

## Decision

dated 11 February 1992 (K. 14/91)

The Constitutional Tribunal sitting with the bench composed of the Chairman and Vice-President of the Constitutional Tribunal, Leonard Lukaszuk, and Judges Czeslaw Bakalarski, Kazimierz Dzialocha (Reporting Judge), Tomasz Dybowski, Maria Labor-Soroka, Wojciech Laczkowski, Remigiusz Orzechowski, Mieczyslaw Tyczka, Janina Zakrzewska, and Andnej Zoll.

(...)

held

**1. that article 6, section 4, article 7, section 6, article 8, article 10, section 1, article 11, sections 1, 2 and 4, article 12, section 1, article 21, section 4 with the exception of the deprivation of the right to allowances by virtue of state distinctions, article 27, sections 2 and 3, article 28, section 1, article 29, sections 1 and 3, article 32, section 4, and article 35, sub-section 11 of the Act dated 17 October 1991 on the Revaluation of Retirement and Disability Pensions, the Principles of Setting Retirement and Disability Pensions and Amendments to Certain Acts (Journal of Laws, Number 104, Item 450) contravene article 1 of the Constitution of the Republic of Poland in that portion in which the statement is made regarding the rule of law to the extent to which they worsen the terms for obtaining the right to retirement or disability pensions, but they do not contravene article 3, section 1 and article 7 of the Constitution of the Republic of Poland.**

**Article 7, section 6 and article 27, section 3, article 21, section 4, and article 32, section 4 of the Act cited above contravene article 1 in the portion making the statement regarding social justice and article 67, section 2 of the Constitution of the Republic of Poland, while article 6, section 4 and article 7, section 6 of the Act cited. contravene article 70, sections 1 and 2, sub-section 1 of the Constitution of the Republic of Poland.**

**2. that article 26 cited in Item 1 of this Decision contravenes article 1 of the Constitution of the Republic of Poland in the section laying down the rule of law, and article 70, section 1 as well as section 2, sub-section 1 of the Constitution of the Republic of Poland to the extent to which it pertains to persons endowed with the right to benefits or who satisfied the conditions to receive such benefits prior to the date when the statute cited came into force regardless of the date when the application for benefits was filed.**

**3. that article 22, sections 1 and 2 of the Act cited in Item 1 of this Decision contravenes articles 1 and 7 of the Constitution of the Republic of Poland.**

**4. that article 23, sections 1 and 2 of the Act cited in Item 1 of this Decision contravenes article 1 of the Constitution of the Republic of Poland.**

**5. that article 28, section 1, sub-section 2 and section 2 in connection with article 10, section 1, sub-sections 2 and 3 as well as article 27, section 4 in connection with section 2 of that article as well as article 7, section 2 of the Act cited in Item 1 of this Decision contravene article 67, section 2 of the Constitution of the Republic of Poland.**

**6. that article 24, section 3, sub-section 1 of the Act cited in Item 1 of this Decision contravenes article 1 and article 67, section 2 of the Constitution of the Republic of Poland to the extent to which it pertains to persons who took early retirement pursuant to the regulations of the law issued on the basis of article 27, section 3 of the Act dated 14 December 1982 on Pension Benefits for Employees and Their Families (Journal of Laws, Number 40, Item 267 with subsequent amendments). For their part, articles 24 and 25 of**

**the Act cited above contravene articles 7 and 68 of the Constitution of the Republic of Poland.**

**7. that article 47 of the Act cited in Item 1 of this Decision contravenes article 70, section 1 as well as section 2, sub-section 1 of the Constitution of the Republic of Poland.**

**8. that the provisions of the following:**

**- article 29a of the Act dated 24 May 1990 on Amendments to Certain Regulations Governing Pension Benefits (Journal of Laws, Number 36, Item 206) in their wording as established in the Act dated 24 May 1990 on Pension Benefits for Employees and Their Families and the Act on Amendments to Certain Regulations Governing Pension Benefits (Journal of Laws, Number 66, Item 309) and article 1 of the Act dated 14 December 1990 on the Revaluation of Retirement and Disability Pensions in the Case of Persons Over Eighty and Amendments to Certain Regulations Governing Pension Benefits (Journal of Laws, Number 92, Item 540) restricting the revaluation of the retirement and disability pensions to persons who are or will be eighty by 31 December 1990, bypassing persons who will be seventy-five by 31 December 1990 as well as those who will be eighty after that date in any revaluation; and**

**- article 2, sections 2 and 3 as well as articles 3 to 5 of the Act dated 14 December 1990 on the Revaluation of Retirement and Disability Pensions in the Case of Persons Over Eighty and Amendments to Certain Regulations Governing Pension Benefits (Journal of Laws, Number 92, Item 540) contravene article 1, article 3; section 1, article 67, section 2, article 68, article 78, and article 81 of the Constitution of the Republic of Poland.**

**9. that the proceedings shall be discontinued in reference to the statement of nonconformity with the Constitution of the Republic of Poland concerning articles 16, 74 and 741 of the Act dated 14 December 1982 on Pension Benefits for Employees and Their Families (Journal of Laws, Number 40, Item 267 with subsequent amendments) in the wording as established in the Act dated 24 May 1990 on Amendments to Certain Regulations Governing Pension Benefits (Journal of Laws, Number 36, Item 206).**

**10. that the allegation on the nonconformity of the following provisions of the Act cited in Item 1 of this Decision shall be left without any course of action: article 21, section 4 of the Act cited in Item 1 of this Decision with article 89 of the Act dated 26 January 1982 entitled the Teacher's Charter (Journal of Laws, Number 3, Item 19 with subsequent amendments), article 10, section 1 and article 28, section 1 with article 3 of the Act dated 14 December 1990 on the Revaluation of Retirement and Disability Pensions in the Case of Persons Over Eighty and Amendments to Certain Regulations Governing Pension Benefits (Journal of Laws, Number 92, Item 540) as well as article 11, section 4 and article 29, section 3 with article 19 of the Act dated 12 June 1975 on Work Accident and Vocational Disease Benefits (Journal of Laws, 1983, Number 30, Item 144 with subsequent amendments).**

