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The implementation of the principles of equality and the prohibition of discrimination in the activities of the Ombudsman as an independent authority for equal treatment

Introduction

The below article is devoted to the activities of the Ombudsman who plays a key role in fulfilling the constitutional principle of equality and the prohibition of discrimination stated in Article 32 of the Constitution of the Republic of Poland of April 2, 1997 (hereinafter: the Polish Constitution).¹ In Poland, as well as in other European countries, the issue of equal treatment and preventing discrimination is becoming a major political and legislative challenge for the authorities of the European Union and the authorities of individual member countries whose primary goal is to raise the level of respect of basic human rights. Due to the growing tendency to intensify behavior such as hate speech, xenophobia, racism, chauvinism, unequal treatment and discrimination, it is necessary to take more effective measures within public policy, legislative solutions, implementation of educational programs, campaigns and information initiatives in order to reduce this phenomenon. It is crucial to initiate and support information policy on legal effects, consequences and the impact of this type of behavior on the society to an even greater extent. The statistics prepared by various entities involved in the research and monitoring the issue of equal treatment and discrimination indicate a significant increase of these phenomena in recent years. This causes not only more demanding challenges for law enforcement agencies in the fight against this type of crimes, but also for all other institutions and organizations that actively support the policy to prevent such phenomena. For this reason, it becomes so critical and necessary to coordinate the activities of all the entities being involved (operating within the country, as well as international authorities) to determine further common tasks and individual goals, and thus the widely understood anti-discrimination strategy.

* Dr, Wyższa Szkoła Humanitas w Sosnowcu, Instytut Nauk Prawnych.

¹ The Constitution of the Republic of Poland of April 2, 1997 (Journal of Laws 1997, No. 78, Item 483 with later amendments)

Legal regulations in equal treatment and the prohibition of discrimination

Currently applicable legal regulations relating to the principle of equal treatment and the prohibition of discrimination consist of several dozen legal acts in both international and national law. Many of the conventions and strategies that constitute the anti-discrimination law system have been developed thanks to the initiatives undertaken by the international organizations such as the United Nations and the Council of Europe. The key conventions are as follows: the European Convention on Human Rights (formally the Convention for the Protection of Human Rights and Fundamental Freedoms), the International Covenant on Civil and Political Rights of the United Nations, the International Convention on the Elimination of All Forms of Racial Discrimination of the United Nations, the Convention on the Elimination of All Forms of Discrimination against Women of the United Nations.² Within recent years, Polish anti-discrimination law has undergone a significant change, mainly due to the adaptation to the standards of the European Union but also because of the necessity to take into account the international human rights law. These regulations are included in a number of statutory laws and are aimed at contributing to the creation of equal opportunities and preventing discrimination. The basic and most important regulation can be found in the Polish Constitution, and the more extensive regulations are stated in the provisions of the Labor Code or the Equality Act.³

The question arises whether the legal protection measures defined in legal acts are sufficient to implement the principle of Article 32 of the Polish Constitution. In many studies (including reports on the activity of the Commissioner for Human Rights and on the status of observance of human and citizen freedoms and rights) some judgmental voices are quoted stating that current legislation does not allow for full protection of basic human and citizen rights and freedoms. Many of the non-government organizations dealing with the human rights raise the issues of lack of effective legal procedures and instruments to fight and prevent discrimination, the existence of inaccurate legal regulations, insufficient action plans of state authorities in the area of policy of equality, deficiencies in effective anti-discrimination education and, as a consequence, a low level of awareness to claim their own

² J. Szymańczak, *Przeciwdziałanie dyskryminacji w Polsce – wybrane aspekty polityki państwa*, [in:] B. Kłos, J. Szymańczak (eds), *Zasada równości i zasada niedyskryminacji*, Studia BAS, no. 2(26), Warszawa 2011, p.239-240

³ P. Filipek, Ł. Połatyński, N. Żytkiewicz, *Równe traktowanie w życiu społecznym. Wybrane zagadnienia prawa europejskiego i polskiego*, Kraków 2008, p.21; J. Szymańczak, *Przeciwdziałanie...*, p.240

rights by individuals.⁴ Therefore, further changes in current legislation become necessary by implementing further instruments of legal protection against unequal treatment and discrimination, as well as a wider field of action in this respect.

The principle of equality and the prohibition of discrimination in the Polish Constitution

Starting from the 18th century, the principle of equality and the prohibition of discrimination has been a constant citizens demand for every democratic state.⁵ It has been and still is a unique principle in the history of mankind, and it is undoubtedly one of the most complex and complicated principles as far as interpretation is concerned in various aspects, including normative, social, ethical or philosophical ones.⁶ This principle is included in the basic laws of democratic countries not only because it forms the basis of the entire regulation relating to the fundamental rights and freedoms of the individual human being, but also because it is one of the most essential and natural constitutional principles. Therefore, it has a huge impact and status for the functioning and shaping of a civil society – simultaneously tolerant of each individuality. Constitution of the Republic of Poland from 1997 also declares the principle of equality in article 32 section 1 stating that "Everyone is equal before the law. Everyone has the right to equal treatment by public authorities ", whereas in section 2 there is a prohibition of discrimination mentioned as follows: "No one may be discriminated against in political, social or economic life for any reason."⁷ Setting this principle in the Constitution in the context of its article 8 section 2 suggests its special meaning. This article introduces the direct application of principle of equality and the prohibition of discrimination, thus making the Constitution a legal act of real significance in the legal life of the country. This gives the individuals the opportunity to effectively invoke the regulations of the Constitution, which refer to their rights and freedoms, as well as human and citizen rights and obligations, which constitutes the basic guarantee of compliance with them. The legislator also decided to make a general reference to the principle of equality in the preamble to the Constitution of the Republic of Poland, which mentions all citizens of the Republic of Poland being of "equal

