

**Speech by the Commissioner for Civil Rights Protection
at the Sixth Seminar of National Ombudsmen from the Member Countries of the
European Union and from Candidate Countries**

**“The Connections between Ombudsmen and the
Courts”**

1. The institution of the Commissioner for Civil Rights Protection has existed in Poland for over twenty years. It was called into being in 1987 and this was connected with many other political changes taking place in the 1980s, the time of the decline of the Communist system in Poland

In this period, the shaping was taking place of the administrative courts (called into existence in 1980) and of the independent Constitutional Court (which commenced its activity in 1986). The creation of all these institutions was an expression of the concessions made by the weakening regime, which expected them to have only a superficial nature. The actions of all these organs, however, from the very beginning of their functioning, aimed at the creation of the foundations of a state of law – above all, an improvement in the quality of the law and the respecting of civil rights by the public authorities.

It was clear from the beginning that the Commissioner and the courts had similar aims within this scope. Cooperation between these institutions was, therefore, the most natural thing in the world. The activities both of my predecessors in this post and of those exercising judicial functions, whether in courts of the highest instance or in courts of the first instance, closest to the everyday lives of citizens, were a major factor, in my opinion, in increasing the awareness among Polish citizens of their rights and in increasing the observance of these rights by public authorities. After twenty years of the functioning of the office of the Polish Ombudsman, and also of an independent judiciary, the situation in this respect is of course completely different. Although obviously there is still much to be done and, as usually occurs, we are now facing new challenges and new dangers.

In the actions undertaken by the Commissioner vis-à-vis the courts, there can clearly be seen a certain double-track approach. On the one hand, the Commissioner is involved in cases of individual citizens, in which in his opinion the judgements issued infringe the rights of the individual. On the other hand, he undertakes activities in cases of a more general nature, often in an attempt to improve the functioning of the administration of justice, for

example by initiating changes in the law or aiming to elucidate controversial problems in judicial decisions.

2. The Polish Commissioner has relatively broad possibilities of acting in judicial proceedings. He has the right to examine the records of all judicial proceedings, including preparatory proceedings. He can take part in practically all ongoing proceedings. He is entitled to lodge all the appeal procedures envisaged in judicial proceedings. In the last few years, the scope of the possible activities was broadened as a result of the introduction into the Polish legal system of new appeal measures against valid judgements, which can also be lodged by the Commissioner. One characteristic complaint in this regard is for example that about a statement of the non-conformance with the law of a valid judgement, created for the needs of claiming compensation from the state for faulty court verdicts. In the case of this complaint, one of the separate conditions for its admissibility is a violation of constitutional freedoms or human or civil rights.

In the case of proceedings before civil and administrative courts, the measures available to the Commissioner are practically identical to those available to the parties. The Commissioner, however, in principle should not become involved in disputes ensuing from private law – where there usually appear, on the basis of the principle of the equality of parties, property relations between private subjects. He could after all be leaving himself open to the charge of favouring one of the parties.

That is why the Commissioner, respecting in full the independence of the courts and the adversarial nature of civil proceedings, takes advantage of his entitlement with great caution. He supports the standpoint of a party only if he sees that the person applying for help is not capable of defending his or her rights by him- or herself or when the case may have a breakthrough nature and may influence resolutions in similar situations which might constitute a threat to the rights of the individual.

The new measure mentioned above – the complaint about the statement of the non-conformance with the law of a valid judgement – was used by the Commissioner only twice in 2007 and he took part in only seven proceedings before civil courts. In the case of judicial and administrative actions, the Commissioner was somewhat more active (participation in nine cases and seven lodged cassation appeals).

The situation looks completely different in the case of criminal cases. Here, the Commissioner has considerably broader powers than the accused in lodging appeals against the judgements of the courts of second instance. The powers of the Commissioner are here analogous to the powers of the General Public Prosecutor. He can appeal to the Supreme

Court against practically every judgement of a criminal court, while the accused can only do this in exceptional circumstances (in the case of a sentence of an unconditional punishment of deprivation of liberty). This power is utilised considerably more often – for example, in the previous year, the Commissioner appealed to the Supreme Court with seventy-eight cassations. It is worth emphasising here that, in over 80% of the cases, the Court upheld the appeal.

3. Of greater significance in practice are the competences ascribed to the Commissioner to intervene in situations where the binding law or discrepancies in its interpretation threaten the realisation of the rights of an individual.

