40/4/A/2013

JUDGMENT

of 7 May 2013

Ref. No. SK 11/11*

In the Name of the Republic of Poland

The Constitutional Tribunal, in a bench composed of:

Piotr Tuleja – Presiding Judge
Stanisław Biernat
Maria Gintowt-Jankowicz – Judge Rapporteur
Andrzej Rzepliński
Andrzej Wróbel,

Krzysztof Zalecki – Recording Clerk,

having considered, at the hearing on 7 May 2013, in the presence of the Sejm and the Public Prosecutor-General, a constitutional complaint submitted by Mr T. C., in which he requested the Tribunal to examine the conformity of:

Article 83 of the Act of 27 July 2001 - the Law on the Organisational Structure of Common Courts (Journal of Laws - Dz. U. No 98, item 1070, as amended; hereinafter: the Act on the Organisational Structure of Common Courts), insofar as this provision does not determine the maximum permissible hours of work for common court judges, does not precisely specify situations where the said maximum number of hours may be exceeded, and it rules out the right to compensation in the form of additional remuneration or an equivalent period of time off work for the work performed outside the said maximum number of hours, to:

– Article 30 in conjunction with Article 24 and in conjunction with Article 66(1) and (2) of the Constitution of the Republic of Poland,

---

* The operative part of the judgment was published on 21 May 2013 in the Journal of Laws - Dz. U., item 585.

– Article 32(1) and (2) in conjunction with Article 2 of the Constitution,
– Article 47 in conjunction with Article 71(1) of the Constitution,

adjudicates as follows:

Article 83 of the Act of 27 July 2001 - the Law on the Organisational Structure of Common Courts (Journal of Laws - Dz. U. of 2013, item 427) **is consistent with Article 66 in conjunction with Article 24 of the Constitution of the Republic of Poland as well as is not inconsistent with Article 30 and Article 47 in conjunction with Article 71(1) of the Constitution**.

Moreover, the Tribunal decides:

pursuant to Article 39(1)(1) of the Constitutional Tribunal Act of 1 August 1997 (Journal of Laws - Dz. U. No. 102, item 643, of 2000 No. 48, item 552 and No. 53, item 638, of 2001 No. 98, item 1070, of 2005 No. 169, item 1417, of 2009 No. 56, item 459 and No. 178, item 1375, of 2010 No. 182, item 1228 and No. 197, item 1307 as well as of 2011 No. 112, item 654)**, to discontinue the proceedings as to the remainder, on the grounds that issuing a judgment is inadmissible.**

STATEMENT OF REASONS

[…]

III

The Constitutional Tribunal has considered as follows:

1. The subject and scope of the review.

1.1. The subject of the review in the present case is Article 83 of the Act of 27 July 2001 - the Law on the Organisational Structure of Common Courts (Journal of Laws - Dz. U. of 2013, item 427, as amended; hereinafter: the Act on the Organisational Structure of Common Courts). Challenging the constitutionality of Article 83 of the said Act, the complainant requests the Tribunal to determine that the indicated provision, insofar as it does not determine the maximum permissible hours of work for common court

judges, does not precisely specify situations where the said maximum number of hours may be exceeded, and it rules out the right to compensation in the form of additional remuneration or an equivalent period of time off work for the work performed outside the said maximum number of hours, is inconsistent with Article 30 in conjunction with Article 24 in conjunction with Article 66(1) and (2), Article 32(1) and (2) in conjunction with Article 2 as well as Article 47 in conjunction with Article 71(1) of the Constitution.

When reconstructing the subject of the review, one may not disregard the fact that the complainant has actually challenged two provisions of the Act on the Organisational Structure of Common Courts in his constitutional complaint, namely: Article 83, pursuant to which "the hours of work for judges are determined by their workload", and Article 91(1), which sets out a basic rule for determining the amounts of remuneration for judges, i.e. "the amounts of remuneration for judges in equivalent positions vary depending only on the length of service or their specific duties as judges". For formal reasons, the Constitutional Tribunal has refused to proceed with the complaint in the part regarding Article 91(1) of the Act on the Organisational Structure of Common Courts. However, the way in which the *petitum* of the complaint has been formulated, the arguments and allegations concerning unconstitutionality remain relevant to the original scope of the allegation. The complainant (a common court judge of many years) has indicated an infringement of his subjective rights in a ruling in which a court did not grant his claims for the payment of "an allowance for overtime". When assessing a functional relation between the normative content of the two originally challenged provisions of the said Act, the complainant correctly notices, in the content of Article 83 of the said Act, a reason for the refusal to recognise the judge's right to "compensation in the form of an allowance for overtime". Therefore, the subject of the allegation in the present case is the way in which the legislator has regulated the hours of work for judges in proper provisions on the rights and duties of judges, i.e. the Act on the Organisational Structure of Common Courts.

1.2. The allegations raised by the complainant have been multi-faceted. Above all, the complainant has based his argumentation, to a large extent, on the interpretation adopted by courts with regard to provisions concerning the right to compensation for work performed outside the permissible hours of work specified in the Act of 26 June 1974 – the Labour Code (Journal of Laws - Dz. U. of 1998 No. 21, item 94, as amended; hereinafter: the Labour Code), in the judgment of the Circuit Court in Warsaw, the 12th Labour Division, of 15 September 2009 as well as, in particular, in the resolution

of the Supreme Court of 8 April 2009, ref. no. II PZP 2/09. However, it should be noted that the said rulings primarily address the question of the admissibility of applying the provisions of the Labour Code (Article 151^1 of the Labour Code) to remuneration for judges. By contrast, some allegations raised by the complainant comprise his criticism of the work schedule model that applies to judges, and the complainant's proposals for amending the said model in the way deemed desirable by the complainant. They include, *inter alia*, the complainant's suggestions to determine the permissible hours of work for judges in accordance with rules that are analogical to those applied to other functionaries or employees of state institutions, in particular as regards the right to compensation in the form of additional remuneration or an equivalent period of time off work for the work performed outside the permissible hours of work. The said allegations should be regarded as conclusions *de lege ferenda*, which – for obvious reasons – may not be addressed to the Constitutional Tribunal. Moreover, when substantiating the unconstitutionality of Article 83 of the Act on the Organisational Structure of Common Courts, the complainant also indicates a number of actual circumstances, such as: the insufficient number of vacancies for judges and assistants to judges, inadequate technical equipment in courts or an increasing number of duties assigned to judges. The main allegation concerns an infringement of Article 66 in conjunction with Article 24 of the Constitution, i.e. violation of constitutional guarantees regarding work as well as conditions of work.