⁴ J. Szymańczak, *Przeciwdziałanie...*, p.241-242

⁵ I. Bernatek-Zagula, *Konstytucyjna zasada równości wobec prawa w świetle ustawy o udostępnianiu informacji gospodarczych*, *Przegląd Prawa Konstytucyjnego*, no. 2012/3, p. 73

⁶ A. Deryng, *Rzecznik Praw Obywatelskich jako wnioskodawca w postępowaniu przed Trybunałem Konstytucyjnym*, Warszawa 2014, p.276-277

⁷ B. Banaszak, *Porównawcze prawo konstytucyjne współczesnych państw demokratycznych*, Warszawa 2012, p. 146; M. Chmaj (ed.), *Wolności i prawa człowieka w Konstytucji Rzeczypospolitej Polskiej*, Warszawa 2016, p. 58; J. Kuciński, *Konstytucyjny system organów państwowych*, Warszawa 2011, p.150; I. Pużycka, J. Wojnowska-Radzińska, *Zasada równości i zakaz dyskryminacji w Konstytucji RP*, [in:] Z. Niedbała (ed.), *Prawo wobec dyskryminacji w życiu społecznym, gospodarczym i politycznym*, Warszawa 2011, p.263

rights and obligations towards the common good - Poland".⁸ It has to be pointed out that the principle specified in article 32 section 1 is *lex generalis* for other constitutional norms relating to equality, which specify various fields of social or economic life, including Art. 6, Art. 11, Art. 32 sec. 2, Art. 33, Art. 60, Art. 64, Art. 68 sec. 2, Art. 70 sec. 4, Art. 96 sec. 2, Art. 127, Article 169 sec. 2.⁹ What is crucial as well is that there are some connections between the principle of equality and other principles included in the Constitution. Special attention and significance must be paid to the principles of social justice and a democratic rule of law, which the Constitutional Tribunal has repeatedly pleaded in the context of the interpretation of the principle of equality.¹⁰

There are three main regulations to follow directed to public authorities that result from the principle defined in article 32 of the Polish Constitution - equal treatment of subjects of freedom and rights in the process of applying law (equality before the law; equality in the application of law; equality of treatment), taking into account the principle of equality when creating the law (equality in law; equality in enactment) and compliance with the principle of non-discrimination in public, social or economic life for any reason.¹¹

Firstly, the reference ought to be made to the first two principles described in section 1, i.e. the principle of equality, which according to the case-law of the Constitutional Tribunal constitutes "a directive according to which the law should be shaped in such a way as to lead to equalize the differences occurring in the actual situation of citizens."¹²

The distinction between equality before the law and equality in law is essential. In the first case, it means an obligation imposed on public authorities to treat equally all the addressees of legal norms that should be regarded as similar entities due to their belonging to a given class or category. In the doctrine, it is explained as "an order for the bodies applying the law to make independent decisions regardless of the individual characteristics of the addressee, irrelevant from the point of view of the norm's hypothesis".¹³ The second order is

⁸ W. Skrzydło, *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, Warszawa 2013, p. 22; M. Chmaj (ed.), *Wolności i...*, p. 58-59; K. Działocha, *Zasada bezpośredniego stosowania konstytucji w dziedzinie wolności i praw obywatelskich*, [in:] B. Oliwa-Radzikowska (ed.) *Obywatel - jego wolności i prawa: zbiór studiów przygotowanych z okazji 10. lecia urzędu Rzecznika Praw Obywatelskich*, Biuro Rzecznika Praw Obywatelskich, Warszawa 1998, p.26

⁹ B. Banaszak, *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, Warszawa 2012, p. 225; M. Chmaj (ed.), *Wolności i...*, p. 64

¹⁰ M. Jabłoński (ed.), *Wolności i prawa jednostki w Konstytucji RP, vol. I, Idee i zasady przewodnie konstytucyjnej regulacji wolności i praw jednostki w RP*, Warszawa 2010, p.426

¹¹ W. Skrzydło, *Polskie prawo konstytucyjne*, Lublin 2010, p.165; See: L. Garlicki, *Polskie prawo konstytucyjne*, Warszawa 2018, p.112; E. Gdulewicz (ed.), *Konstytucyjny system organów państwowych*, Lublin 2009, p. 63

