

The Principle of Equality as a Basis for Constitutional Complaint

The admissibility of a constitutional complaint based on the infringement of the principle of equality provided for in Art. 32 of the Constitution, without referring at the same time to specific freedoms and rights, was resolved for the first time by the Constitutional Tribunal (CT) in its decision dated 24 October 2001¹. The Tribunal adopted the view that this principle is not a touchstone by which to measure constitutionality. It may raise doubts evidenced by the dissenting opinions of the justices. The aim of this article is to present arguments both for lodging a complaint based solely on the principle of equality and against it.

In order to discuss the arguments for the complaint as outlined above it is necessary to take a closer look at the place of the constitutional complaint in the Polish legal system and the meaning of the constitutional principle of equality.

According to the provisions Art. 32 of the Constitution of the Republic of Poland, all persons are equal before the law and all persons have the right to equal treatment by public authorities. Art. 32 prohibits discrimination and applies to all within the jurisdiction of the Polish state. It was formulated by the Constitutional Tribunal which stated that “since in the new Polish Constitution the legislator used, with respect to the scope of the principle of equality, the terms “all persons” and “no one”, in place of terms previously used (“citizen”, “human being”), it cannot be said, as it was possible under Art. 67 sec. 2 of the constitutional provisions, that today this principle applies only to citizens. It should rather be assumed that subjects of the principle of equality under Art. 32 include “all persons”, to include natural

¹ Decision of 24.10.2001, SK 10/01, OTK 2001, No. 7, item 225.



and legal persons”². The principle set out in Art. 32 sec. 1 is a *lex generalis* in relation to other constitutional provisions on equality³.

Under the said principle similar entities in similar situations should be treated similarly, whereas different entities should be treated differently. Equality between two or more entities lies in their affiliation to at least one class distinguished by a specific relevant feature⁴. Depending on the criterion entities can be categorized as the same class⁵. As L. Garlicki⁶ put it, the key is to find a “relevant feature” that determines whether comparable entities are similar or different. If it is established that law does not treat similar entities similarly, the next question is whether such differentiation is admissible under the principle of equality⁷. One should consider its various aspects. Interpretation of “all persons shall have the right to equal treatment by public authorities” is debatable in the light of what the Tribunal has said. Decoding Art. 32 sec. 1 makes it possible to answer the question whether it contains a subjective right and, consequently, whether it can be the basis of a constitutional complaint⁸. Equality in law means that the said principle must be taken into account in interpretation of law⁹. Equality is also one of the principles of the system of rights and freedoms. Hence, as L. Garlicki¹⁰ observed, it should be considered strictly in connection with the principle of human dignity and the principle of freedom.

A constitutional complaint serves the protection of fundamental rights of individuals. However, its definitions vary. One can say that “the constitutional complaint an instrument serving a natural or legal person (under private or public law) for the protection of its fundamental civil rights, infringed by the acts of public authorities, by way of special proceedings before a constitutional court”¹¹. It does not protect against infringing on constitutional rights and freedoms by lack of activity¹² or lack

² Decision of 24.2.1999, SK 4/98, OTK 1999, No. 2, item 24.

³ L. Garlicki, *Polskie prawo konstytucyjne*, Liber, Warsaw 2008, pp. 94 et seq.

⁴ W. Sadurski, *Równość wobec prawa*, Państwo i Prawo 1978, No. 8–9, p. 52.

⁵ L. Garlicki, *Konstytucja Rzeczypospolitej Polskiej. Komentarz do art. 32 Konstytucji*, Wydawnictwo Sejmowe, Warsaw, p. 6.

⁶ L. Garlicki, *op. cit.*, p. 7.

⁷ *Ibidem*.

⁸ B. Banaszak, *Konstytucja Rzeczypospolitej Polskiej. Komentarz do art. 32*, Warsaw 2009.

⁹ L. Garlicki, *Polskie prawo konstytucyjne*, Warsaw 2008, p. 94.

