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The authorized entity to perform the constitutional right of public information access – remarks on the grounds of the judgement of the Constitutional Tribunal of December 2nd 2015 (SK36/14)

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Słowa kluczowe: informacja publiczna, dostęp do informacji publicznej, konstytucyjne prawo dostępu do informacji publicznej, uprawniony do realizacji prawa dostępu do informacji publicznej; uprawniony do wniesienia skargi konstytucyjnej

Summary

The analysis contained in the subject matter article focuses on two linked matters, which is the detailed description of the entitled one to perform the constitutional right to access public information and the evaluation of the judgement of the Constitutional Tribunal of December 2nd (SK 36/14), in which it claimed that the constitutional protection of the right to access public information (article 61 of the Polish Constitution) is exclusively reserved for the benefit of citizens.

Streszczenie

Uprawniony do realizacji konstytucyjnego prawa dostępu do informacji publicznej – uwagi na tle postanowienia Trybunału Konstytucyjnego z 2 grudnia 2015 r. (SK 36/14)

Analiza zawarta w przedmiotowym artykule koncentruje się na dwóch powiązanych ze sobą zagadnieniach, tzn. sprecyzowaniu uprawnionego do realizacji konstytucyjnego prawa dostępu

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do informacji publicznej oraz ocenie postanowienia Trybunału Konstytucyjnego z 2 grudnia 2015 r. (SK 36/14), w którym stwierdził on, że konstytucyjna ochrona prawa dostępu do informacji publicznej (art. 61 Konstytucji RP) zastrzeżona jest wyłącznie na rzecz obywateli.

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I.

On December 2nd 2015 the Constitutional Tribunal issued a judgement in which in 2015, it dismissed the proceedings in terms of the constitutional complaint filed by one of the existing associations in Poland, claiming in its complaint the discrepancy of art. 4 sec. 1 of the Access to Public Information Act of September 6th 2001 (later referred to as: a.p.i.a.)², with the content of art. 61 sec. 1 and 2 of the Polish Constitution of April 2nd 1997³.

Leaving aside the analysis of the actual state – the situation concerned the acknowledgement of a deputy as obliged to release public information on the basis of a.p.i.a.⁴ – I would like to focus on the by the Tribunal's presented manner of materialization of the authorized one to perform the constitutional right guaranteed within in the content of art. 61 of the Polish Constitution, and consequently – also a legitimate one to file a constitutional complaint concerning his security.

In its regulation, the Constitutional Tribunal claimed that the “right to access public information was secured in art. 61 of the Constitution for the benefit of the

² The Access to Public Information Act of September 6th 2001, J.L. 2015 No. 2058 with changes.

³ The Polish Constitution of April 2nd 1997, J.L. No. 78, item 483 with changes.

⁴ It would be worth here, to raise that in art. 61 sec. 1 of the Polish Constitution, a person performing a public function is directly pointed as the one, from whom it is possible to efficiently request information. A matter, which definitely requires a deeper analysis is, whether it is about a constitutionally defined source (different than those, that were pointed in sec. 2 art. 61), or whether reference is made directly about the obliged one to share particular information. Administrative courts stated that a member of Parliament “is not an entity performing public authority”, he cannot be equated with entities performing public tasks, he is not included in public administration, which leads to the conclusion that the performance of a member of Parliament is not subject to cognition of administrative courts (compare: Ruling of the Regional Administrative Court of Warsaw of November 29th 2013, SO/Wa 92/13 and the Ruling of the National Administrative Court of February 14th 2014, I OZ 91/14).

citizens. This regulation [...] does not have a coincidental meaning. The close connection to the right to obtain information about authorities and people performing public functions with the rule of the sovereignty of the nation and voting rights for public authorities held only by Polish citizens should be noticed [...]. The right of public information access, reserved only for citizens, is perceived as an instrument enabling the use of remaining, reserved rights for the group, political rights, for example voting rights. It does not mean that the legislator cannot exceed the personal scope of this right for all interested entities, although the provision of the Constitution fully performs its liability function, pointing minimal standard of protection of the citizens' political rights. Therefore, the Tribunal states that the constitutional right of public information access is reserved only for "citizens" being natural persons, holding a Polish citizenship. This means that an association does not have the right to file a constitutional complaint, concerning this law⁵.

Such a statement seems to be in line with the one, which was presented during works of the Constitutional Commission of the National Assembly, where it was underlined, from one side "in reference to human rights in the Constitution we utilize two motions: the first one being the "citizen", when we mean a Polish citizen. The second motion "each" is utilized in reference to a human being"⁶, whereas on the other side – directly towards the constitutional right defined in art. 61 of the Polish Constitution: "Each word [...] was thoroughly deliberated. The personal scope of this provision has been limited to citizens, as not everyone possesses the right to obtain information about the performance of public authorities in our country. Such a right is exclusively reserved for citizens. The subject matter information [...] cannot be full as there are some requirements of state and economical secrets, as the determined requirements to conduct state activities, which do not allow for full transparency of the public administration's actions"⁷. It should also be underlined that despite different suggestions claimed during the works of the Commission by social entities⁸, it was determined that the law contained in art. 61 of the Constitution, lying within the

⁵ A judgment of the Constitutional Tribunal of December 2015, SK 6/14.

