Judgment of 18th February 2004, K 12/03

POSTPONING INCREASES IN JUDGES' REMUNERATION. APPOINTMENT AND DISMISSAL OF COURT PRESIDENTS

Type of proceedings:	Composition of Tribunal:	Dissenting opinion:
Abstract review **Initiator:** National Council of the Judiciary	Plenary session	1

Legal provisions under review	Basis of review
Postponing for a year the entry into force of wage regulations concerning so-called promotion remuneration rates for judges of common courts, originally intended to be operative as of 1st January 2002 and 1st January 2003 [Act on Amendment of the Organisation of Common Courts Act, Prosecutor's Office Act and Court-Appointed Custodians Act (of 14th December 2001): Article 1 point 5 letters a and b] Decreasing the first and second promotion remuneration rates from 110% and 125% of basic remuneration rates to 107% and 115%, respectively [Act on Amendment of the Organisation of Common Courts Act and Certain Other Statutes (of 23rd November 2002): Article 1 point 2]	Rule of law Guaranteeing judges remuneration consistent with the dignity of their office and scope of their duties [Constitution: Article 2 and Article 178(2)]
Appointing appellate and regional court Presidents after seeking the opinion of the relevant court's general assembly of judges and, in the event of the assembly disapproving the appointment, conditioning such appointment upon approval thereof by the National Council of the Judiciary [Organisation of Common Courts Act (of 27th July 2001): Article 23 and Article 24] Minister of Justice's competence to dismiss a President or Vice-President of a court, during their term of office, due to flagrant non-performance of their official tasks or for reasons of the interest of the administration of justice [*Ibidem*: Article 27]	Principle of the separation of powers Independence and separateness of the judicial power [Constitution: Article 10 and Article 173]

Organisation of Common Courts Act 2001 (concerning district, regional and appellate courts, established to adjudicate in civil and criminal matters) envisaged an increase in judges' remuneration involving, inter alia, the introduction of so-called promotion remuneration rates at higher than basic remuneration levels (at a rate of 110% or 125% of the latter). Such rates were intended for judges having occupied a given position for an appropriate number of years. In its original wording, the Act envisaged the introduction of such rates at the outset of 2002 and 2003, respectively.

Given the existence of very serious budgetary difficulties the Polish Parliament, at the government's initiative, adopted Acts amending these legal provisions, on 14th December 2001 and 23rd November 2002, i.e. even prior to their entry into force. Firstly, introduction of the promotion remuneration rates

was postponed for a year and, subsequently, these rates were decreased to levels of 107% and 115%, respectively.

The aforementioned amendments were challenged before the Constitutional Tribunal by the National Council of the Judiciary, which alleged that they failed to conform to the rule of law principle (Article 2 of the Constitution) and the principle guaranteeing judges remuneration consistent with the dignity of their office and scope of their duties (Article 178(2) of the Constitution).

Furthermore, the new Organisation of Common Courts Act 2001 introduced a limitation, not existing in previous legal provisions, on the role of judicial self-governing bodies (judges' general assemblies) of the appellate and regional courts, as regards appointment and dismissal of the Presidents of these courts. Court Presidents are appointed and dismissed by the Minister of Justice. In accordance with the new Organisation of Common Courts Act 2001, judges' assemblies were deprived of the right to disapprove of the Minister's decision (thereby blocking an appointment or dismissal) and were left with purely advisory competences. Where a judges' general assembly disapproved of the appointment of an appellate or regional court President, such appointment became conditional upon obtaining the approval of the National Council of the Judiciary. The legislator also conditioned the dismissal of a President of such a court upon approval by the Council. However, Article 27 of the Act envisages the possibility of dismissal even following Council disapproval, upon the fulfilment of certain – ambiguously defined – conditions, i.e. following "flagrant non-performance of their official tasks", or where it becomes "irreconcilable with the interest of the administration of justice" for a President to continue fulfilling their functions.

The National Council of the Judiciary also challenged the aforementioned legal provisions, alleging that they failed to conform to the constitutional principles of the separation of powers (Article 10) and the independence and separateness of the judicial power (Article 173).