2. The legal status of judges as provided for by the Constitution.

2.1. An assessment of the challenged provision should be preceded by determining the legal status of judges. The discussion should begin with those provisions of the Constitution that concern the exercise of judicial power. The constitution-maker has assigned the exercise of judicial power in the name of the Republic of Poland to courts and tribunals (Article 174 of the Constitution). The regulations concerning that issue comprise the determination of structure, system and scope of the activity of courts as well as the position of judges.

The Constitution expresses several principles that are closely related to the office of judge. The said regulations specify issues in great detail. Above all, judges constitute the only professional group whose conditions of work and remuneration constitute the subject of an explicit constitutional regulation. The legislator has been obliged to provide judges with appropriate conditions for work and to grant them remuneration consistent with the

dignity of their office and the scope of their duties (Article 178(2) of the Constitution). Moreover, the Constitution ensures that judges: shall be appointed for an indefinite period (Article 179), shall not be removable (Article 180), shall not be transferred to another bench or position against their will (Article 180(2) and (5)), shall not be held criminally responsible or deprived of liberty (Article 181), and shall have a possibility to retire (Article 180(3)-(4)). All these elements are to guarantee that the principle of judges' independence is implemented; the said principle constitutes one of the basic and, at the same time, characteristic features of the judicial system and is a prerequisite for the efficient and diligent performance of public tasks for the purpose of which courts have been established. The said tasks primarily include ensuring that everyone shall have the right to a fair and public hearing of his/her case before an impartial and independent court, which arises from Article 45 of the Constitution. The said right constitutes one of the most important guarantees of human rights and the rule of law, as well as one of the fundamental elements of a state ruled by law, which has a number of times been indicated by the Tribunal in its jurisprudence (see e.g. the judgment of the Constitutional Tribunal of 9 February 2010, ref. no. SK 10/09, OTK ZU No. 2/A/2010, item 10 and the jurisprudence cited therein).

The Constitution does not specify the term 'judges' independence', but merely delineates the boundaries thereof by indicating that judges are subject to the Constitution and statutes (Article 178(1) of the Constitution). Traditionally, the principle of independence has been specified as "excluding judges from any impact of secondary factors" (S. Gołąb, *Organizacja sądów powszechnych*, Kraków 1938, p. 17). Incorporating that principle into the Constitution of 17 March 1921 (Article 77), it was stressed that: "the judicial branch of government may not be established on the basis of the principle of subordination towards superior authority, as this is the case with other branches of state authority" (see verbatim record from the 179th sitting of the Statutory Sejm, 28 October 1920). Taking the above into account, from the early years the Second Republic of Poland (which existed in the years 1919-1939), attention was paid to the autonomy of the office of judge and a need for separate statutory regulations on the organisational structure of the judicial system as well as on the rights and obligations of judges (S. Gołąb, *Organizacja…*, pp. 32-33).

Nowadays it is also emphasised that respect for judges' independence implies a prohibition against exerting any influence on judges' decisions outside court proceedings by authorities or political factors, superiors, as well as parties to and participants in the

proceedings (see the judgment of the Constitutional Tribunal of 24 June 1998, ref. no. K 3/98, OTK ZU No. 4/1998, item 52). The preservation of independence is contingent not only upon the personality traits of a given judge, but it also requires legal solutions and guarantees that are proper in a democratic state ruled by law. Judges should be provided with such conditions that they could freely adjudicate, in accordance with legal provisions and their own conscience (see W. Sanetra, "Swoboda decyzji sędziowskiej z perspektywy Sądu Najwyższego", *Przegląd Sądowy* Issue No. 11-12/2008, p. 5; L. Garlicki, commentary on Article 178 of the Constitution, [in:] *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, Vol. IV, Warszawa 2005, pp. 8-9). The Constitutional Tribunal has indicated on a number of occasions that respect for and protection of judges' independence "is a constitutional obligation which lies with all organs of public authority, persons who are involved in the activity of courts, as well as judges themselves" (see e.g. the judgment of 16 April 2008, ref. no. K 40/07, OTK ZU No. 3/A/2008, item 44).

Guaranteeing the independence and impartiality of judges as well as the independence of courts are universally regarded as constitutional standards, which should set a model for adjusting not only the law, but also the practice of states. The said issues are discussed in the Recommendation No. R(94)12 of the Committee of Ministers to Member States on the Independence, Efficiency and Role of Judges of 10 July 1998. It is emphasised in the said Recommendation that : "[t]he independence of judges is one of the central pillars of the rule of law", and thus the Member States should aim at guaranteeing the highest level of the competence, independence and impartiality of judges as well as the independence of courts. The indispensable means of judges' independence comprise, *inter alia*, the necessity to specify the terms of holding the office by judges and determining their remuneration. The efficient performance of work by judges is related to having an appropriate number of judges, providing them with remuneration that is consistent with the dignity of their office and the scope of their duties, specifying a career path, as well as providing appropriate auxiliary personnel and technical equipment. However, the necessity to promote judges' independence does not refer only to particular judges, but to the entire judicial system.