**11. that the allegation on the nonconformity of article 21, section 4 of the Act cited in Item 1 of this Decision with collective labor agreements shall be left without any course of action.**

**Furthermore, the Constitutional Tribunal, by virtue of article 6 of the Constitutional Tribunal Act (uniform text in Journal of Laws, 1991, Number 109, Item 470), shall present to the Sejm its comments regarding the inconsistencies identified in article 45 of the Act cited in Item 1 of this Decision that must be removed in order to maintain the cohesiveness of the legal system of the Republic of Poland.**

## Reasoning

(...)

### III

The suggestion (...) regarding the existence of a state of superior economic need at the moment at which the challenged Act was ratified failed to find any reflection in the parliamentary debate over the draft legislation. Furthermore, the Constitutional Tribunal has taken the stand that no state of superior economic need may serve as a basis for adjudication in matters of the constitutionality of legislation for the following reasons: (a) If one were to agree that a state of superior economic need existed, then the Constitutional Tribunal would be unable to derive legal consequences from that fact for lack of any legal basis in the Constitution. Under constitutional rule of law, any state of superior economic need (extraordinary economic situation) should have defined material premises and procedures for introduction specified in the State's basic law. This in its turn, would necessitate extraordinary constitutional legal instruments to rescind it, and not a mere parliamentary act. (b) Under the rule of law, the law is a phenomenon that is, to a great extent, autonomous of the State as an organization implementing defined political tasks and it should not serve to bring to life political or economic objectives in a manner that may depreciate the role of the law and its acceptance by society. The use of the law as an instrument for implementing economic objectives, encompassing cases of economic difficulties, necessitates the observance of constitutional principles in force for creating law. (c) During the course of proceedings in this case, it was not proven beyond a shadow of a doubt – this the Constitutional Tribunal brings up outside the course of reasoning proper – that the challenged solution as accepted in the Act cited was the only possible and optimum solution from the point of view of legislative objectives, nor even from the point of view of necessity, bearing in mind the economic and financial conditions for the functioning of the social security system.

(...)

The scope of review exerted by the Constitutional Tribunal with respect to legislation, encompassing not only the review of the constitutionality of the provisions of legislation (norms) but also the „observance of legislative procedures” during their passage, placed before the Constitutional Tribunal the task of determining if such „legislative procedures,” forming a component of the rule of law (article 1 of the Constitution) and legality (article 3 of the Constitution) were applied correctly in the process of passing the legislation in question. The concept of „legislative procedures required in issuing a normative act” (article 2 of the Constitutional Tribunal Act) should be understood as not only consisting of actions aimed at the parliament examining draft legislation and ratifying it by way of a vote in both chambers as defined in the Constitution and the bylaws of those chambers, but also as to the preparation of the draft legislation with the participation of organized public groups (organizations) if such participation is envisaged by the law. In this case, in light of the social content of social security legislation, the first question was whether the requirement for trade unions to review the draft legislation was satisfied to the extent encompassed by trade union objectives as established in article 19, section 1 in connection with article 8 of the Act dated 23 May 1991 on Trade Unions (Journal of Laws, Number 55, Item 234).

This question came to the attention of the Constitutional Tribunal as a result of the reservations forwarded by the applicant during proceedings. The representatives of the applicant – the trade unions – declared, in essence, that the draft version of this Act was not consulted with them. The Legislative Bureau of the Office of the Sejm, in the information provided on 9 January 1992 to the Constitutional Tribunal, stated that „The documents held do not state that the government's draft legislation (Sheet number 1069) was the subject of

consultation with trade unions, but that trade union representatives took part in all of the sessions of the Commission working on the draft legislation” (p. 2 of the memorandum). It was on the basis of an examination of the work on the draft legislation dated 2 May 1991 (as set forth in the Sejm’s Record Number 851) and the closely related draft version of the Act dated 5 September 1991, as well as on the basis of shorthand notes from the session of the Sejm (Shorthand Report Number 75 from the Session of the Sejm dated 25-28 September 1991) that the Constitutional Tribunal established that the legal requirement of consulting draft legislation with trade unions was satisfied because the legislative process leading up to the passage of the second draft legislation in the form of the Act dated 17 October 1991 on the Revaluation of Retirement and Disability Pensions was, with respect to its merits and in formal terms, a continuation of the legislative process commenced in May of 1991 through the Government’s initiative. The draft version of the Act dated 5 September 1991 was, in fact, a part of the first draft legislation isolated from it in terms of subject matter, and that first draft legislation was subject to consultations between the Government and the trade unions. This was confirmed at the session of the Social Policy Commission of 28 June 1991 and all members of the Commission received the comments forwarded by the trade unions in writing. Strictly speaking, the Sejm’s work on the second draft legislation was a continuation of the legislative process commenced on the first draft legislation on 2 May 1991 because its tabling before the Sejm was the result of the Sejm summoning the Government to redraft the draft legislation pursuant to article 36, section 3 of the bylaws of the Sejm following the vote on the motion to reject the initial draft legislation. It is for the reasons cited above that the Constitutional Tribunal does not share the view of the applicant – the group of Members of the Sejm of the present term and of the FZZ Górnicy Federation of Trade Unions of Miners regarding the nonconformity of the Act dated 17 October 1991 on the Revaluation of Retirement and Disability Pensions with article 3, section 1 of the Constitution.

