



**Poland and international control mechanisms
for the enforcement of economic, social and cultural rights, children's rights and
rights of persons with disabilities**

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1. Introduction

- Poland has not yet ratified any international treaty devoted to economic, social and cultural rights, children's rights and rights of persons with disabilities, which would enable individuals or their organisations to seek remedies at the international level.
- The arguments against the adoption of such treaties presented by the Polish Ministry of Foreign Affairs are rather unconvincing, in particular those regarding financial constraints. The practice of international human rights protection bodies (including the European Court of Human Rights) does not support such concerns.
- Considering the above, it may reasonably be argued that the Government of Poland fails to take sufficient measures to improve the protection of individual rights, and – contrary to a common opinion – does nothing to promote human rights internationally. Individuals are deprived of real protection and cannot seek effective remedies against Poland's violations of economic, social and cultural rights, children's rights and rights of persons with disabilities at the international level.
- In light of the crisis of the control mechanism operated by the European Court of Human Rights, states should advance rather than limit such opportunities for accessing complaint mechanisms. The current schemes for governmental reporting on the enforcement of individual international treaties are time-consuming and ineffective from the individual's point of view. They have also limited impact on the promotion of rights enshrined in a given treaty.
- Poland's failure to provide its nationals with an opportunity for challenging violations of second generation rights effectively strips these rights of any meaningful significance. As for children's rights and rights of persons with disabilities, the absence of ratification of complaint instruments cast doubts on

whether Polish authorities actually intend to abide by these rights. The international law instruments described below should be ratified as soon as possible.

➤ **Poland does not allow its citizens to submit (individual or collective) complaints to the following international control bodies:**

- 1) UN Committee on Economic, Social and Cultural Rights;**
- 2) European Committee of Social Rights;**
- 3) UN Committee on the Rights of the Child;**
- 4) UN Committee on the Rights of Persons with Disabilities.**

Below, this paper will quote an official position statement of the Polish Government on the discussed complaint procedures, expressed in the reply of an under-secretary of state at the Ministry of Foreign Affairs to parliamentary question no. 26509 regarding the current status or ratification of international obligations of the Republic of Poland in respect of the United Nations human rights protection conventions (the “MFA opinion”).

2. Optional Protocol to the International Covenant on Economic, Social and Cultural Rights of 10 December 2008

The International Covenant on Economic, Social and Cultural Rights¹ (the “ICESCR” or the “Covenant”) is a basic international law instrument in the area of economic, social and cultural rights. Poland is a party to the Covenant. On 10 December 2008 the UN General Assembly adopted the Optional Protocol to the ICESCR,² which entered into force on 5 May 2013. The Protocol sets out a mechanism for submission of individual and inter-state complaints (in articles 1 and 10, respectively) to the UN Committee on Economic, Social and Cultural Rights (currently led by a Pole, Prof. Zdzisław Kędzia).

Poland has not signed the Protocol, explaining that “The Republic of Poland (...) expresses reservations about the mechanism of international review of the enforcement of social rights put in place by the Protocol. A possible cause of concern is the financial consequences of decisions that Poland would be obliged to implement. Poland may consider putting its signature to the Protocol after we learn more about the practice of the instrument’s application, and in particular the lines of interpretation of the Covenant developed by the Committee on Economic, Social and Cultural Rights in the process of examination of complaints. So far, the Committee has not issued any decision in this respect. At the same time it must be noted that five years passed since the Protocol was opened for signature before it entered into force and so far a low number of only 12 states have ratified it, including just four EU Member States (Finland, Portugal, Slovakia, Spain).”³

¹1977 Journal of Laws (Dz.U.), No. 38, item 169.

²Resolution A/RES/63/117.

³<http://www.sejm.pl/Sejm7.nsf/InterpelacjaTresc.xsp?key=3345FA4E> (accessed on 1 December 2014).

The aforementioned Poland's reservations can be summarised as follows: according to the Polish Government, complaints to international control bodies are groundless because of the very nature of the rights they invoke; violations of such rights are not judicially actionable as they do not create any legal rights but merely indicative and programmatic provisions.⁴

In the context of the above position, reference should be made to General Comment No. 3 of the Committee on Economic, Social and Cultural Rights to the ICESCR regarding the nature of the Covenant's obligations imposed on State Parties.⁵ The Committee noted that although a majority of Covenant obligations are programmatic principles, or "obligations of conduct", that need to be progressively implemented, the Covenant also imposes obligations that must be immediately complied with.⁶ Moreover, all rights, thus also these of programmatic nature, have their minimum essential level (termed "minimum core obligation") that should be incumbent upon the State⁷ *and subject to international review*.

