

Judgment

dated 19 May 1998 (U. 5/97)

The Constitutional Tribunal sitting with the bench composed of the Chairman Zdzisław Czeszejko-Sochacki, Stefan J. Jaworski and Ferdynand Rymarz (Reporting Judge).

(...)

held

1. paragraph 5, section 1 of the Regulation issued by the Minister of Health and Social Care dated 17 May 1996 on the matter of Ruling on the Temporary Inability to Work (Journal of Laws, Number 63, Item 302) to the extent to which the statistical number of the illness must be displayed in the physician's certificate – contravenes article 31, section 3, article 47, article 51, sections 1, 2 and 5 of the Constitution of the Republic of Poland dated 2 April 1997 (Journal of Laws, Number 78, Item 483); article 8 of the Convention on Protecting Human Rights and Basic Freedoms (Journal of Laws, 1993, Number 61, Item 284); article 17 of the International Pact on Civil and Political Rights (Journal of Laws, 1977, Number 38, Item 167); and article 50, section 2 of the Act dated 17 December 1974 on Pecuniary Benefits from Social Security Insurance in the event of Illness and Maternity (Journal of Laws, 1983, Number 30, Item 143; 1985, Number 4, Item 15; 1986, Number 42, Item 202; 1989, Number 4, Item 21, Number 3 5; Item 192; 1991, Number 104, Item 450, Number 106, Item 457, Number 110, Item 474; 1995, Number 16, Item 77), since it establishes a limitation in exercising the constitutional rights and freedoms of citizens reserved for statutory exclusivity.

2. Pursuant to article 190, section 3 of the Constitution, paragraph 5, section 1 of the Regulation issued by the Minister of Health and Social Care dated 17 February 1996 on the matter of Ruling on the Temporary Inability to Work (Journal of Laws, Number 63, Item 302) specifies the deadline for losing binding force as by 19 May 1999.

Reasoning

(...)

III

(...)

1. In general it has been accepted in the doctrine that private life refers *inter alia* to the protection of information about a given person and the guaranty of a certain status of independence within the framework of which a person may decide about the scope and the extent to which he/she communicates information concerning his/her own life to other persons. The existence of the right to private life in the Polish legal order has been confirmed in the collection of the decisions of the Supreme Court, which in its decision dated 8 April 1994 (III ARN 18/94) referred to the concept of protecting personal interests (article 23 and 24 of the Civil Code) to the sphere of private life and the sphere of intimacy.

The Constitutional Tribunal also singled out the essential link between the right to private life and to protect personal data *inter alia* in its decision dated 24 June 1997 in the matter whose file number is K. 21/96. Making reference to its stable jurisprudence according to which the principle of democratic rule of law also entails certain material contents, in particular associated with the rights and freedoms of the individual, the Tribunal acknowledged that article 1 of the previously binding constitutional provisions gave the basis to formulate the constitutional right to private life understood *inter alia* as the right to

maintain information about one's own life in secrecy (OTK ZU Number 2/1997, Item 23, p. 225).

In this decision the Constitutional Tribunal referring to the current jurisprudence formulated the hypothesis that the right to private life does not have an absolute nature and may be subject to limitations. It is, however, necessary for these limitations to be formulated in a manner that meets constitutional requirements. „This means *inter alia* that the curtailment of a right or a freedom may be instituted only if some other norm, principle or constitutional value supports it, while the degree of this curtailment must retain the appropriate proportion to the rank of the interest which this curtailment is supposed to serve.”

The Constitution of the Republic of Poland dated 2 April 1997, in contrast to the previously binding constitutional provisions, regulates outright the right to private life stipulating in article 47 that „everyone shall have the right to legal protection of his private life and family life, of his honor and good reputation and to make decisions about his personal life.” The Constitution also introduces in article 51 a new category of an individual's right to protect personal data, its scope includes *inter alia* the condition of a statutory basis for an individual to disclose information about his/her person (section 1), a ban against obtaining, collecting and making available other information about citizens besides that which is necessary under a democratic State ruled by law (section 2), the right of an individual's access to the relevant documents and data files and to demand that data be corrected or deleted if they are false, incomplete or if they have been collected in a way that conforms with the statute (sections 3 and 4). Moreover, this provision entails a general constitutional announcement in keeping with which the „principles and procedures for collection of and access to information shall be specified by statute” (article 51, section 5).

