

Polish Experience of the Co-operation between the Ombudsman and the Constitutional Tribunal

Ancient wisdom attests to the observation that where you find the laws most numerous, there you will find also the greatest injustice. Violations of civil rights and freedoms, as is well known, may result not only from the acts of applying the law, but may also occur in the legal acts that form basis for the working of courts, public administration and other public authorities. Therefore it is extremely important for the Ombudsman to be endowed with effective means to counteract against violations of rights and freedoms in this respect. Among the crucial procedural means under Polish regulations is the Ombudsman's power to initiate constitutional review before the Constitutional Tribunal.

Under Polish law, the Ombudsman has two modes of participation in proceedings before the Constitutional Tribunal. First, he may initiate the proceedings on his own; and second, the Ombudsman may join in proceedings that have been initiated through the lodging of constitutional complaint.

In order to be able to explain the Polish experience, I will have to introduce you to some details concerning our regulations in this field. I am well

aware that if you like laws or sausages, you should not watch either being made, but I am afraid that some technical explanations are needed.

According to the Polish Constitution, Ombudsman may file an application to the Constitutional Tribunal in cases related to: (first) Conformity of statutes and international treaties with the Constitution, (second) conformity of statutes with international treaties, of which the ratification had been subject to consent expressed in the form of a statute, (third) conformity of legal provisions issued by central state institutions with the Constitution, ratified international treaties, and statutes, (and fourth) conformity of objectives of activities of a political party with the Constitution.

The decision concerning such an application is within exclusive powers of the Ombudsman, and cannot be subject to control by the Constitutional Tribunal. It usually follows the complaints addressed to the Ombudsman, who can nevertheless act *ex officio*.

As an application filed by the Ombudsman essentially aims at protection of rights and freedoms, the objections raised before the Tribunal should relate to violations of such rights. The Ombudsman may, however, question a given normative act for other reasons, such as the fact that the executive institution acted *ultra vires*.

Usually, before referring a case to the Constitutional Tribunal, the Ombudsman takes appropriate steps to change the law that, in his view, violates civil rights and freedoms, by using the so-called indirect legislative initiative. Polish Ombudsman does not have the power of legislative initiative as such, but he may address the institutions to which this power is attributed. In such an address, the Ombudsman would point out at violations of constitutional standards by provisions in force. If an institution does not share the views expressed by the Ombudsman, and does not take action, it may still have to confront the objections of Ombudsman, who can file an application that questions conformity of a legal act enacted by this institution with superior legal acts.

Such an application to the Constitutional Tribunal must indicate the institution that issued the law in question, but also define the legal act in question (or parts of it) and include justified charges as far as conformity of the legal act with the Constitution, ratified international treaty or statute is concerned.

The Ombudsman may also request that cases be joined by the Tribunal, if there is a defensible connection, or ask the Tribunal to indicate a date of acts' loosing its validity different from that of a judgment. The latter might be particularly justified if the judgments binding force from the day of its issuing could lead to violation of civil rights and freedoms, e.g. by creating a lacuna.

By filing an application the Ombudsman becomes a participant of the proceedings and may act either personally or by his representative. An application may be withdrawn. It is established in the jurisprudence of the Constitutional Tribunal that this is a discretionary power of an applicant, which obliges the Tribunal to discontinue legal proceedings.

Such a withdrawal of an application may be particularly justified by the fact that a legal act under dispute had lost its binding force. The present Ombudsman has initiated quite a new practice of negotiations with the institution responsible for the questioned legal act, carried out after the application had been filed. This practice has already led to spectacular withdrawal of an application, when conditions posed by the Ombudsman were met.

The Ombudsman may also participate in proceedings relating to constitutional complaint. The Constitutional Tribunal is obliged to inform the Ombudsman of proceedings resulting from constitutional complaint, so that he could present his view on the case, and within 60 days, declare his participation in the proceedings. Such a participation obviously takes place when protection of civil rights and liberties, as guaranteed by the Constitution, is at stake.

In a well established practice, the Ombudsman informs the Constitutional Tribunal on his view even when not interested in joining the proceedings. As you may notice, this practice respects the principle of legal certainty.

It might be worth noting here that as far as Polish model of constitutional complaint is concerned, anyone whose Constitutional rights or freedoms have been violated, has the right to lodge a complaint concerning conformity of statute or other normative act which became legal basis for court's or administration's decision regarding individual rights or freedoms. All in all, constitutional complaint can only target normative acts, and not individual decisions or judgments.

There are controversies about whether it is ultimately the Ombudsman or the applicant who points at the allegedly infringed rights and freedoms of the applicant. In other words, can the Ombudsman indicate different constitutional provisions than those indicated by an applicant? In some older judgments of the Constitutional Tribunal rather strictly represented the view that the Ombudsman is bound by the limits set in the complaint, as far as constitutional standards are concerned. However, recent developments in the jurisprudence of the Tribunal tend to enable the Ombudsman to widen the scope of the constitutional standards, as long as they concern civil rights and freedoms.

Another positive impact of the Ombudsman's right to join in constitutional complaint proceedings stems from the fact that it enables him to present his views on procedural matters as they occur in course of the proceedings before the Constitutional Tribunal.

To give you an example, in one of the cases I was faced with a problem of admissibility of a judgment concerning the regulations of criminal procedure

concerning the preliminary custody. The Prosecutor General was asking the Constitutional Tribunal to discontinue the proceedings, claiming that the decision on preliminary custody is not final in its character. My objective in joining this proceeding was far more than supporting the applicant. A decision on inadmissibility of a judgment in this case would have resulted in excluding a very important aspect of constitutional freedom from the scope of constitutional review. Fortunately the Tribunal shared my view, and made the provisions on preliminary custody subject of its judgment.

Polish Ombudsman makes full use of his powers to participate in the proceedings before the Constitutional Tribunal. There is even an increase, reflected by the figures: in 2004 there were 21 applications and participation in 10 constitutional complaints, in 2005 28 applications and 8 complaints, last year as many as 15 applications and 27 complaints, and by the end of August this year I have filed 18 applications and joined in 13 constitutional complaints.

Ombudsman's involvement with the Constitutional Tribunal and its judges is aimed at effective protection of the rights of citizens. Some say that a judge is a law student who marks his own examination papers. This may be true, but still we have to invest our hopes in judges' impartiality and honesty, and it would be a serious mistake for the Ombudsman not to cooperate with judges on matters of human rights.

One has to bear in mind that decisions of the Constitutional Tribunal resulting from applications filed by the Ombudsman usually have impact on the situation of not only those who asked for help, but more generally on legal situation of other individuals as well. In my opinion this makes the Polish Ombudsman far more effective than institutions that may only intervene in individual cases.

But as effective as I may try to be, my speaking capacity is limited, and so is the time reserved for my presentation. I will be very happy to answer your questions and respond to your comments. Thank you!