

Mandates of the Special Rapporteur on the situation of human rights defenders; the Special Rapporteur in the field of cultural rights and the Special Rapporteur on the independence of judges and lawyers

REFERENCE:
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Excellency,

We have the honour to address you in our capacities as Special Rapporteur on the situation of human rights defenders; Special Rapporteur in the field of cultural rights and Special Rapporteur on the independence of judges and lawyers, pursuant to Human Rights Council resolutions 43/16, 46/9 and 44/8.

In this connection, we would like to submit the following **observations and comments on the selection process for the next Commissioner for Human Rights and the future of the Office of the Commissioner for Human Rights**.

Concerns about situation of Mr. Adam Bodnar have been addressed in previous communications sent by special procedures mandate holders on 5 March 2019 (POL 1.2019). We thank your Excellency's Government for the response received on 17 April 2019.

Additionally, the Special Rapporteur in the field of cultural rights, in her report on the visit to Poland (A/HRC/43/50/Add.1) raised concerns about the situation of the Office of the Commissioner for Human Rights. In paragraph 15 of the above-mentioned report, the Special Rapporteur stated: "[S]ince 2015, the Commissioner for Human Rights and his Office have been facing increasing pressure from the Government, including in the form of attempts to strip his immunity and impose budget cuts. (...) Such pressure is unacceptable and is not compatible with the principles relating to the status of national institutions for the promotion and protection of human rights (the Paris Principles) of the United Nations or with the principles on the protection and promotion of the ombudsman institution (the Venice Principles) adopted in March 2019 by the European Commission for Democracy through Law. The Special Rapporteur calls upon the Polish authorities to respect the independence of the Office of the Commissioner for Human Rights and to guarantee all the conditions necessary for that institution to effectively fulfil its mandate, including through the provision of more funding. The Special Rapporteur salutes the vital work of the Commissioner and his staff."

Selection and appointment of the next Commissioner for Human Rights

On 9 September 2020, the five-years term of the current Polish Commissioner for Human Rights (*Rzecznik Praw Obywatelskich*, hereinafter Commissioner) Mr. **Adam Bodnar** expired. Although the selection and appointment procedure has started, the Parliament did not reach an agreement to select a new person for the position. Therefore, and following the well-established practice and based on article 3.6 of the Act on the Commissioner for Human Rights, Mr. Adam Bodnar has stayed in office as acting Commissioner for Human Rights until the appointment of the new Commissioner. Article 3.6 stipulates that 'The current Ombudsman performs his duties until the new Commissioner takes up his position'

According to article 209.1 of the Constitution of the Republic of Poland and article 3.1 of the Act on the Commissioner for Human Rights, the Commissioner is appointed by the Sejm (the lower house of the bicameral Parliament of Poland) with prior approval of the Senate. The ruling majority currently does not have a majority in the Senate, therefore the appointment would require a compromise with the opposition. Although four attempts to select a new person to fill the Commissioner's position have taken place, the process is not yet completed.

On 17 September 2020, a group of Polish MPs affiliated with the ruling party, Law and Justice, lodged an abstract motion to the Constitutional Tribunal claiming the unconstitutionality of article 3.6 of the Act on the Commissioner for Human Rights: 'The current Ombudsman performs his duties until the new Commissioner takes up his position'. The Tribunal hearing to consider this motion was postponed 9 times.

On 15 April 2021, the Constitutional Tribunal ruled that the provision that allowed the Commissioner to stay in office until a successor took over was unconstitutional. The Tribunal stated: "The Act on the Commissioner for Human Rights is inconsistent with the Constitution, which defines the Commissioner's term of office as five years. A term of office is a strictly defined period that cannot be exceeded. The Commissioner's term of office cannot be longer". The Tribunal added that the provision would cease to apply after three months starting from 15 April 2021, when this decision was published in the Journal of Laws of the Republic of Poland, whereupon the Ombudsman will have to step down even if no replacement has been agreed by the Parliament.

Article 3.6 of the Act on the Commissioner for Human Rights and similar provisions related to other constitutional bodies were never challenged before the Constitutional Tribunal.

The judicial panel to review the case was composed of five judges nominated to the Tribunal between 2015 and 2019. The Commissioner requested the exclusion of the three judges from the adjudication panel: due mainly to their negative public comments on the work of Mr. Adam Bodnar. All requests for exclusion were rejected.