Taking account of that broader context allows one to notice that the legal status of judges should primarily be perceived in the light of "the intention to ensure actual adherence to the constitutional principles of the administration of justice and the judicial system (the judgment of the Constitutional Tribunal of 7 November 2005, ref. no. P 20/04,

OTK ZU No. 10/A/2005, item 111), which is in turn to guarantee that the individual will have his/her rights protected by courts. The constitutional provisions concerning judges may not be regarded as personal privileges granted to a certain group of public functionaries which are aimed at protecting their interests. These are provisions that specify a systemic institution which serves the best interest of the state, and in particular the exercise of the right to a fair trial, arising from Article 45(1) of the Constitution. This is the context in which an interpretation has been provided with regard to higher-level norms indicated by the complainant and assessment of Article 83 of the Act on the Organisational Structure of Common Courts has been carried out.

2.2. What specifies the constitutionally established legal position of judges is the entirety of provisions in the Act on the Organisational Structure of Common Courts, which - as any statute on the rights and duties of a given professional group – constitutes *lex specialis* when juxtaposed with the Labour Code. The said Act, *inter alia*, specifies the content of the legal situation of judges, within the scope of which judges fulfil their public duties. The way of regulating judges’ hours of work constitutes an element of that legal situation.

The complainant has devoted considerable attention to presenting an analogy between the legal situation of judges and that of other persons employed in public service. In particular, he compared the legal situation of judges with the legal status of state officials, the members of a corps of civil servants and the functionaries of uniformed services. Taking the above into consideration, attention should be drawn to those essential features of the legal situation of judges, which clearly set them apart from other public-service employees. This is of significance from the point of view of the above-indicated constitutional bases of the legal status of judges.

In the Constitution, the term ‘public service’ (cf. Article 60 of the Constitution) is a collective term that comprises the situation of persons employed in all institutions of public authority, construed in a broad sense. They include persons employed in public offices and state institutions for the purpose of performing the tasks and duties of the state - as the organs of authority, the judiciary, public prosecution, state supervision and various branches of state administration - as well as uniformed services. There is no doubt that different systemic functions of each of the groups, their objectives and the principles of their organisational structure require the proper regulation of content of the legal position of the persons holding a given office or performing certain public functions. This is

reflected in particular statutes i.e. statutes on the rights and duties of those professional groups. Nevertheless, one may specify the basic characteristics of that particular employment relationship that is regulated outside the Labour Code. In its jurisprudence, the Tribunal has indicated that those characteristics include: 1) unilateral determination by the state (by statute) of the terms of state service, i.e. the elements of the service relationship, namely the obligations and rights of a given functionary (official); 2) the public-law character of the service, manifested by a unilateral administrative act stating that one has been admitted to the service on the basis of designation (an act which is a decision in character), in compliance with the principle of voluntary character of the service; 3) the permanence of the service relationship, which consequently implies much greater stability of the status of an official than in the case of other terms of employment; 4) subordination of officials which is reflected in obligations and restrictions imposed on them by law, which includes subordination to as well as the subordination of the officials' personal interests to the interests of the state (service); 5) stringent requirements as a functionary's responsibility for his/her actions, and in particular disciplinary responsibility; 6) the existence of certain rights granted to state officials which have at times the character of privileges aimed at compensating sacrifice incurred because of service (see the judgment of the Constitutional Tribunal of 7 May 2002, ref. no. SK 20/00, OTK ZU No. 3/A/2002, item 29).

The Act on the Organisational Structure of Common Courts, which comprises provisions on the rights and duties of judges, also regulates the employment relationship of the said professional group in an autonomous way, and a different manner than the Labour Code and other provisions on the rights and duties of other professionals groups. This is manifested in the basic elements of the service relationship of judges, such as: the introduction of stricter requirements concerning legal capacity with regard to candidates to be employed as judges (Articles 61-64), service relationship established by an act of designation (Article 65), a unilateral determination of the terms of service by the state (Articles 66-106g), enhanced system of responsibility (Articles 107-133), special rights that are unavailable in the context of contractual employment relationships (e.g. judges' retirement – Article 69, an additional leave – Article 92) or the stability of employment (Article 68).

At the same time, the service relationship of judges is special as regards subordination. Being characteristic of service relationships, including the service relationship of officials, subordination to one's superior or availability is, indeed,

incompatible with independence – the supreme principle of judges' service. Therefore, in accordance with the Act on the Organisational Structure of Common Courts, judges follow only instructions within the scope of administrative activities, and only if by law the activities fall within the scope of judicial duties, as well as instructions concerning the efficiency of court proceedings (Article 79). Additionally, the said provision grants judges the right to request the said instructions in a written form. Unlike state officials (Article 18 of the Act of 16 September 1982 on the Employees of State Institutions, Journal of Laws - Dz. U. of 2001 No. 86, item 953, as amended), the members of a corps of civil servants (Article 77 of the Act of 21 November 2008 on Civil Service, Journal of Laws - Dz. U. No. 227, item 1505) or the functionaries of uniformed services (e.g. Article 38 of the Act of 9 June 2006 on the service of the functionaries of the Military Counter-Intelligence Service and the Military Intelligence Service, Journal of Laws - Dz. U. No. 104, item 710, as amended), who are obliged to follow instructions from their superiors which concern their work, the subordination of judges to their superiors has been limited merely to strictly specified administrative activities, and does not concern judges' powers related to adjudicating. The Act on the Organisational Structure of Common Courts also restricts the possibility of transferring a judge to a different post without his/her consent (see Article 75 the said Act).