¹⁰ L. Garlicki, *op. cit.*, p. 11.

¹¹ B. Banaszak, *Sądownictwo konstytucyjne a ochrona podstawowych praw obywatelskich RFN, Austria, Szwajcaria*, Wydawnictwo Uniwersytetu Wrocławskiego, Wrocław 1990, p. 104.

¹² B. Banaszak, *op. cit.*

of regulation¹³. Its definition includes an obligation to exhaust all legal remedies prior to filing¹⁴. Art. 79 of the Constitution stipulates that everyone whose constitutional freedoms or rights have been infringed, shall have the right to appeal to the Constitutional Tribunal for a judgment on the conformity to the Constitution of a statute or another normative act on the basis of which a court or a body of public administration has made a final decision on his/her freedoms or rights or on his/her obligations specified in the Constitution. There are two interpretations of the constitutional complaint. According to the first one, the grounds for complaint are limited to an allegation that the infringing decision was based on an unconstitutional provision, thus becoming a complaint against a norm – which is a narrowing construction¹⁵. A broader construction allows to allege that the judgment itself was in breach of the Constitution, making it a complaint both against a norm and a judgment¹⁶. The Polish model of a constitutional complaint includes the admissibility of lodging a complaint against an unconstitutional act, following a narrow interpretation.

Among the basic elements of a constitutional complaint the first is a person entitled to lodge the complaint. The second is the scope of “constitutional rights or freedoms” which is the basis of the constitutional complaint, and a model of control of constitutionality. The third is “finality” of the infringing judicial or administrative decisions. Finality speaks of a subsidiary nature of the constitutional complaint¹⁷. Another element of a complaint is its objective scope, i.e. specification of a statute or another normative act that was the basis of a final judgment. The procedure of lodging a complaint is also important as a fulfillment of the requirements specified in the Act on the Constitutional Tribunal¹⁸.

The question of who entitled to lodge a complaint is answered by Art. 79 of the Constitution. It names “everyone whose constitutional freedoms or rights have been infringed”. In the opinion of J. Trzciński¹⁹, the term

¹³ Judgement of 13.1.2004, SK 10/03, OTK-A 2004, No. 1, item 2.

¹⁴ B. Banaszak, *Skarga konstytucyjna*, Państwo i Prawo 1995, No. 12, p. 5; L. Garlicki, *Trybunał Konstytucyjny w projekcie Komisji Konstytucyjnej Zgromadzenia Narodowego*, Państwo i Prawo 1996, No. 2, p. 12.

¹⁵ L. Garlicki, *op. cit.*, p. 366.

¹⁶ *Ibidem*.

¹⁷ Z. Czeszejko-Sochacki, *Skarga Konstytucyjna w Prawie Polskim*, Przegląd Sejmowy 1998, No. 1, p. 35.

¹⁸ Act on the Constitutional Tribunal of 1 September 1997, Journal of Laws No. 102, item 643.

¹⁹ J. Trzciński, *Konstytucja Rzeczypospolitej Polskiej. Komentarz do Art. 79 Konstytucji*, in: L. Garlicki (ed.), *Komentarz do Konstytucji Rzeczypospolitej Polskiej*, Wydawnictwo Sejmowe, Warsaw, p. 4.



“everyone” should be understood broadly. Thus, it includes not only Polish citizens but also other persons subject to Polish jurisdiction, and legal persons²⁰. It does not include public authorities however. As far as legal persons are concerned they are eligible to lodge a complaint only to the extent they can benefit from the constitutional rights and freedoms²¹. In addition, the Tribunal has denied to right to complain to public business entities wholly owned by the Treasury²². At the same time, the right to lodge a complaint does not apply to the subject-matter of Art. 37 sec. 2 of the Constitution as well as to the so-called stateless persons. According to the author cited above, in order to determine entities eligible to lodge a constitutional complaint it is right to draw an analogy between Art. 45 providing for the right of access to courts and Art. 79. The author is right that a constitutional complaint is a variation of the right to justice, which explains its subjective scope. A similar view was expressed by Z. Czeszejko-Sochacki²³, who pointed out that both institutions are procedural, constitutional guarantees, stating, just as J. Trzeciński has, that the right to a constitutional complaint is a variation of the right of access to courts, qualified as to the object of the protection and procedure.

