Marcin Jastrzębski

Obligation of Being "Apolitical" and Ban on Party Membership in Poland in the Light of European Standards of Human Rights

In Poland, like in other democratic countries, political pluralism may be considered to be one of the basic constitutional principles. This principle is not only to be treated as a directive regulating the way in which political parties function as specific organizations, but it is also related to an individual plane – the freedom of joining political parties by Polish citizens[1]. In Poland, both the principle of the political pluralism and the individual dimension of it meet numerous restrictions. According to the Polish constitution, such suppressions are possible to be established at least in an act, when it is necessary in a democratic state, with the view to the reasons of safety or public order, environmental protection, health, public morality or freedom and other people's rights. Those restrictions cannot violate the essence of freedom of forming political parties[2]. The Polish regulation referring to membership in political parties grants this authorization to Polish citizens of at least 18 years of age, however, other acts may impose restrictions concerning this matter[3].

The manner of restricting the freedom of forming a party, similar to the Polish one, is stipulated in the system of human rights protec-

[1] Art. 11 & 13 of the Constitution of April 2, 1997, "Journal of Laws", No. 78, item 483, formulate the rule of political pluralism an the manner of its restricting, while Art. 58 regulates the freedom of party membership.

[2] Art. 58 read with Art. 31 par. 3 of the Constitution.

[3] Art. 11 of the Constitution read with Art. 2 par. 1 Act of Political Parties of June 27, 1997, "Journal of Laws" No. 98, item 604; uniform text "Journal of Laws" of 2001, No. 79, item 857, as amended. However, paragraph 2 of the provision formulates a general clause referencing different Acts in the issue of restrictions.

tion of the European Council. However, the Article 11 paragraph 2 of the European Convention of Human Rights (hereinafter: ECHR)[4] creates specific, comparing to other types of freedom defined in it, restriction to freedom of forming a party, which applies to army officers, police officers, and public servants. The main sphere the restriction refers to is the freedom of forming political parties. A question appears, whether the Polish restrictions concerning the possibilities of individuals to act in political parties are "compatible" with the principles formed on basis of ECHR. The question is essential, as in diverse ways more than 30 types of functions and jobs performed by citizens in Poland are excluded from fully exercising the freedom of joining political parties. Usually such limitations are justified in the doctrine, by the fact that the entity, to smaller or bigger extend, perform governing functions[5]. Established interdicts concerning membership in political parties take in the Polish legislation different forms and have various scope of the binding force.

The first one refers to the ban on joining political parties of certain entities. The Constitutional Tribunal (hereinafter: CT) substantiate the restriction with eliminating the threat due to the fact of *"existing organizational and political bonds between a person performing public functions and a political party"*[6].

On the other hand, being apolitical does not stand for lack of political views, only for not manifesting them by certain categories of entities while performing their functions. CT also identifies with this requirement the necessity of political neutrality, which, for some of the public services means the inadmissibility of motivating the realization of constitutional and statutory tasks by their individual believes or interests of groups, including objectives of political parties.

[4] "Journal of Laws" of 1993, No. 61, item 284

[5] M. Chmaj, M. Żmigrodzki, *Status prawny partii politycznych w Polsce*, Toruń 1995, pp.48–49.

[6] Decision of the Constitutional Tribunal of April 10, 2002, file No. K 26/00, OCT-A 2002, No.2, item 18, clause III, par.2

This institution is to ensure, first of all, impartiality in performance of the public administration.

According to the Tribunal *"it is impossible to ensure political indifference of public services in situation when people performing such functions are members of political groups"*[7]. It seems that such categorical connection between being apolitical and ban on party membership is not always justifiable. In situation when people perform functions connected with numerous governing or control powers, which may result in restricting significantly the rights and freedoms of an individual or to be used for examining contingent infringement of such freedoms, the connection is necessary.

However, in a situation, when a person performs a function which does not give them important powers, the requirement of being apolitical and an appropriate control of the entity's decisions by superior organs and courts seems to be sufficient. In this situation ban on membership in a political party may seem to be an excessive interference in the sphere of freedom of party membership.

The ban of party membership in the Polish legal system concerns the following entities :

1. Judges of the Constitutional Tribunal;
2. Judges of the common courts of law;
3. Judges of the Supreme Court (hereinafter: SC – footnote M.J.);
4. Judges of the Supreme Administrative Court (hereinafter: SAC – footnote M.J.);
5. Judges of the Military Court;
6. Members of the National Broadcasting Council (hereinafter: NBC – footnote M.J.);
7. The President of the Supreme Control Chamber (Najwyższa Izba Kontroli) (hereinafter: NIK – footnote M.J.), its vice-presidents, a general director, supervisors or employees of controlling departments;

[7] Ibidem.

