

**Decision**  
**of 13 July 1993 (P. 7/92)**

The Constitutional Tribunal sitting with the bench composed of the Chairman, Kazimierz Działocho, and Judges: Maria Łabor-Soroka (Reporting Judge), Wojciech Łączkowski, Remigiusz Orzechowski, and Andrzej Zoll

(...)

held

**1. article 21, section 2 of the Employment and Unemployment Act dated 16 October 1991** (Journal of Laws, Number 106, Item 457; amended in 1992, Number 21, Item 84 and Number 78, Item 394) **contravenes article 1 of the Constitution of the republic of Poland, upheld under article 77 of the Constitutional Act dated 17 October 1992 on the Mutual Relations Between the Legislative and Executive Branches of the Republic of Poland and on Local Self government** (Journal of Laws, 1992, Number 84, Item 426);

**2. article 21, section 5, sub-section 1 of the Employment and Unemployment Act dated 16 October 1991** (Journal of Laws, Number 106, Item 457; amended 1992, Number 21, Item 84 and Number 78, Item 394), **to the extent it overlooks the unemployed eligible for social security in connection with „other non-agricultural activity,” contravenes articles 1 and 67, section 2 of the Constitution of the Republic of Poland, upheld by the Constitutional Act invoked in point 1 of this Decision.**

**Furthermore, the bench of Judges adjudicating this case submits to the President of the Constitutional Tribunal that there is a need for the Constitutional Tribunal to initiate proceedings to examine whether the Social Assistance Act dated 29 November 1990** (Journal of Laws, 1993, Number 13, Item 60) **conforms with the Constitution of the Republic of Poland with reference to social assistance for the unemployed who cease to be eligible for unemployment benefits.**

(...)

Reasoning

III

(...)

2. In embarking on the evaluation of the legal status presented in the legal questions, the Constitutional Tribunal considered it reasonable to recall its position on the notion and legal nature of the unemployment benefit expressed in the reasoning dated 1 June 1993 in connection with case P. 2/92.

In that case, the Constitutional Tribunal decided that in light of the provisions of the Employment and Unemployment Act dated 16 October 1991 the unemployment benefit is a cash benefit to which the unemployed are entitled by law from the Labor Fund, with the benefit conditional on; as a rule, a specific period of employment prior to registration with the regional labor office and payable for a specific period of time (generally 12 months).

The legal nature of the benefit is not unequivocal. The unemployment benefit is a public-law benefit from the Labor Fund, most closely related to social security benefits. As rightly observed by W. Sanetra in his article entitled „W sprawie konstrukcji prawnej zasiłku dla bezrobotnych” [On the Legal Construction of the Unemployment Benefit] (PiZS Number 1, 1993), the unemployment benefit neither replaces remuneration for work nor constitutes its surrogate. Likewise, under the said Act, it is not an insurance-like benefit nor a social

assistance benefit. However, in displaying some features of such a social welfare benefit by means of establishing no link between the amount of the unemployment benefit and the amount of remuneration with the previous employer, the unemployment benefit is in fact most closely related to the benefits provided for under social security law.

This is so because the manner of collecting funds for the payment of such benefits is similar. A special-purpose fund (i.e. the Labor Fund) is used for this purpose. The Fund consists of contributions made by employers and persons covered by social security in connection with other non-agricultural activities, as described in article 52 of the Act. Just as in the case of persons eligible for social security, the unemployed are required to have worked a specific period of time (benefit-related period of employment).

3. In considering the legal issues raised in the legal questions; the Constitutional Tribunal decided that it was necessary to review the nature of the right to benefits held by the unemployed in light of the principles and rules of the Constitution.

The consideration of the constitutionality of a social benefit must be based on the conclusion that the Constitution lays an obligation on the State to guarantee to its citizens a minimum level of subsistence. Article 68 in connection with article 70, sections 2 and 3 and article 79 (with reference to the family as a legally protected interest) serve as the basis for the validity of this norm. This norm should be interpreted in light of the principle of social justice expressed in article 1 of the Constitution. The notion of social justice entails the satisfaction of the individual's needs, and this principle should be applied specifically to persons whose minimum level of subsistence is at risk.

a) The Constitutional Tribunal decided that article 21, section 2 of the Employment and Unemployment Act, that is the provision which, as a rule, limits eligibility for the benefit to a period of 12 months, is not in contravention of the constitutional principle of social justice (article 1). The Tribunal's decision, on one hand, allows for the content of the constitutional principle of social justice and, on the other hand, for the nature and function of the right to the unemployment benefit, which are determined by the State's obligation stemming from article 68 of the Constitution.