The provisions of the Constitution quoted above shall retain a certain mutual relationship: the right to private life embodied in the law in article 47 is guaranteed *inter alia* with respect to personal data protection, envisaged by article 51. The latter more fully explicated provision, making reference to the condition of legality a full five times – *expressis verbis* in sections 1, 3, 4 and 5 and indirectly by referring to the democratic rule of law in section 2 – constitutes a more concrete elaboration of the right to private life in procedural aspects.

In the current legal state of affairs, the very broad list of an individual's freedoms and rights accepted by the Constitution which incorporates the categories regulated by articles 47 and 51- does not need to be supplemented by referring to the general clause on the democratic rule of law set forth in article 2 of the Constitution. 2. The constitutional regulation of the principles of general freedoms, rights and duties of a man and a citizen set out in Chapters I and II of the Constitution fully refers to the rights regulated in articles 47 and 51 of the Constitution, which have been included by the maker of the system in the category of civil freedoms and rights. These principles primarily include incorporating in article 5 the protection of a man and a citizen's freedoms and rights among the fundamental goals and objectives of the Polish State and the recognition in article 30 of a man's innate and inalienable dignity as the source of a man and a citizen's freedoms and rights, where this dignity cannot be violated, and where the public authorities are bound to respect and to protect it.

In turn, in light of article 31 of the Basic Act the freedom of man is subject to legal protection (section 1), the duty of respecting the rights and freedoms of others is accompanied by the ban against forcing an individual to do that which the law does not order it to do (section 2), and – what is the most important in the context of this matter – the limitations in exercising constitutional freedoms and rights may only be established in statutes and only if

they are necessary under a democratic State ruled by law for its safety or public order, or the protection of the environment, public health and morality, or the freedoms and rights of other persons. These limitations cannot infringe upon the essence of freedoms and rights (section 3).

When comparing the cited constitutional regulation to the issue which is the basis of the Tribunal's review it is necessary to note that the criteria accepted by the new Constitution for the limitations under discussion explicitly correspond to the sense incorporated in article 8 of the Convention on Protecting Human Rights and Basic Freedoms. This provision deems it to be impermissible for a public authority to intervene in the exercise of the right to respect an individual's own private life with the exception of the instances envisaged by the statute and which are required in a democratic society on account of national and public security, national economic welfare, the protection of order and the prevention of crime, the protection of health and morality or the protection of the rights and freedoms of other persons.

The condition formulated in article 30 of the Constitution for respecting and protecting human dignity is fully applicable to the parliament as an organ of one of the public bodies, namely, the legislative body. The parliament is also the sole entity entitled to curtail – by means of legislation – the scope to which constitutional freedoms and rights can be exercised, where the Constitution specifies in detail the reasons for these limitations in the form of values (interests) competing with the extent to which an individual exercises his/her freedoms and rights.

The foregoing unequivocally indicates that the evaluation of the constitutionality of every regulation stipulating the curtailment of the extent to which an individual may exercise freedoms and rights must concern at least two aspects: the procedural (formal), in other words the statutory rank of the normative or material act under examination, in other words the fulfillment of the constitutional reasons for the accepted limitation.

This means that insofar as the statutory rank itself of the regulation limiting the individual's status does not suffice to acknowledge their substantive justification which is subject to verification with respect to filling the material reasons set forth in article 31, section 3, thus *a contrario*: the failure to follow the statutory form for curtailing freedoms and rights must lead to the disqualification of the given regulation as it contradicts the norm indicated in article 31, section 3 of the Constitution.