¹² I. Pużycka, J. Wojnowska-Radzińska, *Zasada...*, p.266

¹³ L. Garlicki, M. Zubik (ed.), *Konstytucja Rzeczypospolitej Polskiej, Komentarz*, vol. II, Warszawa 2016, p.110-112; M. Safjan, L. Bosak, *Konstytucja RP. Komentarz*, vol. I, Warszawa 2016, p.833

directed to the legislator to provide the law with such a content (by creating abstract and general legal norms) to shape an equal legal situation of entities which, according to the criteria adopted by the legislator, are considered alike. It means that the order of equality in law means "the distinguishing of individual classes (categories) of similar legal entities in the content of legal norms".¹⁴ The essence of this order is to formulate obligations and rights of entities in legal acts in such a way that they are free from discrimination and the occurrence of unjustified privileges (the phenomenon of favoritism).¹⁵

The constitutional guarantee of equality before the law applies only to the legal sphere (its enactment and application). Therefore, its meaning should not be understood as the actual minimization of inequalities, e.g. social, cultural or socio-economic differences among entities, unless they are a direct consequence of the applicable legislation.¹⁶

The principle of equality does not suggest equality in its absolute meaning, because similar entities will not always be treated identically. The case-law of the Constitutional Tribunal indicates the criteria upon the fulfillment of which the exceptions to the order for equal treatment of entities are acceptable in certain situations.¹⁷ These criteria have to have:

- a) firstly, a relative nature, and thus be directly related to the purpose and the main content of the regulations in which the audited rule is included, as well as to serve the accomplishment of this purpose and content, i.e. the introduced differences must be rationally justified (...)
- b) secondly, the proportional nature, i.e. the importance of the matter, which is to be used to differentiate the situation of the addressees of the rule, must be in an appropriate proportion to the significance of the matters that will be affected as a result of unequal treatment of similar entities (...).
- c) thirdly, these criteria must be related to other values, constitutional principles or rules justifying the diverse treatment of similar entities (...).¹⁸

To sum up, the criteria for justified differences should be based on the three features mentioned above: the criteria of justice, rationality and proportionality.¹⁹

¹⁴ Ibidem

¹⁵ M. Jabłoński (ed.), *Wolności i...*, p.424

¹⁶ I. Pużycka, J. Wojnowska-Radzińska, *Zasada...*, p.267

¹⁷ K. Kurowski, *Wolności i prawa człowieka i obywatela z perspektywy osób z niepełnosprawnościami*, Warszawa 2014, p.83; B. Banaszak, *Prawo konstytucyjne*, Warszawa 2012, p.382

¹⁸ B. Banaszak, *Konstytucja...* p. 227-228

¹⁹ M. Masternak-Kubiak, *Prawo do równego traktowania*, [in:] B. Banaszak, A. Preisner (eds), *Prawa i wolności obywatelskie w Konstytucji RP*, Warszawa 2002, p.123

The third order referred to in Article 32 section 2 of the Constitution of the Republic of Poland concerns the prohibition of discrimination and it is a consequence of the legal norm defined in section 1, because it means a prohibition on introducing differentiation of unjustified nature (it is a kind of aggravated form of unequal treatment).²⁰ Also in its case-law, the Constitutional Tribunal observed that "the prohibition of discrimination resulting from article 32 section 2 of the Constitution is not identical with the prohibition of differentiating the situation of legal entities. Nevertheless, it is a prohibition on unjustified, distinct shaping of the situation of similar legal entities in the process of establishing and applying the law.

Discrimination therefore means unacceptable creation of different legal norms for legal entities that should be categorized in the same class (category) or unequal treatment of similar legal entities in individual cases where the differentiation has no justification in legal norms. Thus, for the assessment of a given situation as either discrimination or non-discrimination, it is important to define the criterion of diversity as well as the justification for its introduction. In the case of similar entities belonging to the same relevant class (category), the supposition supports the lack of differentiation.²¹ According to the Tribunal, the prohibition of discrimination means "the unacceptability of introducing any restrictions on the equal treatment of citizens that do not result from the desire to deepen the process of achieving the actual equality."²² As a result, a given proceeding will be treated as discriminatory if it violates the principle of equal treatment or having equal opportunities.²³

The article 32 section 2 of the Constitution of the Republic of Poland which says: "No one may be discriminated against in political, social or economic life (...)" is universal due to the fact that the legislator decided to refer it to all the areas of society's functioning (the human's activity), i.e. economic, social or political life, in which the individual or other entities of rights and freedoms directly encounter the activities of public authorities. The expression "for any reason" is the widest and most general term possible that replaces the criteria of sex, race, marital status, birth, language, social origin, religion or lack of religion, beliefs, political views, wealth, physical or mental disability, or sexual orientation (in other

²⁰ I. Pużycka, J. Wojnowska-Radzińska, *Zasada...*, p.277; A. Błaszczak, *Efektywność środków ochrony przed dyskryminacją w Polsce*, Przegląd Prawa Publicznego, no. 6/2015, p.37

²¹ M. Domagała, J. Podkowik, M. Zubik, *Konstytucja RP w orzecznictwie Trybunału Konstytucyjnego oraz SN i NSA*, Warszawa 2018, p. 97

