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Disease as an obstacle in the exercise of public functions in international and national law

Abstract

Purpose: The purpose of the article is to explain the problem of the disease as an obstacle in the exercise of the highest functions and public offices. The analysis of international and national regulations making the highest functions and public offices dependent on the health status of candidates was made.

Methods: The article was prepared on the basis of the following research methods: legal dogmatic, systematic and comparative method. In the alternative, the systematic method and case law analysis were used.

Results: The research confirmed the thesis that the existing health regulations of officers are functional. Their aim is to provide state protection in the event of illness of a person responsible for the public sphere.

Discussion: Further research should be given to whether the solutions proposed by the national legislator are partially compatible with international regulations obliging candidates for public office to undergo medical examination or disclose certain medical data, including the scope of health information.

Keywords: diseases, illness, public officials, public health, international law, constitutional.

1. Introduction

The aim of the article is to examine and determine to what extent appropriate regulations have been provided at the national and international level relating to the health check of persons holding the highest public functions. The regulations should meet the requirements of the public need and, at the same time, not of the passive electoral law. The main hypothesis was that disease, that is a state contrary to health, in some situations constitutes an obstacle in the exercise of public functions: national

and international. The additional objective will be to verify to what extent the solutions proposed by the national legislator coincide with international regulations obliging candidates for public positions to disclose data about their state of health or resignation from the office of persons who already have a mandate.

2. Research methods

Research is conducted in the following fields of science of law: constitutional, international and public health. In order to verify the hypothesis, the following methods were applied: legal dogmatic, systemic and comparative. An auxiliary method was used to analyse the jurisprudence of tribunals and committees, and the systemic method based on the combination of a universal, European and national protection system was used.

3. Health as a legal value

Illness, that is a condition contrary to health, is an obstacle to the exercise of public functions. In the light of the WHO regulations, any deficiencies in the physical, mental and social health of decision-makers determine not only the decision made by him, but also the entire legislative process (Grad, 2002, pp. 982-984). They also affect the functioning of executive and representative activities. With the taking of public office, decision-makers are covered by special forms of protection and healthcare. Therefore, different legal systems provide for various mechanisms ensuring protection of the state in case of illness (Tabaszewski, 2016, pp. 75-84). This applies to three stages: the selection of healthy candidates for public positions provided for by the norms of electoral law; the stage of holding.

a public office; and the moment when the existence of a serious illness which is an obstacle to the exercise of a public function is established.

Undoubtedly, the poor health of people making key decisions in the state has an impact on the legal security of citizens (Czarny, 2010, pp.1-9). Therefore, you can not demand from people who can not take care of their own health, that they properly conduct the affairs of other people, entire communities and the nation. At present, the norms of international law recognize that illness, that is a condition contrary to health, is an obstacle to the exercise of public functions. Lack of adequate health, diseases and other dysfunctions of the organism are an obstacle to possible recruitment and taking up positions and state offices at various

levels (Post, 1995, p. 759). It is necessary to prove the premise of an „appropriate” state of health. Also, constitutional norms recognize that the absence of life-threatening diseases is a premise enabling and conditioning the exercise of state functions, the exercise of public service, or the performance of a given profession, or the exercise of a mandate (Kołodziej and Plac-Bobula, 1995, p. 27-32). At present, various systems of legal states differ in their approach to this issue (Dziewulak and Łukasz, 2010, pp. 3-11). This also applies to European countries.

Health is a desirable and protected value by the UN and regional international organizations: CoE and EU (Abbing, 1994, pp. 123-126). For many years, however, health was related to the state of the entire population, and the health condition of people performing public functions was taboo even in the countries of liberal democracy. The paradigm changed only at the end of the 20th century, and after the departure from the binary interpretation of the concept of health (Declaration of Alma-Ata; UN Millennium Declaration; UN 2005 World Summit Outcome.). They were presented negatively, i.e. as a lack of poor physical state of the individual (disease) determined by doctors and medical personnel using qualified quantitative and qualitative measures. The holistic model promoted by the WHO was adopted defining health not merely the absence of disease or infirmity but is of complete physical, mental and social well-being (Constitution of The World Health Organization). In 1993 at the WHO conference in Vienna it was also recognized that health was a set of traits and a long-lasting attribute. States have been obliged to prevent, treatment and control of epidemic, endemic, occupational and other diseases (Vienna Declaration and Programme of Action).