⁶ Bulletin of the Constitutional Commission of the National Assembly, 1994, No. XII, p. 80.

⁷ Bulletin of the Constitutional Commission of the National Assembly 1995, No. XVI, Warsaw 1995, p. 59.

⁸ About this subject, cf.: T. R. Aleksandrowicz, *Komentarz do ustawy o dostępie do informacji publicznej*, Warszawa 2008, p. 122.

part of regulations grouping freedom and political rights, due to its character, should be limited for the benefit of a Polish citizen. That is why it was not decided to name the entitled one as “everybody” or “each person”.

The quoted arguments and facts seem to be clear, legible and also sufficient to claim that the statement of the Constitutional Tribunal is logical and it fully reflects the specificity of defining the personal scope of the constitutional complaint and what is linked to it, the materialization of the legitimate one to demand granting protection based on the constitutionally defined personal right⁹, who is only the Polish citizen in case of access to public information¹⁰.

Despite such a clear documented statement it is necessary to point some arguments, the analysis of which will enable a different grasp of defining who is entitled to perform the constitutional right to access public information, as well as the way of identifying the holder to quote the content of article 61 of the Constitution, in the scope of performing the constitutional complaint (art. 79 of the Polish Constitution), and the same way to apply for effective protection of this personal right.

II.

In the judgment of the Constitutional Tribunal (SK 36/14) it was explicitly confirmed that the entitled one to perform, and also protect the law – through performance with the constitutional complaint – is only a natural person being at the same time a Polish citizen. People being foreigners and also oth-

⁹ Cf.: M. Kłopocka-Jasińska, R. Balicki, *Zakres podmiotowy skargi konstytucyjnej – wybrane problemy*, [In:] *Skarga konstytucyjna. Zagadnienia teorii i praktyki*, ed. K. Urbaniak, Poznań 2015, p. 39 et seq.; K. Urbaniak, *Model polskiej skargi konstytucyjnej na tle porównawczym*, cf. p. 28 et seq.; S. Jarosz-Żukowska, *Prawo do skargi konstytucyjnej – stan obecny i postulaty de lege ferenda*, [In:] *Realizacja i ochrona konstytucyjnych wolności i praw jednostki w polskim porządku prawnym*, ed. M. Jabłoński, Wrocław 2014, p. 829 and p. 829 et seq.

¹⁰ L. Garlicki, who commented chapter II of the Polish Constitution of April 2nd 1997 and underlined that: “freedoms and rights were distinguished, the subject of which can be each person, from the freedoms and rights which are restricted solely for Polish citizens. This distinction is justified by the terminology of each of the provisions of chapter II, as they usually utilize the notions “each”, “every”, “nobody” which excludes their reference only to the situation of citizens, L. Garlicki, *Rozdział II Wolności, prawa i obowiązki człowieka i obywatela*, [In:] *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, T. III, ed. L. Garlicki, Warszawa 2003, p. 6.

er legal entities, legal persons and other organizational entities with no legal personality do not possess such a right.

While analyzing the content of art. 61 of the Polish Constitution, we come to the conclusions that it contains a personal right which defines:

- very narrowly the entitled one (a citizen),
- broadly (a public authority entity, people performing public functions, professional or business organization bodies and other people and organizational entities in the scope in which they perform public authority tasks, as well as manage municipal property or assets of the Treasury) obliged (section 1),
- sources (documents, sessions),
- ways of performance (access to documents and access to sessions of collegial organs arising from general elections linked to the possibility to record voice or video – section 2),
- rules and premises of its limitation (statutory limitations based on the following premises: protection of freedoms and rights of other people and business entities, as well as public order, safety or an important economic interest – section 3),
- distinction of the informative duty performance by particular obliged ones – in this case representative organs that are: the Polish Senate and Sejm – section 4)¹¹.

The analysis of content of the solutions expressed in art. 61 of the Constitution does not create an explicit base enabling to name the right contained therein as a right of public information access. Generally, it enables the statement that some rights were contained therein, which can be performed jointly or separately by the entitled one. The following ones are:

- the right to obtain information about the performance of public authority organs,
- the right to obtain information about the performance of people holding public functions,
- the right to obtain information about the performance of economic and vocational self-governments, and other people and organizational

¹¹ M. Jabłoński, *Udostępnianie informacji publicznej w formie wglądu do dokumentu*, Wrocław 2013, p. 27 et seq.

entities in the scope in which they perform public authority tasks as well as manage municipal property or Treasury.

Taking into account the aforementioned, it is not surprising that in the first commenting works to this article of the Polish Constitution we do not find the motion of “distinctive right to inform about the performance of public authority organs¹² – state and municipal ones and also people performing public functions¹³, or the “right of information about the performance of public authority organs as well as people performing public functions”¹⁴.

In practice, only the passing of a bill about the access to public information enables to form the practice and identification of the right to access public information with the right contained in art. 61 of the Constitution.