²² P. Sarnecki (ed.), *Prawo konstytucyjne RP*, Warszawa 2014, p. 159

²³ I. Pużycka, J. Wojnowska-Radzińska, *Zasada...*, p. 278

words, it contains the essence of the prohibition of discrimination, without the need to specify various reasons in detail) and thus complies with international law standards.²⁴

The subjective scope of the principle of equality and the prohibition of discrimination is regulated in article 32 of the Polish Constitution in a very wide way. This is indicated by the concepts defined by the legislator in section 1 - "everyone" and section 2 - "nobody". As a result, the subject of this principle is "everyone", "all people", and hence it refers not only to natural persons (citizens, foreigners, stateless persons - every human being, regardless of its legal situation which is subject to the jurisdiction of the Republic of Poland), but also legal persons and any other constitutional subjects of rights and freedoms (as per the statement of the Constitutional Tribunal, "Article 32 of the Constitution does not limit the group of entities entitled to equal treatment by public authorities (ergo also by the legislator) only to natural persons).²⁵ The recipients of the obligation of this rule are primarily "public authorities". This term is versatile and refers to all institutions, offices, authorities whose competences are of executive nature or the ones that organize handling of these competences. The term also includes the non-public institutions performing similar and commissioned functions.²⁶

The Commissioner for Human Rights as an independent authority for equal treatment

The Commissioner for Human Rights (hereinafter CHR) has been operating for over thirty years, yet it is hard not to resist the impression that Poland is far from the ideal of a good country. The democratic system of the country is still not citizen-friendly, it is essentially visible in the executive, legislative and judicial sphere. For this reason, it is so important for the society to have a strong and fully independent institution with its aim to control, which in its scope will intervene to defend a human being and a citizen in an emergency situation, violation of his fundamental rights and freedoms.²⁷

Since 1989 the CHR has become a constitutional authority. Its constitutional separation was primarily aimed at creating an authority that would deal with the verification and investigation of the activities of public institutions with powers that could lead to violations of the rights and freedoms of the individual. Its functioning in the Polish legal system is directly determined by the Polish Constitution (Article 80, Article 191, Articles 208-

²⁴ L. Garlicki, *Polskie...*, p.113; W. Skrzydło, *Polskie...*, p.166; M. Masternak-Kubiak, *Prawo...*, p.127; I. Pużycka, J. Wojnowska-Radzińska, *Zasada...*, p.276

²⁵ M. Safjan, L. Bosak, *Konstytucja...*, p.835; M. Chmaj (ed.), *Wolności i...*, p.59

²⁶ L. Garlicki, M. Zubik (eds), *Konstytucja...*, p.122-123

²⁷ A. Gajda, *Kierunki rozwoju instytucji Rzecznika Praw Obywatelskich w Polsce*, Warszawa 2013, p.9; A. Deryng, *Prawo do wystąpienia z wnioskiem do Rzecznika Praw Obywatelskiego*, [in:] M. Jabłoński (ed.), *Realizacja i ochrona konstytucyjnych wolności i praw jednostki w polski porządku prawnym*, Wrocław 2014, p.855

212)²⁸, whereas the constitutional regulations are further detailed on the basis of the Act of July 5, 1987 on the Ombudsman (hereinafter the Act on the Ombudsman).²⁹

The office of the Commissioner for Human Rights (CHR) in Poland, compared to the ombudsmen in other countries, is remarkably powerful, and the wide range of competences and actions is a trait of a strong ombudsman. The responsibilities of the CHR are so specific that the CHR Office cannot be included in the traditional principle of the tripartition of powers. This is because the CHR applies standards close to those enforced by courts of law, they are interested in the activities of executive bodies, and at the same time they are closely connected with the legislative power.³⁰ It has to be noted, however, that the Polish Ombudsman does not substitute for other public authorities as regards decisions, but takes legal actions for persons whose freedoms and rights are threatened or infringed.³¹ They are not vested with powers that would allow them to spontaneously amend, suspend, or repeal a contested act. They are only entitled to draw attention, initiate, suggest or make requests, while the substantive resolution of a given case lies outside their competences. Therefore, it is crucially important that the Commissioner has high authority, substantive competence, legal knowledge and determination because the effectiveness of their actions depends on the strength of their influence on a controlled entity.³² The Commissioner for Human Rights is an independent state authority having the structural (they are appointed by the parliament) and functional (they control the activities of the executive) connection with the parliament, yet independent of other bodies.³³ Autonomy and the aforementioned independence are a precondition for the Ombudsman to perform their duties. The CHR must remain impartial in their actions, without prejudices and preconceived *judgments*, as well as acting to the best of their knowledge. They cannot be influenced by public authorities, politicians, or give in to the pressure of mass media.³⁴ It is worth mentioning that state authorities do not have any means or competences that would allow them to control the Ombudsman's activities or to enforce their liability. Thus, it means freedom in making decisions about taking or not taking a given

²⁸ M. Kruk, M. Olszówka, M. Godlewski, *Ochrona praw i wolności. System instytucjonalny w Rzeczypospolitej Polskiej*, Warszawa 2019, p. 413; A. Deryng, *Rzecznik...*, p.31

