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THE COMMISSIONER FOR CITIZENS' RIGHTS - PAST, PRESENT AND FUTURE

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1. Ten years after the establishment of the Office of the Commissioner for Citizens' Rights it is a good moment to reflect both on the road we have made in this time and the place of the institution of the Commissioner in the present state and legal system of Poland. It is also an occasion to consider whether it is necessary to make any modifications in the present form of this institution. At any rate, legislative intervention will probably be necessary in the nearest future. The new Constitution of 2 April 1997[1] introduced a number of changes to the legal status connected with the Commissioner's activity, and in Article 236, paragraph 1 provided for a two-year period for preparing such bills as are necessary for the implementation of the Constitution.

Our further reflections focus on matters whose present legal regulation is doubtful. It seems, however, worth starting with some historical remarks. Besides, according to a frequently quoted saying by Norwid, the past is today, but a little further.

2. The act on the Commissioner for Citizens' Rights (CCR) was adopted on 15 July 1987.[2] Although the first proposals concerning the establishment of this kind of institution in Poland go back to the period after 1956, it was not until the early Eighties that discussions on this matter became more intense.[3]

Not much earlier, the Chief Administrative Court, appointed pursuant to the Act of 31 January 1980 on the Chief Administrative Court and on the amendments to the Act Code of Administrative Procedure,[4] initiated its activity; so did the Tribunal of State, established pursuant to the Constitutional Amendment of 26 March 1982[5] and the Act of 26 March 1982[6] on the Tribunal of State, as well as the Constitutional Tribunal,

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[1] *Dz.U. {Dziennik Ustaw* [Journal of Laws]) no. 78, item 483.

[2] *Dz.U.* no. 21, item 123. The constitutional amendment of 7 April 1989 *(Dz.U.* no. 19, item 101) introduced to the Constitution Article 36a concerning the institution of the Commissioner. The version of the Act on the CCR is now a consolidated text as of 10 October 1991 *(Dz.U.* no. 109, item 471).

[3] S. G e b e t h n e r: "Przesłanki ustanowienia Rzecznika Praw Obywatelskich w Polsce" [Prerequisites for Establishing the Commissioner for Citizens' Rights in Poland] [in:] *Rzecznik Praw Obywatelskich* [The Commissioner for Citizens' Rights], Warszawa 1989, p. 29.

[4] *Dz.U.* no. 4, item 8. The Act of 11 May 1995 on the Chief Administrative Court is now in force (Dz.U. no. 74, item 368).

[5] *Dz.U.* no. 11, item 83.

[6] *Dz.U.* no. 11, item 84. A consolidated text of this Act was published in the Announcement of the Marshal of the Sejm of the Republic of Poland of 7 April 1993 *Dz.U.* no. 38, item 172.

whose establishment was based on the provisions of the Constitutional Amendment of 26 March 1982[7] and the Act of 29 April 1985 on the Constitutional Tribunal.[8]

Disputes are still held on the evaluation of amendments consisting in the introduction of those institutions into the Polish legal system. The disputes started anew on the occasion of the Sejm discussion connected with an examination of the first annual report of the Commissioner's third term of office. Apart from the opinion that the institution of the Commissioner was designed to be a mere façade of democracy,[9] an opposite view was expressed: that it was proof of the fact that, in the field of the protection of citizens' rights, Poland was heading in the right direction, though taking account of the systemic context of that time.[10] Without involving ourselves in political evaluations, one can formulate a hypothesis that since the establishment of the office of the CCR, similarly to the Chief Administrative Court, the Tribunal of State or the Constitutional Tribunal, was collective work, the motivations might have been different. Therefore, it is not surprising that certain lawyers, involved in creating those institutions with the best of intentions, deny the accusations that they were only trying to establish some sort of a fig leaf and consciously took part in make-believe actions. On the other hand, we have to remember that when those institutions were being created, people claimed that they would defend socialism on par with the independence of the Homeland.

The importance of the above-mentioned institutions was determined by their later practice. In particular, from the beginning of the office of the CCR, first Prof. Ewa Łętowska, and later on, after the transformations of 1989, Prof. Tadeusz Zielinski, tried to make use of all the existing possibilities in order to build the authority of the Commissioner's Office in Poland through involvement in a determined protection of citizens' rights and freedoms. Its present high social prestige has been, to a considerable degree, their achievement. It has also been the accomplishment of numerous employees of the Office and experts, assisting the subsequent Commissioners in their activities with knowledge and experience.

Today, nobody questions the fact that the office of the Commissioner is necessary. Furthermore, the institution of the ombudsman functions all over the world and is on the increase. There are nearly 80 such offices, including almost 30 in Europe, with the European Ombudsman at the level of the European Union. It is now considered whether there is a need to establish such an organ within the Council of Europe. International organizations encourage the establishment of ombudsman institutions in countries which started to build democratic systems a relatively short time ago. Ombudsman provide an

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[7] *Dz.U.* no. 11, item 83. See also the Constitutional Amendment of 7 April 1989 *Dz.U.* no. 19, item 101.