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#### IV

The Constitutional Tribunal, bearing in mind the agreement reached as to the assumptions and actual content of the provisions of the Act challenged in the Petitions and encompassing Items 1 and 2 of the Decision, came to the conclusion that the basis for assessment (review) of their conformity with the Constitution should be article 1, article 67, section 2 and article 70 sections 1 and 2, sub-section 1 of the Constitution. This is due to the appropriateness of the nature of the legal matter encompassed by the regulations of the provisions of the Act and the provisions of the Constitution cited herein. This is also in line with the suggestions of the majority of Applicants. It should be stressed, however, that a portion of the Applicants challenged the conformity of the provisions of the Act cited herein with article 7 of the Constitution; the Constitutional Tribunal was also obliged to examine this allegation. Two Applicants – the group of Members of the Sejm and the Federation of Trade Unions of Miners – in their petitions, also claimed that the provisions of the challenged Act are inconsistent with article 3 of the Constitution (the group of Members of the Sejm) or with section 1 of that article (the Federation of Trade Unions of Miners). However, due to the fact that neither in the reasoning of the written petition nor during the course of the proceedings did the Members of the Sejm undertake any explanation of their allegation of nonconformity between the Act and the whole of article 3 of the Constitution, the Constitutional Tribunal, failing to see any basis for examining the provisions of the Act challenged by them from the point of view of the wording of article 3, section 2 of the Constitution – i.e. the question of legality – bypassed this allegation in its assessment of the constitutionality of the provisions of the Act, restricting itself to an examination of the accuracy of the allegation regarding the infringement of article 3, section 1 of the Constitution. Its decision – discussed above – was

negative. It does not share the view of the Applicants regarding the violation of regulations defining the procedures for passing legislation.

Prior to undertaking any decision regarding the nonconformity of the regulations of the Act dated 17 October 1991 on the Revaluation of Retirement and Disability Pensions as listed in Items 1 and 2 of this Decision with the Constitution, the Constitutional Tribunal conducted an interpretation of that part of article 1 pertaining to the rule of law as well as of article 70, sections 1 and 2, sub-section 1 of the Constitution. As to that part of article 1 of the Constitution expressing social justice as well as where there is discussion of equality (article 67, section 2 of the Constitution), the Constitutional Tribunal made reference to earlier interpretations made during prior adjudication.

As to the interpretation of article 1 of the Constitution in the section pertaining to the rule of law with respect to social security law within the scope of these proceedings, the Constitutional Tribunal lays it down in the form of the hypotheses listed below. The Constitutional Tribunal also makes reference to its jurisprudence as well as to legal doctrine.

1. The rule of law embodies maintaining the confidence of citizens in the State; the protection of acquired rights (also the non-retroactive effect of law) is tied to the foregoing according to the principle of instrumental links:

2. Maintaining confidence is the guiding principle serving as the basis of the social security relationship as it is based on the legal structure of maintaining confidence and on the conviction of the insured that upon the performance of defined terms (work, premiums) and upon the elapse of a defined period of time (achievement of the required age) or the occurrence of some other insurance ask (disability), the insured shall receive defined benefits – in principle greater as work effort increases – which, put simply, means that this will be taken on by the social security system. Thus, the social security system takes on the form of a unique type of social contract governed by the principle of *pacta sunt servanda*.

3. Equitably (justly) acquired rights, including rights acquired within the framework of the social security system, fit within the binding scope of the protection of acquired rights (compare with the Constitutional Tribunal's decision in case K. 7/90). Thus, only limited protection of acquired rights exists. In principle, there is no reason to assume – if there is no justified basis for such an assumption – that retirement and disability pension rights, inclusive of the level of such benefits, as stemming from the rules by which they are determined, are acquired inequitably.

The matter of industry-related allowances, however, requires separate consideration. This specifically pertains to the question of whether all allowances acquired during the period of the People's Republic of Poland were acquired equitably and therefore, if under the conditions of the present system the State has the appropriate axiomatic justification. Regardless of the results of the examination of their justification, which according to the Constitutional Tribunal should primarily be the task of the legislative body, it should be assumed that the general retraction of all basic allowances of this type from the parties so endowed, including above all those that are justified by extremely difficult working conditions, cannot be reconciled with the protection of equitably acquired rights. The decision would be different if the allowances were to be compensated with other solutions pertaining to the level of benefits or – which, however, is different in meaning – if the remuneration for work was high enough. This premise is supported by the principle of social justice, which shall be discussed separately.

Keeping the above in mind, the Constitutional Tribunal has held that article 21, section 4 of the Act dated 17 October 1991 on the Revaluation of Retirement and Disability Pensions

is inconsistent with article 1 of the Constitution. State distinction-related allowances were excluded; however, from the scope of this decision because they do not entirely fit within the definition of social security benefits which are work-related or cover the needs created by random events or other related circumstances (compare with W Szubert: *Ubezpieczenie Społeczne. Zarys systemu* [Social security – An Outline of the System], Warsaw, 1987, p. 57 ff). This was already noted by the Constitutional Tribunal in its decision on case K. 1/88 (Collection of the Constitutional Tribunal's Decisions, 1988, p.106).

4. The protection of acquired rights encompasses both the rights acquired by way of a concrete final decision granting benefits and the rights acquired *in abstracto* pursuant to legislation prior to the submission of an application regarding the award thereof. As to expected rights, the need for their protection, by their very nature, stems from the social security system, which is based on the assumption that in exchange for premiums – work input – guarantees of future, gradually increasing rights are created (compare with the Constitutional Tribunal's decision in case K. 1/88 as well as the opinion of C. Jackowiak, p. 5). The Constitutional Tribunal, in spite of all the difficulties emerging at this point, has taken the stand of protecting expected rights to their maximum extent – i.e. satisfying, in principle; all legislative premises regarding the acquisition of rights as governed by the given act regardless of its relation to later acts. Further protection of expectations, i.e. within the whole actually formed scope of social items dependent on the time period of premiums, would not be in sufficient harmony with the present nature of the social security system in Poland and would necessitate Poland's ratification of ILO Convention Number 102: A more far-reaching stand could also greatly impede basic reform in the Polish social security system with respect to the new principles of the State's socio-economic system.

