

Decision

dated 9 May 1989 (Kw. 1/89)

The Constitutional Tribunal sitting with the bench composed of Chairman Kazimierz Buchała, and Judges: Natalia Gajl, Kazimierz Działocha, Andrzej Kabat, Stanisław Paweła (Reporting Judge).

(...).

held

1. that article 122, section 2 of the Act dated 14 December 1982 on Retirement Pensions for Employees and Their Families („the Retirement Act”) (Journal of Laws, Number 40, Item 267, amended by 1984, Number 52, Item 268, Number 52, Item 270; 1986, Number 1, Item 1) and article 2, section 2 of the Act dated 29 January 1987 on Raising Retirement Pensions and Disability Benefits in 1987 and 1988 („the Raising Act”) (Journal of Laws, Number 3, Item 20) conform with article 5, sub-section 5, article 8, section 2 and section 3, article 67, section 2 and article 70 of the Constitution of the People's Republic of Poland;

2. that article 29, section 2, article 35, section 2, article 44, section 3, and article 74, section 1, section 3 and section 4a of the Retirement Act contravene article 5, sub-section 5, article 19, section 3 and article 67, section 2 of the Constitution of the People's Republic of Poland;

3. that Resolution Number 27 of the Council of Ministers dated 4 March 1985 on the Raising of Certain Retirement and Disability Pensions („the Resolution”) (Monitor Polski Number 4, Item 29 and Number 13, Item 97) contravenes article 41, sub-section 8 of the Constitution of the People's Republic of Poland;

4. that § 8, section 2 of the Regulation of the Council of Ministers dated 30 January 1986 on the Detailed Rules for the Indexation of Retirement and Disability Pensions („the Regulation”) (Journal of Laws, Number 2, Item 14) contravenes article 74, section 5 of the Retirement Act;

5. to set a three-month time limit from the service hereof in which the inconsistencies named in points 3 and 4 above should be removed; if the said inconsistencies are not removed, the provisions covered hereby shall become null and void after the lapse of the said time limit to the extent determined in points 3 and 4 hereof.

Reasoning

(...)

1. In order to evaluate the constitutionality of the Resolution it is of decisive importance to determine its rule making character. (...)

Assuming that the Resolution is an independent enactment of the Government, any further deliberations must be preceded by an analysis of this form of lawmaking.

In a country based on the rule of law, say exercise of authority must be grounded in law; i.e. a lawfully conferred authority to act must sanction it. It follows that all lawmaking activities must be sanctioned by constitutional provisions or by principles constitutionally enacted in legislation, i.e. issued by virtue of the Constitution and appropriate to grant lawmaking powers within specific limits. Hence, the use made of lawmaking powers by state organs may not be arbitrary but they must exercise the powers granted to them. This

understanding of the lawmaking system means that there is no freedom to use various forms of enactments as one wishes and, at the same time, makes it necessary to expand lawmaking to meet the needs of a modern State in which law is the chief instrument of both satisfying social needs and controlling the directions of social development as well as an instrument for organizing and directing the activities of the state apparatus. To understand better the application of Constitutional rules it is of vital importance to realize the division into direct and indirect application of the Constitution. With the direct application of the Constitution, the act of applying a constitutional rule is done directly and only in pursuance of a constitutional rule, i.e. without a need to elaborate on it or to make it more specific on a regular statute. Whereas, the indirect application of the Constitution occurs when a constitutional norm calls for a prior elaboration and concretization in a regular statute. The direct application of the Constitution may take the form of both lawmaking acts and individual acts.

As far as the form and range of application of Constitutional rules by individual kinds of state organs is concerned, they depend in the first place on the nature of the legal functions fulfilled by these organs, which functions are, in turn, determined by generically homogeneous competence rules established for these organs.