It should also be assumed that the statutory extension of the entitled one to perform the right to access public information (art. 2 sec. 1 a.p.i.a.) was a consequence of acceptance by the legislator that the essence of this right requires the guarantee of its performance not only for a Polish citizen. Taking into account the rule of public life openness, transparency and clarity of the state, its organs and people performing public functions, omitting of legal persons, and even wider different kinds of social organizations, whose statutory aim is the control of performance relevance of public institutions, is linked to the necessity of further extension of the notion of the entitled one and to eliminate the necessity to point by each interested entity – in terms of performance of this law – the legal or factual interest (art. 2 sec. 2 a.p.i.a.). Taking into account the fact that on the grounds of current regulations of the Polish Constitution of April 2nd 1997 there are no negative premises eliminating the admissibility of the statutory extension of the personal scope of law, which is mentioned in its article 61, a statutory definition of the entitled one is fully justified and desired¹⁵.

¹² I. Lipowicz, *Komentarz do art. 61 Konstytucji*, [In:] *Konstytucje Rzeczypospolitej oraz komentarz do Konstytucji RP z 1997 roku*, ed. J. Boć, Wrocław 1998, p. 115.

¹³ P. Winczorek, *Komentarz do Konstytucji RP z dnia 2 kwietnia 1997 r.*, Warszawa 2000, p. 83.

¹⁴ W. Skrzydło, *Konstytucja Rzeczypospolitej Polskiej z dnia 2 kwietnia 1997 r. Komentarz*, Zakamycze 1998, p. 57.

¹⁵ M. Bernaczyk, *Obowiązek bezwzrostkowego udostępniania informacji publicznej*, Warszawa 2008, pp. 46–50.

Also, in the jurisdiction it is confirmed that the notion “each” should be understood as “natural persons, legal persons and organizational entities without the legal capacity, for example social organizations”¹⁶.

Taking into account the aforementioned, it seems justified to divide the constitutional right to obtain information about the performance of state organs, other entities and public persons from the statutory right to access public information, which would consequently be equal to the full approval of the statement expressed in the content of the regulation of the Constitutional Tribunal of December 2nd 2015.

However, it should be mentioned that in the Polish Constitution of April 2nd 1997, we observe a diversity of categories of the entitled one not only due to the use of notions “citizen” and “human being – each”, but what can have a significant meaning, the legislator also uses amaterialization of the notion “Polish citizen”¹⁷. Obviously, we can assume that the reference of the legislator to the adjective “Polish” together with the notion “citizen” is performed only to underline a specific category of freedoms and political rights, which is being justified by the constitutional point of view that the superior authority belongs to the sovereign (the Nation) has clear justification, while clarifying that the power does not belong to everyone but only to Polish citizens. On the other hand, if we assume that the reference to the notion “citizen” is generally identified only with the entitled one, who is the Polish citizen, the division in the Polish Constitution of liberties and human rights and liberties and rights of a “citi-

¹⁶ Obviously in case of legal persons and other entities, there needs to be relevant representation, see: judgment of the Supreme Administrative Court of September 19th 2007, I OSK 1680/06. A matter which raises doubts is whether the entitled one needs to identify himself with legal capacity. The problem generally does not arise on the Surface of non-request sharing of public information. Access thereto is granted to everyone, with no exceptions. Discrepancies in literature in terms of the statement, standing for the necessity to possess legal capacity (M. Bar, A. Piskorz-Ryń) and contrary (M. Bar, A. Piskorz-Ryń) was presented in the work of A. Kowalska, *Wymóg formalny opatrzenia wniosku o udzielenie informacji publicznej podpisem a status postępowania w sprawie udzielenia tej informacji*, Przegląd Prawa Publicznego, 2012, No. 10, pp. 44–45.

¹⁷ M. Jabłoński, *Problem zdefiniowania podmiotu wolności i praw w Konstytucji RP – wybrane zagadnienia*, [In:] *Konieczne i pożądane zmiany Konstytucji RP z 2 kwietnia 1997 roku*, eds. B. Banaszak, M. Jabłoński, Wrocław 2010, p. 225 et seq.

zen” and “Polish citizen”, can rise justified interpretation doubts, similar to those which characterized the interpretation of the provisions of the Constitution of the Polish People’s Republic remaining in force and being current up to October 17th 1997. What is more, there may be justified doubts if the notion “citizen” was identified during the works of the Constitutional Commission of the National Assembly with citizens of these countries that were the signatories of particular agreements, binding for the Republic of Poland¹⁸.

Taking the aforementioned into consideration, it is worth mentioning that Poland is bound by a range of provisions of international agreements, from which the obligation to access information arises, together with access to public information¹⁹, not only by a person who is linked to a particular country

¹⁸ M. Jabłoński, *Zasada zróżnicowania zakresu realizacji konstytucyjnych wolności i praw jednostki w oparciu o kryterium obywatelstwa polskiego*, [In:] *Wolności i prawa jednostki w Konstytucji RP*, T. I *Idee i zasady przewodnie konstytucyjnej regulacji wolności i praw jednostki w RP*, ed. M. Jabłoński, Warszawa 2010, pp. 537–539.