[8] *Dz.U.* no. 22, item 98. A consolidated text of the Act on the Constitutional Tribunal is comprised in the Announcement of the President of the Sejm of the Republic of Poland of 10 October 1991 *(Dz-U.* no. 109, item 470). This text has been amended three times since then, due to subsequent amendments to the Act on the Constitutional Tribunal.

[9] *Diariusz Sejmowy* [Sejm Diary] 114th session of the Sejm on 29 August 1997, Warszawa 1997, p. 42.

[10] See previous, p. 49.

additional level of control over the functioning of state organs, being at the same time flexible and not very formalised, which often makes it possible to achieve aims which would be difficult to attain otherwise.

3. Since it was adopted, the Act on the CCR has undergone very few and insignificant amendments. From the point of view of the growing importance of the Office of the Commissioner, a very characteristic amendment was introduced by the Act of 24 August 1991 on amendments to the Act on the Commissioner for Citizens' Rights and the Acts Code of Criminal Procedure on the Supreme Court, and on the Constitutional Tribunal *(Dz.U.* no. 83, item 371). That amendment consisted in lifting restrictions as regards the handling by the Commissioner of cases concerning national defence, armed forces and state security. According to the initial tenor of Article 16 of the Act on the CCR, the Commissioner could refer such cases to relevant supreme organs of state administration, which were obliged to inform him, within 30 days, on the actions undertaken or on the opinions held, and the Commissioner, finding the way of handling the case to be unsatisfactory, could, within 30 days of receiving such information, apply for revision of the case by the State Defence Committee. Repealing this provision meant extending the competence of the Commissioner so as to include such cases. This was accompanied by introducing the possibility of appointing a special Commissioner's deputy for soldiers' affairs (Article 29, paragraph 3 of the Act on the CCR); however, none have been appointed so far.[11]

On the other hand, legislation concerning the legal institutions, which the Commissioner can use, changed quite quickly. As a result, the Act on the CCR was frequently inconsistent with other Acts. Examples of such inconsistency include the abolition of extraordinary appeal against valid court judgments, which is referred to in the Act on the CCR, and the introduction of cassation or widening the scope of the cognition of the Chief Administrative Court so as to include various administrative acts, while the Act on the CCR still stated that the Commissioner was only authorised to appeal against administrative decisions. Those inconsistencies could be resolved by reference to the principle of *lex posterior derogat legi priori.* This does not, however, change the fact that, as a consequence, the Act on the CCR became less legible, and that the resulting inconsistencies can lead to various interpretational doubts.

The constitutional legal status has also changed. The biggest number of changes were brought by the new Constitution, which strengthened the institution of the Commissioner. The principles of the Commissioner being independent in his activities,independent of other state organs, and accountable only to the Sejm, in accordance with the principles specified by statute, received constitutional sanction (Article 210). The Commissioner's obligation to submit an annual report about his activities to the Sejm and the Senate was replaced by a much less troublesome duty of providing information (Article 212). The immunity of the Commissioner was constitutionally [11]

[11] The Office of the CCR includes, however, a separate Team for the Rights of Soldiers and Officials of Public Services, which specialises, among other things, in military problems.

guaranteed (Article 211). His term of office was extended to a period of 5 years (Article 209, para 1), so that it is not linked with the term of office of a given parliament.

In order to resolve inconsistencies in this field, we can refer to the principle of *lex superior derogat legi inferiori*, particularly in connection with the provision envisaging the direct application of the provisions of the Constitution (Article 8, paragraph 2). It is, however, difficult to accept the situation of a statute being inconsistent with the Constitution for a longer period.

Finally, it should be borne in mind that global legal reflections on the model for the ombudsman institution is still developing. In particular, the exchange of views and information within the framework of the European Ombudsman Institute and the International Ombudsman Institute allows for the identification of new needs and possibilities. The Act on the CCR, although adopted in the period of a non-democratic system, was an example for many countries building their democracies. Since that time, numerous new normative acts have been adopted in the world; in them, Polish lawyers can find much interesting material.

4. In the sub-chapter devoted to means for the defence of human and citizens' freedoms and rights, the Constitution mentions the right to apply to the Commissioner for assistance in the protection of one's freedoms or rights infringed by organs of public authority. This right corresponds to the Commissioner's duty to assume a standing every time he is applied to. According to the Constitution, this right is granted to everybody (Article 80).

