

THE ROLE OF STATE AUTHORITIES IN THE IMPLEMENTATION AND ENFORCEMENT OF THE PRINCIPLE OF NON-DISCRIMINATION

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Abstract: *The prohibition of discrimination in the Polish legal system is based on numerous international agreements and conventions, as well as on various internal regulations. Article 32.2 of the Polish Constitution constitutes a general prohibition of discrimination. Nevertheless, it is a very vague statement, which needs to be determined by specific non-discrimination principles. Primarily, such regulations can be found in labour law provisions. Moreover, since January 1, 2011, "The Act on the Implementation of Certain Provisions of the European Union in the Field of Equal Treatment" has been in force. This Act implements five European Union directives, which introduce non-discrimination principles in various aspects of social life.*

According to article 1 of the Equal Treatment Act, discrimination is prohibited on the basis of: sex, race, ethnicity, nationality, religion, belief, outlook on life, disability, age or sexual orientation. The Equal Treatment Act designates Ombudsman and The Government Plenipotentiary for Equal Treatment as those organs which are responsible for the implementation of government policy in the field of equal treatment. Even though the latter institution had already existed in Poland before the Act entered into force, its functioning and appointment are determined by this regulation.

The existence of specific provisions aimed at counteracting discrimination does not prevent abuses. Both Ombudsman and The Government Plenipotentiary for Equal Treatment frequently intervene with state authorities responsible (especially with the respective Ministers) in cases which constitute an infringement of the principle of non-discrimination. These actions are undertaken to introduce amendments in existing legal regulations, thus adapting them to certain obligations derived from the principles of equal treatment and non-discrimination.

Keywords: *Convention to protect your rights and liberties, Council of Europe, equal treatment, EU-La, Implementation International Covenant on Civil and Political Rights, International Law.*

1. Introductory remarks

The prohibition of discrimination is guaranteed in Poland and in most EU member states alike, in the Constitution. Similarities are primarily derived from the common bases of Constitutional regulations, constituted by a common European history as well as the provisions existing on the European ground. Among these there are both instruments of universal character¹, which are international treaties concluded within the United Nations framework as well as regulations passed by the Council of Europe².

¹ More details on universal character of the UN regulations in respect to human rights protection, see: inter alia: R. Wieruszewski, ONZ-owski system ochrony praw człowieka, in: System ochrony praw człowieka, Kraków 2003, p. 57 and on.

² More details, see in A. Bisztyga, Ochrona praw człowieka w systemie Rady Europy, in: System ochrony praw człowieka, Kraków 2003, p. 115 and on. Prohibition of discrimination see also: M. A.

In the Polish legal system the prohibition of discrimination is included in both international treaties binding on Poland as well as in national legislation. On the basis of these regulations, competent national organs are obliged to guarantee the fulfillment of nondiscrimination.

The so called non-discriminatory provisions are included, among others, in International Covenant on Civil and Political Rights³. The United Nations Covenant, contains prohibition of discrimination on the basis of: race, colour, gender, language, religion, political or other opinion, national or social origin, property, birth or other status⁴. Similar provisions may be found in Article 14⁵ of the Convention for the Protection of Human Rights and Fundamental Freedoms⁶ drafted by the Council of Europe.

The above mentioned international regulations from the field of prohibition of discrimination are formulated in a very general way and specified and executed by the state parties to those agreements on the level of internal law. In the case of the Polish legal system one should indicate primarily the prohibition of discrimination regulated in the Constitution of the Republic of Poland⁷.

Article 32 of the Constitution contains both the equal treatment principle and prohibition of discrimination: *1. All persons shall be equal before the law. All persons shall have the right to equal treatment by public authorities. 2. No one shall be discriminated against in political, social or economic life for any reason whatsoever*⁸.