Due to the subject of the allegation, one may not overlook the issue of judges' remuneration. In the Act on the Organisational Structure of Common Courts, the legislator has provided for equal amounts of remuneration for judges of equivalent courts, differentiation with regard to the said amounts depending on the length of service or their specific duties as judges (allowances for seniority and function allowances), calculation the amounts of judges' remuneration as a multiple of a basic amount (an amount of forecast average remuneration in the public sector). At the same time, the legislator has excluded introducing varied amounts of remuneration depending on how time-consuming and complex duties assigned to judges are (see Article 91 of the Act on the Organisational Structure of Common Courts). Determined by objective factors, the statutory regulation of judges' remuneration is neither a new or unusual solution, and there is no doubt that it is closely related to judges' independence. For a long time, it has been indicated that there is a need to regulate judges' remuneration by a statute that would exclude "a possibility of arbitrary determination of judges' remuneration, depending on the opinions of their superiors or a regulation that may be repealed at any time" (J. Vacha, "Sędzia w państwie nowoczesnym", *Głos Sądownictwa* Issue No. 11/1933, pp. 650-651). This is to

prevent exerting any pressure by superiors on judges' work within the scope of adjudicating on cases.

The above-mentioned characteristics of the legal status of judges confirm that the characteristics of the service relationship of judges which significantly distinguish the situation of judges from the situation of other public-sector employees are aimed at providing appropriate guarantees of judges' independence. In this context, the challenged regulation should be analysed.

Pursuant to Article 83 of the Act on the Organisational Structure of Common Courts, the hours of work for judges are determined by their workload. There is no possibility of quantitative determination of duties; nor is it possible to individually determine the amount of remuneration, depending on the actual workload of a given judge. Also, judges do not rely on instructions of their employers, but they themselves adjust time that is necessary for the performance of duties assigned to them. They do not have an obligation to work within set hours and for a set number of days in a week. They may perform their work at a chosen time and place, apart from activities that – due to their nature – require being in a given place and at a given time, e.g. carrying out proceedings or having duty hours. Judges' hours of work are not subject to being recorded on time sheets, and judges are evaluated on the basis of the performance of their duties (see T. Ereciński, J. Gudowski, J. Iwulski, [in:] *Prawo o ustroju sądów powszechnych. Ustawa o Krajowej Radzie Sądownictwa. Komentarz*, J. Gudowski (ed.), Warszawa 2009, pp. 318-323; the judgment of the Supreme Court of 4 November 2004, ref. no. SNO 44/04, Lex No. 471960).

3. The assessment of the conformity of Article 83 of the Act on the Organisational Structure of Common Courts to Article 66 in conjunction with Article 24 of the Constitution.

3.1. The basic allegation concerns an infringement of Article 66 of the Constitution, which reads as follows: "1. Everyone shall have the right to safe and hygienic conditions of work. The methods of implementing this right and the obligations of employers shall be specified by statute. 2. An employee shall have the right to statutorily specified days free from work as well as annual paid holidays; the maximum permissible hours of work shall be specified by statute". When emphasising that the said provisions constitute "a set of norms that remain in an immanent functional relation", the complainant

primarily referred to Article 66(2) of the Constitution. In his opinion, it follows from the end part of the second sentence of the indicated provision that every person that performs work has the right to expect the legislator to effectively determine the maximum permissible hours of work. This makes it possible to delineate the limit of maximum permissible hours of work in a precise way, where - in the case of exceeding the said maximum - employees are entitled to "adequate financial or other compensation, and at times they may refuse further performance of work without negative consequences". In the complainant's opinion, the said requirement is not met by Article 83 of the Act on the Organisational Structure of Common Courts, which introduces a rule that the hours of work for judges remain unrestricted by any maximum permissible hours, which as a result also causes lack of additional remuneration for work performed in excess of the maximum permissible hours (since the said maximum permissible hours have not been set out).

What is supposed to directly follow from the violation of Article 66(2) of the Constitution, which is caused by the fact that no maximum permissible hours have been specified, is an infringement of paragraph 1 of the said provision. The complainant indicated that, in Article 66(2) of the Constitution, the ordinary legislator has been granted powers within the scope of determining the maximum permissible hours, but he does not have full discretion in that respect. When specifying the maximum permissible hours, the legislator is also bound by a requirement to provide employees with safe and hygienic conditions of work (paragraph 1). The complainant has underlined that the hygienic conditions of work entail that factors which are detrimental to human health are eliminated from the work environment. In his opinion, such factors should undoubtedly include the lack of specified maximum permissible hours, which may "even ruin a person's health".

Also, the complainant juxtaposed the non-conformity of the challenged provision to Article 66(2) of the Constitution with an infringement of Article 24 of the Constitution, which implies an obligation to protect employees by the state, as well as legal guarantees for the protection thereof. In the complainant's view, the protection of performance of work must comprise, on the one hand, clear provisions regulating issues related to the permissible hours of work and, on the other hand, the introduction of different types of penalties for the breach of the said provisions that would vary in their degree of stringency. According to the complainant, the said penalties include employees' right to additional remuneration or an equivalent period of time off work for the work performed outside the maximum permissible hours of work, as well as penalties under criminal law. In the

opinion of the complainant, the challenged regulation infringes Article 24 of the Constitution in both these aspects.

3.2. With reference to the above allegations, it should be pointed out that Article 66 of the Constitution, to a large extent, has a referral character. Indeed, it stipulates that the proper content of rights set therein is specified by statute. In its jurisprudence, the Tribunal has emphasised that the Article falls into the category of provisions that oblige the ordinary legislator to introduce a regulation, but they do not specify the shape of the said regulation in a detailed way (see the Constitutional Tribunal of 2 July 2002, ref. no. U 7/01, OTK ZU No. 4/A/2002, item 48). The legislator is competent both to specify the detailed content of the rights arising from that provision as well as to introduce restrictions in that respect (see the judgment of the Constitutional Tribunal of 24 February 2004, ref. no. K 54/02, OTK ZU No. 2/A/2004, item 10). This way, the constitution-maker has granted the legislator considerable regulatory freedom, in particular that Article 81 of the Constitution permits asserting rights set out in Article 66 of the Constitution only within "limitations specified by statute". This reduces the scope of claims which may be put forward on the basis of that provision by the individual – an allegation of the unconstitutionality of a statutory regulation within that scope may only be raised when it provides for protection that is below the set minimal level and leads to a situation where a given right has been devoid of actual content" (the judgment of the Constitutional Tribunal of 24 October 2000, ref. no. K 12/00, OTK ZU No. 7/2000, item 255; L. Garlicki, commentary on Article 66, [in:] *Konstytucja...*, Vol. 3, Warszawa 2003, p. 2).