Lack of illness as a condition enabling taking care of and using one’s health appears in the constitutions of the world (Dziewulak and Łukasz, 2010, pp. 14-15). Because, apart from the WHO definition, no act of international law precisely defines the condition of a healthy person, that is why states use different names: good health, health condition, optimal health, illness or health impairment (Blaxter, Warszawa, p. 10). In the text of the Polish constitution alone, the concept of health appears 8 times (Tabaszewski, 2016, pp. 170-173). There are various concepts in national law that refer to describing the state of health, which should be characterized by the politician holding public functions.

Health, as a personal attribute, is the value of every human being (Tabaszewski, 2016, p. 30; Wołoszyn, 2009, pp. 108-120). It affects his legal capacity and legal activities, as well as his ability to act in the public sphere. Health, however, is not an absolute value. In the event of a disease, various human rights can be

restricted, including passive electoral rights (Marks, 1995, p. 209-238; Greer, 1997, pp. 24-29). On the European continent it is possible with the help of so-called limitation clauses located in Article 2 and Article 8-11 European Convention of Human Rights and Fundamental Freedoms (ECoHR) and Article 31 European Social Charter (ESCh). The HRC also recognized that political and civic rights are not absolute and can be derided by the general rule of Article 21 Universal Declaration of Human Rights UDHR and Article 12 International Covenant on Civil and Political Rights (ICCPR) (Hannum, 1998, pp. 145-158; Tabaszewski, 2017, pp. 14-15; Toebes, 1999, p. 178). W pewnych sytuacjach zdrowie może stanowić również przesłankę typu cenzusowego (Banaszak, 2013, pp. 1236-1238). It is worth noting that in the light of HRC General Comment No. 25, for reasons of public health it is permissible to restrict passive electoral law and the right to participate in the public service, if the restrictions and reasons for exemption are determined by law and which are objective and reasonable (CCPR General Comment No. 25). In particular, this applies to people affected by infectious protection and quarantined.

The scope of passive electoral law can be limited, while in the process of selecting candidates for public and political positions, changes should be taken into account in the physical, mental and social spheres (Czarny, 2007, pp. 33-35). Deficits in the human psychic sphere affect to a much greater extent the inability to make rational and based on a conscious choice of electoral decisions than those resulting from the sphere of physical and spiritual human health (Klein and Grossman, 1967, pp. 149-152; Douglas, 2008, pp. 200-201). HRC confirmed that “confirmed mental incapacity can be the basis for denying a person the right to hold office”. The Siracusa Principles allow the exclusion of passive electoral law and the exercise of a mandate due to the lack of specific characteristics or qualifications due to: illness, infirmity, disability, health exclusion, physical and mental defects. (The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights; Schriner, Ochs and Shields, 1997, pp. 75-96).

4. Disease as an obstacle in the exercise of functions in international law

Illness or lack of health may be an obstacle in the exercise of the mandate of an international official. Good health, understood as the highest level of fitness, is often a criterion of recruitment in addition to substantive qualifications, impeccability of character, fair geographical representation, gender parity

and formal criteria (Stein, 1962, pp. 9-32). In the light of Article 101.3 UN Charter, the paramount consideration in the employment of the staff and in the determination of the conditions of service shall be the necessity of securing the highest standards of efficiency, competence, and integrity (UN Charter and Statute of the International Court of Justice). UN regulations also specify that employees of its organization should display good health not only during the recruitment stage, but also throughout its entire period of its exercise.