The existence of a “normative act upon which basis a court or organ of public administration has made a final decision” authorizes “everyone” to lodge the constitutional complaint.²⁴ In the Polish model by lodging the complaint, it is a statute or another normative act which is appealed against. However, as noticed J. Trzeciński²⁵ the applicant lodges complaint due to the fact that a court has issued a judgment unfavorable to him/her on the basis of a statute or another normative act – thus the judgment is indirectly appealed against.

²⁰ Bogusław Banaszak emphasised that the extension of the scope of entities eligible to lodge a complaint by legal persons in private law aims at strengthening the protection of natural persons of which they are made. Despite theoretical controversies in some countries judgements of constitutional courts allow to resort to a constitutional complaint if applicants “act on the basis of civil law or are in any other way (...) in the same situation as citizens and the state act they challenge relate to them on similar terms as to private persons.” (Judgement of the Swiss Federation Tribunal—Entscheidungen des Schweizerischen Bundesgerichtp. Amtliche Sammlung (BGB), volume 1031A, p. 59.) in: B. Banaszak, *Skarga konstytucyjna, Państwo i Prawo*, 1995, No. 12, pp. 5–6; According to Z. Czeszejko-Sochacki, foreign jurisprudence excludes filing of a constitutional complaint by public law persons, unless their constitutionally protected rights are at stake, in which case they are in the same situation as natural or legal persons, a view applicable in Poland, Z. Czeszejko-Sochacki, *op. cit.*, pp. 40–41.

²¹ The Constitutional Tribunal admitted lodging the constitutional complaint by legal persons in its judgement of 24 February 1999, SK 4/98 and 8 June 1999, SK 12/98 and of 21 March 2000, SK 6/99.

²² Decision of the Constitutional Tribunal of 20.12.2007, SK 67/05, OTK-A 2007, No. 11, item 168.

²³ Z. Czeszejko-Sochacki, *op. cit.*, p. 40.

²⁴ *Ibidem*, p. 41.

²⁵ J. Trzeciński, *op. cit.*, s. 11.

Discussing this issue, it is necessary to point to another condition under which a complaint may be filed, its finality. The finality of a judgment opens the way to lodging a complainant. The Constitutional Tribunal will consider the complaint only if the applicant has exhausted all means of appeal or remedies to which he/she is entitled in the civil, criminal or administrative proceedings. In the civil procedure, according to Art. 3981 of the Code of Civil Procedure, a cassation can be lodged against a final judgment. The proceedings do not involve three instances, then in order to exhaust all remedies it is sufficient to appeal. As P. Tuleja²⁶ notes, a cassation complaint as an extraordinary remedy, not part of the “exhaustion”. It is similar in criminal proceedings, where in view of the Tribunal, finality is associated with the passing a judgment by the court of second instance²⁷. The cassation in criminal proceedings is an extraordinary measure of appeal. With respect to administrative proceedings the Constitutional Tribunal decided that where decisions are subject to judicial review, the exhaustion of this procedure allows to lodge the constitutional complaint²⁸. According to the Tribunal, “as long as the procedure at a given level has not been exhausted, it cannot be assessed whether we deal with unconstitutionality of a normative act being the basis for a judgment or just a defect of a decision applying law”²⁹.