Here, there arises another inconsistency with the Act on the CCR, to be removed without delay. According to the Act on the CCR, its provisions apply to Polish citizens, and - *mutatis mutandis* - to foreigners (Article 18, paragraph 2) as well as to stateless persons permanently residing in Poland (Article 18, paragraph 1). The exclusion from the scope of the application of the Act of stateless persons staying, and not permanently residing in Poland, cannot be justified on the grounds of the Constitution, which declares that the freedoms and rights ensured by the Constitution, including the right to apply to the Commissioner for assistance, shall be enjoyed by anyone under the authority of the Polish State (Article 37), that is to say, also by stateless persons temporarily staying in Poland.

5. It is often said that the Polish model of the ombudsman takes much from the Swedish one. There is much truth in this statement. Although Polish solutions differ at some important points from the Swedish model, there are more similarities than differences. The reference to the Swedish model is not only caused by the desire to establish links with a certain historical tradition. It is worthwhile to emphasise that, during international meetings, representatives of countries whose ombudsman institutions have nothing in common with the Swedish example, also make references to this model.

What makes the Polish and Swedish models similar is, above all, a very wide scope of the competence of the Commissioner. All ombudsman institutions comprise, among their competence, control of the activity of the state administration. Sometimes, they deal also with infringements of citizens' rights and freedoms by the legislative power,

which is expressed in ombudsman's authorisation to institute proceedings before constitutional courts in the case of a normative instrument being inconsistent with the Constitution, or another instrument superior in rank being adopted, and in the possibility of presenting his observations concerning the need to change the existing legal status. Much more rarely does the ombudsman's competence include infringements of citizens' rights and freedoms by courts. Such is the competence of the Swedish ombudsman.[12] The Polish solutions constitute an obvious reference to this example.

6. In order to protect citizens from infringements of their freedoms and rights by the legislative power, the Commissioner was authorised to apply to the Constitutional Tribunal for verifying the conformity of statutes and international agreements to the Constitution, the conformity of statutes to ratified international agreements, the conformity of statutes to ratified international agreements and the conformity of legal provisions issued by central state organs to the Constitution, ratified international agreements and statutes (Article 191, paragraph 1, sub-paragraph 1 of the Constitution; Article 16, paragraph 2, sub-paragraph 2 of the Act on the CCR). He was also vested with the power to approach relevant organs with proposals for legislative initiative (Article 16, paragraph 1, sub-paragraph 1 of the Act on the CCR).

The Act of 1 August 1997 on the Constitutional Tribunal *(Dz.U.* no. 102, item 643) additionally guaranteed a special position of the Commissioner in proceedings for a constitutional complaint, which may be referred to the Constitutional Tribunal by any person whose constitutional freedoms or rights have been infringed by a statute or another normative act, pursuant to which a court or an organ of state administration issued a final decision on his freedoms or rights or on his obligations specified in the Constitution (Article 79 of the Constitution). The Commissioner should always be informed of such proceedings having been instituted. He can announce his participation in such proceedings (Article 51 of the Act on the CT) and if he does, he becomes a participant in the proceedings (Article 52, paragraph 1 of that act). However, the time limit for making such an announcement is 14 days from the Commissioner being notified of the initiation of the proceedings. In many cases, such a period may prove to be too short for the Commissioner to make a decision whether to take part in the proceedings or not, which may, in turn, have adverse effect on his activity in such cases. On the other hand, the Commissioner can himself institute proceedings before the CT, also while the proceedings for a constitutional complaint are already pending, which allows him to avoid at least some of the difficulties.

Another shortcoming of the existing legal status is the limitation of the effective protection of citizens' rights and freedoms in proceedings before the CT as a result of Article 39, paragraph 1, sub-paragraph 3 of the Act on the CT maintaining the principle of discontinuing the proceedings before the CT in a situation when a normative act questioned its binding force before the Tribunal issued its judgment. Although the

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[12] See, e.g. C. E k l u n d h: "The Ombudsman Specialized in Judicial Matters" [in:] VI International Conference of the International Ombudsman Institute, Buenos Aires 1996 and a collection of studies: *Judicial Ombudsman. International Outlooks*, Mexico 1996.

Tribunal assumes that this can only take place when the content of the norm causing a normative act to lose its binding force allows an unequivocal statement that the repealed provision has lost its binding force completely, so that it cannot be applied to past, present or future factual states,[13] this solution means that the author of a normative act, repealing such an act before the Tribunal issued its judgment, can prevent the occurrence of a legal effect consisting in the possibility of resuming the proceedings ended with a final judgment, administrative decision or another final settlement, and preventing thereby citizens' rights or freedoms from being infringed. It is understandable that in such a situation a sense of wrong can occur, particularly in the case of the citizen who submitted the constitutional complaint.