The lines of ICESCR interpretation are generally determined by the adoption of "General Comments".⁸ Consequently, any interpretation given during examination of a complaint should not substantially divert from that contained in a General Comment.

Real-life example

Currently, there are three cases pending before the UN Committee on Economic, Social and Cultural Rights. One of the two cases brought against Spain involves a denial of access to a judicial remedy to protect the complainant's right to housing. The other concerns discrimination in access to pension.

3. Additional Protocol to the European Social Charter of 9 November 1995 Providing for a System of Collective Complaints

The Charter of Social Rights of the Council of Europe is the equivalent of the International Covenant on Economic, Social and Cultural Rights within a regional

⁴Record of the 43rd session of the UN Committee on Economic, Social and Cultural Rights, 16 November 2009, E/C.12/2009/SR.37, para. 34.

⁵CESCR General Comment No. 3: The Nature of STATES Parties' Obligations (Art. 2, Para. 1, of the Covenant), 1 January 1991.

⁶*Ibidem*, para. 1.

⁷*Ibidem*, para 10.

⁸A list of General Comments can be viewed at the website of the UN Committee on Economic, Social and Cultural Rights,

http://tbinternet.ohchr.org/_layouts/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=9&DocTypeID=11 (accessed on 1 December 2014).

(European) system of human rights protection.⁹ This collective term covers five international treaties: 1) The European Social Charter of 18 October 1961 (the “ESC”); 2) The Additional Protocol to the European Social Charter of 5 May 1988; 3) The Protocol amending the European Social Charter of 21 October 1991; 4) The Additional Protocol to the European Social Charter Providing for a System of Collective Complaints of 9 November 1995, 5) the Revised European Social Charter of 3 May 1996 (the “RESC”).

The Republic of Poland is a party to the European Social Charter¹⁰ and the Protocol Amending the European Social Charter of 21 October 1991. On 25 October 2005 Poland also signed the Revised European Social Charter, which is still awaiting ratification.¹¹

According to the MFA: “The Republic of Poland has not ratified the Protocol to the European Social Charter Providing for a System of Collective Complaints because of a broadening interpretation of the Charter developed by the European Committee of Social Rights (the law-making activity of a control body) and financial implications that may result from the implementation of the Committee’s decisions. There are doubts concerning the control body’s flexible approach to the extent of complaints, which is to ensure that a given case can be resolved irrespective of the original subject matter of the complaint. It is worth noting that only 13 countries are parties to the Protocol.”

The “law-making” activity of the European Committee of Social Rights criticised by the Polish government does not substantially differ from the “law-making” powers of other international human rights protection bodies, specifically international courts and tribunals, to whose control Poland is subject. In its long 16-year history, the Committee has heard only 111 collective complaints¹², which is merely a fraction of the cases brought against Poland to the European Court of Human Rights just during the first six months of 2014.¹³ Furthermore, there is a closed list of entities that may file a complaint with the European Committee of Social Rights, notably employers’ organisations and representative trade unions (in Poland this would be the “Solidarity” trade union and the All-Poland Alliance of Trade Unions). Private persons do not have the standing before the Committee, which is a material difference as compared to the procedure of the European Court of Human Rights.

A decision of European Committee of Social Rights is not binding *per se*, even on the country against which the complaint has been brought. It serves only as a basis for the

⁹This term is used by A. Świątkowski in *Karta Praw Społecznych Rady Europy*, Warszawa 2006.

¹⁰1999 Journal of Laws, No. 8, item 67.

¹¹More extensively: K. Sękowska-Kozłowska, R. Wieruszewski, “Zaległości ratyfikacyjne Polski w dziedzinie praw człowieka”, *Europejski Przegląd Sądowy* Vol. 03/2013, p. 4-13.

¹²A complete list of complaints heard is available at:

http://www.coe.int/t/dghl/monitoring/socialcharter/Complaints/Complaints_en.asp, (accessed on 1 December 2014).

¹³The respective figure was 1498.

http://www.echr.coe.int/Documents/CP_Poland_ENG.pdf (accessed on 1 December 2014).

adoption of an appropriate resolution or recommendation by the Council of Europe's Committee of Ministers.