The charge of a breach of the Constitution must refer only to the rights and freedoms contained therein. Rights and freedoms are contemplated in Chapter II of the Constitution. It is undisputable that the constitutional complaint cannot be filed only on the basis of a breach of rights and freedoms expressed in international agreements binding Poland³⁰. This opinion was expressed by the Tribunal, which stated that “Art. 79 sec. 1 of the Constitution does not provide for the right to appeal due to a non-compliance of a normative act with an international agreement”³¹. However, the complaint may be grounded not exclusively on the rights and freedoms rooted in Chapter II. Other provisions of the Constitution

²⁶ P. Tuleja, *Dopuszczalność złożenia skargi konstytucyjnej po nowelizacji przepisów kodeksu postępowania cywilnego dotyczących skargi kasacyjnej*, *Opinia Dyrektora Zespołu Wstępnej Kontroli Skarg Konstytucyjnych i Wniosków*, <http://www.trybunal.gov.pl/epublikacje/download/DopuszczalnoscZlozeniaSkargi.pdf>.

²⁷ Decision of the Constitutional Tribunal dated 1.08.200, case file ref. Ts 71/00.

²⁸ P. Tuleja, *op. cit.*

²⁹ Decision of the Constitutional Tribunal dated 4.02.1998, case Ts 1/97.

³⁰ The example of such standpoint can be a judgement of the Constitutional Tribunal of 13 January 2004, SK 10/03.

³¹ Judgement of 13.1.2004, SK 10/03, OTK-A 2004, No. 1, item 2.



may also be taken into account, provided that they concern rights and freedoms. J. Trzciński³² is of the opinion that in formulating the grounds for a constitutional complaint, it is possible to invoke any other constitutional provision from which one could derive rights and freedoms “understood as provisions specifying subjective rights of a citizen or another entity and that this provision affects legal situation of a citizen, and, finally, that the addressee of the norm is free to choose to comply with the norm or not”. A complaint, as B. Szmulik points out, cannot be based on “the traditional principles of the political system such as sovereignty of the nation, or separation of powers”. In his opinion, “it seems that, for instance, the principle of freedom of economic activity or the principle of protection of ownership or the rule of law can be used for this purpose”³³. Authors differ with regard to admissibility of program norms as the basis for a constitutional complaint. Prevails the view that it is impossible to file a constitutional complaint on the basis of program norms or the Preamble to the Constitution³⁴. J. Trzciński takes a different stance, according to which program norms which express certain economic and social rights may be violated and thus be the basis for the constitutional complaint.³⁵ He identifies the following circumstances in which such norms can be violated by the legislator: improper interpretation of constitutional provision setting a goal or a task for public authority; violation of the essence of a right or a freedom; regulating a right or a freedom below the minimal standard. In addition, he goes on, if programs contain the minimum of civil rights corresponding to the minimum obligations of public authorities, then Chapter II program norms carrying the minimum of rights, can become legal grounds for a constitutional complaint³⁶.

Taking into account the above comments, the following two issues concerning Art. 32 should be considered. The first is the place of the principle of equality and the consequences thereof resulting from the systemic interpretation adopted by the Tribunal. The second concerns the concept of “subjective rights” (*prawa podmiotowe*) that are the basis for lodging the complaint.

³² J. Trzciński, op. cit., p. 5.

³³ B. Szmulik, *Skarga konstytucyjna. Polski model na tle porównawczym*, Wydawnictwo C.H. Beck, Warsaw 2006, p. 92.

³⁴ B. Banaszak, A. Preisner (eds.), *Prawa i wolności obywatelskie w Konstytucji RP*, Wydawnictwo C.H. Beck, Warsaw 2002, p. 769.

³⁵ J. Trzciński, op. cit., p. 10.

³⁶ *Ibidem*.