The prohibition of discrimination is regulated in Chapter II, which consists of regulations concerning freedoms, rights and obligations of persons and citizens⁹. In the case of these regulations the continuation is noticeable. Also in the previous Polish constitutions there was a general prohibition of discrimination regulated by the provisions regarding the Rights of Man and Citizen¹⁰. Non discrimination was included as one of the

Nowicki, Wokół Konwencji Europejskiej, Krótki komentarz do Europejskiej Konwencji Praw Człowieka, Kraków 2000, p. 387 and on.

³ International Covenant on Civil and Political Rights, adopted and opened for signature, ratification and accession by General Assembly, resolution 2200A (XXI) of 16 December 1966, entry into force 23 March 1976, Polish text in: Dz. U. 1977.38.167

⁴ Art. 2.1 Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

⁵ According to art. 14 the enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status. A general prohibition of discrimination is included in a Protocol 12, though the Protocol has not been signed or ratified by all Member States of Council of Europe.

⁶ Signed on 4.11.1950., Dz.U.1993.61.284

⁷ Dz.U.1997. 78.483 with the subsequent changes

⁸ Text of the Constitution of the Republic of Poland: <http://www.sejm.gov.pl/prawo/konst/angielski/kon1.htm>

⁹ Art. 32 of Constitution consists a general constitutional rule and must be taken into consideration with regard to the other rights and freedoms guaranteed in the Constitution. See judicial decisions of Constitutional Tribunal, f. ex. SK 10/01, K 8/97 in M. Zubik (red.), Konstytucja III RP w tezach orzeczniczych Trybunału Konstytucyjnego i wybranych sądów, Warszawa 2008, p. 187 and on.

¹⁰ Relevant regulations prohibiting discrimination on any grounds were included in the Constitution of the Republic of Poland from 1935 (Art. 7.2) and the Constitution of the People's Republic of Poland from 1952 (Art. 67.2).

constitutional principles in art. 32.2 of the Constitution, though it was formulated by the Polish legislator in a general way. Consequently, it requires further specification in subsequent legal acts¹¹. Moreover, it should be emphasized that the formula taken by the legislator, according to which nobody should be subjected to discrimination on any grounds constitutes a relatively broad statement¹². The Polish legislator has thus resigned from applying the exhaustive list of grounds of discrimination as it is done in the case of international treaties and conventions. This fact also adds to the need for a specification of the prohibition of discrimination on the level of national legislation. There are several legislative acts through which the specification is being achieved, though most of them don't refer directly to the prohibition of discrimination¹³.

The legal act, which directly regulates the issue of non-discrimination is the Equal Treatment Act. The legislator indicates in this statutory regulation duties of the state in respect to the realization of the principle of equal treatment, respective state organs, relevant in respect of guaranteeing prohibition of discrimination provided by the Constitution and other legal acts.

2. Statutory regulations of prohibition of discrimination

In order to fulfill freedoms and rights of man and citizen there needs to be a system providing protection of those rights and freedoms from eventual breach. The state is not able to exclude all the threats and limitations of rights and freedoms, so one has to consider the fact, that virtually in every country breaches of the law through unlawful acts can be observed¹⁴. In this regard, in all democratic countries there is a system of protection of those rights and freedoms. This system is composed of various legal provisions as well as

¹¹ See M. Jabłoński, klasyfikacja wolności i praw jednostki w Konstytucji RP in: M. Jabłoński (red.), *Wolności i prawa jednostki w Konstytucji RP, Tom I, Idee i zasady przewodnie konstytucyjnej regulacji wolności praw i jednostki w RP*, Warszawa 2010, p. 88.

As an example of the realization of non-discrimination we could mention provisions of Polish Labour Law which provide at the same time implementation of the EU Directive. One should point art. 11³ and art. 18 §3 of Polish Labour Code. According to art. 11³ unacceptable is any discrimination in the employment relationships, in particular with respect to: gender, age, disability, race, nationality, opinions, especially political or religious, and trade union membership. Art. 18 regulates the consequences of discrimination: According to art. 18 §3 Provisions of contracts of employment and other acts, pursuant to which employment relationship is established, which violate the principle of equal treatment are invalid. Instead of such provisions, provisions of Labour law are applied accordingly, when such provisions are lacking- the provisions should be substituted with relevant provisions having non-discriminatory character.

