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# THE COMMISSIONER FOR CIVIL RIGHTS PROTECTION IN POLAND AND ITS RELATIONS WITH THE CONSTITUTIONAL TRIBUNAL

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The office of the Commissioner for Civil Rights Protection in Poland was brought into life in 1987 as an entirely novel institution, unknown to the tradition of the Polish legal system; it did not win at once the position of a constitutional body, as opposed to the Constitutional Tribunal. Only by virtue of the 7 April 1989 amendment to the Constitution was the Commissioner for Civil Rights Protection included in Chapter IV of the Constitution, where a single article was devoted to the Commissioner. That article, beside the procedure for appointing the Commissioner, outlined the general responsibilities of that institution, referring to the Act on the Commissioner for Civil Rights Protection in other issues. At the same time, Article 4 of the Constitution was amended to include among other things the Constitutional Tribunal and the Commissioner for Civil Rights Protection.

The legal position of the Commissioner thus defined was maintained by the Constitutional Act of 17 October 1992.

In the general structure of the new Constitution of the Republic of Poland of 2 April 1997, whereas the courts and tribunals are dealt with separately in chapter VIII, the Commissioner for Civil Rights Protection was included in Chapter IX, which regulates the status of national control and law protection institutions. In fact, the Commissioner for Civil Rights Protection *is* a law protecting institution. The Constitution stresses his unique legal position, clearly bringing into relief the independence of the office of the Commissioner, his autonomy in relations with other state institutions (such as administration or the judiciary) and leaving no room for doubt that he may only be accountable to the Sejm in accordance with the provisions of ordinary law.

The new Constitution devotes five Articles to the Commissioner for Civil Rights Protection: it is thus more extensive in that respect than the previous one, but nevertheless it maintains the previous status of the office. The innovation consists in that several factors affecting the Commissioner's legal position, so far regulated exclusively by the Law of 1987, have now been raised to the constitutional level.

The scope of authorised action by the Commissioner for Civil Rights Protection is outlined in Article 208 para 1 of the Constitution. The said provision makes the Commissioner the guardian of human and civil rights and freedoms set out in the Constitution and other normative acts. In this manner the Constitution clearly defines the general field and persons covered by the responsibilities of the Commissioner for Civil Rights Protection. Thus, it is the Commissioner's task, on the on hand, to protect the so-called fundamental rights set out in Chapter II of the Constitution (namely three main groups of rights and freedoms: personal; political; economic, social and cultural), and on the other, to protect the rights guaranteed in acts of law other then the Constitution, provided that they have a normative character. The human rights and freedoms set out in international agreements ratified by Poland also come under the Commissioner's protection.

Within the framework established by the Constitution and the Law of 15 July 1987 on the Commissioner for Civil Rights Protection (Official Journal of 1991, No. 109, item 471, as amended), the Commissioner controls the activities of public authorities and intervenes when he has ascertained breach of law due to action or failure to act by the authorities and institutions responsible for the respect and implementation of the rights and freedoms of the individual in Poland.

The essential criterion on the basis of which the Commissioner for Civil Rights Protection undertakes his actions is therefore the legality of actions and decisions taken by the administration with respect to the rights and freedoms of the individual. Besides, the

Commissioner assesses the activities of the administration with respect to the principles of community life and social justice, which - as shown by the experience of the office - most often concerns cases related to the labour and social protection law. The adoption of that general clause by the legislator enables the Commissioner to review decisions of administration authorities from the viewpoint of the pertinence and expediency of their content, though this must still be related to the rights and freedoms set out in the Constitution and other normative acts. At the same time, the fact that the activity of the Commissioner for Civil Rights Protection is founded on the criterion of principles of community life and social justice leaves the Commissioner more freedom in deciding whether to take up or reject the particular cases filed by the complainants.

Once the Commissioner has decided to take up a case, his options include conducting independent explanatory proceedings. In such a situation the Act on the Commissioner for Civil Rights Protection grants the Commissioner a wide range of competencies. By virtue of Article 13 para 1 he is entitled to: examine every case on the spot; request explanations and presentation of documentation of cases run by the supreme and central state administration authorities, self-government authorities, as well as authorities of co-operative, social and professional organisations; request information on the status of cases examined by courts, the public prosecutor's offices and other prosecution agencies; commission expert's reports and opinions.

Following review of the case, the Commissioner for Civil Rights Protection may take different moves depending on whether the case concerns individual problems or has a general significance. With reference to the subject of the present comments, we shall describe the Commissioner's activities of a general character.

Within the scope of protection of rights and freedoms in a general context, it is the Commissioner's role to inspire actions by other authorities and institutions. He may request appropriate authorities to initiate legislation, to issue or amend legal acts with respect to individual rights and freedoms. He is also entitled to apply to the Constitutional Tribunal to examine the compliance of legal provisions with the Constitution. In such cases the Commissioner is one of the persons generally empowered to submit such petitions within the scope of abstract control exerted by the Constitutional Tribunal; he is not entitled, however, to address the Constitutional Tribunal with a question of law within the scope of concrete control.