The Sejm exercising the function of the supreme state body is called upon to apply the Constitution always in a direct manner regardless of whether it enacts statutes elaborating on and spelling out constitutional norms or whether it makes individual and specific acts. The constitutional sanction to make laws with the binding force of a statute and the constitutional permission to make laws ranking below a statute „pursuant to statutes and to enforce them” have drawn only general limits of lawmaking and left a broad margin for their specification by government practice and interpretation by judiciary authorities. On one hand, the brevity of the constitutional provision concerning the principles of law making by the administrative apparatus contained in one general formula: „pursuant to statutes and to enforce them”, on the other hand, the pressing need, facing the chief state organs to give state organizational units the necessary powers to meet specific economic objectives or to implement the State’s social policies have led to a doctrinal transformation of principles governing the lawmaking activities of the administration and determining its place within the legal system. It is in this context that the concept of „independent resolutions” needs to be placed as an attempt to doctrinally reconcile practice with the constitutional premises (this concept was put forward by S. Rozmaryn in the work: *Ustawa w PRL*, Warsaw 1964).

The Council of Ministers was placed in the system of state organs as „the chief executive and administrative organ of state authority” (article 38, section 1 of the Constitution), which under the Constitution is vested in the Sejm and, to a limited extent, to the Council of State. This formula in its literal meaning and assuming a strict interpretation of the principle of unity of state authority may lead to the conclusion that the activities of the Government are totally determined by the legislative acts of organs of power, therefore ruling out the possibility of direct application of the Constitution by the said organ. However, the doctrine of law has taken a stand that the Government is an organ not only organizationally but also functionally independent, that it exercises – under the supervision of the Sejm – its own powers in managing the administration which are grounded both in the Constitution and statutes. Thus the Government may apply the Constitution directly provided that it does not encroach on matters reserved to statutes or act in contravention of them (cf. S. Rozmaryn: *Ustawa w PRL*, Warsaw 1964, p. 216).

„This attempt was based on a very free reinterpretation of the constitutional premises and as such it should be placed among *contra legem* interpretations. If the text, clearly stating that the issuance of lawmaking acts by the administration is to take place pursuant to a statute

was to be taken to express a necessary and „natural” lawmaking activity of the Government outside the framework of legislation, and that the lawmaking acts of government agencies should necessarily be of an enforcing character in relation to statutory enactments was to mean that such agencies were free to enact laws independently, outside the arena drawn by delineating a sphere reserved to statutes only.” (W Zakrzewski: *Zakres przedmiotowy i formy działalności prawotwórczej* [The Subject Matter and Forms of Lawmaking Activity], Warsaw 1979, p. 75).

The doctrine, followed by the jurisprudence of the Chief Administrative Court and the Supreme Court, has rejected the original broad concept of „independent resolutions.” However, there are still many possible forms of lawmaking activity of chief organs of authority. In the area of interest, the following matters necessitate explication:

a) The relation between the scope of exclusive competence to make laws by enacting provisions of statutory force and the sphere in which lawmaking activity may be exhibited in the form of resolutions of the Council of Ministers,

b) The relation of the binding force of statutory rank provisions to those enacted in the form of resolutions of the Council of Ministers.

In order to do that, one needs first to determine the legal nature of rules of law of limited binding force and addressed exclusively to specific categories of state organizational units or to officers in individual branches or divisions of the state apparatus (so-called internal governance acts) as well as universally binding acts.

Neither in the doctrine nor in the decisions of common courts or the Constitutional Tribunal is the view currently questioned that delegations to enact universally binding laws, that is laws capable of defining the rights and duties of all natural and legal persons and determining generally binding models of conduct, may follow only from specific regulations of a statute or an equivalent act clearly defining the subject matter, scope and principles which the enacted law is supposed to have and satisfy. Whereas delegations to enact laws of limited binding force may be a result of the correlation of tasks lawfully delegated to specific organs with legally defined structural and organizational positions which define their controlling powers in respect to subordinate units competent to participate in the performance of specific tasks (cf. W. Zakrzewski: *op. cit.* p. 51)

To substantiate this view one may quote, in the first place, the general principle following from those provisions of the Constitution which refer (explicitly or implicitly) to a statutory enactment regulating specific subject matter and from those constitutional principles (article 40, section 2; article 41, sub-section 8, article 42, section 2) which regulate the lawmaking powers of the chief organs of state administration. What this overall principle means is that regulating rights and duties of citizens and their organizations, both in relations between them and with the State, as well as other independent entities affected by law can be performed only by statute (subsidiarily by decrees with the force of a statute) and only pursuant to statutes and in order to enforce them by enactments issued by organs of state administration (administrative acts).. Consequently, acts of applying the law defining the rights and duties should have such a legal foundation; too.