Neither can one consider it proper that the provisions of the Act of 8 March 1990 on Local Self-government *(Dz.U.* 1996, no. 13, item 74 with subsequent amendments) and of the Act of 22 March 1990 on Local Organs of Government Administration *(Dz.U.* no. 21, item 123 with subsequent amendments) limited the possibility of the Commissioner submitting a complaint to the Chief Administrative Court, when a provision of local law infringes a legal interest or a right of the citizens. The Commissioner is bound by a general time limit for submitting a complaint; moreover, Article 25a, paragraph 4, sub-paragraph 2 of the Act of 22 March 1990 on Local Organs of Government Administration excludes the possibility of declaring the invalidity of a provision of local law, referred to in this Act, if the complaint was submitted after the lapse of one year after its publication in a voivodeship official journal; Article 101, paragraph 4 of the Act on Local Self-government makes it impossible to declare the invalidity of a resolution of an organ of a commune after the lapse of one year after its adoption, and envisages only issuing a judgment on its unconformity to the law. Nevertheless, it is quite probable that the defectiveness of such provisions becomes evident later.

Quite often, the Commissioner used the power to submit proposals for legislative initiative, which brought up the problem of his participation in the legislative process. Many parliamentarians expect this participation to be very active. Nevertheless, it must be taken into consideration that, according to the existing law, the Commissioner safeguards the human rights and freedoms specified in the Constitution and other normative acts (Article 208, paragraph 1). He is, therefore, a guardian of the existing legal status. Consequently, typical Commissioner's proposals for legislative initiative include, for instance, motions indicating insufficient implementation in ordinary statutes of principles resulting from the Constitution or international agreements concerning the protection of human rights, ratified by Poland, inconsistencies in the law, which may threaten citizens' freedoms and rights or other defects of the existing legal solutions. The Commissioner's deep involvement in current legislative activities would be incompatible with such a legislative conception. Moreover, it would certainly be detrimental to other spheres of his activity. This would also result in the Commissioner

[13] Judgment of the CT of 21 September 1987 - P. 3/87, *OTK* 1987, item 5, and of 26 September 1995 - U. 4/95, *OTK* 11/1995, item 27.

assuming a position of a party in the legislative process and, inevitably, getting involved in various political disputes. As a consequence, all this could affect adversely his impartiality and subsequent activity as regards questioning certain provisions before the CT. In any case, such situations require a reasonable sense of measure.

7. The main field of activity of ombudsman institutions is protecting citizens from infringements of their rights and freedoms by organs of the executive power, since in this area infringements of citizens' rights occur particularly often. This also applies to the situation in Poland.

The legal means which can be used by the Commissioner in order to counteract such infringements are manifold, and enable him to undertake various actions, according to the existing state of affairs. Those are both means pertaining to the protection of a citizen in a specific situation and ones of a more general nature. Their catalogue seems to be sufficient. The problem still involves the way in which organs of the administration react, and particularly delays in responding to Commissioner's applications, the vagueness of such responses and attempts to defend evidently mistaken opinions.

8. In principle, the means at the disposal of the Commissioner as regards the activities of the organs of the administration of justice also seem to be sufficient.[14] Nonetheless, some critical remarks spring to mind.

In civil (including family cases and cases concerning employment relationships and social insurance) and administrative cases, the Commissioner can institute proceedings before a court, and then participate in them with such powers as are vested in the public prosecutor (Article 14, sub-paragraphs 4 and 6 of the Act on the CCR). The possibility of using such powers is of great importance, even though the Commissioner does so very rarely, since usually the activity of persons concerned is, in itself, sufficient.

It must be considered as a fortunate solution that the Commissioner, who is not a public prosecutor, cannot institute criminal proceedings. Nor can he participate in criminal proceedings already pending,[15] but can only demand that preparatory proceedings be instituted by a competent public prosecutor in cases concerning offences prosecuted *ex officio* (Article 14, sub-paragraph 5 of the Act on the CCR). The Commissioner may move for punishment in proceedings concerning minor offences (Article 14, sub-paragraph 7 of the Act on the CCR). Such cases are examined by a court if, in the situation specified in Article 508, paragraph 1 of the Code of Criminal Procedure, a minor offences board or its president refer the case to a court. Courts examine also the means of appeal against decisions of minor offences boards (Article 508, paragraph 3 of the CCP). The Commissioner may also move for the reversal of a valid

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[14] I discussed this question in more detail in the article entitled "Rzecznik Praw Obywatelskich a sądy" [The Commissioner for Citizens' Rights and the Courts], submitted for publication in a book in honour of Prof. J. Łętowski: *Państwo prawa. Administracja. Sądownictwo* [Law State. Administration. Judiciary], Warszawa 1999.

[15] In the course of preparations of the Act on the Commissioner for Children's Rights it was suggested that this Commissioner should have the right to participate in criminal proceedings according to the same principles as envisaged for a social representative.

decision of a minor offences board, a valid decision on the discontinuance of the proceedings or a valid criminal order (Article 14, subparagraph 7 of the Act on the CCR in connection with Article 515, paragraph 2 of the CCP). Those means, too, are used by the Commissioner with moderation.