Article 66(1) of the Constitution grants everyone (not only employees) a general right to the safe and hygienic conditions of work. Despite the fact that the content of the said right has not been specified in the Constitution, there is no doubt that there is a close relation between the hours of work on the one hand and the safe and hygienic conditions of work on the other. The safe and hygienic conditions of work imply the elimination of factors which are detrimental to human health. Excessively long hours of work may be perceived as such a factor (see A. Sobczyk, *Zasady prawnej regulacji czasu pracy*, Poznań 2005, pp. 369-384).

Paragraph 2 of the said Article provides for the right to statutorily specified days free from work and annual paid holidays as well as the maximum permissible hours of work. The rights that are set out therein should be regarded as a constitutional guarantee of

the right to rest, which in an obvious way remains related to the issue of permissible hours of work.

3.3. In the light of the Tribunal's views, it should be indicated that the Constitution does not provide for one specific work schedule model which should apply to everyone. On the contrary, it is at the legislator's discretion to determine work schedule models that apply to particular professional groups; the legislator's departure from the solution adopted in the Labour Code, in the context of determining the permissible hours of work for judges, and the introduction of a separate regulation included in provisions on the rights and obligations of judges falls within the scope of the regulatory freedom to which the legislator is entitled. The Constitution determines neither the permissible hours of work nor the number of days free from work, nor the terms of being granted holidays. Thus, it may not be deemed that Article 66(2) of the Constitution requires that the definition of permissible hours of work from the Labour Code should be referred to all forms of activity with regard to all professionals group. The Tribunal has pointed this out in its judgment of 24 February 2004, ref. no. K 54/02, in which it has underlined that: "it is obvious that standards and requirements concerning the safe and hygienic conditions of work within the scope of maximum permissible hours of work are not and may not be identical for all positions".

In the case of judges, the binding regulation on the permissible hours of work falls within the scope of the legislator's regulatory freedom. It constitutes a historically shaped and separate model which arises from a special character of the work performed by judges and the special character of the organisation of the said work. Performing duties related to the office of judge constitutes public service which is assigned with great responsibility due to obligations that are to be fulfilled, and the said responsibility is compensated by special rights, reserved for that professional group, i.e. the right to additional annual holidays, the right to a paid leave for the improvement of health, the right to receive full remuneration for the period of absence of work due to ill-health, and the right to judges' retirement. When assessing the challenged regulation, the Tribunal took into account the complete constitutional context of issues under examination. Unlike the complainant, the Tribunal may not ignore the fact that the situation of judges in the light of the Constitution is special, and the provisions on the permissible hours of work for judges, which constitute a vital element of the service relationship of judges, serve the purpose of safeguarding the independence of the judiciary, its ability to administer justice in an independent way, and

thus is conducive to the exercise of the constitutional right to a fair trial. This directly follows from Article 178 of the Constitution, which links the guarantee of judges' independence (paragraph 1) with the guarantee of appropriate conditions for work and granted remuneration consistent with the dignity of their office and the scope of their duties (paragraph 2).

The adopted regulation provides for a possibility of flexible hours of work, depending on the individual predisposition of judges. Indeed, as regards the work schedule of judges, they are not subject to strict supervision of their employers, which entails that the said employers do not – what is of significance – keep time-sheet records. Thus, judges are not obliged to provide their employers with detailed reports of duties performed. It is the character of a given task as well as the professional qualifications and organisational skills of a given judge, and not his/her employer, that determine the amount of time for the performance of the task. This limits the employer's impact on the way of adjudicating by a judge, and this is, in turn, conducive to preserving the independence of judges in the fulfilment of their duties.

3.4. It is possible to declare the non-conformity of the challenged Act to Article 66(2) of the Constitution if arguments are presented for the infringement of the "essence" of that right by the challenged regulation. In the complainant's opinion, the unconstitutionality of Article 83 of the Act on the Organisational Structure of Common Courts arises from the fact that the said provision – in the situation of a constant and unlimited increase in the scope of judges' duties – constitutes approval for work without limit, and at the same time – as no maximum permissible hours of work has been specified – does not guarantee the right to compensation for exceeding the said maximum. Thus, an infringement of the essence of that provision is alleged to arise from the lack of any norms that limit the hours of work for judges.

The Tribunal cannot agree with such argumentation. The complainant's assertion that there are no restrictions on the permissible hours of work for judges stems from the fact that he has overlooked provisions specifying the right to rest.

In his constitutional complaint, the complainant has adopted a narrow dogmatic interpretation of Article 83 of the Act on the Organisational Structure of Common Courts, overlooking a broader normative context regarding the service relationship of judges. The said interpretation is to follow from the generally established practice, in which the hours of work for judges are not governed by the provisions of the Labour Code. The

complainant has primarily based his view on the resolution issued by the Supreme Court of 8 April 2009, ref. no. II PZP 2/09 (adopted with relation to the complainant's case), in which the said Court deemed that a common court judge was not entitled to additional remuneration on terms specified in Article 151[1] of the Labour Code in the case of performing work outside the permissible hours of work set out in Article 129(1) of the Labour Code (hereinafter: the resolution of the Supreme Court of 2009). However, it should be emphasised that, in the said resolution, the Supreme Court indicated that the legal regulations on the organisational structure of common courts should be supplemented in the context of the hours of work, on the basis of Article 5 of the Labour Code, with the norms of the said Code concerning the right to rest. Within that scope, the Supreme Court made reference to the Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time (OJ L 299 of 18.11.2003, p. 9; hereinafter: Directive 2003/88/EC). The said Directive indicates a link between the right to rest and the hours of work, and determines that a rest period is every period which does not constitute the hours of work. It guarantees minimum rest periods in any 24-hour period and weekly rest periods as well as limits the number of hours of work to 48 hours a week on average calculated over a reference period not exceeding 4 months. The requirements of the said Directive with regard to the maximum permissible hours of work and minimum rest periods which, as indicated on a number of occasions by the Court of Justice, constitute a rule of Community social law of particular importance from which every worker must benefit (see paragraph 100 of the reasoning for the judgment of 5 October 2004, in the cases C-397/01 to C-403/01 concerning the case of *B. Pfeifer and Others v Deutsches Rotes Kreuz*).