8. The Civil Rights Protection Commissioner (hereinafter: CRPC – footnote M.J.);
9. The President of the Polish National Bank (hereinafter: PNB– footnote M.J.);
10. Public prosecutors;
11. The General Inspector of Personal Data;
12. The manager and employees of the National Election Bureau (hereinafter: NEB – footnote M.J.);
13. The police officers;
14. The officers of the Internal Security Agency and the Foreign Intelligence Agency (hereinafter: IAS and FIA– footnote M. J.);
15. The Border Guard officers (hereinafter: BG – footnote M. J.);
16. The Custom Inspectorate officers;
17. The custom officers;
18. The Warder officers (hereinafter: WO– footnote M.J.);
19. The communal guards;
20. The fire fighters of the State Fire Service (hereinafter: SFS – footnote M.J.);
21. Regularl soldiers;
22. Civil servants (hereinafter: CS– footnote M.J.);
23. The chairperson and employed members of the Local Government Board of Appeal;
24. The experts adjudicating in the field of industrial property rights;
25. The Public Interest Commissioner at their two deputies ;
26. The President of the Institute of National Remembrance (hereinafter: INR – footnote M.J.)[8].

[8] As appropriate: 1. Art. 195 par. 3 of the Constitution; 2. Art. 178 par. 3 of the Constitution; 3. Art. 178 par. 3 of the Constitution and Art. 38 par. 3 Act of the Supreme Court, "Journal of Laws" of 1994, No. 13, item 48; 4. Art. 178 par. 3 of the Constitution and Art. 38 par. 3 Supreme Administrative Court Act, "Journal of Laws" of 1995, No. 74, item 368 as amended.; 5. Art. 178 par. 3 of the Constitution and Art. 21 par. 3 Act on Court Martial System, "Journal of Laws" of 1994, No. 13, item 48; 6. Art. 214 par. 2 of the Constitution; 7. Art. 205 par. 3 of the Constitution; 8. Art. 19, 21 par. 4 and Art. 74 par. 1 Act on

Beside this restriction, the Polish legislation differentiates also suspension of membership of compulsory military service soldiers as well as suspension of party membership for members of NBC and PNB[9].

NIK, "Journal of Laws" of 2001, No. 85, item 937 and No. 154, item 1800; 9. Art. 227 par. 4 of the Constitution; 10. Art. 44 par. 3 Act on Public Prosecutor's Office, "Journal of Laws" of 2002, No. 21, item 206; 11. Art. 10 par. 2 Personal Data Protection Act, "Journal of Laws" of 1997, No 133, item 883 as amended; 12. Art. 58 par. 3 Act on Representation of the People to the Sejm of the Republic of Poland and the Senate of the Republic of Poland, "Journal of Laws", No. 46, item 499 as amended; 13. Art. 63 par. 1 and 2 Act on Police, "Journal of Laws" of 2002, No. 7, item 58; 14. Art. 81 par. 1 Act on Internal Security Agency and Foreign Intelligence Agency, "Journals of Laws" of 2002, No. 74, par. 676; 15. Art. 68 par. 1 and 2 Act on BG, "Journal of Laws" of 1991, No. 78, item 462 as amended; 16. Art. 34 par. 1 clause 1 Act on Customs Inspectorate, "Journal of Laws" of 1998,No. 71, item 449 as amended; 17. Art. 33 par. 3 Act of Customs Service, "Journal of Laws" of 1999, No. 72, item 802; 18. Art. 64 par. 1 and 2 Act on Internal Affairs Service, "Journal of Laws" of 1996, No. 61, item 283; 18. Art. 30 par. 2 Act on Communal Guards, "Journal of Laws" of 1997, No. 123, item 779; 19. Art. 57c par. 1 and 2 Act on State Fire Service, "Journal of Laws" of 1992, No. 88, item 400 as amended; 20. Art. 30 par. 2 Act on Communal Guards, "Journal of Laws" of 1997, No. 123, item 779; 21. Art. 68 par. 1 and 3 Act on Regular Soldiers Military Service, "Journal of Laws" of 1997, No. 10, item 55 as amended; 22. Art. 69 par. 5 Civil Service Act, "Journal of Laws" of 1999, No. 49, item 483 as amended; 23. Art. 7 par. 8 Act on Local Government Board of Appeal, "Journal of Laws" of 2001, No. 79, item 856 as amended; 24. Art. 270 par. 2 Act on Industrial Property Rights, "Journal of Rights" of 2000, No. 49, item 508; 25. Art. 17b par. 2 Act on disclosing employment or service in state security organs or co-operation with them in years 1944–1990 by people performing public functions, "Journal of Laws" of 1999, No. 42, item 428 as amended, 26. Art. 11 par. 3 Act of Institute of National Remembrance – Commission for Prosecution of Crimes Against Polish Nation, "Journal of Laws" of 1999, No. 155, item 1016 as amended. Refer to: M. Granat, A. Gorgol, J. Sobczak, *Ustawa o partiach politycznych. Komentarz*, Warszawa, 2003, pp. 33–35 and M. Chmaj *Wolność zrzeszania się*, [in:] *Wolności i prawa polityczne*, W. Skrzydło (ed.), Kraków, 2002, pp. 62–64.

[9] As appropriate: Art.65 par. 1 Act on Compulsory Military Service in Republic of Poland, "Journal of Laws" of 1992, No. 4, item 16, Article 8 par. 3 of Broadcasting Act, "Journal of Laws" of 1993 item 34 as amended, Art. 14 par. 2 of Act on National Bank of Poland.