¹⁹ M. Bernaczyk, *Funkcja prawa do informacji w polskim porządku prawnym*, [In:] *Realizacja i ochrona konstytucyjnych wolności i praw jednostki w polskim porządku prawnym*, ed. M. Jabłoński, Wrocław 2014, p. 371 et seq.; idem, *Prawo do informacji w Polsce i na świecie*, Warszawa 2014, p. 83 et seq. It also needs to be underlined that in the European Union, in 1993, based on a decision of the Council concerning public access to documents (Council Decision No. 93/731 of December 20th), a document register was established, to which all interested ones had access. The exclusion of a particular document could only be performed through a decision. In 1994 a similar decision was performed by the Council which concerned public access to its documents (Council Decision No. 94/90 of February 8th 1994). Council Regulation No. 1049/2001, despite entering into force in June 2001 was started to be utilized since December 2001. The provisions of the regulation supplement the internal regulations of the institution: Council Decision 2004/338/WE, Commission Decision 2001/937 and article 97 of the regulations of the European Parliament. The informative status of an entity was determined in the EU Charter of Fundamental Rights. In art. 11 thereof, it is clearly underlined that everyone has the right to freedom of expression, which includes the freedom to possessing views and receiving and forwarding information and ideas without the interference of public authorities and regardless to national borders. Regardless of the approval of this fundamental right of the entity, the Chart guarantees the Union citizen and also every other human being and legal entity, residing or conducting business registered in a Member State, the right to access information concerning the European Parliament, The Council and Commission (art. 42). The Chart also guarantees the freedom of the media and their pluralism (art. 11 sec. 2). In this provision, the possibility to perform the right to access information by legal persons, whose performance aims to obtain and share information, is confirmed.

through a citizen bond but also any other one, including the one by a legal person or entities with no legal personality.

Assuming that the reference to the notion “citizen” in the Polish Constitution is consequent and coherent, we generally challenge the equality of personal protection at least in the scope of social security (article 67 of the Polish Constitution), the specificity of which does not solely rely on the citizenship²⁰, criteria, but mutual obligations which occur between the entity (secured one) and the state (the securing one). Moreover, taking into account the fact that the entitled one to perform constitutional rights such as the freedom of meetings (art. 57 of the Constitution), freedom of association (art. 58 of the Constitution), freedom to conduct business (art. 20 and 22 of the Constitution), freedom of media together with the freedom to express opinions and obtain, and distribute information (guaranteed by the ban of implementing preventive censorship – art. 14 together with art. 54 of the Polish Constitution)²¹ and rights, that is the right to file petitions, complaints and motions (art. 63 of the Polish Constitution)²², the right to obtain information about the condition and environmental protection (art. 74 section 3 of the Polish Constitution)²³, or even the right of ownership (art. 64 of the Polish Constitution) is everyone, not only the citizens, but also foreigners, and other legal entities²⁴ – it is hard to justify that its full performance will be possible without

²⁰ This took place during the works on the content of art. 67 of the Polish Constitution, cf.: R. Wieruszewski, *Pozycja ustrojowa cudzoziemca, azylanta i uchodźcy – założenia konstrukcyjne i praktyka prawna*, [In:] *Wolność i prawa jednostki oraz ich gwarancje w praktyce*, ed. L. Wiśniewski, Warszawa 2006, p. 26 et seq.

²¹ J. Sobczak, *Prawo prasowe. Komentarz (komentarz do art. 1)*, System informacji prawnej LEX 2008; M. Sakowska-Baryła, *Dostęp do informacji publicznej a ochrona danych osobowych*, Wrocław 2014, p. 22 et seq.

²² *Teoretyczne i praktyczne aspekty realizacji prawa petycji*, eds. R. Balicki, M. Jabłoński, Wrocław 2015, with specific regard to work of M. Masternak-Kubiak and P. Kuczma, *Prawo petycji jako prawo podmiotowe (aspekt podmiotowy i przedmiotowy)*, p. 267 et seq. and M. Bernaczyka, *Uprawniony i zobowiązany. Redefinicja czy konkretyzacja*, p. 389 et seq.

²³ B. Rakoczy, *Ustawa o udostępnianiu informacji o środowisku i jego ochronie, udziale społeczeństwa w ochronie środowiska oraz o ocenach oddziaływania na środowisko. Komentarz*, LexisNexis 2010.

²⁴ As it was underlined by judge P. Tuleja in his separate statement to the judgment of the Constitutional Tribunal of December 2nd 2015: “Everyone” in the Constitution may also mean a legal person, as long as the content of each freedom or constitutional right determines that

the simultaneous warranty to the beneficiaries equivalent protection to access public information.

As it was noticed by the Constitutional Tribunal “article 61 of the Polish Constitution concerning the right to information contains in its content the right to request information about the functioning of public institutions, mainly the institution of public authorities. It relates to information concerning current proceedings within one institution and delegated tasks, the process of their performance and investments or organized tenders”²⁵. In this statement, it not only clearly underlines the political character of this right, which is being performed on many surfaces of the current activity of various entities, on the economic and social surface directly relating to rules defining the functioning in Poland of the social market economy rule, assuming cooperation of social partners, who are not only natural persons being Polish citizens.