The Tribunal has stated that the special legal position of judges, and in particular the special character of work performed by them, as well as the necessity to ensure their independence within the scope of adjudication, make it difficult to match judges' tasks by a fixed work schedule. At the same time, the constitutional regulations that guarantee the right to rest permit a pro-constitutional interpretation of a norm that specifies the hours of work assigned to judges. Article 66(2) of the Constitution guarantees the right to rest and days free from work, and thus, although a judge has flexible hours of work, s/he must have the above rights guaranteed. The lack of the explicit formulation of the right to rest in the Act on the Organisational Structure of Common Courts may not be understood as the legislator's consent to impose an obligation of unlimited work on judges. This entails that, in the context of judges, their hours of work are determined by their workload (Article 83

of the Act on the Organisational Structure of Common Courts), with the proviso that constitutional provisions specifying the right to rest is taken into account. Thus, one may not agree with the complainant's basic allegation that the legislator has permitted that judges should work "non-stop", without any time limits.

3.5. It follows from the *petitum* of the constitutional complaint and the statement of reasons for the complaint that the purpose of determining the maximum permissible hours of work is to create a possibility to be awarded compensation in the form of additional remuneration or an equivalent period of time off work for the work performed outside the said hours of work. When challenging the work schedule model that applies to judges, the complainant aims at asserting his right to remuneration for overtime. In his opinion, "what follows from the final part" of Article 66(2) of the Constitution is that every person performing work has the right to expect the legislator to effectively specify maximum permissible hours of work, and after exceeding the said maximum s/he has the right to receive financial or other compensation.

The Tribunal has stated that the obligation arising from Article 66(2) of the Constitution is directly linked to the obligation to ensure an appropriate amount of free time, which constitutes an element of the right to rest. But it does not concern compensation for overtime. The Tribunal has deemed that the norms included in Article 66(2) of the Constitution protect the conditions of work, and not remuneration that is granted for that reason. By analogy, when it comes to the safety and hygiene of work, the issue of remuneration (in any form) for overtime is irrelevant (similar views were presented by the Tribunal in the case K 54/02).

It should be underlined that the work schedule model that applies to judges is fully consistent with the adopted rules concerning remuneration. Overtime may be recognised only when a person performing work (service) is bound by certain permissible hours of work. Since judges are not bound by fixed hours of work, it is logical that the binding rules concerning remuneration for judges are based on restricted premisses for differentiating the amounts of remuneration, i.e. only on judges' particular positions within the hierarchy of the judicial system, the length of their service as well as their specific duties as judges. There is no possibility of differentiating the amounts of remuneration depending on the hours of work of a particular judge or the degree of complexity of his/her work.

The said solution raises no constitutional reservations. In one of its latest judgments, the Tribunal (full bench) emphasised that: "The remuneration of judges should

be determined in a way that excludes any discretion on the part of the executive branch, both as regards an entire professional group as well as with regard to particular judges, in whose case it is inadmissible to correlate the amount of their remuneration with the individual evaluation of their work" (the judgment of the Constitutional Tribunal of 12 December 2012, ref. no. K 1/12, OTK ZU No. 11/A/2012, item 134). The lack of correlation between the amount of remuneration and the number of cases, efficiency, the manner of adjudicating or professional achievements of any kind should be regarded as a solution that emphasises respect for the office of judge and guarantees the independence thereof. Within that scope one should agree with the view presented by the Tribunal in its judgment in the case P 8/00, in accordance with "the consistency of judges' remuneration with the dignity of their office, as required by Article 178(2) of the Constitution, excludes the discretionary determination of individual amounts of the said remuneration, which would not be based on precise general regulations". The bench of the Tribunal adjudicating in the present case has held that it should be stressed that, in accordance with the requirement set out in Article 178(2) of the Constitution, the consistency of judges' remuneration with the dignity of their office and the scope of their duties, especially when the hours of work for judges are determined by "their workload", requires that the legislator should provide this professional group with remuneration that is adequately high.

As regards judges' remuneration for overtime, the Supreme Court extensively addressed that issue in the above-mentioned resolution ref. no. II PZP 2/09, issued in the complainant's case. When carrying out a thorough background analysis in the context of the obligation to perform work by persons taking part in the exercise of public authority, the Supreme Court stressed that the said persons had an obligation, in the case of fulfilling state duties, to "perform work outside their regular hours of work and, in exceptional cases, also at night, on Sundays and non-working days, without any ensuing right to compensation in the form of additional remuneration or an equivalent period of time off work, unless a special provision stipulates otherwise". The Supreme Court emphasised that the said special obligations and inconvenience are compensated by special privileges which have been granted to that group.

The Tribunal has stated that the granting of possible compensation in the form of additional remuneration or an equivalent period of time off work for the work performed outside the maximum permissible hours of work would not resolve the problem of excessive workload assigned to judges. Due to the special character of judicial duties within the judicial system, granting time off work to judges will only cause judges to lag

behind with their work, which they will have to make up for any way. Also, the payment of remuneration for work outside the maximum permissible hours does not constitute an appropriate solution. Indeed, this would mean that judges burdened with excessive caseload would constantly work more than the maximum permissible hours of work, which could affect their effectiveness and quality of their work, as well as have a negative impact on their health (see M. Kurzynoga, "Czas pracy sędziego sądu powszechnego", [in:] *Czas pracy*, L. Florek (ed.), Warszawa 2011, pp. 237-238).