Particular concern for the health of UN employees is dictated by the fact that its statute in four places directly refers to the protection of human health (Article 13, 55, 57, 62). According to Article 5 of the Convention on the privileges and immunities of UN of February 13, 1946, employees of the UN, ICoJ and specialized organizations in the Member States enjoy diplomatic privileges and immunities, including health care on preferential terms. Their individual contract concluded with the UN specifies details. The organization's secretary-general may grant a sick leave of absence to staff members who can not perform their duties due to sickness or accident or whose presence at work is undesirable for the protection of public health. The detailed conditions applicable to the parties when making decisions are set out in the statutes and regulations of the personnel (e.g. Article 106. 1 of the UNESCO Regulations).

The requirement of the absence of diseases of a potential candidate applies not only to the UN, but to all international organizations affiliated and closely cooperating with the UN, especially to specialized organizations. Therefore, the Standards of Conduct for the International Civil Service regulations specify that while an executive head assigns staff in accordance with the exigencies of the service, it is the responsibility of organizations to ensure that the health, well-being, security and lives of their staff, without any discrimination whatsoever, will not be subject to undue risk. The organizations should take measures to protect the safety of their staff and that of their family members. At the same time, it is incumbent on international civil servants to comply with all instructions designed to protect their safety (Gërxihi, 2014, pp. 894-896). This means that in the light of Article 41 each of the international organizations should take care of the highest level of health protection of their staff and provide special care in case of illness.

Also in the recruitment process at the Council of Europe, there is a requirement for a certain state of health. It has been specified in the Statute of the Council of Europe and General Agreement on Privileges and Immunities of the Council of Europe of September 2, 1949. It follows from Article 36 of the Statute of the

Council of Europe that the members of the Secretariat's staff are appointed by the Secretary General in accordance with administrative provisions. This means that only candidates who best meet certain criteria are considered for the initial selection for all levels. They are: health condition that allows you to work on a given position, no terminal diseases and threaten public safety. During the recruitment process, the recruitment committee is free to choose the candidate, based on the submitted documents, including medical certificates, vaccination cards submitted, a list from the insurer and candidate's written declarations (General Agreement on Privileges and Immunities of the Council of Europe). With regard to people already employed who, due to a disease that makes it impossible to appear at work, the relevant provisions of the labour law are applied, and in the case of the Secretary General, the disease determined means the takeover of the function by his deputy by the power of law.

Health as a formal requirement for the exercise of functions in the EU has been mentioned in the new Code of Conduct of 2018, for Commissioners and EC employees (Article 6, point 2). During the process of applying for a given function, candidates present documents confirming their state of health issued by their home countries (Commission Decision of 31.1.2018). In the EU, however, there are no regulations governing the procedure of dismissal or termination of the mandate of a sick person who is permanently or temporarily unable to perform his functions. Therefore, a special role should be attributed to the so-called hearing during which candidates for Commissioners are questioned individually or collectively by their respective parliamentary committees. The health condition, the lack of disease and physical activity have so far been the subject of occasional interest of EP deputies. Specific restrictions are foreseen for judges and advocates general of the CJUE (art. 253 Treaty on the Functioning of the European Union Consolidated and art. 19 Treaty on European Union). They should have the qualifications required to occupy the highest judicial positions in their Member States. States may impose on their representatives additional health requirements, guaranteeing the undisputed independence and independence of the judges.

5. Disease as an obstacle in the exercise of functions in national law

The rules of exercising the right to health have been included in almost 90% of all constitutional orders of world countries, but only a small part of all constitutions specify the health situations of persons holding public functions

(Tabaszewski, 2016, p. 161). Usually, the functional approaches dominate in this respect, specifying the means of taking over by virtue of law the tasks of the person holding the highest functions in the state by a legally appointed deputy. This is the case if the so-called transient obstacle in the performance of the function is revealed. It can be a physical illness, a mental illness or an accident. In light of the ECoHR judgment in the *Adamsons v. Latvia* case, the Court has recognized that states have the option of introducing stricter requirements for candidates for the highest state functions than restrictions on active electoral law (*Adamsons v. Latvia*, App. No. 3669/03). This means that restrictions on passive electoral rights are acceptable for candidates for public positions who do not enjoy “due”, “appropriate” or “proper” state of health. The burden of proof will rest on the candidate. The blocking of a given candidate because of his transient disease may be considered discriminatory in light of the established case law of international bodies.