The obligation of being apolitical, first of all, refers to public servants employed in the office of Sejm and Senate as well as in the President' office, National Broadcasting Council and generally civil servants[10]. Next restriction in concern to party membership is a ban on participating in any forms of political activities, which concerns public prosecutors and regular soldiers[11].

Therefore, the catalogue of restrictions is very diverse and spacious. At the same time, as noticed by CT, it is a very chaotic collection[12]. It is particularly visible while comparing the obligation to suspend party membership to refraining from party membership . It is difficult to explain rationally the difference between the first and the second obligation.

In 2002 CRPC appealed to CT against the regulations limiting the membership in political parties, which have been legislated on the statutory level[13]. Before I proceed to discuss particular groups of entities restricted by legal norms in joining political parties, some general settlements of CT should be cleared up. Following these gave basis for the complaint of the Civil Rights Protection Commissioner.

The Commissioner in their motion referred to international conventions protecting human rights, that is ECHR and the International Treaty of Civil and Political Rights (hereinafter: ITCPR) . He considered that the Treaty formulates lesser restrictions of freedom

[10] It derives from Art. 45 par. 1 Act on state offices employees, Journal of Laws of 1982, No. 31, item 214 as amended and Art. 69 par. 2 of Civil Service Act; see: M. Granat, A. Gorgol, J. Sobczak, op.cit., p. 36. This requirement is in force also in recently passed Civil Service Act (Art. 49 par. 1 clause 2) of August 24, 2006, parliamentary form No. 552 and in Act on state staff resources and state officials (Art. 15 par. 1) of August 24, 2006, parliamentary form No. 553.

[11] Art. 44 par. 3 Act of Public Prosecutor's Office and Art. 68 par. 4 Act on Regular Soldiers Military Service.

[12] Decision of the Constitutional Tribunal of April 10, 2002 par. 5 clause 1.

[13] It referred to clause 6 partly 7 and 10, 12–26 listing the non-party organs and suspending the membership or acting in a party, as well as requirement of apolitical attitude and ban on taking part in any political actions.

of forming parties, as its paragraph 22 enables limitation of freedom of forming parties for members of military forces and police officers, however, does not mention members of the Administration, as stated in the Article 11 paragraph 2 ECHR. Furthermore, he declared that, because of fundamental character of freedom to form parties, the concept "restriction" cannot be identified with the concept of complete deprivation of the right, as enacted in the appealed regulations.

CCR claimed that paragraph 11 and 13 of the Constitution cannot constitute basis for forbidding the citizens to join to legally existing political parties, as freedom of joining parties is granted to all individuals on the strength of the Article 58 paragraph 1, as the Article does not give any authorization to the legislator to limit the civil freedom of joining political parties, what is more – to impose the ban on joining political parties.

CCR expressed doubts whether restrictions permitted by the Article 31 paragraph 3 of the Constitution, may refer to all freedoms and rights of an individual included in chapter II of the Constitution, or only to those, which are plainly defined by an appropriate regulation. Finally, the Commissioner stated that the instruction of the Article 31 paragraph 3 of the Constitution, should be understood in such a way, that it defines the procedure and conditions of limiting the freedom and rights, when such limitations referring to particular freedoms have been stipulated in regulations.

Moreover, the Commissioner admitted that, if the Constitution itself prohibits in some cases some groups of people from becoming members of political parties and trade unions, it constitutes a closed list, which cannot be extended in the norms of statutory levels. Taking the above into consideration the referral of the Article 2 paragraph 2 of the Act on Political Parties is unconstitutional. Because of the circumstances, the ban on political party membership which is in force in Polish legal system, is excessive and disproportionate[14].

[14] Decision of the Constitutional Tribunal of April 10, 2002, par.1, clause 1

CT did not consent to the statements of the Commissioner. They claimed that the regulations of the Constitution are logically arranged and their proper location in the chapter II of the Constitution allows to conclude that, the principle of the Article 31 paragraph 3 of the Construction as the "general rule", refers to all rights and freedoms defined in this chapter, thus to the Article 58 of the Constitution. The Tribunal referred to the opinion of the doctrine. Leszek Garlicki stated that "groundless would be the statement, that lack of indication of reasons for limitation in a specific regulation, stands for prohibition of statutory interference in the shape of those freedoms and rights an thereby give them an absolute character. Lack of any limiting clauses in those regulations must be interpreted as reference to the Article 31 paragraph 3. Exclusion for the possibility to establish limitations will appear only in a situation, when the Constitution explicitly acknowledges particular right or freedom to be inviolable or in case when inviolability of particular right or freedoms results from international treaties"[15]. Otherwise, one should admit that majority of rights and freedoms mentioned in the Constitution has an absolute character.