The above interpretation is also borne out by article 90 of the Constitution which imposes a duty on citizens to obey the provisions of the Constitution and statutes thus delineating civil duties. The doctrine notes, not without reason, that it was not by chance that the drafters of the Constitution used qualified kinds of enactments here (constitutional and statutory) and that article 90 sets strict limits of obligations not only for citizens but also for state organs; to state organs the civil duty is „a limit of admissible imperial interference on the

part of a state organ which can compel obedience for its acts only within statutes” (cf. J. Borkowski: gloss to the NSA judgement of 21 December 1983 S.A./Gd 822/83 – OSPiKA 1985, number 2, Item 26, see also W. Zakrzewski: op. cit., p. 168; K. Działocha: *Bezpośrednie stosowanie Konstytucji PRL przez sądy* (Direct Application of the Constitution of the People’s Republic of Poland by Courts], Warsaw 1987, pub: NSA).

It should be noted here that the phrase „pursuant to statutes and to enforce them” (article 41, subsection 8 of the Constitution) does not give clear premises for differentiating between situations when state organs should use this form of regulation and when they should rather take advantage of a resolution or an executive order. Neither in the part concerning the requirement of a statutory foundation, nor in the part indicating that the purpose of a regulation should be the enforcement of a statute, does this phrase – treated conjunctively – contain a distinction between the legal conditions necessary to use a regulation and a legal situation justifying the choice of a resolution. *De lege ferenda* it seems necessary to distinguish clearly between the grounds justifying the use of each form of lawmaking pronouncement.

Turning to the question of rules of law of limited binding force, the following should be mentioned.

It follows from the above deliberations that if the decision of a chief state body is to be binding *erga omnes* it is necessary that it find support in universally binding provisions. It is for this reason that independent resolutions of the Council of Ministers, issued without a delegation granted by statute (or a decree with the force of a statute), are merely legislative acts of internal governance and – similarly to all other legislative acts of internal governance – may be binding only on those addressees who are organizationally subordinated or who report to the organ issuing such a statute. The Constitutional Tribunal concurs, in this respect, in the interpretation handed down by the Chief Administrative Court. (...) In the area of internal governance acts, the forms of delegations of directive acts, their scope of binding force and effectiveness in the sphere of legal consequences may be, and are varied. The meaning of the overall concept of „internal governance acts” is – as it has been mentioned above – the opposite of the concept of „universally binding enactments.” From this point of view, it is not enough for an organizational unit of the state apparatus to have usable commanding powers by virtue of some provisions. Such powers may be used only „on express authorization.” For this reason such powers may be used for the performance of tasks and attainment of goals for which they were granted. Thus, they cannot be used for other purposes, even if authorized by internal law, but going beyond a statutory delegation. Internal governance acts may neither replace universally binding enactments nor modify their sense and import. Since their binding force is restricted solely to entities remaining in a special subordinating relation, the use of such acts in such a manner as to affect the situation of natural and legal persons not related to the lawmaker by a special relationship of subordination would be going beyond the said relation.

In the doctrine and the decisions of the Supreme Court (cf. judgement dated 17 January 1988, file number II URN 271/88 and Resolution dated 27 July 1988, file number III UZP 20/88) one may encounter the view that an independent resolution of the Council of Ministers may create specific rights but may not worsen the legal situation following from statutory provisions.

In this respect, the Constitutional Tribunal is of a different opinion. First and foremost, because of the far-reaching consequences of this interpretation. Dividing administrative decisions into two categories, where one comprises decisions issued according to statutory provisions and concerned with rights and duties, while the other includes decisions issued

according to independent acts, without a statutory foundation, and concerned only with the rights of an individual, gives rise to an internal contradiction. „Decisions reaching beyond a statutory regulation – rightly says J. Borkowski – go beyond the civil duty to respect the acts of state organs. They cannot be called individual acts of authority because they cannot be such as a citizen may evade their application.

They would be administrative decisions that would not have attributes of an administrative act. As acts not being an emanation of administrative authority, they would become non-authoritative acts (socio-organizational ones).” (Gloss to the Chief Administrative Court’s judgement dated 21 December 1983, SA. Gd 822/83 – OSPiKA 1985, Number 2, Item 26).