In a decision of 24 October 2001, SK 10/01, the Constitutional Tribunal rejected the admissibility a constitutional complaint on the basis of the principle of equality. The applicants submitted a plea for the examination of the compliance of Art. 2 item 2 of the Act on pecuniary benefits for persons deported as forced laborers and imprisoned in work camps by the Third Reich and in the Soviet Union of 31 May 1996, with the principle of equality envisioned in Art. 32 of the Constitution. According to the complainants, a relevant criterion was the fact of being a forced laborer. They further submitted that acquisition of the right to a benefit conditional on residence at the time of deportation constituted a breach of Art. 32. Dismissing the complaint, the Tribunal was of the opinion that the right to equal treatment is a “second-degree law” (a “meta-right”), vested in connection with legal norms or other actions of public authorities and inseparable from them³⁷. The Tribunal indicated that in order to consider the principle of equality as a basis for a constitutional complaint other provisions of the Constitution must be referred to since only such interpretation allows to determine the constitutional status of an individual, negatively affected by statutory or sub-statutory regulation. In the statement of reasons the Tribunal said: “we deal here with a situation of ‘co-application’ of two provisions of the Constitution, thus not only with the right to equal treatment but with a specific right to equal exercise of certain rights and freedoms”³⁸. The Tribunal perceives the principle of equality only as a general rule, hence Art. 32 must be referred to more specific provisions of the Constitution in order to become the basis for a constitutional complaint. Rejecting the literal interpretation in favor of systemic interpretation, the Tribunal decided that equality can only be referred to as a general principle due to the fact that Art. 32 is positioned under the heading of “General Principles” which constitutes only a general formula, preceding the enumeration of specific freedoms and bearing on their implementation³⁹.

Commenting on the above decision, B. Banaszak⁴⁰ criticized the concept of meta-right envisioned in the justification, stating that both in legal writings and in the court judgments in many democratic countries the concept of internal hierarchy of constitutional rights and freedoms has not been

³⁷ SK 10/01, OTK 2001, No. 7, item 225.

³⁸ *Ibidem*.

³⁹ Justification to the decision of the Constitutional Tribunal dated 24.10.2001, SK 10/01, OTK 2001, No. 7, item 225.

⁴⁰ B. Banaszak, *Glosa do postanowienia Trybunału Konstytucyjnego* of 24.10.2001, SK 10/01, *Przegląd Sejmowy* 2002, No. 2(49), p. 128.



popular. In his opinion, it is difficult to distinguish norms of higher and smaller binding force in the Constitution which, itself, is the act that has the highest force, known from the concept of meta-rights. The author was doubtful whether the meta-rights should be regarded as superior, or, perhaps, inferior since it transpires from the justification that the Tribunal is putting down their significance. The above position of the Tribunal is confirmed by inadmissibility of a constitutional complaint based on the meta-rights. B. Banaszak states that there are no sufficient grounds to adopt such a concept, and that “in order to deny any group of the advantages provided in the fundamental rights of the highest legal force, an explicit decision of the legislator is necessary”⁴¹, and no such decision can be found in the Constitution.

Similarly, K. Kolasieński⁴² does not agree with the Tribunal, pointing out that any part of Chapter II may constitute a basis for the constitutional complaint. Thus, in his opinion, there are no grounds for a different treatment of constitutional rights and freedoms formulated in the first part of this chapter on “General Principles”. He argues that the subchapter “General Principles” contained in Chapter II of the Constitution also contains specifically formulated constitutional rights, including the acquisition of the Polish citizenship by birth by Polish citizens (Art. 34), the right of national and ethnic minorities to establish their own educational and cultural institutions and institutions for the protection of religious identity (Art. 35 sec. 2).⁴³ In his opinion, wording individual rights and freedoms in more general terms is not the same as “deprivation of the provisions in which they are contained of their normative content, and consequently, that they do not provide for constitutional rights”. A similar view could be found in a dissenting opinion by justice J. Stępień⁴⁴ who also referred to a very specific nature of the regulations contained in the subchapter “General Principles”, being a source of subjective rights. J. Stępień holds that the subchapter above is not only a set of rules but rather “the expression of legislator’s will to treat certain subjective rights as particularly important from the point of view of the constitutional position of an individual”⁴⁵. In

⁴¹ *Ibidem*.

⁴² A dissenting opinion of judge K. Kolasieński on the decision of the Constitutional Tribunal of 24.10.2001, SK 10/01, OTK 2001, No. 7, item 225.