Moreover, the Tribunal came to the conclusion, that the catalogue of limitations of freedom to form political parties mentioned in the Constitution is not closed and it refers only to the most important national organs. However, similarity of tasks fulfilled by the organs formed in statutory procedure to tasks of those constitutional organs is a significant argument to keep in force the ban on forming political parties also for the limitations included in the regulations. Constitutional court pointed out that "impartiality in performing a particular public function is a value which, from the point of view of public order, environmental protection, health, and public morality or rights and freedoms of other people, prevails over the right of a person performing a public function to become a member of

[15] L. Garlicki, *Przesłanki ograniczania konstytucyjnych praw i wolności (na tle orzecznictwa Trybunału Konstytucyjnego)*, [in:] "Państwo i Prawo", Issue 10, 2001, pp. 7–8.

a political party"[16]. Therefore, the rules of being apolitical and ban on political party membership seem to be very crucial.

With regard to limitations permeating into the crux of freedom of forming political parties, the tribunal stated that deprivation of the right of forming political parties imposed on some categories of people holding governmental positions or having status of public servants, is not violation of the crux of freedom or the right an individual may have to influence the state policy. It is undoubtedly limitation of the rights, however, it does not violate their crux as it is not the only form in which the rights may be exercised and the people have the right to join different organizations.

Moreover, CT carried out a test of proportionality of the analyzed restrictions, declaring that "the legislator, protecting the contradicting values, such as freedom of joining political parties and objectivity of the jurisdiction, national security or public order, may establish their own hierarchy, giving priority to some over the others"[17].

Such judgment got approval of the doctrine[18]. However, it should be emphasized that while considering specific cases of limiting the freedom of party membership in relation to people holding public functions, many doubts may appear referring, first of all, to proportionality of the ban on political party membership to purposes of such limitation

It creates a lot of difficulties to divide types of restrictions established in Poland concerning party membership according to the distinction included in the Article 11 paragraph 2 of ECHR. It results from the fact that the Strasburg organs have only adjudicated in a few cases referring to limitations of such kind. It may be specially problematic to define, which functions are contained in a very capacious term of "members of public administration". ETPC defined

[16] Decision of Constitutional Tribunal of April 10, 2002 par. 3, clause 3

[17] Ibid, par. 4, clause 3.

[18] See: M. Granat, (2002) *Glosa do wyroku Trybunału Konstytucyjnego z dn. 10.04.2002 r. (File No. K.26/00)*, [in:] "Przegląd Sejmowy", No. 4 (51), 2002, 79 and following and M. Granat, A. Gorgol, J. Sobczak, op.cit., pp. 38–40.

only that the term should be treated in a narrowing manner and it should refer solely to the current position of a specific civil servant[19]. It that case, in accordance with negative selection, I include in this category all public servants, who are not members of the army or police or "police-like" formations subordinated, first of all, to the Ministry of Internal Affairs. Such distinction may not necessarily be consistent with later settlements of conventional organs.

At the same time, I would not classify judges as belonging to any of the categories. It is difficult to consider them to be part of "the Administration". The ban on political party membership imposed on members of judicial authorities is a results of not only the principle of the division of power stated in the Article 10 of the Constitution, but also of the principle of their independence and of being subjected exclusively to laws, as well as because of the need of impartial judgment. Due to this fact, ban on joining political parties imposed on them seems to be fully authorized and proportional, not only in the light of the Polish law, but also of the ECHR, taking into consideration in particular the Article 6 of the convention, which tells about "independent and impartial trial".

1. Members of the military forces

Polish legal system forbids regular army officers to be members of parties and to conduct any activities political in character. On the other hand, soldiers doing compulsory military service are ordered to suspend their membership in parties while being on duty.

CT justifies the limitations with specific purposes of military forces, defined in the Article 26 of the Constitution. The army is to protect sovereignty of the country, indivisibility of its territory as well as to guarantee security and inviolability of its borders. For this reason members of the military forces can be subjected to much

[19] Decision Vogt vs. Germany of December 9, 1994, series A, No. 323, clause 67 or decision Grande Orient D'Italia di Palazzo Giustiniani vs. Italy of August 2, 2001, complaint No. 35972/97, Reports 2001/VIII, clause 31.

more extended restrictions in the name of political neutrality of the army which protects the country, than other groups of the society. Neutrality of the army has two aspects – first, it means that the army cannot constitute an autonomic entity in the political structure of the country, and that is why there must be a strong civil control over them. Second aspect of the political neutrality of the army is to exclude this national structure from the sphere of immediate impact of political parties. The army is to perform defensive functions and to follow common good of all citizens, and not particular interests of some groups or organizations. They will perform their duties in the best way while being neutral and impartial.

The role of the army is understood in the doctrine likewise. "The forces neither as a whole, nor acting through their members – soldiers, particularly commanders, cannot participate in election campaigns, political polemics and ideological disputes, perform or to accept to be taken advantage of in interest of any parties or political personages . They are the tool of the Republic of Poland, notwithstanding the fact, which party or political coalition exercises power in it[20].