¹² L. Garlicki, *Prawo konstytucyjne, zarys wykładu*, Warszawa 2011, p. 93

¹³ Next to already mentioned Labour law provisions, relevant provisions banning discrimination can be found in the Penal Code. Those provisions criminalise discriminatory behaviours (Penal Code, Dz. U. 1997.88.553). Moreover, they impose a fine and a term of imprisonment (deprivation of liberty) for discriminatory behaviours or the ones marked with hatred. According to article 256, subject to a penalty shall be those, who incite hatred based on national, ethnic, race or religious differences or for reason of lack of any religious denomination, and on the base of article 257 also whoever publicly insults a group within the population or a particular person because of their national, ethnic, race or religious affiliation or because of their lack of any religious denomination. Public insult (216. § 1) or insult in mass media(212) are also considered in certain circumstances – in the case of the so called “hate speech” basis for punishment for discrimination.

¹⁴ An attempt to define the meaning of the breach of constitutional rights and freedoms was taken also by the Constitutional Tribunal. More, see in B. Banaszak, *Prawo konstytucyjne*, Warszawa 2008, p. 477 and on.

relevant organs and institutions. We should therefore indicate Constitution, which regulates manner and terms of appointment and functioning of organs responsible for protection of rights and freedoms¹⁵. Moreover, the Constitution consists of regulations regarding principles of the state's organization and its structures, which undoubtedly affect the content and interpretation of the basic rights and freedoms.

Among statutory regulations, which directly apply to the general principle of equal treatment and the prohibition of discrimination, the Equal Treatment Act is of primary importance¹⁶.

The above mentioned Act is aimed to implement to the state law provisions of the EU in the field of equal treatment¹⁷. On the basis of this Act, the discrimination based on any of the reasons mentioned in the article 1 of the discussed act is prohibited; that is discrimination on the grounds of sex, race, ethnic origin, nationality, religion, outlook on life, disability, age, as well as sexual orientation. The Act regulates also the scope of validity, methods of counteracting any unequal treatment as well as organs relevant for guaranteeing compliance with the principle of non discrimination. In addition, the act provides the definition of terms "discrimination" and "unequal treatment"¹⁸.

This statutory act applies in relation to vocational training, terms of undertaking and pursuing business and vocational activity, joining and working in trade unions, associations of employers and trade self-governments, in the field of social security, health care, education and higher education as well as services. The legislator has excluded certain domains from the scope of application of the present act including the sphere of private and family life, the mass media content or the limitations imposed by the church authorities and religious unions as regards access to business activities and their performance for the sake of religion¹⁹.

According to chapter II of the Equal Treatment Act forbidden is unequal treatment of all natural persons on the basis of the above mentioned conditions, though the legislator has diversified the causes of unequal treatment depending on the scope of application which the prohibition concerns²⁰.

The statutory act also provides the rules of proceedings and relevant organs in the case of infringement of the principle of equal treatment . According to art. 13, the person, who was subject to unequal treatment has the right to demand a compensation. Seeking

¹⁵ Constitution provides for inter alia: existence of Ombudsman and a possibility to lodge a constitutional claim in case of breach of constitutional rights and freedoms.

¹⁶ The Act on the Implementation of Certain Provisions of the European Union in the Field of Equal Treatment was adopted on 3.12.2010 and came into force 1.01.2011; Dz.U. 2010.254.1700.