It is this stand of the Constitutional Tribunal that should be used to explain the decision that article 26 of the Act dated 17 October 1991 on the Revaluation of Retirement and Disability Pensions is inconsistent with article 1 of the Constitution-within the scope defined in Item 2 of this Decision...

5. The primary assumption, applied by the Constitutional Tribunal was that retirement and disability pension benefits are subject to strong legal protection. They guarantee a minimum of social security to the beneficiaries, especially bearing in mind the low level of benefits in relation to the high and ever-growing costs of living and, in spite of the redistributive function of the social security system and the State Budget's growing participation in creating the Social Security Fund (FUS), they are strongly linked to the insured's personal input in the creation of the social security funds. In his expert opinion, Professor C. Jackowiak expressed the view that it is the „link between the input of work by the employee and the accumulation of social security funds that is the main material premise of the right to benefits and is, at the same time, the basic argument in favor of protecting such rights.” In conclusion, as well as for the reasons cited above, the protection of retirement and disability pension rights, as was stressed by the Commissioner for Citizens' Rights, is of primary importance from the point of view of maintaining the confidence of citizens in the State.

6. The foregoing statements do not imply that all modifications or restrictions whatsoever to equitably acquired retirement and disability pension rights are impermissible. The Constitutional Tribunal unequivocally stated its support for the permissibility of such changes in its decisions in cases K. 1/88 and K. 7/90. This is particularly pertinent in the case of the reform of retirement and disability pension rights during an economic crisis in the State and the poor financial state of the social security system. The lawmaker is, in fact, obligated to take appropriate legislative action under such conditions whenever necessary and to the degree to which the economy's crisis is a constitutional matter. What is more, the velocity of

change within the realm of economic and social relations, especially over a period of basic transformations in these relations as is the case at present, with the concurrent explicitly restricted regulation of the constitutional grounds of social security law in article 70, sections 1 and 2, sub-section 1 of the Constitution, demands that the lawmaker be given a relatively broad range of freedom in molding the law. As is the case in the constitutional legislation of other democratic States, the Constitutional Tribunal cannot test if, in detail, the lawmaker chooses the most expedient and appropriate solution (compare with the Constitutional Tribunal's decision in the Federal Republic of Germany dated 23 January 1990, published in *Bundesanzeiger*, 1991, Number 80, p. 5).

The subsidization of social security funds, even to an enormous degree, by the State Budget, in and of itself cannot serve as justification for restricting acquired retirement and disability rights (according to data from the Ministry of Labor and Social Policy, subsidies from the State Budget covered approximately 19.7% of expenditures in 1991 and approximately 28% in 1992). This is because budgetary subsidies are a rule in contemporary States as well as because the social security fund in Poland is encumbered – as rightly noted by the Applicants – by other expenditures that are not directly linked to social security, and finally because its financial resources are encumbered by retirement and disability benefits to persons covered by other legislation in which there is no obligation to pay premiums (the armed forces, the police, the department of corrections, etc.). Experts have also pointed out that retirement and disability rights cannot be restricted without agreeing that the criteria for selecting the types of resources financed by the State be socially justified and without an objective conviction that the State is undertaking sufficient actions to combat economic crisis. Furthermore, the concepts of social equality and justice signify that „the weight of economic crisis should encumber all social strata and not specifically affect only certain strata or groups” (C. Jackowiak), especially if these were to have been pensioners.

7. In the event that sufficient justification is found to restrict acquired retirement and disability pension rights, the lawmaker should apply maximum effort so that the new, less advantageous legal regulations are undertaken maintaining democratic procedures as stemming from the rule of law and the binding provisions of law. It follows from above that the new regulations should be ratified in the wake of negotiations with the interested parties or their representatives.

Secondly, the lawmaker should create a maximum of legal security, under the given circumstances, for persons encompassed by the new legal regulations. Since the citizens of a land ruled by legality should not be suddenly surprised by regulations that are to their disadvantage, the lawmaker, in order to preserve safety, should use techniques such as transitory regulations phasing in the reduction of benefits over time, or the suitable adjustment period (*vacatio legis*) should be long enough to permit the interested parties to adapt to the changed legal situation to the best of their ability. The absence of a suitable adjustment period (*vacatio legis*) is a violation of article 1 of the Constitution if it infringes on acquired rights or expectations thereof. Attention should be drawn here to the fact that since retirement and disability rights were established previously and gradually and since it is impossible to replace lost (restricted) rights with new guarantees over a short period of time—especially with respect to pensioners, the period of adaptation to the new legal regulations must be sufficiently long.

No such guaranties of legal and social security were created by the Act in question with respect to the persons whose rights were affected by the provisions of the Act dated 17 October 1991 on the Revaluation of Retirement and Disability Pensions when considering the entirety of the technique of direct action applied by the new Act. This technique is convenient for the lawmaker in that it facilitates rapid changes in the law by subjugating, under the new law, matters regulated by prior laws. However, this leads to changes, as is the case here, that

surprised those insured and infringed upon their confidence in the law. It is difficult to reconcile this technique with the requirements of the rule of law in a matter of social import as significant to the individual as social security. It is for this reason that the absence of guaranties of the gradual adaptation of those insured to new, less advantageous regulations as created by the Act was a deciding factor for the Constitutional Tribunal in deciding that the provisions discussed in Items 1 and 2 of the Decision contravene article 1 of the Constitution.