Admittedly, in the Article 26 the Constitution there is a term "political matters" which has undefined character, however, CT considers that this is a deliberate action of the legislator enabling the legislator to adjudicate upon the scope of limitations of rights and freedoms of the regular soldiers. Finally, the Tribunal admitted that "although the ban of party membership for soldiers does not result directly from the Article 26 of the Constitution, yet the condition to preserve the neutrality in political issues could not be realized without the constitutional limitation of the right to form parties"[21].

The Article 68 paragraph 3 read with the Article 70 paragraph 2 of Regular Military Service Act determines that when a soldier is

[20] [20] P. Winczorek, *Komentarz do Konstytucji RP z dnia 2 kwietnia 1997 r.*, Warszawa 2000, p. 42.

[21] Decision of the Constitutional Tribunal of April 10, 2002 par. 5, clause 2.

called up by the army, their to date membership in a political party, a society, or another organization of a political character or in a trade union ceases. A candidate for this service should take into account limitations of the civil freedoms, and their decision, in this situation, results from the freedom of choosing the profession. At the same time they can organize societies of another type, which does not have political character[22]. Fully accepting the argument of the organ protecting the Constitution, one can assume that similar motives justifies the obligation of suspending the membership in political parties by conscripts, who, after having finished the compulsory military service, can return to their membership in a political party.

In respect of members of the army, there have not been announced any precedent verdict based on the Article 11 paragraph 2 of ECHR. It should be certainly assumed that rights and freedoms of soldiers are protected by the convention to the same degree as freedoms of civilians. However, on the basis of the conventional protection, states are free to introduce special restrictions concerning freedom of assembling and forming political parties[23]. ECHR decided likewise, that the possibility of restricting the political activities, including the freedom of political debate, which is protected with the Article 10 of the convention, also refers to the personnel of the military forces[24]. In accordance to this, it should be assumed that the limitations of freedom to form political parties by the military personnel are entirely in agreement with the convention order, which means

[22] Ibidem.

[23] Decision Engel and the Others vs. the Netherlands of June 8, 1976, complaints No. 5100/71-5102/71; 5354/72; 5370/72; series A, No. 22, clause 54, see also T. Jasudowicz (transl. and analyses), *Orzecznictwo strasburskie. W dwudziestolecie "Polskiego doświadczenia Solidarności*, Toruń 2001, p. 136.

[24] See: decision Rekvenyi vs. Hungary of May 20, 1999, complaint No. 25390/94, Reports 1999-III. In clause 26 and 47 of the decision despite the police, to whom the verdict referred, there were mentioned also members of military forces and civil service. The contents of the verdict refers also *mutatis mutandis* of army officers.

they are consistent with law, necessary in a democratic society for the reason of public order, public safety, rights and freedoms of other people and proportional to legal purposes.

2. Members of the police

CT considered, that the basis for the limitation of a party membership referring to members of the police are the authorizations granted to this service, the way it is organized as well as relations of the discipline and complete subordination of subordinates towards superiors. It is essential that "especially where the range of entrusted competences is so wide that enters the sphere of rights and freedoms of other people, it is understandable to implement such regulations, which create more rigorous guarantees of impartiality of these organs"[25]. Police officers have number of competences entering into the sphere of rights and freedoms of an individual in a very significant way. Among other things, they can use the direct coercive measures[26]. Such situation justifies entirely forming the limitations of functionaries' rights, guarantying their political impartiality.

The Polish constitutional court justifies its thesis with the sentence of the Strasburg Tribunal in the case Rekvenyi against the Hungary, declaring that such restrictions of functionaries' rights are especially necessary in countries, whose system, for many years, was based on using the police in order to repress political opponents. It caused that mentality and some habits of police officers were shaped in a political system which based on leading role of one party. Therefore, deviation from the rules accepted in countries with consolidated democratic rules is here justified[27].

Also the system of subordination of the police officers supports,

[25] Decision of the Constitutional Tribunal of April 10, 2002 par. 5, clause 4.

[26] See: Art. 15 and Art. 16 Act on Police.

[27] Decision of the Constitutional Tribunal of April 10, 2002 par. 5, clause 4.

according to the tribunal, excluding the possibility of their joining to political parties. Political divisions could contribute to e.g. not carrying out orders by police officers and by that to weakening their impact on preserving order and national security. At the same time, mentioned regulations do not limit police officers as far as membership in nonpolitical societies is concerned, including trade unions.

CT claimed also that the mentioned considerations refer automatically to functionaries of other services similar in character, that is: the State Protection Bureau (currently Internal Security Agency and Intelligence Agency), BG, WO, officers of the Customs Inspectorate, the State Fire Service, communal guards[28].

Provided that one should agree with arguments of the Tribunal, which show the necessity to limit freedom of joining political parties police officers, it seems that it cannot be automatically transmitted to all the mentioned services. First of all, it concerns fire fighters and communal guards. Both structures are constructed, like the police, on the rules of discipline in relations between the superior and the subordinate. However, their authorization to influence the rights and freedoms of individuals are much more limited. It concerns particularly the fire fighters, who have not got any competence to use direct coercive measures or to deprive someone of their freedom. Criticism of Mirosław Granat seems to be justified in here, as he stated that CT itself believed that in the considered case, particular types of limitations should be examined separately but in this case they "threw into one sack" the state fire service and the police[29]. In case of fire fighters and some degree communal guards, it is probable to recognize that the ban on joining political parties imposed on them could be out of proportion to the purpose of the limitation. .