3. In the opinion of the Constitutional Tribunal, in light of the binding Constitution, the superiority of statutes has been subjected to a certain re-valuation both with respect to the Constitution and to executive orders.

Among the supreme principles of the Constitution is the principle of constitutionalism which points to the very essence of the Basic Act (the Constitution), by recognizing it as the highest law of the Republic of Poland (article 8, section 1), whose primary consequence is the rule that the provisions of the Constitution are applied directly unless it stipulates otherwise (article 8, section 2). This means that „in all those instances when the constitutional provisions are formulated in a manner that is sufficiently precise and unequivocal such that they may be referred to specific situations occurring in legal reality, the entity applying the law should base its actions (decisions) directly on such a constitutional provision, and only later should it refer to the provisions of normal acts. Under this concept the Constitution may be applied continuously in the operation of all the organs of public bodies where the fundamental role in this area must fall to the .. court” (see L. Garlicki, *Polskie prawo konstytucyjne*, [Polish Constitutional Law], Part 1, Warsaw 1997, p. 60).

Further conclusions stem from an analysis of the separate regulation in Chapter III of the Constitution devoted to the sources of law.

Executive Regulations have been included among the universally binding sources of law in the Republic of Poland, next to the Constitution, statutes and ratified international agreements. It is characteristic that with reference to regulations the Constitution has formulated precise requirements which to a great degree relate to the line of thought elaborated in the Constitutional Tribunal's jurisprudence.

According to article 92 of the Constitution, regulations are issued by the bodies indicated in the Constitution on the basis of a specific delegation included in statutes and in order to execute it, where this delegation should specify the competent body, the scope of affairs transferred for regulation and the guidelines pertaining to the contents of the act (section 1). The Constitution simply forbids an authorized body from transferring the powers under discussion to some other body (section 2).

4. The provision set forth in § 5, section 1 of the Regulation issued by the Minister of Health and Social Care dated 17 May 1996 and which has been challenged by the applicant, was issued on the basis of article 50, section 2 of the Act dated 17 December 1974 on Pecuniary Social Insurance Benefits in the Event of Illness and Maternity. Article 50, section 2 of the Act authorized the Minister of Health and Social Care to specify by way of a Regulation in consultation with the Minister of Labor, Salaries and Social Affairs the principles and the course for making decisions and the principles for auditing the physician's collection of decisions in matters related to the establishment of the right to illness benefits.

As stems from above, article 50, section 2 of the Act did not simply authorize the Minister of Health and Social Care to specify in the Regulation (nor all the more so in an attachment to the Regulation showing the chief physician's certificate about the temporary inability to work), the statistical number of the illness thereby encroaching in a man's private sphere of life. The general delegation set forth in article 50, section 2 of the Act could have elicited objections even at the time when it was extended. The conditions for formulating this type of delegation were, however, explicitly defined at the outset of the Constitutional Tribunal's decision-making activities, where the doctrine fully approves its position. The deep system wide changes of 1989, which also included constitutional changes, *inter alia* introducing the democratic rule of law, solidified the legislative act's position in the system of sources of law and the legal nature of executive orders. Before the Constitution dated 2 April 1997 came into force, the following fundamental principles: the exclusivity of a statute when dealing with freedoms and rights, the permissibility of an executive order regulating only that which is explicitly enumerated in the delegation, was unequivocally understood both in the doctrine as well as in the collection of the Tribunal's decisions. There was especially no doubt that in a democratic State ruled by law, intervention in the freedom and right of a man and a citizen must be constitutionally founded in the form of a statute.