In this context, a note should be made on the absence of additional and optional insurance systems in Polish law to supplement pension revenues stemming from the single, universally obligatory social security system, as well as the absence of any legal basis to create company social security systems. It is also necessary to agree with the Commissioner for Citizens' Rights in the statement that other methods of securing material resources for times of illness, disability, or old age were inaccessible throughout the postwar period for the bulk of people employed due to relatively low wages or the lack of practical effectiveness, as was the case with pensions procured through the PZU State Insurance Company, due to the lack of appropriate revaluation of the amounts designated for individual social security.

The Constitutional Tribunal, however, did not concur with the stance taken by many Applicants – the trade unions (...) – regarding the nonconformity of the provisions of the Act dated 17 October 1991 on the Revaluation of Retirement and Disability Pensions with article 7 of the Constitution in the part presenting total protection of personal interest. The Constitutional Tribunal is of the opinion that the constitutional principle under discussion cannot serve as a separate basis for the decision on the provisions of the Act because of, in the most general sense, the different legal nature of retirement and disability benefits as compared with property elements encompassed by the concept of ownership as understood by the Constitution. Thus, article 7 of the Constitution, in this part, is irrelevant as a basis with respect to the provisions of the legislation guaranteeing retirement and disability benefits.

In line with the decisions of the Constitutional Tribunal, personal interest is synonymous with property *sensu stricto*, but it also encompasses other property rights; not exclusive of rights stemming from obligations (the Constitutional Tribunal's decision in cases K. 3/88 and K. 12/90). Primarily, the right to social security benefits cannot in any way be qualified as property in the narrow meaning of the word, although the legal position of the insured is similar to the position of an owner in certain ways. As is the case with property; acquired retirement and disability benefits serve the insured individual as a free and responsible way to mold living conditions. However, they are not benefits stemming from owned property, they are not among property elements of the insured person, and they cannot be the subject of succession (inheritance). The same is true of the premiums, sometimes referred to as „set aside work” or „set aside employee savings” as some of the Applicants would have it in this case. It is also difficult to claim that the rights of the insured to benefits have the qualities of ownership in the broader constitutional sense as what is known as ownership of an annuity, a structure known in the constitutional decisions of other countries. A barrier to accepting this concept with respect to Polish insurance law is the fact that the benefits belonging to the insured cannot be considered an equivalent of payments made in the form of insurance premiums directed to the FUS Social Security Fund, especially in light of the fact that State Budget subsidies play a significant role in the present system of financing retirement and disability pensions. And finally; the right to social security benefits cannot be ranked among the rights stemming from obligations. The relationship of the insured is not a full relationship of obligation in the general view of the study of law. In this case there is no strict interdependence between the benefit and the premium (a share in the creation of a defined portion of the insurance fund). This insurance relationship has no synallagmatic nature characteristic of mutual obligations in the civil law sense.

It is for this reason that the Constitutional Tribunal held that the provisions encompassed by this decision do not contravene article 7 of the Constitution and that acquired rights to social security benefits, as discussed in those provisions, do not benefit from the guaranties of complete protection of personal interest.

## V

As follows from the text of Items 1 and 2 of this Decision, article 7, section 6 and article 27, section 3 as well as article 21, section 4 and article 32, section 4 of the Act dated 17 October 1991 on the Revaluation of Retirement and Disability Pensions contravene article 1 of the Constitution in the part laying down social justice as well as article 67, section 2 of the Constitution defining equality.

The principle of social justice claimed by certain Applicants (...) is the primary assumption of the social security system. It primarily appears in the form of a formula for granting benefits in line with work (mainly in the case of pensioners), but also distribution in line with needs (especially in relation to people collecting disability pensions, family pensions, and accident pensions). From the point of view of an evaluation of the challenged provisions of the Act, the Constitutional Tribunal considers the following to be significant components of justice:

1. There is an interdependence between the level and period of premiums (work input) of the insured and the creation and level of the right to retirement and disability benefits. This interdependence is simultaneously a characteristic assumption of the relationship and social security system and it appears more strongly in non-employee insurance systems than in employee insurance schemes. The view of those Applicants who maintain that the premiums are the set aside savings of the insured employees and that there is a state of equality (or mathematical equivalence) between the premium and the level of benefits provided by virtue of the insurance cannot be accepted. The rejection of this view is also strictly linked to the next premise regarding the course for implementing social justice in the social security systems.

2. Social justice is realized in the social security system bearing in mind its redistributive function. Put most simply, redistribution is based on a defined flattening of the level of benefits to the advantage of people with a low benefit base and to the disadvantage of those with a high base. Social solidarity is the justification of social security's function of redistribution forcing the distribution of the burden of benefits over a wider group of people encompassed by social security (compare with W Szubert, *op. cit.*, p. 63).

The attenuation in the level of benefits with respect to persons with a high base necessitates that the proportionality between the level of benefits and premiums be kept in mind – i.e. the insured's share in accumulating the insurance fund. Concurring with the experts, the Constitutional Tribunal has accepted the premise that the level of benefits should be approximately appropriate with respect to the insured's personal share in the creation of the insurance fund, and in no case should it deviate from that share excessively. The principle of proportionality is thus in harmony with justice in the formula assuming distribution by merit and it is here that it finds its justification. This has also been expressed in ILO conventions, including those ratified by Poland – Number 35 (article 7), Number 37 (article 7), and Number 39 (article 9).

3. Social justice demands that prescribed preferences be awarded to those insured parties who were employed under extremely difficult working conditions or in some specific nature if their' work input could not have been appropriately taken into account in the form of a higher benefit base dependent on the level of remuneration (income). These preferences are

also due to those insured parties who suffered disability as a result of an accident at work or vocational disease if the law does not assume specific compensation for them. The importance of the necessity of guaranties does not, in the view of the Constitutional Tribunal, encompass the right to seek indemnity by civil means from the employer for the results of accidents at work or vocational disease due to the difficult economic and financial situation of the employers. And finally, social justice necessitates the protection of beneficiaries receiving the lowest or just slightly higher benefits even if the rules for calculating the benefit base clearly demonstrate that they should be low. In such a case, proportionality in the structure of social security must be adjusted in favor of social justice as a constitutional principle implemented applying the rule of distribution by need and in line with social security's function of redistribution.