Without access to information being in the possession of relevant organs and public institutions (including entities performing public tasks and managing communal assets or Treasury) the performance of the aforementioned freedoms and rights can become only partial (for example in the scope of planning to start developing business in the situation of lack of information concerning current expenses of public resources, similarly to the scope of information concerning the managing of public assets, or the way of managing public affairs in a wide scope of meaning), which consequently weakens the concept of constitutional protection of freedom and rights of an entity understood as an entirety instead of a sum of separate and autonomous warranties²⁶. In this place,

the performance of this right is possible also by legal persons. A classic example is the right of property protection, expressed in article 61 section 1 of the Constitution, which refers to natural and legal persons. Additionally, it needs to be mentioned that the object of constitutional rights can also be a subject, which is not a natural, nor a legal person. An example thereof is an ordinary association being subject of the freedom to associate, expressed in article 58 section 1 of the Constitution. The scope of the notion “each” is jointly determined by the content of each constitutional right, its manner of performance and function, which this right performed in the Constitution”.

²⁵ Judgement of the Constitutional Tribunal of March 20th 2006, K 17/05.

²⁶ At the same time, it is worth mentioning that democracy needs to be immanently linked to the existence of the warranty of transparency of public life, identified with the existence of real openness and transparency warranties of the functioning of the state apparatus and all related people thereof, who perform a public function. This openness and transparency in practice, has to ensure the possibility to firstly obtain information and then (potentially) ob-

it seems worth underlining that the Constitutional Tribunal itself defined “civil society” as a “society of free, aware, active and dedicated citizens in public affairs”, who can organize themselves “in various organizational structures”.

Referring to the constitutional warranties of action and organizing freedom, the Tribunal stated that “the frames of the civil society are contained in provisions of art. 11–13 of the Constitution, with special consideration of art. 12”, underlining the role of not only political parties but also other structures of public life²⁷. Bearing in mind the aforementioned, it seems that the introduction of a rigid criteria of Polish citizenship in terms of the identification of the entitled one according to the content of article 61 section 1 of the Polish Constitution has no further justification – of course, except the legible but doubtful linguistic interpretation – and it seems to defy the fundamental right to obtain information about the public organs’ performance and people performing public functions. Moreover, it doubtfully varies the rights of not only those natural persons, that do not hold such citizenship, but also other legal entities, that would like to efficiently and fully perform the above mentioned constitutional freedoms and rights. In case of foreigners and other legal entities, this information may have the same meaning in the scope of functioning, developing and planning their tasks.

Assuming an explicit division of freedoms and rights, that can be performed by the citizen and common ones, which everybody can rely on, requires the reference to the matter of the addressee of the law – in this case the right to access public information – can be a legal person or an organizational entity with no legal capacity.

The most part of state constitutions directly point at the addressee of guaranteed rights and freedoms, who is a human being and a citizen. Generally, only as an exception we can observe a solution, where we see particular pointing of other entities (generally for example: Germany – article 19 of the Polish Constitution,

tain knowledge not only about the subject, which is the subject of the performance of different organs, but the identification of results of each kind of settlements (and also lack thereof). This warranty may not only be restricted for the benefit of a citizen.

²⁷ Judgment of the Constitutional Tribunal of May 27th 2003, OTK ZU Nr 5/A/2003, item 14, which is confirmed in literature concerning constitutional law, cf.: A. Łabno, *Partie polityczne a proces kształtowania się społeczeństwa obywatelskiego. Rozważania na tle sytuacji w Polsce w latach 1989–2002*, [In:] *Prawne aspekty funkcjonowania partii politycznych w państwach Europy Środkowej i Wschodniej*, eds. A. Domańska, K. Skotnicki, Łódź 2003, p. 38.

or Portugal – art. 12 sec. 2, particular: for example Poland – art. 70 sec. 5). The constitutional realization of the addressee's freedoms and rights generally does not tolerate appeals to the notions "each human being", "every person". It usually relies on the following notions: "every human" or "every person". It is usually based on the use of the following notions "citizen, each, everybody, nobody". The problems of interpretation thereof lead to the establishment of doubts if the addressees of constitutional freedoms and rights are solely natural persons or also legal persons, and other entities – organizational bodies with no legal capacity?

Within the scope of this matter, there are several statements presented. The first one excludes the possibility to rely on constitutional freedoms and rights of a human being and citizen by legal persons and other private law bodies. In the justification thereof, it is underlined that the entities have a solely institutional character, their functioning relies on distinct rules of law, that also influence relevant procedures and mechanisms of the protection of their rights.

The second group of views rather focuses on the statements according to which the possibility of relying on guaranteed freedoms and rights by legal persons (organizational entities with no legal capacity) is acknowledged, having regard to the protection of natural persons establishing or being included within those legal entities. *De facto* the entity (or a group thereof) is protected instead of a legal person as a separate legal entity.

In a wider scope it is assumed that other than natural persons of private law may, with no exceptions, use individual constitutional rights, provided that it does not arise directly therefrom, that they may only be performed by a human being²⁸ (for example the right of life, freedom of conscience, freedom of creative work or personal data protection)²⁹.

²⁸ J. Trzciński, *Zakres podmiotowy skargi konstytucyjnej*, [In:] *Skarga konstytucyjna*, ed. J. Trzciński, Warszawa 2000, p. 52 et seq. In the judgment of June 8th 1999, SK 12/98, the Tribunal underlined that this kind of solution "is not only an intention to strengthen the position of legal persons, but a pursuit to intensify the protection of entities, that basically constitute a legal person (in case of corporation legal persons), or they utilize its performance (in case of company legal persons). A part of the rights and freedoms constitutionally guaranteed to natural persons, by its definition, can be performed through other entities, created thereby, and granting a constitutional complain to them does not aim to strengthen the position such natural persons".