⁴³ Opinion K. Kolasieński on the decision of the Constitutional Tribunal of 24.10.2001, SK 10/01, OTK 2001, No. 7, item 225.

⁴⁴ Opinion of J. Stępień on the decision of the Constitutional Tribunal of 24.10.2001, SK 10/01, OTK 2001, No. 7, item 225. p. 11, p. 17.

⁴⁵ *Ibidem*.



his opinion, the location in the Constitution of the principle of equality and of other provisions does not diminish their role, nor prevent admissibility of a constitutional complaint. On the contrary, they are no less important for being “general” but rather more important for being mentioned first in the order of constitutional framework.

J. Trzciński⁴⁶ notes that making the principle of equality part of the subchapter on the “General Principles” does not predetermine the “strength” of the right. Like the authors cited above, J. Trzciński adopts the view that the remaining rights set forth in the subchapter cannot be considered subjective rights and freedoms. Trzciński states that their place is to stress their importance and not belittle them. He suggests that in the context of the entire Chapter II those general principles “mean fundamental principles crucial for the characteristics of the rights of human being”⁴⁷. B. Banaszak⁴⁸ also takes a stance on that issue indicating, however the irrelevance of the dispute. He notes that the nature of other rights mentioned in this subchapter as subjective rights as well as the possibility of their being the basis for a constitutional complaint has not been questioned so far. R. Arnold, commenting on the decision of the Tribunal, said that the term “general principles” fails to provide an argument against “the thesis on the subjective nature of the guarantees contained in this fragment of the Constitution”⁴⁹. The position of the Constitutional Tribunal, accepting the auxiliary nature of Art. 32⁵⁰ “deprives” the guarantee of the right to equality of its independent character as a subjective right.

One of the major issues in a debate on the constitutional complaint is the existence of subjective rights as a manifestation of equality, particularly that the applicants must invoke a violation of their subjective rights. As B. Banaszak⁵¹ rightly points out in his comment on the Tribunal decision, the difficulty in interpreting the phrase “all persons shall have the right to equal treatment” obscures the meaning of Art. 32. One can ask if this article contains a subjective right, and, consequently, is it possible to base on it a constitutional complaint? In the justification the Tribunal

⁴⁶ Opinion of J. Trzciński on the decision of the Constitutional Tribunal of 24.10.2001, SK 10/01, OTK 2001, No. 7, item 225, p. 19.

⁴⁷ *Ibidem*.

⁴⁸ B. Banaszak, *op. cit.*, p. 128.

⁴⁹ Opinion of R. Arnold on the decision of the Constitutional Tribunal of 24.10.2001, SK 10/01, *Przegląd Sejmowy* 2002, No. 2(49), p. 119.

⁵⁰ *Ibidem*.

⁵¹ B. Banaszak, *op. cit.*, p. 125.



stated that “the wording of the entire Art. 32 allows to assume that the legislator had no clear vision if the equality before the law is only a general rule (...) or a subjective right (...), or a kind of a combination of ‘subjective’ and ‘objective’ elements”⁵². The Tribunal said that Art. 32, first of all sets a “systemic rule” and a special subjective right, however, in the Tribunal’s opinion, this is only a second degree right, so to speak a meta-right, which cannot be applied individually. This is the right which has no independent legal meaning⁵³. It is possible to allege the infringement of the constitutional principle of equality only with a simultaneous indication of a breach of another, specifically named constitutional right or freedom. In Tribunal’s opinion, the constitutional complaint may be based on the principle of equality only “in connection with specific legal norms or other actions of public authorities”. M. Safjan⁵⁴, referring to the above statement, was of the opinion that Tribunal’s reasoning on the principle of equality “would make sense and be justified only if it was not possible at all to determine the meaning of the content of the right to equal treatment (...) that is if a directive derived from Art. 32 had no immediate application in the assessment of the legal position of an individual”. In response to the above comments J. Trzciński⁵⁵ observed that Art. 32 set out both the principle of equality and the right to equal treatment paralleled by equality before the law and the equality in the law. He emphasized that thanks to the Constitution of 1997, according to which the principle of equality is understood as the right to equal treatment, the subjective nature of Art. 32 has been clearly stressed, and thus the doubts arising from the previous constitutional provisions were dispersed⁵⁶. L. Garlicki⁵⁷, in his dissenting opinion, argues similarly, stating that Art. 32 of the Constitution formulates not only the systemic rules – the objective right – but also subjective right of an individual. In his opinion, there is no doubt that the founders of the new Constitution gave the principle of equality a new character by including a subjective right into it. As Garlicki puts it in his commentary to the Constitution⁵⁸, the subjective