Social justice was the basis for reviewing the constitutionality of the Act in question as stated in Item 1 of this Decision (second paragraph) along with equality (article 67, section 2 of the Constitution). In keeping with its jurisprudence the Constitutional Tribunal understands it as an injunction to treat legal entities under identical circumstances, including the realm of social security law, without applying any solutions that are discriminatory or marked by favoritism. The interdiction against favoring certain categories (groups) of entities is not inconsistent with objectively justified social preferences based on justice. This is the interpretation referred to by the Applicants. The OPZZ Polish Nationwide Trade Union Alliance also pointed to the wording of article 26 of the International Citizen's and Political Rights Pacts to reinforce this view. The formula of equality used in those Pacts, however, does not differ in any aspect from equality in article 67, section 2 of the Constitution as interpreted by the Constitutional Tribunal.

The Constitutional Tribunal had social justice and equality in mind as presented above in its decision on the nonconformity of article 7, section 6 and article 27, section 3 of the Act dated 17 October 1991 on the Revaluation of Retirement and Disability Pensions with the Constitution. These provisions had to be deemed inconsistent not only with the rule of law, as was discussed earlier, but also due to their infringement upon justice and equality. The specified provisions of the Act establishing a ceiling on benefits of no more than 250% of mean compensation means that above-average inputs by insured parties in the accumulation of insurance funds are not reflected in appropriately higher retirement or disability pensions. Such a solution does not conform with equality. Experts have demonstrated that the law knows of other ways to flatten benefits in a manner that does not infringe upon the discussed principles of the Constitution, especially by abandoning the collection of premiums on higher remuneration (what are known as „better risks”) and, as a consequence, withholding the right to higher benefits. It is generally believed that in a free market economy a more justifiable method is the restriction of the level of the base amount and the prevention of calculation of benefits on excessive levels, simultaneously serving as a cap above which premiums are not collected (compare with W. Piątkowski: *Ubezpieczenia dziś i jutro* [Insurance Today and Tomorrow], Warsaw, 1990, p. 31). Attention was also paid, during the course of proceedings, to the fact that a form of compensation for higher input of insured parties in the accumulation of insurance funds lacking an equivalence in higher benefits could be the disbursement of the difference in benefits due in securities (bills) issued by the State.

In the above sense, the Constitutional Tribunal also deemed article 21, section 4 of the Act... inconsistent with social justice and equality. Article 21, section 4 abolish... industry - related allowances to retirement and disability pensions without their prior verification as to merits, and primarily without testing if the specific working conditions or work of a specific nature justifies the retention of allowances with respect to defined professional groups. It is the view of the study of law that in the present state of the social security system in Poland

these allowances have a basically justified existence and are an expression of vocational differentiation and distribution according to work in the social security system (compare with W. Szubert, op. cit., p.171). They are also considered to be an indication of proportionality of benefits to work input (compare with W. Jaskiewicz, C. Jackowiak, W Piotrowski, *Prawo pracy w zarysie* [Outline of Labor Law], Warsaw, 1985, p. 499). Professor W Szubert, an expert, did not concur with this view during the course of proceedings. He did state, however, that work that is harmful to human health, responsible, and awarded higher remuneration should encompass additional insurance in exchange for a separate, additional premium. It is also impossible not to notice that in abolishing allowances within the scope encompassed by the challenged Act, such benefits are maintained there with respect to certain professional groups (e.g. the police and armed forces). This is the source of the question as to whether such differentiation finds sufficient social justification. The elimination of allowances bringing about a reduction in benefits with respect to their present level may be considered justified within the present state of the structure of social security if the lawmaker provided compensation for the modifications by way of more just principles of acquiring basic benefits in line with work input (premiums), measured by way of the nature of work, the level of risk to employee health, linked to responsible work, etc. In the Act, such a compensatory meaning of the new principles of calculating benefits may only be attached, in principle, to retirement and disability pensions granted pursuant to the Act dated 1 February 1983 on Pension Benefits for Miners and Their Families for which article 6, section 5 of the Act in question orders the application of higher coefficients for calculating the period of employment 1.8 or 1.5 for every year of work. With respect to other groups of workers (teachers, for example) who elected to take early retirement pursuant to the Act on Early Retirement, the elimination of allowances is an additional injustice in light of their low seniority. If they do not have the right to advantageous coefficients with respect to their employment period, then they cannot benefit from preferences on an equal footing as the new legislation links these to a construct it calls „premium payment periods.”

The Constitutional Tribunal also deemed article 32, section 4 of the Act to be inconsistent with justice and equality. Throughout the interpretation of these principles it is clear that in the situation regulated by these provisions a retreat from the rigorous understanding of proportionality is fully justified in justice and is also dictated by the requirements of equality since this is a case of creating socially justified preferences.

Those retirement-disability benefits awarded in the second half of 1989 and 1990 remain outside the Constitutional Tribunal’s decision as based on social justice and equality. As a result of the amalgamation of various legislative decisions, there was a socially unjustified increase in the retirement and disability pension level granted at this time compared with the benefits awarded in the appropriately earlier period. This fact, noted by certain Applicants as well as the experts in their opinions (specifically compare with the opinion of W Szubert, op. cit., p. 9) cannot find justification in light of social justice and the lawmaker had the right to make good on a faulty decision. It is also impossible to justify the then excessive benefits from the point of view of protection of acquired rights. Their adjustment, however, would have to be by way of concrete legislative norms targeted directly at the mentioned benefits, not by way of subjectively general legislative provisions. They do not make it possible to isolate the legal situations that are not justified by the Constitution and can be declared unconstitutional primarily on the grounds of their nonconformity with social justice and equality.

