

## Judgment

dated 24 November 1998 (K. 22/98)

The Constitutional Tribunal sitting with the bench composed of the Chairman Wojciech Sokolewicz, and Judges: Janusz Trzcíński (Reporting Judge), Teresa Dębowska-Romanowska, Lech Garlicki, Stefan J. Jaworski

held

**article 18<sup>2</sup> of the Act dated 26 October 1992 on Inculcating Sobriety and Counteracting Alcoholism (Journal of Laws, Number 35, Item 230;1984, Number 34, Item 184;1987, Number 33, Item 180;1989, Number 35, Item 192;1990, Number 34, Item 198, Number 73, Item 431; 1991, Number 73, Item 321 and Number 94, Item 419; 1993, Number 40, Item 184; 1996, Number 127, Item 593; and 1997, Number 88, Item 554, Number 113, Item 732 and Number 121, Item 770) conforms with article 165, section 2 of the Constitution of the Republic of Poland.**

Reasoning

(...)

III.

(...)

1. Analysis of article 18<sup>2</sup> of the Act leaves no doubt about the lawmaker's intent of obliging townships to designate the financial means received from the fees for the permits to sell alcoholic beverages to carry out the township's activities related to the prevention and resolution of alcohol-related problems. This has been expressed outstandingly in article 18<sup>=</sup> by using the word „solely”; „the income from the fees for the permits issued on the grounds of article 18 or article 18' and the income from the fees specified in article 11' may be utilized solely to carryout township programs for the prevention and resolution of alcohol-related problems,” and indirectly in article 11<sup>1. article</sup> 1 in the phrase „In order to obtain additional means...” The expression – „additional means” implies in this instance the means facilitating the conduct of the new proprietary tasks imposed on the township by the power of article 4' of the statute under discussion herein.

This will most certainly restrict a township's freedom in disbursing the income from the fees collected. However, the following issue is to be determined, namely, whether this freedom has been assumed constitutionally and in effect whether the challenged article 18<sup>2</sup> contravenes the constitutional principle of a township's financial independence.

2. A township's independence, including its financial independence has already been the subject of the Tribunal's considerations in many of its decisions; they are of importance for this case. The Tribunal believes that it is necessary to recall them.

In the decision dated 24 January 1995 (ref. no. K. 5/94) when considering the problem of whether a township's independence appears on the grounds of positive law and can therefore be a criterion of the constitutionality of the challenged statutory provisions, the Tribunal, on the basis of an analysis of the provisions in the Small Constitution (articles 70 and 71) and article 5 of the constitutional principles upheld by article 77 of the Small Constitution, asserted that it is in force even though the constitutional formula was amended in comparison with prior constitutional provisions (article 44, sections 1 and 2 of the Constitution after being amended on 8 March 1990) (Collection of the Constitutional Tribunal's Decisions,1995, Part I, pp. 39-40). In another decision dated 4 October 1995 (ref.

no. K. 8/95) the Tribunal perceived an indispensable element of the constitutional principle of a township's independence in the form of its financial independence in article 73 of the Small Constitution, obligating the lawmaker to institute regulations ensuring that townships have their own income (Collection of the Constitutional Tribunal's Decisions, 1995, Part II, pp. 33-35).

The Tribunal lectured to the fullest extent on the constitutional principle of local self government independence, especially the issue of its financial independence and the constitutional guarantees and boundaries thereof in its reasoning underlying the decision dated 23 October 1996 (ref. no. K.1 /96).

According to the Tribunal's point of view – a local self government's constitutional rights and duties have primarily been shaped on the basis of its independence. This means that when performing public tasks local self government units participate in governance to the extent prescribed by the lawmaker within the boundaries of the independence protected by law and awarded to such a local self government by the law. The provisions of the Small Constitution in the sphere of public law have linked a township's independence to the fact that local self government units discharge the public tasks vested in them in their own name and at their own liability (article 71, section 2), while in the sphere of civil law they have linked the independence of a township as a legal person to its ownership entitlements and other property rights (article 70, sections 2 and 3).