Taking the position that „independent” administrative enactments may serve as a basis for the activities of state administration with respect to the granting of rights to citizens conforms only in appearance to the fundamental principle of our legal system, i.e. legality (article 8, section 3 of the Constitution). The reason lies in the fact that, on one hand, this position results in conferring a right on a citizen, on the other, it makes the enjoyment of specific rights in a given field dependent on the regulating activities of state bodies leading in fact to the restriction of civil liberties. It may also become – as it happened in the case at hand – an instrument to draw profound distinctions between civil rights. Hence, distinguishing between the legal grounds of a decision depending on whether it grants rights or imposes duties is unjustified also from the point of view of the protection of civil rights and liberties.

The doctrine rightly claims that order in the development of a legal system is a self evident social value and that limits protecting its integrity should be set. In view of this, obliging subordinate state administrative organs by an internal directive act to grant specific benefits to citizens despite a lack of relevant statutory grounds for such a statute is an example of „replacing” a statute by forms of directive actions not having a lawmaking character „Such conduct objectively violates the principles of developing a legal system and must be negatively evaluated even when the effects produced in this way satisfy the social sense of equity and, from this perspective, gain social acceptance. „ (W Dawidowicz: *Wstęp do nauk prawn-administracyjnych* [Introduction to Legal and Administrative Studies], Warsaw 1974, pp.102-103; see also J. Jędrońska, B. Adamiak: Gloss to the NSA judgement of 27 April 1981 S.A. 767/81- OSPiKA 1983, Item 109; J. Borkowski: op. cit. p. 65) The jurisdiction of the Constitutional Tribunal as defined in article 33a, sections 1 to 3 of the Constitution and in articles 1 and 2 of the Constitutional Tribunal Act dated 29 April 1985 extends to independent lawmaking acts, which are subject to the review of their constitutionality and legality similarly to statutory enactments and other laws. In this respect, the judicial definition of a lawmaking act is fully adequate when it says that it is any act „which sets rules and models of conduct, the addressees of which are legally bound to observe regardless of the legal foundation of their enactment, regardless of their subject matter, scope or the range of persons affected by them or the sanctions ensuring their observance.” (W. Zakrzewski: op. cit. p.18).

Turning to the question of assessing the constitutionality of the Resolution, the Constitutional Tribunal has reached the following conclusions.

The Resolution, as an independent act of the Council of Ministers, contravenes article 41, sub-section 8 of the Constitution. Firstly, since independent resolutions of the Government may not serve as legal grounds for all those decisions of the state administration that are directed at entities not organizationally subordinated to the issuing organs and whose aim is to create a specific legal situation on the part of these entities, specifically by granting rights or imposing duties. The Resolution is addressed in fact to those beneficiaries whose retirement and disability pensions were raised by the said Resolution. Secondly, since it

concerns a sphere exclusively reserved to the statute, i.e. the matters regulated by the Retirement Act. A sphere exclusively reserved to a statute means – as it has been mentioned above – that matters covered by it may not be regulated in any other way but by statute (decrees with the force of a statute) or by enactments made in pursuance of an express and specific delegation contained in a statute. In the case under consideration, the Resolution of the Council of Ministers could have only the form of an administrative act enforcing the Retirement Act had the Act contained a relevant lawmaking delegation. It should be mentioned here that two successive enactments concerning also the raising of retirement and disability pensions specified in the Retirement Act had the appropriate form of statute. This refers to the Act dated 30 January 1986 on Raising Retirement and Disability Benefits in 1986 (Journal of Laws, Number 1, Item 1) and the Act dated 29 January 1987 on Raising Retirement and Disability Benefits in 1987 and 1988 (Journal of Laws, Number 3, Item 20). The Constitutional Tribunal wishes to express the opinion that any changes in the amount of retirement and disability pensions and in the principles of their indexation – if they do not find support in an express statutory delegation – should be introduced by statute. The reason for this is the fact that they concern one of the fundamental civil rights, namely the right to receive assistance in case of illness or inability to work (article 70 of the Constitution). (...)