## VI

The Constitutional Tribunal also reviewed the provisions of the Act encompassed in Items 1 and 2 of this Decision from the point of view of their conformity with article 70,

sections 1 and 2, sub-section 1 of the Constitution. The interpretation of these regulations of the Constitution are contained in the Constitutional Tribunal's previous decisions. It is mainly the Decision in case K. 1/88 that confirms that the injunction to „develop” the right to social security as expressed in the provisions of the basic law cited primarily signifies constitutional guaranties of the legislative terms for acquiring, maintaining, and terminating the right to social security benefits at least at the level which existed when the Constitution came into force.

In practice, the Constitution's guarantee function in this field became possible following the Constitutional Tribunal's commencement of activity in 1986. The development of social security also signifies an injunction to successively (progressively) mold the terms of acquiring rights in the future. These two aspects of the constitutional norm cannot be at odds with each other; they should be mutually harmonized. The injunction for progress in the realm of social security may require modifications and changes in the field of conditions (premises) to acquire the right to benefits in force as was discussed above in a different context. This is especially important in the present phase of the development of Polish law in line with the new system principles formulated in the Constitution of the Republic of Poland as amended on 29 December 1989. Thus, not every change in social security legislation relating to the premises of acquiring rights to benefits must be considered in conflict with the guaranties of article 70, sections 1 and 2, sub-section 1 of the Constitution. From this point of view, many of the assumptions of the Act dated 17 October 1991 as specified in the preface to this reasoning as well as the regulations to implement them should be considered as satisfying the injunction for the progressive development of social security.

However, this does not apply to article 6, section 4 of the Act in the part encompassed by this Decision because it worsens the conditions for acquiring rights to a retirement pension within the realm of the basic premise underlying that right in the form of a required period of employment by abolishing the application of a longer period for work performed under difficult conditions (two years, 1.5 years, fourteen months) with respect to defined professional groups of employees. It is for this reason that it is also inconsistent with article 70, sections 1 and 2, subsection 1 of the Constitution.

In light of the subject matter of the challenged provisions of the Act that primarily regulate, though not exclusively, the new rules with respect to the level of benefits, the Constitutional Tribunal was faced with the question whether and to what extent article 70, sections 1 and 2, subsection 1 of the Constitution also define an overriding directive defining these rules. In line with its earlier decisions, the Constitutional Tribunal confirmed that the specified provision of the Constitution does not contain any specifically defined norms shaping the level (amount) of benefits. In Decision K. 1/88 the Constitutional Tribunal held that the constitutional requirements are satisfied by a level of benefits defined by the autonomous FUS Social Security Fund. This view was presented at a time when the balance of insurance expenditures demonstrated that the system, as a rule, generated a substantial financial surplus from 1980 to 1987; this surplus was then channeled into the State Budget for general use (compare with H. Prasznic: *Finansowanie ubezpieczenia społecznego pracowników* [Funding Employees Social Security], Wrocław, 1990, pp. 110-111), but the Constitutional Tribunal therein expressed a more – general concept. Specifically, that the constitutional assumptions of molding the level of benefits have a basis in the fact that the level of benefits should be approximately proportional to the level of premiums channeled into the insurance fund. This principle maintains its value as a characteristic quality of the insurance relationship in spite of the State's defined share in supplementing the fund because that share – as the experts asserted – is not excessive. The principle of mutuality and proportionality of benefits as the premise of social security therefore generally defines the

statutory rules for setting the amounts of benefits and is subject to protection by the power of article 70 sections 1 and 2, sub-section 1 of the Constitution.

For this reason the Constitutional Tribunal held that article 7, section 6 of the challenged statute, which excessively flattens benefits in relation to those persons who paid an appropriately high premium, is at odds with the mutuality and proportionality of benefits and premiums and is therefore inconsistent not only with the protection of acquired rights (article 1 of the Constitution) but also with article 70, sections 1 and 2, sub-section 1 of the Constitution.

The Constitutional Tribunal has held that article 70, sections 1 and 2, sub-section 1 of the Constitution have been violated by article 26 of the Act in question to the extent discussed in Item 2 of this Decision. Bearing in mind the comment made in section III regarding the determination of the normative content embodied in article 26 of the Act, the Constitutional Tribunal came to the conclusion that the extension of the binding force (the application) of the Act to include the persons endowed with the right to benefits or who satisfied the conditions to acquire them before the Act came into force regardless of the date when the application for benefits was filed, under circumstances in which the new legislation worsens the terms for acquiring the right to benefits or reduces their level, severing the mutuality and proportionality of benefits and premiums, is a blatant infringement against the injunction for the progressive development of social security. This premise should be treated in tandem with the view proffered above regarding the permissibility of modifications to the social security system in keeping with new system principles in the Republic of Poland.

## VII

In Item 2, the Constitutional Tribunal has held that article 22, sections 1 and 2 of the Act dated 17 October 1991 on the Revaluation of Retirement and Disability Pensions defining the level of nursing and total orphan allowances as well as article 34 defining the level of the funeral allowance contravene the Constitution because they establish the level of the allowances directly by applying a specified percentage coefficient for determining the base of the most recently conducted revaluation that defines a specific cash amount. This is not accomplished by way of abstract principles (rules) for setting the levels of allowances. It is for this reason that these regulations are not subject to the protection of the Constitution, including article 1 of the Constitution. As was already stated, the Constitution makes the level of benefits dependent on the proportionality of benefits and premiums in a general way applying the provisions cited in article 70 of the Constitution. Any other view would go too far towards restricting the legislative body's freedom to shape the level of benefits, as discussed above. (...)