The principle of social justice with respect to the social problems following from unemployment should be understood as a principle of behavior in relations between social groups, and in this case between the Nation (which is the largest social group) represented by the State and the unemployed. Thus, within its social function, the State is obligated to guarantee to those who are unemployed the conditions for exercising their right to existence and freedom, having regard for a human being's inalienable and inherent dignity. The Constitutional Tribunal assumed that social security, serving this purpose and guaranteed to the unemployed by the State, should at least guarantee the minimum level of subsistence, as social justice, within the meaning of constitutional decisions in Poland, entails, among other things, the distribution formula that everyone should be able to satisfy his/her needs (meaning basic needs), and that this formula should be mainly applied to individuals whose minimum level of subsistence due to the loss of a job as a source of income is at risk.

Given its general and legally virtually undefined nature, the principle of justice does not, however, determine the legal form for the implementation of the justice formula with respect to the unemployed.

A form, or legal instrument, of its implementation is the unemployment benefit. Its nature and function are determined, as mentioned above, by article 68 of the Constitution, and its detailed legal construction was determined first by the Employment Act of 1989 and then by the Employment and Unemployment Act of 16 October 1991 which is currently in force.

In accordance with the interpretation of this provision of the Constitution included in the Tribunal's Decision concerning case. P 2192, which also takes international legal norms into consideration, and following changes in the political system of the Republic of Poland, it currently means that the State is obligated to conduct a policy of full (rational) employment, closely correlated with the right of the unemployed citizen to social protection in the event of unemployment (but not – pursuant to article 70, sections 1 and 2 of the Constitution – the right to social security in the event of unemployment). The provisions of the Employment and Unemployment Act of 1991 should be regarded as a current implementation of the legal directive following from article 68 of the Constitution. Pursuant to article 1, section 1, the Employment and Unemployment Act determines „the State's obligations with respect to employment, the prevention of unemployment, and the mitigation of its consequences.” It follows from subsequent provisions of the Act that the main legal instrument serving to mitigate the effects of unemployment is precisely the unemployment benefit. In principle, the lawmaker has the right to choose freely a legal instrument serving this purpose.

The characteristic feature of the unemployment benefit is the fact that it is subject to time limitation: in effect (apart from specific exceptions mentioned in the Act) to a period of 12 months. This time limitation is justified in constitutional terms because it is closely connected with the function (purpose) of the unemployment benefit. The basis for the payment of the benefit is job loss, registration as unemployed, and readiness to take employment (or to accept an offer requiring job training or acquisition of new qualifications). The benefit's purpose is to ensure subsistence funds to the unemployed for this period of time. At the same time, the time limitation is designed to motivate the unemployed to seek employment. Therefore, the benefit serves an important social and psychological motivational function in a society in which individuals are in principle responsible for themselves. It must be noted, however, that if the unemployed subsequently lose their job, they become eligible for the benefit subject to the satisfaction of the same conditions as on the previous occasion (article 21, section 6 of the Act). The time limitation imposed on the right to the benefit is further justified on the premises that upon a person's prolonged unemployment for objective reasons or irrespective of other reasons, the unemployed's situation and the State's responsibilities designed to mitigate the effects of unemployment are subject to change and require different legal instruments. This is especially true in the case of what is referred to as structural unemployment. This fact is also corroborated by the experience and legal solutions of other market economy countries. Likewise, the period of eligibility (e.g., 2 „ years in Denmark or 2 to 8 months in Greece) is at the discretion of the lawmaker.

Given these considerations, the Constitutional Tribunal saw no grounds for finding article 21, section 2 of the Employment and Unemployment Act in violation of the principle of social justice (article 1 of the Constitution). On the other hand, the Tribunal is of the opinion that this provision of the Act conforms with article 68 of the Constitution, serving as a direct basis for the interpretation of the statutory construction of the right to the benefit.

At the same time, the Constitutional Tribunal took the view that neither the principle of social justice to be implemented by the Republic of Poland nor the directives following from article 68 of the Constitution release the State from the obligation of providing social protection to the unemployed at the minimum level of subsistence following the expiration of the eligibility period for unemployment benefits if they continue to be unemployed for reasons beyond their control or if they have no other source of income. If, among the unemployed registered at the end of May 1993, 1,318,800 are not eligible for unemployment benefits (according to the Ministry of Labor and Social Policy), even on the assumption that only some of those unemployed are not covered by social protection at the minimum level (in January 1993 a mere 110,861 people received social assistance benefits), one cannot claim

that the State is implementing the principle of social justice and fulfilling its responsibilities embodied in article 68 of the Constitution. On this fundamental issue; the Constitutional Tribunal fully shares the position of the Chief Administrative Court (NSA) in Warsaw.