²⁹ Act of July 5, 1987 on Ombudsman (Journal of Laws 1987, No. 21, Item 123 with later amendments)

³⁰ J. Świątkiewicz, *W piętnastą rocznicę ustanowienia instytucji Rzecznika Praw Obywatelskich*, [in:] *Godność człowieka a prawa ekonomiczne i socjalne. Księga Jubileuszowa wydana w piętnastą rocznicę ustanowienia Rzecznika Praw Obywatelskich*, Biuro Rzecznika Praw Obywatelskich, Warszawa 2003, p.11; A. Gajda, *Kierunki...*, p.257; I. Malinowska, *Rzecznik Praw Obywatelskich w systemie ochrony praw i wolności w Polsce*, Warszawa 2007, p.147; S. Serafin, B. Szmulik, *Organy ochrony prawnej RP*, Warszawa 2007, p.409

³¹ S. Serafin, B. Szmulik, *Organy...*, p.409

³² R.M. Małajny (ed.), *Polskie prawo konstytucyjne na tle porównawczym*, Warszawa 2013, p.667; A. Domańska, *Pozycja ustrojowo-prawna Rzecznika Praw Obywatelskich*, Łódź 2012, p.257

³³ I. Malinowska, *Rzecznik...*, p.147

³⁴ S. Serafin, B. Szmulik, *Organy...*, pp.409-410

case (no possibility of any intervention in conducting and resolving specific cases).³⁵ The undoubted strengthening of the principle of autonomy and independence is the granting of formal immunity and inviolability to the Ombudsman.³⁶ In addition, the CHR Office is governed by the following principles: incompatibility (Lat. incompatibilitas) forbidding the Ombudsman to hold any other position (except for holding the position of a university professor) and to perform other professional activities; and the principle of neutrality forbidding the Ombudsman to be a member of a political party, trade union, and to undertake public activities that would be contrary to their responsibilities.³⁷ The legal position, competences, and means of action conferred on the Commissioner for Human Rights make it possible for them to implement the principles of equal treatment and non-discrimination.

There was an important change in the work of the Commissioner for Human Rights, when on 01 January, 2011, the Act of 3rd December, 2010, on the implementation of some regulations of the European Union regarding equal treatment came into force³⁸, which was a result of Poland's obligations arising from its membership in this supra-national community. At the same time, this ended a long period of discussion on how to ensure an adequate level of legal protection against unequal treatment and on implementation of relevant common regulations. The Act brought a number of legal solutions to the Polish law system, the assumption of which is to establish institutional, substantive and procedural guarantees - in various areas of life in which the EU legislator has recognized the threat of non-objective, unequal treatment, i.e. discrimination.³⁹ The key provision of the Act is the one in which authorities competent in the cases of counteracting violations of the principle of equal treatment have been indicated. The performance of tasks related to the implementation of the principle of equal treatment has been entrusted with the Commissioner for Human Rights and the Government Plenipotentiary for Equal Treatment. Yet, taking into account the guidelines set out in the directives on the protection against discrimination, i.e., among others, independence in performing entrusted functions, only the Commissioner for Human Rights should be recognized as an authority meeting this requirement, and only the CHR is the only state body for equal treatment (who safeguards the implementation of the principle of equal treatment). At the same time, this forced an amendment to the Act on the Commissioner for

³⁵B. Szmulik, M. Paździor (ed.), *Konstytucyjny system organów państwowych*, Warszawa 2014, p.258

³⁶P. Sarnecki (ed.), *Prawo...*, p.456

³⁷B. Banaszak, *Konstytucja...* p. 1025-1026

³⁸ Act of 3rd December, 2010, on the implementation of some regulations of the European Union regarding equal treatment (Journal of Laws of 2010, No. 254, item 1700)

³⁹K. Kędziora, K. Śmiszek (ed.), *Ustawa o wdrożeniu niektórych przepisów Unii Europejskiej w zakresie równego traktowania*, Warszawa 2017, p.11; A. Gajda, *Kierunki...*, p.143

Human Rights.⁴⁰ It should be pointed out, however, that before the Act came into effect in 2011, the Ombudsmen had also undertaken various activities aimed at preventing and counteracting discrimination and implementing the principle of equal treatment.⁴¹

As part of the amendments to the Act on the Commissioner for Human Rights, it was unanimously decided that the main task of the CHR is to safeguard the liberties and human and citizen rights set forth in the Constitution of the Republic of Poland and in other normative acts, including the guard of the implementation of the principle of equal treatment.⁴² Moreover, the CHR, in addition to taking action in the case of obtaining information about violation of human and citizen rights and freedoms by a public authority, is obliged to monitor, analyze and support equal treatment of all persons, to conduct autonomous research concerning discrimination, to develop and issue independent reports, and to issue recommendations regarding problems related to discrimination.⁴³ Additionally, the Act obliges the CHR to collaborate with associations, civic movements, other goodwill societies and foundations as well as cooperating with foreign and international institutions and organizations for the protection of human and citizen rights and liberties, also in the area of equal treatment.⁴⁴ Another amendment concerned the annual reporting to the Sejm and the Senate about CHR activities and the observance of the liberties and rights of a human and a citizen, including information on the activities conducted in the field of equal treatment and on their results, information on observing the principle of equal treatment in Poland, prepared in particular on the basis of research, conclusions and recommendations concerning actions which should be undertaken to ensure compliance with the principle of equal treatment.⁴⁵ A more significant change concerned the extension of the group of entities protected by the Commissioner for Human Rights to legal persons and administrative units other than legal persons, to which legal capacity has been assigned under the Act on the implementation of some regulations of the European Union regarding equal treatment.⁴⁶