## VIII

In an extremely controversial matter, in light of the course of proceedings as well as the opinions of experts, on the conformity between articles 24 and 25 of the Act dated 17 October 1991 on the Revaluation of Retirement and Disability Pensions and the Constitution, the Constitutional Tribunal assumes that social security is a system of benefits insuring against the complete loss or significant restriction in the capacity for gainful employment. In principle, this is the reason why agreement has been denied to collect benefits for such reasons and the unrestricted ability to undertake work or other gainful employment. In addition to this, in Poland, pension benefits are not exclusively based on seniority without bearing in mind other assumptions, especially regardless of maintaining the capacity to work and continue employment for this reason. It is primarily this fact as well as the State's significant participation in funding insurance benefits (with restrictions as to social security from which benefits are basically disbursed out of the premium funds) that justifies the

suspension of benefit collection from social security in the event of unrestricted earnings by the insured as well as the reduction of collected benefits in the event that a prescribed amount of earnings (income) is surpassed. As to the principle, this conforms with the nature of social security as well as its constitutional basis (article 70, sections 1 and 2, sub-section 1 of the Constitution) and ILO conventions Numbers 35 to 40 that permit both the suspension and the restriction of benefits in the situations defined therein.

The Constitutional Tribunal simultaneously concurred with the view that the suspension or restriction of collected social security benefits should not be overly restrictive; its should not exceed certain limits.

(...) The Constitutional Tribunal did not share the view of the Applicants regarding the nonconformity of article 24 and 25 of the Act with article 68 of the Constitution as well as with the international legal acts cited by them. It assumed the following interpretation of article 68 of the Constitution as its basis, bearing in mind the appropriate norms of international law.

The Constitution defines the right to work as the right to employment for remuneration in line with the quantity and quality of work, which conforms with the formula used in article 6 of the Economic, Social, and Cultural Pacts that state that the right to work „encompasses the right of every person to make a living by working,” which signifies, using the wording of the Constitution, nothing more than work for remuneration in line with the quantity and quality of work. Article 6 of the Pacts adds an element *prima facie* that is not taken into consideration in the Constitution. Specifically, that the law (the State) should guarantee the individual free choice or the acceptance of work. In essence, however, the interpretation of article 68 of the Constitution, bearing in mind the wording of other provisions of the Constitution (mainly article 6), assumes free choice and the acceptance of work as a prerequisite to the right to work.

The right to work as seen in the Constitution as well as in the cited Pacts does not imply that the individual has the right to claim employment. All that may be derived from it is the obligation of the State to conduct policies targeted at full and productive employment. This view was shared by all experts taking part in the case. If for no other reason besides this being the nature of the right to work, the restrictions incorporated in article 24 of the Act in question cannot be accepted as contravening article 68 of the Constitution.

One matter, noted by the Commissioner for Citizens' Rights, did come to light, however. Does not freedom of choice and acceptance of work require that the restrictions stemming from articles 24 and 25 of the Act be declared inconsistent with article 68 of the Constitution? Is not the freedom to take up work restricted in this case since someone on a retirement or disability pension may only make a decision regarding the continuation of work or to take employment under threat of suspension of the right to benefits? According to the Constitutional Tribunal, this does not represent a restriction on the right to work, but of specific effects (restrictions) regarding the collection of social security benefits in the form of the suspension or reduction in benefits. This is closely linked with the fact that an employee or someone in business is simultaneously a beneficiary by virtue of social security in the case defined in article 24 of the Act. The second role taken on in this case is of prime consideration – a pensioner or someone with a disability pension does not, by definition, make a livelihood by working. (...)

## IX

In Item 7 of this Decision, the Constitutional Tribunal has held that article 47 of the challenged Act, which established that it shall be in force until 31 December 1993, is

inconsistent with article 1 of the Constitution, or, more specifically, it is inconsistent with maintaining confidence as was discussed earlier. (...)

The legal state created by article 47 of the Act results in complete uncertainty as to the legal positions of the insured which follow from the Act. This may cause the beneficiaries to forfeit the rights acquired on the basis thereof (and most expectant rights) or the restriction thereof. The ratification of a new statute within the deadlines limited by the time over which the Act is in force may prove disadvantageous for them without concurrently providing an opportunity for adapting to the changed situation. In the realm of social security, only legislative regulations that allow future pensioners and disability pensioners to engage in long term planning may constitute effective legal guaranties. Such guaranties are not provided by the short period barely lasting two years over which the Act is in force. What will occur upon its termination? A return to the old principles, a continuation of the present ones, or something completely different – the current insured do not know. This cannot be deduced in any way from the wording of the Act. It is for this reason that the Constitutional Tribunal held as in this Decision. (...)

## XI

In Item 10 of this Decision; the Constitutional Tribunal decided to leave without any course of action the allegation of nonconformity between the provisions of the Act dated 17 October 1991 on the Revaluation of Retirement and Disability Pensions as cited in this Item with certain regulations, also named, in three other statutes related to the provisions of the challenged Act. The Tribunal acted in this manner because it is not its purpose to review the conformity between one statute and other statutes or legislation which are equal in terms of force of the law; but only between statutes that are hierarchically lower with higher ones. The Act dated 17 October 1991, through the derogative clause of article 45, sub-section 1, altered the provisions of the trade union legislation to which the Applicants point and it had the right to do so. (...)

In Item 11, the Constitutional Tribunal left without any course of action the allegation regarding the nonconformity between article 21, section 4 of the challenged Act with collective labor agreements because such a allegation has no substance. Collective labor agreements, in light of their legislatively defined subject matter as well as in light of the nature of regulations regarding social security that are legislative regulations outfitted with the absolute force of law, cannot be an independent source of insurance law (compare with W. Muszalski: *Ubezpieczenia* [Insurance], Warsaw, 1987, p. 36). If these regulations were to incorporate this, which the Applicants did not prove, then they could be the subject of a review of legality. (...)