However, given that under Polish social welfare laws social protection for the unemployed after the period of eligibility for unemployment benefits is to be implemented by means of statutes and institutions following from the Social Assistance Act dated 29 November 1990 (Journal of Laws, 1993, Number 13, Item 60), the Constitutional Tribunal took the view that the allegation of the State's failure to provide means of support to the unemployed following a 12-month period of receiving the unemployment benefit, presented in the legal inquiry addressed to the Chief Administrative Court, should be examined not against the provisions of the Employment and Unemployment Act, but against the provisions of the Social Assistance Act.

It is true that the unemployment benefit is not designed to play a social role, and to this extent one can agree with the view expressed by the Prosecutor General in response to the legal inquiry made by Chief Administrative Court (NSA) in Warsaw, especially since the benefit is to motivate the unemployed to seek employment. However, one cannot agree with that part of the Prosecutor General's presentation included in the letter of inquiry, in which the Prosecutor General makes reference to the international practice of limitations imposed on the payment of benefits. Unlike the mechanisms introduced by the Social Assistance Act, it is outside Poland (in free-market countries) that there exists a real possibility to protect individuals and their families against misfortunes that they are unable to cope with on their own by using their own resources, possibilities, and rights. Such mechanisms have not been established in the Polish State.

Restricting the grounds of eligibility for unemployment benefits and passing the Social Assistance Act were designed to rationalize the efforts to provide social protection to the citizens. Unemployment benefits are not suitable for playing the role of an instrument guaranteeing wider social protection due to the manner in which the benefit is granted („automatism”), restrictions on the assessment of citizens' current financial standing, and the purpose of its introduction into the legal system.

The implementation of the obligation imposed on the State is effected through various legal institutions. No doubt, one of them is the institution of social security or unemployment benefits. However, in cases where no such legal institution can serve as the basis for providing citizen with a minimum of social security, it should be effected by a social welfare institution. This is especially important in a country that has limited resources for measures guaranteeing a minimum level of subsistence.

The above conclusion cannot serve as the basis for claiming that the State has fulfilled its obligation to help the unemployed. And while the Social Assistance Act provides for the right of the unemployed to assistance (article 3, sub-section 1 of the Act), subject to the rules governing the relevant aid institutions (and specifically, article 4, section 1 of the Act), the Act lacks a suitable normative content as it fails to impose on social welfare bodies an obligation to guarantee to the unemployed a sustained means of support. The situation differed prior to the amendment introduced in the Social Assistance Act of 1990 by amending the Act of 1 August 1992. Specifically, it does not follow from article 27 of the Act (an article which determines who is eligible for a permanent cash allowance) that the unemployed no longer eligible for the unemployment benefit have the right to such an allowance subject to the rules specified in the Act. Article 31, section 1, sub-section 3 provides for the possibility to grant a temporary allowance to individuals and families in difficult circumstances due to their inability to find employment.

The guarantee function of the law requires that the right to such an allowance follow from a statute and the eligible person be entitled to make a claim, the satisfaction of which could be prosecuted in court.

In the light of the above, the Constitutional Tribunal sitting with the bench composed as above decided to submit to the President of the Constitutional Tribunal (pursuant to article 24 of the resolution on proceedings before the Constitutional Tribunal) a petition for the Constitutional Tribunal to initiate proceedings to examine whether the provisions of the Social Assistance Act conform with the Constitution with respect to the objection raised by the Chief Administrative Court in Warsaw. The objection should be directed against the provisions of the Social Assistance Act to the extent in which the Act omits the right of the unemployed to a permanent social welfare allowance after ceasing to be eligible for benefit under the Employment and Unemployment Act.

b) Regarding one portion of the conclusion of the decision in which the Constitutional Tribunal finds article 21, section 5, sub-section 1 of the Employment and Unemployment Act to be in contravention with articles 1 and 67, section 2 of the Constitution, the premises of the decision are as follows:

Article 20, section 1 of the Act lays down uniform rules of eligibility for benefits (two positive premises) for both former employees and persons formerly engaged in nonagricultural economic activity.

Article 21, section 2 of the Act serves as the basis for determining the period during which benefits are paid to the unemployed. The said article lays down a rule according to which the period of eligibility for benefits may not exceed 12 months. Exceptions to the rule are listed in article 21, sections 3 to 5. The exceptions are justified on the grounds of special situation of the designated categories of individuals as to the possibility of finding a new job or another source of income. Thanks to a longer eligibility period for the unemployed specified in article 21, sections 3 to 5, their actual situation is to be put on an equal footing with the other unemployed. This statutory construction corresponds with the constitutional principle of equality.