The Constitution dated 2 April 1997, under the influence of the doctrine and the Constitutional Tribunal's jurisprudence, defined not only an individual's legal status in an extensive and exhaustive fashion but also the permissibility and the form of statutory intervention into the constitutionally protected freedoms and rights. Thus when evaluating the constitutionality of the challenged provision one may fully refer to the provisions of the Constitution, which, even before it came into force, were understood in the same manner on the basis of the constitutional provisions in force at the time. In particular, it is necessary to emphasize that the Council of Ministers could issue Regulations „in order to execute acts and on the basis of the delegation extended therein” (article 54, section 1 of the Constitutional Act dated 17 October 1992 on the Mutual Relationships between the Legislative and the

Executive Authorities of the Republic of Poland and the Local Self government Act). The formal conditions of this delegation, as pointed out, were defined precisely in the Constitutional Tribunal's jurisprudence. In this respect the state of constitutional law has not undergone basic change but only the criteria required for the statutory delegation have been explicitly sharpened in article 92 of the Constitution of the Republic of Poland, according to which Regulations are issued by the bodies indicated in the Constitution on the basis of a detailed delegation set forth in a statute and in order to execute it. The delegation should specify the body with jurisdiction to issue the Regulation and the scope of matters transferred for regulation and the guidelines pertaining to the contents of the statute.

With reference to the sphere of human freedoms and rights, the exclusive reservation to the statutory rank of regulations for their limitation and restriction them should be understood literally while ruling out the permissibility of further evolvement, i.e. transferring norm-giving powers to some other body, similarly to the exclusion thereof with reference to executive regulations to statutes.

The Constitutional Tribunal believes that in this specific subject matter constituted by the regulation of human and civil freedoms and rights, envisaged as a necessary or even as a statutory regulation permitted by the Constitution must feature completeness. In no instance in a dispute between an individual and a public body over the scope or manner of their exercise may the legal basis for the decision on this dispute be separated from the constitutional regulation, nor may it be lower in rank than a statute.

5. There is no doubt that the information about the state of health, which is the subject of regulation in the challenged Regulation (the type of illness) stated in the physician's certificate in the form of the illness' statistical number belongs to the sphere of an individual's private life. This information, in light of currently binding executive provisions, is to be obtained by the physician and to be made available to – besides the interested party – at least three addressees: the relevant agencies of the health care establishment, the employer and the ZUS Social Insurance Company. This creates an indirect threat to the sphere of private life for specific persons, although it may be violated directly only when third persons infringe upon the confidentiality of these data. Such a situation is all the more possible since the Act dated 14 December 1982 on State and Public Service Secrets (Journal of Laws, Number 40, Item 271 as amended) permits information about an employee's state of health to be included in the category of public service secrets only with reference to state, cooperative and social organizational units (article 3, section 1).

In turn the provisions of the Civil Code about the protection of personal interests, which should most certainly include intimate information about a person's state of health, provide a certain degree of legal protection against such lawless infractions; they only constitute, however, insufficient *post factum* means of legal protection.

It must then be stated that § 5, section 1 of the Regulation dated 17 May 1996, constituting an explicit manifestation of norm-giving intervention in the right to private life (article 47), curtailing its scope by providing the work establishment (employer) with concrete information about the employee's state of health, fails to meet the elementary conditions of the statutory form for this intervention, nor its indispensable proportion for following constitutionally defined values. For this Regulation does not refer to any interest whatsoever which the indicated limitation would serve.

The statutory delegation of this regulation (in article 50, section 2 of the Act dated 17 December 1974) does not authorize one to consider it as meeting the constitutional condition of the statutory rank of the duty to disclose a given person's information as envisaged in article 51, section 1 of the Constitution, which stipulates that „no one may be obligated,

except on the basis of statute, to disclose information concerning his person.” The provision challenged in the Regulation also infringes upon article 51, section 2 of the Constitution, according to which „public authorities shall not acquire, collect nor make accessible information on citizens other than that which is necessary in a democratic State ruled by law,” and article 51, section 5 of the Constitution, stipulating that „principles and procedures for collection of and access to information shall be specified by statute.”