In ETPC's judicial decisions substantiation of limiting right of the police officers to joining political parties is practically identical

[28] Ibidem, clause 5.

[29] M. Granat, *Glosa do wyroku Trybunału Konstytucyjnego z dn. 10.04.2002 r. (file No. K.26/00)* 89.

as in decision of the Polish constitutional court. This limitation "is aimed at imposing non-political attitude of the mentioned services and by that contributing to consolidation and maintaining plural democracy in the country"[30]. It results also from the fact that police officers have the competences do use forms of state coercion, including carrying and using gun in some situations. The police give the service to the state and a citizen facing such power has the right to expect, that he or she in such a situation meets "a neutral functionary, not engaged in any political struggle"[31].

ECOHR underlined very distinctively the historical context, which is one of the basis for existing obligation of Hungarian police officers to remain apolitical. The country, like Poland, for almost 50 years had been governed by one political party. Membership in this party was, in some social spheres, expected to be the sign of support for the regime. Such membership had been obligatory particularly in "force departments" - the army and the police, which guaranteed one-party rule. Having declared after 1989 the limitations of freedom of party membership for police officers was aimed , among others, at preventing the situation to recur[32].

It is worthwhile noticing that in this decision the European Tribunal does not attach any importance to specific internal structure of uniformed services, focusing on wide range of competences of the police officers in historical context, identical to the one in Poland. It makes probable the thesis that the Strasburg court could admit in its verdict that the requirement of remaining apolitical which refers to Polish fire fighters and communal guards is out of proportion to legally valid purposes resulting from the Article 11 paragraph 2 ECHR.

---

[30] Decision Rekvenyi vs. Hungary 41.

[31] Ibidem and *mutatis mutandis* decision Ahmed and Others vs. the Great Britain of September 2, 1998, complaint No. 22954/93, Reports 1998-VI, clause 53.

[32] Decision Rekvenyi vs. Hungary clause 47.

3. Members of the Administration

CT stated that the reasons for limitation of freedom of political party membership concerning civil servants are connected with the necessity of ensuring the professional, reliable, impartial and politically neutral pursuance of state duties[33]. The issue of political impartiality of civil servants is contained in two aspects: in the aspect of implementation the governmental policy by the Administration and in the aspect of equal treatment for all the citizens by the Administration. From the first point of view, politically loyal civil servants implement program of these ruling parties, which have democratic legitimacy to exercise power. To make it possible, civil servants cannot follow their own opinions or political sympathies. From the point of view of equal treatment of citizens by the Administration, civil servants should preserve political neutrality form informal, party pressure of politicians, inside-organizational impact of political parties[34].

Political neutrality, or in different words being apolitical assumes, first of all, that civil servants cannot be in any degree determined in their actions by their own political, religious, ideological believes, party, group interests, etc. The attitude of a civil servant and their pursuance of duties should be objective and with detachment. By being apolitical a civil servant should be free in their functioning from specific influence of any party, political option, ideology, religion, etc. Moreover, the Tribunal pointed out that it depends on the manner in which the civil servants performs the duties, how citizens perceive the authority of the country and its organs. Imposing political attitude on the Administration would favor negative evaluation of the authority, especially in confrontation with data on the degree of corruption in Poland[35].

[33] Art. 1 of Civil Service Act of December 18, 1998; "Journals of Laws" of 1998, No. 49, item 483 as amended.

[34] Decision of the Constitutional Tribunal of April 10, 2002 par. 5, clause 3.

[35] Ibidem, clause 6.

Also in this case "the core" of freedom of party membership, according to CT, has not been infringed, as civil servants have the right to join organizations different that political parties.

Impermissibility of party membership of the employees of the Supreme Control Chamber supervising or performing controlling functions, first of all, is justified with reasons of maintaining their impartiality. Granting to those employees complete freedom of joining political parties could, in some cases, lead to a dangerous conflict of conscience between their professional duties and their political sympathies and interest of a political party[36].

Ban on party membership in political parties of public prosecutors is caused, according to the Tribunal, by the necessity of securing public order and concern for protecting the rights and freedoms of other people. The need of such prohibition, first of all, derives from the fact that the Ministry of Justice, who is a person holding a political position, performs the function of the general public prosecutor. The ban on party membership for the Commissioner for the Public Interest derives from the similarities of this function of the institution of the prosecutor. The person is even called an inspection prosecutor[37].

The Constitutional Court decided that the President of the Institute of National Memory cannot be a member of political parties due to appointing in some situations prosecutors to hear cases and due to performing accusatory functions. Moreover, the character and high degree of confidentiality of performed duties require such prohibition[38].

On the other hand, the prohibition of joining political parties that concerns the General Inspector of Personal Data Protection is justified, according to CT, with the fact that it "guarantees discretion and independence of this position towards the organs of public administration, and provides being apolitical and strengthen

[36] Ibidem.
[37] Ibidem, clause 7 and 8.
[38] Ibidem, clause 9.

the authority"[39]. At the same time independence of the General Inspectorate could be compared in this respect to discretion of court or a judge.