An especially important right of the Commissioner is to lodge cassation in civil and criminal proceedings, and extraordinary appeal against decisions of the Chief Administrative Court. As a rule, it can be evaluated only at that stage of the proceedings whether a court judgment infringes citizens' freedoms or rights.

The Commissioner may lodge cassation in civil cases only if he previously participated in appeal proceedings in this case (Article 392 of the CCP). Since the Commissioner, as a rule, will not participate in appeal proceedings, in practice this signifies depriving him of the possibility to lodge cassation in civil cases. This solution is deservedly criticised in the doctrine for not providing adequate protection to citizens' rights.[16]

Lodge cassation against a valid judgment ending the court proceedings, issued before or after the day of this act coming into force, including a judgment of the Supreme Court issued as a result of an examination of an extraordinary review. After the new Code of Criminal Procedure enters into force, the Commissioner may lodge cassation against a judgment ending the court proceedings in criminal cases (Article 521 of the Code of Criminal Procedure). This is a reference to the cassation in defence of statute,[17] which existed in the period between the two world wars. The grounds for cassation are the same as for the parties; nevertheless, The Commissioner may lodge cassation at any time (Article 524, paragraph 2 of the Code of Criminal Procedure).[18] The persons lodging cassation criticise the exclusion of the possibility of lodging cassation exclusively against a judgment stating the penalty,since such judgments can glaringly infringe their rights.

In administrative cases, the Commissioner can, probably until a two-instance system of administrative courts is introduced, for which the Constitution envisaged a period of five years (Article 236, paragraph 2) pursuant to the Act of 1 March 1996 on Amendments to the Code of Civil Procedure (...), lodge with the Supreme Court an extraordinary appeal against a judgment of the Chief Administrative Court (Article 14, paragraph 8 of the Act on the CCR). The hitherto existing grounds for extraordinary appeal, as laid down in Article 57 of the Act on the Chief Administrative Court, have not changed. The time limit for lodging extraordinary appeal is 6 months, and lodging extraordinary appeal after the lapse of this time limit is inadmissible (judgment of the Supreme Court (7) of

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[16] See W. B r o n i e w i c z: "Nowelizacja prawa postępowania cywilnego z dnia 1 marca 1996 r." [Amendments to Law on Civil Procedure of 1 March 1996], *Kwartalnik Prawa Prywatnego* 1997, no. 2, p. 216.

[17] The institution of cassation in defence of the statute is known in some countries of Western Europe. See, for example, A. M u r z y n o w s k i: "Ogólna charakterystyka nowego kodeksu postępowania karnego" [General Characteristic of the New Code of Criminal Procedure], *Państwo i Prawo* 1997, no. 8, p. 17.

[18] It is, however, inadmissible for the Supreme Court to examine cassation against the accused, applied after the lapse of 6 months of the day of the judgment becoming valid (Article 524, paragraph 3 of the Code of Criminal Procedure).

21 November 1996 III ZP 2/96, *OSNAP* 1997, no. 10, item 158). In the original tenor of this act, this time limit started from the day of the issue of the judgment. It was often difficult to observe it, since judgments of the Chief Administrative Court are frequently delivered to parties with delay, while extraordinary appeal can only be prepared after receiving the judgment. Upon the initiative of the Commissioner, this state was changed by Article 98 of the Act of 29 August 1997 on Court Executive Officers and Execution *(Dz.U.* no. 133, item 882), which states that such a term starts from the day of the judgment of the CAC being delivered to the party concerned.

The provisions hitherto in force envisaged, in certain cases, the possibility of the Commissioner lodging extraordinary appeal with the Supreme Court against decisions of non-court organs. After the day of the entry into force of the Act of 1 March 1996 on Amendments to the Code of Civil Procedure (...), the Commissioner can also lodge extraordinary appeal (Article 10 of this Act), according to the hitherto existing rules.

9. According to Article 16, paragraph 2, subparagraph 4 of the Act on the CCR and Article 16, paragraph 2 in connection with Article 3, paragraph 3 of the Act of 20 September 1984 on the Supreme Court *(Dz.U.* no. 13, item 48 with subsequent amendments), the Commissioner may approach the Supreme Court for resolutions aimed at explaining legal provisions in two situations: if such provisions appear vague or if their application has caused inconsistencies injudicial decisions. Whereas the second situation seems clear, the concept of legal provisions, which appear vague in practice, has received very different evaluations. It is unclear whether it is sufficient for adopting such a resolution if vagueness occurs in the practice of state organs, organs of local self-government or even social organs, or whether it is necessary that such vagueness occurs in court practice.[19] In some of its judgments, the Supreme Court opts for an interpretation according to which it is necessary that the vagueness of legal provisions occurs in juridical practice.[20] This would signify a limitation of the scope of the application of this provision to a situation where the tendencies revealed in judicial practice appear vague.