The Small Constitution recognized a township's financial independence as an essential element of its ability to be a local self government entity (article 73). Referring to the findings of science, the Tribunal concluded in the decision cited above that the principle whereby a township conducts its own financial management on the basis of a budget does not however signify such internal independence in a township (commune) that would lead to arbitrariness in collecting income and disposing of it. To the contrary, within their financial management townships are only allowed to do that which the statutes permit. The Tribunal has emphasized that the issues of township finances belong to public law, and in the public law the principle is binding whereby that which the statutes provide for is permissible. The consequence of understanding the financial independence of townships in this manner is that the list of sources of township income, delineated in statutes, is closed, and not open, in nature – this implies that a township may avail itself of financial independence but only with respect to that income which is statutorily due to it. Thus a township's financial independence should be recognized not as a type of financial autonomy, but rather as a form of decentralization leading, however, to the self restriction of central state authority.

Generalizing the foregoing findings the Tribunal asserted that the independence of local self government units, including its financial independence cannot be made absolute as a protected and guaranteed value, insofar as the local self government, in light of article 71, section 1 of the Small Constitution, performs public tasks „within the framework of statutes” solely in the form of statutes, a statutory framework may therefore be created for the activity of a local self government founded on the performance of tasks specified as „public.” The constitutional independence of a local self government is also binding upon the lawmaker. This means that the independence of townships may be curtailed by the lawmaker by statute, under the condition that these restrictions and limitations are justified in constitutionally defined goals and constitutionally protected values. In the cited case K. I /96 the Tribunal ultimately formulated the view that those restrictions and limitations should be deemed as not being contrary to the constitution which correspond to constitutional requirements in a formal and procedural sense and in a material sense. The primary formal and procedural condition for restricting and limiting local self government independence, including its financial independence, is the imposition of an obligation upon the township by statute and not by

adopting any other lawmaking act whatsoever. Under the material sense the statutory limitations on a township's independence cannot be arbitrary; they must be founded in constitutional provisions. (Collection of the Constitutional Tribunal's decisions, 1996, Volume II, pp.137-140).

The Tribunal has retained this line of thought in the jurisprudence built upon the provisions of the Small Constitution and continues to do so even after the Constitution of the Republic of Poland dated 2 April 1997 came into force. It has asserted this in an explicit fashion in the reasoning underlying its judgment dated 15 December 1997 – ref. no. K.13/97 („It should be added that the Constitution has not only retained the hitherto provisions pertaining to local self government (articles 70-75 of the Small Constitution) but it has explicitly expounded upon and strengthened them (articles 163-172 of the Constitution of the Republic of Poland), placing the warranty for the independence of local self government units under judicial protection (article 165, section 2). The intention and will of the creator of the system with respect to the local self government's system position do not therefore leave any room for doubt. Against this backdrop the views of the doctrine and the Constitutional Tribunal's jurisprudence retain their currency”), concurrently repeating the aforementioned fundamental hypotheses concerning the financial independence of a township (Collection of the Constitutional Tribunal's decisions, ZU, Number 5-6 (14-15) 97, Item 69, pp. 493-494).

The issue of a township's financial independence and especially its constitutional guarantees and boundaries was also the subject of consideration by the Constitutional Tribunal in the judgment dated 24 March 1998 (ref. no. K. 40/97) against the background of an interpretation of article 167, section 3 of the Constitution. The fundamental hypotheses of this decision are also of importance for the case under discussion.

The interpretation of article 167, section 3 of the Constitution, which also gives expression to a township's financial independence, leads one to ascribe two-tiered legal significance – according to the Tribunal. First and foremost, it must be treated as a provision guaranteeing townships the relevant level of income thereby allowing them to carry out the tasks which have been demarcated to them constitutionally, and which have observed the form of a statute to specify the sources of the income. Its legal significance, however, is not exhausted on this note, especially if this provision were to be interpreted in combination with article 16 and the other provisions of Chapter VII of the Constitution on local self government. The statutory guarantee of the sources of income fulfills the instrumental role towards the basic goal which is to ensure to a local self government unit (the township) the appropriate financial means for it to carry out its tasks. The Tribunal has stated that that article 167, section 3 may be treated as an expression of a more general principle guaranteeing to the township not only that certain financial means will be left to its disposal (by guaranteeing the sources whence it flows) but also guaranteeing the township the opportunity of using these funds independently, thereby making expenditures and shaping them by way of tasks. If the existence of constitutional guarantees were to be excluded for the independent utilization of expenditures, the statutory guarantee of sources of income and the independent performance of tasks could turn out to be illusory since the financial means obtained could be taken away from the township without any limitations whatsoever.