We would like to note that the Constitutional Tribunal in its decision postponed the entry into force of its decision for three months after the date when this decision was published in the Journal of Laws of the Republic of Poland, that is until 15 July 2021. In this connection, We would like to stress that during those three months, the current Commissioner, Mr. Adam Bodnar, should have full legitimacy to perform all the functions entrusted to him under the Act on the Commissioner for Human Rights. This interpretation is in accordance with the previously well-established case law of the Constitutional Tribunal. Additionally, this interpretation is also necessary for the rule of law and in order to ensure that there is no gap in the protection of human rights and fundamental freedoms in Poland resulting from a hiatus in the post of the Commissioner.

During the above-mentioned three months period, ideally the Parliament should be able to agree on the identity of the next Commissioner and appoint the new Commissioner, in accordance with the UN Paris Principles and other relevant international and regional standards. Should this not be possible, the post of the Commissioner would remain vacant and the Deputy Commissioner would take over

as acting Commissioner.

We note that the Commissioner's Office had faced a similar situation in 2010 after the Smoleńsk plane crash, during which the former Commissioner had died. The precedent established at that time was that the Deputy took over in performing the Commissioner's duties. This was never challenged by the highest courts in the country, including by the Constitutional Tribunal.

We are concerned that the result of the Constitutional ruling and the delays in the process of selecting and appointing a new Commissioner have created a situation which carries the risk that the position of the Commissioner for Human Rights may be left vacant for a considerable amount of time. Such an eventuality may hamper the continuity and effective functioning of the institution and make it more difficult for victims of alleged violations of human rights to find recourse..

In connection with the above alleged facts and concerns, please refer to the **Annex on Reference to international human rights law** attached to this letter which cites international human rights instruments and standards relevant to these allegations.

As it is our responsibility under the mandates provided to us by the Human Rights Council to seek to clarify all cases and issues brought to our attention, we would be grateful for your observations on the following matters:

1. Please provide any additional information and/or comment(s) you may have on the above analysis.
2. Kindly provide information on the remaining stages of the selection and appointment process.
3. Please provide information on the steps that your Excellency's government intends to take to ensure that there is no gap in the protection of human rights in Poland should a new Commissioner not be appointed by 15 July 2021 and how such steps would be in compliance with the Constitution of Poland, the Act on the Commissioner for Human Rights, the UN Paris Principles and the Venice Principles of the European Commission.
4. Please provide information on the steps taken by your Excellency's government to respect the independence of the Office of the Commissioner for Human Rights, to recognize the importance of this mechanism for the promotion and protection of human rights for all and to provide it with adequate resources to effectively fulfil its mandate, in compliance with the Paris Principles

We would appreciate receiving a response within 60 days. Passed this delay, this communication and any response received from your Excellency's Government will be made public via the communications reporting [website](#). They will also subsequently be made available in the usual report to be presented to the Human Rights Council.

While awaiting a reply, we urge that all necessary interim measures be taken to halt the alleged violations and prevent their re-occurrence and in the event that the investigations support or suggest the allegations to be correct, to ensure the accountability of any person(s) responsible for the alleged violations.

We would be grateful if this letter could be shared with both chambers of the Parliament at the earliest.

Please accept, Excellency, the assurances of our highest consideration.

Mary Lawlor
Special Rapporteur on the situation of human rights defenders

Karima Bennoune
Special Rapporteur in the field of cultural rights

Diego García-Sayán
Special Rapporteur on the independence of judges and lawyers

Annex

Reference to international human rights law

In connection with above alleged facts and concerns, we would like to draw the attention of your Excellency's government to the following international human rights standards:

The 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, Paragraph 1 of the Paris Principles provides that '(t)he composition of the national institution and the appointment of its members, whether by means of an election or otherwise, shall be established in accordance with a procedure which affords all necessary guarantees to ensure the pluralist representation of the social forces (of civilian society) involved in the protection and promotion of human rights',

General Assembly Resolution 69/168 of 18 December 2014, in particular paragraphs 2 (a) and (b); General Assembly Resolution 72/186 of 19 December 2017 on the role of the Ombudsman, mediator and other national human rights institutions in the promotion and protection of human rights; as well as General Assembly Resolution 72/181 of 19 December 2017 on National institutions for the promotion and protection of human rights,

We would also like to refer to the Principles on the Promotion and Protection of the Ombudsman Institution (Venice Principles) of the European Commission for Democracy Through Law (Venice Commission). Paragraph 6 of the Venice Principles provides that '(t)he Ombudsman shall be elected or appointed according to procedures strengthening to the highest possible extent the authority, impartiality, independence and legitimacy of the Institution'. Additionally, paragraph 24 stresses that '(s)tates shall refrain from taking any action aiming at or resulting in the suppression of the Ombudsman Institution or in any hurdles to its effective functioning, and shall effectively protect it from any such threats'.