This does not entail that judges are not entitled to any protective measures in the case of an infringement of their right to rest, which has been suggested by the complainant in the present case.

The said right is related to judges' personal rights which arise from their service relationship. However, in this respect, it is unnecessary to apply workplace procedures (see Article 89(2) of the Act on the Organisational Structure of Common Courts). Thus, with regard to employers who repeatedly infringe the right to rest in 24-hour and weekly periods, one may apply provisions guaranteeing protection from the scope of labour law, e.g. Article 281(5) of the Labour Code in conjunction with Articles 131-133 of the Labour Code. The legal aspects and facts of the present case provide the Tribunal with grounds to state that the service relationship of judges which is not completely consistently shaped may, and in fact does, in practice lead to difficulties with interpretation. The said lack of complete consistency in the context of service relationship is manifested, *inter alia*, in the fact that disputes within that scope are subject to the jurisdiction of common courts (as in the case of employment relationship), and not to administrative courts, which have jurisdiction within the scope of public-law relations (see L. Florek, Prawo pracy, Warszawa 2011, pp. 3-4, 31-32, 83-86).

Irrespective of the above, judges may make claims for compensation or redress in accordance with general rules (Article 443 of the Act of 23 April 1964 – the Civil Code (Journal of Laws - Dz. U. No. 16, item 93, as amended) in conjunction with Article 300 of the Labour Code).

In the Tribunal's view, judges should exercise restraint when resorting to available means, and use them in cases where it is necessary and after exhausting possibilities to resolve issues by applying workplace procedures. Although judges may not be alleged to have exhausted all means within the scope of court proceedings if their claims aimed at asserting their right to rest have not been satisfied, this does not, however, mean that judges enjoy complete freedom in that respect. A voluntary decision to hold the office of

judge means consent to serve that entails accepting both traditional and generally approved restrictions or additional requirements as well as rights. Therefore, with regard to judges who consciously and intentionally, without any actual reasons, question professional duties assigned to them, one may raise an allegation of undermining the dignity of the office (see e.g. the judgment of 27 June 2008, ref. no. SNO 52/08; OSNSD 2008, item 66).

3.6. The Tribunal has indicated that the review of the conformity of statutory provisions of Article 66 of the Constitution amounts to determining whether the regulations under assessment do not, in an obvious and unambiguous way, contradict the essence of rights set therein (part III point 3.4.). When adjudicating in a give case, the Tribunal considers the entire constitutional context of an issue under examination. In the case of judges, what is of primary importance is their special constitutional status, related to their role that they fulfil in a democratic state ruled by law. Since the complainant did not take account of the constitutional bases of the legal status of judges, or the special character of their service, directly related to the obligation to guarantee judges' independence, the Tribunal could not deem that the presumption of constitutionality of Article 83 of the Act on the Organisational Structure of Common Courts had effectively been overturned. Consequently, there was no other way but to rule that Article 83 of the said Act was consistent with Article 66 in conjunction with Article 24 of the Constitution.

4. The discontinuation of the proceedings within the scope of the review in the light of Article 32(1) and (2) as well as Article 2 of the Constitution.

The Tribunal has also referred to the allegation that the challenged provision infringed Article 32 of the Constitution and the right to equal treatment by public authorities, which arises therefrom, in the context of Article 2 of the Constitution, which expresses the principle of a democratic state ruled by law that implements the principles of social justice.

In accordance with the well-established view of the Tribunal, Article 32 and Article 2 of the Constitution, where the latter has been indicated as a provision to be read in conjunction with the former, establish no specific right or freedom. Arising from Article 32 of the Constitution, the principle of equality and a prohibition against discrimination, on their own, constitute only general principles, which, in a sense, have the character of the right of "second level", i.e. one that is granted with relation to specific

legal norms, and not in isolation – "independently" (see the decision of the Constitutional Tribunal of 24 October 2001, ref. no. SK 10/01, OTK ZU No. 7/2001, item 225). In the opinion of the Constitutional Tribunal, this primarily entails that "all persons are equal as regards their 'dignity, rights and freedoms', which are referred to in other provisions of the Constitution, and that no discrimination is admissible when it comes to the exercise of the rights and freedoms". Thus, equality and the prohibition against discrimination are not abstract and absolute in character, but they always function in a certain situational context, and they must be referred to prohibitions or requirements, or the granting of entitlements to certain individuals (groups of individuals) in comparison with the status of other individuals (groups). For the above reasons, Article 32 of the Constitution may constitute a higher-level norm for constitutional review with regard to a constitutional complaint only when a complainant indicates which of his/her rights or freedoms arising from other provisions are regulated in violation of the above principles. As regards the constitutional complaint in the present case, the above requirement has not been fulfilled.

By contrast, Article 2 of the Constitution expresses a number of systemic principles, but does not constitute a basis of a subjective right or freedom. Hence, relying on a principle such as the principle of social justice may not be an autonomous basis of a constitutional complaint.

Also, it should be indicated that the allegation that the principle of equality has been infringed is justified if we deal with similar subjects of rights whose legal situation should be shaped in the same way. Yet, when arguing for the infringement of the indicated constitutional provisions, the complainant compared the professional status of judges with the status of other professional groups, with regard to which the legislator introduced a separate working hour system from the one provided in the Labour Code and specified the consequences of exceeding the maximum permissible hours of work. The complainant, in particular, focused on the situation of the members of a corps of civil servants and the functionaries of the uniformed services. What the complainant regarded as a relevant common characteristic of those subjects was the fact that they performed public service.