In the matter of the boundaries of independence for a township to shape its expenditures the Tribunal has made reference to a viewpoint expressed previously that a township's independence cannot be treated as fully autonomy. This pertains to employing the means obtained, and thus to determining its expenditures. The independence of a township in shaping its expenditures must be realized within statutory boundaries from which, for instance, flows the absolute priority of expenditures for obligatory proprietary tasks. It is not a matter of contention – according to the Tribunal – that townships may have various types of

financial burdens placed upon them statutorily, including the obligation of transmitting contributions to maintain municipal unions or – in the future – for higher ranking local self government units. Since there is a direct connection between the specification of a township's sources of income, the acquisition by townships of financial means and managing them (or making expenditures) then article 167, section 3 cannot be subject to *a contrario* making expenditures) then article 167, section 3 cannot be subject to *a contrario* interpretation and acknowledge that the exclusivity of the statute instituted therein refers only to specifying the sources of a township's income. Against the backdrop of the general independence of local self government units, as well as against the backdrop of a township's „fundamental” nature in the local self government system (article 164, section 1) one should accept that statutory exclusivity applies to all the aforementioned aspects of financial management in local self government units, and thus to setting and defining the obligatory expenditures of these entities. An auxiliary argument employed by the Constitutional Tribunal was the interpretation of article 216, section 1 of the Constitution indicating that „Financial resources devoted to public purposes are... disposed of in the manner specified by statute.” In effect, the Constitutional Tribunal acknowledged and has continued to maintain the stance in this matter that the Constitution does not institute an absolute ban for imposing on townships (other local self government units in the future, too) the duty of making expenditures; nor is it necessary for the duty of making expenditures always to have a derivative nature stemming from the statutorily defined duty of carrying out specific tasks. In the material plane it is always necessary, however, to treat this as an exception from the general financial independence of a township. In turn, in the formal plane these issues belong to the scope of statutory exclusivity, just as the issues related to specifying a local self government's source of income K. 40/92, (Collection of the Constitutional Tribunal's Decisions, ZU, Number 2 (17) 98, Item 12, pp. 69-71).

In yet another judgment dated 4 May 1998 (ref. no. K. 38/97) the Tribunal asserted while making reference to previous decisions that „according to article 16, section 2, in conjunction with article 165, section 2 of the Constitution of the Republic of Poland, a township's independence is a protected value, albeit not an absolute one. The protection of its value cannot preclude or totally eliminate or to a large degree the lawmaker's right to shape relations in the State. This independence is founded, *inter alia* on the action of the local self government within the framework of statutes, which should be understood such that the purpose of acts limiting a local self government's independence – especially townships as basic units (article 165, section 1 of the Constitution) – has to be the creation of a legal framework in which this independence could be realized in a uniform state” (Collection of the Constitutional Tribunal's decisions, ZU, Number 3 (18) 1998 Item 31, pp. 183-184). The Tribunal also reiterated the hypotheses expressed in previous decisions on the constitutionality of the requirements to which the lawmaker's interference in the sphere of township independence (as above, p.184) must correspond, both in a formal and a material and legal sense.

The academic literature commenting the constitutional provisions on local self government also strongly emphasizes that the financial independence of townships, whose scope and content are legally determined cannot be made absolute and interpret as a totally free way of deciding about the sources and amounts of income obtained and utilizing for any goals whatsoever. The public legal nature of this institution rules out such an interpretation. The scope of this independence has been defined by the Constitution which demarcates its area subject to judicial protection (See W. Miemiec, *Finanse samorządu terytorialnego w nowej Konstytucji Rzeczypospolitej Polskiej*, [Local Self government Finances as Well as the Constitution of the Republic of Poland], *Finanse Komunalne*, 5, 1997 p. 7; as well as the

[Constitution of the Republic of Poland and a Commentary to the Constitution of the Republic of Poland of 1997], ed. J. Boć, Wrocław 1998, p. 259).

In the conclusion to this portion of the reasoning the Tribunal would like to claim that it maintains the hypotheses expressed earlier in the matter of the financial independence of local self government units and that it does not find any provisions in the Constitution which would distinguish local self government units (townships) from the point of view of independence (financial) under discussion from among other public authority bodies and would order that local self government units be treated as a specific structure not subject to the general principles of the operation of the State.

3. The foregoing findings on the content of the concept of a township's independence developed by the Constitutional Tribunal on the grounds of the constitutional provisions before the Constitution dated 2 April 1997 was ratified as well as the findings discerned from the basis of the provisions in the binding Constitution (articles 16,165, section 2,167, section 3) lead one to the conclusion that its financial independence cannot be understood in such a way that it would imply a ban against all intervention in the township's financial management by the lawmaker. This comment refers both to its income authority and to its expenditure authority carried out within the framework of budgetary management on the grounds of statutes in order to perform public functions.