The Constitutional Tribunal, evaluating the constitutionality and legality of the challenged provision in § 5, section 1 of the Regulation issued by the Minister of Health and Social Care also considered the regulation in the Act dated 29 August 1997 on Protecting Personal Data (Journal of Laws, Number 133, Item 883). According to this Act „everyone has the right to protect personal information about his/her person” (article 1), and „personal data may be processed for a public good, the good of the person concerned by the data or the good of third persons to the extent and in the manner prescribed by the act” (article 2). According to article 27, sections 1 and 2 in connection with article 7, sub-section 2 of this Act it is forbidden to collect, record, store and make data available about the state of health without the consent of the person concerned by the data unless a particular provision of the Act permits it and creates complete guarantees for their protection.

6. The provision challenged in § 5, section 1 of the Regulation regulating the issues exclusively reserved to statutes on human freedoms and rights was in violation of the international agreements ratified by Poland even at the time of its issuance. Under the previously binding constitutional provisions, in reasoning its decisions the Constitutional Tribunal frequently referred to the conformity between normative acts and acts of international law, especially civil rights and freedoms. The currently binding Constitution of the Republic of Poland dated 2 April 1997 explicitly establishes the Tribunal's reasoning in article 188, sub-section 3 to investigate the „conformity in the provisions of law issued by central government bodies with the Constitution, ratified international agreements and statutes”. Article 70, section 1, subsection 3 of the Constitutional Tribunal Act dated 1 August 1997 (Journal of Laws, Number 102, Item 643) entails an identical provision pertaining to the powers to investigate the conformity *inter alia* between regulations and ratified international agreements.

The applicant rightly lodges the allegation that the provision challenged in the Regulation contravenes the Constitution and article 8 of the Convention on Protecting Human Rights and Basic Freedoms and article 17 of the International Pact on Civil and Political Rights. According to article 8 of the Convention on Protecting Human Rights and Basic Freedoms „every one has the right to respect his/her own private life...,” and „the intervention of a public body in exercising this right is not permissible with the exception of the instances envisaged by statute and which are necessary in a democratic society on account of state security, public safety or the nation's economic welfare, protecting order and preventing crimes, protecting health and morality or the rights and freedoms of other persons.”

Article 17 of the International Pact on Civil and Political Rights treats this matter similarly stipulating *inter alia* that „no one may be threatened with willful and lawless intervention in his/her private life” and that „everyone has the right to legal protection against this type of intervention and attempts to restrict liberty.”

It should be emphasized that the foregoing international norms ratified by Poland conform to the provisions of the Polish Constitution and the Constitutional Tribunal's jurisprudence on the right of legal protection to private life and the exclusivity of statutes in this respect. 7. A new power held by the Constitutional Tribunal which was unknown under the previously binding constitutional provisions is the ability specified in article 190, section 3

of the Constitution to set a deadline by which a normative act is to lose its binding force. The reasons allowing one to resolve that a normative act shall lose binding force on the day after the decision asserting nonconformity with the Constitution, a ratified international agreement or a statute is handed down have not been defined statutorily and in every instance are subject to consideration and evaluation by the Constitutional Tribunal. In this concrete matter the Constitutional Tribunal resolving that paragraph 5, section 1 of the Regulation of the Minister of Health and Social Care shall lose binding force by 19 May 1999 took into consideration lawmaking needs and the relevant time to consider the arguments employed in justifying the verdict, the legislative initiative and the ratification of the Act.

It should be noted that the Tribunal evaluating the constitutionality of the challenged provision from the point of view of the currently binding Constitution and asserting – in keeping with article 31, section 3 – that limitations on exercising constitutional freedoms and rights, which indubitably include the right to private life (article 47), may be established only in a statute and only if they are necessary in a democratic state for state security or public order, or to protect the environment, public health and morality or the freedoms and rights of other persons, whereas these limitations cannot infringe upon the essence of freedoms and rights – did not evaluate the material and legal substantiation for entering the statistical number of the illness on the physician's certificate. It left this issue up to statutory regulation where the proportions between the public interest and the ; interest in protecting every person's private life will be duly expressed. (...)