According to the provision of Article 191 para 1 item 1 of the Constitution, the Commissioner for Civil Rights Protection may address the Constitutional Tribunal concerning the compliance of a law with the Constitution or of another normative act with the Constitution or a law (this includes petitions concerning: compliance of laws and international agreements with the Constitution; compliance of laws with ratified international agreements, the ratification of which required prior approval by law; compliance of legal provisions issued by the central state authorities with the Constitution, ratified international agreements and laws). Thanks to that capacity, the Commissioner for Civil Rights Protection has become one of the dozen persons holding full and unlimited powers, both in essence and in procedure, to institute proceedings before the Constitutional Tribunal.

It must be stressed that the petitions addressed by the Commissioner to the Constitutional Tribunal are most often inspired by concrete cases raised in the complaints sent to the Commissioner's Office (which assists the Commissioner in his work). In practice the complaints, depending on their subject, are taken up by the various problem groups which operate within the Commissioner's office, dealing in the various fields of law. At the background of those complaints there may emerge an issue which demands examination in a broader aspect. The first

step is then to request the competent authority to take a position, and should it share the Commissioner's objections - to take moves to eliminate the breaches of law specifically referred to in the Commissioner's address.

On the other hand, in situations where the use of persuasion does not yield the expected results, the Commissioner for Civil Rights Protection resolves to address a petition to the Constitutional Tribunal to examine the compliance with the Constitution of a determined legal provision, which in the practice of legal transactions entails breaches of specific civil rights and freedoms.

The objections raised most often in the Commissioner's petitions concern: abuse of statutory competencies; breach of the principle of equality; breach of the principle of the citizen's confidence in the state stemming from the principle of democratic state of law; and breach of the right to trial.

Two cases might be cited here as examples, since they seem interesting also from the viewpoint of an international observer. In those cases the Commissioner addressed petitions to the Constitutional Tribunal which then ruled that the provisions questioned were unconstitutional.

1) Petition for the examination of compliance with the Constitution of several statutory regulations concerning judges, court officials and persons exerting other legal professions, i.e. public prosecutors, advocates and legal advisers, in so far as they introduce a ban on family relations between judges and persons exerting other professions in law (including prohibition of combining the profession of advocate with that of a judge within the same family, and the impossibility of exerting the profession of legal advisor for a person whose spouse is a judge), and in particular the compliance of those provisions with the principle of democratic state of law, the protection and care extended by the Republic of Poland to matrimony and family as guaranteed by the Constitution, the principle of equality, the right of protection of privacy and family life and the freedom of decision on individual private life, the right to equal conditions of access to public service, the freedom of choice and exercise of profession and the choice of workplace guaranteed by the Constitution.

2) Petition for the ascertainment of the inconsistence with the Constitution of a provision of the Co-operative Law, under which - unlike in the general legal regulations in force concerning succession - succession to the right to a co-operative apartment was submitted to special legal restrictions; namely, under the provision of the Co-operative Law which was questioned by the Commissioner, in the case of death of a member of a co-operative who was entitled to a co-operative apartment, his successor must submit a proof of acquisition of inheritance within a year from the opening of the succession, or a proof of the institution of court proceedings to establish acquisition of inheritance if such proceedings have not been completed by that date. If there are more than one successor, they must moreover name the successor who will acquire the right to a co-operative apartment as a result of the division of inheritance, or submit a proof of the institution of proceedings to divide the inheritance, within three months after the decision on establishing acquisition of inheritance has become valid. Moreover, any successor who is not member of the co-operative must apply for membership along with submitting the proof of acquisition of inheritance, and when there are more than one successor, along with submitting the proof that he is entitled to the right to a co-operative apartment as a result of the division of inheritance. Should such conservatory action fail to be undertaken, or should the application for co-operative membership be rejected, the right to co-operative apartment expires. Thus any default on the deadlines automatically entails

the expiry of the right to apartment. The negative consequences of default on the statutory deadlines also apply when the successors did not take any conservatory action since they were unaware of the opening of the succession.

In the Commissioner's opinion, the said provisions of the Co-operative Law with reference to protection of the right of property collide with the protection of property and right to inherit guaranteed by the Constitution of the Republic of Poland and the constitutional provisions stating that any restrictions of the enjoyment of constitutional rights and freedoms may only be imposed by law and only when they are necessary in a democratic state to protect public security or law and order, provided that such restrictions do not violate the essence of freedoms and rights. Moreover, the provisions of the Co-operative Law referred to in the Commissioner's petition also violate Article 1 of the NI 1 Protocol to the European Convention for the Protection of Human Rights and Fundamental Freedoms. According to that Article, any individual or legal entity may enjoy the right to respect of their property; no one may be deprived of his property, unless it is done in the public interest, on conditions determined by law and in accordance with the general principles of international law. In the said case, the first condition was not met, since there is no reasonable interest justifying the expiry of the right to co-operative apartment.