This problem is an extremely important one, since it is concerned with the role to be played by the Supreme Court in the field of the protection of citizens' rights and freedoms through a judicial interpretation of legal provisions, unconnected with a specific case, particularly after the new Constitution abolished the institution of the universally binding interpretation of statutes provided by the Constitutional Tribunal. In many cases, such an interpretation may prove useful for the purpose of avoiding infringements of citizens' rights. It can also help to protect the fundamental values, upon which the legal system should be based. Besides, it is not unusual that no court judgment is issued, for example, in cases belonging to bankruptcy proceedings, in spite of the fact that a defective settlement of such cases by way of arrangements in the pre-court phase may have serious consequences. Moreover, court proceedings are often so

[19] J. I w u 1 s k i: "Podejmowanie przez Sąd Najwyższy uchwał na podstawie art. 13 pkt. 3 ustawy o Sądzie Najwyższym" [Adopting Resolutions by the Supreme Court Pursuant to Article 13, Subparagraph 3 of the Act on the Supreme Court], *Przegląd Sejmowy* 1994, no. 11-12, p. 43.

[20] See also judgment (7) of the Supreme Court of 27 September 1995 III CZP 83/95 with a critical gloss by E. Gniewek *(OSP* 1996, no. 6, item 108).

lengthy that in many other cases irreparable losses are sustained before the court issues a judgment, which could be prevented by removing the existing legal doubts earlier.

Thus, doubts may arise whether the tendency to narrow down the interpretation of the provision in question is justifiable. Referring, in this context, to the example of renouncing the universally binding interpretation of statutes or guidelines for the administration of justice and judicial practice, which, fortunately, disappeared from the Polish legal system, is pointless insofar as the interpretation of statutes provided by the Constitutional Tribunal was universally binding,[21] and the non-observance of the guidelines constituted grounds for applying a remedy. In practice, the effect of the guidelines was the same as that of a legal provision, which was unacceptable in a state of law observing the principle of judges being subject only to statutory law. However, the resolutions provided for in Article 13, paragraph 3 of the Act on the Supreme Court are not binding, and they only exert influence by virtue of the authority of the Supreme Court. The fact that this influence is so small is a pure consequence of the weakness of arguments evoked in judgments of the Supreme Court and of the anticipation that, in case of a dispute, the Supreme Court may sustain an opinion expressed in the resolution. The principle according to which judges are only subject to the statutory law, is not violated in that situation.

10. In order to perform his duties, the Commissioner may demand that case files be presented to him. In respect of Article 13, paragraph 1, subparagraph 2 of the Act on the CCR, which provides for this right, doubts arose whether it created the obligation to send the files to the Office of the Commissioner or whether it was sufficient to enable him to examine the files on the spot. The doubts of public prosecutors were quickly resolved by the Prosecutor-General, and now public prosecutor's offices send case files to the Commissioner without any obstacles. By virtue of the Regulation of the Minister of National Defence no. 43 of 30 September 1996 on detailed rules for securing the archives of the department of national defence (unpublished), a prohibition was imposed against making available to the Commissioner files of military courts dating from before 1 August 1990 away from the place of their storage.[22] The Commissioner applied to the Constitutional Tribunal for a declaration of unconformity to the Act on the CCR of the provision introducing that prohibition, and the Minister of National Defence repealed the said provision. It might be, however, worthwhile to provide a clearer statutory regulation of the Commissioner's right to be presented with case files.

11. According to the Constitution, there exists one Commissioner for Citizens' Rights, who, being an organ for the protection of the law, safeguards the freedoms and rights of persons and citizens specified in the Constitution and other normative acts, and whose scope and mode of activity are specified by statute (Article 208 of the

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[21] It is a well-known fact that it was disputed whether such an interpretation was binding for courts (represented by the Constitutional Tribunal) or not (this opinion was expressed in the judgments of the Supreme Court).

[22] *Sprawozdanie Rzecznika Praw Obywatelskich za okres od 8 V 1996 do 7 V 1997* [Report of the Commissioner for Citizens' Rights for the Period 8 May 1996 to 7 May 1997], Warszawa 1997, p. 340.