The taking over of the president’s office in the event of emptying this office is regulated by the 25th amendment to the oldest constitution of the world, that is to the United States Constitution, which entered into force on February 23, 1967 (United States of America’s Constitution of 1789). A similar model view of the situation in which it is possible to remove the decision-maker is set out in Article 104 of the Azerbaijan Constitution. It specifies that the powers of the President of the Republic of Azerbaijan shall be considered to have expired before the official end of his or her term when he or she retires, loses the ability to fulfill the duties of his or her office for health reasons, or is removed from office in the conditions and in the procedure specified by the present Constitution (Azerbaijan’s Constitution of 1995). Constitutional regulations are necessary and preventive in nature, because a longer absence in the performance of public functions may result in total disorganization of the state. (Ferrell R. H., 1998, pp. 185; Patyra, 2013, p. 23). However, the role of decisions and medical decisions is of the utmost importance. These documents are important for determining whether a given disease and illness, which a politician suffers from, can realistically influence his/her actions.

In the light of Article 131 of the Polish Constitution of 1997, poor health may constitute an obstacle to the office of the President (Zubik, 2010, p. 71). If the President of the Republic is temporarily unable to discharge the duties of his office, he shall communicate this fact to the Marshal of the Sejm, who shall temporarily assume the duties of the President of the Republic. If the President

of the Republic is not in a position to inform the Marshal of the Sejm of his incapacity to discharge the duties of the office, then the Constitutional Tribunal shall, on request of the Marshal of the Sejm, determine whether or not there exists an impediment to the exercise of the office by the President of the Republic. If the Constitutional Tribunal so finds, it shall require the Marshal of the Sejm to temporarily perform the duties of the President of the Republic (Constitution of the Republic of Poland). The literature emphasizes that the shape of the above constitutional regulations resulted in rumours that Lech Wałęsa's imbalance was also caused by leaps and disorders caused by diabetes.

The Polish Constitution also provides for a situation in which the President, in a life-threatening situation, is unable to inform the Marshal of the Sejm. The Marshal of the Sejm shall, until the time of election of a new President of the Republic, temporarily discharge the duties of the President of the Republic in case of a declaration by the National Assembly of the President's permanent incapacity to exercise his duties due to the state of his health. Such declaration shall require a resolution adopted by a majority vote of at least two-thirds of the statutory number of members of the National Assembly. The sick president is entitled to a retirement pension or health benefits. It is worth noting that apart from the President, the act grants special health care to his spouse, the Marshal of the Sejm, the Marshal of the Senate, the Prime Minister, spouses of these persons and family members who are dependent on them (Ustawa z dnia 31.07.1981 r. o wynagrodzeniu osób zajmujących kierownicze stanowiska państwowe). The purpose of this care is to enable uninterrupted performance of public functions without any disruptions caused by an accident or illness (Cornell, 2017, pp. 2-7).

6. Final Remarks

Certain diseases are an obstacle to the function of politician in the country, as well as an official of an international organization. Good health is much more often required for international than national positions. However, the constitutions are much more likely to specify situations in which the disease becomes an obstacle to continue holding the highest state functions. In practice, however, determining the health status of a person affected by the disease may face considerable difficulties. First, health is still a concept that is legally out of focus, before which civil rights give way. Secondly, due to the development of medical sciences, certain diseases that were considered threatening life in the 20th century currently do not

present an obstacle to normal human functioning. Thirdly, the exercise of power by addicts and those affected by civilization diseases, which do not threaten the life of the politician, but make him vulnerable to environmental influences, is problematic. It is difficult to require people who do not care about their health to properly take care of the health and safety of the entire population.

References

The compact publication of one author

Blaxter M. (2009). *Zdrowie*. Warszawa: Wydawnictwo Sic!.

Czarny P. (2010). *Opinia prawna w sprawie zgodności z Konstytucją RP projektu ustawy o zmianie ustawy o dostępie do informacji publicznej (druk nr 2748)*. Warszawa: Biuro Analiz Sejmowych.

Dziewulak D., Łukasz D. (2010). *Informacja BAS-WAP-1068/10*. Warszawa: Biuro Analiz Sejmowych.