¹⁷ The Act implements such EU directives in the field of equal treatment: 86/613/EEG, 2000/43/EG, 2000/78/EG, 2004/113/EG, 2006/54/EG

¹⁸ Art. 3 of the Act on the Implementation of Certain Provisions of the European Union in the Field of Equal Treatment

¹⁹ Art. 5 of the Act on the Implementation of Certain Provisions of the European Union in the Field of Equal Treatment

²⁰ In respect to access and conditions of using the social security and services- on the grounds of sex, race, ethnicity or nationality; in terms of health care, education and higher education- on the basis of race, ethnicity or nationality, and in respect to taking up vocational training and supplementary education, undertaking and carrying out business or occupational activity, joining and working in the trade unions, employers associations, trade self-government and access and conditions of use of labour market instruments according to the Act on the Employment Promotion – on the basis of sex, race, ethnicity, nationality, religion, beliefs, outlook on life, disability, age or sexual orientation.

compensation shall be governed by the relevant provisions of Civil Code and Code of Civil Procedure²¹.

3. Constitutional organs and state administration bodies guaranteeing the realization of prohibition of discrimination

Next to the system of judicial control and protection of rights and freedoms²², including guarantees of equal treatment, the Polish legislator established specific organs aimed at counteracting discrimination and guaranteeing compliance with the principle of equal treatment. Those tasks have been entrusted, according to provisions of art. 18 of the Equal Treatment Act, to The Commissioner for Citizens' Rights and The Government Plenipotentiary for Equal Treatment. It needs to be emphasized that both organs had existed long before the Equal Treatment Act was adopted and entered into force.

The Commissioner for Citizens' Rights is a constitutional organ. In chapter IX of Constitution there is a separate subsection regulating procedures of the organ's appointment and its functioning²³. Moreover, the details are regulated in the Act on the Commissioner for Citizens' Rights²⁴.

The Commissioner for Citizens' Rights is appointed by the Parliament (Sejm) with the consent of the Senate for a period of 5 years, the terms of the office shall be renewable once. The candidate is proposed by the Marshall of the Sejm or a group of at least 35 Members of Parliament. The Commissioner for Citizens' Rights shall not hold any other post, except for a professorship in an institute of higher education, nor perform any other professional activities. The Commissioner for Citizens' Rights shall not belong to a political party, a trade union or perform other public activities incompatible with the dignity of his office. The Commissioner for Citizens' Rights shall be independent in his activities, independent of other State organs and shall be accountable only to the Sejm in accordance with principles specified by statute. The Commissioner for Citizens' Rights shall annually inform the Sejm and the Senate about his activities and report on the degree of respect accorded to the freedoms and rights of persons and citizens²⁵.

According to the statutory regulations The Commissioner for Citizens' Rights can, with the consent of Sejm establish his local plenipotentiaries²⁶. On the request of the Commissioner, Sejm can also appoint three deputies. In certain cases The Commissioner can be dismissed before the end of his term of office²⁷.

²¹ During the proceedings the affected party must authenticate the breach of equal treatment principle, and the adverse party, which is accused of a breach of equal treatment principle, is obliged to prove that the principle hasn't been infringed. The time limit for claims on account of a breach of the principle of equal treatment is 3 years from the day of learning about the infringement of equal treatment by the affected party, not longer though, than within 5 years from the occurrence of the event constituting the infringement of this principle.

²² Constitution guarantees everyone a right of access to court, moreover in the case of violation of constitutional rights and freedoms it is possible to lodge a constitutional claim. Art. 77-79 of the Constitution of the Republic of Poland.

²³ Art. 208 – 212 of the Constitution of the Republic of Poland

²⁴ Act on the Commissioner for Citizens' Rights from 15.07.1987, Dz. U. 2001.14.147 (Ustawa o rzeczniku praw obywatelskich z 15.07.1987, Dz. U. 2001.14.147)

²⁵ More see Art. 208 – 212 of the Constitution of the Republic of Poland and the Act on the Commissioner for Citizens' Rights, <http://www.rpo.gov.pl/index.php?md=8537&s=3>

²⁶ Art. 22 of the Act on the Commissioner for Citizens' Rights

²⁷ Art. 7 of the Act on the Commissioner for Citizens' Rights

In the event of infringements of rights of a person and a citizen, among these principle of equal treatment, The Commissioner for Citizens' Rights undertakes actions on the request of citizens or their organizations, self-government bodies, Commissioner for the Rights of the Child or on his own initiative²⁸. After examining the application, The Commissioner for Citizens' Rights can undertake an action, point out to the applicant certain measures to which he is entitled, transfer the case to the relevant organ or not undertake any actions, informing about it both the person whom the case concerns and the applicant²⁹.