Constitution). At the final stage of the work of the Constitutional Commission, a provision was introduced into the Constitution concerning the establishment of the Commissioner for Children's Rights. This provision was, however, placed outside Chapter IX of the Constitution, concerning organs of state control and the defence of rights, containing a sub-chapter devoted to the Commissioner for Citizens' Rights. More specifically, paragraph 4 was added to Article 72 of the Constitution, concerning the protection of the rights of the child, and stating the competence and procedure for the appointment of the Commissioner for Children's Rights. Due to such regulations and the lack of a constitutional regulation of the relationship between the CCR and the Commissioner for Children's Rights, there are two possible interpretations. First, that the Commissioner for Children's Rights is an institution supplementing means for the protection of freedoms and rights, and as such does not limit the right of the CCR to deal with the protection of children's freedoms and rights. Second, that the sphere of the protection of children's freedoms and rights has been excluded from the competence of the CCR, and that, in the future, the CCR will only deal with the protection of freedoms and rights of the remaining members of family or of the family as a whole. There seem to be more arguments in favour of the first interpretation; a particularly powerful one is the fact that in matters of the protection of children and youth, the use of means of control, at the disposal of the CCR, is not as necessary as providing extensive assistance: educational, social and financial.[23] As a consequence, one should conclude that the Commissioner for Children's Rights is a similar institution to that of the Commissioner of the Insured, who operates pursuant to Articles 90b to 90d of the Act of 28 July 1990 on Insurance Activity *(Dz.U.* 1996, no. 11, item 62), with the sole difference that his existence is envisaged in constitutional provisions. The Commissioner of the Insured, protecting the interests of insured persons and persons having rights in insurance contracts, does not limit the powers of the CCR.

On various occasions, it has been suggested to appoint other more specialized commissioners. Such suggestions concerned, for instance, the appointment, by the statute, of commissioners for taxpayers, patients, disabled persons, soldiers and pensioners. Bills, introduced to the Sejm of the second term of office, concerning acts on the equal status of women and men and on the protection of personal data, envisaged appointing two separate commissioners for matters covered by those acts.[24] At one time, the President of the National Bank of Poland appointed a commissioner for bank customers, who existed only for a short period, since later his scope of activity was included in that of the department of customer complaints at the National Bank of Poland. Deputies of supervisors of education, who were, pursuant to paragraph 6, subparagraph 3 of the Regulation of the Minister of National Education of 31 December 1996 on detailed rules for exercising pedagogical supervision, specification of posts and qualifications

[23] On the other hand, instead of creating an additional control authority, repeating, to a certain extent, the example of the CCR, it would probably be better to establish in Poland an extensive system of administrative organs dealing with care of children, such as the well-known Jugendamts.

[24] Eventually, the Act on Protection of Personal Data of 29 August 1997 *(Dz.U.* no. 133, item 883) established the office of Inspector General for the Protection of Personal Data.

necessary for occupying them *(Dz.U.* 1997, no. 9, item 46), charged with exercising pedagogical supervision over the observance of the rights of a pupil and child in schools and establishments listed in Article 2 of the Act of 7 September 1991 on the Educational System *(Dz.U.* 1996, no. 67, item 329 with subsequent amendments), are referred to as commissioners for pupils' rights. However, certain pupils' organizations criticise this solution, claiming that commissioners for pupils' rights should represent pupils' self-government and not school administration. In some hospitals, there exist, without a particular legal basis, commissioners for patients rights, some communes have commissioners for children's rights, and the National Council of the Disabled - a Commissioner for the Rights of Disabled Citizens.

All this speaks in favour of determining a general conception of the commissioner and not violating such a conception while preparing specific statutes. This conception should be based on the assumption that, from the point of view of the effectiveness of the protection of citizens' rights and freedoms, an adequately powerful office gives the best guarantees. Ancient Romans already noticed that the best way to make an enemy weaker is to divide his rights among various subjects, according to the principle: *divide et impera*, because in this situation such subjects can have different opinions, and engage in disputes as regards competence and conflicts. All this can be applied to ombudsman institutions. Although there are countries where several ombudsmen specialise in various fields, the intensity of the protection of citizens' rights and freedoms does not increase as a result.

Indubitably, different specialized protective institutions, particularly public ones, which would not limit the powers of the Commissioner, might provide firm support for his actions. The creation of such institutions should be deemed useful. There can only emerge doubts as to whether the term "commissioner for rights" should be used in their names, since this may cause misunderstandings as to the relationship between such institutions and the CCR. Nonetheless, this question does not seem particularly important.[25]

12. During the VI Congress of the International Ombudsman Institute in Buenos Aires, held in 1996, the importance of the impartiality of ombudsman institutions was emphasised very strongly.

It is a commonly known fact that there are systems in which ombudsmen are members of political parties or parliamentarians. In Polish conditions, with distinct political divisions in society and fierce fights between political parties, sometimes continued even in the Parliament, the impartiality of the Commissioner should also mean his non-political status. This is how the new Constitution sees it, expressly excluding the possibility of the Commissioner belonging to any political parties or trade unions, prohibiting him to perform other public activities incompatible with the dignity of his office (Article 209, paragraph 3), holding his office jointly with the mandate of a Deputy or a Senator (Article 103, paragraph 1 and Article 124) or any other post, except for a professorship in an institute of higher education, or performing any professional

[25] Quite a different kind of misunderstanding was caused by the activity of several persons, described in the press, who decided to deal with the protection of citizens' rights, without remuneration, and called themselves commissioners for citizens' matters.

activities (Article 209, paragraph 2). The notion of public activities incompatible with the dignity of the office of Commissioner is not fully clear. What is seems to imply, however, is that the Commissioner should also refrain from expressing opinions on purely political subjects, evaluating programmes of political parties, participating in party conferences and other such events, since his presence might be interpreted as supporting a given political option, taking part in election campaigns to organs of authority or in rankings designated for politicians.[26] Above all, however, he must ensure that none of his actions is motivated by political considerations.