In the case where the Commissioner sees the necessity of undertaking changes to the binding law, he can turn to the organ empowered to initiate legislative changes (usually to members of the government) to consider the possibility of changing the binding provisions. He can also intervene during further stages of the legislative proceedings by including himself in the public debate on the proposed changes to the law. Recently, among the subjects of my great interest were the provisions changing the scope of the possible intervention of the Minister for Justice in the administrative activity of the courts. I appealed to the President of the Republic of Poland, while fully supporting the standpoint of the Polish National Judiciary Council, the constitutional organ whose task is to protect the independence of judges, not to sign the provisions passed by Parliament, since in my opinion they excessively and unnecessarily interfered in the sphere of the independence of the courts.

4. If such activity does not bring the desired effects, he is entitled to appear with a motion before the Constitutional Tribunal to state the non-conformance of legal acts with the Constitution. For many years, the commissioner has been one of the most active initiators of proceedings before the Constitutional Tribunal – his motions last year alone led to a statement of the unconstitutionality of thirteen legal acts. This year, the number of such motions will probably be doubled

The Commissioner can also support the constitutional complaint of a citizen and support his argumentation. In this way, last year I took part in eight cases as a result of which unconstitutional provisions were removed from the legal order.

Proceedings before the Constitutional Tribunal give the opportunity to undertake actions in order to improve the judicial system. Among the provisions questioned by the Tribunal there are very often norms concerning court proceedings. One example of this could

be a case which lies within my current sphere of interest and whose result will have a crucial importance for the organisation of the administration of justice in Poland. It concerns the possibility of granting the right to pass judgement in civil and penal proceedings to assessors (assistant judges), namely to persons who are training for the profession of judge and have the right to pass judgements as part of a bench of a court but do not yet have all the guarantees of independence that Polish law foresees for judges. The judgement of the constitutional court should be announced this month. Among earlier matters, of the greatest importance were the solutions concerning for example court costs (and therefore the factor still very strongly influencing access to courts in Poland) and limitations on the openness of proceedings.

5. As part of his cooperation with the courts, the Commissioner can also lodge motions with the Supreme Court to elucidate legal provisions which arouse doubts in practice or whose application caused divergences in adjudication. These kinds of judgement by the Supreme Court do not directly bind courts of a lower rank but, on account of the authority of the Supreme Court, they are taken into account during adjudication. They are, therefore, a very effective tool for the unification of court practice and, in consequence, for ensuring the certainty of the law. Every year there are several such motions (last year six were lodged). What is characteristic is that the judges of the Supreme Court themselves, in reports on their activity, emphasise the particularly high level of the preparation of these motions, which speaks very highly of the efforts of my colleagues, and they also emphasise the fact that they concern matters of great significance for the functioning of the Polish administration of justice.

One of the most important matters settled in this way, after several years of doubts and the questioning by the European Court of Human Rights in Strasbourg of the conformance of Polish practice with the right to trial, was the admissibility of an appeal to the civil court against the solutions of a Polish-German foundation which granted financial compensation to persons wronged during the Second World War. The Supreme Court finally adjudicated on the existence of recourse to law in these matters.

Another important case for Polish court practice concerned the timetable for pursuing injury claims in civil proceedings in the situation where the injury inflicted by a prohibited deed only came to light after a longer period of time. The resolution announced as a result of the Commissioner's motion was the subject of a lively discussion among Polish lawyers and in effect led to changes in the provisions of the civil code in February 2007.

6. From the experience of the office of the Polish Ombudsman, it ensues that the use of courtroom tools is one of the most effective ways of protecting the rights of the individual. At the same time, the Commissioner has to bear in mind that when he decides to appear in court proceedings, supporting a party in the proceedings or indicating some more general matter connected with the protection of human rights, his role is only to signal the problem and to present his standpoint in the matter. The solution itself, however, always depends on the independent and sovereign court.

Despite the fact that the courts do not always share the standpoint of the Commissioner in the perspective of the experience of the last twenty years or so it can be said that the cooperation between the Commissioner and the Polish courts – possible thanks to the acceptance by the Polish legislator of a model of broad powers of the Ombudsman in the sphere of the activity of the judicial authority – is bringing about a strengthening of respect for the rights of the individual in Poland. This can be seen both from the experience of my office and from the statements made by Polish judges.

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