The requirement of prohibition of party membership of the members of Local Government Boards of Appeal is caused by the fact that the institutions perform quasi-legal functions. The way they are organized follows the rules of court performance and the range of competences granted to them in the area of administrative control, justify adopting such restrictions imposed on entities which apply domineering, unilateral decisions towards citizens[40].

The reason for limitation of party membership for employees of State Election Bureau, in turn, according to CT, is the need to ensure professional and free from pressure service of State Election Commission[41].

CT decided that the Article 8 paragraph 3 clause 1 of Broadcasting Act is inconsistent with the Article 214 paragraph 2 of the Constitution, as the first provision prohibited party membership to members of National Broadcasting Council, while the questioned legal norm stipulated that the membership in a political party of members of the National Broadcasting Council "is suspended".

As it has been already mentioned, on the basis of judicial decisions of the Strasburg organs, it has not been defined, which particular functions are included into the Administration. ECOHR stated number of times, that the European convention does not guarantee the right of access to the public service, which, however, does not exclude protection of civil servants on the basis of the freedom expressed in it[42]. In case Vogt vs. Germany ECOHR examined a case

[39] Ibidem, clause 10.

[40] Ibidem, clause 11.

[41] Ibidem, clause 12.

[42] Initially EKPC rejected two teachers' complaints on expelling them from their job due to membership in extremist political parties, deciding that the core of theirs does not refer to freedom of party membership or expression , but the right to access to the public service. See: Decision in case of Kosiek vs. Germany of August 28, 1986, series A, No. 105, clause 39 and Glasenapp

of a teacher, who had been disciplinary dismissed for her breaking obligation of political loyalty and her active membership in an extremist party, which then in Federal Republic of Germany was German Communist Party (DKP). ECOHR decided in this case, that it is the state that has the right to define, who is the addressee of the norm limiting the freedom of expression and freedom of party membership[43].

The decisions of the Strasburg court could be referred to requirements of ban on party membership and apolitical attitude of civil servants which are expressed in Polish legislation. However, one should remember that the limitation which was the subject of ECOHR's control, was not as broad as complete prohibition of party membership. Conventional institutions decided that the countries which are the parties of the convention, have the right to impose on civil servants the obligation to remain discreet in expressing opinions on political issues, in the name of supporting free, democratic, constitutional system, which in Germany derived from opinion that the civil service is the guarantee of the constitution and democracy. Public authorities should impose such limitations sensibly, carefully and in good faith[44]. It is especially important in the Federal Republic with a view to experiences of the country in the period of Weimar Republic. For this reason, the Tribunal acknowledged that the dismissal of Ms Vogt realized legal purpose within the meaning of the paragraph 2 Article 10 of the Convention[45].

In case of the accused teacher, it was ascertained that she had not indoctrinated her students and she had believed that acting which is consistent with the law, in a legal party, cannot be against the requirement of political loyalty. The issues of loyalty should be ex-

vs. Germany of August 28, 1986, series A, No. 104, clause 53. Only in decision Vogt vs. Germany, clause 43–44, the Tribunal admitted that cases of this type refer also to freedoms protected by EKPC.

[43] Decision Vogt vs. Germany, clause 48.

[44] Ibidem, clause 52.

[45] Ibidem, clause 51.

amined with regard to specific activity of a given person, and not to abstract purposes of the party they belong to.

At the same time the Tribunal stated that, "absolute character of the obligation defined by German courts is striking. (...) It is identical for every civil servant, regardless of their function and rank. This situation does not make it possible to separate wok from private life, the obligation is always in force, the situation notwithstanding"[46]. This being the case, ECOHR decided that Germany violated the Article 10 and 11 of the European Convention, however, it came to discrimination of the plaintiff, resulted from the Article 14[47].

Such approach of the Court may cause serious implications for Polish legal regulations referring to the issue of the ban on of party membership and apolitical approach. In a specific case being examined by the Strasburg organs, it may turn out that prohibition of political party membership of civil servants may not meet criteria of proportionality of legal purposes to the scope of limitations derived from the Article 11 paragraph 2 ECHR. Such a verdict could be brought in case when a plaintiff - a member of the civil service, would hold a low position in a hierarchy of the civil servants and in that case it would be necessary, at the most, to impose the requirement of apolitical approach, not to ban the party membership. At the same time, Polish state, in such cases, can refer to some specific circumstances, for example to political character of the state as the reason for so significant limitations of freedom to form political parties.

* * *

It should be recorded that Strasburg organs have made important interpretation of possibilities of limiting freedom of joining parties imposed on members of the army, police and the Administration. Grammatical interpretation of the second sentence of the

[46] Decision Vogt vs. Germany, clause 59.
[47] Decision Vogt vs. Germany, clause 74.