Regrettably, it is a matter of concern that the provisions of the Act on the implementation of some regulations of the European Union regarding equal treatment are not fully implemented and used, which is confirmed by the experiences of lawyers and NGO workers. Investigations carried out by the Commissioner for Human Rights and sociological

⁴⁰ A. Gajda, *Kierunki...*, p.144; K. Kędziora, K. Śmiszek (ed.), *Ustawa o...*, p.237

⁴¹ A. Domańska, *Pozycja...*, p.230

⁴² A. Gajda, *Kierunki...*, p.144

⁴³ J. Szymańczak, *Przeciwdziałanie...*, p.246

⁴⁴ A. Gajda, *Kierunki...*, p.145

⁴⁵ J. Szymańczak, *Przeciwdziałanie...*, p.246

⁴⁶ A. Gajda, *Kierunki...*, p.145

analyses performed by Polish research centers, non-governmental organizations and European institutions which monitor the observance of human rights within the scope of their operations still indicate a high level of discrimination experienced in Poland, on the ground of disability, race, ethnic origin, sexual orientation, age, gender, religion, or belief.⁴⁷ This situation is caused by little knowledge about its significance and scope, demonstrated not only by those who are to be protected by the said Act, but also by lawyers themselves.⁴⁸ Therefore, education is a vital function to be fulfilled by the CHR. As emphasised by E. Łętowska: 'In regard to people seeking support and protection of their interests and reasons from the Ombudsman – the Commissioner has the role of a teacher to play, the teacher of such subjects as the rule of law, civil society rules, constitutionalism, and applied human rights.'⁴⁹ Their function is not only to focus on promoting knowledge about rights and freedoms in the society; decisive actions should also refer to state authorities and 'relate to the standards of a modern, efficient, democratic state of law (law cannot be a trap for the individual, procedures should be reliable, transparency maintained, word kept)', they should concentrate on explaining the difference between apparent (bureaucratic) legalism and legalism arising from the democratic principle of the rule of law, respecting the rights of the individual (human rights) and making the fundamental rights of that individual a restriction on positive law.'⁵⁰ This function is performed through various forms of speeches (radio broadcasts, television programs, interviews, press articles, conferences, lectures, etc.), training sessions, dissemination of the content of legal acts (concerning human rights), development of websites dedicated to civil rights, human rights.⁵¹ It has to be mentioned that the CHR publishes a number of monographs on various forms of discrimination, leaflets, tutorials and guides concerning legal measures available to people who have experienced discrimination, as well as issuing reports, analyses and recommendations of the committees of experts supporting the Ombudsman's work. Within the organizational structure of the CHR Office, the Commissioner for Human Rights creates specialized teams (units) dealing with a detailed and in-depth analysis of the situation in given areas. In the field of non-discrimination, there is also a team for equal treatment, which is to implement the tasks of an

⁴⁷ K. Kędziora, K. Śmiszek (ed.), *Ustawa o...*, p.12

⁴⁸ Ibidem.

⁴⁹ E. Łętowska, *O godności, jej funkcji w obrocie prawnym i promocyjnej roli Rzecznika Praw Obywatelskich*, [w:] *Godność człowieka a prawa ekonomiczne i socjalne. Księga Jubileuszowa wydana w piętnastą rocznicę ustanowienia Rzecznika Praw Obywatelskich*, Biuro Rzecznika Praw Obywatelskich, Warszawa 2003, p.242

⁵⁰ Ibidem, pp.242-243

⁵¹ A. Domańska, *Pozycja...*, p.237 et seqq.

autonomous body for equal treatment.⁵² The part that various forms of cooperation between the Commissioner and different entities play in building and reviving civil society has become invaluable (collaboration may be of a formal character - the agreement made between the Commissioner and a given organization, or of informal nature – related to specific matters concerning the protection of human rights and freedoms).⁵³ The implementation of the principles of equal treatment and non-discrimination makes it possible to build an open society that is the foundation for the development of a strong, organized civil society. Therefore, collaboration with the widest possible group of partners, including associations, civic movements, other goodwill societies, foundations, and organizations for fighting against discrimination, was, is and should be one of the chief missions of the CHR Office.⁵⁴ As a result of this cooperation, the Commissioner is provided with information on individual problems and general matters requiring specific actions to be taken. On this very basis, the Commissioner has the opportunity to form their opinion on current social problems, on the reasons for an infringement of the rights and liberties, and on the scale of the problem.⁵⁵ Through the Article 17a of the Act on the Commissioner for Human Rights, which obliges the Commissioner to such cooperation (these activities could also be undertaken by the Ombudsman under previously binding provisions), they have become something more than just an institution, the activities of which had formerly focused mostly on receiving applications and complaints against violation of freedoms and rights by state authorities. This provision has certainly added a distinctive character to this issue and the perception of the protective function of this authority.⁵⁶