The present judgment was reached by a majority of votes. ***Judge Bohdan Zdziennicki*** issued a dissenting opinion disagreeing with the judgment's reasoning insofar as regards the principles for determining judges' remuneration and the relationship between the executive and judicial powers concerning the appointment and dismissal of Presidents and Vice-Presidents of the common courts.

RULING

I

1. Article 1 point 5 letters a and b of the Amendment Act 2001 (postponing the introduction of promotion remuneration rates) and Article 1 point 2 of the Amendment Act 2002 (reducing the level of promotion remuneration rates) conform to Articles 2 and 178(2) of the Constitution.

2. Articles 23 and 24 of the Organisation of Common Courts Act 2001 (governing the procedure for appointing Presidents and Vice-Presidents of appellate and regional courts) conform to Articles 10 and 173 of the Constitution.

3. Article 27 of the aforementioned Act, in its part authorising the Minister of Justice to dismiss a court President or Vice-President during their term of office in the

event of flagrant non-performance of their official tasks, conforms to Article 10 and 173 of the Constitution.

4. The aforementioned provision, in its part authorising the Minister of Justice to dismiss a President of a court during their term of office, despite the disapproval of the National Council of the Judiciary, where it is irreconcilable with the interest of the administration of justice for a President to continue fulfilling their functions, for reasons other than non-performance of their official tasks, does not conform to Articles 10 and 173 of the Constitution.

II

The Tribunal ruled that the loss of binding force of Article 27 of the Organisation of Common Courts Act 2001, in its part indicated in point I.4 of the ruling, shall be delayed until 31st August 2004.

PRINCIPAL REASONS FOR THE RULING

1. Judges are the only professional category whose work conditions and remuneration are the subject of explicit constitutional regulation. The location of Article 178(2) of the Constitution in Chapter VIII thereof ("Courts and Tribunals") and the wording of this provision unambiguously indicate that these factors form part of the construction of the judiciary's position within the constitutional system, whose objective is to create genuine and appropriate bases and guarantees for proper fulfilment of their judicial function, which is fundamental in a democratic State governed by the rule of law. The aim of the discussed legal norm is not to protect the individual interest of judges but, rather, to protect a broadly-construed interest of the administration of justice. The principal addressees of this norm are the State organs authorised to shape the organisation of judges' remuneration. Accordingly, the guarantee expressed in Article 178(2) of the Constitution may not be considered in terms of individual rights of judges, with all the consequences arising therefrom (e.g. concerning the protection of acquired rights).

2. Since expenditures connected with the activity of all judicial organs are, by their very nature, linked to the State budget, it is an issue for the democratically legitimated legislator to decide which elements and rates of remuneration are "consistent" with the dignity and scope of duties of judicial office. The Constitutional Tribunal's role consists in reviewing whether or not the legislator exceeded the limits of its discretion, as specified in the Constitution. This discretion remains broad since, in Article 178(2) of the Constitution, the constitutional legislator uses several ambiguously defined phrases that do not translate into specific monetary amounts. The boundaries of the legislator's discretion are, however, determined by several points of reference. The first reference point is the average remuneration level within the public sector (i.e. the average remuneration level of persons paid from the State budget) – the remuneration level of judges, including those in the district courts, should significantly exceed average remuneration in the public sector. Secondly, judges' remuneration should exhibit a long-term tendency to increase at a rate no less than does average public sector remuneration. Thirdly, in the event of State budgetary difficulties, judges' remuneration should be especially protected against exceedingly detrimental fluctuations. Fourthly, judges' remuneration should not be lowered by way of normative regulations.

3. In the amendments indicated in point 1 of the ruling (above), the legislator did not exceed the aforementioned boundaries of regulatory discretion with which it is endowed. Judges' remuneration levels remained proportionately linked to average public sector remuneration, since the latter category was also "frozen" in 2002. The tendency for judges' remuneration to increase has been sustained in the long-term since, as of 1st January 2004, such increases are no longer "frozen". Furthermore, it is not possible to claim that there has been a lowering of judges' remuneration by way of normative regulations, since it is merely the level of an increase which has not yet entered into force that has been lowered by amendment of the original Act.

4. On the basis of the constitutional principle of protecting acquired rights, as derived from the rule of law clause (Article 2 of the Constitution), maximally-shaped legitimate expectations are treated equally to *sensu stricto* acquired rights. Such an expectation exists only upon fulfilment of all basic prerequisites for acquiring rights under an operative statute. Moreover, every expectation concerns the acquisition of a particular right in the future, albeit on the basis of a currently operative legal regulation.