⁵² Decision of the Constitutional Tribunal of 24.10.2001, SK 10/01, OTK 2001, No. 7, item 225.

⁵³ *Ibidem*.

⁵⁴ Opinion of M. Safjan on the decision of the Constitutional Tribunal of 24.10.2001, SK 10/01, OTK 2001, No. 7, item 225, p. 12.

⁵⁵ J. Trzciński, *op. cit.*, p. 20

⁵⁶ *Ibidem*.

⁵⁷ Opinion of L. Garlicki on the decision of the Constitutional Tribunal dated 24.10.2001, SK 10/01, OTK 2001, No. 7, item 225.

⁵⁸ L. Garlicki, *op. cit.*, p. 12.



rights arising from Art. 32 result, firstly, from the explicit wording of sec. 1 sentence 2 which guarantees “the right to equal treatment by public authorities to all persons”. He points out that such a stance is supported by the content of Art. 32. If the Parliament had a different intention, it would have not couched the provisions in question in terms typical of subjective rights⁵⁹. Thus “Equality before the law” contained in Art. 32 has become the right of an individual. R. Arnold⁶⁰ also expressed the view that the norm contained in Art. 32 of the Constitution can be treated as a guarantee of the subjective right rather than only a subjective constitutional norm which as such could not be the basis for a constitutional complaint under Art. 79. At the same time, it is not important that the first sentence of Art. 32 expresses a principle formulated in an objective way. The aforementioned author emphasises that the expression “of this kind” can be found in many constitutions and irrespective of their wording are typically treated as a subjective right⁶¹. In the light of textual interpretation, referred to by B. Banaszak⁶² and rejected (in the case at hand) by the Constitutional Tribunal, it raises no doubt that Art. 32 refers to a subjective right. In Banaszak’s opinion, the arguments given by the Tribunal, being too general, is not sufficient to resolve such a fundamental issue. The argument, that the normative content of Art. 32 would not have changed if the provision had omitted the noun “right”, contradicts the principle of rationality of a legislator who, by definition, consciously, resorts to specific terms⁶³. The legislator used the said noun to “purposefully to formulate a subjective right and not only an obligation of a public authority”. J. Stępień, in his dissenting opinion, elaborates on the above, taking a stance that it is normatively insignificant whether the noun “right” is used in Art. 32 since its “hypothetical omission in the analyzed part of Art. 32 sec. 1 of the Constitution in fact does not change its normative content; this type of textual operation (if admissible) even more emphasises the constitutional nature of the right of all persons to equal treatment by public authorities (...)”⁶⁴.

⁵⁹ Ibidem.

⁶⁰ R. Arnold, *op. cit.*, p. 118.

⁶¹ Ibidem.

⁶² B. Banaszak, *op. cit.*, pp. 124–125.

⁶³ Ibidem, p. 125.

⁶⁴ J. Stępień, *op. cit.*, p. 17.