The Commissioner for Human Rights, as part of their activities in the area of equal treatment, also actively cooperates with foreign entities. Every year, the Commissioner, their deputies and a representative of the CHR Office take part in foreign seminars, conferences and trainings, as well as participating in various working groups dealing with the analysis of anti-discrimination law in the Member States.⁵⁷

⁵² A. Gajda, *Kierunki...*, p.261

⁵³ S. Trociuk, *Ustawa o Rzeczniku Praw Obywatelskich. Komentarz*, Warszawa 2005, p.110

⁵⁴ I. Malinowska, *Ochrona praw i wolności*, Warszawa 2009, p.202; A. Domańska, *Pozycja...*, pp.214-215; A. Gronkiewicz, *Pełnomocnik Rządu do Spraw Równego Traktowania*, [in:] A. Gronkiewicz (ed.), *Instytucje ombudsmanskie w Polsce*, Częstochowa 2013, p.68

⁵⁵ A. Gajda, *Kierunki...*, pp.104-105

⁵⁶ A. Zoll, *Spółeczeństwo obywatelskie w świetle doświadczeń Rzecznika Praw Obywatelskich IV kadencji* [in:] M. Zubik (ed.), *Księga XX-lecia Rzecznika Praw Obywatelskich w Polsce. Księga jubileuszowa Rzecznika Praw Obywatelskich*, Vol. IV, Biuro Rzecznika Praw Obywatelskich, Warszawa 2008, p.68; K. Kędziora, K. Śmiszek (ed.), *Ustawa o...*, pp.260-261

⁵⁷ Report on the activities of the Commissioner for Human Rights and on the observance of the freedoms and rights of a human and a citizen in 2018, p. 436, Retrieved from <https://www.rpo.gov.pl/pl/content/informacje->

A crucial part of the CHR activities, set forth in Article 19 (1) of the Act on the Commissioner for Human Rights, is the already mentioned obligation to inform about the observance of the liberties and rights of a human and a citizen, and – importantly – also about the operations in the field of equal treatment. This proves that the issue of equality has become particularly vital in the CHR most essential periodic document. This should be a stimulus for maintaining social discussion on counteracting violations of the equal treatment principle, as well as being a signal for the legislator to monitor and improve the standard of legal protection in this respect.⁵⁸ The latest published report on the activities of the Commissioner for Human Rights in 2018 shows that the CHR Office received a total of 626 cases concerning the field of equal treatment (for comparison, 560 cases were raised in 2017); however, according to the Commissioner, in relation to the actual scale of discrimination in Poland, this number is far disproportionate. The main reason for not reporting this type of misbehavior to the relevant state authorities by persons exposed to discrimination and exclusion, and the reason for their passive attitude is the lack of trust in public institutions.⁵⁹ According to the research conducted at the request of the Commissioner, as many as 84% of people who witnessed or experienced discrimination did not notify any public institution about that. Moreover, more than 44% of respondents claimed that reporting discrimination would not have produced the expected results. Regrettably, this is an indication of high social acceptance for this type of misbehavior and low effectiveness of practical and legal mechanisms supporting the principle of equal treatment. Given the scope of the Act on equal treatment, the operations of the Commissioner for Human Rights mainly focus on such grounds of discrimination as gender, race, origin ethnic, nationality, religion, belief, disability, age and sexual orientation.⁶⁰

Summary

Over the years, the CHR Office has developed a significant and strong position in the system of authorities, organizations and institutions that implement the protection of rights and freedoms, becoming its indispensable element. It is safe to say that no other authority is so well known and appreciated and has such a significant impact on citizens and other entities. None of them conducts such an extensive educational action (of education and improvement) in the field of equal treatment, fighting against discrimination. The

roczne-o-dzialalnosci-rpo (accessed August 13, 2019) (Further referred to as Report on the activities of the Commissioner for Human Rights in 2018)