In the Tribunal's view, performing public service constitutes a criterion that is too general to be deemed relevant (legally essential). Public service comprises the situations of persons employed in the institutions of public authority in a broad sense. Even when the complainant resorted only to comparing the situation of judges with the situation of state officials, the members of a corps of civil servants and the functionaries of uniformed services, this changes nothing here. Taking account of remarks included in this statement

of reasons with reference to the special character of the office of judge (part III, point 2.2.), it could be stated that the above-mentioned groups are characterised by a diversity of tasks assigned to them, which implies a different degree of subordination and availability, leads to different ways of carrying out the tasks, and consequently results in the different regulation of the rights and duties of those professional groups in law. The said provisions on the rights and duties of professional groups differ as regards regulating not only the permissible hours of work, but also a number of other issues such as remuneration, holidays and retirement. Less advantageous regulations of certain issues are reserved for each of these groups (e.g. retirement in the case of judges or the acquisition of the right to an old-age pension acquired by police officers after 15 years of service). Such differentiation with regard to rights and obligations due to the character of employment and the type of service performed is a characteristic of labour law in a broad sense, which has been indicated by the Tribunal in its jurisprudence on a number of occasions (see the judgments of the Constitutional Tribunal of: 25 November 1997, ref. no. U 6/97, OTK ZU Nos. 5-6/1997, item 65; 17 May 1999, ref. no. P 6/98, OTK ZU No. 4/1999, item 76; 2 December 2008, ref. no. P 48/07, OTK ZU No. 10/A/2008, item 173).

Taking the above into account, the Constitutional Tribunal has discontinued the proceedings as regards the review of Article 83 of the Act on the Organisational Structure of Common Courts in the light of Article 32(1) and (2) in conjunction with Article 2 of the Constitution.

5. The inadequacy of Article 30 as well as Article 47 in conjunction with Article 71(1) of the Constitution.

The Tribunal has also addressed the following higher-level norms for the review, indicated by the complainant: Article 30, Article 47 as well as Article 71(1) of the Constitution. The Tribunal has deemed that there is no relation between the challenged provision and those provisions of the Constitution.

The allegation that Article 30 of the Constitution has been infringed amounts to the statement that the lack of regulations on the maximum permissible hours of work for judges and the lack of effective mechanisms for the protection of such norms undermine the dignity of a person who works as a judge, understood as the inherent and inalienable dignity of "every person living under the authority of the Republic of Poland". The formulation "the inherent and inalienable dignity of the person" comprises those crucial values that are not protected by separate constitutional guarantees, but concern the essence

of the individual's position in society, his/her relation to other persons as well as to public authorities. In its jurisprudence, the Tribunal stresses that in order to speak of an infringement of the principle enshrined in Article 30, a given regulation under review would have to "humiliate the individual, treat him/her wrongly, undermine his/her civic, social and professional status, which leads to an intersubjective conviction based on relevant circumstances that the individual has been treated unfairly for which there is no justification" (the judgment of the Constitutional Tribunal of 14 July 2003, ref. no. SK 42/01, OTK ZU No. 6/A/2003, item 63).

The regulation concerning the hours of work for judges is directly linked with holding the office of judge. It refers to the right arising from Article 66 of the Constitution, which has aptly been pointed out by the complainant, and is also related to the dignity of the office of judge (Article 178(2) of the Constitution). But the Tribunal has not found such a relation with Article 30 of the Constitution, where the point is not dignity linked to an office held by a given person, but 'the dignity of the person'.

Article 47 of the Constitution protects the so-called privacy and prohibits the legislator from unjustified interference in the realm of family relations and personal life (see the judgment of the Constitutional Tribunal of 24 October 2000, ref. no. K 12/00, OTK ZU No. 7/2000, item 255). However, it does not concern the way of shaping professional duties, and such should include issues related to judges' hours of work. The time in which judges fulfil their duties may not be regarded as "personal time", which would be protected under the guarantees arising from Article 47 of the Constitution. However, it may not be concluded that – by adopting a certain work schedule model with regard to judges – the legislator has permitted any interference in private or family life, provided for obtaining information related thereto, allowed for undermining judges' honour or good reputation.

The said assessment remains the same regardless of the fact of indicating Article 71(1) of the Constitution as a provision to be read in conjunction with Article 47. Article 71(1) stipulates that: "The state, in its social and economic policy, shall take into account the good of the family. Families, finding themselves in difficult material and social circumstances - particularly those with many children or a single parent - shall have the right to special assistance from public authorities". It should be indicated that the first sentence of the provision imposes a certain obligation on the state, but the obligation gives no rise to any individual claims. An allegation concerning the infringement of the regulation may not constitute a basis of a constitutional complaint. Only the second

sentence of that provision provides for a subjective right that is subject to protection by way of a constitutional complaint (see L. Garlicki, commentary on Article 71, [in:] *Konstytucja…*, Warszawa 2003, p. 4). However, the subject of the right does not comprise all families, but merely those in "difficult material and social circumstances". The complainant has not proved that he is entitled to such a status, and this would be the only instance where he could rely on Article 71(1) of the Constitution and the subjective right arising therefrom.

Thus, the Constitutional Tribunal has shared the views presented by the Marshal of the Sejm and the Public Prosecutor-General that the complainant's allegations are inadequate to the indicated higher-level norms for the review, which implies that Article 83 of the Act on the Organisational Structure of Common Courts is not inconsistent with Article 30 as well as Article 47 in conjunction with Article 71(1) of the Constitution.

6. The Constitutional Tribunal has deemed that the challenged regulation is consistent with the Constitution. Indeed, the said regulation constitutes a kind of compromise between the tasks of the judiciary related to citizens' right to a fair trial and the protection of work and the hours of work. However, this does not mean approval for assigning judges with excessive caseload and additional duties related thereto. There should be no situations where judges are forced to assert their rights by recourse to courts. The Tribunal does not rule out that the constitutional complaint under discussion manifests a wider problem of excessive workload of judges, which does not merely stem from the bad organisation of work in particular courts. Public authorities should therefore consider taking appropriate remedial measures. A possibility to interpret essential elements of the service relationship of judges proves that there is an urgent need to assign that relationship, in a consistent and complete way, with all the features of the legal relationship under public law.

For these reasons, the Tribunal has adjudicated as in the operative part of the judgment.