5. From the perspective of legislative correctness and the principle of protecting trust in the State governed by the rule of law, it is not good practice for the legislator to amend provisions during a period of their *vacatio legis*. If overused, such a practice fails to encourage a feeling of legal certainty and undermines the legislator's authority. The purpose of *vacatio legis* is, by its very nature, to prevent the occurrence of situations surprising the addressees of legal norms and to enable them to adjust their conduct to new legal provisions. Concomitantly, *vacatio legis* is a period within which the legislator has the possibility to correct errors, internal contradictions or solutions leading to contradictions within the legal system which were noticed only following adoption of a normative act, or to prevent negative effects arising from the entry into force of provisions which, although already adopted, are not yet operative. Accordingly, it may not be excluded that, in certain situations, the amendment of provisions having only just been adopted will be justified by special circumstances.

6. It is unfounded to claim that the detrimental alterations made by the amendments indicated in point 1 of the ruling (above) to remuneration rates, and the dates of their entry into force, infringe judges' acquired rights and the principle of citizens' trust in the State and its laws and, accordingly, fail to conform to Article 2 of the Constitution. Since the original provisions of the Organisation of Common Courts Act 2001, as subsequently amended, did not become operative law (as a result of the amendment), they could not have formed the basis for constructing individual rights, including legitimate expectations (cf. point 4 above). The need to amend certain provisions of the Organisation of Common Courts Act 2001, during their *vacatio legis* period, arose because of the state of public finances – at least this was the justification for the introduced modifications.

7. Article 173 of the Constitution, in which courts and tribunals are referred to as a separate power, independent of other branches of power, neither abolishes nor modifies the basic principle of the system of government of the Republic of Poland, i.e. the principle of the separation of, and balance between, the legislative, executive and judicial powers (Article 10 of the Constitution). These separated powers are not mutually independent elements of the State governmental system but are, in essence, components of a single construction, within which they are required to co-operate in order to en-

sure the diligence and efficiency of public institutions (the principle of co-operation, as expressed in the Preamble to the Constitution). In other words, the separateness and independence of courts may not lead to abolishing the mechanism for necessary balance between all powers. Each of these powers should have instruments at its disposal allowing it to check or hold back the actions of the remaining powers. However, each of the aforementioned powers has its own "core of competence", upon which the remaining powers may not encroach. Reference to the judicial power indicates that no interference may affect the independence of judges when exercising their office and any interference with the actions or organisation of the judicial power, concerning matters falling outside the absolute principle of independence, may occur only as an exception and must be sufficiently justified on its merits.

8. The Constitution of the Republic of Poland of 2nd April 1997, whilst remaining silent on the issue of the judicial self-governing body, includes the position of the National Council of the Judiciary as a constitutional matter, stating in Article 186 that the Council shall safeguard the independence of the courts and judiciary. This imposes an obligation upon the ordinary legislator to equip the National Council of the Judiciary with instruments ensuring it a real possibility to effectively exercise its constitutional duty.

9. In depriving the assemblies of regional and appellate court judges of the power they previously enjoyed (on the basis of Article 29 of the former Organisation of Common Courts Act 1985) to conclusively disapprove the appointment of a court President, and endowing the National Council of the Judiciary with an essentially identical power in this area, Article 23 of the Organisation of Common Courts Act 2001 transfers this power to a different forum but, nevertheless, one remaining within the broadly-construed representation of the judicial community. The National Council of the Judiciary has amongst its members far more judges than persons appointed by the President and Parliament and, therefore, the Council is rightly treated as being the highest representation of this community. Endowing the National Council of the Judiciary, as opposed to the judicial self-governing body, with the power to adopt binding opinions concerning the appointment of Presidents and Vice-Presidents of appellate and regional courts may not be regarded as an infringement of the constitutional principle of the separateness and independence of the judicial power (Article 178(1) of the Constitution), since the competence to adopt such an opinion ultimately remains with the judiciary.