As the Constitutional Tribunal has already maintained in previous decisions, the independence for a township to shape its expenditures must be realized within statutory bounds and the Constitution does not institute an absolute ban against imposing the obligation of making certain expenditures on a township by statute. The exclusivity of statutes to set and to specify a township's expenditures is a formal and procedural requirement for the ability to curtail a township's independence in the area of the expenditures it makes. The fulfillment of this condition is not, however, sufficient reason to ascertain the constitutionality of the lawmaker's intervention in a township's financial independence. This intervention, as an exception from the general independence of a township, may not be arbitrary, but must be founded in constitutionally defined goals and values; moreover, it cannot be excessive. It is only the assertion of having fulfilled this material and legal pre-requisite in combination with the formal and procedural condition of preserving statutory exclusivity for imposing a specific obligation on the township may testify to the constitutionality of the solution adopted.

An attempt at evaluating the challenged article 182 of the Act on Inculcating Sobriety and Counteracting Alcoholism through the prism of the findings made by the Constitutional Tribunal which refer to the content of a township's constitutional independence leads to the following conclusions:

1) there is no doubt that article 18' of the challenged Act limits a township's independence in the area of expending the income originating from the fees obtained for the permits issued to sell alcoholic beverages in the manner that it imposes upon townships the duty of appropriating them exclusively for conducting the tasks outlined in the township programs for preventing and resolving alcohol-related problems,

2) the formal and procedural condition of constitutionality of the adopted solution has been fulfilled in that the foregoing duty was imposed in a legislative act. The statute also defined, without referring to executive provisions, fairly precisely and unequivocally, the way of setting income from fees for the issued permits as well as their expenditure to carry out the public tasks delineated in this statute. The adopted resolution calling for statutorily appending proprietary tasks to the township while concurrently indicating the sources of funding these tasks fulfills the constitutional rigors described in article I 67, section 4 of the Constitution – „alterations to the scope of duties and authorities of units of local self government shall be

made in conjunction with appropriate alterations to their share of public revenues.” Article 4<sup>1</sup> of the challenged statute included activities associated with preventing and resolving alcohol-related problems to townships' proprietary tasks. Without doubt, this is also a task of public importance, *inter alia* article 182 pointed out the sources and manner for financing these tasks. The township council should define these tasks precisely on an annual basis under the general statutory regulation embodied in article 4<sup>1</sup>, section 1 in township programs for preventing and resolving alcohol-related problems,

3) The evaluation of whether the challenged regulation fulfills in a material sense the requirement of justified intervention in the sphere of a township's financial independence cannot be carried out with an interpretation making reference to the purpose of the regulations set out in the Act on Inculcating Sobriety and Counteracting Alcoholism.

Its purpose, next to the title of the statute, has already been defined in the preamble to the statute under consideration where the following is asserted: („Recognizing the life of citizens in sobriety as an indispensable pre-requisite for the Nation's moral and material interest, the following is hereby resolved:”) while the duties of the public authorities, including local government, associated with its performance were formulated in article 1. Pursuant to these provisions state bodies, organs of authority and local self government bodies are obliged to undertake actions aiming at curtailing the consumption of alcoholic beverages and to change the structure of their consumption, to initiate and to support ventures which aim to support customs in how these beverages are consumed, actions for the sake of sobriety in the workplace, counteracting and eradicating the consequences of abusing alcohol and supporting social organizations and work establishments in this area. The positive evaluation of the axiology of the statute referring to universally recognized values does not require a more extensive substantiation. These values, most generally associated with the protection of health, the good of the family, public order and the security of citizens, are reflected in a series of provisions in the Constitution of the Republic of Poland. In order to fulfill them the lawmaker founded the system for the sale of alcohol on the principle of regulation, concurrently introducing legal instruments to the law to curtail its excessive consumption.