²⁹ P. Czarny, *Konstytucyjne podstawy prawnej regulacji stosunków prywatnoprawnych w Polsce (na tle koncepcji oddziaływania praw konstytucyjnych oraz obowiązku ochrony tych praw*

It is also worth mentioning the interpretational doubts accompanying the recognition that particular public law entities (and particularly public providers) are entitled to appear with a constitutional complaint concerning the protection of constitutional freedoms and rights.³⁰ As it is underlined in academic literature – recently – The Constitutional Tribunal modified its previous, rigorous statement, according to which such entities have absolutely no legitimacy to file a constitutional complaint³¹. As it is pointed in academic literature – “It is relevant to expect from a final guarantor of rights and free-

przez państwo, [In:] *Oddziaływanie współczesnych konstytucji na stosunki między podmiotami prywatnymi*, Kraków 2015, p. 171 et seq.; and also works contained in the book called: *Sądy i trybunały wobec problemu horyzontalnego działania praw jednostki*, ed. M. Florczak-Wątor, Kraków 2015.

³⁰ P. Tuleja, *Skarga konstytucyjna w Polsce – dziesięć lat doświadczeń*, Przegląd Legislacyjny 2007, No. 3(61), p. 29 et seq.; A. Krzywoń, *Zdolność skargowa publicznych podmiotów gospodarczych w postępowaniu przed Trybunałem Konstytucyjnym*, “Państwo i Prawo” 2014, No. 11, p. 32 et seq.

³¹ It mainly concerns the judgement of the Constitutional Tribunal of December 20th 2007, SK 67/05 in which it referred to two criteria: estate: “The crucial [...] element diversifying the position of private entities from “state and other public institutions” is the material base of the performed business activity, and the acknowledgement of estate criteria as a base to distinguish public economic entities – whose activity is based on public estate – from private business entities, whose activity is based on personal estate, it is fully justified” and also in the functional criteria “in reference to the definition of a public entrepreneur contained in European Union legal acts (The Commission Directive 89/723/EEC of June 25th 1980 of financial transparency inside particular entrepreneurship, EU Journal of Laws L 195 of July 19th 1980, p. 35 et seq. the Commission Directive 2006/111/WE of November 16th 2006 of financial transparency among Member States and public business entrepreneurship, and also in terms of financial transparency inside particular entrepreneurship, EU Journal of Laws L 318 of November 17th 2006, p. 17 et seq.) and repeated in the act of September 22nd 2006 concerning financial transparency of some business entities (Journal of Laws, No. 191, item 1411). However, in the judgement of December 18th 2013, TS 13/12 in which the Tribunal States “Public business entities may use the constitutional rights and means of protection related to it only if they are in the same situation as natural persons and other legal persons, and the questioned legal act refers to them on identical rules, on which it could refer to those entities. In such situations, due to the fact that public business entities remain in the same subordinate relation towards a particular public authority organ, as it happens in case of other (“non-public”) legal persons, they may have an active legitimacy to file a constitutional claim [...]. Such a potential possibility of being an entity of constitutional freedoms and rights – and what refers to it – the initiator of constitutional control in a complaint mode, is each time subject to Tribunal verification, that evaluates if a particular entity is the beneficiary of a right, the infringement of which it alleges.

doms and at the same time, a warrior of the Constitution, to a more flexible attitude towards the matter of entitlement to issue a constitutional complaint, which is actually the only means of enabling an entity to directly formulate a request to eliminate unconstitutional provisions from the legal system³².

In practice it should be assumed that currently, the entitled one to perform constitutional freedoms and rights of the entity, including that from the content of a particular law the admissibility of its performance by a natural person, being not only a human being and/or citizen does not arise – which is almost never pointed in the Polish Constitution – also other legal entities, which are legal persons and other organizational entities with no such capacity.

Even more significant – from the point of precisely determining the entitled one to perform the constitutional right to access information – becomes the fact that the statement of the Constitutional Tribunal, expressed in the regulation of December 2nd 2015, seems to lie in contradiction towards the previous settlement of the Tribunal, where the organ of legal constitutional control stated that “[...] contained therein (that is in article 61 section 1 of the Polish Constitution – NdA) subjective right can be personally performed by a citizen as it can be realized through the press. From it, it arises that a constitutional complaint leading to the protection of the right of information applies to each citizen and the “press” in general, not a particular press organ³³.

What is more, the assumption of limited efficiency to rely on the constitutional right to access public information solely by a Polish citizen is at variance with the practice of direct utilization of article 61 section 1 in current case law, also before the period of entering into force of the act of access to public information.

It seems worth mentioning that in 1999, the Supreme Administrative Court of Poland settled that “the citizen’s right to obtain information of this subject is stated by the Polish Constitution in art. 61 section 1 stating, among others, that “A citizen has the right to obtain information about the performance of the performance of public authorities and persons performing public functions [...] Such tasks are also performed by the press according to article 1 of the Press Law Act of January 26th 1984 [...] The press may require, according

³² M. Kłopotcka-Jasińska, R. Balicki, *op.cit.*, p. 78.