Moreover, since 2001 The Commissioner for Citizens' Rights has been obliged to cooperate with the national and international organizations working for the benefit of protection of persons and citizens, also in respect of equal treatment.

The second organ established to protect from discrimination is The Government Plenipotentiary for Equal Treatment³⁰.

His tasks were determined in the above mentioned Equal Treatment Act. We should emphasize here, that the office of The Government Plenipotentiary for Equal Treatment has been established for the first time in 2008 under a relevant regulation of the Council of Ministers³¹. In this regulation the tasks of the Plenipotentiary have also been defined. The scope of tasks and duties from the regulation is basically transferred into the Equal Treatment Act.

The Government Plenipotentiary for Equal Treatment is appointed and dismissed by the Head of the Government (Prime Minister) and his task is to realize the policy in respect to equal treatment. Among these duties are development, opinion making and submitting to the government projects of legal acts and other government documents concerning equal treatment. He might also, acting in concert with relevant ministers, cooperate with national and international organisations and institutions in the cases connected with equal treatment. He also cooperates in making of reports and statements from the realization of international treaties binding on Poland concerning prohibition of discrimination. Among his tasks, there is also coordination of ministries' actions and public institutions in order to provide realization of equal treatment and prevent discrimination. Moreover, the Plenipotentiary is obliged to draw and present to the Council of Ministers National Action Programme for Equal Treatment and an annual report containing information on his activities in the field of equal treatment. The report should contain information on the results already achieved, recommendations and conclusions concerning the actions which need to be taken as well as a report on realization of the National Programme.

Within the scope of his actions Plenipotentiary is under the supervision of the Head of the Government (Prime Minister) and a Chancellery of the Chairman (Head) of the Council of Ministers is providing him with the substantial and organizational service in legal and administrative matters.

²⁸ Art. 8 and art. 9 of the Act on the Commissioner for Citizens' Rights

²⁹ More about activities of The Commissioner for Citizens' Rights see in B. Banaszak, T. Milej, *Polnisches Staatsrecht*, Warszawa 2009, p. 201 and on., and L. Garlicki, *Prawo konstytucyjne ...*, p. 389 and on.

³⁰ Predecessor of The Government Plenipotentiary for Equal Treatment was The Government Plenipotentiary for Equality between Men and Women who was appointed in 2001 in order to fulfill conditions necessary for Polish accession to the EU. The Government Plenipotentiary had been performing the functions until 2005, when a new government liquidated that office.

³¹ Regulation of the Council of Ministers from 22.04.2008, Dz.U.08.75.450 (*Rozporządzenie Rady Ministrów*)

4. Practical examples of actions taken by the state organs in order to prevent discrimination.

Both of the state organs characterized above, appointed to guarantee realization of equal treatment principle have to deal with numerous interventions during their performance³². A few examples presented below show that despite the existence of relevant legal regulations both international and national as well as the functioning of state organs, whose task is the protection from discrimination, there are still many infringements of equal treatment principle and prohibition of discrimination.

The current Commissioner for Citizens' Rights has been addressing to the state organs and other institutions because of violations of prohibition of discrimination on various grounds. Intervention to the Prosecutor General was connected with the numerous cases having racist and xenophobic background, like the destruction and setting fire to the Centre for Muslim Culture in Białystok, drawing anti-semitic and fascist slogans and symbols on the synagogues in Orla and Krynki and an arson of the doors of an apartment of mixed, Polish- Arabic, marriage in Białystok. The Prosecutor General has been asked to monitor the penal proceedings pending in those cases, and in similar ones. He was also asked to take actions aimed at intensifying works of public prosecutor's office in such cases³³.