Against the backdrop of this general concept of the statute referring to constitutionally protected values one should also see the purpose of the challenged regulation embodied in article 18<sup>2</sup> of the Act on Inculcating Sobriety and Counteracting Alcoholism. Strictly linking expenditures to the sources of income will certainly serve to discipline township bodies in issuing quantities of permits for the sale of alcoholic beverages and as a result it will lead to the achievement of the goals assumed by the lawmaker. The awareness that the revenues from fees for the permits issued may only be used to carry out township programs to prevent and to resolve alcohol-related problems should foster caution and prudence in issuing the foregoing permits. An amendment to the regulation under discussion in the direction presented in the petition could lead to the total distortion of the purpose of the statute under consideration. With the awareness of the deficiency of financial means to carry out a series of proprietary tasks, a phenomenon could appear whereby the expense side would be totally independent of the sources of income for the permits issued and conducting a financial policy targeted at obtaining as much income as possible for the permits issued by increasing the network of points of sale offering alcoholic beverages in the township which would be manifestly in contradiction with the purpose of the statute.

Attention should also be drawn to that which follows from the contents of the petition, that the basic problem in the township is the excess amount of income generated from the fees for the permits issued to sell alcoholic beverages. Their rational expenditure is dependent upon the contents of the township program ratified by the township council to prevent and to

resolve alcohol-related problems. Article 4<sup>1. section</sup> 1 of the Act does not specify in an exhaustive fashion all of the township's tasks related to the prevention and resolution of alcohol-related problems. It merely establishes a general framework where the township program has been charged with the responsibility for filling it out. The complete, rational and appropriate – with respect to the needs present in the township – usage of income generated from the fees for the permits issued is first and foremost dependent upon the invention and specific organizational actions of township bodies – in the conviction of the Constitutional Tribunal. In effect, the Constitutional Tribunal has not asserted the lawmaker's arbitrariness in the statutorily introduced limitation on a township's financial independence.

For these limitations are substantiated in constitutionally protected values and that is why they are permissible.

In connection with what was stated above the Tribunal did not ascertain that the limitation of the township's financial independence was excessive with respect to the values whose realization and protection are supposed to be served by the challenged regulation.

4) Even though the regulation in article 182 of the Act on Inculcating Sobriety and Counteracting Alcoholism has been asserted to be consistent with the Constitution, the Constitutional Tribunal does perceive with a certain amount of concern that the foregoing regulation introduces certain exceptions from the binding principles on which the township budget is founded.

In the field of financial law it is believed that when conducting a township's financial management the rule is that expense-side independence is expressed in the independent creation and shaping of expenditures which in effect leads to the disconnection and autonomy of the amounts of specific expenditures for proprietary tasks as opposed to the income which makes it possible to fund these tasks. This is expressed not only in the budget's formal and material unity but also in the universality and the general appropriation of a global amount of income in relation to a global amount of expenditures.

The contents of article 182 under examination which strictly link the income generated from fees for the permits issued to equally strictly defined expenditures and formally speaking of the thing at hand they are in contradiction with the budget's material unity which is also termed as the non-funding principle. This principle boils down to the postulate that the budget is to be organized as one pool of assets where the entirety of income is appropriated to the entirety of expenditures, and internally, there is no link between specific income and specific expenditures (W. Miemieć: *Struktura budżetu gminy*, [Structure of the Township Budget], *Samorządowy poradnik*, p. 270). Thus the evaluation of the nature of the regulation under consideration leads one to the conclusion that even though this is not a separate special-purpose fund, for both the collection and the expenditure of the financial means take place within the framework of the township budget, this is certainly a form of setting aside financial assets with the nature of a fund, whose basic function is convergent with the function of a special-purpose fund.

The budgetary principles cited above do not have, however, the character of constitutional principles. Their contents have been deduced from the interpretation of article 51 of the Local Self government Act as well as from articles 7 and 8 of the Budgetary Law Act, while the ban against local self government bodies creating special-purpose funds from article 18, section 1 of the Budgetary Law Act which envisages the ability only to create state funds exclusively on the basis of an act. The regulation considered hereunder cannot therefore be treated as one contradicting the constitution but a certain, statutory exceptional limitation on the funding principle. One should note that this principle was already restricted in 1993 at the time when the Act on the Protection and the Shaping of the Environment and the Water

Rights Act were amended in 1993 (Journal of Laws, 1993, Number 40, Item 183) which, in addition to the township budget, introduced a second pool of financial means known as the township environmental protection and water management fund. Thus in the study of financial law when characterizing the expenditures for a township's proprietary tasks, one can perceive and permit the establishment of „statutory exceptions to special-purpose funding within the township budget” (T. Dębowska-Romanowska: *System prawny finansów lokalnych* [Legal System of Local Financing), *Samorząd terytorialny*, Legal and Administrative Issues, Warsaw, 1998, p. 379).