³³ Judgement of the Constitutional Tribunal of 13th September 2000, SK 4/00.

to art. 4 sec. 1 and 3 of the Press Law Act, to share its information as long as it is not subject to protection, mainly due to the provisions of The Act on Protection of Secret Information of January 22nd 1999 [...] and other provisions. Limitations to access such information also have a substantial, as well as a personal character³⁴.

No less important was the settlement in which the Supreme Administrative Court of Poland, referring to the previous statement of the Supreme Court³⁵, stated that constitutional freedom the press (art. 14) and the right to access public information (art. 61), rely on the transparency of public life rule³⁶.

In another settlement, the Supreme Administrative Court of Poland stated that “during the determination of scopes of entities obliged to share information to the press and the scope of its rights, the following regulations should be utilized: art. 7–8, art. 10, art. 14, art. 54 and art. 61 of the Polish Constitution. They define the notion of public authority organs in a wide manner, including the legislative, executive and judicial authority. Ensuring the freedom of the press and its role as mass media authorize to obtain information about the performance of authority organs, understood in that way and entities performing tasks of public authority. The right to obtain information also includes the access to documents of such organs.

The guarantees of freedom of the press are strictly linked to the transparency of public life rule performed in accordance with the right of the citizen to obtain information about the performance of public authority organs in the functional point of view. Also, article 1 of the Press Law refers to it and it states that the press – according to the Constitution – utilizes the freedom of speech and it realizes the rights of citizen to their reliable informing, transparency of public life, control and social criticism³⁷.

³⁴ Judgement of the Supreme Administrative Court of June 24th 1999, II SA 686/99.

³⁵ Judgement of the Supreme Court of January 11th 1996, III ARN 57/95, where it was underlined that it is even admissible, without infringement of article 14 section 6 of Press Law, to publish information and data concerning the private sphere of life without the permission of a person, if this is directly linked to his public performance, not all statutorily limitations of press freedom (including the right of information) can be interpreted in a wider manner as it infringes the right of citizens to obtain relevant information and the rule of transparency of public life.

³⁶ Judgement of the Supreme Administrative Court of October 5th 2000, II SA 414/00.

³⁷ Judgement of the Supreme Administrative Court of September 9th 2001, II SA 172/01.

It is necessary to recall the settlements of the Supreme Administrative Court of Poland, in which it confirmed that “before entering into force of the act of Access to public information of September 6th 2001 [...] the provision of art. 61 sect. 2 of the Polish Constitution can be a sole base to require providing information about the performance of municipal authorities”, and what goes with it, is the sharing or originals of the municipal council’s resolutions³⁸.

Taking into account the aforementioned, there may be some doubts, whether the statement of the Constitutional Tribunal is consequent and actually the only entitled one is the natural person being at the same a Polish citizen. Previous practice – including the one of the Constitutional Tribunal – seems to confirm a contrary statement, according to which the entitled one is not only a natural person being a Polish citizen, and also another widely defined entity of law, in this case the entity conducting press activity or narrower “a press organ”. Taking into account the personal scope of this notion – exactly in the context of identifying the press through the scope of understanding the conducting of press activity³⁹ – the notion of the entitled one seems

³⁸ Judgement of the Supreme Administrative Court of January 30th 2002, II SA 717/01.

³⁹ “Analyzing the content of article 2 section 2 point 1 of Press Law, it seems worth noticing that the legislator, while defining press in this provision, was aware of the fact that the technical progress in terms of creating and sharing periodic publications is extremely rapid and technical possibilities, in which the press may be established, are difficult to be predicted or guessed. That is why, it stated that “press is also all existing mass media and all which will be established due to technical development”. So, the broadcast through Internet, if it fulfills the rules determined in article 7 section 1 point of Press Law is press and the time interval in which it appears, determines if this is a journal, according to article 7 section 2 point 2 of Press Law or a magazine, according to article 7 section 2 point 2 of Press Law [...]. In this situation it is indisputable that journals and magazines, through appearing in an online broadcast do not lose the features of a press title even if the internet broadcast is accompanied by a message perpetuated on paper, printed, constituting another, electronic form in the online system, as well as when this broadcast only exist in an electronical manner online, but only appears periodically, fulfilling the requirements, which are mentioned in article 7 section 2 of Press Law – judgement of the Supreme Court of December 15th 2010, III KK 250/10 “According to article 7 section 2 point 1 of Press Law “it also includes groups of people and particular people performing journalistic activity, where a journalist is a person who edits, develops or prepares press materials, remaining employed by a press office or performing such activity for the benefit and on behalf of the press office” – compare judgment of the Supreme Administrative Court of February 4th 2016, I OSK 881/15.

to be identified in a completely different manner, than it happens in the December's regulation of the Constitutional Tribunal.

III.