Another intervention concerned the situation of homeless persons. The Commissioner has addressed the Minister for Health with a proposal to examine the problem and draw accurate statutory regulations in order to provide realization of access to health care, guaranteed to everybody on the basis of the Constitution³⁴.

Subsequent example is the reaction of the Commissioner for Citizens' Rights on the public statement made by the Member of Parliament during the TV interview. The MP has answered the question regarding the situation of people with different sexual orientation citing the jokes of his party fellows, insulting this minority group and violating their dignity and, at the same time, the non discrimination principle. The Commissioner has addressed the Marshall of the Sejm to initiate appropriate disciplinary proceedings in this case³⁵.

Also the currently residing Government Plenipotentiary for Equal Treatment has to deal with numerous violations of the prohibition of discrimination. His interventions³⁶ usually consist of drawing the attention of relevant organs, like Ministers, to the necessity of amendments in the provisions that are currently in force or suggesting undertaking other actions provided by the law, in order to eliminate discrimination.

The Plenipotentiary has been addressing the Minister for Education in the case of children being HIV positive, who were forbidden to attend English classes in one group with healthy children due to their illness. The Minister was asked to clarify this case.

³² There are around 35.000 applications and requests submitted to the Commissioner for Citizens' Rights each year. Accurate data concerning the amount of cases being examined by the Commissioner can be found on the website: <http://bip.brpo.gov.pl/index.php?md=9027>

³³ The letter of the Commissioner for Citizens' Rights in the case no. RPO-683675-II/II/PS (Pismo Rzecznika Praw Obywatelskich w sprawie nr RPO-683675-II/II/PS)

³⁴ The letter of the Commissioner for Citizens' Rights in the case no. RPO-630971-V/09/AA PS (Pismo Rzecznika Praw Obywatelskich w sprawie nr RPO-630971-V/09/AA PS)

³⁵ The letter of the Commissioner for Citizens' Rights in the case no. RPO-667179-I/II/NC (Pismo Rzecznika Praw Obywatelskich w sprawie nr RPO-667179-I/II/NC)

³⁶ Information on the action of Government Plenipotentiary for Equal Treatment can be found on the official website: <http://www.rownetraktowanie.gov.pl/interwencje>

Many cases of the Plenipotentiary's interventions concerned the discrimination of persons of different sexual orientation, whom Public Registry Office has refused to issue an appropriate certificate stating the capability to get married once the Registry has established that the case concerns concluding a partner relationship outside Poland with the people of the same sex. The Plenipotentiary has applied to the Minister for Internal Affairs and Administration for an appropriate change of provisions concerning the preparation of public registry records.

5. Conclusions

In the Polish legal system both prohibition of discrimination on various grounds and functioning of state organs, appointed to guarantee compliance with this prohibition have been regulated. The regulations present in the internal law fulfill the requirements and obligations placed on Poland in binding international treaties in the field of prohibition of discrimination and realize various EU directives. Nevertheless, the analysis conducted by those organs shows that in many spheres of social life there are still cases of violations of non-discrimination.

The cause of such state of affairs is, on one hand, a mismatch between the legal provisions currently being in force and the changes which are the effect of the implementation of relevant provisions of the EU law. On the other hand, recent years have witnessed rapid changes in the way in which society perceive the people who differ for some reason from the others. Through, complaints and proposals most of which being reasonable and justified, brought to the Commissioner for Citizens' Rights and the Government Plenipotentiary for Equal Treatment by discriminated people, those organs were able to contribute to numerous changes in the discriminatory provisions in the course of their statutory regulated performance. We should presume that their actions will be continued. Even though actions taken so far in this respect can be judged positively, there is still a lot to be done. Unfortunately, the removal of all the discriminatory provisions from the system of law is impossible.

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