10. The provisions indicated in point 2 of the ruling (above), according to which the Minister of Justice must announce to the National Council of the Judiciary his intentions to dismiss a President or Vice-President of a regional or appellate court, together with a written justification for such a decision, in order to solicit the Council's opinion thereupon, do not raise objections from the perspective of Articles 10 and 173 of the Constitution. This conclusion is not undermined by the fact that an asymmetry exists in respect of the significance of National Council of the Judiciary disapproval concerning the mechanisms for appointing and dismissing court Presidents: in the former case (i.e. appointment), such disapproval is binding whereas in the latter case (i.e. dismissal), it is not. It must be noticed, however, that appointment and dismissal serve principally distinct purposes: appointment creates a certain continuous state of personal organisation, whilst dismissal is always a reaction to an event or a new situation. In the former case, it would be difficult for a statute to make the decision concerning appointment

conditional upon the existence of certain particular circumstances whereas, in the latter case, the indication of such "particular circumstances" is most desirable, since they remove the element of arbitrariness from the dismissal procedure. Such differences in these institutions justify the possibility to differentiate the procedure for taking a final decision as regards appointment and dismissal. In principle, it is not possible to challenge the competence *per se* of the Minister of Justice allowing him to undertake efficient action in such situations whilst denying a collegiate organ, such as an organ of the judicial self-governing body or the National Council of the Judiciary, the decisive competence to disapprove of decisions taken by the Minister.

11. The notion of "flagrant non-performance of official tasks" – used by the legislator in Article 27 of the Organisation of Common Courts Act 2001 as a reason for the Minister of Justice to dismiss a court President prior to the expiry of his term of office – refers to similar expressions functioning in other normative contexts and is more precise and, concomitantly, more predictable as regards the direction of its application than the second term used in the same Article: "the interest of the administration of justice". Jurisprudence concerning judicial conduct and disciplinary matters has elaborated on the proper understanding of the expression "flagrant non-performance of official tasks"; cases falling within this concept are definable without major difficulty and may be clarified on the basis of the totality of regulations concerning the functioning of the judiciary and judicial administration. The formulation in such a manner of a reason for dismissing a court President prior to the expiry of his term of office does not risk excessive and arbitrary interference by an organ of executive power with a court's functioning and, *ipso facto*, may not be found to infringe the principle of the balance of powers and independence of the judicial power (cf. point 3 of the ruling).

12. Constitutional review of the same Article 27 of the 2001 Act is otherwise as regards the factors indicated in point 4 of the ruling. The concept of the "interest of the administration of justice" is a general clause, lacking distinct definitional boundaries. The "interest of the administration of justice", especially as an independent reason, as an alternative to the reason of "flagrant non-performance of official tasks", encompasses elements which are not directly related to assessment of the dismissed person's conduct but, primarily, relate to an external perspective of the administration of justice. Endowing an organ of administration, such as the Minister of Justice, with discretion to take decisions as regards the dismissal of a court President (fulfilling a function linked to exercising jurisdictional actions), on the basis of a reason which is ambiguously defined and not entirely verifiable, may not be reconciled with the principles expressed in Articles 10 and 173 of the Constitution. This assessment would be otherwise if, in such a situation, the Minister would be required to take into account the position of the National Council of the Judiciary.

MAIN ARGUMENTS OF THE DISSENTING OPINION

- Article 178(2) of the Constitution may not be treated as a declaration having little meaning. Limitations on judges' wage increases may not stem solely from the need for budgetary savings. Necessary limitations in this field may only be imposed where payment of remuneration consistent with judges' dignity of office and scope of duties would constitute a threat to the financial security of the State and where no other possibility exists to avoid infringing the prohibition expressed in Article 216(5) of the Constitution.