Different treatment of the unemployed does not appear until article 21, section 5, subsection 1 of the Act, which provides that the right to benefits until one becomes eligible for a retirement pension is to be retained by the unemployed who have been in employment or service for a period of a minimum of 30 years (in the case of women) and 35 years (in the case of men), as the provision does not regulate in the same way or in any other similar way the case of the unemployed who were in the past engaged in nonagricultural economic activity.

Given this, the question arises of whether it is fair to overlook this category of individuals if their status as unemployed is the same as the status of an unemployed former employee.

Regarding the above issue; the Constitutional Tribunal states as follows: Pursuant to article 67, section 2 of the Constitution of the Republic of Poland and the interpretation embodied in the Constitutional Tribunal's jurisprudence, equality must be understood to mean that those who are equal must be treated equally and those who are not equal – unequally. To determine whether this principle is observed by the lawmaker requires the determination of the circles of those to whom the rule of procedure applies and the description of the legally relevant features of their actual situation. Such identification enables one to decide who is equal or not equal in relation to others.

If the same legal treatment is applied to individuals sharing an essential' feature, there is no doubt that such rules conform with' article 67, section 2 of the Constitution. Doubts arise if the lawmaker differentiates the legal treatment of some individuals. In order to determine whether such differentiation conforms with the Constitution, an analysis should be conducted of the criterion (criteria) on the basis of which such differentiation takes place. In other words, it must be established whether the differentiation criteria are justified in terms of substance, and, eventually, whether they are fair.

In connection with the above, the question arises what criterion serves as the basis for the differentiation referred to in article 21, section 5. The lawmaker assumed that the right to the allowance until one acquires the right to a retirement pension was to be retained by, among others, unemployed persons who were employed or in service for a minimum of 30 years (women) and 35 years (men) (pursuant to article 21, section 5, sub-section 1). Given that the scope of application of the quoted provision is determined in such a manner, doubts arise in connection with making the right to the allowance conditional on having been employed or in service and excluding from the scope of its application individuals covered by social security under other forms of economic activity (nonagricultural economic activity), although such individuals are subject to article 20, section 1, sub-section 2 making them eligible for the unemployment benefit (for 12 months). The legal justification of this preference stems from the intention to ensure a source of permanent income to the unemployed with a long period of employment, in whose case it can reasonably be presumed that changing professional qualifications or finding a new job may be especially difficult. The above reasoning is in full agreement with the constitutional meaning of justice mentioned earlier. However, the question arises whether it should be considered justified to limit the rights under article 21, section 5, sub-section 1 of the Act only to persons who were employed or in service.

In answering this question, the Constitutional Tribunal first of all considered the arguments raised by the Chief Administrative Court. Thus, the Tribunal accepted that no rational justification can be identified for the differentiation of citizens based on the form of their earlier professional activity. With respect to this issue, the view taken by the Chief Administrative Court is especially apt, that matching the State's financial means to its obligations toward the citizens cannot be achieved through differentiation that discriminates against legally defined groups of citizens. In this case, discrimination follows from the fact that the lawmaker assumed in advance that individuals covered by social security under non-agricultural economic activity either would not be faced with job loss or an inability to take up a different type of professional activity or that as a result of conducting this type of activity, they had accumulated sufficient funds ensuring them social security until retirement. The Chief Administrative Court justly observes that difficulties connected with adjustment to market economy conditions may also affect the group under consideration. Finally, it must be pointed out that persons covered by social security under non-agricultural economic activity must contribute to the Labor Fund, as is established in the conclusions of the reasoning just as the employers of persons engaged under a contract of employment or a contract of service (article 54, section 1, sub-section 1 of the Act). Failure to fulfill this obligation is subject to the measures under the provisions governing execution proceedings (article 55, section 1 of the Act) as well as other disciplinary measures (article 55, sections 2 to 3 of the Act). However, these citizens are unable to share equally with persons engaged under a contract of employment or a contract of service in the funds to which they contribute.

To recapitulate, the Constitutional Tribunal stated that the *ratio legis* of the statute justified the differentiation in the period of eligibility (under article 21, section 5, sub-section 1) for the benefits drawn by the unemployed persons enumerated in the same article. in

juxtaposition to the rule of a 12-month period. However, the essential feature- on the basis of which differentiation takes place is determined in a faulty manner; this is the cause of a discriminatory rejection of the right to benefits until retirement for that group of citizens who were covered by social security under non-agricultural economic activity. The unjustified limitation under article 21, section 5, sub-sections 1 of the Employment and Unemployment Act causes inequality, which means that the provision under consideration contravenes article 67, section 2 of the Constitution. And, by violating the criterion of just differentiation of legal bodies, it also contravenes the principle of social justice following from article 1 of the Constitution of the Republic of Poland and the provisions upheld by article 77 of the Constitutional Act dated 17 October 1992.

(...)