Article 11 paragraph 2 of ECHR leads to the conclusion, that the only criterion for examining this limitation is its legality. Whereas, the Strasburg Tribunal interpreted functional regulations and *de facto* acknowledged that, for this type of limitation, a test of purposefulness, necessity and proportionality should be applied[48].

Such approach of ETPC results in significant limitation of state interference in freedom of party membership for members of qualified groups listed in the Article 11 paragraph 2. The Tribunal, thanks to such interpretation, excluded the possibility of arbitrary limitation of the rights of civil servants by the public authorities. Limitations imposed on members of mentioned groups could be, according to ETPC, admitted as "necessary in a democratic society" at the moment, when "important public need" exists, and the state has here "a narrow margin of freedom" to define when such a need occurs. Public authorities should act sensibly, carefully, and in good faith[49]. At defining the proportionality of binding legal purposes, which, in such cases, are usually order and public security, as well as rights and freedoms of other people, the Strasburg organs take into consideration individual situation of the plaintiff and their activity.

Such interpretation of the methods of controlling the limitations of freedom to form political parties for functionaries of the army, the police, and the Administration may cause significant implications for the Polish regulations concerning this issue. It would be difficult to accuse the legal regulation of being not stipulated by law. Moreover, it seems that the Strasburg organs would entirely agree with the general justification of the prohibition of forming political parties, which was stated by the Polish CT. It admitted that in case

[48] See: decision Rekvenyi vs. Hungary, clause 60-61 and *mutatis mutandis* Vogt vs. Germany, clause 68.

[49] Vogt vs. Germany, clause 52. However, in separate opinion as many as 8 out of 17 judges decided, that the margin of freedom of the state should be here wide. See: Ibid, separate opinion of judges: Bernhardt, Gölcüklü, Matscher, Loizou, Mifsud Bonnici, Gotchev, Jungwiert and Kuris, clause 3.

of all mentioned functions and positions, valid regulations "emphasize need to preserve impartiality of organs and functionaries while performing their duties. The impartiality stands for independence from all the external and beyond-substantive factors, which could influence the manner of realizing competences credited to particular organs. Entities covered with the prohibition of political party membership are active, among other things, in prosecuting crimes, applying legislation, controlling. Taking and pursuing actions connected with settling individual cases constitutes especially large domain of the Administration's activity. Using governing forms of activity in democratic state and other entities of public and legal character must be accepted "in the name of public interest"[50]. While performing their duties the organs have numerous authorizations, such as access to many types of legally protected secrets, documents, and the possibility to enter the area of civil rights and freedoms. Party membership of these individuals may result in performing their duties in unilateral way, realizing a specific political concept and may limit citizens' trust towards the state[51].

However, examining by the Strasburg organs specific cases of limiting the freedom of party membership of civil servants, for example fire fighters or lower level civil servants, may induce ECOHR to draw a conclusion on disproportion of such limitations.

Bibliography

Chmaj M., *"Wolność zrzeszania się"*, [in:] W. Skrzydło (ed.), *Wolności i prawa polityczne*, Vol. 3, Kraków 2002.

Chmaj M., Żmigrodzki M., *Status prawny partii politycznych w Polsce,* Toruń 1995

[50] Decision of the Constitutional Tribunal of April 10,2002, par. 6 clause 1.

[51] Ibidem.

Decision EKPC Glasenapp vs. Germany of August 28, 1986, series A No. 104.

Decision EKPC Kosiek vs. Germany of August 28,1986, series A, No. 105.

Garlicki L., *Przesłanki ograniczania konstytucyjnych praw i wolności (na tle orzecznictwa Trybunału Konstytucyjnego)*, [in:] "Państwo i Prawo", No. 10, 2001

Granat M. *Glosa do wyroku Trybunału Konstytucyjnego z dn. 10.04.2002 r. (File No. K.26/00)*, [in:] "Przegląd Sejmowy", No. 4 (51), 2002

Granat M., Gorgol, A., Sobczak, J. *Ustawa o partiach politycznych. Komentarz*, Warszawa, 2003.

Jasudowicz T., (transl. and analysis), *Orzecznictwo strasburskie. W dwudziestolecie "Polskiego doświadczenia Solidarności"*, Toruń, 2001

Decision ETPC Ahmed and others vs. the Great Britain of September 2, 1998, complaint No. 22954/93, Reports 1998-VI.

Decision ETPC Engel and other vs. the Netherlands of June 08, 1976, complaints No. 5100/71-5102/71; 5354/72; 5370/72; series A, No. 22.

Decision ETPC Grande Orient D'Italia di Palazzo Giustiniani v. Italy of August 2, 2001, complaint No. 35972/97, Reports 2001/VIII.

Decision ETPC Rekvenyi vs. Hungary of May 20, 1999, complaint No 25390/94, Reports 1999-III.

Decision ETPC Vogt vs. Germany of December 9, 1994, series A, No. 323.

Decision of he Constitutional Tribunal of April 10, 2002, File No. K 26/ /00, OCT-A 2002, No. 2, item 18

Winczorek, P. *Komentarz do Konstytucji RP z dnia 2 kwietnia 1997 r.*, Warszawa, 2000.