Tabaszewski R. (2016). *Prawo do zdrowia w systemach ochrony praw człowieka*. Lublin: Wydawnictwo KUL.

Toebes B. (1999). *The right to health as a human right in international right*. Antwerpen-Groningen-Oxford: Springer.

Ferrell R. H. (1998). *The Dying President: Franklin D. Roosevelt 1944-1945*. Columbia and London: University of Missouri Press.

The chapter section of compact publication:

Czarny P. (2007). *Ubezważnienie jako przesłanka utraty praw wyborczych (refleksje konstytucyjne na tle teorii prawa cywilnego)*, in: F. Rymarz (ed.), *Iudices electionis custodes - Sędziowie kustoszami wyborów* (pp. 33-35). Warszawa: Wydawnictwo Krajowego Biura Wyborczego.

Tabaszewski R. (2016). *Dopuszczalność ograniczania czynnego i biernego prawa wyborczego ze względu na potrzebę ochrony zdrowia* in: W. Hermeliński, B. Tokaj (ed.), *25 lat demokratycznego prawa wyborczego i organów wyborczych w Polsce (1991-2016), część 2* (pp. 75-84). Warszawa: Wydawnictwo Krajowego Biura Wyborczego.

Tabaszewski R. (2017). *Human rights and freedoms in systems of human rights protection*, in: K. Koziół (ed.), *Wolność człowieka i jej granice* (pp. 10-31). Lublin: Regis, 2017.

The article in journal:

Abbing R. (1994). *Health Law & the European Union*. *European Journal of Health Law* 1(1994), pp. 123-126.

- Banaszak B. (2013). Czynne i bierne prawo wyborcze w Polsce. *Monitor Prawniczy* (23) 2013, pp. 1236-1238.
- Cornell A. S. (2017). Health Benefits for Members of Congress and Designated Congressional Staff: In Brief. *Congressional Research Service* 7-5700 (2017), pp. 2-7.
- Douglas J.A. (2008). Is the Right to Vote Really Fundamental. *Cornell Journal of Law and Public Policy* (2008), pp. 200-201.
- Gërxi, J. (2014). Ethical Standards in the International Civil Service. *Mediterranean Journal of Social Sciences* 5/20 (2014), pp. 894-896.
- Grad F.P. (2002). The Preamble of the Constitution of the World Health Organisation, *Bulletin of the World Health Organisation* 12 (2002), pp. 981-984.
- Greer S. (1997). The exceptions to Articles 8 to 11 of the European Convention on Human Rights. *Human Rights Files* 15 (1997), pp. 24-29.
- Hannum H. (1998). The UDHR in National and International Law. *Health and Human Rights* 2 (1998), pp. 145-158.
- Klein M.M., Grossman S.A. Voting pattern of mental patients in a community state hospital. *Community Mental Health Journal* 2 (1967), pp. 149-152.
- Kołodziej J., Plac-Bobula E. Stan zdrowia a zdolność do pracy. Głos w dyskusji o reformie ustawodawstwa inwalidzkiego. *Archiwum Medycyny Sądowej i Kryminologii* 1 (1995), pp. 27-32.
- Marks S. The European Convention on Human Rights and its „democratic society”. *The British Yearbook of International Law* 16 (1995), pp. 209-238.
- Patyra S. (2013). Przesłanki i tryb przejmowania obowiązków Prezydenta Rzeczypospolitej Polskiej w ramach tzw. władzy rezerwowej. *Studia Iuridica Lublinensia* (20) 2013, p. 33-45.
- Post J.M. (1995). The health of president and presidential candidates: dilemmas and controversies. *Political Psychology* 4 (1995), p. 759.
- Schriner K., Ochs L.A., Shields T.G. (1997). The Last Suffrage Movement: Voting Rights for Persons with Cognitive and Emotional Disabilities. *Publius* 3 (1997), pp. 75-96.
- Stein E. (1962). Mr. Hammarskjöld, the Charter Law and the Future Role of the United Nations Secretary General. *American Journal of International Law* 56 (1962), pp. 9-32.
- Wołoszyn A. (2009). Ochrona danych o stanie zdrowia na gruncie obowiązującego ustawodawstwa polskiego. *Mysł Ekonomiczna i Prawna* 1 (2009), pp. 108-120.

