In conclusion, the establishment of the Patients' Right Ombudsman can be seen as a complement to the health care system in Poland. First and foremost, "persons aggrieved by the providers of health services have gained another opportunity to pursue their claims". It is noteworthy, however, that by placing the Patients' Right Ombudsman among the organs of government administration, the Patients' Right Ombudsman was deprived of the most important feature of the ombudsman's office – the feature of independence from the executive authorities. The Patients' Right Ombudsman should also be independent of other bodies, which is also not guaranteed by the legislator. The Patients' Right Ombudsman also does not have immunity, unlike the other two ombudsmen. Another aspect that significantly weakens the constitutional position of the Patients' Right Ombudsman is the lack of anchoring of this institution in the Constitution of the Republic of Poland. The qualification prerequisites for candidates for the Patients' Right Ombudsman and the influence of the Minister of Health on its selection should be considered too vague and not conducive to good selection. The Patients' Right Ombudsman should be a tenure body, like the other two Ombudsmen. Finally, one should also note the phenomenon of duplication of competences between the Patients' Right Ombudsman and the constitutional ombudsmen (the Ombudsman for Civil Rights and Ombudsman for Children). Indeed, a patient whose rights have been violated can, in most cases, apply to both the Patients' Right Ombudsman and the Ombudsman for Civil Rights, and sometimes even to the Ombudsman for Children.

The legal structure of the Patients' Right Ombudsman leads to the conclusion that he does not have adequate legal instruments that could lead to the realisation of the patient's right of access to publicly funded health care services. The activities of the Patients' Right Ombudsman are primarily aimed at controlling entities

performing medical activities. Due to its systemic position, i.e. total structural and functional dependence on the government administration, the Patients' Right Ombudsman has no effective possibilities to influence other "actors" occurring in the health care system. It is worth considering a solution that would enable a broader control, e.g. of the activities of the National Health Fund, which, as a state organisational unit, should closely cooperate with other executive authorities. Extending the competences of the Patients' Right Ombudsman in this direction could pay off in the future when the problem of protecting patients' rights with regard to the behaviour of private insurers arises.

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