The equality principle serves as a basis of instruments other than the constitutional complaint. Questions of law in individual cases and applications addressed to the Constitutional Tribunal (control *in abstracto*) may be formulated exclusively by reference to the principle of equality. Therefore Art. 32 is interpreted as an independent basis of control of constitutionality. The principle of equality as the basis for specific and abstract control is not only a meta-right, subject to further specification. Referring to different prerequisites of a constitutional complaint and a preliminary ruling, M. Safjan⁶⁵ stated that the duality of the right to equal treatment as a constitutional model is incomprehensible. It is difficult to understand, he argued, why, in Tribunal's opinion, this right is good enough for assessing the constitutionality of laws, but not applicable to constitutional complaints⁶⁶. To J. Trzciński⁶⁷ the difference between the grounds for a preliminary question and a constitutional complaint is unjustified. Limitation of constitutional rights only to those which the Tribunal considers to be a model for a constitutional complaint makes "a totally unjustified limitation of the "constitutional rights and freedoms", and, by extension, a limitation of the individual right to lodge a constitutional complaint"⁶⁸. This stance is shared by L. Garlicki⁶⁹ who holds there are no grounds to presume that a breach of Art. 32 cannot be an exclusive basis for constitutional complaints. Depriving the "right to equal treatment" of its protection arising out of Art. 79, would be acceptable only if the Constitution expressly provided so, as it stipulates in Art. 79 sec. 2 in relation to certain rights of foreigners.

On a similar note B. Banaszak⁷⁰ wrote that the "constitutional courts in many democratic countries accept the principle of equality as a legal basis substantiating the rights and claims of an individual, without expressing any doubts, even if they do not result from any of the rights covered by constitutional regulations"⁷¹. To confirm his standpoint, the author quotes judgments of the constitutional tribunals in the Federal Republic of Germany, Switzerland or Austria⁷². The Human Rights Committee took a similar

⁶⁵ M. Safjan, *op. cit.*, p. 13.

⁶⁶ *Ibidem*.

⁶⁷ J. Trzciński, *op. cit.*, p. 20.

⁶⁸ *Ibidem*.

⁶⁹ Opinion of L. Garlicki on the decision of the Constitutional Tribunal dated 24.10.2001, SK 10/01, OTK 2001, No. 7, item 225.

⁷⁰ B. Banaszak, *op. cit.*, p. 126.

⁷¹ *Ibidem*.

⁷² Judgement of the German Federal Constitutional Court contained in volume 1 of the official collection of judgements, p. 82; judgement of the Swiss



stance stating that the principle of equality and non-discrimination is an independent enforceable right even in matters not covered by the Convention⁷³.

The way the Constitutional Tribunal justified the impossibility to base a constitutional complaint on the principle of equality remains strongly disputed in legal writings. Denying the principle of equality the position of a subjective right, and in consequence making it impossible to provide grounds for a constitutional complaint has met with vehement objections even within the Tribunal. It was expressed by as many as five dissenting opinions. It seems that B. Banaszak rightly notes that the judgment of the Tribunal would have been different had the Tribunal applied a textual interpretation which it had considered the only proper interpretation in a similar case in 1999⁷⁴. Applying a textual interpretation resulted in taking away from Art. 32 its status as a subjective right. Legal academics view the Tribunal's justification as too vague⁷⁵. The concept of meta-rights also failed to fetch their acceptance. It was a product of the systemic interpretation adopted in the justification of the judgment, driving a wedge between the rights contained in Chapter II of the Constitution. It is not fully known whether meta-rights should be treated as superior or rather inferior laws if they cannot serve as a basis for a constitutional complaint. Considerable doubts remain particularly in the light of the principle of equality in other democratic countries.

Federal Tribunal contained in volume 6 of the official collection of judgements, p. 173; judgement of the Austrian Constitutional Court No. 6240 of the official collection of judgements of 1970.

⁷³ R. Wieruszewski, *Zasada równości i niedyskryminacji w świetle orzecznictwa Komitetu Praw Człowieka, (wybrane aspekty)*, Państwo i Prawo 2000, No. 4, pp. 40 et seq.

⁷⁴ Judgement of the Constitutional Tribunal of 24.02.1999 SK 48/98, OTK ZU 1999, No. 2, item 24, p. 158.

⁷⁵ B. Banaszak, *op. cit.*, p. 125.