Zubik M. (2010). Gdy Marszałek Sejmu jest pierwszą osobą w państwie, czyli polskie interregnum. *Przegląd Sejmowy* 5 (2010), pp. 71-89.

Legislation (by date):

United States of America's Constitution of 1789 with Amendments through 1992. Philadelphia Convention. 17.09.1787. Obtained (20.7.2018) from <https://www.constituteproject.org>.

UN Charter and Statute of the International Court of Justice. San Francisco Conference. 26.6.1945. Obtained (20.7.2018) from <https://treaties.un.org>.

UNESCO Constitution. Adopted in London. 16.11.1945. Obtained (20.7.2018) from <http://unesdoc.unesco.org>.

UN Convention on the Privileges and Immunities of the United Nations. New York. 13.2.1946. U.N. Doc. A/519, 8.1.1948. No. 521.

Constitution of The World Health Organization. New York. 22.6.1946. Dz.U. 1948.61.477.

Universal Declaration of Human Rights. Paris 10.12.1948. G.A. Res. 217A (III). U.N. Doc. A/810.71.1948.

Statute of the Council of Europe. London. 05.05.1949. ETS No. 001.

General Agreement on Privileges and Immunities of the Council of Europe. Paris. 2.9.1949. ETS. No. 2.

European Convention of Human Rights and Fundamental Freedoms. Rome. 4.11.1950. ETS No. 5. Amended by Protocols Nos. 11: ETS No. 150 and 14: CETS No. 194. Supplemented by Protocols Nos. 1: ETS No. 009, 4: ETS No. 046, 6: ETS No. 114, 7: ETS No. 117, 12: ETS No. 177.

European Social Charter. Turin. 18.10.1961. ETS No. 035.

International Covenant on Civil and Political Rights. New York. 16.12.1966. UNTS 999:171.

International Covenant on Economic, Social and Cultural Rights (ICESCR). New York 16.12.1966. UNTS 993:3.

Declaration of Alma-Ata. International Conference on Primary Health Care. Alma Ata. 6-12.09.1978.

Ustawa z dnia 31.07.1981 r. o wynagrodzeniu osób zajmujących kierownicze stanowiska państwowe. Dz.U. 2011.79.430, tekst jedn. Obtained (20.7.2018) from prawo.sejm.gov.pl.

The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights. Siracusa. 28.9.1984, U.N. Doc. E/CN.4/1985/4.

- Vienna Declaration and Programme of Action. New York. 12.7.1993. A/CONF.157/23.
- Azerbaijan's Constitution of 1995 with Amendments through 2016. Baku. 12.11.1995. Obtained (20.7.2018) from <https://www.constituteproject.org>.
- CCPR General Comment No. 25: Article 25 (Participation in Public Affairs and the Right to Vote), The Right to Participate in Public Affairs, Voting Rights and the Right of Equal Access to Public Service. 12.7.1996. CCPR/C/21/Rev.1/Add.7.
- Constitution of the Republic of Poland. Warsaw. 2.4.1997. Dz.U.1997.78.483. Obtained (20.7.2018) from prawo.sejm.gov.pl.
- UN Millennium Declaration. New York. 18.9.2000. A/RES/55/2.
- UN 2005 World Summit Outcome. New York. 16.9.2005. A/RES/60/1.c.
- Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union. Declarations annexed to the Final Act of the Intergovernmental Conference which adopted the Treaty of Lisbon, signed on 13.12.2007. OJ C 326, 26.10.2012, p. 47-390.
- Adamsons v Latvia. App. No. 3669/03. Judgment of 24.6.2008. Obtained (20.7.2018) from <https://hudoc.echr.coe.int/eng>.
- Commission Decision of 31.1.2018. Code of Conduct for the Members of the European Commission. Brussels. 31.1.2018 C(2018) 700 final. Obtained (20.7.2018) from <https://eur-lex.europa.eu>.