- It is erroneous to suggest that the principle of the separation of powers (Article 10) does not require judges' remuneration to be comparable with the remuneration of persons participating in the exercise of legislative or executive power.
- Judicial office should constitute the crowning achievement vis-à-vis the other legal professions. Accordingly, judges' remuneration should also be linked to the principles by which the Minister of Justice determines official rates for the other legal professions.
- The Minister of Justice's competences as regards administrative supervision over the courts may not encroach upon areas in which judges are independent. Meanwhile, in addition to their administrative activities, court Presidents also pursue jurisdictional activities reserved for them; it is not possible to categorically separate their jurisdictional and administrative functions. Accordingly, for the purpose of guaranteeing the independence of courts, it is necessary that statute provide for the appropriate participation of the judicial self-governing body in appointing court Presidents. The direction of appropriate regulation is indicated by provisions of the Constitution concerning Presidents and Vice-Presidents of the Supreme Court (Article 183(3)), the Supreme Administrative Court (Article 185) and the Constitutional Tribunal (Article 194(2)). Since no analogous regulations exist in the Constitution referring to the common judiciary, it remains for them to be elaborated by ordinary legislation.
- The National Council of the Judiciary is not an organ of the judicial self-governing body but, rather, a constitutional State organ "safeguarding the independence of courts and judges" (Article 186(1) of the Constitution). It does not stem from the Constitution that the National Council of the Judiciary should have been granted, by means of ordinary legislation, competences concerning the appointment and dismissal of court Presidents with which the judicial self-governing body was previously endowed. Transferring such competences from the self-governing bodies of particular courts to a national organ of mixed composition (consisting of 25 persons: judges; Presidents of the Supreme Court and the Supreme Administrative Court; Deputies; Senators; the Minister of Justice; and a representative of the President) constitutes a very serious legislative amendment. It departs from the formerly operative democratic (self-governing) solutions and is thereby flawed, although this may not be equated with unconstitutionality.
- The absence of binding effect upon the Minister of Justice of an opinion of the National Council of the Judiciary regarding the dismissal of a court President or Vice-President, combined with the judicial self-governing body's complete lack of influence regarding such matters, and taking into account the fact that each such decision is taken on the basis of an ambiguous definition ("flagrant non-performance of official tasks") or a general clause ("the interest of the administration of justice") and that no verification procedure exists – signifies that the Minister of Justice occupies a dominant position in this area, thereby amounting to an infringement of Articles 10 and 173 of the Constitution.

Provisions of the Constitution

[Preamble] Having regard for the existence and future of our Homeland […] We, the Polish Nation […] Hereby establish this Constitution of the Republic of Poland as the basic law for the State, based on […] cooperation between the public powers […].

Art. 2. The Republic of Poland shall be a democratic state governed by the rule of law and implementing the principles of social justice.

Art. 10. 1. The system of government of the Republic of Poland shall be based on the separation of and balance between the legislative, executive and judicial powers.
2. Legislative power shall be vested in the Sejm and the Senate, executive power shall be vested in the President of the Republic of Poland and the Council of Ministers, and the judicial power shall be vested in courts and tribunals.

Art. 173. The courts and tribunals shall constitute a separate power and shall be independent of other branches of power.

Art. 178. 1. Judges, within the exercise of their office, shall be independent and subject only to the Constitution and statutes.
2. Judges shall be provided with appropriate conditions for work and granted remuneration consistent with the dignity of their office and the scope of their duties.

Art. 183. […] 3. The First President of the Supreme Court shall be appointed by the President of the Republic for a 6-year term of office from amongst candidates proposed by the General Assembly of the Judges of the Supreme Court.

Art. 185. The President of the Supreme Administrative Court shall be appointed by the President of the Republic for a 6-year term of office from amongst candidates proposed by the General Assembly of the Judges of the Supreme Administrative Court.

Art. 186. 1. The National Council of the Judiciary shall safeguard the independence of courts and judges.
2. The National Council of the Judiciary may make application to the Constitutional Tribunal regarding the conformity to the Constitution of normative acts to the extent to which they relate to the independence of courts and judges.

Art. 194. […] 2. The President and Vice-President of the Constitutional Tribunal shall be appointed by the President of the Republic from amongst candidates proposed by the General Assembly of the Judges of the Constitutional Tribunal.

Art. 216. […] 5. It shall be neither permissible to contract loans nor provide guarantees and financial sureties which would engender a national public debt exceeding three-fifths of the value of the annual gross domestic product. The method for calculating the value of the annual gross domestic product and national public debt shall be specified by statute.

Art. 220. 1. The increase in spending or the reduction in revenues from those planned by the Council of Ministers may not lead to the adoption by the Sejm of a budget deficit exceeding the level provided in the draft Budget.
2. The Budget shall not provide for covering a budget deficit by way of contracting credit obligations to the State's central bank.