Real-life example

The Protocol has been ratified by a number of European countries, including France – this allowed the European Committee of Social Rights to hear the complaint of *FEANSTA v. France* and come to the conclusion that “[R]educing homelessness implies the introduction of emergency and longer-term measures, such as the provision of immediate shelter and care for the homeless as well as measures to help such people overcome their difficulties and to prevent them from returning to a situation of homelessness”.

In another case, *Interights v. Greece*, the European Committee of Social Rights held that by forcibly evicting Roma without providing them with suitable alternative accommodation and tolerating the unacceptable living conditions of the Roma, the Greek authorities have breached Article 16 of the ESC, i.e. the right of the family to social, legal and economic protection.

4. Optional Protocol to the Convention on the Rights of the Child of 19 December 2011

The Republic of Poland is a party to the Convention on the Rights of the Child¹⁴ of 20 November 1989. This year, the Polish Sejm commemorated the 25th anniversary of the adoption of the Convention by establishing the National Day of Children’s Rights. On 19 December 2011, an Optional Protocol to the Convention was adopted. Poland signed it on 30 September 2013. The Protocol sets out a mechanism for submission of individual and inter-state complaints (in articles 5 and 11, respectively) to the United Nations Committee on the Rights of the Child. The Protocol has not yet been ratified.

According to the MFA: “The Republic of Poland has not yet ratified the Optional Protocol to the Convention on the Rights of the Child of 19 December 2011 because so far no in-depth analysis of the financial implications of possible decisions against Poland has been made. The Ministry of Labour and Social Policy reported that appropriate works will be initiated in the third quarter of 2015. It is worth mentioning that so far only ten countries have ratified the Protocol, including three EU Member States (Germany, Spain and Portugal).”

Since Poland signed the Protocol, the Ombudsman for Children Rights, Marek Michalak, has been taking endeavours to secure the ratification of the instrument.¹⁵ Poland was

¹⁴1991 Journal of Laws, item 120, No. 526.

¹⁵Cf. e.g. the statement of the Minister of Labour and Social Policy on the ratification of the Third Optional Protocol to the Convention on the Rights of the Child of 27 August 2014.

one of initiators of and a main driving force behind the works on the said Protocol. Therefore, its ratification is especially desirable for developing the image of Poland as a responsible member of international community.

5. Optional Protocol to the Convention on the Rights of Persons with Disabilities of 13 December 2006

Poland has relatively recently become a party to the Convention on the Rights of Persons with Disabilities of 13 December 2006.¹⁶ The optional protocol, adopted on 13 December 2006, established a complaint mechanism for the Convention. According to this Protocol, ratified by 85 state-parties,¹⁷ the UN Committee on the Rights of Persons with Disabilities was given the power to accept individual complaints (article 1). So far, the Committee has used this power on eight occasions.¹⁸

The MFA opinion reads: “The Republic of Poland has not ratified the Optional Protocol to the Convention on the Rights of Persons with Disabilities of 13 December 2006 because of reservations about the mechanism of international review of the enforcement of social rights put in place under the Protocol. A possible cause of concern is the financial consequences of any decisions that Poland would be obliged to implement. According to the Ministry of Labour and Social Policy, Poland may reconsider the decision on the accession to the Protocol after we learn more about the practice of the instrument’s application, and in particular the lines of interpretation of the Convention developed by the Committee on the Rights of Persons with Disabilities in the process of examination of complaints. So far, decisions on the merits have been issued in five cases”.

Real-life example

In *Zsolt Bujdosó and five others v. Hungary*, the Committee explicitly stated that every restriction of voting rights imposed on persons with intellectual disabilities was inadmissible.

Replying to the complaint made in another Hungarian case by *Szilvia Nyusti and Péter Takács*, the Committee held that a failure to provide access to ATMs for visually impaired persons is a violation of the UN Convention on the Rights of Persons with Disabilities.

<http://brpd.gov.pl/aktualnosci-wystapienia-generalne/w-sprawie-ratyfikacji-iii-protokolu-fakultatywnego-do-konwencji--0> (accessed on 1 December 2014).

¹⁶2012 Journal of Laws, item 1169.

¹⁷United Nations Treaty Collection website

https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-15-a&chapter=4&lang=en (accessed on 1 December 2014).

¹⁸The cases are listed on the website of the UN Committee on the Rights of Persons with Disabilities, <http://www.ohchr.org/EN/HRBodies/CRPD/Pages/Jurisprudence.aspx> (accessed on 1 December 2014).

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