Moreover, it is worth noting that the Commissioner for Civil Rights Protection, inspired by concrete cases submitted by citizens (as it has been told above), has been so far the one among the persons entitled who filed the largest number of petitions with the Constitutional Tribunal to examine the compliance with the Constitution of legal acts or to issue a generally binding interpretation of law. Statistical data gathered by the Office of the Commissioner show that for instance in 1997 the Commissioner addressed to the Constitutional Tribunal 22 petitions claiming inconsistence of legal acts with the Constitution and 3 requests to issue a generally binding interpretation of law. In 1998, the Commissioner filed 16 claims of inconsistence of legal acts with the Constitution. It must be stressed that under the new Constitution the Constitutional Tribunal has been deprived of the right to issue generally binding interpretations of law.

The new Constitution also changed the role played so far by the Commissioner of an intermediary between the citizens, who were not entitled to directly file cases with the Constitutional Tribunal, and that very institution. The new regulations introduced the possibility of lodging individual complaints with the Constitutional Tribunal.

It is worth devoting here some attention to the institution of constitutional complaint regulated in Article 79 para 1 of the Constitution. By virtue of that provision, anyone whose constitutional freedoms or rights have been breached may lodge a complaint with the Constitutional Tribunal, on conditions regulated by law, concerning the compliance with the Constitution of a law or other normative act on the grounds of which a court or a public administration authority has issued a final decision on his freedoms or rights or obligations specified in the Constitution.

The institution of constitutional complaint was designed in the Constitution as a fundamental human right. It gives every individual an inalienable right to apply to the Constitutional Tribunal for protection against infringement on his constitutional rights by a state institution or any other public authority. The constitutional complaint must meet simultaneously two fundamental conditions. Firstly, it may serve exclusively the defence of rights and freedoms specified in the Constitution. Secondly, the right to lodge it belongs exclusively to the person whose rights or freedoms have been breached.

It must be stressed however that in the light of the Constitution the prerequisite for submitting a constitutional complaint is the breach of concrete constitutional rights, freedoms or obligations of a given individual. The complaint therefore is concrete and not abstract in character. Moreover, the right to constitutional complaint may only be exerted following complete exhaustion of means of legal protection, that is following exhaustion of court or administrative procedure; it may be filed therefore exclusively against a final decision by court or administrative authority. Besides, the only charge authorised in a constitutional complaint is that the final decision of the court or administration body was issued on the basis of a law or other normative act inconsistent with the Constitution.

The Constitution does not therefore grant the right to constitutional complaint with respect to decisions violating the constitutional rights, freedoms and obligations of individuals e.g. by way of improper procedure or faulty application of legal qualification ; it guarantees such a right exclusively in situations where the legal ground of the decision is unconstitutional. According to regulations contained in the Constitution, ascertainment of unconstitutionality results in the resumption of proceedings, which are carried on with the omission of the legal act which has been found unconstitutional by the Constitutional Tribunal.

To proceed to the essence of the matter after those explanations, we must note in conclusion of those comments the circumstance - very important in the context of the relations between the Commissioner for Civil Rights Protection and the Constitutional Tribunal - namely that under the new Constitutional Tribunal Act (Law of 1 August 1997, Journal of Law No. 102, item 643), the Commissioner must be informed by the Constitutional Tribunal on the institution of proceedings on the basis of a constitutional complaint. The Commissioner thereupon has 14 days to declare his participation in the proceedings. The effect of such declaration is that the Commissioner becomes a participant in the proceedings.

To this day the Commissioner has declared his participation in 8 cases of constitutional complaints. Those cases, resulting from constitutional complaints filed by citizens, where the Commissioner presented his position, concerned in particular:

1) the inconsistency of a provision of the Law on the Code of Penal Procedure (Article 481 § 1) stating that complaint may not always be lodged against a decision to reject an application for the resumption of proceedings or to leave the application unexamined, even when the decision to which the application for resumption referred was issued by a court of first instance, with the constitutional principle of two-instance court proceedings (Article 176 § 1).

2) the inconsistency of a provision of an act inferior to a law, namely the Ordinance of the Minister of Justice concerning disciplinary regulations for Prison Guard officers (§ 64 para 2), with the constitutional provisions guaranteeing equal right of access to public service (punishing a functionary of the Prison Guard by disciplinary dismissal from service may lead to infringing on the right of equal conditions of access to public service; therefore the functionary punished by disciplinary penalty, in particular by dismissal, should be entitled to appeal to a court against the decision of the disciplinary authorities).

In conclusion of these comments it is worth adding that the projected amendment to the law on the Commissioner for Civil Rights Protection provides among others for the prolongation of the deadline by which the Commissioner may declare his participation in the proceedings instituted by the Constitutional Tribunal on the basis of constitutional complaint.