⁵⁸ K. Kędziora, K. Śmiszek (red.), *Ustawa o...*, pp.261-262

⁵⁹ Report on the activities of the Commissioner for Human Rights in 2018, p.431

⁶⁰ Ibidem

Commissioner for Human Rights has gained tremendous authority, social recognition and trust through consistent work to improve the activities of organs, organizations and institutions in terms of protecting human rights and freedoms as well as observing anti-discrimination law.⁶¹ The CHR Office is an institution that responds to constantly changing social needs, shows an interest in real social problems, protects currently and continuously violated rights and freedoms, and safeguards, in particular, the observance of the principles of equal treatment and non-discrimination as an independent body for equal treatment.⁶² Although they do not have the imperative means of action at their disposal, the Commissioner may effectively implement this principle as part of the granted competences, but this requires the implementation of anti-discrimination law to be constantly monitored.⁶³ As emphasized by the Commissioner for Human Rights, for further efficient and effective operation in the field of equal treatment, it becomes necessary to increase funding for the activities of the CHR Office. Due to the lack of appropriate funds to achieve its goals, the proper fulfillment of its responsibilities, expected by EU and international institutions, in particular, social ones, is considerably impeded.⁶⁴ Despite the implementation of EU directives on equal treatment into the Polish legal order, the guarantees of effective protection against discrimination, equal for all, have not been sufficiently ensured in Poland.⁶⁵ Further legislative work is needed to change and clarify the provisions on equal treatment and adapt them to the standards established by EU regulations. It is also necessary to carry out the widest possible cooperation between the Commissioner and various national and international entities as well as conducting educational campaigns aimed at limiting and minimizing the discriminatory tendencies which carry serious social consequences. The Ombudsman's Office faces many challenges. Due to ever-increasing expectations and requirements not only for the Commissioner, but also for those organs and organizations that safeguard rights and freedoms, there is a need to give Commissioners even broader competencies, especially those that may affect specific individual situations to a greater extent.⁶⁶ The current practice in regard to creating and applying the law indicates that there is a further need to strengthen the legal status of the Commissioner for Human Rights and their function in a democratic state of

⁶¹ I. Malinowska, *Rzecznik...*, pp.525-526

⁶² A. Gajda, *Kierunki...*, p.246

⁶³ A. Krakala, *Pozasądowe ochrona wolności przemieszczania się realizowana przez Rzecznika Praw Obywatelskich*, [in:] E. Wójcicka (ed.), *Pozasądowa ochrona praw i wolności jednostki – instytucje, standardy, efektywność*, Częstochowa 2014, p.164

⁶⁴ A. Gajda, *Kierunki...*, p.253

⁶⁵ A. Błaszczak, *Efektywność...*, p.49

⁶⁶ A. Gajda, *Kierunki...*, p.263

law.⁶⁷ Finally, the words of N. Banaszak may be quoted: 'The law made by representative bodies, exercised by the administration and guarded by courts should provide citizens with a stable and dignified existence. The basic human values - freedom, dignity and property - are protected by law. This catalog has expanded over time. The rule of law is a reaction to the arbitrariness of the executive that violates these values. At present, when the level of respect for human rights becomes an indicator of democracy and progress, these rights must also be protected against the arbitrariness of not only the executive, but also of the legislator or the courts.'⁶⁸

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⁶⁷ A. Deryng, *Prawo...*, pp.871-872

⁶⁸ N. Banaszak, *Skuteczność działania Rzecznika Praw Obywatelskich – podstawowe problemy*, [in:] K. Marszałek, *Studia Lubuskie: prace Instytutu Prawa i Administracji Państwowej Wyższej Szkoły Zawodowej w Sulechowie*, Wydawnictwo PWSZ, Vol.5 (2009), Sulechów 2009, pp.63-64

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Summary: The article is aimed at explaining and defining the activities of the Ombudsman (the Commissioner for Human Rights) as an independent authority for equal treatment. In Poland, as well as in European countries, the issue of equal treatment and preventing discrimination is becoming more and more of a social, legislative and also political challenge. On account of the growing tendency to intensify behavior such as hate speech, xenophobia, racism, chauvinism and discrimination, it is necessary to take more effective steps at various levels in order to limit this phenomenon. It is vital to initiate and support information policy on legal effects, consequences and the impact of this type of behavior on the society to an even greater extent. The Ombudsman plays the fundamental and leading role among a number of institutions and organizations that actively support the policy of preventing such phenomena.

Key words: Ombudsman, principle of equality, equal treatment, prohibition of discrimination, anti-discrimination law

Realizacja zasady równości i zakazu dyskryminacji w działalności Rzecznika Praw Obywatelskich jako niezależnego organu do spraw równego traktowania

Streszczenie: Artykuł prezentuje problematykę mającą na celu przybliżyć i scharakteryzować działania Rzecznika Praw Obywatelskich jako niezależnego organu do spraw równego traktowania. W Polsce, jak również w państwach europejskich problematyka równego traktowania i zapobiegania dyskryminacji staje się coraz to większym wyzwaniem społecznym, legislacyjnym, ale także i politycznym. Ze względu na rosnącą od kilku lat tendencję nasilania się zachowań dotyczących mowy nienawiści, ksenofobii, rasizmu, szowinizmu i dyskryminacji konieczne jest podejmowanie skuteczniejszych działań na różnych płaszczyznach w celu ograniczania tego zjawiska. Istotne jest, aby w coraz to szerszym zakresie inicjować i wspierać politykę informacyjną dotyczącą skutków prawnych, konsekwencji oraz wpływu tego rodzaju zachowań na funkcjonowanie społeczeństwa. Wśród wielu instytucji i organizacji, które czynnie wspierają politykę przeciwdziałania tego rodzaju zjawiskom zasadniczą i wiodącą rolę odgrywa Rzecznik Praw Obywatelskich.

Słowa kluczowe: Rzecznik Praw Obywatelskich, zasada równości, równe traktowanie, zakaz dyskryminacji, prawo antydyskryminacyjne