It seems worth noticing, that an implication of the statement contained in the regulation of the Constitutional Tribunal (SK 36/14) can be the development of a rather particular practice to evaluate claims to share public information by a group of legally obliged ones. If – as it was stated by the Constitutional Tribunal – the entitled one to the performance of the constitution law is solely a Polish citizen, then all claims filed by other entities, such as: foreigners, legal persons, organizational entities with no legal capacity of the exclusive base on the content of article 61 of the Polish Constitution, can be treated by the obliged ones to share public information as vitiated due to lack of legitimacy to admit relying by those entities on the substantial constitution law. In practice, after the regulation of the Constitutional Tribunal – it is necessary to distinguish law to directly rely on the constitutional right to access public information, granted to the Polish citizen from relying on law determined in acts, in this case the so called universal right to access public information. In such a recognition, a claim filed by entities other than Polish citizens shall rely on the provisions of the act to access public information of September 6th 2001. Other entities, than Polish citizens, are not entitled to efficiently rely on the right, which is determined in art. 61 of the Polish Constitution.

A statement, that only a Polish citizen can rely on the right to access public information can also lead to the limitation of possibilities of a foreigner entering the collegiate sessions of public authority organs, arising from general elections, also if he represents the press or narrowly “a press organ”. If he relies on art. 61 sec. 3 of the Constitution, instead of provisions of art. 17–18 a.p.i.a., it shall result of his removal from the session. In practice, it also appears that such a person (here, a widely understood journalist) not holding a Polish citizenship is not entitled to register during these sessions, as a.p.i.a. does not directly precise such a right.

Finally, what seems inevitable, taking into account significant dedication of non-governmental organizations functioning as various kinds of associ-

ations, we should expect weakening of conducted works initiating and controlling the functioning of the public sphere of the state (public activity). Acknowledgement, that no constitutional protection is granted to them, leads to weakening the constitutional group of informative rights of an entity, the performance of which aims to ensure each interested one the possibility to obtain and share information about the performance of public authority organs and persons performing public functions, consequently not only to guarantee a real character of transparency and openness of the state performance and the clarity thereof, containing obviously the representatives selected⁴⁰, but serve to deepen democracy and the rule of civil society.

Therefore – as judge P. Tuleja, I believe that the entitled one to perform the right to access publish information is not only a group of Polish citizens, grouped in other legal forms of activity (for example legal person – association)⁴¹ – but I propose the evaluation of another, wider point of view on the problem of the entitled one to perform the right contained in art. 61 of the Constitution and the acknowledgement that it is everyone, also a natural person, legal person and an organizational entity with no legal capacity. I feel that that from the directive of settling interpretational doubts in a way that strengthens the constitutional protection of freedoms and rights (article 5 of the Polish Constitution) the need arises to define a large scope of the entitled one to use the law determined in the content of article 61 of the Polish Constitution. The essence of this law, which is the request to receive information about the performance of organs, public institutions and also people performing public functions is in no case linked with the exclusivity defined by the criteria of citizenship. Consequently, the possibility to act with a constitutional complaint in the scope of protecting this right, should also not be restricted exclusively for the benefit of Polish citizens.

I believe that if not only citizens are granted a constitutional protection of a range of freedoms and rights, whose performance is immanently linked to the necessity of obtaining information (including public information), then it is

⁴⁰ About the concept of the so called “open government” cf.: M. Bernaczyk, P. Kuczma, *Jawność działania władz publicznych jako zasada ustroju Rzeczypospolitej Polskiej*, [In:] *Konieczne i pożądane zmiany Konstytucji RP z 2 kwietnia 1997 roku*, eds. B. Banaszak, M. Jabłoński, Wrocław 2010, p. 206 et seq.

⁴¹ A separate statement of the Constitutional Tribunal judge P. Tuleja in the case concerning SK 36/14, op.cit.

irrational to seek to limit particular constitutional informative rights, which jointly create a full entirety. Performing their law – here, access to public information only on the basis of statutory arrangements – through a particular entity of law, not only citizens but also foreigners, are deprived of relevant constitutional protection (the rule of direct utilization of constitutional regulations)⁴², and also the possibility to use the constitutional complaint. I also fully agree with the view expressed by judge P. Tuleja, that in a situation, in which the “constitutional claim is filed by a legal person (for example an association), the Tribunal acknowledges that it lies within the personal scope of art. 61 section 1 of the Constitution.

If a constitutional complaint was filed by a citizen, for example a member of an association, the constitutional complaint would be inadmissible due to a different reason. Such a citizen would not possess the final statement, mentioned in art. 79 sec. 1 of the Constitution as the addressee thereof is an association⁴³.

Finally, it is worth mentioning that constitutional rights shall only serve an entity as a warranty, protecting from extensive or illegal interference of the state and other public entities (including those acting on behalf of public officials)⁴⁴. Obtaining public information, within the right to access public information is crucial not only to protect Polish citizens, but also all legal entities, who – of course with taking into account the essence of each freedom and right – can prove that such protection does not apply for them.

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⁴² P. Tuleja, *Stosowanie Konstytucji RP w świetle zasady jej nadrzędności – wybrane problemy*, Kraków 2003, p. 382 et seq.

⁴³ A distinct sentence of the Constitutional Tribunal judge P. Tuleja in case SK 36/14, op.cit.

⁴⁴ Trzciński, *Zakres podmiotowy i podstawa skargi konstytucyjnej*, [In:] *Skarga konstytucyjna*, ed. J. Trzciński, Warszawa 2000, p. 53.

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