13. The principle that citizens should have unrestricted access to the office of the Commissioner is very important. However, if the number of cases is as great as now it is impossible to implement this suggestion by way of personal contacts between the Commissioner and all persons submitting complaints. Nonetheless, citizens must have an opportunity to present their complaints personally to employees of the Office of the CCR. This principle, which is observed in the practice of the office of the CCR, is a very important element inspiring trust in the office of the CCR.

It has already become an impossible task for the Commissioner to read personally all incoming correspondence. As the office of the CCR is monocratic, many authors of complaints expect the Commissioner to take cognizance of the content of their complaints. Moreover, public opinion harbours the belief that he does so. In reality, practice of this kind is not feasible. Consequently, it is necessary to create such conditions which would guarantee that the Commissioner is aware of the contents of all the correspondence he receives, and that the most important cases reach him.

The suggestion of unrestricted access to the office of the Commissioner poses yet another problem. The legislations of certain countries still includes provisions ensuring the anonymity of citizens submitting complaints to the Commissioner.[27] The Act on the CCR does not contain a similar provision. Since the police has already attempted to identify one citizen, who applied to the Commissioner, under the pretext that the provisions on the protection of state secrecy had been infringed on that occasion, the introduction of an adequate provision seems desirable.

14. At the time of writing of those remarks, complete statistical data concerning the whole decade were not available. The total number of cases submitted to the Commissioner in that period can be expected to approach 300,000, and the total number of letters addressed to the Commissioner - 400,000. Those figures prove that there is a great demand for the Commissioner's activity, and that the Polish office is one of the busiest in the world.

15. The Act on the CCR allows the Commissioner to appoint his local representatives subject to approval by the Sejm. Towards the end of the second term of office of

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[26] The popularity of the Commissioner can be compared to that of other non-political institutions, including courts, tribunals or the Supreme Chamber of Control.

[27] See, for example, Article 5, paragraph 3 of the Act on the Latvian National Human Rights' Office: "The Office has the right to refrain from revealing information about the person submitting a complaint or about another person, if doing so is necessary for protecting the rights of an individual".

the Commissioner, preparations were made for the appointment - by way of an experiment - of two local representatives (in Szczecin and in Rzeszów). Since this conception required more detailed preparation, and in particular making decisions whether there were to be only local offices of the Commissioner or fully autonomous organizational units, which would, in turn, affect matters of human resources and the preparation of many technical details, appointing such representatives within the expected time proved impossible. As new financial needs arose in other fields, the Sejm decided not to assign means from the budget for the appointment of representatives of the Commissioner in 1997. The question of appointing local representatives remains still open and is worth further discussion.

16. Some countries, apart from, or instead of ombudsmen, have national commissions of human rights. As a rule, they accompany heads of state or government, in spite of being fully independent organs. Such commissions are usually composed of representatives of various public organizations and state institutions dealing with problems of human rights' protection. Usually, they enjoy very high status. Those commissions prepare opinions on the degree of respect for citizens' rights in particular fields, formulate appropriate conclusions for relevant organs of state administration and co-ordinate the work of organizations and institutions acting within their framework. A classic example of such a commission is the French Commission Nationale Consultative des Droits de l'Homme.

During his visit to Poland, Mr. J. Kahn, the President of the French commission, tried to promote the idea of establishing such a commission in our country. However, the responses varied. The government organs of that time welcomed this idea. However, bad experiences from the time of the People's Republic of Poland, when co-ordination served manipulating social initiatives and subordinating such initiatives to political objectives, immediately provoked a considerable skepticism of Polish organizations for the protection of human rights.

17. As a mark of acknowledgement for the Polish Office of the Commissioner, on 7 November 19997 an agreement was concluded, upon the initiative of the Regional Bureau for Europe and Countries of the CIC (RBEC) of the United Nations Development Programme (UNDP), between the Commissioner and that Bureau, providing technical assistance for countries of Eastern and Central Europe, the Baltic Republics and the countries of the Community of Independent Countries in the field of ombudsman institutions and other institutions for the protection of human rights. The agreement concerns mainly specialist consultation, creating a centre for gathering and exchanging information, organising conferences, assistance in creating new legal instruments, etc.

The coincidence of the time of signing this agreement and the tenth anniversary of the office of the Commissioner has a symbolic meaning, documenting the distance that this office has made since its establishment until reaching its present position at home and abroad. It is also a cause of satisfaction for all persons who have, for the past decade, contributed to it.